

DUPLICATE

DUPLICATE ORIGINAL



CITY OF SAN DIEGO

AND

BRAEMAR PARTNERSHIP/9th & A LIMITED PARTNERSHIP

CATAMARAN PIER LEASE

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SAN DIEGO, CALIFORNIA

LEASE OUTLINE

SECTION 1: USES	1
1.1 <u>Premises</u>	1
1.2 <u>Uses</u>	1
1.3 <u>Related Council Actions</u>	1
1.4 <u>Quiet Possession</u>	2
1.5 <u>Easements and Reservations</u>	2
1.6 <u>Competent Management</u>	2
1.7 <u>Public Use</u>	3
SECTION 2: TERM	3
2.1 <u>Commencement</u>	3
2.2 <u>Right to Extend</u>	3
2.3 <u>Holdover</u>	3
2.4 <u>Surrender of Premises</u>	3
SECTION 3: RENT	4
3.1 <u>Time and Place of Payment</u>	4
3.2 <u>Rent Abatement</u>	5
3.3 <u>Payment Procedure</u>	5
3.4 <u>Gross Income</u>	6
3.5 <u>Inspection of Records</u>	6
3.6 <u>Delinquent Rent and Audit Fees</u>	8
3.7 <u>Unauthorized Use Charge</u>	9
SECTION 4: ASSIGNMENT	9
4.1 <u>Time is of Essence; Provisions Binding on Successors</u>	9
4.2 <u>Assignment and Subletting</u>	9
4.3 <u>Encumbrance</u>	10
4.4 <u>Defaults and Remedies</u>	10
4.5 <u>Eminent Domain</u>	14
4.6 <u>Partnership Liability</u>	15
4.7 <u>Additional Consideration to CITY</u>	15
SECTION 5: INSURANCE RISKS/SECURITY	16
5.1 <u>Indemnity</u>	16
5.2 <u>Insurance</u>	16
5.3 <u>Waste, Damage, or Destruction</u>	18
SECTION 6: IMPROVEMENTS/ALTERATIONS/REPAIRS	19
6.1 <u>Acceptance of Premises</u>	19
6.2 <u>Entry and Inspection</u>	19
6.3 <u>Maintenance</u>	19
6.4 <u>Improvements/Alterations</u>	20

6.5	<u>Utilities</u>	20
6.6	<u>Construction Bond</u>	20
6.7	<u>Liens</u>	20
6.8	<u>Taxes</u>	21
6.9	<u>Signs</u>	21
6.10	<u>Ownership of Improvements and Personal Property</u>	21
6.11	<u>Unavoidable Delay</u>	22
6.12	<u>Maintenance Plan</u>	22
6.13	<u>Hazardous/Toxic Waste</u>	22
SECTION 7: GENERAL PROVISIONS		24
7.1	<u>Notices</u>	24
7.2	<u>Compliance with Law</u>	24
7.3	<u>CITY Approval</u>	24
7.4	<u>Nondiscrimination</u>	24
7.5	<u>Compliance with CITY'S Equal Opportunity Contracting Program</u>	25
7.6	<u>Partial Invalidity</u>	26
7.7	<u>Legal Fees</u>	26
7.8	<u>Number and Gender</u>	26
7.9	<u>Captions</u>	26
7.10	<u>Entire Understanding</u>	26
7.11	<u>CITY Employee Participation Policy</u>	26
7.12	<u>Drug-free Workplace.</u>	26
7.13	<u>Disabled Access Compliance</u>	27
7.14	<u>Corporate Authority</u>	28
7.15	<u>LESSEE Right to Negotiate Renewal</u>	28
7.16	<u>CITY Option to Purchase</u>	28
7.17	<u>Supersedure</u>	29
7.18	<u>Plastic Food Containers</u>	29
7.19	<u>Public Access to and Use of Beach.</u>	30
7.20	<u>CITY Access to and Use of Beach</u>	30
7.21	<u>Water Quality - Best Management Practices and Storm Water Pollution Prevention Plan</u>	30
SECTION 8: SIGNATURES		31
8.1	<u>Signature Page</u>	31
SECTION 9: EXHIBITS		33
9.1	<u>Legal Description</u>	33
9.2	<u>Parcel Map(s)</u>	34
9.3	<u>Corporate Name</u>	35
9.4	<u>Schedule of Days and Hours of Operation</u>	36

**CITY OF SAN DIEGO
CATAMARAN PIER LEASE**

This Lease Agreement ("Lease") is executed between the CITY OF SAN DIEGO, a municipal corporation ("CITY"), and BRAEMAR PARTNERSHIP, a California limited partnership, and 9th & A LIMITED PARTNERSHIP, a California limited partnership (collectively, "LESSEE").

SECTION 1: USES

- 1.1 Premises. CITY leases to LESSEE and LESSEE leases from CITY all of that certain real City-owned property situated in Mission Bay in the City of San Diego, County of San Diego, State of California, described in Exhibit "A" attached to this Lease and by this reference made part of this Lease. The real property shall be called the "Premises."
- 1.2 Uses. The Premises are leased to LESSEE solely and exclusively for the purposes of the operation and maintenance of a docking facility for the temporary berthing of boats by the general public, including those persons patronizing the restaurant and hotel at the Catamaran Resort Hotel; for the storage and rental of small boats and watercraft to patrons of the hotel and the general public; for the operation of a beach chair, umbrella and boat rental concession serving patrons of the hotel and the general public; for the sale of food and non-alcoholic beverages to hotel patrons and the general public from the existing stand on the Premises; for the storage and moorings of the sight-seeing and excursion boats operated by Bahia Sternwheelers, Inc., on the sides of the pier; and for other related or incidental purposes as may be first approved in writing at the sole discretion of the City Manager and for no other purpose whatsoever.

The use of the Premises for any unauthorized purpose shall constitute a substantial default and subject this Lease to termination at the sole option of CITY.

LESSEE covenants and agrees to use the Premises throughout the Lease Term, as defined below, for the above-specified purposes and to diligently conduct the business on the Premises to produce the most gross income that can be reasonably expected. Failure to continuously use the Premises for the purposes, or the use of the Premises for purposes not expressly authorized in this Lease, shall be grounds for termination by CITY.

- 1.3 Related Council Actions. By entering into 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 Premises.

- 1.4 Quiet Possession. LESSEE, paying the rent and performing the covenants and agreements in this Lease, shall at all times during the Lease 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 Lease 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 event, this Lease shall not be voidable nor shall CITY be liable to LESSEE for any loss or damage, 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.

1.5 Easements and Reservations.

- a. CITY 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 Premises for utilities, thoroughfares, or access as it deems advisable, in its sole discretion, 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 Premises resulting from CITY exercising the rights reserved in this section. 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.

- 1.6 Competent Management. Throughout the Lease Term, LESSEE shall provide competent management of the Premises for the intended uses to the satisfaction of the City Manager. For the purposes of this paragraph, "competent management" shall mean demonstrated ability in the management and operation of a dock, boat rental operation, and related activities in a fiscally responsible manner.

- 1.7 Public Use. The general public shall not be wholly or permanently excluded from any portion of the Premises. LESSEE may develop reasonable restrictions for the facility use provided they are consistent with the rights of the general public, and are designed to allow LESSEE to use the Premises for the purposes specified in this Lease. LESSEE agrees that all activities conducted on the Premises will be as stated in Section 1.2, Uses, of this Lease.

SECTION 2: TERM

- 2.1 Commencement. The initial term of this Lease shall be five (5) 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. "Lease Term" as used in this Lease shall mean the initial five-year term and the five-year extension term, if the right to extend is exercised.
- 2.2 Right to Extend. Provided that LESSEE is not in default of this Lease and provided further that LESSEE agrees to provide the maintenance set forth in Section 6.12 of this Lease, LESSEE has the right to extend this Lease once for an additional term of five (5) years on the same terms and conditions by so notifying CITY before the expiration date of the initial Lease Term.
- 2.3 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 Lease constitutes a month-to-month tenancy, and all other terms and conditions of this Lease shall continue in full force and effect; provided, however, at the sole discretion of the City Manager, 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.
- 2.4 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, 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

- 3.1 Time and Place of Payment. All rents required in this Lease must be made payable to the City Treasurer and mailed to the Office of the City Treasurer, City of San Diego, P.O. Box 122289, San Diego, California, 92112-4165, or delivered to the Office of the City Treasurer, Civic Center Plaza Building, 1200 Third Avenue, First Floor, San Diego, California 92101.

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 the 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.

- a. Minimum Rent. The annual minimum rent established for the first three (3) years following the effective date of this Lease is Seventeen Thousand Five Hundred Dollars (\$17,500), which is One Thousand Four Hundred Fifty-Eight Dollars and Thirty-Three Cents (\$1,458.33) on a monthly basis.

The cumulative minimum rent is to be paid annually, in arrears, on or before the last day of the calendar year pursuant to Section 3.3, Payment Procedure, in this Lease.

- b. Minimum Rent Adjustment. Effective at the beginning of the first day of the fourth Lease Year of this Lease and at the beginning of each three year period thereafter during the Lease Term, the annual minimum rent shall be eighty percent (80%) of the annual average of actual rents paid or accrued during the three (3) years preceding the adjustment date. The annual minimum rent shall then be divided by twelve (12) to establish the new monthly minimum rent. It is recognized that the 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 in this Lease. Until the calculations are completed, LESSEE shall continue paying minimum rent at the prior rate. In no event shall any 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 Activity

Ten (10%)

All operations conducted 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 1.2, Uses, of this Lease as may be approved in writing by the City Manager prior to commencement of 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 3.7, Unauthorized Use Charge, of this Lease.

- 3.2 Rent Abatement. If the Sail Bay portion of Mission Bay is closed to all water operations by the direction of the City Manager or an authorized designee, and the closure affects LESSEE'S use and enjoyment of the Premises for a period of time in excess of twenty-four (24) consecutive hours, the minimum annual rent as defined in Section 3.1 of this Lease shall be reduced by 1/365 for each consecutive day of closure.
- 3.3 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 (1/12) 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 (1/12) 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.).

3.4 Gross Income. "Gross income" or "gross receipts", as used in this Lease, shall include all income resulting from occupancy of the Premises from whatever source derived whether received or to become due. Provided, however, gross income at this location shall not include any income derived from the Bahia Sternwheelers boats, nor any 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 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 the 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 the Premises or the operation thereof shall be regarded as gross income of LESSEE for the purpose of calculating the percentage rent required by this Lease to be paid by LESSEE to CITY, except as may be otherwise specified by or pursuant to this Lease.

3.5 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 issue a receipt. The registers will be equipped with devices that lock in sales totals and other transaction numbers and sales details that are not resettable. Totals registered shall be read and recorded at the beginning and end of each business day.

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

- b. Financial Statements. Within sixty (60) days after the end of each Lease Year, 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. The 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 3.5a. in this Lease, will be kept for at least five (5) years and made available to CITY in one location within the City of San Diego. The books and records shall be maintained separate from all other accounts not relating to the Premises. 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. The data will include, if requested by CITY, 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 Ten Thousand Dollars (\$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 of this Lease.

LESSEE shall pay any deficiency determined by the audit(s) plus interest on the amount as defined in Section 3.6, Delinquent Rent and Audit Fees, of this Lease, within thirty (30) days of notice 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.

3.6 Delinquent Rent and Audit Fees.

- a. Late Payment. 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 to this Lease to be appropriate to compensate CITY for loss resulting from rental delinquency, including lost interest, opportunities, legal costs, and the cost of servicing the delinquent account. Notwithstanding the foregoing, in no event shall the charge for late payments of rent be less than Twenty-Five Dollars (\$25).
- b. Audit Deficiency. If a 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 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 in this Lease. If CITY audit(s) discloses that the unpaid rent is less than five percent (5%) of the total rent, and should LESSEE fail to pay the unpaid rent within thirty (30) days after written

notice from CITY, an additional fee of ten percent (10%) of the unpaid amount shall be added to the unpaid amount to compensate CITY for costs and losses due to nonpayment. LESSEE agrees to pay the 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.

- 3.7 Unauthorized Use Charge. LESSEE shall pay CITY fifty percent (50%) 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 fifty percent (50%) 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 Premises.

SECTION 4: ASSIGNMENT

- 4.1 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 in this Lease, 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.
- 4.2 Assignment and Subletting. LESSEE shall not assign this Lease or any interest in this Lease 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 assignment or subletting without consent shall be void and shall, at the option of CITY, terminate this Lease. This Lease shall not, nor shall any interest in this Lease, 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, its general partners, or principals.

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 assigned or subleased and that it will keep and perform all covenants, conditions, and provisions of this Lease which are applicable to the rights acquired. The City Manager shall require, as a condition to approval of any sublease of the majority portion of the Premises or any assignment, that the LESSEE pay additional consideration to CITY, as set forth in Section 4.8, Additional Consideration to CITY, in this Lease, commencing on the effective date of the proposed sublease of the majority portion of the Premises or assignment, and may further require that this Lease or the requested sublease otherwise be revised to comply with standard CITY Lease requirements that are then current. Pursuant to City Charter Section 225, the City Manager must review and approve every person or entity which will have an interest in this Lease as a sublessee or assignee. The City Manager's approval will not be unreasonably withheld, provided all persons and entities are of good character and reputation in the community. The forgoing shall not restrict LESSEE's ability, without the consent of CITY, to transfer the leasehold interest in this Lease to any type of entity or to individuals directly, so long as at least fifty-one percent (51%) interest in the direct or indirect interest is held by Anne L. Evans and/or any of her direct lineal descendants and/or any trust(s) created and/or operated by and for the benefit of any individuals and/or any corporation or partnership of which they hold and maintain a controlling interest.

4.3 Encumbrance. No encumbrance of the Premises will be permitted without the prior written consent of the City Manager.

4.4 Defaults and Remedies. On the occurrence of a default by LESSEE, CITY shall have the right to pursue any one or more of the remedies listed in this section in addition to any other remedies now or later available to CITY in law or in equity. These remedies are not exclusive but cumulative.

a. Default. Each of the following shall constitute an event of default under this Lease:

- (1) LESSEE'S failure to make any payment required under this Lease when due if the failure continues for five (5) days following written notice of the failure from CITY; or
- (2) LESSEE defaults in the performance of any covenant or condition required by this Lease, other than those requiring payment to CITY, to be performed by LESSEE and fails to cure the default within thirty (30) days following written notice from CITY; or if any default, other than those not requiring payment to CITY, is not curable within thirty (30) days, and LESSEE fails to commence to

cure the default(s) within thirty days and diligently pursue the cure to completion; or

- (3) LESSEE voluntarily files any bankruptcy or insolvency act or law; or
- (4) LESSEE has involuntarily filed against it any petition under any bankruptcy or insolvency act or law and the matter is not dismissed by a court of competent jurisdiction within ninety (90) days of filing; or
- (5) LESSEE is adjudicated a bankrupt; or
- (6) LESSEE makes a general assignment for the benefit of creditors; or
- (7) LESSEE uses the Premises for any unauthorized purpose.

b. Remedies.

- (1) For Default Based Upon Nonpayment. Upon default by LESSEE for nonpayment under Section 4.4(a)(1) above, CITY may, at its option, give LESSEE or any person claiming rights through LESSEE, a written Three-Day Notice to Pay or Quit or may terminate this Lease and all right of LESSEE and of all persons claiming right through LESSEE to the Premises or to possession thereof, and CITY may enter and take possession of the Premises, and may recover the sums set forth below.
- (2) For Any Other Default. Upon default by LESSEE based upon Sections 4.4(a)(2-7) above, CITY may, at its option, terminate this Lease and all right of LESSEE and of all persons claiming right through LESSEE to the Premises or to possession thereof, and CITY may enter and take possession of the Premises, and may recover the sums set forth below. However, in the event that any default described in Sections 4.4(a)(2-7) is not curable within thirty (30) days after notice to LESSEE, CITY will not terminate this Lease pursuant to the default if LESSEE immediately commences to cure the default and diligently pursues the cure to completion.
- (3) Upon termination of this Lease due to default, CITY may recover the sum of:

- (a) the worth at the time of award of any unpaid rent that had been due at the time of termination;
 - (b) the worth at the time of award of the amount by which (i) the unpaid rent that would have been earned after termination until the time of award exceeds (ii) the amount of rental loss, if any, as LESSEE affirmatively proves could have been reasonably avoided;
 - (c) the worth at the time of award of the amount by which (i) the unpaid rent for the balance of the Lease Term after the time of the award exceeds (ii) the amount of rental loss, if any, as LESSEE affirmatively proves could be reasonably avoided;
 - (d) any other amount necessary to compensate CITY for the detriment proximately caused by LESSEE'S failure to perform LESSEE'S obligations or that, in the ordinary course of things, would be likely to result; and
 - (e) all other amounts in addition to or in lieu of those previously stated as may be permitted from time to time by California law. As used in clauses (a) and (b) of this Section, the "worth at time of award" is computed by allowing interest at the rate of ten percent (10%) per annum. As used in clause (c) of this Section, the "worth at the time of award" is computed by discounting that amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus two percent (2%). As used in this Section, the term "rent" shall include Base Rent, Percentage Rent and any other payments required by LESSEE.
- (4) If there is a deed of trust or mortgage on the leasehold interest, and LESSEE has provided CITY with an address where notice can be sent to the respective mortgagee or beneficiary, CITY will give the mortgagee or beneficiary written notice of the default(s) complained of, and the same mortgagee or beneficiary will have thirty (30) days from the notice to cure the default(s) or, if any default is not curable within thirty (30) days, to commence to cure the default(s) and diligently pursue a cure to completion. The thirty (30) day period may be extended during the time the mortgagee or beneficiary pursues a cure with reasonable diligence.

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

- (a) CITY may correct the default(s) and charge the costs thereof to the account of LESSEE, which charge will 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 the costs.
- (b) CITY may correct the default(s) and may recover 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 cost of correction performed by or at the direction of CITY.
- (c) 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 of early payoff of the related obligations by CITY. CITY may, as an alternative, substitute for the terminated LESSEE a new tenant reasonably satisfactory to the mortgagee or beneficiary. Any reasonable costs incurred by CITY in re-leasing to a new tenant will be the responsibility of the terminated LESSEE, and LESSEE hereby agrees to reimburse CITY for any costs.

Should the default(s) be noncurable by LESSEE, then any lender holding a beneficial interest in the Premises, whose qualifications as an assignee have been approved by CITY, will have the absolute right to substitute itself to the estate of LESSEE in this Lease and to commence performance of this Lease. If the mortgagee or beneficiary will give notice in writing of its election to so substitute itself within the thirty (30) day period after receiving written notice by CITY of the default, and the default, if curable, is cured by the mortgagee or beneficiary, then this Lease will 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 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 in this Lease, 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, have the legal right to require the cure of any default when and as the 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 the default is brought to the attention of the City Council by the City Manager or by any concerned citizen.
- 4.5 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. If 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. If 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. If a partial taking of the Premises, and in the opinion of CITY, the remaining part 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 taking shall belong to CITY, whether the 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.
- 4.6 Partnership Liability. Each general partner of LESSEE shall jointly and severally perform and be responsible for each and every term, covenant, and condition, and each general partner is jointly and severally liable for performance under this Lease.
- 4.7 Additional Consideration to CITY. LESSEE and CITY agree that in the event of an assignment, in the event of a subletting of the majority portion of the Premises, or in the event of a refinancing creating an encumbrance against the Premises, LESSEE shall pay to CITY a fee in the amount of Five Thousand Dollars (\$5,000) in connection with an approved assignment of the Lease, a fee in the amount of Five Thousand Dollars (\$5,000) in consideration of a sublease of all or a majority portion of the Premises, or a fee in the amount of Five Thousand Dollars (\$5,000) for any increased loan or encumbrance against the property over and above the amount of the then existing balance(s) of the existing encumbrance(s). 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 Premises resulting from devise, bequest, intestate succession, or by operation of law for the benefit of the spouse and/or lineal descendants (i) of LESSEE (if an individual) or (ii) of LESSEE'S initial partners (if LESSEE is other than an individual);
- b. Other assignments for which the City Manager determines that the legal and equitable ownership interests in the Premises have remained unchanged, such as a change in the legal or fictitious name of LESSEE without any other change in the equity in beneficial use of, or legal title to, the Premises as an asset or the income produced.

SECTION 5: INSURANCE RISKS/SECURITY

5.1 Indemnity. LESSEE agrees to defend, indemnify, protect, and hold CITY, its elected officials, officers, representatives, agents and employees harmless from and against any and all claims asserted or liability established for damages or injuries to any person or property, including injury to LESSEE'S employees, invitees, guests, agents, or officers, which arise out of or are in any manner directly or indirectly connected with the development or operation of the Premises or the work and operations to be performed under this Lease, and all expenses of investigating and defending against same; provided, however, that LESSEE'S duty to indemnify and hold harmless shall not include any claims or liability arising from the established active negligence, sole negligence, or sole willful misconduct of CITY, its elected officials, officers, representatives, agents and employees.

5.2 Insurance.

- a. LESSEE shall take out and maintain at all times during the Lease Term the following insurance at its sole expense:
 - (1) Public liability and property damage insurance in the amount of not less than Two Million Dollars (\$2,000,000) 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.

- (2) Fire, extended coverage, and vandalism insurance policy on all insurable property on the Premises in an amount to cover one hundred percent (100%) 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 Premises in accordance with Section 4.3, Encumbrance, of this Lease, 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.

b. LESSEE'S responsibility to maintain the insurance also includes the following:

- (1) Additional Insured. All insurance policies shall name, by separate endorsement, "The City of San Diego, its elected officials, officers, representatives, agents and employees" as additional insureds, protect CITY against any legal costs in defending claims, and shall not terminate without thirty (30) 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 Lease Term. 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.
- (2) Modification. CITY, at its discretion, may require the revision of amounts and coverages at any time during the Lease Term by giving LESSEE sixty (60) days prior written notice. CITY'S requirements shall be commercially reasonable and designed to assure protection from and against the kind and extent of risk existing on the Premises. LESSEE also agrees to obtain any additional insurance required by CITY for new improvements, in order to meet the requirements of this Lease.
- (3) Accident Reports. LESSEE shall report to CITY any accident causing more than Twenty-Five Thousand Dollars (\$25,000) 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.

- (4) 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. The 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 (4), 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 default.

- 5.3 Waste, Damage, or Destruction. LESSEE agrees to give notice to CITY of any fire or other damage that may occur on the Premises within ten (10) days of 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 Premises are 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 the damage and to restore the Premises to the condition which existed prior to the damage; or, at CITY'S option, LESSEE agrees to clear and remove from the Premises all debris resulting from the 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 the damage, using for either purpose the insurance proceeds as set forth in Section 5.2, Insurance, of this Lease.

LESSEE shall commence preliminary steps toward performing repairs, restoration, or replacement of the Premises shall be commenced by LESSEE within thirty (30) days, and shall complete the required repairs, restoration, or replacement within a reasonable time thereafter. CITY may determine an

equitable deduction in the minimum annual rent requirement for the period or periods that the Premises are untenable by reason of the damage.

SECTION 6: IMPROVEMENTS/ALTERATIONS/REPAIRS

- 6.1 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 independent inspection, tests, investigations, and observations in entering into 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 whether apparent or latent, in the Premises, including the presence of any hazardous wastes.
- 6.2 Entry and Inspection. CITY reserves and shall always have the right, but not the obligation, to enter the 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. If entry or inspection by CITY discloses that the 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 the necessary maintenance work done, in order to keep the Premises in a decent, safe, healthy, and sanitary condition. Further, if at any time CITY determines that the 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. The bond shall be in an amount adequate in the opinion of CITY to correct the unsatisfactory condition. LESSEE shall pay the cost of the bond. The rights reserved in this section shall not create any obligations on CITY or increase obligations elsewhere in this Lease imposed on CITY.
- 6.3 Maintenance. Except as provided in this Lease, LESSEE shall assume full responsibility and cost for the operation and maintenance of the Premises throughout the Lease Term. LESSEE will make all repairs and replacements necessary to maintain and preserve the Premises in a decent, safe, healthy, and sanitary condition satisfactory to CITY and with all applicable laws. All applicable codes and standards of CITY, state and federal agencies shall be observed in all maintenance, repairs, and replacements on the Premises.

- 6.4 Improvements/Alterations. Lessee may not construct any improvements, structures, or installations on the Premises or make any alterations to the Premises without prior written approval by the City Manager. LESSEE may not make major structural or architectural design alterations to approved improvements, structures, or installations made on the Premises without prior written approval by the City Manager and that 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.
- 6.5 Utilities. LESSEE shall order, obtain, and pay for all utilities and service and installation charges in connection with the development and operation of the Premises. All utilities will be installed underground.
- 6.6 Construction Bond. Whenever there is any construction to be performed on the Premises, LESSEE shall deposit with CITY, prior to commencement of the construction, a faithful performance bond in the amount of one hundred percent (100%) 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 will 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.
- 6.7 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 claims, including reasonable attorneys' 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 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.

- 6.8 Taxes. LESSEE shall 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 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 interest, and that LESSEE shall pay all possessory interest taxes. LESSEE further agrees that payment for taxes, fees and assessments will not reduce any rent due CITY.
- 6.9 Signs. LESSEE shall not 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 unauthorized item is found on the Premises, LESSEE agrees to remove the item at its expense within twenty-four (24) hours notice by CITY, or CITY may remove the item at LESSEE'S cost. The Premises shall be signed as a public area.
- 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 the 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 shall remove LESSEE-owned machines, appliances, equipment (other than trade fixtures), and other items of personal property by the date of the expiration or termination of this Lease. Any 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 the items at LESSEE'S expense.

- d. If any removal of personal property by LESSEE results in damage to the remaining improvements on the Premises, LESSEE agrees to repair all damage.
 - e. For necessary removal by either CITY or LESSEE which takes place beyond the expiration or Lease termination, LESSEE shall pay rent to CITY at the rate in effect immediately prior to Lease expiration or Lease termination.
 - f. Notwithstanding any of the foregoing, if LESSEE desires to dispose of any of its personal property used in the operation of the Premises upon expiration or termination of this Lease, then CITY shall have the first right to acquire or purchase the 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, the 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 rent pursuant to this Lease. If LESSEE or CITY claims the existence of a delay, the party claiming the delay shall notify the other party in writing of the fact within ten (10) days after the beginning of the claimed delay.
- 6.12 Maintenance Plan. The parties agree that it is the intention of the parties that the Premises be maintained in its original condition, less normal wear and tear, throughout the Lease Term by LESSEE. To assure that result, and as consideration for the Lease Term granted by CITY under the Lease, LESSEE agrees to commit a minimum of one percent (1%) of gross income per year for maintenance, upkeep and replacement upgrades throughout the Lease Term in order to maintain the Premises in a first-class condition.
- 6.13 Hazardous/Toxic Waste. LESSEE shall not allow the release of hazardous substances in, on, under, or from the Premises. For the purposes of this provision, a release shall include but not be limited to any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leeching, dumping, or otherwise disposing of hazardous substances. "Hazardous substances" shall mean those hazardous substances listed by the Environmental Protection Agency in regularly released reports and any other substances incorporated into the State's list of hazardous substances. A copy of the presently effective EPA and the State lists is on file in the Office of the City Clerk as Document 769704 and by this reference is incorporated in this Lease.

In the event of any release of a hazardous substance during the Lease Term by other than CITY, LESSEE shall be responsible for all costs of remediation and removal of the substances in accordance with all applicable rules and regulations of governmental authorities.

LESSEE shall defend, indemnify, and hold CITY harmless from any and all claims, costs, and expenses related to environmental liabilities resulting from LESSEE'S operations on the Premises, including but not limited to costs of environmental assessments, costs of remediation and removal, any necessary response costs, damages for injury to natural resources or the public, and costs of any health assessment or health effect studies.

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 the knowledge or cause for belief. Provided, however, if LESSEE knows or has reasonable cause to believe that the 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 the danger. LESSEE shall 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 sublessees shall not utilize or sell any hazardous substance on the Premises without the prior written consent of CITY.

At any time within the twelve (12) months before Lease expiration or Lease termination, LESSEE, at 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. The 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 the environmental assessment shall include a discussion of these substances with recommendations for remediation and removal necessary to effect compliance with those laws or statutes and estimates of the cost of the remediation or removal. LESSEE shall cause the remediation and/or removal recommended in the environmental assessment to ensure that compliance with environmental law is achieved and shall be solely responsible for all costs and expenses incurred, but only if the presence of the hazardous materials was caused during the term of this Lease, or any previous lease under which LESSEE occupied the Premises, by other than CITY.

SECTION 7: GENERAL PROVISIONS

7.1 Notices

- a. Any notice required or permitted to be given in this Lease shall be in writing and may be served personally or by United States mail, postage prepaid, addressed to LESSEE at:

Catamaran Pier
c/o Evans Hotels
Attention: General Counsel
998 West Mission Bay Drive
San Diego, CA 92109

or at any other address designated in writing by LESSEE; and to CITY as follows:

City Manager
Attention: Real Estate Assets 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 any 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.

- 7.2 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 law, statute, ordinance, or regulation.
- 7.3 CITY Approval. The approval or consent of CITY, wherever required in this Lease, shall mean the written approval or consent of the City Manager unless otherwise specified, without need for further resolution by the City Council.
- 7.4 Nondiscrimination. LESSEE agrees not to discriminate in any manner against any person or persons on account of race, color, religion, gender, sexual orientation, medical status, national origin, age, marital status, or physical disability in 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.

7.5 Compliance with CITY'S Equal Opportunity Contracting Program.

- a. Equal Opportunity Contracting. LESSEE acknowledges and agrees that it is aware of, and will comply with, City Council Ordinance No. 18173 (San Diego Municipal Code Sections 22.2701 through 22.2708, as amended), EQUAL EMPLOYMENT OPPORTUNITY OUTREACH PROGRAM, a copy of which is on file in the Office of the City Clerk and by this reference is incorporated in this Lease. LESSEE and all of its subcontractors are individually responsible to abide by its contents.

LESSEE will comply with Title VII of the Civil Rights Act of 1964, as amended; Executive Orders 11246, 11375, and 12086; the California Fair Employment Practices Act; and any other applicable federal and state laws and regulations hereafter enacted. LESSEE will not discriminate against any employee or applicant for employment on any basis prohibited by law.

LESSEE submitted and CITY acknowledges receipt of a current Work Force Report or a current Equal Employment Opportunity (EEO) Plan as required by Section 22.2705 of the San Diego Municipal Code, which sets forth the actions that LESSEE will take to achieve the CITY'S commitment to equal employment opportunities.

LESSEE agrees to insert the foregoing provisions in all subcontracts for any work covered by this Lease so that the provisions will be binding upon each subcontractor. LESSEE agrees that compliance with EEO provisions flowing from the authority of both parties will be implemented, monitored, and reviewed by the CITY'S Equal Opportunity Contracting Program staff.

- b. Local Business and Employment. LESSEE acknowledges that the City of San Diego seeks to promote employment and business opportunities for local residents and firms in all CITY contracts. LESSEE will, to the extent legally possible, solicit applications for employment, and bids and proposals for subcontracts, for work associated with this Lease from local residents and firms as opportunities occur. LESSEE agrees to hire qualified local residents and firms whenever feasible.

LESSEE understands that failure to comply with the above requirements and/or submitting false information in response to these requirements may result in termination of this Lease and debarment from participating in CITY contracts for a period of not less than one (1) year.

- 7.6 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.
- 7.7 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 attorneys' fees.
- 7.8 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.
- 7.9 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. The 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 Lease agrees that there is no other written or oral understanding between the parties with respect to the 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. This Lease may, at the sole option of CITY, be unilaterally and immediately terminated by CITY if the LESSEE employs an individual who, within the twelve months immediately preceding 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 LESSEE. These provisions do not apply to members of the City Council.
- 7.12 Drug-free Workplace. LESSEE shall be required to abide by the omnibus drug legislation passed by Congress on November 18, 1988, by adopting and enforcing a policy to maintain a drug-free workplace by doing all of the following:

- a. Publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of controlled substances are prohibited on the Premises and specifying the actions that will be taken against employees for violations of the prohibition.
- b. Establishing a drug-free awareness program to inform employees about all of the following:
 - (1) The dangers of drug abuse in the workplace.
 - (2) LESSEE'S policy of maintaining a drug-free workplace.
 - (3) Any available drug counseling, rehabilitation, and employees assistance programs.
 - (4) The penalties that may be imposed upon employees' for drug abuse violations.
- c. LESSEE shall include in each sublease agreement language which indicates the sublessee's agreement to abide by the provisions of a drug-free workplace. LESSEE and sublessees shall be individually responsible for their own drug-free workplace programs.

7.13 Disabled Access Compliance. LESSEE shall at all times comply in the construction, maintenance, occupancy and operation of the Premises with the 1990 Americans with Disabilities Act ("ADA") and Title 24 California Code of Regulations ("Building Code") as defined in Section 18910 of California Health and Safety Code ("Title 24") and any other applicable federal, state or local laws and regulations hereafter enacted protecting the rights of people with disabilities. LESSEE acknowledges and agrees that LESSEE is aware of and will comply with Council Policy 100-04, incorporated in this Lease by reference, adopted by Resolution No. R-282153, relating to the federally-mandated ADA. LESSEE will be individually responsible for administering its own ADA and Title 24 program. LESSEE'S compliance shall include but not necessarily be limited to the following:

- a. LESSEE shall not discriminate against qualified persons with disabilities in any aspects of employment, including recruitment, hiring, promotions, conditions and privileges of employment, training, compensation, benefits, discipline, layoffs, and termination of employment.
- b. No qualified individual with a disability may be excluded on the basis of disability from participation in, or be denied the benefits of, services, programs, or activities of LESSEE.

- c. LESSEE shall post a statement addressing the requirements of the ADA in a prominent place at the work site.
- d. Where required by law, LESSEE shall comply with CITY'S disabled access requirements by bringing up to code and making accessible any areas of the Premises which deny access to disabled persons. All improvements and alterations shall be at the sole cost of LESSEE.
- e. LESSEE shall include language in each sublease agreement which indicates the sublessee's agreement to abide by the foregoing provisions. LESSEE and sublessees shall be individually responsible for their own ADA employment programs.

LESSEE understands that failure to comply with the above requirements and/or submitting false information in response to these requirements shall constitute a default under this Lease.

- 7.14 Corporate Authority. Each individual executing this Lease on behalf of LESSEE represents and warrants that he/she is duly authorized to execute and deliver this Lease on behalf of the corporation, in accordance with a duly adopted resolution of the Board of Directors of the corporation or in accordance with the bylaws of the corporation, and that this Lease is binding upon the corporation in accordance with its terms, and that LESSEE is a duly qualified corporation and all steps have been taken prior to the date of this Lease to qualify LESSEE to do business in the state where the Premises are situated.
- 7.15 LESSEE Right to Negotiate Renewal. Provided LESSEE is not then in default of any provision in this Lease upon expiration of this Lease, LESSEE shall have the right to negotiate a proposed renewal lease of the Premises for a mutually agreeable term upon the conditions and rental CITY then offers. This right must be exercised by written notice thereof to CITY not less than six (6) months nor more than twelve (12) months prior to expiration of the Lease Term. Following notice and not less than three (3) months prior to the expiration, CITY shall offer LESSEE a renewal Lease containing the conditions and rental that CITY is then willing to accept from any other qualified party desiring to Lease the Premises. In the event conditions and rental are not accepted by LESSEE and in the event CITY and LESSEE do not agree as to any other conditions for renewal prior to expiration of this Lease, then LESSEE'S right to renew shall terminate upon expiration of this Lease.
- 7.16 CITY Option to Purchase. If 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 Premises, CITY shall be given the first right to purchase the interest and improvements at a mutually agreeable price. If

CITY does not exercise the 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 the lower price.

7.17 Supersedure. It is mutually agreed that this Lease, upon commencement, supersedes and annuls that certain Lease executed on December 8, 1992, Document Number RR-281244-1, 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 that lease agreement.

7.18 Plastic Food Containers.

- (1) LESSEE shall not, after the effective date of this Lease, provide to its customers any prepared food in polystyrene foam food packaging, nor shall LESSEE obtain or keep any polystyrene foam food packaging of a type, design, and condition suited for providing prepared food to its customers for consumption off the Premises.
- b. LESSEE'S food packaging for prepared food to be consumed on the Premises or for takeout food shall be biodegradable, and LESSEE shall provide upon demand evidence in the form of paid invoices to indicate the purchase of biodegradable containers in amounts sufficient to indicate compliance with this section. LESSEE'S food packaging for prepared food to be consumed off the Premises shall be biodegradable unless LESSEE demonstrates to the satisfaction of CITY that biodegradable food packaging materials are not available for purchase in the quantities required by LESSEE. In the event that biodegradable food packaging materials are not available for purchase in the quantities required by LESSEE, LESSEE may limit its use of packaging to the amount actually available.
- c. For purposes of this Lease, the following definitions are applicable:
- (1) "Prepared food" means foods or beverages which are prepared on the Leased Premises by cooking, chopping, slicing, mixing, freezing or squeezing, and which require no further preparation to be consumed.
 - (2) "Food packaging" means all bags, sacks, wrapping, containers, bowls, plates, trays, cartons, cups, straws and lids which are not intended for reuse, on or in which any foods or beverages are placed or packaged on the Premises.

- (3) "Takeout food" means prepared foods or beverages requiring no further preparation to be consumed and which are purchased in order to be consumed off the Premises.

- 7.19 Public Access to and Use of Beach. LESSEE shall allow the general public access to and use of the beach area behind the Catamaran Resort Hotel as shown on Exhibit "B."
- 7.20 CITY Access to and Use of Beach. LESSEE shall allow CITY access to and use of the beach area behind the Catamaran Resort Hotel, and access across the Premises known as the Catamaran Pier for the purpose of beach cleaning. Should CITY'S beach cleaning equipment use other than rubber tires, then CITY shall provide LESSEE with a minimum of twelve (12) hours prior notification.
- 7.21 Water Quality - Best Management Practices and Storm Water Management Plan. CITY and LESSEE are committed to the implementation of programs to manage activities on the Premises in a manner which aids in the protection of San Diego's precious water resources. LESSEE shall comply with the Best Management Practices ("BMP") including the Storm Water Management Plan ("SWMP") approved by CITY'S Storm Water Management Program. LESSEE shall submit for review and approval by the City Manager or his designee, within ninety (90) days of the execution of this Lease, BMP and SWMP that will control erosion and reduce the amount of pollutants and other sediments discharged from the Premises. The BMP and SWMP will be reviewed periodically by CITY. Upon written notice from the City Manager requesting an update of the BMP, LESSEE shall submit updated BMP and SWMP for City Manager review and approval within ninety (90) days of receipt of notice. LESSEE shall implement any necessary changes to the BMP and SWMP as a result of any review by CITY to ensure compliance with any changes in laws or regulations.

When the BMP and SWMP have been developed and implemented by LESSEE, it is crucial that the practices be enforced and maintained. It is LESSEE'S responsibility to inform employees, contractors, subcontractors, agents and vendors of the BMP and SWMP.

SECTION 8: SIGNATURES

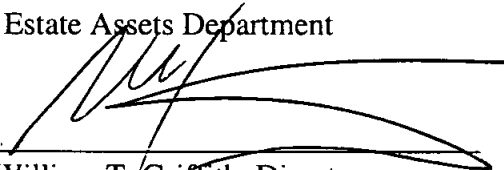
8.1 Signature Page.

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

CITY OF SAN DIEGO

Real Estate Assets Department

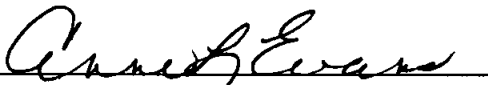
Date NOV 15 2004, 2004

By: 
William T. Griffith, Director

LESSEE:
BRAEMAR PARTNERSHIP,
a California limited partnership

By: 9th BRAEMAR, INC.,
a California corporation
Its: Managing General Partner

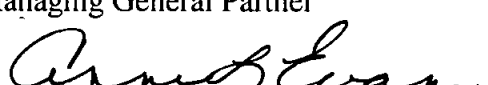
Date Oct 25, 2004

By: 
Anne L. Evans, Chairman

9th & A LIMITED PARTNERSHIP,
a California limited partnership

By: 9th BRAEMAR, INC.,
a California corporation
Its: Managing General Partner

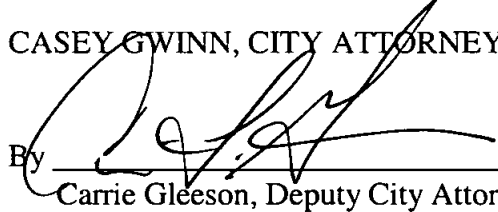
Date Oct 25, 2004

By: 
Anne L. Evans, Chairman

APPROVED as to form and legality this 22nd day of November, 2004.

CASEY GWINN, CITY ATTORNEY

By


Carrie Gleeson, Deputy City Attorney

CLY/cj

10/22/04

I:\YOUNGLEASE-CATAMARAN PIER4.wpd

SECTION 9: EXHIBITS

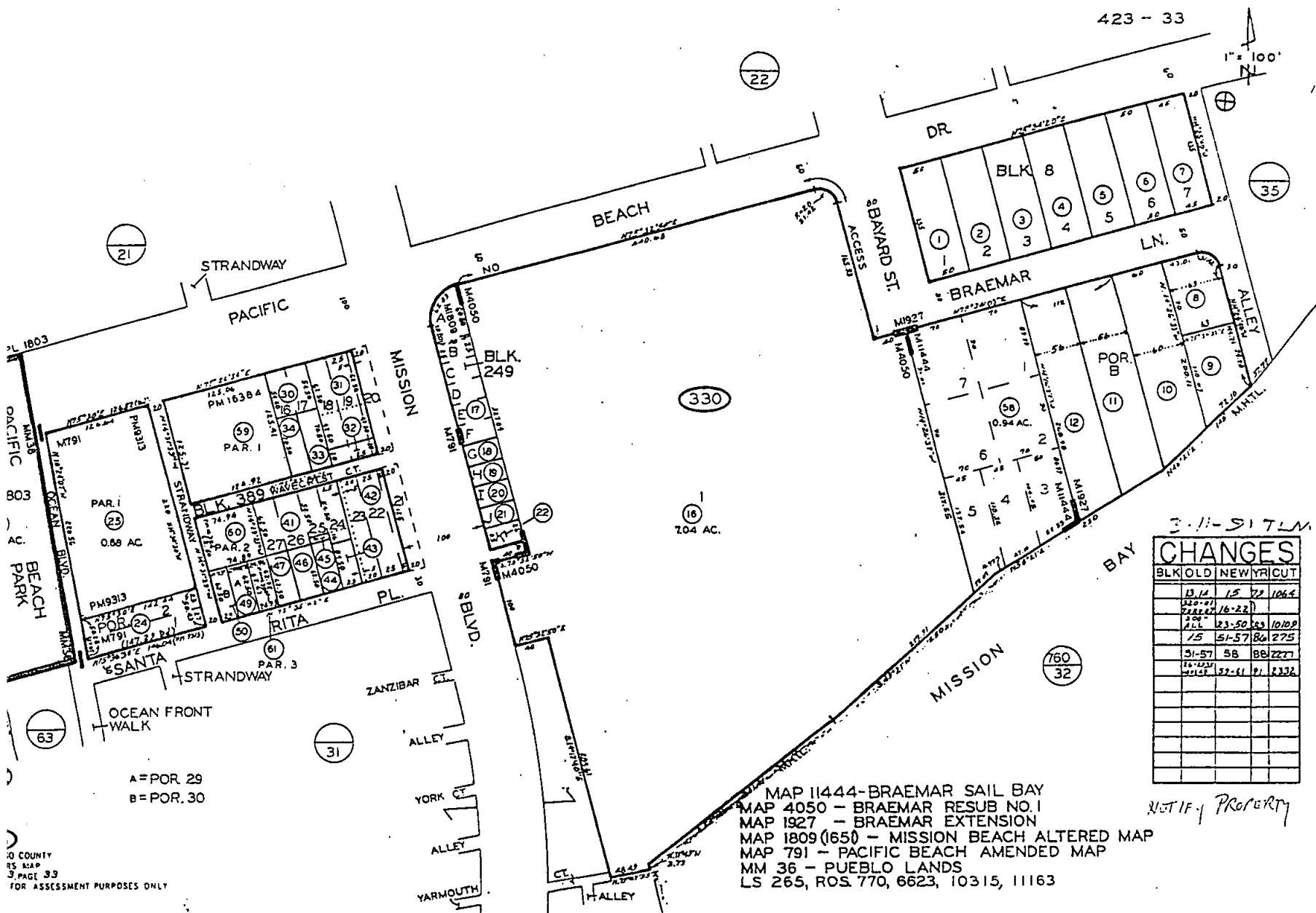
9.1 Legal Description.

Catamaran Resort Hotel Pier
Legal Description
"Lease Parcel"

THAT PORTION OF THE TIDELANDS AND SUBMERGED OR FILLED LANDS OF MISSION BAY, FORMERLY FALSE BAY, ACCORDING TO MAP THEREOF MADE BY JAMES PASCOE 1870, A COPY OF SAID MAP WAS FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO, NOVEMBER 14, 1921, AND IS KNOWN AS MISCELLANEOUS MAP NO. 36, ALL BEING IN THE CITY AND COUNTY OF SAN DIEGO, STATE OF CALIFORNIA AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE SOUTHWESTERLY CORNER OF LOT 1 OF BRAEMAR RESUBDIVISION NO 1, ACCORDING TO MAP NUMBER 4050 ON FILE IN THE OFFICE OF THE COUNTY RECORD; THENCE ALONG THE SOUTHERLY LINE OF SAID MAP NUMBER 4050 NORTH 79° 45 '12" EAST 48.46 FEET; THENCE NORTH 11° 51' 23" WEST 3.73 FEET; THENCE NORTH 52° 11' 39" EAST 281.47 FEET; THENCE NORTH 49° 20' 40" EAST 7.33 FEET TO THE *TRUE POINT OF BEGINNING*; THENCE SOUTH 36° 32' 42" WEST 132.50 FEET; THENCE NORTH 53° 27' 18" WEST 176.02 FEET; THENCE SOUTH 24° 18' 22" WEST 46.45 FEET; THENCE NORTH 53° 27' 18" WEST 176.02 FEET TO THE SOUTHERLY LINE OF SAID MAP NUMBER 4050; THENCE ALONG THE SOUTHERLY LINE OF SAID MAP NUMBER 4050 NORTH 52° 11' 39" EAST 177.32 FEET; THENCE NORTH 49° 20' 40" EAST 7.33 FEET TO THE *TRUE POINT OF BEGINNING*.

1" = 100'



9.3 Corporate Name.

9th Braemar, Inc.
CORPORATE NAME

I, ANNE L. EVANS, certify that I am the CHAIRMAN
of the corporation named in the attached Lease; that Anne L. Evans, who signed this Lease
on behalf of the corporation, was then Chairman of the corporation; that the Lease was duly
signed for and on behalf of the corporation by authority of its governing body, pursuant to a
resolution duly adopted by its Board of Directors on OCT. 25, 2004, and is
within the scope of its corporate powers; and that set out below are the names of the officers and
directors of the corporation.

By Anne L. Evans

CORPORATE SEAL

Name Grace E. Cheraschore
Title Director & President

Name William L. Evans
Title Director & EVP

Name David L. Cheraschore
Title EVP

Name Robert H. Gleason
Title Secretary & CFO

9.4 Schedule of Days and Hours of Operation.

The schedule of days and hours will be based upon demand levels, weather conditions and the needs of the general public and patrons of the Catamaran Resort Hotel.

CATAMARAN RESORT HOTEL PIER

LEGAL DESCRIPTION "PERMIT PARCEL"

THAT PORTION OF THE TIDELANDS AND SUBMERGED OR FILLED LANDS OF MISSION BAY, FORMERLY FALSE BAY, ACCORDING TO MAP THEREOF MADE BY JAMES PASCOE IN 1870, A COPY OF SAID MAP WAS FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO, NOVEMBER 14, 1921, AND IS KNOWN AS MISCELLANEOUS MAP NO. 36, ALL BEING IN THE CITY AND COUNTY OF SAN DIEGO, STATE OF CALIFORNIA, AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE SOUTHWESTERLY CORNER OF LOT 1 OF BRAEMAR RE SUBDIVISION NO. 1, ACCORDING TO MAP NO. 4050 ON FILE IN THE OFFICE OF THE COUNTY RECORDER; THENCE ALONG THE SOUTHERLY LINE OF SAID MAP NO. 4050 NORTH 78°46'12" EAST 48.46 FEET; THENCE NORTH 11°51'23" WEST 3.73 FEET; THENCE NORTH 52°11'39" EAST 281.47 FEET; THENCE NORTH 49°20'40" EAST 7.33 FEET TO THE TRUE POINT OF BEGINNING; THENCE LEAVING SAID SOUTHERLY LINE SOUTH 53°27'18" EAST 125.40 FEET; THENCE NORTH 43°57'38" EAST 47.53 FEET; THENCE NORTH 53°27'18" WEST 120.83 FEET TO THE SOUTHERLY LINE OF SAID MAP NO. 4050 THENCE ALONG SAID SOUTHERLY LINE SOUTH 49°20'40" WEST 48.33 FEET TO THE TRUE POINT OF BEGINNING.

LEASE AREAS:

PERMIT PARCEL
1403 SQ. FT. 0.133 AC.
LEASE PARCEL
MEAN HIGH WATER LINE DIVIDES THE TWO AREAS
LAND: 25.611 SQ. FT. 0.588 AC.
WATER: 39,319 SQ. FT. 0.902 AC.
TOTAL: 64,930 SQ. FT. 1.490 AC.

APPLICANT/OWNER:

ANNE L EVANS
BRAEMAR PARTNERSHIP
998 W MISSION BAY DRIVE
SAN DIEGO, CA 92109
(619) 488-0551

Anne L Evans
ANNE L EVANS

THIS DRAWING SUPERCEDES THE DRAWING BY HALL ENGINEERING DATED MARCH 13, 1990 (W.D. 11421)

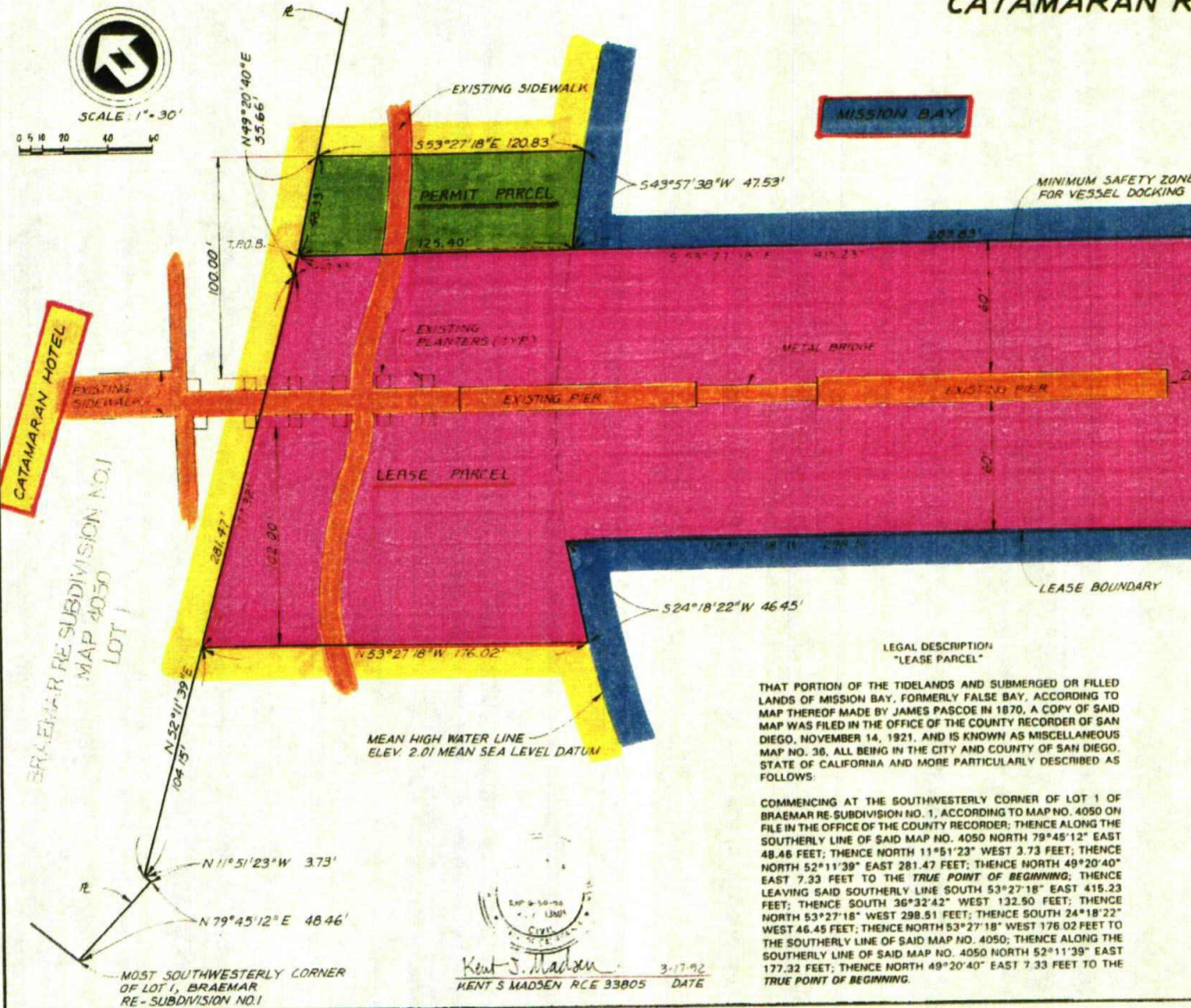
	LINTVEDT, McCOLL & ASSOCIATES		PLANNING
			ENGINEERING
			LAND SURVEYING
75760 Camino del Sur Suite 101 • LINDSEY, CALIFORNIA 92034 • (619) 460-3172 • FAX (619) 460-1300			
DATE 3-17-92	JOB NO. 11585	DR. #1	ENGR. #1

LEGAL DESCRIPTION "LEASE PARCEL"

THAT PORTION OF THE TIDELANDS AND SUBMERGED OR FILLED LANDS OF MISSION BAY, FORMERLY FALSE BAY, ACCORDING TO MAP THEREOF MADE BY JAMES PASCOE IN 1870, A COPY OF SAID MAP WAS FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO, NOVEMBER 14, 1921, AND IS KNOWN AS MISCELLANEOUS MAP NO. 36, ALL BEING IN THE CITY AND COUNTY OF SAN DIEGO, STATE OF CALIFORNIA AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:

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Kent S. Madsen
KENT S MADSEN RCE 93805 DATE 3-17-92



- = LEASE PARCEL
- = PERMIT PARCEL
- = MISSION BAY
- = BEACH AREA
- = EXISTING SIDEWALK/PIER AREAS

RESOLUTION NUMBER R- 299832

ADOPTED ON NOV 15 2004

WHEREAS, Braemar Partnership, a California limited partnership, and 9th & A Limited Partnership, a California limited partnership [collectively, Lessee], in connection with the operation of the Catamaran Resort Hotel and pursuant to a lease with the City [the Catamaran Pier Lease], maintain and operate a pier on a .588 acre land area and .902 acre water area extending from the hotel property into Mission Bay; and

WHEREAS, the Catamaran Pier Lease provides for the negotiation and renewal of the Lease; and

WHEREAS, the City of San Diego and Lessee have negotiated a ten year lease (an initial five year term with one five year option to extend) to operate and maintain a docking facility for the temporary berthing of boats, the storage and rental of small boats and watercraft, the operation of a beach chair, umbrella and boat rental concession, the sale of food and non-alcoholic beverages and the storage and moorings of sight-seeing and excursion boats operated by Bahia Sternwheelers, Inc., all for the general public and patrons of the Catamaran Resort Hotel, at the initial rental rate of ten percent of all gross revenues from operations on the leased property and not less than \$17,500 per year; and

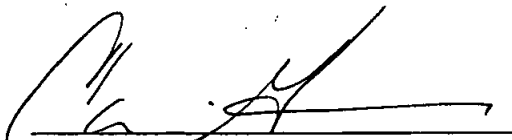
WHEREAS, as additional consideration, the proposed Catamaran Pier Lease requires Lessee to spend one percent of gross income annually for maintenance, upkeep and replacement upgrades to keep the pier in first class condition; and

WHEREAS, the City's valuation staff has determined the fair market rental value of the property to be ten percent of gross revenue; NOW, THEREFORE,

BE IT RESOLVED, by the Council of the City of San Diego, that the City Manager is authorized to execute a ten year lease agreement (an initial five year term with one five year option to extend) with Braemar Partnership and 9th and A Limited Partnership for the operation and maintenance of a docking facility for the temporary berthing of boats, the storage and rental of small boats and watercraft, the operation of a beach chair, umbrella and boat rental concession, the sale of food and non-alcoholic beverages and the storage and moorings of sight-seeing and excursion boats operated by Bahia Sternwheelers, Inc., all for the general public and patrons of the Catamaran Resort Hotel, at the initial rental rate of ten percent of all gross revenues from operations on the leased property and not less than \$17,500 per year, under the terms and conditions and as more specifically set forth in that certain Catamaran Pier Lease Agreement on file in the office of the City Clerk as Document No. RR- 299832.

APPROVED: CASEY GWINN, City Attorney

By


Carrie Gleeson
Deputy City Attorney

CLG:mm
10/26/04
Or.Dept:READ
Job Order No.223506
R-2005-469
MMS-973

Passed and adopted by the Council of San Diego on November 15, 2004 by the following vote:

YEAS: ZUCCHET, ATKINS, DISTRICT 4 VACANT, MAIENSCHIN, FRYE, MADAFFER, INZUNZA, MAYOR MURPHY.

NAYS: NONE.

NOT PRESENT: PETERS.

AUTHENTICATED BY:

DICK MURPHY
Mayor of The City of San Diego, California

CHARLES G. ABDELNOUR
City Clerk of The City of San Diego, California

(SEAL)

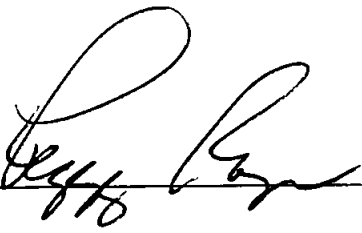
By: Peggy Rogers, Deputy

I HEREBY CERTIFY that the above and foregoing is a full, true and correct copy of
RESOLUTION NO. R- 299832

passed and adopted by the Council of The City of San Diego, California on November 15, 2004.

CHARLES G. ABDELNOUR
City Clerk of The City of San Diego, California

(SEAL)

By: , Deputy