



Real Estate Assets Department
SDC003

Document Type

LEGAL DOCUMENTS



Sub - Category

AGREEMENTS



COPY

DOCUMENT NO. RR-275324

FILED MAR 19 1990

OFFICE OF THE CITY CLERK
SAN DIEGO, CALIFORNIA

THE CITY OF SAN DIEGO

Percentage Lease

LEASE OUTLINE

<u>SECTION</u>	<u>PARAGRAPH</u>	<u>PAGE</u>
SECTION 1:	USES	
1.01	Premises	1
1.02	Uses	1
1.03	Related Council Actions	2
1.04	Quiet Possession	2
1.05	Easements and Reservations	2
1.06	Competent Management	3
1.07	Operation of Facilities	3
1.08	Rates and Charges	3
SECTION 2:	TERM	
2.01	Commencement	3
2.02	Holdover	3
2.03	Surrender of Premises	3
SECTION 3:	RENT	
3.01	Time and Place of Payment	4
3.02	Rent	4
3.03	Payment Procedure	7
3.04	Gross Income	8
3.05	Inspection of Records	8
3.06	Delinquent Rent and Audit Fees	10
3.07	Unauthorized Use Charge	11
SECTION 4:	ASSIGNMENT	
4.01	Time is of Essence; Provisions Binding on Successors	11
4.02	Assignment and Subletting	11
4.03	Encumbrance	13
4.04	Additional Consideration to City	13
4.05	Defaults and Remedies	15
4.06	Eminent Domain	17
4.07	Partnership Liability	18
SECTION 5:	INSURANCE RISKS/SECURITY	
5.01	Indemnity	18
5.02	Insurance	19
5.03	Waste, Damage, or Destruction	20
SECTION 6:	IMPROVEMENTS/ALTERATIONS/REPAIRS	
6.01	Acceptance of Premises	21
6.02	Entry and Inspection	21
6.03	Maintenance	22

LEASE OUTLINE

<u>SECTION</u>	<u>PARAGRAPH</u>	<u>PAGE</u>
	6.04 Improvements/Alterations	22
	6.05 Utilities	22
	6.06 Construction Bond	22
	6.07 Liens	23
	6.08 Taxes	23
	6.09 Signs	23
	6.10 Ownership of Improvements and Personal Property	24
	6.11 Unavoidable Delay	24
	6.12 Hazardous/Toxic Waste	25
SECTION 7:	GENERAL PROVISIONS	
	7.01 Notices	26
	7.02 Compliance with Law	27
	7.03 CITY Approval	27
	7.04 Nondiscrimination	27
	7.05 Equal Opportunity	27
	7.06 Partial Invalidity	27
	7.07 Legal Fees	27
	7.08 Number and Gender	27
	7.09 Captions	28
	7.10 Entire Understanding	28
	7.11 CITY Employee Participation Policy	28
	7.12 LESSEE'S Right to Terminate	28
	7.13 Standard of Employees	29
	7.14 Supersedure	29
	7.15 Relocation Payments	29
SECTION 8:	SIGNATURES	
	8.01 Signature Page	30
SECTION 9:	EXHIBITS	
	9.01 Description of Premises	31
	9.02 Description and Listing of LESSEE-owned Improvements	32
	9.03 Schedule of Rates and Charges	33
	9.04 Schedule of Days and Hours of Operation	34

**CITY OF SAN DIEGO
PERCENTAGE LEASE**

THIS LEASE AGREEMENT is executed between the CITY OF SAN DIEGO, a municipal corporation, hereinafter called "CITY," and BALBOA PARK CAROUSEL, hereinafter called "LESSEE."

SECTION 1: USES

1.01 Premises. CITY hereby leases to LESSEE and LESSEE leases from CITY all of that certain real property situated in the City of San Diego, County of San Diego, State of California, described in Section 9.01 herein and by this reference made part of this agreement. Said real property is hereinafter called the "premises" or "leased premises."

1.02 Uses. It is expressly agreed that the premises are leased to LESSEE solely and exclusively for the purposes of operation of a carousel amusement facility and kiddy airplane rides and the sale of carousel-motif souvenir items, such as clothing and novelties, and similar items in the area shown in Section 9.03 herein, and for such other related or incidental purposes as may be first approved in writing by the City Manager and for no other purpose whatsoever.

LESSEE covenants and agrees to use the premises throughout the term hereof for the above-specified purposes and to diligently conduct the business thereon to produce the most gross income that can be reasonably expected. Failure to use the premises for said purposes as set forth in the Schedule of Days and Hours of Operation, or the use thereof for purposes not expressly authorized herein, shall be grounds for termination by CITY. In case of a breakdown of the carousel, LESSEE shall give CITY notice of such breakdown within ten (10) days thereof. LESSEE may terminate the lease as of the date of the breakdown if LESSEE submits documentation to the reasonable satisfaction of the CITY that the carousel's repair is not feasible. If the carousel can be feasibly repaired, LESSEE shall, within thirty (30) days of breakdown, provide CITY with documentation regarding the nature of the breakdown and extent of repairs needed, including an estimated schedule for completing the repairs. If repairs take longer than thirty (30) days from the breakdown and LESSEE has complied with the above procedure and diligently attempted to have repairs made as quickly as possible, rent shall be waived for the duration of the breakdown, but not to exceed 180 days. The amount of the rent waiver shall be an amount equal to eighty percent (80%) of the rent paid for the same time period in the prior lease year.

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

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

1.05 Easements and Reservations.

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

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

- 1.06 Competent Management. Throughout the term of this Lease Agreement, LESSEE shall provide competent management of the leased premises 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 carousel amusement facility and related activities in a fiscally responsible manner.
- 1.07 Operation of Facilities. A regular schedule of days and hours of operation shall be established by LESSEE to best serve the public as set forth in Section 9.04, Schedule of Days & Hours of Operation, hereof. Any changes in this schedule shall be subject to the prior written approval of the City Manager or his authorized representative. LESSEE shall diligently and in a creditable manner furnish services to the public in conformity with all applicable rules and regulations of the City of San Diego.
- 1.08 Rates and Charges. All charges for services on said premises shall be in accordance with the schedule set forth in Section 9.03, Schedule of Rates & Charges, hereof. Any changes in said schedule are subject to prior written approval by the City Manager or his authorized representative. All fees and charges for merchandise shall be comparable to those of other Balboa Park lessees.

SECTION 2: TERM

- 2.01 Commencement. The term of this agreement shall be 25 years commencing January 1, 1990. "Lease year" as used in this lease shall mean the 12-month period commencing January 1 and ending December 31.
- 2.02 Holdover. Any holding over by LESSEE after expiration or termination shall not be considered as a renewal or extension of this lease. The occupancy of the premises after the expiration or termination of this agreement constitutes a month-to-month tenancy, and all other terms and conditions of this agreement shall continue in full force and effect; provided, however, CITY shall have the right to apply a reasonable increase in rent to bring the rent to fair market value and to terminate the holdover tenancy at will.
- 2.03 Surrender of Premises. At termination of this lease for any reason, LESSEE shall execute, acknowledge and deliver to CITY, within five (5) days after written CITY demand, a valid and recordable quitclaim deed covering all of the premises.

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

Upon termination of the lease, LESSEE shall have thirty (30) days to remove its property from the premises free of any rent charge. In the event it takes LESSEE longer than said thirty (30) days to remove its property, LESSEE shall pay rent for each day in excess of thirty (30) days at the rate of \$33 per day; in the event it takes LESSEE longer than ninety (90) days, the daily rent shall be increased to eighty percent (80%) of the daily rent paid in the prior lease year. The foregoing notwithstanding, LESSEE shall diligently proceed with its work in removing its property from the premises upon termination of the lease.

SECTION 3: RENT

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

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

3.02 Rent.

- a. Minimum Rent. The annual minimum rent established for the first five (5) years following the effective date of this lease is thirty-five thousand dollars (\$35,000).

If the annual minimum rent is greater than the annual percentage rent, then the annual minimum rent minus any percentage rent paid is required to be paid within 30 days of the anniversary of that lease year.

It is the intent of this provision that LESSEE shall pay the annual minimum rent as a guarantee against the percentage rent requirement and that the greater of the two

requirements, minimum or percentage, whichever occurs throughout the term shall prevail on an annual basis.

b. Minimum Rent Adjustment. Effective at the beginning of the first day of the sixth lease year of this lease and at the beginning of each two and one-half year period thereafter during the term, the annual minimum rent shall be eighty percent (80%) of the annual average of actual rents paid or accrued during the two (2) years preceding the adjustment date. It is recognized that such adjustments shall be calculated by CITY upon completion of payments due for the preceding rental period in order to determine the amount of the adjustment to be effective on the dates stated herein. Until such calculations are completed, LESSEE shall continue paying minimum rents at the prior rate. Any additional rent determined by the adjustment to be due for the year previously paid at the prior rate shall be paid to CITY within thirty (30) days following written notice (e.g., letter, invoice or other demand) or thirty (30) days following the anniversary of that lease year, whichever is later. In no event shall any such minimum rent adjustment result in a decrease in the minimum rent requirement in effect immediately prior to the adjustment date.

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

<u>Percentages</u>	<u>Business Activities</u>
Twenty-five Percent (25%)	Carousel and kiddy airplane rides admission.
Ten Percent (10%)	Carousel-motif souvenir items.

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

d. Percentage Rate Adjustment. At least four (4) months prior to the end of the tenth year of the term of this agreement and at least four (4) months prior to the end of each

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

- e. Percentage Rate Appraisal. In the event the parties do not agree upon the amount of adjustment to said percentage rent as provided for in Section 3.02d., the adjustment shall be determined by appraisal in the manner set forth herein. At least sixty (60) days prior to the end of the ten (10) year period then in effect, CITY and LESSEE shall each give the other, in writing, the name, address and telephone number of an arbitrator selected by it pursuant to this subparagraph and, at the same time, shall give its arbitrator a copy of this lease. CITY and LESSEE shall, immediately upon receipt of the information pertaining to the other party's arbitrator, give such information to its own arbitrator. The two (2) arbitrators so selected shall, at least forty-five (45) days prior to the end of the ten (10) year term then in effect, jointly select a third arbitrator and shall, concurrently with his or her selection, provide him or her with a copy of this lease and shall notify CITY and LESSEE of his or her name, address and telephone number. In the event a third arbitrator is not so selected for whatever reasons, the third arbitrator shall be selected by the then presiding judge of the main branch of the San Diego County Superior Court upon application of either CITY or LESSEE on an ex parte basis, after giving the other party at least forty-eight (48) hours notice of the date, time and place said application will be made.

To be eligible to act as an arbitrator under this Section, a person must have been actively and continuously engaged in the real estate brokerage business of leasing commercial and light industrial properties in San Diego County, California, for at least the immediately preceding five (5) years. No one who has been an employee of or agent of either party within said five (5) year period shall be eligible.

The arbitrators shall, at least twenty (20) days prior to the end of the ten (10) year period then in effect, determine the

percentage rents to be paid to CITY for the following lease period to the next adjustment, if any. In the event all arbitrators do not agree on what the percentage rents shall be, the agreement of any two (2) arbitrators shall be determinative. The third arbitrator selected shall give CITY and LESSEE written notice of the percentage rents immediately upon the making of the determination by the arbitrators.

In determining the percentage rents to be paid CITY, the arbitrators may consider whatever factors they deem relevant, but shall consider the premises as being owned by CITY in fee simple absolute, vacant and to be used for the purposes permitted by this lease. In no event, however, shall the percentage rents provided for in Section 3.02c. be reduced.

CITY and LESSEE shall each pay the fees and expenses of its own arbitrator, one-half of the fees and expenses of the third arbitrator and one-half of the court costs (but excluding attorneys' fees) for any court proceeding for the appointment of the third arbitrator.

Nothing herein shall preclude CITY and LESSEE from agreeing on a single arbitrator to determine what the fair percentage rents should be.

In the event the percentage rents are increased by more than ten percent (10%) as the result of such arbitration, LESSEE may terminate this lease by giving CITY ninety (90) days notice of its election to terminate; such notice shall be given within thirty (30) days after LESSEE'S receipt of the notice of the new percentage rent.

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

- a. 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.
- b. The percentage rental due CITY, computed and totaled.

- c. The accumulated total of all rents previously paid for the current lease year.
- d. Payment in the amount of the total percentage rent due CITY computed as described in this section.

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

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

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

3.05 Inspection of Records.

- a. Records. LESSEE shall, at all times during the lease term, keep or cause to be kept true and complete books, records and accounts of all financial transactions in the operation of all business activities conducted upon and financial

transactions resulting from the use of the premises. The records shall be supported by source documents such as sales slips, daily cash register tapes, purchase invoices or other documents as necessary to allow CITY to easily determine the total gross income.

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

In the event of admission charges or rentals, LESSEE shall issue serially numbered tickets for each such admission or rental and shall keep an adequate record of such tickets, as well as a record of unissued tickets.

All retail sales and charges may be recorded by a system other than cash registers or other comparable devices provided such system is approved by CITY.

- b. Financial Statements. Within sixty (60) days after the end of each lease year as previously established herein, LESSEE will, at its expense, submit to CITY a statement in which the total gross receipts and the corresponding amounts of rents paid CITY for the year are classified according to the categories of business established for any percentage rental and for any other business conducted on or from the premises. Said statement shall be signed by LESSEE or its authorized agent, attesting to the accuracy thereof, which shall be legally binding upon LESSEE.
- c. Right to Inspect. All LESSEE'S books of account, records and supporting documentation, as described under Section 3.05a. Records will be kept for at least five (5) years and made available to CITY in one location within the City of San Diego. Said books and records shall be maintained separate from all other accounts not relating to the leased premises. The CITY, at its discretion, shall have the right to inspect and audit the business of LESSEE, its agents, sublessees, concessionaires and licensees operating on and in connection with the premises as necessary and appropriate for CITY to determine the amounts of rent due CITY in compliance with the requirements of this lease.

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

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

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

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

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

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

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

- 3.07 Unauthorized Use Charge. LESSEE shall pay CITY twenty-five percent (25%) of the gross receipts for any service or use that is not permitted by this lease. This payment is subject to the due date provided in this lease for rental payments, and the provision for delinquent rent. The existence of the twenty-five percent (25%) charge in this clause and the payment of this charge or any part of it, does not constitute an authorization for a particular service or use, and does not waive any CITY rights to terminate a service or use or to default LESSEE for participating in or allowing any unauthorized use of the leased premises.

SECTION 4: ASSIGNMENT

- 4.01 Time is of Essence; Provisions Binding on Successors. Time is of the essence of all of the terms, covenants and conditions of this lease and, except as otherwise provided herein, all of the terms, covenants and conditions of this lease shall apply to, benefit and bind the successors and assigns of the respective parties, jointly and individually.
- 4.02 Assignment and Subletting. LESSEE shall not assign this lease, or any interest therein, and shall not sublet the premises or any part thereof, or any right or privilege appurtenant thereto, or suffer any other person, except employees, agents and guests of LESSEE, to use or occupy the premises or any part thereof, without the prior written consent of the City Manager in each instance. A consent to assignment, subletting, occupation or use

by any other person shall not be deemed to be a consent to any subsequent assignment, subletting, occupation or use by another person. Any such assignment or subletting without such consent shall be void, and shall, at the option of CITY, terminate this lease. This lease shall not, nor shall any interest therein, be assignable, as to the interest of LESSEE, by operation of law, without the written consent of the City Manager.

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

Approval of any assignment or sublease shall be conditioned upon the assignee or sublessee agreeing in writing that it will assume the rights and obligations thereby assigned or subleased and that it will keep and perform all covenants, conditions and provisions of this agreement which are applicable to the rights acquired.

Notwithstanding any other provision in the lease, CITY consents to the following types of transfers, which shall not be deemed to be "assignments" for purposes of this Paragraph 4.02 and Paragraph 4.04.

- a. The present LESSEE may transfer its interest in the lease to a corporation in which one or more of the present general partners (William A. Steen, Gary L. Folsom and John T. Folsom) or their family members owns over fifty percent (50%) of the outstanding voting shares of said corporation.
- b. Any transfer of an interest between any of the general partners in, or in the event of incorporation, shareholders of LESSEE and their spouses and/or children, whether resulting from death, divorce or estate planning purposes and any transfer of a partnership interest among said general partners, or in the event of incorporation of LESSEE, a transfer of stock among its shareholders, so long as the shareholders are William A. Steen, Gary L. Folsom or John T. Folsom, or their family members, as permitted above, shall not be an assignment and shall not require the consent of the CITY. For purposes of this section, a family trust created by a partner or shareholder in LESSEE for the benefit of this spouse and/or children shall be considered to be a transfer between that partner and his spouse and/or children.

LESSEE shall endeavor to notify the CITY within thirty (30) days of any such transfer.

- 4.03 Encumbrance. Subject to prior consent by CITY, which shall not be unreasonably withheld, LESSEE may encumber this lease and leasehold estate therein by deed of trust, mortgage, chattel mortgage or other security instrument to assure the payment of a promissory note or notes of LESSEE, upon the express condition that the net proceeds of such loan or loans be devoted exclusively to the purpose of improving the leased premises and/or to fund the transfer of an interest in the lease pursuant to Sub-paragraphs a. and b. of section 4.02. However, a reasonable portion of the loan proceeds may be disbursed for payment of incidental costs of construction, including but not limited to the following: off-site improvements for service of the premises; on-site improvements; escrow charges; premiums for hazard insurance, or other insurance or bonds required by CITY or lender; title insurance premiums; reasonable loan costs such as discounts, loan fees, interest and commissions; and architectural, engineering and attorney's fees and such other normal expenses incidental to such construction. Such a lender may be any domestic government regulated financial institution or, if another type of lender is contemplated, such type of lender as CITY may reasonably approve.

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

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

- 4.04 Additional Consideration to City. LESSEE acknowledges that CITY expends considerable sums for maintenance of Balboa Park adjacent to the leasehold. LESSEE further acknowledges that the expenditure of such funds enhances the value of the leasehold. LESSEE and CITY agree that the exact amount of such enhancement is impossible to ascertain. However, CITY desires to be reimbursed to a reasonable extent in consideration for the continued maintenance of the adjacent park. Therefore, LESSEE and CITY agree as follows:

- a. In the event of an assignment of this lease or a subletting of the majority portion of the leasehold, LESSEE shall pay to CITY an amount equal to:

6 month's rent during the first ten (10) years of the lease term;

4 months' rent during the second ten (10) years of the lease term; and

2 months' rent during the last five (5) years of the lease term.

The rent described above will be based on the annual average of actual rents paid or accrued during the two (2) years preceding the effective date of the assignment or subletting.

- b. In the event LESSEE obtains or refinances a loan which is secured in whole or in part by this lease, LESSEE shall pay CITY five percent (5%) of that portion of the loan proceeds attributable to the leasehold and used for purposes other than those permitted by the first paragraph of Paragraph 4.03 of this lease. The amount of loan proceeds attributable to the leasehold shall be determined by multiplying the loan proceeds by the percentage that the appraised value of the leasehold bears to the total appraised value of all security taken by the lender for said loan using the appraised values as reasonably determined by the lenders appraiser for purposes of the loan.

Prior to CITY'S consent to any assignment, majority subletting or leasehold financing, LESSEE shall deliver to CITY a written statement of all sums due and owing to CITY from LESSEE pursuant to the provisions of this paragraph together with an acknowledgment from the proposed assignee, sublessee or lender as to the amount due CITY. The sum due CITY shall be payable in full to CITY concurrent with the completion of the transaction. Any assignment, subletting or financing in violation of the terms and conditions of this paragraph shall be void.

LESSEE shall endeavor to notify CITY of the identity of any lender that has a security interest in LESSEE'S personal property used at the premises; such notice is to be given within thirty (30) days after the creation of such security interest.

4.05 Defaults and Remedies.

a. Default. In the event that:

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

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

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

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

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

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

beneficiary. LESSEE expressly agrees to assign all its interest in and to its leasehold estate to mortgagee or beneficiary in that event.

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

4.06 Eminent Domain. If all or part of the premises are taken through condemnation proceedings or under threat of condemnation by any public authority with the power of eminent domain, the interests of CITY and LESSEE (or beneficiary or mortgagee) will be as follows:

- a. In the event the entire premises are taken, this lease shall terminate on the date of the transfer of title or possession to the condemning authority, whichever first occurs.
- b. In the event of a partial taking, if, in the opinion of CITY, the remaining part of the premises is unsuitable for the lease operation, this lease shall terminate on the date of the transfer of title or possession to the condemning authority, whichever first occurs.

- c. In the event of a partial taking, if, in the opinion of CITY, the remainder of the premises is suitable for continued lease operation, this lease shall terminate in regard to the portion taken on the date of the transfer of title or possession to the condemning authority, whichever first occurs, but shall continue for the portion not taken. The minimum rent shall be equitably reduced to reflect the portion of the premises taken.
 - d. Award. All monies awarded in any such taking shall belong to CITY, whether such taking results in diminution in value of the leasehold or the fee or both; provided, however, LESSEE shall be entitled to any award attributable to the taking of or damages to LESSEE'S then remaining leasehold interest in installations or improvements of LESSEE. CITY shall have no liability to LESSEE for any award not provided by the condemning authority.
 - e. Transfer. CITY has the right to transfer CITY'S interests in the premises in lieu of condemnation to any authority entitled to exercise the power of eminent domain. If a transfer occurs, LESSEE shall retain whatever interest it may have in the fair market value of any improvements placed by it on the premises in accordance with this lease.
 - f. No Inverse Condemnation. The exercise of any CITY right under this lease shall not be interpreted as an exercise of the power of eminent domain and shall not impose any liability upon CITY for inverse condemnation.
- 4.07 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.

SECTION 5: INSURANCE RISKS/SECURITY

- 5.01 Indemnity. LESSEE shall at all times relieve, indemnify, protect, and save CITY and any and all of its boards, officers, agents, and employees harmless from any and all claims and demands, actions, proceedings, losses, liens, costs, judgments, civil fines, and penalties of any nature whatsoever in regard to or resulting from the use of the premises, including but not limited to expenses incurred in legal actions, death, injury, or damage that may be caused directly or indirectly by:
- a. any unsafe or defective condition in or on the premises of any nature whatsoever which may exist by reason of any act, omission, neglect, or any use or occupation of the premises;

- b. any operation, use, or occupation conducted on the premises;
- c. any act, omission, or negligence on the part of LESSEE, its employees, agents, sublessees, invitees, licensees; or
- d. any failure by LESSEE to comply or secure compliance with any of the lease terms or conditions.

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

- a. Public liability and property damage insurance in the amount of not less than ONE MILLION DOLLARS (\$1,000,000) Combined Single Limit Liability with an occurrence claims form. This policy shall cover all injury or damage, including death, suffered by any party or parties from acts or failures to act by CITY or LESSEE or by authorized representatives of CITY or LESSEE on or in connection with the use or operation of the premises.
- b. Fire, extended coverage and vandalism insurance. The LESSEE has the option to have its personal property covered by a fire insurance policy. If LESSEE does not obtain such a policy, each partner in LESSEE agrees to indemnify CITY for all expenses incurred by it in removing any such debris if LESSEE fails to do so. Any such removal shall be completed within thirty (30) days after the destruction occurs or within 30 days after LESSEE is able to reasonably access the property for purposes of such removal. If the debris is not removed within 30 days after the destruction occurs, then the CITY may have it removed and charge LESSEE for such removal. For purposes of this paragraph, debris removal shall include securing the premises in a reasonable manner so as to guard against personal injury and property damage as a result of the condition of the premises.
- c. Conditions. All required insurance policies will name CITY as an additional insured, protect CITY against any legal costs in defending claims, and will not terminate without sixty (60) days' prior written notice to CITY. All insurance companies must be satisfactory to CITY and licensed to do business in California. All policies will be in effect on or before the first day of the lease, except "course of construction fire insurance" shall be in force on commencement of all authorized construction on the premises, and full applicable fire insurance coverage shall be effective upon completion of each insurable improvement. A copy of the insurance certificate will remain on file with CITY during

the entire term of the lease. A copy of policy will be made available to the City upon demand. At least thirty (30) days prior to the expiration of each policy, LESSEE shall furnish a certificate(s) showing that a new or extended policy has been obtained which meets the terms of this lease.

- d. Modification. CITY, at its discretion, may require the revision of amounts and coverages at any time during the term by giving LESSEE one hundred and twenty (120) days' prior written notice. CITY'S requirements shall be designed to assure protection from and against the kind and extent of risk existing on the premises. LESSEE also agrees to obtain any additional insurance required by CITY for new improvements, in order to meet the requirements of this lease.
- e. Accident Reports. LESSEE shall prepare a report of any accident causing more than TEN THOUSAND DOLLARS (\$10,000) worth of property damage or any serious injury to persons on the premises. This report shall contain the names and addresses of the parties involved, a statement of the circumstances, the date and hour, the names and addresses any of any witnesses and other pertinent information. LESSEE shall keep accurate records available to CITY upon 30 days notice of all injuries on premises.
- f. Failure to Comply. If LESSEE fails or refuses to take out and maintain the required insurance, or fails to provide the proof of coverage, CITY has the right to obtain the insurance. LESSEE shall reimburse CITY for the premiums paid with interest at the maximum allowable legal rate then in effect in California. CITY shall give notice of the payment of premiums within thirty (30) days of payment stating the amount paid, names of the insurer(s) and rate of interest. Said reimbursement and interest shall be paid by LESSEE on the first (1st) day of the month following the notice of payment by CITY.

Notwithstanding the preceding provisions of this Subsection f., if LESSEE fails or refuses to take out or maintain insurance as required in this lease, or fails to provide the proof of insurance, CITY has the right to declare this lease in default without further notice to LESSEE and CITY shall be entitled to exercise all legal remedies in the event of such default.

- 5.03 Waste, Damage, or Destruction. LESSEE agrees to give notice to CITY of any fire or other damage that may occur on the leased premises within ten (10) days of such fire or damage. LESSEE agrees not to commit or suffer to be committed any waste or

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

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

SECTION 6: IMPROVEMENTS/ALTERATIONS/REPAIRS

- 6.01 Acceptance of Premises. By signing this lease, LESSEE represents and warrants that it has independently inspected the premises and made all tests, investigations, and observations necessary to satisfy itself of the condition of the premises. LESSEE agrees it is relying solely on such independent inspection, tests, investigations, and observations in making this lease. LESSEE further acknowledges that the premises are in the condition called for by this lease, that CITY has performed all work with respect to the premises, and that LESSEE does not hold CITY responsible for any defects in the premises.
- 6.02 Entry and Inspection. CITY reserves and shall always have the right to enter said premises for the purpose of viewing and ascertaining the condition of the same, or to protect its interests in the premises, or to inspect the operations conducted thereon. In the event that such entry or inspection by CITY discloses that said premises are not in a decent, safe, healthy, and sanitary condition, CITY shall have the right, after ten (10) days written notice to LESSEE, to have any necessary maintenance work done at the expense of LESSEE, and LESSEE hereby agrees to pay promptly any and all costs incurred by CITY in having such necessary maintenance work done, in order to keep said premises

in a decent, safe, healthy, and sanitary condition. Further, if at any time CITY determines that said premises are not in a decent, safe, healthy, and sanitary condition, CITY may at its sole option, without additional notice, require LESSEE to file with CITY a faithful performance bond to assure prompt correction of any condition which is not decent, safe, healthy, and sanitary. Said bond shall be in an amount adequate in the opinion of CITY to correct the said unsatisfactory condition. LESSEE shall pay the cost of said bond. The rights reserved in this section shall not create any obligations on CITY or increase obligations elsewhere in this lease imposed on CITY.

- 6.03 Maintenance. LESSEE agrees to assume full responsibility and cost for the operation and maintenance of the premises throughout the 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 in compliance with all applicable laws. LESSEE agrees to paint the structures on the premises at least every ten years. Also, LESSEE shall obtain prior written approval from the City Manager or his representative for the color(s) to be used to paint the structures.
- 6.04 Improvements/Alterations. No improvements, structures, or installations shall be constructed on the premises, and the premises may not be altered by LESSEE without prior written approval by the City Manager. Further, LESSEE agrees that major structural or architectural design alterations to approved improvements, structures, or installations may not be made on the premises without prior written approval by the City Manager and that such approval shall not be unreasonably withheld. This provision shall not relieve LESSEE of any obligation under this lease to maintain the premises in a decent, safe, healthy, and sanitary condition, including structural repair and restoration of damaged or worn improvements. CITY shall not be obligated by this lease to make or assume any expense for any improvements or alterations.
- 6.05 Utilities. LESSEE agrees to order, obtain, and pay for all utilities and service and installation charges in connection with the development and operation of the leased premises. All utilities will be installed underground.
- 6.06 Construction Bond. Whenever there is any construction to be performed on the premises, LESSEE shall deposit with CITY, prior to commencement of said construction, a faithful performance bond in the amount of 100 percent of the estimated construction cost of the work to be performed. The bond may be in cash or may be a corporate surety bond or other security satisfactory to CITY.

The bond shall insure that the construction commenced by LESSEE shall be completed in accordance with the plans approved by CITY or, at the option of CITY, that the uncompleted construction shall be removed and the premises restored to a condition satisfactory to CITY. The bond or cash will be held in trust by CITY for the purpose specified above or at CITY'S option it may be placed in an escrow or other trust approved by CITY.

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

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

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

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

- 6.09 Signs. LESSEE agrees not to erect or display any new type of banners, pennants, flags, posters, signs, decorations, marquees, awnings, or similar devices or advertising without the prior written consent of CITY. If any such unauthorized item is found on the premises and notice to remove the item is given LESSEE by CITY, LESSEE agrees to remove the item at its expense within 48 hours when carousel is operating every day and seven days when carousel is not operating every day, or CITY may thereupon remove the item at LESSEE'S cost.

6.10 Ownership of Improvements and Personal Property.

- a. LESSEE-owned machines, appliances, equipment, and other items of personal property listed in Section 9.02 shall be removed by LESSEE by the date of the expiration or termination of this lease. Any said items which LESSEE fails to remove from the premises within one hundred eighty (180) days of lease termination will be considered abandoned and become CITY'S property free of all claims and liens, or CITY may, at its option, remove said items at LESSEE'S expense.
- b. If any removal of such personal property by LESSEE results in damage to the remaining improvements on the premises, LESSEE agrees to repair all such damage.
- c. Any necessary removal by either CITY or LESSEE which takes place beyond said expiration or termination hereof shall require LESSEE to pay rent to CITY at the rate in effect immediately prior to said expiration or termination.
- d. Upon termination or expiration of the lease, CITY shall have the right to make an offer to LESSEE to purchase LESSEE'S personal property then being used to operate the carousel business. If the lease is terminated by LESSEE or CITY (for cause), CITY shall have thirty (30) days from the notice of termination in which to give LESSEE written notice that CITY intends to make an offer to purchase all of said personal property. If CITY intends to make such an offer to LESSEE upon expiration of the lease, it shall give written notice of such intent not more than one hundred fifty (150) days nor less than one hundred twenty (120) days prior to the expiration of the lease. If CITY gives such notice, it shall have ninety (90) days from the date such notice is given in which to submit said offer to LESSEE. CITY'S offer shall be on behalf of a nonprofit foundation created by or on behalf of CITY to acquire and operate the carousel.

LESSEE agrees not to dispose of said personal property so long as CITY has any rights under this subparagraph. Without LESSEE'S written consent, CITY'S rights under this subparagraph are not assignable to any person or entity other than the nonprofit foundation as described above.

- 6.11 Unavoidable Delay. If the performance of any act required of CITY or LESSEE is directly prevented or delayed by reason of strikes, lockouts, labor disputes, unusual governmental delays, acts of God, fire, floods, epidemics, freight embargoes, or other causes beyond the reasonable control of the party required to perform an act, said party shall be excused from performing that

act for the period equal to the period of the prevention or delay. Provided, however, this provision shall not apply to obligations to pay rental as required pursuant to this lease. In the event LESSEE or CITY claims the existence of such a delay, the party claiming the delay shall notify the other party in writing of such fact within ten (10) days after the beginning of any such claimed delay.

- 6.12 Hazardous/Toxic Waste. LESSEE will not allow the installation or release of hazardous substances in, on, or 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 attached hereto as Attachment 9.09 and by this reference incorporated herein.

In the event of any release of a hazardous substance, LESSEE shall be responsible for all costs of remediation and removal of such substances in accordance with all applicable rules and regulations of governmental authorities.

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

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

SECTION 7: GENERAL PROVISIONS

7.01 Notices

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

Balboa Park Carousel
8580 La Mesa Boulevard
Suite 102
La Mesa, CA 92041
Attn.: William A. Steen

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

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

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

- b. Any party entitled or required to receive notice under this lease may by like notice designate a different address to which notices shall be sent.
- 7.02 Compliance with Law. LESSEE shall at all times in the construction, maintenance, occupancy, and operation of the premises comply with all applicable laws, statutes, ordinances, and regulations of CITY, County, State, and Federal Governments, at LESSEE'S sole cost and expense. In addition, LESSEE shall comply with any and all notices issued by the City Manager or his authorized representative under the authority of any such law, statute, ordinance, or regulation.
- 7.03 CITY Approval. The approval or consent of CITY, wherever required in this lease, shall mean the written approval or consent of the City Manager unless otherwise specified, without need for further resolution by the City Council.
- 7.04 Nondiscrimination. LESSEE agrees not to discriminate in any manner against any person or persons on account of race, marital status, sex, religious creed, color, ancestry, national origin, age, or physical handicap in LESSEE'S use of the premises, including, but not limited to the providing of goods, services, facilities, privileges, advantages, and accommodations, and the obtaining and holding of employment.
- 7.05 Equal Opportunity. LESSEE agrees to abide by CITY'S Equal Opportunity Program for LESSEES as it exists or is amended to the extent that the program is applicable to this lease. A copy of the program effective as of the date of this lease is on file in the City Clerk's Office and by this reference is part hereof. The program's goal is the attainment of employment for minorities and women in all areas of employment, in a total percentage as established by CITY for its Equal Opportunity Program each year.
- 7.06 Partial Invalidity. If any term, covenant, condition, or provision of this lease is found invalid, void, or unenforceable by a court of competent jurisdiction, the remaining provisions will remain in full force and effect.
- 7.07 Legal Fees. In the event of any litigation regarding this lease, the prevailing party shall be entitled to an award of reasonable legal costs, including court and attorney's fees.
- 7.08 Number and Gender. Words of any gender used in this lease shall include any other gender, and words in the singular number shall include the plural, when the tense requires.

7.09 Captions. The Lease Outline, section headings, and captions for various articles and paragraphs shall not be held to define, limit, augment, or describe the scope, content, or intent of any or all parts of this lease. The numbers of the paragraphs and pages of this lease may not be consecutive. Such lack of consecutive numbers is intentional and shall have no effect on the enforceability of this lease.

7.10 Entire Understanding. This lease contains the entire understanding of the parties. LESSEE, by signing this agreement, agrees that there is no other written or oral understanding between the parties with respect to the leased premises. Each party has relied on its own examination of the premises, advice from its own attorneys, and the warranties, representations, and covenants of the lease itself. Each of the parties in this lease agrees that no other party, agent, or attorney of any other party has made any promise, representation, or warranty whatsoever which is not contained in this lease.

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

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

7.12 LESSEE'S Right to Terminate. If LESSEE reasonably determines that it is no longer feasible to operate the carousel, it shall have the right to terminate this lease by giving CITY at least sixty (60) days notice of the termination date. Such determination may be based upon any or all of the following conditions:

- a. LESSEE is incurring or is likely to incur decreased revenues from and/or increased expenses due to hazardous or unsafe conditions in and around Balboa Park which have or may result in increased risk or harm to LESSEE'S employees, agents, patrons, and property; or

- b. Changes are made to pedestrian and vehicular access, and related parking, to the leased premises; or
- c. Governmental regulations that adversely affect the use of Balboa Park are implemented.

In the event LESSEE determines that any such condition(s) exists to the extent that further operation of the carousel is no longer feasible, it shall give written notice to CITY and CITY shall have thirty (30) days to eliminate such condition(s). Should such condition(s) not be so eliminated, LESSEE may proceed to give CITY the notice of termination as provided for above.

- 7.13 Standard of Employees. LESSEE and its employees shall at all times conduct themselves and the operations on the leased area in a creditable manner. LESSEE will train all employees in their duties and shall require all employees to maintain high standards of courtesy, service, cleanliness and appearance.
- 7.14 Supersedure. It is mutually agreed that this lease, upon execution, supersedes and annuls that certain lease executed on the 18th day of June, 1968, with Clarence E. Wilken and Arthur J. Long (Document 724601), first assignment to Virginia E. Long dated December 11, 1973 (Document 746003), assignment to lessee, herein, dated June 29, 1977 (Document 760045) and first amendment dated June 29, 1977 (Document 760041), which are hereafter void and of no effect except as to any rentals and fees which may have accrued or any rights and remedies accrued or granted to CITY under such agreement.
- 7.15 Relocation Payments. LESSEE understands and agrees that it shall not be entitled to any relocation payment whatsoever upon termination of this lease.

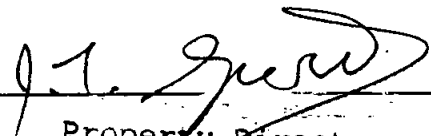
SECTION 8: SIGNATURES

8.01 Signature Page

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

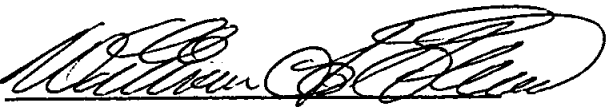
THE CITY OF SAN DIEGO

Date MAR 19 1990

By 
Property Director

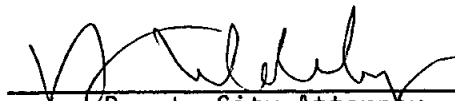
LESSEE: BALBOA PARK CAROUSEL

Date 1-30-90

By 
Managing Partner

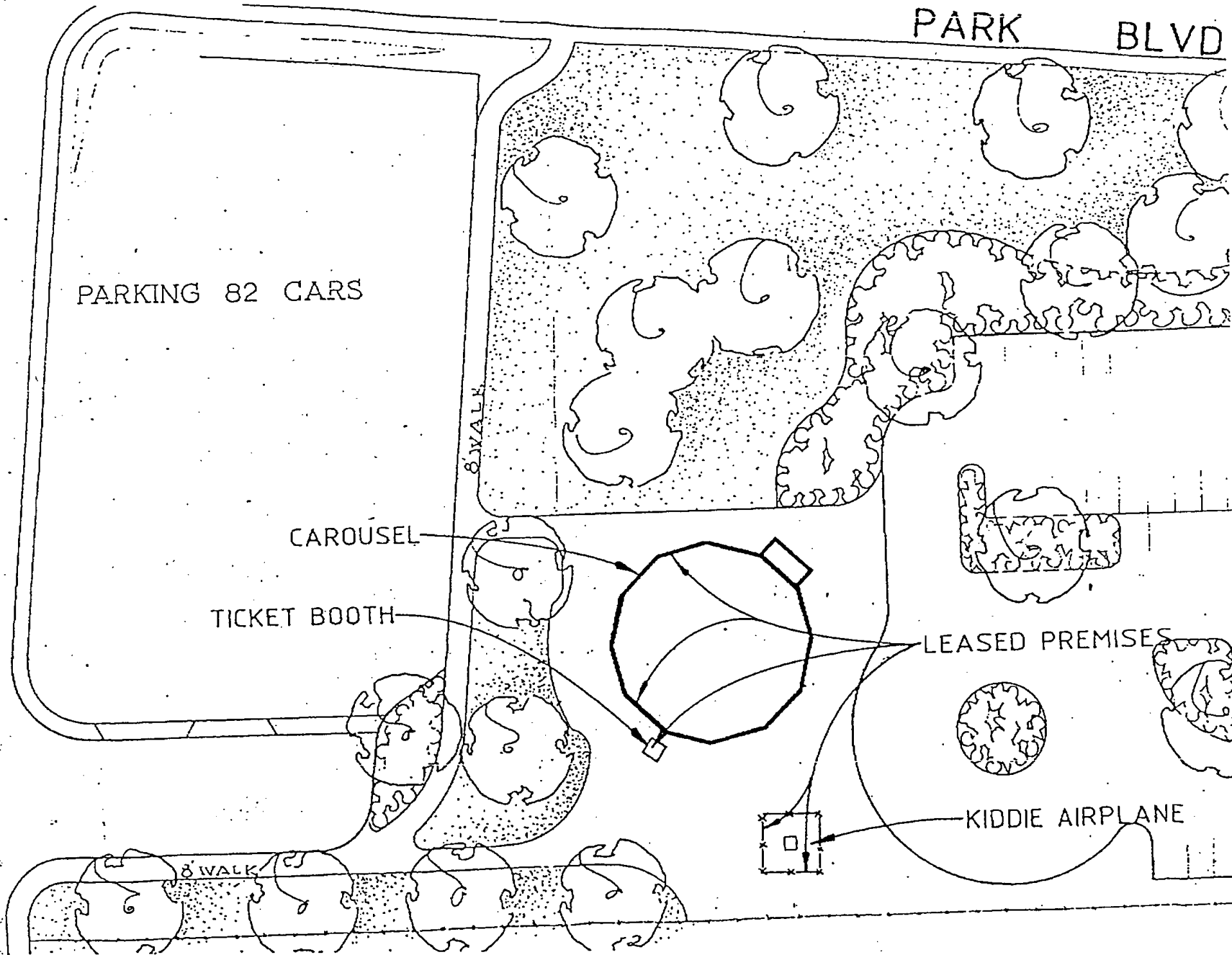
APPROVED as to form and legality this 20 day of April, 1990.

JOHN W. WITT, City Attorney

By 
Deputy City Attorney

RJC:st(61-9)
12-18-89

ZOO PLACE



9.02 Description and Listing of LESSEE-owned Improvements.

- a. Kiddy airplane ride including all fencing, mechanical and electrical systems;
- b. Merry-go-round building and ticket booth;
- c. Merry-go-round assembly, animals, mechanisms, mechanical and electrical systems, organ, sound system, tools, furniture and fixtures; and
- d. Flags, banners, signs and all other personal property.

9.03 Schedule of Rates & Charges. \$1.00 per ride for carousel and kiddy airplane rides.

9.04 Schedule of Days & Hours of Operations. The Balboa Park Carousel is open in general every day that the City of San Diego Unified School District is closed, except for Thanksgiving Day and Christmas Day.

In the winter, the Balboa Park Carousel is open Saturdays, Sundays and holidays from approximately September 15 through June 15. The winter hours are 11 a.m. to 5:30 p.m. Holidays include New Years Day, President's Day, Martin Luther King Day, Easter Week, Easter Sunday, Memorial Day, July 4th, Veterans Day, Labor Day, the Friday after Thanksgiving and Christmas vacation.

In the summer, the Balboa Park Carousel is open 7 days per week from approximately June 15 through September 15. The summer hours are 11 a.m. to 6 p.m.

These hours may vary by approximately 30 minutes due to the number of patrons or weather conditions. The Balboa Park Carousel closes when it rains. Due to the mechanical sensitivity of the merry-go-round that may result in breakdowns, the Balboa Park Carousel may have to occasionally close at the discretion of the Balboa Park Carousel Management.

(R-90-1348).

RESOLUTION NUMBER R- 275324

ADOPTED ON MAR 19 1990

BE IT RESOLVED, by the Council of The City of San Diego, that the City Manager is hereby authorized and empowered to execute, for and on behalf of The City of San Diego, a 25-year lease agreement with BALBOA PARK CAROUSEL, a partnership consisting of William A. Steen, Gary L. Folsom and John T. Folsom, for the carousel located south of the San Diego Zoo parking lot in Balboa Park, at an initial rent of 25 percent of gross revenue versus a minimum of \$35,000, under the terms and conditions set forth in that lease agreement on file in the office of the City Clerk as Document No. RR- 275324.

APPROVED: JOHN W. WITT, City Attorney

By 
Harold O. Valderhaug
Deputy City Attorney

HOV:ps
02/16/90
Or.Dept:Prop.
Job:220230
R-90-1348
Form=r.none

Passed and adopted the Council of The City of San Diego on

MAR 19 1990 by the following vote:

YEAS: Wolfsheimer, Roberts, Hartley, Pratt, Bernhardt, Henderson, McCarty,
Filner, O'Connor.

NAYS: None.

NOT PRESENT: None.

AUTHENTICATED BY:

MAUREEN O'CONNOR

Mayor of The City of San Diego, California

CHARLES G. ABDELNOUR

City Clerk of The City of San Diego, California

(SEAL)

By: JUNE A. BLACKNELL, Deputy

I HEREBY CERTIFY that the above and foregoing is a full, true
and correct copy of RESOLUTION NO. R- 275324, passed
and adopted by the Council of The City of San Diego, California
on MAR 19 1990.

CHARLES G. ABDELNOUR

City Clerk of The City of San Diego, California

(SEAL)

By: June A. Blacknell, Deputy

*Property 51A
Barone/Collins*

(R-90-1348)

RESOLUTION NUMBER R- 275324

ADOPTED ON MAR 19 1990

BE IT RESOLVED, by the Council of The City of San Diego, that the City Manager is hereby authorized and empowered to execute, for and on behalf of The City of San Diego, a 25-year lease agreement with BALBOA PARK CAROUSEL, a partnership consisting of William A. Steen, Gary L. Folsom and John T. Folsom, for the carousel located south of the San Diego Zoo parking lot in Balboa Park, at an initial rent of 25 percent of gross revenue versus a minimum of \$35,000, under the terms and conditions set forth in that lease agreement on file in the office of the City Clerk as Document No. RR- 275324.

APPROVED: JOHN W. WITT, City Attorney

By


Harold O. Valderhaug
Deputy City Attorney

HOV:ps
02/16/90
Or.Dept:Prop.
Job:220230
R-90-1348
Form=r.none