

LICENSE AGREEMENT

The CITY OF SAN DIEGO ("City") hereby grants a non-exclusive license ("License") to BRAEMAR PARTNERSHIP, a California limited partnership ("Licensee"), for the following purposes in the license area described below, subject to the below-described terms and conditions:

- A. **PURPOSES:** Operation of a beach chair, umbrella, boat rental, and food and beverage service for Catamaran Resort Hotel guests and 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.
- B. **LICENSE AREA:** The beach area adjacent to Sail Bay in Mission Bay Park bounded on the east by Mission Bay; on the west by the eastern boundary of Lot 1 of Braemar Re-Subdivision No. 1; on the south by Catamaran Pier; and on the north by a line parallel to and 100 feet north of the Catamaran Pier, as delineated on Exhibit "A," attached to this License.
- C. **TERMS AND CONDITIONS:**
1. **TERM:** The initial term of this License shall be five (5) years, commencing on the first day of the calendar month following execution by the City Manager; provided, however, this License may be canceled by either party without cause by giving sixty (60) days prior written notice.
 2. **RIGHT TO EXTEND.** Provided that Licensee is not in default of this License and provided further that Licensee shall provide the maintenance set forth in Section 28 of this License, Licensee has the right to extend this License 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 original term.
 3. **CONSIDERATION:**
 - A. **RENT:** Beginning on the effective date of this License, Licensee shall pay to City, monthly in arrears, on or before the last day of the calendar month following that month in which the revenue subject to rent was earned, a sum of money equal to ten percent (10%) of all gross income derived from the operations permitted by this License.

Provided, however, if the total amount of percentage rent paid to City by Licensee in any one year ending upon the day prior to the anniversary date of this License is less than the sum of Five Hundred Dollars (\$500), hereinafter referred to as minimum rent, then Licensee shall pay to City, within sixty (60) days of the anniversary date, the difference between the amount actually paid and the minimum rent.

DOCUMENT NO. **299833**

FILED **NOV 15 2004**

OFFICE OF THE CITY CLERK
SAN DIEGO, CALIFORNIA

The minimum rent shall be adjusted every three (3) years after the License commences to an amount which equals seventy-five percent (75%) of the average of the total annual rent paid by Licensee during the previous two fiscal years. Provided, however, the adjusted minimum rent shall not be less than Five Hundred Dollars (\$500) per year.

4. DELINQUENT RENT COMPENSATION: If Licensee fails to pay the applicable rents when due, then Licensee shall pay City, in addition to the delinquent rent, a sum of money equal to five percent (5%) of the delinquent rent. If the delinquent rent is still unpaid fifteen (15) days after becoming delinquent, then Licensee shall pay City, in addition to the delinquent rent, a sum of money equal to ten percent (10%) of the delinquent rent. The additional sum or sums shall be deemed compensation to City for loss resulting from the delinquency including costs to City of servicing the delinquent account. If a City audit discloses that the rent for the audit period has been underpaid in excess of five percent (5%) of the total required rent, then Licensee shall pay City the cost of the audit plus ten percent (10%) on the amount by which the 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 above. The City Manager may for good cause waive any delinquency compensation charge upon written application of Licensee prior to the delinquent period.
5. GROSS INCOME: Gross income shall include all income earned by Licensee from the operations allowed by this License, from whatever source derived and whether received or to become due. Gross income, however, shall not include federal, state or municipal taxes collected from the consumer (regardless of whether the amount is stated to the consumer as a separate charge) and paid over periodically by Licensee to a governmental agency accompanied by a tax return or statement. The amount of the taxes shall be shown on the books and records required by Section 6 of this License.
6. RECORDS - STATEMENTS: Licensee shall maintain adequate and accurate records from which City can determine the nature and amount of Licensee's gross income. In order that City may determine the basis of payments to be made hereunder, a statement of all income derived by Licensee during the preceding month and allowable deductions shall accompany each payment.
7. INSPECTION AND AUDIT: The City may enter and inspect the operations permitted under this License and audit Licensee's business records at any reasonable time. The records and books of account shall be made available within the City of San Diego.
8. SIGNS: The License area shall be signed as a Public Beach by Licensee. No

other signs shall be displayed on the license area without prior written approval of the City Manager.

9. RATES AND HOURS: Licensee shall secure the City Manager's prior written approval of Licensee's proposed rental rates, food service charges, hours of operation and any subsequent change or changes, which approval shall not be unreasonably withheld. The City Manager shall have the right to require Licensee to temporarily limit and/or discontinue its operation during any time that Licensee's operation may conflict with scheduled City activities held in Mission Bay Park.
10. BEACH CLEANING: Upon a minimum twenty-four (24) hour phone notification by the Park and Recreation Department staff, Licensee will remove beach chairs and umbrellas to allow for beach cleaning by City.
11. PUBLIC OR PRIVATE NUISANCE: Licensee shall not use the license area in any manner which, in the opinion of the City Manager, creates a nuisance or disturbs the quiet enjoyment of persons in the surrounding area.
12. COMPLIANCE WITH LAW: Licensee shall at all times in the maintenance, occupancy, and operation of the license area comply with all applicable laws, statutes, ordinances, and regulations of City, county, state, and federal governments at Licensee's sole cost and expense. In addition, Licensee 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.
13. ASSIGNMENT AND SUBLEASE: Licensee shall not assign this License, or any interest herein, or sublet any of its operations hereunder, without first obtaining the written consent of the City Manager. Any assignment by operation of law shall automatically terminate this License.
14. STANDARD OF EMPLOYEES: Licensee and its employees shall, at all times, conduct themselves in a creditable manner.
15. DILIGENCE: Failure by Licensee to diligently conduct its operations so as to produce a reasonable and substantial gross income may result in termination of this License.
16. TAXES: Licensee shall pay promptly, when due, all taxes and assessments levied upon Licensee's business, its personal property or upon Licensee by reason of this License.
17. HOLD HARMLESS: Licensee 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 Licensee's employees, invitees, guests, agents, or officers, which arise out of or are in any manner directly or indirectly connected with the maintenance or operation of the license area or the work and operations to be performed under this License, and all expenses of investigating and defending against same; provided, however, that Licensee'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.

18. INSURANCE: Licensee shall be insured by an insurance carrier acceptable to City against loss from public liability and property damage arising from the use or condition of the license area or operations conducted hereunder. Minimum coverage shall be Two Million Dollars (\$2,000,000) Combined Single Limit Liability, determined on an occurrence basis. A Certificate of Insurance shall be filed with City. The Policy of Insurance shall name, by separate endorsement, the "City of San Diego, its elected officials, officers, representatives, agents and employees" as additional insureds and shall provide that a thirty (30) day notice of cancellation be given to City.
19. LEGAL PROCEEDINGS: Should it become necessary for City to commence legal proceedings to collect any payments due hereunder, or enforce any other condition of this License, Licensee agrees to pay all legal costs in connection therewith, including a reasonable sum as attorneys' fees.
20. TERMINATION LIABILITY: It is mutually agreed that City shall not be obligated for any loss, financial or otherwise, which may be incurred by Licensee, as a result of termination of this License, and further that Licensee expressly waives any claim or expense or loss which Licensee might incur as a result of termination of this License.
21. ADMINISTRATION AND CONTROL - NOTICES: The administration and control of the operations permitted hereunder shall be under the jurisdiction of the City Manager of City.

Notices to City hereunder shall be directed to:

City of San Diego
Attention: Director, Real Estate Assets Department
City Administration Building
202 "C" Street (M.S. 9B)
San Diego, California 92101

Notices to Licensee may be mailed or otherwise delivered to:

Braemar Partnership
c/o Evans Hotels
Attention: General Counsel
998 West Mission Bay Drive
San Diego, California 92109

or, notices may be personally served upon Licensee.

22. DEFAULT: City may terminate this License upon failure of Licensee to perform any condition imposed upon Licensee herein.
23. WAIVER: The failure of City to insist upon strict performance by Licensee of any condition of this License, in one or more instances, shall not be construed as a waiver of any such condition, and the same shall remain in full force.
24. ORAL REPRESENTATIONS: This License contains the complete expression of the agreement between the parties and there are no promises, representation, agreements, warranties or inducements, either expressed orally or implied, except as set forth in this License. The conditions of this License cannot be changed in any respect except by written agreement between the parties.
25. NONDISCRIMINATION: Licensee 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 Licensee's use of the license area, including but not limited to the providing of goods, services, facilities, privileges, advantages, and accommodations, and the obtaining and holding of employment.
26. CITY EMPLOYEE PARTICIPATION POLICY: It is the policy of City that all City contracts, agreements or leases/licenses with consultants, vendors or lessees/licensees shall include a condition that the contract, agreement or lease/license shall be unilaterally and immediately terminated by City if the contractor or lessee/licensee employs an individual who within the twelve (12) 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/licensee. It is not the intent of this policy that these provisions apply to members of the City Council.
27. POSSESSORY INTEREST TAX: Licensee recognizes and understands that this License may create a possessory interest subject to property taxation and that

Licensee may be subject to the payment of property taxes levied on such interest. Licensee further agrees that tax payment shall not reduce any fee paid City hereunder and that any tax shall be paid by Licensee before becoming delinquent.

28. MAINTENANCE OF LICENSE AREA: Licensee agrees not to commit or suffer to be committed any waste or injury or any public or private nuisance, to keep the spaces occupied by the concession and food service operations clean and clear of refuse and obstructions, and to dispose of all garbage, trash, and rubbish in or about said spaces to the satisfaction of City and at Licensee's sole cost. The spaces shall be cleaned up nightly by Licensee or more often as required.
29. ALCOHOL BAN EXCLUSION: If an alcohol ban is enacted for public beaches in this area of Mission Bay Park which is more restrictive than any regulations in effect at the commencement of this License, then alcohol served by the hotel will be allowed only with the express written permission of the City Manager.
30. PLASTIC FOOD CONTAINERS:
 - a. Licensee shall not, after the effective date of this License, provide to its customers in the license area any prepared food in polystyrene foam food packing, nor shall Licensee obtain or keep any polystyrene foam food packing of a type, design and condition suited for providing prepared food to its customers for consumption in or takeout from the license area.
 - b. Licensee's food packaging for prepared food to be consumed in the license area or for takeout food shall be degradable, and Licensee 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. Licensee's food packaging for prepared food to be consumed out of the license area shall be biodegradable unless Licensee demonstrates to the satisfaction of City that biodegradable food packaging materials are not available for purchase in the quantities required by Licensee. In the event that biodegradable food packaging materials are not available for purchase in the quantities required by Licensee, Licensee may limit its use of such packaging to the amount actually available.
 - c. For purposes of this License, the following definitions are applicable:
 - (1) "Prepared food" means foods or beverages which are prepared 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.

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

31. DISABLED ACCESS COMPLIANCE. Licensee shall at all times comply in the construction, maintenance, occupancy and operation of the license area 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. Licensee acknowledges and agrees that Licensee is aware of and will comply with Council Policy 100-04, incorporated in this License by reference, adopted by Resolution No. R-282153, relating to the federally-mandated ADA. Licensee will be individually responsible for administering its own ADA and Title 24 program. Licensee's compliance shall include but not necessarily be limited to the following:

1. Licensee 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.
2. 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 Licensee.
3. Licensee shall post a statement addressing the requirements of the ADA in a prominent place at the work site.
4. Where required by law, Licensee shall comply with City's disabled access requirements by bringing up to code and making accessible any areas of the license area which deny access to disabled persons. All improvements and alterations shall be at the sole cost of Licensee.
5. Licensee shall include language in each sublease agreement which indicates the sublessee's agreement to abide by the foregoing provisions. Licensee and sublessees shall be individually

responsible for their own ADA employment programs.

Licensee 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 License.

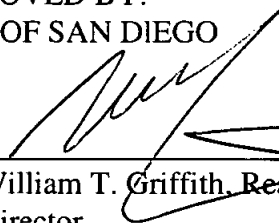
32. WATER QUALITY - BEST MANAGEMENT PRACTICES AND STORM WATER MANAGEMENT PLAN. City and Licensee are committed to the implementation of programs to manage activities on the license area in a manner which aids in the protection of San Diego's precious water resources. Licensee shall comply with the Best Management Practices ("BMP") including the Storm Water Management Plan ("SWMP") approved by City's Storm Water Management Program. Licensee shall submit for review and approval by the City Manager or his designee, within ninety (90) days of the execution of this License, BMP and SWMP that will control erosion and reduce the amount of pollutants and other sediments discharged from the license area. The BMP and SWMP will be reviewed periodically by City. Upon written notice from the City Manager requesting an update of the BMP, Licensee shall submit updated BMP and SWMP for City Manager review and approval within ninety (90) days of receipt of notice. Licensee 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 Licensee, it is crucial that the practices be enforced and maintained. It is Licensee's responsibility to inform employees, contractors, subcontractors, agents and vendors of the BMP and SWMP.

33. REVOCABLE LICENSE. This License is not a lease. It is a license to use City property, revocable at any time by either party without cause by giving sixty (60) days prior written notice.

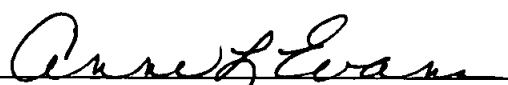
THE ABOVE IS ACKNOWLEDGED AND ACCEPTED THIS _____ DAY OF
~~NOV 14 2004~~ 2004.

APPROVED BY:
CITY OF SAN DIEGO

By 
William T. Griffith, Real Estate Assets
Director

LICENSEE:
BRAEMAR PARTNERSHIP,
a California limited partnership

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

By 
Anne L. Evans, Chairman

APPROVED AS TO FORM AND LEGALITY
THIS 22nd DAY OF November, 2004:

CASEY GWINN, City Attorney

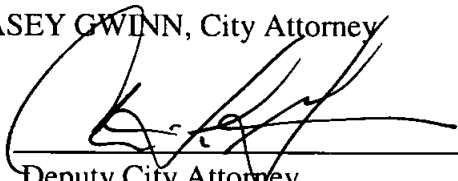
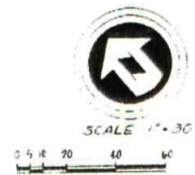
By 
Deputy City Attorney

EXHIBIT "A"



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 79°45'12" EAST 48.46 FEET, THENCE NORTH 11°51'23" WEST 3.73 FEET, THENCE NORTH 52°11'38" EAST 201.47 FEET, THENCE NORTH 48°20'40" EAST 7.33 FEET TO THE TRUE POINT OF BEGINNING, THENCE LEAVING SAID SOUTHERLY LINE SOUTHWEST 53°27'18" EAST 125.40 FEET, THENCE NORTH 43°57'38" EAST 45.53 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 48°20'40" WEST 48.33 FEET TO THE TRUE POINT OF BEGINNING

$\frac{1}{2} \times 100 = 50$
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ANNE L EVANS
BRAEMAR PARTNERSHIP
998 W MISSION BAY DRIVE
SAN DIEGO CA 92109
(619) 488-2551

Anne L Evans
ANNE L EVANS

THIS DRAWING SUPERSEDES THE DRAWING
BY HALL ENGINEERING DATED MARCH 13, 1990
P.C. 42



= EXISTING SIDEWALK/
PIER AREAS

RESOLUTION NUMBER R- **299833**

ADOPTED ON **NOV 15 2004**

WHEREAS, Braemar Partnership, a California limited partnership, and 9th & A Limited Partnership, a California limited partnership, 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 for purposes that include the operation of a beach chair, umbrella and boat rental concession and the sale of food and non-alcoholic beverages; and

WHEREAS, in addition to the Catamaran Pier Lease, the Braemar Partnership [Licensee] holds a license to operate a beach chair, umbrella and boat rental concession and food and non-alcoholic beverage service on a 0.133 acre area adjoining the Catamaran Pier leasehold pursuant to a non-exclusive license granted by the City of San Diego in 1992 which expired on June 30, 2004 and is currently on holdover; and

WHEREAS, the license was issued to assist in the operations on the Catamaran Pier leasehold to meet seasonal demands; and

WHEREAS, the City of San Diego has negotiated a new Catamaran Pier Lease; and

WHEREAS, in conjunction with the new proposed Lease, the City of San Diego and Licensee have negotiated a ten year license agreement (an initial five year term with one five year option to extend) for the operation of a beach chair, umbrella and boat rental concession and food and non-alcoholic beverage service 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 property and not less than \$500 per year; and

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

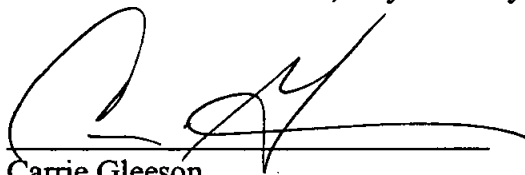
WHEREAS, based on the Licensee's right to carry on the same concession activities on the adjacent property pursuant to the Catamaran Pier Lease and the purpose of the license agreement to facilitate operations at the Catamaran Pier, the City Manager recommends the waiver of Council Policy 700-41 relating to the use of a request for proposal process as being in the best interests of the City. 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 license agreement (an initial five year term with one five year option to extend) with Braemar Partnership for operation of a beach chair, umbrella, boat rental and food and beverage service for the general public and the guests of the Catamaran Resort Hotel, at an initial rental rate of ten percent of all gross revenue and not less than \$500 per year, under the terms and conditions and as more specifically set forth in that certain License Agreement on file in the office of the City Clerk as Document No. RR-299833.

BE IT FURTHER RESOLVED, by the Council of the City of San Diego, that Council Policy 700-41 is hereby waived as it relates to the above-referenced License Agreement.

APPROVED: CASEY GWINN, City Attorney

By


Carrie Gleeson
Deputy City Attorney

CLG:mm
10/26/04
Or.Dept:READ
Job Order No.220732
R-2005-470
MMS-974

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)

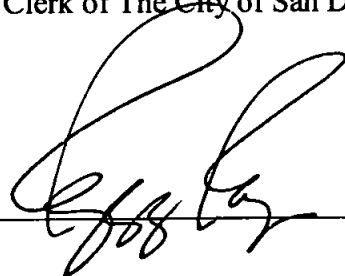
By: Peggy Rogers, Deputy

I HEREBY CERTIFY that the above and foregoing is a full, true and correct copy of
RESOLUTION NO. R- 299833

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