

COPY

JOHN A. BALDAN & AMELIA BALDAN
d.b.a. CASA MACHADO RESTAURANT #3

THE CITY OF SAN DIEGO

Percentage Lease

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SAN DIEGO, CALIFORNIA

LEASE OUTLINE

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**CITY OF SAN DIEGO
PERCENTAGE LEASE**

THIS LEASE AGREEMENT is executed between the CITY OF SAN DIEGO, a municipal corporation, hereinafter called "CITY," and JOHN A. BALDAN and AMELIA BALDAN d.b.a. CASA MACHADO RESTAURANT NO. 3, hereinafter called "LESSEE."

SECTION 1: USES

1.01 Premises. CITY hereby leases to LESSEE and LESSEE leases from CITY all of that certain real property situated in the City of San Diego, County of San Diego, State of California, described as the second floor restaurant area, including the roof deck patio, inside and outside stairways beginning on the ground floor level, storage area under stairway No. 2, wash area adjacent to stairway No. 1 and the dumbwaiter all located in and adjacent to Building No. 126 Montgomery Field Airport and as shown on in Exhibit "A" attached hereto and by this reference made part of this agreement. Said real property is hereinafter called the "premises" or "leased premises."

1.02 Uses. It is expressly agreed that the premises are leased to LESSEE solely and exclusively for the purposes of operating and maintaining a restaurant and cocktail lounge open to the general public and for such other related or incidental purposes as may be first approved in writing by the City Manager and for no other purpose whatsoever.

LESSEE covenants and agrees to use the premises throughout the term hereof for the above-specified purposes and to diligently conduct the business thereon to produce the most gross income that can be reasonably expected. Failure to continuously use the premises for said purposes, or the use thereof for purposes not expressly authorized herein, shall be grounds for termination by CITY.

1.03 Related Council Actions. By the granting of this lease, neither CITY nor the Council of CITY is obligating itself to any other governmental agent, board, commission, or agency with regard to any other discretionary action relating to development or operation of the premises. Discretionary action includes, but is not limited to rezonings, variances, environmental clearances or any other governmental agency approvals which may be required for the development and operation of the leased premises.

1.04 Quiet Possession. LESSEE, paying the rent and performing the covenants and agreements herein, shall at all times during the term peaceably and quietly have, hold and enjoy the premises. If CITY for any reason cannot deliver possession of the premises to LESSEE at the commencement of the term, or if during the lease term LESSEE is temporarily dispossessed through action or claim of a title superior to CITY'S, then and in either of such events, this lease shall not be voidable nor shall CITY be liable to LESSEE for any loss or damage resulting therefrom, but there shall be determined and stated in writing by the City Manager of CITY a proportionate reduction of the minimum or flat rate rent for the period or periods during which LESSEE is prevented from having the quiet possession of all or a portion of the premises.

1.05 Easements and Reservations.

- a. CITY hereby reserves all rights, title and interest in any and all subsurface natural gas, oil, minerals and water on or within the premises.
- b. CITY reserves the right to grant and use easements or to establish and use rights-of-way over, under, along and across the leased premises for utilities, thoroughfares, or access as it deems advisable for the public good.
- c. CITY has the right to enter the premises for the purpose of making repairs to or developing municipal resources and services.

However, CITY shall not unreasonably or substantially interfere with LESSEE'S use of the premises and will reimburse LESSEE for physical damages, if any, to the permanent improvements located on the leased premises resulting from CITY exercising the rights reserved in this section. Such reimbursement may include a reduction in the rent proportionate to the amount of physical damage as determined by CITY. CITY will pay the costs of maintenance and repair of all CITY installations made pursuant to these reserved rights.

1.06 Experienced Management. Throughout the term of this Lease Agreement, LESSEE shall provide experienced management of the leased premises to the satisfaction of the City Manager. For the purposes of this paragraph, "experienced management" shall mean demonstrated ability in the management and operation of a restaurant and cocktail lounge and related activities in a fiscally responsible manner.

- 1.07 Operation of Facilities. A regular schedule of days and hours of operation shall be established by LESSEE to best serve the public. LESSEE shall diligently and in a creditable manner furnish services to the public in conformity with all applicable rules and regulations of the City of San Diego. The type and quality of service furnished by LESSEE shall qualify for the conditions and requirements of the "A" card issued by the Department of Health to operators of food handling establishments

SECTION 2: TERM

-  2.01 Commencement. The term of this agreement shall be twenty (20) years commencing on the first day of the calendar month following execution by the City Manager. "Lease year" as used in this lease shall mean the 12-month period commencing on the first day of the calendar month following the execution of this lease by the City Manager and each 12-month period thereafter throughout the term of this lease.
- 2.02 Holdover. Any holding over by LESSEE after expiration or termination shall not be considered as a renewal or extension of this lease. The occupancy of the premises after the expiration or termination of this agreement constitutes a month-to-month tenancy, and all other terms and conditions of this agreement shall continue in full force and effect; provided, however, CITY shall have the right to apply a reasonable increase in rent to bring the rent to fair market value and to terminate the holdover tenancy at will.
- 2.03 Surrender of Premises. At termination of this lease for any reason, LESSEE shall execute, acknowledge and deliver to CITY, within five (5) days after written CITY demand, a valid and recordable quitclaim deed covering all of the premises. The premises shall be delivered free and clear of all liens and encumbrances, and in a decent, safe and sanitary condition.

If LESSEE fails or refuses to deliver the required deed, the CITY may prepare and record a notice reciting LESSEE'S failure to execute this lease provision and the notice will be conclusive evidence of the termination of this lease and all LESSEE'S rights to the premises.

SECTION 3: RENT

- 3.01 Time and Place of Payment. All rents required herein must be made payable to the City Treasurer and mailed to the Office of the City Treasurer, City of San Diego, P.O. Box 2289, San Diego, California, 92112-4165, or delivered to the Office of the City Treasurer, City Operations Building, 1222 First Avenue, Third Floor, San Diego, California.

The place of payment may be changed at any time by CITY upon thirty (30) days written notice to LESSEE. Mailed rental payments shall be deemed paid upon the date such payment is postmarked by the postal authorities. If postmarks are illegible, the payment shall be deemed paid upon actual receipt by the City Treasurer. LESSEE assumes all risk of loss and responsibility for late payment charges if payments are made by mail.

3.02 Rent.

-  a. Minimum Rent. The annual minimum rent established for the first year following the effective date of this lease is forty-six thousand eight hundred dollars (\$46,800) which is three thousand nine hundred dollars (\$3,900) on a monthly installment basis.

The annual minimum for the 2nd year is forty-nine thousand, two hundred dollars (\$49,200) which is four thousand one hundred dollars (\$4,100) on a monthly installment basis.

The annual minimum for the 3rd year is fifty-one, six hundred and fifty dollars (\$51,650) which is four thousand three hundred and four dollars and seventeen cents (\$4,304.17) on a monthly installment basis.

If the minimum rent is greater than the percentage rent, on a calendar month basis, then 1/12 of the annual minimum rent is required to be paid for that month. Minimum rents are to be paid in monthly installments on or before the day of the calendar month when percentage rents are due pursuant to Section 3.03 Payment Procedure, hereof.

Provided, however, in the event that the combined total percentage rent payments and monthly installments during any lease year equal or exceed the required annual minimum rent for that year, then for the balance of such year, LESSEE shall discontinue paying monthly installments of the minimum rent and shall continue paying only percentage rents until the beginning of the ensuing lease year. Provided further, in the event minimum rents paid plus percentage rents paid exceed the annual minimum rent and also exceed the rent which

would have been paid if the percentage rent had been paid on total gross income, the excess over the annual minimum rent shall be credited against the next payable rent as it becomes due. It is the intent of this provision that LESSEE shall pay monthly installments of the annual minimum rent as a guarantee against the percentage rent requirement and that the greater of the two requirements, minimum or percentage, whichever occurs throughout the term shall prevail on an annual basis.

80% or CPI

b. Minimum Rent Adjustment. Effective at the beginning of the first day of the sixth lease year of this lease and at the beginning of each two and one-half year period thereafter during the term, the annual minimum rent shall be eighty percent (80%) of the annual average of actual rents paid or accrued during the two (2) years preceding the adjustment date or, in the alternative, the minimum rent shall be increased based on increases in the consumer price index as specified in 3.02d below, whichever is greater. Said annual minimum rent shall then be divided by twelve (12) to establish the new monthly minimum rent. It is recognized that such adjustments shall be calculated by CITY upon completion of payments due for the preceding rental period in order to determine the amount of the adjustment to be effective on the dates stated herein. Until such calculations are completed, LESSEE shall continue paying monthly minimum rents at the prior rate. Any additional rents determined by the adjustment to be due for the months previously paid at the prior rate shall be paid to CITY within thirty (30) days following written notice. In no event shall any such minimum rent adjustment result in a decrease in the minimum rent requirement in effect immediately prior to the adjustment date.

c. Percentage Rents. Percentage rents will be calculated on a calendar month basis and will consist of the following percentages of the gross income resulting from the use of the premises:

Percentages

Business Activities

Six and One-half Percent
(6.5%)

Of gross income from the sale of food and nonalcoholic beverages.

Eight and One Half Percent
(8.5%)

Of gross income from the sale of alcoholic beverages.

Ten Percent (10%)

Of gross income from all other sources except as otherwise specifically agreed.

Twenty-five Percent (25%)

Of commissions or any other compensation paid to LESSEE or sublessees for the right to install or operate coin-operated vending, game or service machines or devices on the premises, including telephones, or 10% of the gross income from

any such coin-operated machines or devices owned, rented or leased by LESSEE or sublessees for use on the premises.

The City Manager in his sole discretion, may approve another percentage rate or flat rate of rent for each other incidental service or operation supplementary to the permitted use(s) set forth under Section 1.02, Uses, hereof as may be approved in writing by the City Manager prior to commencement of such other service(s) or operation(s). Provided, however, any activity conducted on the premises without prior approval by the City Manager shall be subject to the requirements of Section 3.07, Unauthorized Use Charge, hereof.

- d. CPI Index Adjustments. The index used will be the CPI for "All Urban Consumers" for Los Angeles/Long Beach/Anaheim, California. If this index is no longer published, the index for adjustment will be the U.S. Department of Labor's "Comprehensive Official Index" most comparable to the afore-said index. If a rental adjustment is calculated using an index from a different base year than 1982-1984, which equaled a base figure of 100 for the CPI, the base figure used will first be converted under a formula supplied by the Bureau of Labor Statistics or its successor.

If the Department of Labor indices are no longer published, another index generally recognized as authoritative will be substituted by agreement of CITY and LESSEE. If the parties cannot agree within sixty (60) days after demand by either party, a substitute index will be selected by the Chief Officer of the Regional Office of the Bureau of Labor Statistics or its successor, notwithstanding continued reference herein to "CPI" in any event.

- e. Percentage Rate Adjustment. At least four (4) months prior to the end of the tenth year of the term of this agreement and at least four (4) months prior to the end of each 10-year period thereafter, the parties hereto, by mutual consent or through appraisal as hereinafter set forth, will adjust the percentage rates of LESSEE'S gross income to be paid CITY effective upon the first day of the succeeding 10-year period. Said adjustment will be made to the degree necessary to provide a fair rental to CITY as determined by the City Manager and LESSEE, taking into consideration the criteria set forth in Section 3.02e. below. In the event that such adjustment is not made by mutual consent prior to two (2) months before the end of said 10-year periods, then the parties hereto will refer the matter to appraisal under the terms hereinafter set forth.

- f. Percentage Rate Appraisal. In the event the parties do not agree upon the amount of adjustment to said percentage rates as provided for in the previous section, then the adjustment shall be determined by a qualified professional independent real estate appraiser selected by mutual consent of the parties to this agreement from the list of appraisers approved by CITY. In the event the parties do not reach agreement as to selection of a mutually acceptable appraiser, then CITY and LESSEE shall each select a qualified professional independent real estate appraiser who in turn will select a third qualified professional independent real estate appraiser, which third appraiser will be employed to set the percentage rates to be applied to LESSEE'S percentage rate adjustment. In the event that the two selected appraisers fail to mutually select a third appraiser within thirty (30) days, then the third appraiser will be appointed by the presiding judge of the Superior Court of the State of California, County of San Diego, acting in his or her individual capacity, on prompt application by either CITY or LESSEE with notice thereupon to the other party. In the event that the Superior Court Judge declines to make the appointment, the parties hereto agree that the third appraiser shall be promptly determined in accordance with the rules of the American Arbitration Association. Said third appraiser shall complete the assignment within sixty (60) days of appointment. Each party shall pay the cost of its own selected appraiser and both CITY and LESSEE agree to equally share the cost of the third mutually selected or court-appointed appraiser. CITY and LESSEE agree to accept and be bound by the percentage rates determined by the appraiser selected or appointed to complete the assignment.

In establishing the percentage rates for the items under controversy, the appraiser shall consider CITY'S property as a fee simple absolute estate, and as vacant and available for a full lease term equal to the initial full term of lease on the open market for the authorized purposes of this lease at the commencement of the rental period under review. The appraiser will be guided by prevailing market percentage rates for similar operations primarily within the Southern California area, if available. In the event the appraisal is not completed in time to permit the percentage adjustment to be made upon the applicable commencement of the ten-year period, LESSEE agrees to continue to pay rent in accordance with the then existing lease rates and the adjustment, when determined, will be retroactive to said effective date of rental adjustment as hereinabove established. Any deficiency shall be paid by LESSEE to CITY within sixty (60) days after determination of the new percentage rate(s). IN NO EVENT, HOWEVER, SHALL ANY RENT ADJUSTMENT RESULT IN ANY DECREASE IN ANY PERCENTAGE RENTAL RATE.

3.03 Payment Procedure. On or before the last day of the calendar month following the calendar month in which the gross income subject to rents was earned, LESSEE shall provide CITY with a correct statement together with a payment of rent on all applicable gross receipts in a form selected by CITY. The statement will be signed by LESSEE or its authorized agent, attesting to the accuracy thereof, which shall be legally binding upon LESSEE. Each statement will indicate or include:

- a. One-twelfth of the annual minimum rent until the full annual rent is achieved in any lease year.
- b. Total gross receipts for the subject month, itemized as to business categories for which separate percentage rents are established. A gross receipts breakdown of each business conducted on the premises must be included when a reported category shows gross income to be from more than one business operation.
- c. The percentage rental due CITY, computed and totaled.
- d. The accumulated total of all rents previously paid for the current lease year.
- e. Payment in the greater of the two following amounts:
One-twelfth of the annual minimum rent or the total percentage rent due CITY computed as described in this section.

Any rents due CITY from sublease activities or operations will begin with the earliest of the following dates (whether or not prior approval was given by CITY as required by this lease, and whether or not a separate percentage rent was established by CITY):

- (1) Sublease commencement date.
- (2) Physical occupancy date.
- (3) Earliest activity date (i.e., sale of goods, solicitation of business, construction or alterations, etc.).

3.04 Gross Income. "Gross income or receipts" as used in this lease, shall include all income resulting from occupancy of the leased premises from whatever source derived whether received or to become due. Provided, however, gross income shall not include federal, state or municipal taxes collected from the consumer (regardless of whether the amount thereof is stated to the consumer as a separate charge) and paid over periodically by LESSEE 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 LESSEE in computing gross income. Gross income shall not include refunds for goods returned for resale on the premises or refunds of deposits. The amount of such taxes and refunds shall be clearly shown on the books and records of LESSEE. The percentage rent shall be calculated and paid by LESSEE on the basis of said gross income whether the income is received by LESSEE or by any sublessee, permittee or licensee, or their agents, and all gross income received by any sublessee, permittee, licensee, or other party as a result of occupancy of said premises or the operation thereof shall be regarded as gross income of LESSEE for the purpose of calculating the percentage rent hereunder required to be paid by LESSEE to CITY.

3.05 Inspection of Records.

- a. Records. LESSEE shall, at all times during the lease 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 premises. The records shall be supported by source documents such as sales slips, daily cash register tapes, purchase invoices or other documents as necessary to allow CITY to easily determine the total gross income.

Any retail sales or charges will be recorded by means of cash registers or other comparable devices which display to the customer the amount of the transaction and automatically issues a receipt. The registers will be equipped with devices that lock in sales totals and other transaction numbers and sales details that are not resettable. Totals registered shall be read and recorded at the beginning and end of each business day.

In the event of admission charges or rentals, LESSEE shall issue serially numbered tickets for each such admission or rental 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 system is approved by CITY.

- b. Financial Statements. Within sixty (60) days after the end of each lease year as previously established herein, LESSEE will, at its expense, submit to CITY a statement in which the total gross receipts and the corresponding amounts of rents paid CITY for the year are classified according to the categories of business established for any percentage rental and for any other business conducted on or from the premises.

Said statement shall be signed by LESSEE or its authorized agent, attesting to the accuracy thereof, which shall be legally binding upon LESSEE.

- c. Right to Inspect. All LESSEE'S books of account, records and supporting documentation, as described under Section 3.05a. Records will be kept for at least five (5) years and made available to CITY in one location within the City of San Diego. Said books and records shall be maintained separate from all other accounts not relating to the leased premises. The CITY, at its discretion, shall have the right to inspect and audit the business of LESSEE, its agents, sublessees, concessionaires and licensees operating on and in connection with the premises as necessary and appropriate for CITY to determine the amounts of rent due CITY in compliance with the requirements of this lease.

At CITY'S request, LESSEE shall promptly provide, at LESSEE'S expense, any necessary data to enable CITY to fully comply with all requirements of the state or federal government for lease information or reports concerning the premises. Such data will include, if required, a detailed breakdown of LESSEE'S receipts and expenses.

- d. Audit Cost. The full cost of CITY'S audit(s) will be borne by CITY unless one or both of the following conditions exists, in which case LESSEE hereby agrees to pay CITY'S cost of audit(s):

- (1) The audit(s) reveal an underpayment of more than five percent (5%), or more than \$10,000 whichever is less between the rent due as reported and paid by LESSEE pursuant to this lease and rent due as determined by the audit(s); or
- (2) LESSEE has failed to maintain complete and true books, records, accounts and supporting source documents in strict accordance with this section hereof.

LESSEE shall pay any deficiency determined by the audit(s) plus interest on such amount as defined in Section 3.06, Delinquent Rent and Audit(s) Fees, hereof, within thirty (30) days of notice thereof by CITY. CITY will credit any overpayment against incoming rents. Any overpayment determined after the end of this lease will be refunded by CITY within thirty (30) days of confirmation by the City Manager of the audit(s) findings.

- e. Default. LESSEE'S failure to keep complete and accurate records by means of double entry bookkeeping and make them available for CITY inspection is, like all other failures to comply with covenants of this lease, a breach of this lease and cause for termination.

- 3.06 Delinquent Rent and Audit(s) Fees. If LESSEE fails to pay the rent when due, LESSEE will pay in addition to the unpaid rents, five percent (5%) of the delinquent rent. If the rent is still unpaid at the end of fifteen (15) days, LESSEE shall pay an additional five percent (5%) [being a total of ten percent (10%)] which is hereby mutually agreed by the parties hereto to be appropriate to compensate CITY for loss resulting from rental delinquency, including lost interest opportunities, and the cost of servicing the delinquent account.

In the event CITY audit(s) if applicable, discloses that the rent for the audited period(s) has been underpaid in excess of five percent (5%) of the total required rent, then LESSEE shall pay CITY the cost of the audit(s) plus ten percent (10%) per year on the amount by which said rent was underpaid in addition to the unpaid rents as shown to be due CITY as compensation to CITY for administrative costs and loss of interest as previously described herein. In the event CITY audit(s) discloses that the unpaid rent is less than five percent (5%) of the total rent, and should LESSEE fail to pay said unpaid rent within thirty (30) days after written notice from CITY, an additional fee of ten percent (10%) of said unpaid amount shall be added to the unpaid amount to compensate CITY for costs and losses due to such nonpayment. LESSEE agrees to pay such amounts and further agrees that the specific late charges represent a fair and reasonable estimate of the costs that CITY will incur from LESSEE'S late payment. Acceptance of late charges and any portion of the late payment by CITY shall in no event constitute a waiver of LESSEE default with respect to late payment, nor prevent CITY from exercising any of the other rights and remedies granted in this lease.

- 3.07 Unauthorized Use Charge. LESSEE shall pay CITY twenty percent (20%) of the gross receipts for any service or use that is not permitted by this lease. This payment is subject to the due date provided in this lease for rental payments, and the provision for delinquent rent. The existence of the twenty percent (20%) charge in this clause and the payment of this charge or any part of it, does not constitute an authorization for a particular service or use, and does not waive any CITY rights to terminate a service or use or to default LESSEE for participating in or allowing any unauthorized use of the leased premises.

- 3.08 Inspection of Records. LESSEE shall, at all times during the lease term, keep accurate and complete records in double entry bookkeeping form of all financial transactions made possible by business operation on the premises. The records must be supported by source documents of original entry, purchase invoices or other pertinent documents. Complete records will be kept on the leased premises or in a location acceptable to CITY. CITY shall have the right to inspect and audit these records at any reasonable time.

CITY shall have the discretion to require the installation of any additional methods or control it may consider necessary. If CITY agrees that the records may be maintained at a place other than the leased premises, LESSEE will pay all necessary expenses incurred by CITY in auditing the records at the location where they are maintained.

The cost of the audit(s) will be borne by CITY unless the audit(s) reveal a discrepancy of more than five percent (5%) between the rent due as reported by LESSEE in accordance with this lease and rent due as determined by CITY audit(s). In the event of such discrepancy, the cost of the audit(s) will be borne by LESSEE. Any rent due, plus any costs incurred by CITY as defined under Section 3.03 Delinquent Rent, hereof shall be paid immediately.

LESSEE'S failure to keep complete and accurate records by means of double entry bookkeeping and make them available for inspection by CITY is a breach of this lease and cause for termination.

SECTION 4: ASSIGNMENT

- 4.01 Time is of Essence; Provisions Binding on Successors. Time is of the essence of all of the terms, covenants and conditions of this lease and, except as otherwise provided herein, all of the terms, covenants and conditions of this lease shall apply to, benefit and bind the successors and assigns of the respective parties, jointly and individually.
- 4.02 Assignment and Subletting. LESSEE shall not assign this lease, or any interest therein, and shall not sublet the premises or any part thereof, or any right or privilege appurtenant thereto, or suffer any other person, except employees, agents and guests of LESSEE, to use or occupy the premises or any part thereof, without the prior written consent of the City Manager in each instance. A consent to assignment, subletting, occupation or use by any other person shall not be deemed to be a consent to any subsequent assignment, subletting, occupation or use by another person. Any such assignment or subletting without such consent shall be void, and shall, at the option of CITY, terminate this lease. This lease shall not, nor shall any interest therein, be assignable, as

to the interest of LESSEE, by operation of law, without the written consent of the City Manager.

"Assignment," for the purposes of this clause shall include any transfer of any ownership interest in this lease by LESSEE or by any partners, principals, or stockholders, as the case may be, from the original LESSEE.

Approval of any assignment or sublease shall be conditioned upon the assignee or sublessee agreeing in writing that it will assume the rights and obligations thereby assigned or subleased and that it will keep and perform all covenants, conditions and provisions of this agreement which are applicable to the rights acquired. The rights of assignment containing herein are further subject to Section 7.16 Additional Consideration to City, hereof.

- 4.03 Encumbrance. Subject to prior consent by CITY, which shall not be unreasonably withheld, LESSEE may encumber this lease, its leasehold estate and its improvements thereon by deed of trust, mortgage, chattel mortgage or other security instrument to assure the payment of a promissory note or notes of LESSEE, upon the express condition that the net proceeds of such loan or loans be devoted exclusively to the purpose of developing the leased premises in accordance with Section 9.06 hereof entitled Development Plan. However, a reasonable portion of the loan proceeds may be disbursed for payment of incidental costs of construction, including but not limited to the following: off-site improvements for service of the premises; on-site improvements; escrow charges; premiums for hazard insurance, or other insurance or bonds required by CITY; title insurance premiums; reasonable loan costs such as discounts, interest and commissions; and architectural, engineering and attorney's fees and such other normal expenses incidental to such construction.

Any subsequent encumbrances on the premises or on any permanent improvements thereon, must first have the approval in writing of City Manager. Such subsequent encumbrances shall also be for the exclusive purpose of development of the premises. Provided, however, after the premises are fully developed in accordance with said Development Plan to the satisfaction of the City Manager, proceeds from refinancing or from such subsequent encumbrances may be used to reduce LESSEE'S equity so long as there is also substantial benefit to the CITY therefrom. LESSEE understands and specifically agrees that the City Manager shall have the sole and absolute discretion to approve or disapprove any such proposed subsequent encumbrance including, but not limited to, amending the lease to provide then current rents and provisions.

In the event any such approved deed of trust or mortgage or other security-type instrument should at any time be in default and be foreclosed, or transferred in lieu of foreclosure, the CITY will accept the approved mortgagee or beneficiary thereof as its new tenant under this lease with all the rights, privileges and duties granted and imposed in this lease.

Any default, foreclosure or sale pursuant to said deed of trust, mortgage or other security instrument, shall be invalid with respect to this lease without prior notice thereof to and approved by CITY. Upon prior written approval by CITY, said mortgagee or beneficiary may assign this lease to its nominee, if nominee is a reputable, qualified and financially responsible person in the opinion of CITY. Any deed of trust, mortgage or other security instrument shall be subject to all of the terms, covenants and conditions of this lease and shall not be deemed to amend or alter any of the terms, covenants or condition hereof.

4.04 Defaults and Remedies.

a. Default. In the event that:

- (1) LESSEE shall default in the performance of any covenant or condition required by this lease to be performed by LESSEE and shall fail to cure said default within thirty (30) days following written notice thereof from CITY; or if any such default is not curable within thirty (30) days, shall fail to commence to cure the default(s) within said thirty-day period and diligently pursue such cure to completion; or
- (2) LESSEE shall voluntarily file or have involuntarily filed against it any petition under any bankruptcy or insolvency act or law; or
- (3) LESSEE shall be adjudicated a bankrupt; or
- (4) LESSEE shall make a general assignment for the benefit of creditors;

then CITY may, at its option, without further notice or demand upon LESSEE or upon any person claiming rights through LESSEE, immediately terminate this lease and all rights of LESSEE and of all persons claiming rights through LESSEE to the premises or to possession thereof; and CITY may enter and take possession of the premises. Provided, however, in the event that any default described in Section 4.04.a.(1) Default and Remedies, hereof, is not curable within thirty (30) days after notice to LESSEE, CITY shall not terminate this lease pursuant to the default if LESSEE immediately

commences to cure the default and diligently pursues such cure to completion.

In the event that there is a deed of trust or mortgage on the leasehold interest, CITY shall give the mortgagee or beneficiary written notice of the default(s) complained of, and the same mortgagee or beneficiary shall have thirty (30) days from such notice to cure the default(s) or, if any such default is not curable within thirty (30) days, to commence to cure the default(s) and diligently pursue such cure to completion. The thirty-day period may be extended during such time as mortgagee or beneficiary pursues said cure with reasonable diligence.

b. Remedies. If the mortgagee or beneficiary shall be required to exercise its right to cure said default(s) through litigation or through foreclosure, then CITY shall have the option of the following courses of action in order that the default(s) may be expeditiously corrected:

- (1) CITY may correct said default(s) and charge the costs thereof to the account of LESSEE, which charge shall be due and payable on the date that the rent is next due after presentation by CITY to LESSEE and mortgagee or beneficiary of a statement of said costs.
- (2) CITY may correct said default(s) and may pay the costs thereof from the proceeds of any insurance fund held by CITY, CITY and LESSEE or by CITY and mortgagee or beneficiary, or CITY may use the funds of any faithful performance or cash bond on deposit with CITY, or CITY may call on the bonding agent to correct the default(s) or to pay the costs of correction performed by or at the direction of CITY.
- (3) CITY may terminate this lease as to the rights of LESSEE by assuming or causing the assumption of liability for any trust deed or mortgage. LESSEE agrees to assume and pay any and all penalties or bonuses required by the beneficiaries, trustees or mortgagees as a condition for early payoff of the related obligations by CITY. CITY may, as an alternative, substitute for the terminated LESSEE a new LESSEE reasonably satisfactory to the mortgagee or beneficiary. Any reasonable costs incurred by CITY in releasing to a new tenant shall be the responsibility of the terminated LESSEE, and LESSEE hereby agrees to reimburse CITY for any such costs.

Should the default(s) be noncurable by LESSEE, then any lender holding a beneficial interest in the leasehold, whose

qualifications as an assignee have been approved by CITY, shall have the absolute right to substitute itself to the estate of LESSEE hereunder and to commence performance of this lease. If such mortgagee or beneficiary shall give notice in writing of its election to so substitute itself within the thirty-day period after receiving written notice by CITY of the default, and the default, if curable, is cured by such mortgagee or beneficiary, then this lease shall not terminate pursuant to the default. In that event, CITY expressly consents to the substitution and authorizes the mortgagee or beneficiary to perform under this lease with all the rights, privileges, and obligations of LESSEE, subject to cure of the default, if possible, by mortgagee or beneficiary. LESSEE expressly agrees to assign all its interest in and to its leasehold estate to mortgagee or beneficiary in that event.

- c. Abandonment by LESSEE. Even though LESSEE has breached the lease and abandoned the property, this lease shall continue in effect for so long as CITY does not terminate this lease, and CITY may enforce all its rights and remedies hereunder, including but not limited to the right to recover the rent as it becomes due, plus damages.
- d. Waiver. Any CITY waiver of a default is not a waiver of any other default. Any waiver of a default must be in writing and be executed by the City Manager in order to constitute a valid and binding waiver. CITY delay or failure to exercise a remedy or right is not a waiver of that or any other remedy or right under this lease. The use of one remedy or right for any default does not waive the use of another remedy or right for the same default or for another or later default. CITY'S acceptance of any rents is not a waiver of any default preceding the rent payment. CITY and LESSEE specifically agree that the property constituting the premises is CITY-owned and held in trust for the benefit of the citizens of the City of San Diego and that any failure by the City Manager or CITY staff to discover a default or take prompt action to require the cure of any default shall not result in an equitable estoppel, but CITY shall at all times, subject to applicable statute of limitations, have the legal right to require the cure of any default when and as such defaults are discovered or when and as the City Council directs the City Manager to take action or require the cure of any default after such default is brought to the attention of the City Council by the City Manager or by any concerned citizen.

- 4.05 Eminent Domain. If all or part of the premises are taken through condemnation proceedings or under threat of condemnation by any public authority with the power of eminent domain, the interests of CITY and LESSEE (or beneficiary or mortgagee) will be as follows:
- a. In the event the entire premises are taken, this lease shall terminate on the date of the transfer of title or possession to the condemning authority, whichever first occurs.
 - b. In the event of a partial taking, if, in the opinion of CITY, the remaining part of the premises is unsuitable for the lease operation, this lease shall terminate on the date of the transfer of title or possession to the condemning authority, whichever first occurs.
 - c. In the event of a partial taking, if, in the opinion of CITY, the remainder of the premises is suitable for continued lease operation, this lease shall terminate in regard to the portion taken on the date of the transfer of title or possession to the condemning authority, whichever first occurs, but shall continue for the portion not taken. The minimum rent shall be equitably reduced to reflect the portion of the premises taken.
 - d. Award. All monies awarded in any such taking shall belong to CITY, whether such taking results in diminution in value of the leasehold or the fee or both; provided, however, LESSEE shall be entitled to any award attributable to the taking of or damages to LESSEE'S then remaining leasehold interest in installations or improvements of LESSEE. CITY shall have no liability to LESSEE for any award not provided by the condemning authority.
 - e. Transfer. CITY has the right to transfer CITY'S interests in the premises in lieu of condemnation to any authority entitled to exercise the power of eminent domain. If a transfer occurs, LESSEE shall retain whatever interest it may have in the fair market value of any improvements placed by it on the premises in accordance with this lease.
 - f. No Inverse Condemnation. The exercise of any CITY right under this lease shall not be interpreted as an exercise of the power of eminent domain and shall not impose any liability upon CITY for inverse condemnation.

SECTION 5: INSURANCE RISKS/SECURITY

5.01 Indemnity. LESSEE shall at all times assume the defense of, relieve, indemnify, protect, and save CITY and any and all of its boards, officers, agents, and employees harmless from any and all claims and demands, actions, proceedings, losses, liens, costs, judgments, civil fines, and penalties of any nature whatsoever in regard to or resulting from the use of the premises, including but not limited to expenses incurred in legal actions, death, injury, or damage that may be caused directly or indirectly by:

- a. any unsafe or defective condition in or on the premises of any nature whatsoever which may exist by reason of any act, omission, neglect, or any use or occupation of the premises;
- b. any operation, use, or occupation conducted on the premises;
- c. any act, omission, or negligence on the part of LESSEE, the City, their employees, agents, sublessees, invitees, licensees; or
- d. any failure by LESSEE to comply or secure compliance with any of the lease terms or conditions.

5.02 Insurance. LESSEE shall take out and maintain at all times during the term of this lease the following insurance at its sole expense:

- a. Public liability and property damage insurance in the amount of not less than ONE MILLION DOLLARS (\$1,000,000) Combined Single Limit Liability with an occurrence claims form. This policy shall cover all injury or damage, including death, suffered by any party or parties from acts or failures to act by CITY or LESSEE or by authorized representatives of CITY or LESSEE on or in connection with the use or operation of the premises.
- b. Fire, extended coverage, and vandalism insurance policy on all insurable property on the premises in an amount to cover 100 percent of the replacement cost. Any proceeds from a loss shall be payable jointly to CITY and LESSEE. The proceeds shall be placed in a trust fund to be reinvested in rebuilding or repairing the damaged property. If there is a mortgage or trust deed on the leasehold in accordance with Section 4.03 Encumbrance hereof, the proceeds may be paid to the approved mortgagee or beneficiary so long as adequate provision reasonably satisfactory to CITY has been made in each case for the use of all proceeds for repair and restoration of damaged or destroyed improvements on the premises.

- c. Conditions. All insurance policies will name CITY as an additional insured, protect CITY against any legal costs in defending claims, and will not terminate without sixty (60) days' prior written notice to CITY. All insurance companies must be satisfactory to CITY and licensed to do business in California. All policies will be in effect on or before the first day of the lease, except "course of construction fire insurance" shall be in force on commencement of all authorized construction on the premises, and full applicable fire insurance coverage shall be effective upon completion of each insurable improvement. A copy of the insurance policy will remain on file with CITY during the entire term of the lease. At least thirty (30) days prior to the expiration of each policy, LESSEE shall furnish a certificate(s) showing that a new or extended policy has been obtained which meets the terms of this lease.
- d. Modification. CITY, at its discretion, may require the revision of amounts and coverages at any time during the term by giving LESSEE sixty (60) days' prior written notice. CITY'S requirements shall be designed to assure protection from and against the kind and extent of risk existing on the premises as well as reflect inflation. LESSEE also agrees to obtain any additional insurance required by CITY for new improvements, in order to meet the requirements of this lease.
- e. Accident Reports. LESSEE shall report to CITY any accident causing more than TEN THOUSAND DOLLARS (\$10,000) worth of property damage or any serious injury to persons on the premises. This report shall contain the names and addresses of the parties involved, a statement of the circumstances, the date and hour, the names and addresses of any witnesses and other pertinent information.
- f. Failure to Comply. If LESSEE fails or refuses to take out and maintain the required insurance, or fails to provide the proof of coverage, CITY has the right to obtain the insurance. LESSEE shall reimburse CITY for the premiums paid with interest at the maximum allowable legal rate then in effect in California. CITY shall give notice of the payment of premiums within thirty (30) days of payment stating the amount paid, names of the insurer(s) and rate of interest. Said reimbursement and interest shall be paid by LESSEE on the first (1st) day of the month following the notice of payment by CITY.

Notwithstanding the preceding provisions of this Subsection f., if LESSEE fails or refuses to take out or maintain insurance as required in this lease, or fails to provide the

proof of insurance, CITY has the right to declare this lease in default without further notice to LESSEE and CITY shall be entitled to exercise all legal remedies in the event of such default.

- 5.03 Waste, Damage, or Destruction. LESSEE agrees to give notice to CITY of any fire or other damage that may occur on the leased premises within ten (10) days of such fire or damage. LESSEE agrees not to commit or suffer to be committed any waste or injury or any public or private nuisance, to keep the premises clean and clear of refuse and obstructions, and to dispose of all garbage, trash, and rubbish in a manner satisfactory to CITY. If the leased premises shall be damaged by any cause which puts the premises into a condition which is not decent, safe, healthy and sanitary, LESSEE agrees to make or cause to be made full repair of said damage and to restore the premises to the condition which existed prior to said damage; or, at CITY'S option, LESSEE agrees to clear and remove from the leased premises all debris resulting from said damage and rebuild the premises in accordance with plans and specifications previously submitted to CITY and approved in writing in order to replace in kind and scope the operation which existed prior to such damage, using for either purpose the insurance proceeds as set forth in Section 5.02 Insurance, hereof.

LESSEE agrees that preliminary steps toward performing repairs, restoration, or replacement of the premises shall be commenced by LESSEE within thirty (30) days, and the required repairs, restoration, or replacement shall be completed within a reasonable time thereafter. CITY may determine an equitable deduction in the minimum annual rent requirement for such period or periods that said premises are untenable by reason of such damage.

- 5.04 Security Deposit. A security deposit shall be paid to the CITY by LESSEE in the sum of two thousand dollars (\$2,000) on or before the commencement date of this lease. All or any portion of the principal sum shall be available unconditionally to CITY for correcting any default or breach of this lease by LESSEE, LESSEE'S successors or assigns, or for payment of expenses incurred by CITY as a result of LESSEE'S failure to faithfully perform all terms, covenants and conditions of this lease.

The security deposit shall take one of the forms set out below:

- a. Cash. Cash deposits shall be deposited with CITY and CITY shall not be liable to LESSEE for any interest thereon. Provided further, any interest earned by CITY from such deposit or redeposit shall be and remain the property of CITY.

- b. Instrument(s) of Credit. An instrument(s) of credit from one or more financial institutions, subject to regulation and insurance by the state or federal government, shall pledge that the funds are on deposit and guaranteed for payment, and agree that any or all funds shall be paid to CITY upon demand by CITY.

The financial institution and the form of any instrument pledging the funds must be approved by CITY.

LESSEE will maintain the required security deposit throughout the lease term and for ninety (90) days thereafter unless previously released by CITY. Failure to do so shall be considered a default and is grounds for immediate termination of this lease.

In the event CITY utilizes all or any portion of the security deposit, LESSEE shall reimburse the deposit within ten (10) days of notice from CITY to bring the security deposit up to the full specified amount.

The security or any balance thereof will be returned to LESSEE within ninety (90) days following expiration or termination of this lease, provided LESSEE has faithfully complied with all terms, covenants and conditions hereof.

The security deposit may be increased by CITY proportionate to any increased performance or rental liability of LESSEE upon sixty (60) days' prior written notice from CITY of such required increase.

SECTION 6: IMPROVEMENTS/ALTERATIONS/REPAIRS

- 6.01 Acceptance of Premises. By signing this lease, LESSEE represents and warrants that it has independently inspected the premises and made all tests, investigations, and observations necessary to satisfy itself of the condition of the premises. LESSEE agrees it is relying solely on such independent inspection, tests, investigations, and observations in making this lease. LESSEE further acknowledges that the premises are in the condition called for by this lease, that CITY has performed all work with respect to the premises, and that LESSEE does not hold CITY responsible for any defects in the premises.

The condition of the premises is completely "as is," which LESSEE acknowledges and accepts by signing this lease. LESSEE understands that no CITY funds will be expended in the improvement of the premises. LESSEE further acknowledges that it has been informed of the presence of asbestos-containing materials in the premises and that it shall assume the defense of, indemnify, and

hold CITY harmless from any or all claims or damages arising from the presence of such materials. LESSEE agrees to post and maintain warning signs in the premises giving the location(s) of the asbestos-containing materials and agrees not to disturb or allow the disturbance of such materials, except under the supervision of a State-certified asbestos contractor.

6.02 Entry and Inspection. CITY reserves and shall always have the right to enter said premises for the purpose of viewing and ascertaining the condition of the same, or to protect its interests in the premises, or to inspect the operations conducted thereon. In the event that such entry or inspection by CITY discloses that said premises are not in a decent, safe, healthy, and sanitary condition, CITY shall have the right, after ten (10) days written notice to LESSEE, to have any necessary maintenance work done at the expense of LESSEE, and LESSEE hereby agrees to pay promptly any and all costs incurred by CITY in having such necessary maintenance work done, in order to keep said premises in a decent, safe, healthy, and sanitary condition. Further, if at any time CITY determines that said premises are not in a decent, safe, healthy, and sanitary condition, CITY may at its sole option, without additional notice, require LESSEE to file with CITY a faithful performance bond to assure prompt correction of any condition which is not decent, safe, healthy, and sanitary. Said bond shall be in an amount adequate in the opinion of CITY to correct the said unsatisfactory condition. LESSEE shall pay the cost of said bond. The rights reserved in this section shall not create any obligations on CITY or increase obligations elsewhere in this lease imposed on CITY.

6.03 Maintenance. LESSEE agrees to assume full responsibility for the operation and maintenance of the premises throughout the term hereof, including without limitations the maintenance, replacement and repair of any doors, heating and air-conditioning system, plumbing, sewer pipes, electrical wiring and conduits without expenses to the CITY unless otherwise specified herein, and to perform all repairs and replacements necessary to maintain and preserve said premises in a decent, safe, healthy, and sanitary condition in a manner satisfactory to CITY and in compliance with the Development Plan described in Section 6.12, hereof, and with all applicable laws. CITY shall repair and maintain the structural portions of the premises, including the exterior walls and restaurant roof, except such maintenance and repairs as are caused in part or in whole by the act, neglect, fault or omission of the LESSEE, its agents, servants, employees, invitees, and except any damage caused by breaking and entering, in which case LESSEE shall pay to CITY the actual cost of such maintenance and repairs. CITY shall not be liable for any failure to make such repairs or to perform any maintenance. There shall be no abatement of rent and no liability of CITY by reason of any injury

to or interference with LESSEE'S business arising from the making of any repairs, alterations or improvements in or to any portion of the premises or in or to fixtures, appurtenances and equipment therein.

6.04 Improvements/Alterations. No improvements, structures, or installations shall be constructed on the premises, and the premises may not be altered by LESSEE without prior written approval by the City Manager. Further, LESSEE agrees that major structural or architectural design alterations to approved improvements, structures, or installations may not be made on the premises without prior written approval by the City Manager and that such approval shall not be unreasonably withheld. This provision shall not relieve LESSEE of any obligation under this lease to maintain the premises in a decent, safe, healthy, and sanitary condition, including structural repair and restoration of damaged or worn improvements. CITY shall not be obligated by this lease to make or assume any expense for any improvements or alterations.

 6.05 Utilities. LESSEE agrees to order, obtain, and pay for all utilities and service and installation charges in connection with the development and operation of the leased premises. All utilities will be installed underground. LESSEE agrees to pay CITY 2.5 tenths of one percent (.0025) of gross income to reimburse CITY for LESSEE'S share of water and sewer services.

At least four (4) months prior to the end of the second year of the term of this agreement and at least four (4) months prior to the end of each five-year period thereafter, the parties hereto by mutual consent or through appraisal as set forth in Paragraph 3.02e, Percentage Rent Adjustment, will adjust the percentage rate of water and sewer reimbursements to reflect changes in sewer and water unit charges as levied by the City of San Diego Utilities Department.

6.06 Construction Bond. Whenever there is any construction to be performed on the premises, LESSEE shall deposit with CITY, prior to commencement of said construction, a faithful performance bond in the amount of 110 percent of the estimated construction cost of the work to be performed. The bond may be in cash or may be a corporate surety bond or other security satisfactory to CITY. The bond shall insure that the construction commenced by LESSEE shall be completed in accordance with the plans approved by CITY or, at the option of CITY, that the uncompleted construction shall be removed and the premises restored to a condition satisfactory to CITY. The bond or cash will be held in trust by CITY for the purpose specified above or at CITY'S option it may be placed in an escrow or other trust approved by CITY.

- 6.07 Liens. LESSEE shall at all times save CITY free and harmless and indemnify CITY against all claims for labor or materials in connection with operations, improvements, alterations, or repairs on or to the premises and the costs of defending against such claims, including reasonable attorney's fees.

If improvements, alterations, or repairs are made to the premises by LESSEE or by any party other than CITY, and a lien or notice of lien is filed, LESSEE shall within five (5) days of such filing either:

- a. take all actions necessary to record a valid release of lien, or
- b. file with CITY a bond, cash, or other security acceptable to CITY sufficient to pay in full all claims of all persons seeking relief under the lien.

- 6.08 Taxes. LESSEE agrees to pay, before delinquency, all taxes, assessments, and fees assessed or levied upon LESSEE or the premises, including the land, any buildings, structures, machines, equipment, appliances, or other improvements or property of any nature whatsoever erected, installed, or maintained by LESSEE or levied by reason of the business or other LESSEE activities related to the leased premises, including any licenses or permits. LESSEE recognizes and agrees that this lease may create a possessory interest subject to property taxation, and that LESSEE may be subject to the payment of taxes levied on such interest, and that LESSEE shall pay all such possessory interest taxes. LESSEE further agrees that payment for such taxes, fees and assessments will not reduce any rent due CITY.

- 6.09 Signs. LESSEE agrees not to erect or display any banners, pennants, flags, posters, signs, decorations, marquees, awnings, or similar devices or advertising without the prior written consent of CITY. If any such unauthorized item is found on the premises, LESSEE agrees to remove the item at its expense within 24 hours notice thereof by CITY, or CITY may thereupon remove the item at LESSEE'S cost.

- 6.10 Ownership of Improvements and Personal Property.

- a. Any and all improvements, trade fixtures, structures, and installations or additions to the premises now existing or constructed on the premises by LESSEE shall at lease expiration or termination be deemed to be part of the premises and shall become, at CITY'S option, CITY'S property, free of all liens and claims except as otherwise provided in this lease.

- b. If CITY elects not to assume ownership of all or any improvements, trade fixtures, structures and installations, CITY shall so notify LESSEE thirty (30) days prior to termination or One-Hundred-Eighty (180) days prior to expiration, and LESSEE shall remove all such improvements, structures and installations as directed by CITY at LESSEE'S sole cost on or before lease expiration or termination. If LESSEE fails to remove any improvements, structures, and installations as directed, LESSEE agrees to pay CITY the full cost of any removal.
 - c. LESSEE-owned machines, appliances, equipment (other than trade fixtures), and other items of personal property shall be removed by LESSEE by the date of the expiration or termination of this lease. Any said items which LESSEE fails to remove will be considered abandoned and become CITY'S property free of all claims and liens, or CITY may, at its option, remove said items at LESSEE'S expense.
 - d. If any removal of such personal property by LESSEE results in damage to the remaining improvements on the premises, LESSEE agrees to repair all such damage.
 - e. Any necessary removal by either CITY or LESSEE which takes place beyond said expiration or termination hereof shall require LESSEE to pay rent to CITY at the rate in effect immediately prior to said expiration or termination.
 - f. Notwithstanding any of the foregoing, in the event LESSEE desires to dispose of any of its personal property used in the operation of said premises upon expiration or termination of this lease, then CITY shall have the first right to acquire or purchase said personal property.
- 6.11 Unavoidable Delay. If the performance of any act required of CITY or LESSEE is directly prevented or delayed by reason of strikes, lockouts, labor disputes, unusual governmental delays, acts of God, fire, floods, epidemics, freight embargoes, or other causes beyond the reasonable control of the party required to perform an act, said party shall be excused from performing that act for the period equal to the period of the prevention or delay. Provided, however, this provision shall not apply to obligations to pay rental as required pursuant to this lease. In the event LESSEE or CITY claims the existence of such a delay, the party claiming the delay shall notify the other party in writing of such fact within ten (10) days after the beginning of any such claimed delay.
- 6.12 Development Plan. LESSEE agrees to develop the leased premises in accordance with the General Development Plan approved by the City Manager and filed in the Office of the Deputy Director of

Airports, which plan is hereby incorporated by this reference. The general contents and provisions of the Development Plan are described in Section 9.06, hereof. The City Manager or his designee shall have the authority to authorize changes to the plan provided that the basic concept may not be modified without City Council approval and a document evidencing any approved changes shall be filed in the Office of the City Clerk. Failure by LESSEE to comply with the General Development Plan shall constitute a major default and subject this lease to termination by CITY.

- 6.13 Hazardous Substances and Toxic Waste. LESSEE shall comply with all laws regarding hazardous substances and waste relative to occupancy and use of the premises. Any hazardous substances and wastes located on the premises and arising out of the occupancy and use of the premises by LESSEE shall be the responsibility of LESSEE, and LESSEE shall be liable and responsible for, including without limitation: 1) removal from the premises of any such substances and wastes and the costs therefor; 2) damages to persons, property, and the premises; 3) claims resulting therefrom; 4) fines imposed by any governmental agency; and 5) any other liability; and LESSEE shall hold harmless the CITY from any and all such responsibilities, damages, claims, fines, and liabilities, including without limitation, any costs, expenses and attorney's fees therefor arising out of LESSEE'S use and occupancy of the premises.

If LESSEE knows or has reasonable cause to believe, that any hazardous substance has been released on or beneath the premises, LESSEE shall give written notice to the City Manager within ten (10) days of receipt of such knowledge or cause for belief. Provided however, if LESSEE knows, or has reasonable cause to believe that such substance is an imminent and substantial danger to public health and safety, LESSEE shall notify the City Manager immediately upon receipt of this knowledge or belief and shall take all actions necessary to alleviate such danger. LESSEE will notify the City Manager immediately of any notice of violation received or initiation of environmental actions or private suits relative to the premises. In addition, LESSEE and LESSEE'S sub-lessees shall not utilize or sell any hazardous substance on the property without the prior written consent of the CITY.

At any time within the twelve (12) months before the expiration or earlier termination of this lease, LESSEE at the CITY'S sole option shall cause an environmental assessment of the premises to be completed by a professional environmental consultant registered with the State of California as a Professional Engineer, Certified Engineering Geologist, or Registered Civil Engineer. Said environmental assessment shall be obtained at the sole cost and expense of LESSEE and shall establish what, if any, hazardous substances exist on, in or under the premises, 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 said 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. LESSEE shall cause the remediation and/or removal recommended in the environmental assessment such that compliance with environmental law is achieved and shall be solely responsible for all cost and expense incurred.

- 6.14 Failure to Meet Development Schedule. Should LESSEE fail to complete construction in accordance with the schedule of development of the General Development Plan hereof, it is specifically agreed by LESSEE and CITY that CITY will be entitled to damages in the amount of twenty dollars (\$20) for every day of failure to meet said schedule of development until completion of development, said amount representing liquidated damages therefor. In the event that construction is not completed within 90 days following the date specified for completion in the Development Plan, CITY may, at its option, terminate this lease.

-  6.15 City Buy Out/Modernization. If the City decides to modify the Montgomery Field Administration Building, the lessee will have the first right of refusal to participate in any modification of the restaurant portion occupied by the lessee. If the lessee does not wish to participate, or if the City decides to change the use of the building, then the City has the right to buy out the leasehold interest at its then current value. Such value would include the remaining leasehold interest as well as Lessee's improvements and equipment. Provided, however, no consideration shall be paid for bonus value. This clause would apply if the CITY desires to modernize or upgrade the premises in any manner.

This agreement as previously negotiated includes a provision that requires the lessee to diligently conduct the business to produce the most gross income possible and to provide experienced management to the satisfaction of the City Manager. A provision requiring the lessee to maintain an "A" card is also included. If these areas are not in compliance, the lease can be placed in default and terminated.

SECTION 7: GENERAL PROVISIONS

7.01 Notices

- a. Any notice required or permitted to be given hereunder shall be in writing and may be served personally or by United States mail, postage prepaid, addressed to LESSEE at the leased premises or at such other address designated in writing by LESSEE; and to CITY as follows:

City Manager
Attention Property Director
City Administration Building
202 "C" Street, M.S. 9B
San Diego, CA 92101-4155

or to any mortgagee, trustee, or beneficiary as applicable, at such appropriate address designated in writing by the respective party.

- b. Any party entitled or required to receive notice under this lease may by like notice designate a different address to which notices shall be sent.

- 7.02 Compliance with Law. LESSEE shall at all times in the construction, maintenance, occupancy, and operation of the premises comply with all applicable laws, statutes, ordinances, and regulations of CITY, County, State, and Federal Governments, at LESSEE'S sole cost and expense. In addition, LESSEE shall comply with any and all notices issued by the City Manager or his authorized representative under the authority of any such law, statute, ordinance, or regulation.
- 7.03 CITY Approval. The approval or consent of CITY, wherever required in this lease, shall mean the written approval or consent of the City Manager or his designee unless otherwise specified, without need for further resolution by the City Council.
- 7.04 Nondiscrimination. LESSEE agrees not to discriminate in any manner against any person or persons on account of race, marital status, sex, religious creed, color, ancestry, national origin, age, or physical handicap in LESSEE'S use of the premises, including, but not limited to the providing of goods, services, facilities, privileges, advantages, and accommodations, and the obtaining and holding of employment. LESSEE shall pay its employees the prevailing wage rates in the City of San Diego for like labor.
- 7.05 Equal Opportunity. LESSEE agrees to abide by CITY'S Equal Opportunity Program for LESSEES as it exists or is amended to the extent that the program is applicable to this lease when LESSEE employs 15 or more persons on the premises. A copy of the program effective as of the date of this lease is on file in the City Clerk's Office and by this reference is part hereof. The program's goal is the attainment of employment for minorities and women in all areas of employment, in a total percentage as established by CITY for its Equal Opportunity Program each year. LESSEE agrees to respond to CITY'S requests for information concerning said Equal Opportunity Program within thirty (30) days from the date of each such request.

- 7.06 Partial Invalidity. If any term, covenant, condition, or provision of this lease is found invalid, void, or unenforceable by a court of competent jurisdiction, the remaining provisions will remain in full force and effect.
- 7.07 Legal Fees. In the event of any litigation regarding this lease, the prevailing party shall be entitled to an award of reasonable legal costs, including court and attorney's fees.
- 7.08 Number and Gender. Words of any gender used in this lease shall include any other gender, and words in the singular number shall include the plural, when the tense requires.
- 7.09 Captions. The Lease Outline, section headings, and captions for various articles and paragraphs shall not be held to define, limit, augment, or describe the scope, content, or intent of any or all parts of this lease. The numbers of the paragraphs and pages of this lease may not be consecutive. Such lack of consecutive numbers is intentional and shall have no effect on the enforceability of this lease.
- 7.10 Entire Understanding. This lease contains the entire understanding of the parties. LESSEE, by signing this agreement, agrees that there is no other written or oral understanding between the parties with respect to the leased premises. Each party has relied on its own examination of the premises, advice from its own attorneys, and the warranties, representations, and covenants of the lease itself. Each of the parties in this lease agrees that no other party, agent, or attorney of any other party has made any promise, representation, or warranty whatsoever which is not contained in this lease.

The failure or refusal of any party to read the lease or other documents, inspect the premises, and obtain legal or other advice relevant to this transaction constitutes a waiver of any objection, contention, or claim that might have been based on these actions. No modification, amendment, or alteration of this lease will be valid unless it is in writing and signed by all parties.

- 7.11 CITY Employee Participation Policy. It is the policy of CITY that all CITY contracts, agreements or leases with consultants, vendors or LESSEES shall include a condition that the contract, agreement or lease shall at the sole option of CITY be unilaterally and immediately terminated by CITY if the contractor or LESSEE employs an individual who within the twelve months immediately preceding such employment did in his/her capacity as a CITY officer or employee participate in negotiations with or otherwise have an influence on the recommendation made to the City Council in connection with the selection of the contractor or LESSEE. It is not the intent of this policy that these provisions apply to members of the City Council.

- 7.12 CITY Option to Purchase. In the event LESSEE desires to dispose of its interest in this lease, together with any of its interest in improvements, trade fixtures and furnishings owned by LESSEE on the leased premises, CITY shall be given the first right to purchase said interest and improvements at a mutually agreeable price. If CITY does not exercise such right to purchase, LESSEE shall not then sell or offer to sell its interest at a lower price without first reoffering to CITY the right to purchase at such lower price.
- 7.13 Standard of Employees. LESSEE and its employees shall at all times conduct themselves and the operations on the leased premises in a creditable manner.
- 7.14 Supersedure. It is mutually agreed that this lease, upon execution, supersedes and annuls that certain lease executed on the 14th day of April 1976 with John A. Baldan and Amelia Baldan, Document 755148, filed May 7, 1976, which is hereafter void and of no effect except as to any rentals and fees which may have accrued or any rights and remedies accrued or granted to CITY under such agreement.
- 7.15 Relocation Payments. LESSEE understands and agrees that it shall not be entitled to any relocation payment whatsoever upon termination of this lease.
- 7.16 Additional Consideration to City. LESSEE acknowledges that CITY expends considerable sums of money for the maintenance of Montgomery Field areas adjacent to the leasehold. LESSEE further acknowledges that the expenditure of such funds enhances the value of the leasehold. LESSEE and CITY agree that the exact amount of such enhancement is impossible to ascertain. However, CITY desires to be reimbursed to a reasonable extent in consideration for the continued maintenance of adjacent areas. Therefore, LESSEE and CITY agree that in the event of an assignment; in the event of a subletting of the majority portion of the leasehold; or in the event of a refinancing creating an encumbrance against the leasehold after the permanent improvements have been constructed, pursuant to the Development Plan as described in Section 6.12 herein, LESSEE shall pay to CITY three percent (3%) of the gross amount paid for the leasehold in connection with an approved assignment of the lease, three percent (3%) of any amount paid LESSEE in consideration of a sublease of all or a majority portion of the leasehold, or three percent (3%) of the amount of any increased loan or encumbrance against the property over and above the amount of the encumbrance needed to finance the improvements. The amount upon which the three percent (3%) shall be based shall be the total consideration resulting from the transaction including total cash payments and the market value of noncash consideration, including, but not limited to, stocks, bonds,

deferred payments, secured and unsecured notes and forbearances regarding claims and judgments. Prior to CITY'S consent to any assignment, majority subletting or refinancing, LESSEE shall deliver to CITY a written statement of all sums due and owing to CITY from LESSEE pursuant to the provisions of this paragraph together with an acknowledgement from the proposed assignee, sublessee or refinancing agency as to the amount due CITY.. The sum due CITY shall be payable in full to CITY concurrent with the completion of the transaction be it an assignment, a sublease or a refinancing. Any assignment, subletting or refinancing in violation of the terms and conditions of this paragraph shall be void. The provisions of this paragraph shall not apply to:

- a. An assignment or transfer of a beneficial interest in the leasehold resulting from devise, bequest, intestate succession or by operation of law for the benefit of the spouse or descendants (i) of LESSEE (if an individual) or (ii) of LESSEE'S principal owner or chief executive officer (if LESSEE is other than an individual);
- b. Such other assignment for which the City Manager determines that the legal and equitable ownership interests in the leasehold have remained unchanged, such as a change in the legal or fictitious name of the LESSEE without any other change in the equity in beneficial use of, or legal title to the leasehold as an asset, or the income produced thereby.

7.17 LESSEE Use to Conform with Law and Other Rules. LESSEE is granted the nonexclusive use of all public airport facilities including, but not limited to, taxiways, runways, aprons, navigational aids and other facilities related to the normal function of any aircraft under LESSEE'S or its sublessee's control. LESSEE agrees that such use shall be in accord with existing or future laws, rules and regulations of the United States of America, the State of California and CITY in regard to their aviation and air navigation authority.

7.18 LESSEE Use and Construction to Conform with Federal Aviation Regulations. LESSEE agrees to conform to all applicable Federal Aviation Regulations in any operation or construction on the premises. LESSEE agrees to comply with the notification and review requirements covered in Part 77 of the Federal Aviation Regulations (which may be amended or replaced by other regulations from time to time) before constructing any improvements or modifying or altering any structure on the premises.

7.19 LESSEE'S Noninterference with Aircraft. LESSEE and LESSEE'S successors, assigns and sublessees agree not to use the premises in any manner or act in any manner that might interfere with any aircraft landing or taking off from Montgomery Field Airport or

otherwise create a hazard. If this covenant is breached in any way, CITY reserves the right to enter the premises and abate or eliminate the interference at the expense of LESSEE.

- 7.20 Lease Subordinate to CITY-United States Agreements. This lease shall be subordinate to the terms of any existing or future agreements between CITY and the United States, or to any United States legal requirement relative to the development, operation or maintenance of the airport.
- 7.21 Height Limitation. LESSEE and LESSEE'S successors, sublessees and assigns agree not to erect or permit any structure or tree on the premises to reach a mean sea level elevation of 553 feet. If this covenant is breached in any way, CITY reserves the right to enter the premises and remove the structure, object, or tree, at the expense of LESSEE.
- 7.22 Right of Flight Easement. CITY and its successors and assigns reserve a right of flight for the passage of aircraft in the air space above the premises, for the benefit and use of the public. This right includes the right to make noise inherent in the operation of existing or future aircraft that operate in any way on or near Montgomery Field Airport.
- 7.23 War or National Emergency. In the event of war or national emergency, this lease and all of its provisions shall be subject to any United States Government right, existing now or in the future, affecting the control, operation, regulation, take over, or exclusive or nonexclusive use of Montgomery Field Airport.
- 7.24 Airport Development. CITY reserves the right to further develop, change or improve the airport and its routes and landing areas as CITY sees fit, without LESSEE interference or hindrance and regardless of LESSEE'S views and desires.
- 7.25 Nonexclusive Right. LESSEE understands and agrees that nothing in this lease shall be construed to grant or authorize an exclusive right within the meaning of Section 308 of the Federal Aviation Act of 1958 (Title 49, Section 1349 of the United States Code).
- 7.26 Landing Area Maintenance. CITY reserves the right, but not the obligation, to maintain and repair the airport landing area and all other public facilities. CITY also has the right to direct and control all LESSEE activities affecting the maintenance and repair of these facilities.

7.27 FAA Nondiscrimination Covenant.

- a. LESSEE and LESSEE'S representatives, successors, sublessees and assigns agree, as part of the consideration that:
 - (1) No person shall be denied benefits, participation or subjected to discrimination in the use of facilities on the premises based on race, color, sex or national origin.
 - (2) No person shall be denied benefits, excluded from participation in or subject to discrimination in the construction of any improvements nor the furnishing of any services on the premises, based on race, color, sex or national origin.
 - (3) LESSEE shall use the premises in compliance with all other requirements imposed by or pursuant to Title 49, Code of Federal Regulations (CFR), Department of Transportation, Subtitle A, Office of the Secretary, Part 21, "Nondiscrimination in Federally-Assisted Programs of the Department of Transportation-Effectuation of Title VI of the Civil Rights Act of 1964," as now exists or may be amended in the future.
- b. If any of the provisions are breached, CITY may terminate the lease and reenter and repossess the premises as if this lease had never been made. This provision is not effective until the procedures of 49 CFR Part 21 are allowed and completed, including expiration of appeal rights.
- c. LESSEE agrees to furnish accommodations and services on a fair and equal basis to all users and will charge fair, reasonable and equal prices for each item or service. LESSEE is allowed to make reasonable and nondiscriminatory discounts, rebates or similar price reductions to volume purchasers. If LESSEE does not comply with this provision, CITY has the right to terminate this lease agreement, without liability, or either CITY or the United States may judicially enforce this entire covenant.
- d. LESSEE agrees to include the entire covenant in any sublease or lease agreement by which LESSEE grants any right or privilege to any firm, corporation or person providing services or accommodations to the public on the leased premises.

7.28 Equal Opportunity. LESSEE, LESSEE'S successors, assigns, sublessees, and any suborganizations agree to undertake an equal opportunity program as required by Title 14, Code of Federal Regulations, Part 152, Subpart E, to insure that no person shall

be excluded from any employment program or opportunity, nor be denied any service described, based on race, creed, color, national origin or sex.

- 7.29 CITY to Mitigate Impacts of Subordination by Termination or Extension. If subordination agreements between CITY and the United States of America result in LESSEE'S inability to operate as a business on the premises, or if the business operations permitted under this agreement are materially affected during a period of subordination, CITY, upon written request from LESSEE, will terminate this lease or extend the term of this lease for the period of time that LESSEE'S operation is affected, and no rent shall accrue during any period of inoperation.
- 7.30 Employee Conduct. LESSEE shall be responsible for the conduct of any employee on the entire property, if that employee is on airport property during any period of employment.

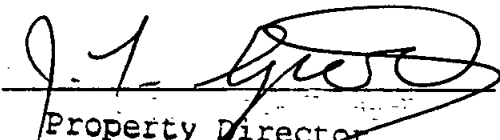
SECTION 8: SIGNATURES

8.01 Signature Page

IN WITNESS WHEREOF, this Lease Agreement is executed by CITY, acting by and through its City Manager, and by LESSEE, acting by and through its lawfully authorized officers.

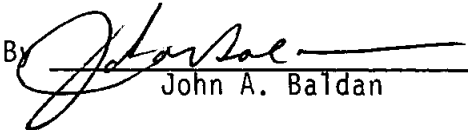
THE CITY OF SAN DIEGO

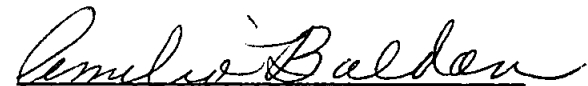
Date APR 23 1990

By 
Property Director

LESSEE:

Date January 30, 1990

By 
John A. Baldan

By 
Amelia Baldan

APPROVED as to form and legality this 11 day of July, 1990.
JOHN W. WITT, City Attorney

By 
Deputy City Attorney

CAB:baa-t-w(6)61
1-24-90

9.01 Legal Description

The second floor restaurant area, including the roof deck patio, inside and outside stairways beginning on the ground floor level, storage area under stairway No. 2, wash area adjacent to stairway No. 1 and the dumbwaiter all located in the Montgomery Field Airport Administration Building (Building #126) at 3750 John J. Montgomery Drive in the City of San Diego, County of San Diego, State of California as shown on Exhibit A, Section 9.02, Parcel Map, and 9.03, Floor Plan.

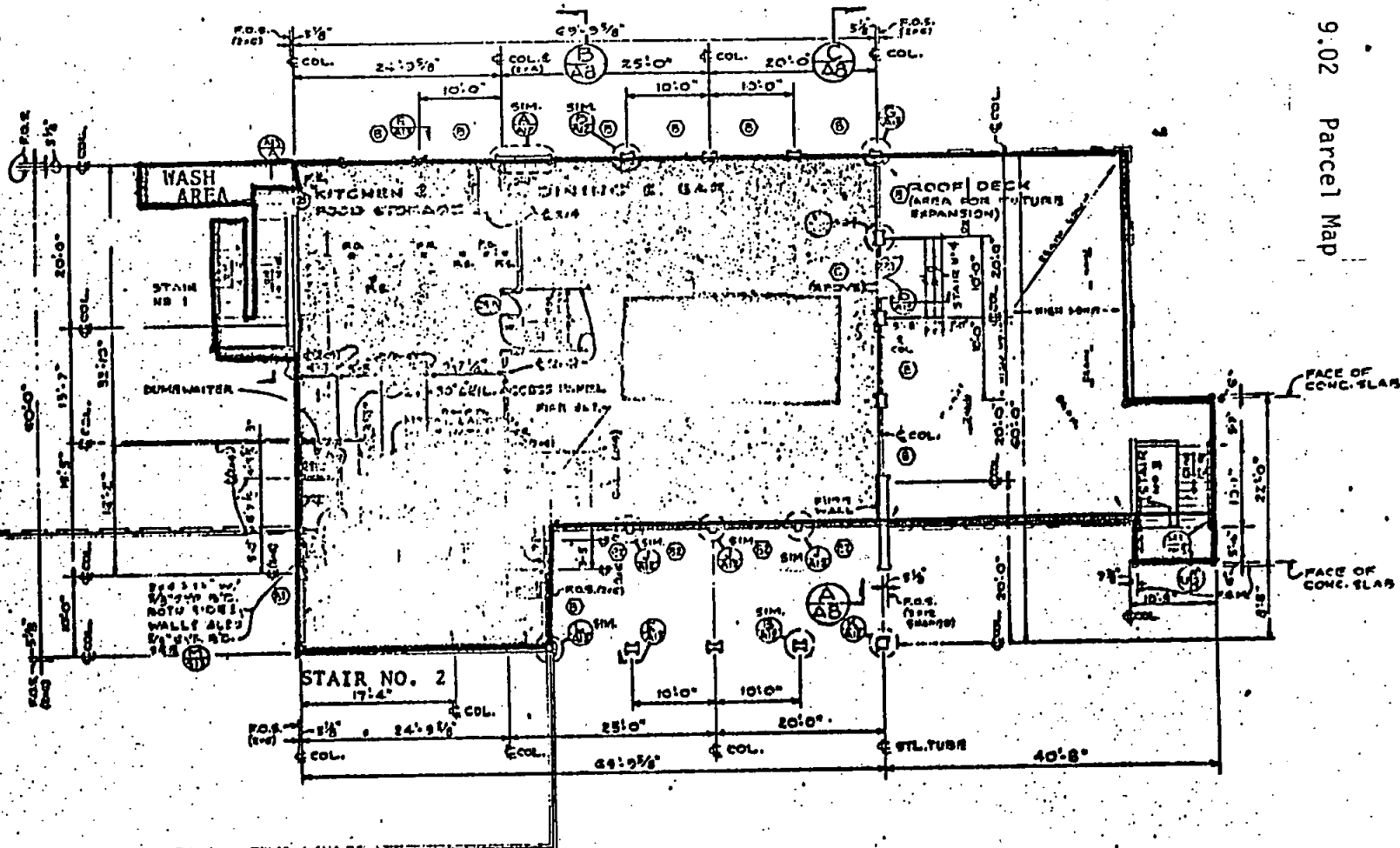


EXHIBIT A

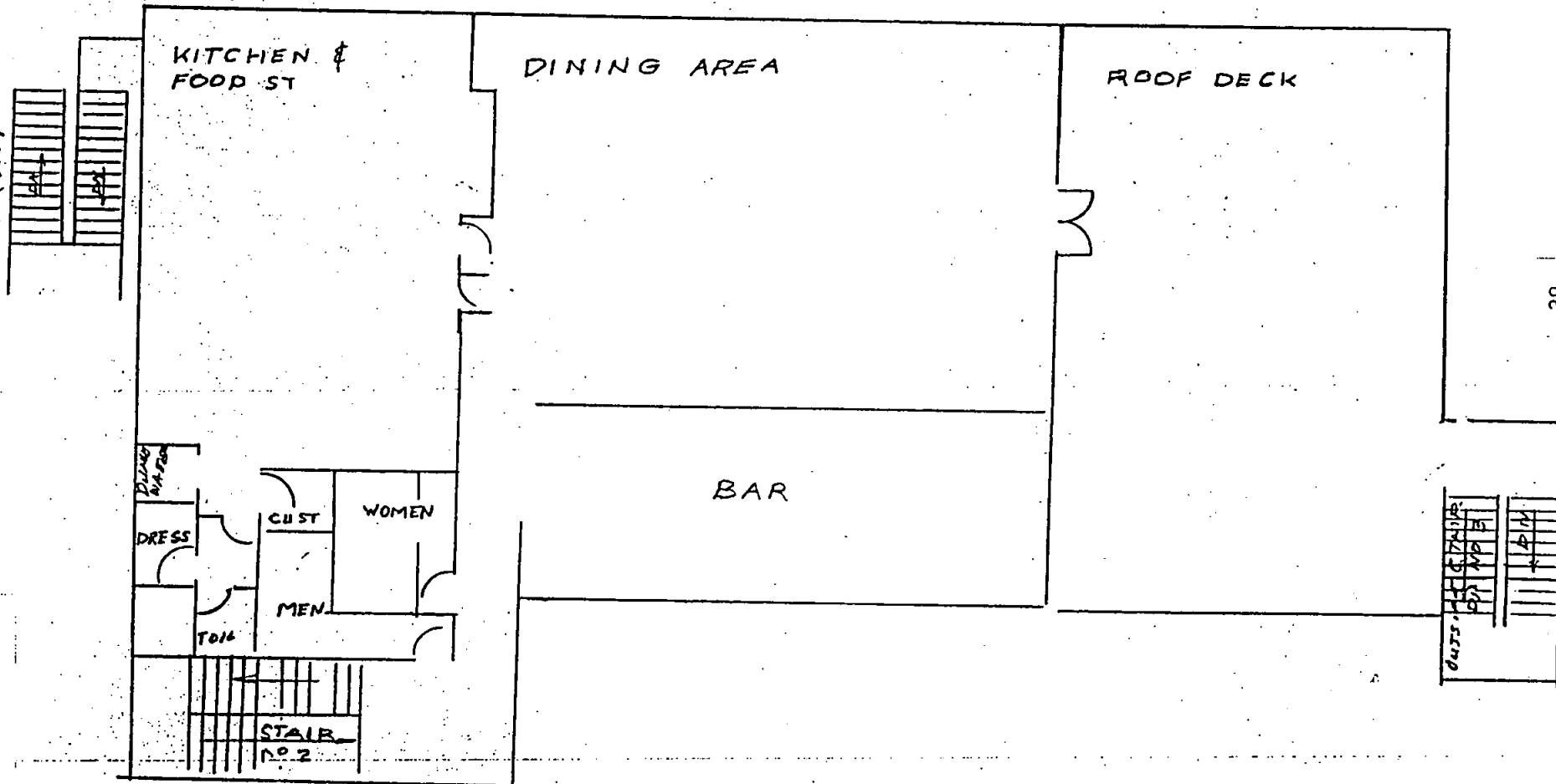
SECOND FLOOR PLAN

SCALE - 1/8" = 1'-0"

The Lease promises are the second floor restaurant area including the roof deck patio, inside and outside stairways beginning on the ground floor level, storage area under stairway No. 2, wash area adjacent to stairway No. 1, and dumbwaiter.

9.03 Floor Plan

OUTSIDE
STAIR NO. 1



9.04 Description and Listing of LESSEE-owned Improvements.

9.05 Description and Listing of CITY-owned Personal Property

9.06 Development of Roof Deck Patio.

LESSEE shall have conceptual drawings prepared for submittal to Airports Division for approval.

LESSEE shall have detailed construction drawings showing the proposed roof over the patio deck area. The drawings shall be prepared by a registered engineer or architect and shall include but not be limited to the following:

- a. Plot Plan
- b. Schematic Elevations
- c. Construction details

Upon receiving conceptual approval from the Airports Division, LESSEE shall submit construction plans and details to the City of San Diego Building Inspection Department for permit.

All construction shall be completed within 180 days of execution of the lease by the CITY.

CITY shall participate by a rent offset for actual cost not to exceed \$5,000 for plan preparation and permit fees. Rental offset shall be applied upon completion of improvements and proof of expenditure paid (receipt).

DUPLICATE

MEMORANDUM OF UNDERSTANDING

THIS MEMORANDUM OF UNDERSTANDING is to the twenty-year Lease Agreement for a portion of the City's Building 126, located on Montgomery Field Airport (Premises), more particularly described in the Lease Agreement filed in the City Clerk's Office as Document RR-275556, executed between the CITY OF SAN DIEGO (CITY) and JOHN A. BALDAN AND AMELIA BALDAN, d.b.a. CASA MACHADO RESTAURANT NO. 3 (LESSEE) on April 23, 1990.

WHEREAS, CITY and LESSEE agree the intention of Paragraph 6.05 Utilities. was that LESSEE would pay the total cost for electricity for the leased premises, and reimburse CITY in arrears the costs for water and sewer (utilities) for the premises, which LESSEE AND CITY agreed was 70% of CITY'S total utility costs for Building 126.

NOW, THEREFORE, CITY and LESSEE hereby agree LESSEE shall continue paying the total costs for electricity for the premises, and the method of calculating LESSEE'S costs for utilities described in Paragraph 6.05 shall be changed to the following method:

Commencing on May 1, 1992 and on the first day of May every year thereafter CITY shall adjust LESSEE'S monthly utility fee for the following one-year period to an amount equalling 1/12th of 70% of CITY'S actual utility costs for Building 126 for the one-year billing period immediately preceding each adjustment date.

DOCUMENT NO. RR-275556-1

FILED OCT 06 1992
OFFICE OF THE CITY CLERK
SAN DIEGO, CALIFORNIA

FOR EXAMPLE:

LESSEE'S monthly utility fees for the period of 5-1-92 to 5-1-93 are \$268.76, which was calculated as shown below:

CITY'S total utility costs for Building 126 for the one-year period covering 5/1/91 to 5/1/92 were \$4,607.32.

$$\$4,607.32 \times 70\% = \frac{\$3,225.12}{12 \text{ months}} = \$268.76 \text{ new monthly utility fee}$$

All monthly utility fees are payable to CITY in advance on or before the first day of each month.

Each year, within 30 days after Lessee receives the written results of the utility fee adjustment from the City, Lessee shall pay City any underpayment of utility fees that occurred between the adjustment date and the date of notificiation, and City shall credit Lessee's account for any overpayment that occurred during the same time period.

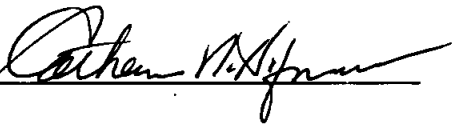
Nothing herein is intended to change any other covenant or condition of said agreement.

When executed by CITY, this agreement shall become effective retroactive on May 1, 1992.

IN WITNESS WHEREOF, this Memorandum of Understanding to said Lease Agreement is executed by CITY, acting through its City Manager, or his designee, and LESSEE, on the day and year set forth below:

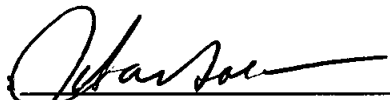
THE CITY OF SAN DIEGO

Date: 9/18/92

By: 

LESSEE:

Date: 9-3-92

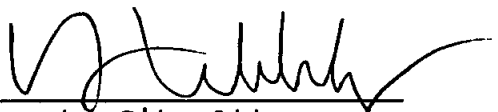
By: 

Date: 9-3-92

By: 

APPROVED AS TO FORM AND LEGALITY THIS 11 DAY OF September, 1992

JOHN W. WITT, City Attorney

By: 
Deputy City Attorney

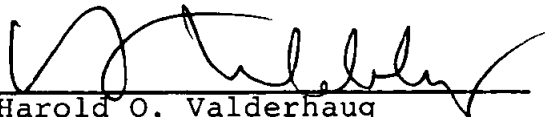
RESOLUTION NUMBER R-275556

ADOPTED ON APRIL 23, 1990

BE IT RESOLVED, by the Council of The City of San Diego, that the City Manager is hereby authorized and empowered to execute, for and on behalf of The City of San Diego, a twenty-year lease agreement with JOHN A. & AMELIA BALDAN dba CASA MACHADO RESTAURANT NO. 3, to operate a restaurant and cocktail lounge at Montgomery Field, on a percentage lease with a beginning minimum annual rent of \$46,800, under the terms and conditions set forth in that lease agreement on file in the office of the City Clerk as Document No. RR-275556.

APPROVED: JOHN W. WITT, City Attorney

By


Harold O. Valderhaug
Deputy City Attorney

HOV:skc
01/31/90
06/08/90 REV.1
Or.Dept:Prop.
R-90-1183
Form=r.none

Passed and adopted by the Council of The City of San Diego on
APR 23 1990

by the following vote:

YEAS: Wolfsheimer, Pratt, Bernhardt, McCarty, Filner.

NAYS: Roberts, Mayor O'Connor.

NOT PRESENT: Hartley, Henderson.

AUTHENTICATED BY:

MAUREEN O'CONNOR

Mayor of The City of San Diego, California

CHARLES G. ABDELNOUR

City Clerk of The City of San Diego, California

(SEAL)

By: MAYDELL L. PONTECORVO, Deputy

I HEREBY CERTIFY that the above and foregoing is a full, true
and correct copy of RESOLUTION NO. R-275556, passed
and adopted by the Council of The City of San Diego, California
on APR 23 1990.

CHARLES G. ABDELNOUR

City Clerk of The City of San Diego, California

(SEAL)

By: *Maydell L. Pontecorvo*, Deputy

RENT COMPARISONS

RESTAURANT TERM PERCENTAGE RENTAL SURVEY

<u>Source</u>	<u>Minimum Lease Term</u>	<u>Rental Rate % of Gross</u>
Casa Machado	20 years	6.5% & 8.5%
Brigantine	20 years	5%-6%
Miguels	20 years	5%-6%
Soup Plantation	20 years	4%-6%
Tengu	20 years	4%-6%
B & B Deli	20 years	4%-6%
John Burnham & Co.*	20 years	6% of total (or 4%-5% food & 6%-8% liquor)
San Diego Business Brokers*	20 years	6%
Laventhol & Horwath (1989 California Restaurant Operations Rpt.)	20 years or 10 yrs. + two 5 yr. options	6%

*Note: These brokerage firms handle a variety of restaurant leases. The data shown reflects their current negotiating position.

COMPARABLE RESTAURANT SALES/SQUARE FOOT*

	<u>Low</u>	<u>Median</u>	<u>High</u>	<u>Casa Machado</u>
Rent as % of Sales:	4.2%	5.8%	8.3%	8.56%
Profit as % of Sales:	1.6%	6.8%	13.2%	6.50%
Sales per Sq.Ft. with following criteria:				
Over 10 years old:	\$154	\$244	\$375	\$126
With full menu:	\$183	\$254	\$375	\$126
Sales: \$500,001-\$1,000,000	\$130	\$187	\$235	\$126
Food & beverage menu:	\$160	\$254	\$361	\$126

* This table is a compilation of comparable restaurants in size and type listed in the 1989 California Restaurant Operators Report published by Laventhol & Horwath. Individual restaurants surveyed by staff, preferred not to release sales data.

EXHIBIT "B"

	<u>GROSS SALES</u>	<u>RENT</u>	<u>% RENT</u>	<u>Net Profit</u>	<u>% Profit</u>
1977 ✓	345,250.80	30,021.17	8.73	8736.19	3.5
1978 No	404,473.51	35,414.46	8.89	6800.09	1.68
1979 ✓	445,721.95	35,961.97	8.08	11,727.15	2.63
1980 No	475,075.34	39,924.77	8.44	12,036.12	2.53
1981 ✓	517,321.13	43,457.48	8.38	27,633.46	5.34
1982 ✓	534,798.99	43,598.48	8.0	27,771.32	5.19
1983 ✓	520,677.84	41,594.16	8.0	35,976.67	6.9
1984 ✓	562,754.66	50,998.39	9.0	41,577.48	7.0
than 10/85 1985 ✓	500,398.89	41,434.50	8.9	28,808.54	5.8
1986 ✓	622,381.91	52,332.47	8.4	41,972.23	6.7
1987 ✓	616,758.83	52,823.80	8.6	40,119.95	6.5
1988 No	MISSING ?				

NOT approved
See MGR. Report on
4-20-90

REQUEST FOR COUNCIL ACTION CITY OF SAN DIEGO			1. CERTIFICATE NUMBER:																																																																																				
TO: CITY ATTORNEY		2. FROM: (ORIGINATOR) Property/General Services, Airports		3. DATE December 20, 1989																																																																																			
4. SUBJECT: Lease - John A & Amelia Baldan dba Casa Machado Restaurant, Montgomery Field																																																																																							
5. PREPARATION OF: ☒ RESOLUTION(S) ☐ ORDINANCE(S) ☐ AGREEMENT(S) ☐ DEED(S)																																																																																							
Authorize the City Manager to execute a percentage lease with John A. and Amelia Baldan dba Casa Machado Restaurant #3 to operate a restaurant and cocktail lounge at Montgomery Field for a twenty-five year term on a percentage lease with a beginning minimum annual rent of \$46,800.																																																																																							
Council District: 5 Community Area: Kearny Mesa																																																																																							
6. SUPPORTING INFORMATION: (INCLUDE ONLY INFORMATION <u>NOT</u> COVERED ON FORM 1472A, "DOCKET SUPPORTING INFORMATION".																																																																																							
Action Requested by: Property Director																																																																																							
Environmental Assessment: This action is exempt per CEQA, Section 15301, Class 1, Existing Facilities of State of California Guidelines.																																																																																							
Consideration: A percentage of gross income per the current rate scheduling or \$46,800, whichever is greater.																																																																																							
Handling: DO NOT RECORD. Deliver documents to Gerald Kretoivics, M. S. #14, for further handling.																																																																																							
7. FOR INFORMATION CONTACT: (NAME & MAIL STA.) Brock/Kretoivics 14			8. TELEPHONE NO. 236-6496	9. CHECK IF "DOCKET SUPPORTING INFORMATION" ATTACHED ☐																																																																																			
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DOCKET SUPPORTING INFORMATION
CITY OF SAN DIEGO

DATE:

SUBJECT:

LEASE - JOHN A. AND AMELIA BALDAN DBA CASA MACHADO RESTAURANT, MONTGOMERY FIELD

BACKGROUND: (DOUBLE SPACE)

John and Amelia Baldan have operated the Casa Machado Restaurant on the second floor of the Administration Terminal Building on Montgomery Field since 1976. The existing lease will expire on April 13, 1991. The current yearly rent is \$33,089 or percentages of gross income, whichever is greater. The Baldan's have paid \$258,266 in percentage rents over the last five years (an average of \$51,650/year).

The Baldan's have proposed a 25-year lease renewal at this time to permit the installation of a 1,380 square foot roof over the patio at a cost of approximately \$75,000 and to allow adequate time to fully amortize design and construction costs. This would increase the number of days the patio is available for use thereby increasing revenue. Since this is part of an existing City-owned building and the roof will alleviate a rain leaking problem in the first floor conference room, the Airports Enterprise Fund will contribute \$5,000 for engineering design through a rental offset.

All terms and conditions of the new lease have been updated to the current market. Rent has been increased to \$46,800 per year initially or the following percentages of gross income, whichever is greater: 6-1/2% food and non-alcoholic beverages; 8-1/2% alcoholic beverages; 10% all other sources; and 25% of commissions from coin-operated vending machines. The minimum yearly rent will be adjusted after 5 years and every 2-1/2 years thereafter based on 80% of the annual average of rents paid over the preceding two years or on the consumer price index, whichever is greater. No downward adjustments will be permitted.

FISCAL IMPACT - A minimum of \$46,800 per year will be deposited to the Airports 41100 Enterprise Fund. A \$70,000 permanent improvement will be added to the building.

BYLINE: (DEPUTY CITY MGR/DEPT. HEAD/AUTHOR INITIALS)

Stapleton/Spotts/GEK

SIGNATURES:

ORIGINATING DEPT. HEAD

CITY MANAGER
(FOR MANAGERIAL DEPARTMENTS ONLY)



The City of San Diego

MANAGER'S REPORT

DATE ISSUED: April 20, 1990 REPORT NO. 90-188

ATTENTION: City Council Docket of April 23, 1990

SUBJECT: Lease - Casa Machado Restaurant - Montgomery Field

REFERENCE: CMR 90-156 dated March 28, 1990

SUMMARY:

Issue - Should the City renew its lease with John A. & Amelia Baldan dba Casa Machado Restaurant, Montgomery Field, for a 20-year term with updated conditions.

Manager's Recommendations - Renew the lease.

Other Recommendations- The Real Estate Advisory Committee recommended the renewal of the lease under the provisions set forth in the Manager's Report of March 28, 1990.

Fiscal Impact - Rents beginning at an annual minimum of \$46,800 will be deposited into the Airports Enterprise Fund 41100. \$70,000 in capital improvements and fixtures will be added to the City-owned Administration Building at Montgomery Field.

BACKGROUND

On April 2, 1990, the City Council requested that this lease be returned to the City Manager for further negotiation and clarification of the terms and conditions. The concerns identified are addressed as follows:

Equity Take-out Provision: The City's standard lease provision regarding equity take-out is included in the agreement, whereby 3% of the gross amount paid to the lessee will be paid to the City in the event of an assignment, sublease, or encumbrance.

Cost of Patio Roof: The lessee is being required to construct a roof that will be architecturally compatible with the existing building and will sustain a one-hour fire rating.

The roof and engineering costs are approximately \$50,560; interior improvements, such as a new waitress station, will cost approximately \$25,000, all as shown on the attached Exhibit A. These costs are subject to increase depending on code requirements. The proposed roof improvements will benefit the City by stopping rain leakage into the first floor of the building. This is a condition which the City would otherwise need to correct. Therefore, the City is contributing \$5,000 toward the engineering costs for the new roof by way of rent credit.

Maintenance: Under the current terms in the proposed lease, the lessee is required to perform all necessary maintenance and preserve the premises in good condition and repair, except for major structural improvements which are the City's responsibility.

Percentage Rent Comparisons: The rental rates proposed for this lease are considered to be at the high range of lease rates for comparable restaurants. As shown on attached Exhibit B, the percentage rental rates for similar restaurants in San Diego range from 4% to 6% of total gross. The existing and proposed percentage rates for the Casa Machado are:

	<u>Current</u>	<u>Proposed</u>
Food & non-alcoholic beverages	7.0% to \$200,000	6.5%
	7.5% \$200,001-\$300,000	
	8.5% over \$300,000	
Alcoholic beverages	9.0% to \$100,000	8.5%
	9.5% \$100,001-\$200,000	
	10.0% over \$200,000	
All other sources	11.0%	10.0%
Coin operated Machines	25.0%	25.0%

The above proposed rates for Casa Machado equate to an overall percentage rate of 7.4% of total gross. Percentage rates are subject to readjustment at the end of the tenth year, based on an appraisal. However, they cannot be decreased below the proposed rates cited above.

The lower rates are being recommended in order to be more compatible with the current market and in light of Lessee's relatively low profit margin. According to profit and loss statements supplied by Lessee's accountant, Lessee has averaged approximately \$40,000 per year profit (including both Mr. and Mrs. Baldan's salaries) over the last three years.

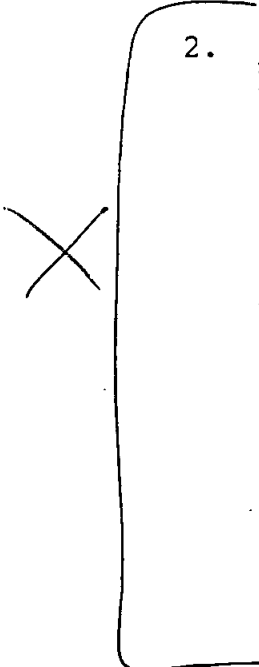
Sales Per Square Foot: Also as shown on Exhibit B, the Casa Machado's rate of sales per square foot (at \$126) is below the rate of comparable restaurants in California. Data on sales per square foot is derived from the 1989 California Restaurant Operations Report published by Laventhol & Horwath. Several factors mitigate against a higher rate of return from the Casa Machado: the isolated location; principally luncheon nature

of business; reduced seating in inclement weather; and independent ownership (vs. chain operation). It is estimated that the proposed improvements will generate a 20% increase in sales volume and will then give Casa Machado a more comparable rate of return with similar type restaurants.

NEW PROVISIONS:

In addition to the previously negotiated conditions, the following renegotiated items have been incorporated since the previous report:

1. Lease Term: The industry indicates a minimum 20 year term for a lease renewal of an existing restaurant (see Exhibit B). In light of this and the improvements being installed, a 25-year term is considered to be in the market. However, after renegotiation with the Baldans, they have agreed to reduce the term to 20 years. They have declined to go below 20 years, considering the cost of improvements and the relatively low profit margin involved. Their lender (Wells Fargo) requires at least a 15-year term to finance the improvements.

- 
2. City Buy Out/Modernization: If the City decides to modify the Montgomery Field Administration Building, the lessee will have the first right of refusal to participate in any modification of the restaurant portion occupied by the lessee. If the lessee does not wish to participate, or if the City decides to change the use of the building, then the City has the right to buy out the leasehold interest at its then current value. Such value would include the remaining leasehold interest as well as Lessee's improvements and equipment. This clause would apply if the City desires to modernize or upgrade the premises in any manner.

This agreement as previously negotiated includes a provision that requires the lessee to diligently conduct the business to produce the most gross income possible and to provide experienced management to the satisfaction of the City Manager. A provision requiring the lessee to maintain an "A" card is also included. If these areas are not in compliance, the lease can be placed in default and terminated.

3. Minimum Annual Rent Adjustments: The existing minimum yearly rent of \$33,089 per year has been increased to \$46,800; \$49,200 and \$51,650 in the first, second and third years respectively. Further minimum annual rent adjustments will occur at the fifth year and every two and one-half years thereafter. In this lease, these adjustment will go to 80% of the annual average of rents paid or the CPI, whichever is greater.

ALTERNATIVES

1. Direct staff to attempt further negotiations with the Baldans in specific areas.
2. Solicit proposals for a new lease, using the RFP process, just before the current lease expires in April, 1991.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Maureen A. Stapleton', with a stylized flourish at the end.

Maureen A. Stapleton
Deputy City Manager

SPOTTS/FLYNN/DWE
Council.doc
4/13/90

Casa Machado Lease Improvements
Cost Estimate

Patio Roof:

Plans and Engineering	\$ 6,000
Soil Analysis	2,000
Permits	300
Site Preparation	2,000
Steel Fabrication	12,000
Trusses	3,360
Lumber	2,500
Carpentry Labor	3,000
Roofing	2,200
Drywall	2,500
Masonry	1,500
Electrical and Heating	6,200
Wind Break	5,000
Painting	500
Plastering	<u>1,500</u>
	\$50,560

Interior Improvements:

Carpeting	\$ 8,000
Tables & Booths	4,500
Ceiling Fans	2,500
Waitress Station	5,000
Tables & Chairs	4,000
Portable Bar	<u>\$ 1,000</u>
	<u>\$25,000</u>

TOTAL COST ESTIMATE:	\$75,560
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RENT COMPARISONS

RESTAURANT TERM PERCENTAGE RENTAL SURVEY

<u>Source</u>	<u>Minimum Lease Term</u>	<u>Rental Rate % of Gross</u>
Casa Machado	20 years	6.5% Food & 8.5% Alc. Bev.
Brigantine	20 years	5%-6%
Miguels	20 years	5%-6%
Soup Plantation	20 years	4%-6%
Tengu	20 years	4%-6%
B & B Deli	20 years	4%-6%
John Burnham & Co.*	20 years	6% of total (or 4%-5% food & 6%-8% liquor)
San Diego Business Brokers*	20 years	6%
Laventhol & Horwath (1989 California Restaurant Operations Rpt.)	20 years or 10 yrs. + two 5 yr. options	6%

*Note: These brokerage firms handle a variety of restaurant leases. The data shown reflects their current negotiating position.

COMPARABLE RESTAURANT SALES/SQUARE FOOT*

	<u>Low</u>	<u>Median</u>	<u>High</u>	<u>Casa Machado</u>
Rent as % of Sales:	4.2%	5.8%	8.3%	8.56%
Profit as % of Sales:	1.6%	6.8%	13.2%	6.50%
Sales per Sq.Ft. with following criteria:				
Over 10 years old:	\$154	\$244	\$375	\$126
With full menu:	\$183	\$254	\$375	\$126
Sales: \$500,001-\$1,000,000	\$130	\$187	\$235	\$126
Food & beverage menu:	\$160	\$254	\$361	\$126

* This table is a compilation of comparable restaurants in size and type listed in the 1989 California Restaurant Operators Report published by Laventhol & Horwath. Individual restaurants surveyed by staff, preferred not to release sales data.

copy

August 18, 1999

Mr. and Mrs. John Baldan
Casa Machado Restaurant
3750 John J. Montgomery Drive
San Diego, CA 92123

Re: Conditional Authorization For Related Uses
Lease Agreement (Document R-275556), Portion of City Building 126

Dear Mr. and Mrs. Baldan:

The City hereby authorizes the Lessee in the above-referenced Lease Agreement with the City, to use the enclosed patio of the leased premises for the Related Uses of "providing entertainment, restricted to dancing, recorded music and vocal artists" ("Related Uses"), as permitted in Paragraph 1.2 Uses of the above-referenced Lease Agreement. This authorization shall become effective on September 1, 1999, with the following conditions:

- (1) Any or all of the Related Uses may be terminated upon 30-day notice by the City Manager, or his designee, by serving Lessee with a 30-day written notice.
- (2) Lessee shall obtain, maintain, and pay for all permits, licenses and authorizations required for the Related Uses, and the City's permit, plus any renewals, must be reviewed and or pre-approved by the City's Fire Marshal.

If Lessee fails to comply with any terms or conditions of the permits, licenses or authorizations, City Manager may, at his/her discretion, rescind this authorization of Related Uses.

- (3) Lessee shall confine the Related Uses to the enclosed patio of the leased premises.
- (4) Lessee shall provide security personnel on the leased premises for the Related Uses, to the degree determined reasonable by City's Airports Deputy Director.
- (5) Lessee shall monitor the Related Uses to control the noise level, so that it does not create a disturbance or nuisance to adjacent residents, businesses, airport tenants or City Airport staff. If the Related Uses do create a disturbance, the City Manager may at his/her discretion rescind his/her authorization of the Related Uses.

DOCUMENT NO. R-275556-2
FILED SEP 10 1999
OFFICE OF THE CITY CLERK
SAN DIEGO, CALIFORNIA

August 18, 1999

John & Amelia Baldan, LESSEE

Conditionally Approved Related Uses

Page 2-of-3

- (6) The City leases space in the Airport Terminal (Building #126) for conferences and classrooms. Lessee shall not conduct the Related Uses during the times these conferences and classrooms are in session.
- (7) Lessee shall not allow anyone to leave the premises with open containers of alcoholic beverages.
- (8) The approved Related Uses are restricted to Friday, Saturday and Sunday nights only, during Lessee's normal hours of operation.
- (9) Lessee shall, at its expense, remove all trash from the parking lot and around the building before 10:00 a.m. on all mornings immediately following the Related Uses activities.
- (10) Lessee shall keep the premises floor dry and clear of obstacles to avoid trip and fall accidents. All electrical cords on the floor must be covered with rubber strips, specifically designed to hold and conceal electrical cords, which shall be safely secured to the floor (See Indemnity clause 5.01 in Lease).

Failure to comply with the above requirements will result in the City Manager rescinding the approval of the Related Uses, at his/her discretion.

August 18, 1999
John & Amelia Baldan, LESSEE
Conditionally Approved Related Uses
Page 3 of 3

IN WITNESS WHEREOF, this Agreement is executed by CITY, acting through the City Manager's authorized designee, and by Lessee.

THE CITY OF SAN DIEGO

Date: 8/24/99

By: Tracy Williams

LESSEE:

Date: 8/24/99

By: John A. Baldan
John A. Baldan

Date: _____

By: Amelia Baldan
Amelia Baldan

Approved as to form and legality on 8/24, 1999

CASEY GWINN, City Attorney

By: Debra J. Gwin
Deputy City Attorney

Environmental Exemption (attached)

AUG 13 '99 09:09AM G/S AIRPORTS 619/2790536

City of San Diego
General Services/Airports Division

FINDING OF MASTER PLAN LAND USE CONFORMANCE

PROJECT: _____

() CIP
(X) LESSEE

John + Amelia Baldan d.b.a
Casa Machado Restaurant + Cocktail Lounge

1. PROJECT DESCRIPTION INCLUDING PROPOSED FUNCTION attach plot plan:
Approval of Related Uses To existing
long-term lease, including: dancing,
live bands + vocal artists -

2. MASTER PLAN LAND USE DESIGNATION attach master plan:
Terminal Area (2nd Floor)

Note: Brown Field non-aviation uses limited to those permitted in
the Gray Mesa Industrial Subdistrict

3. JUSTIFICATION OF CONFORMANCE FINDING

CEQA Section 15301, Class I, Existing
Facilities of the State of California
Guidelines

(X) I find that the proposed use _____ is in
substantial conformance with the Montgomery Field
Master plan as approved by city council on 1989 (last
amendment date).

() The _____ project does not conform
to the existing _____ Field Master Plan. A
Master Plan amendment will be required before the project
can be approved by the City.

[Signature] 7.1. Williams 9/17/99
Deputy Director, Airports Division Date

CONCURRENCE

[Signature] SR ENV PLANNER 8/25/99
Deputy Director, DR LDR/EAS Date

cc: Plan. Dept. (to accompany Envir. Assessment application)
AP#1 9/17/99

