



Real Estate Assets Department  
SDC003

---

JMR - Chilled Water LLC  
SDA-F - 478 - A00

Document Type

LEGAL DOCUMENTS



Sub - Category

\*AGREEMENTS\*



44

ORIGINAL

## CHILLED WATER SYSTEM FRANCHISE AGREEMENT

This CHILLED WATER SYSTEM FRANCHISE AGREEMENT [Agreement] is entered into by and between the CITY OF SAN DIEGO, a municipal corporation [the City], and JMIR-CHILLED WATER LLC, a Delaware limited liability company [Grantee] (each individually a "Party", and collectively "Parties") with reference to the following:

### RECITALS

A. WHEREAS, Grantee desires to obtain a non-exclusive Franchise to construct, maintain and use a Chilled Water System in the Ballpark District.

B. WHEREAS, the City desires to grant such a Franchise, subject to the terms and conditions set forth in this Agreement.

### AGREEMENT

NOW THEREFORE, in consideration of the facts and mutual obligations of the Parties as herein expressed, the City and Grantee agree as follows:

#### Section 1. DEFINITIONS

Whenever in this Agreement the following capitalized words or phrases are used, they have the respective meanings assigned to them in the following definitions:

(a) "Ballpark District" means that certain portion of the City as so designated by the San Diego City Council on February 9, 2004 in Ordinance Number 19262, and set forth in San Diego Municipal Code section 59.0102.

(b) "Chilled Water Facility" means that certain facility, as it may be modified, improved or replaced from time to time, for the manufacture of temperature controlled water and circulation of water for, among other purposes, heat transfer purposes located

RECEIVED  
CITY CLERK'S OFFICE  
SAN DIEGO, CALIF.  
06 JUN -8 PM 4:30

on that certain real property in the City of San Diego more particularly described as Parcel 9 of Parcel Map No. 18855 filed in the office of the County Recorder of San Diego County on December 7, 2001.

(c) "Chilled Water System" means pipes, pipelines, mains, services, traps, vents, vaults, manholes, meters, gauges, regulators, relief valves, valves, conduits, appliances, attachments, appurtenances and without limitation to the foregoing, any other property located in, upon, along, across, under or over Streets, and used or useful in transmitting or distributing temperature controlled water.

(d) "Effective Date" means the first date by which the following two conditions have been met: (i) this Agreement has been fully executed by the Parties, and (ii) the ordinance approving this Agreement as adopted by the San Diego City Council becomes effective. The Effective Date is JUN 08 2006.

(e) "Exempt Gross Receipts" means all gross operating revenues received by Grantee from the sale of the Service to Exempt Projects within the Ballpark District, to the extent that said gross operating revenues are derived from Service which requires the use by Grantee of the Chilled Water System under the terms and conditions of the Franchise granted herein.

(f) "Exempt Projects" means: (a) projects or properties which (i) Padres, JMI Realty, or a Padres/JMI Realty Affiliate controls, or in which Padres, JMI Realty or any Padres/JMI Realty Affiliate has a substantial ownership interest (constituting an ownership interest of twenty-five percent (25%) or more), and (ii) are developed as part of Phase 1 (as defined in that certain Memorandum of Understanding approved by the voters of the City on November 3, 1998 and executed among the City, the

Redevelopment Agency of the City [the Agency], Centre City Development Corporation [CCDC] and the Padres, as amended [the MOU]), or which obtain a development and disposition agreement or other development permit prior to the Opening Date (as defined in the MOU) and are diligently completed thereafter pursuant to such development and disposition agreement or development permit; (b) the residential condominiums constructed as part of a hotel, condominium and related improvements developed on Lots 2 and 3 of the Metropolitan Project in the City of San Diego, County of San Diego, State of California, according to Map thereof No. 14378 filed in the Office of the County Recorder of San Diego County on April 26, 2002, as it may be modified, improved or replaced from time to time; and (c) any facilities owned or controlled by the City, the Agency, CCDC (including the ballpark and related improvements to be developed by the City and the Padres pursuant to the MOU) or The Metropolitan Transit Development Board.

(g) “Franchise” means the nonexclusive right to use the Streets for the purpose of constructing, maintaining and operating a Chilled Water System for the provision of the Service in the Ballpark District.

(h) “Grantee” means JMIR-Chilled Water LLC, its successors or assigns.

(i) “JMI Realty” means JMI Realty, Inc., a Delaware corporation, or its successors.

(j) “Non-Exempt Gross Receipts” means Total Gross Receipts less Exempt Gross Receipts.

(k) “Non-Exempt Transfer” means a Transfer of the Chilled Water Facility to a Person that is not a Padres/JMI Realty Affiliate.

- (l) "Padres" means Padres L.P., a Delaware limited partnership, or its successors.
- (m) "Padres/JMI Realty Affiliate" means any entity controlling, controlled by or under common control with Padres or JMI Realty.
- (n) "Person" means any natural person or any association, firm, partnership, association, joint venture, joint stock company, trust, corporation, limited liability company, or any other governmental or non-governmental, legally recognized entity.
- (o) "Service" means the provision of temperature controlled water to customers through the use of the Chilled Water System.
- (p) "Streets" means the public freeways, highways, streets, ways, alleys, any and all other dedicated rights of way, and places as the same now or may hereafter exist within the Ballpark District.
- (q) "Total Gross Receipts" means all gross operating revenues received by Grantee from the sale of the Service with points of service within the Ballpark District, to the extent that said gross operating revenues are derived from Service which requires the use by Grantee of the Chilled Water System under the terms and conditions of the Franchise granted herein.
- (r) "Transfer" means a transfer of ownership or control of the Chilled Water Facility to any Person.

In addition, the word "day" or "days" means a calendar day or days unless otherwise indicated.

## **Section 2. GRANT OF FRANCHISE**

This Agreement provides Grantee a nonexclusive right to use the Streets for the purpose of constructing, maintaining and operating a Chilled Water System for the provision of

the Service in the Ballpark District. The grant of this Franchise is subject to the faithful performance and observance by the Grantee of all of the terms and conditions described in and incorporated into this Agreement.

Any provision of services by Grantee not authorized by this Agreement must be approved by the City to the extent required by federal, state, or local law.

### **Section 3. ACCEPTANCE OF FRANCHISE**

Grantee accepts and agrees to all the provisions of this Agreement (including every law, statute, ordinance, rule, regulation, and order incorporated into this Agreement) and the obligations imposed upon Grantee. Grantee shall have no recourse whatsoever against the City for any loss, cost, expense, or damage arising out of any provision or requirement of this Agreement and its lawful enforcement by the City.

### **Section 4. RESERVATION OF RIGHTS**

In addition to any rights specifically reserved to the City by this Agreement, the City reserves to itself every right and power vested in the City by applicable law, as well as the Charter of the City and any ordinance adopted by the City Council, but only to the extent the exercise of such rights shall be consistent with the City's obligations hereunder.

The rights reserved to the City and Grantee under this Agreement are in addition to all other rights held by the City and Grantee, whether authorized by the San Diego City Charter or Municipal Code, or any other applicable federal, state, or local law, ordinance, rule or regulation. No action, proceeding or exercise of a right by the City or Grantee shall affect any other right which may be held by the City or Grantee.

Neither the grant of this Franchise nor of any other Franchise, nor any provisions contained therein, shall constitute a waiver or bar by the City to the lawful exercise of any governmental right or power. This Agreement does not relieve Grantee of any applicable

requirement or provision of the San Diego City Charter or Municipal Code; of any federal or state law; or of any federal, state, or City rule, regulation, or specification, including, but not limited to, any requirement relating to work in City streets, including, but not limited to, excavation permits, or the use, removal or relocation of property in City streets, except as specifically prescribed herein.

The City reserves the right, and Grantee acknowledges and accepts the City's right to adopt any additional rules, regulations, terms, conditions authorized or permitted by state or federal law as the City Council finds necessary in the lawful exercise of the City's constitutional powers, the City's police powers to protect the public health, safety or welfare, the City's powers of taxation, and the City's powers of eminent domain. Neither the granting of any Franchise by the City nor any provision of this Agreement shall constitute a waiver or bar to the lawful exercise of any governmental right or power, including those rights and powers vested in the City. The Parties agree, however, that this Section 4 is not intended to limit the Parties' obligations under this Agreement and under applicable law related to the abrogation of contracts by the City or other governmental entities.

#### **Section 5. SERVICE AREA.**

The Franchise permits Grantee to provide Service to all areas within the Ballpark District only.

#### **Section 6. TERM**

The Franchise, subject to each and all of the terms and conditions contained in this Agreement, hereby is granted to Grantee for the term of fifty (50) years from and after the Effective Date [Term]; provided that if the Chilled Water Facility or the Chilled Water System ceases to operate and is abandoned for a period that exceeds one (1) year, the City shall have the

right to give notice to Grantee that the City intends to terminate this Agreement. If the Chilled Water Facility or Chilled Water System is not operating within thirty (30) Days after Grantee's receipt of notice of the City's intent to terminate this Agreement pursuant to the preceding sentence, the City shall have the right to terminate this Agreement by delivery of written notice to Grantee.

#### **Section 7. FRANCHISE FEE**

(a) The rights and privileges herein granted are upon the express condition that for the first thirty-five (35) years of this Franchise Grantee, as consideration therefor and as compensation for the use of the Streets as herein authorized and permitted, shall pay each year to the City in lawful money of the United States a sum equal to five percent (5%) of Non-Exempt Gross Receipts for as long as there is no Non-Exempt Transfer [Franchise Fee]. If a Non-Exempt Transfer occurs, from and after the date of the Non-Exempt Transfer the Franchise Fee shall be five percent (5%) of Total Gross Receipts.

(b) For the last fifteen (15) years of the term of this Franchise, Grantee, as consideration and compensation for the rights and privileges herein granted and for the use of the streets of the City as herein authorized and permitted, shall pay each year to the City in lawful money of the United States a sum equal to an amount to be determined as set forth below of Grantee's Non-Exempt Gross Receipts during the preceding calendar year, or a fractional year, for the remainder of the term of this Franchise by the dates, in the manner and on the conditions as set forth below.

(c) Determination of the amount to be paid as set forth in Section 7(b) above shall be made by good faith negotiation between the City and Grantee commencing not less than six (6) months prior to the expiration of the first thirty-five (35) year period. In

the event that at the conclusion of the first thirty-five (35) year period said good faith negotiation does not result in a determination of the amount to be paid by Grantee during the last fifteen (15) years (or 14 years, 6 months, as the case may be) of the term of this Franchise, then this question (and no other) shall be submitted to binding arbitration as hereinafter set forth; provided however that no later than fifteen (15) days prior to the end of the first thirty-five (35) year period the parties may mutually agree to extend the time for said "good faith" negotiation for an additional six (6) months if they so desire, during which time Grantee shall continue to pay a sum equal to five percent (5%) of Grantee's Non-Exempt Gross Receipts as consideration for the rights and privileges herein granted. Unless the City and Grantee mutually agree in writing to a modification prior to the conclusion of the first thirty-five (35) year period (or at the conclusion of the additional six (6) month period as provided for above) then the determination of the number of arbitrators, the time and mode of their selection, and the rules of practice and procedure to be followed shall be as set forth herein.

(d) Within thirty (30) days after the end of the first thirty-five (35) year period or within thirty (30) days after the six (6) month extension provided for above, as the case may be, Grantee and the City shall each appoint a person to serve as an arbitrator and shall give written notice to the other party of such appointment.

(e) The two persons so appointed shall then agree upon and secure a third arbitrator. If the third arbitrator should not be secured within thirty (30) days from the selection of the arbitrators by Grantee and the City respectively, then upon application in writing by either the City or Grantee to the Chief Justice of the California State Supreme Court, said Chief Justice shall be empowered to appoint a third arbitrator. No person shall

be eligible for appointment by said Chief Justice who is an officer or employee of the City or Grantee, or a shareholder of Grantee.

(f) The arbitrators so appointed shall hear evidence submitted by both the City and Grantee and may call for additional information, which additional information the City or Grantee shall furnish to the extent feasible. An award, decision or determination in writing and signed by a majority of the arbitrators shall be made within sixty (60) days after the selection of the third arbitrator and shall be conclusive with respect to the issue submitted and shall be binding upon both the City and Grantee.

(g) Except as otherwise provided in this section, the arbitration shall be governed by the rules of practice and procedure of the American Arbitration Association from time to time in force, except that, if such rules and practice as herein modified shall conflict with the California Code of Civil Procedure or any other provision of California law then in force, such California rules and provisions shall govern. This submission and agreement to arbitrate shall be specifically enforceable. The award of the arbitrators or a majority of them upon the question submitted to them hereunder shall be final and binding upon the parties to the extent and in the manner provided by the California Code of Civil Procedure.

(h) Each party shall bear the fee and personal expenses of the arbitrator appointed by it together with the fees and expenses of its own counsel and of its own witnesses. All other costs and expenses of the arbitration, including the cost and expense incurred by reason of selection of the third arbitrator, as hereinabove provided, shall be borne equally by this City and Grantee.

**Section 8. PAYMENT OF FRANCHISE FEE**

(a) On or before the 15<sup>th</sup> Day of February of each calendar year during the term of this Franchise, and forty-five (45) days after the expiration of the Term, Grantee shall file with the San Diego City Clerk an original, and with the San Diego City Auditor and Comptroller one copy, of a statement, certified by an executive officer of Grantee, showing in such form and detail as may reasonably be required by the City the facts material to determining the Franchise Fee for the preceding calendar year or, if applicable, fractional calendar year [Franchise Fee Statement]. The Franchise Fee Statement shall include the calculation of Non-Exempt Gross Receipts for the preceding calendar year, or, if applicable, fractional calendar year. In the event of a Non-Exempt Transfer, the Franchise Fee Statement shall include the calculation of Total Gross Receipts for the preceding calendar year, or, if applicable, fractional calendar year.

(b) For the first calendar year, or, if applicable, fractional calendar year of this Agreement [Initial Year], within ten (10) days after the filing of the Franchise Fee Statement, Grantee shall pay to the City Treasurer the Franchise Fee for the Initial Year as determined on the basis of the data set forth in said statement.

(c) For each succeeding calendar year in the Term, it is contemplated and understood that Grantee will make estimated quarterly payments to the City based on the Franchise Fee for the preceding calendar year, and, if required, an adjustment shall be made as more fully set forth in Section 8(e) hereof. For the calendar year following the Initial Year, the quarterly payments shall be based upon the Franchise Fee for a partial Initial Year extrapolated to a full calendar year [Extrapolated Franchise Fee]. The methodology for the payment of the Franchise Fee is set forth in Section 8(d).

(d) Within ten (10) days after the filing of the Franchise Fee Statement, Grantee shall pay to the City Treasurer an amount equal to one-fourth (1/4) of the Franchise Fee for the preceding calendar year (or, if appropriate, the Extrapolated Franchise Fee) based upon the data set forth in the Franchise Fee Statement [Estimated Quarterly Payment]. Thereafter, no later than on each of the 15<sup>th</sup> day of May, the 15<sup>th</sup> day of August and the 15<sup>th</sup> day of November of each calendar year during the Term, Grantee shall pay to the City Treasurer the Estimated Quarterly Payment. If on the day Grantee makes its last Estimated Quarterly Payment for a calendar year to the City, Grantee reasonably determines that making such Estimated Quarterly Payment would result in Grantee overpaying the City for the Franchise Fee for such calendar year, the amount of Grantee's last Estimated Quarterly Payment may be reduced by such amount as may reasonably cause the total of the Estimated Quarterly Payments for the calendar year to approximate the actual Franchise Fee for that calendar year.

(e) The parties recognize that this method of paying the Franchise Fee will require a yearly adjustment to reconcile the actual amounts due to the City with the quarterly remittances of the Grantee. Such reconciliation shall be by the following method: if the sum of the Estimated Quarterly Payments for a calendar year [Actual Payment] is less than the Franchise Fee required to be paid for that calendar year (as determined by the data set forth in the Franchise Fee Statement for that calendar year) [Annual Amount Due], then, within ten (10) days after the filing of the Franchise Fee Statement for that calendar year, Grantee shall pay to the City Treasurer a sum equal to the difference between the Actual Payment and the Annual Amount Due. If the Actual Payment exceeds the Annual Amount Due, then the City shall, at its option, either

(i) within ten (10) days after the filing of the Franchise Fee Statement for that calendar year pay to Grantee the difference between the Annual Amount Due and the Actual Payment as a refund from the City, or (ii) apply as a credit to succeeding Estimated Quarterly Payments the amount of the difference between the Annual Amount Due and the Actual Payment; provided that if, at any time, the City owes Grantee an amount in excess of two hundred fifty thousand dollars (\$250,000.00), the City shall pay to Grantee within ten (10) days the amount that the City owes Grantee in excess of two hundred fifty thousand dollars (\$250,000.00). If the City owes any amount to Grantee under this section as of the termination of this Agreement, the City shall pay such amount to Grantee upon such termination.

(f) The City Auditor and Comptroller, or other qualified person designated by the City, at any reasonable time during business hours, may make examination at Grantee's office or offices, of its books and records, germane to and for the purpose of verifying the data set forth in the Franchise Fee Statement. Such books and records shall be retained for a period of not less than three years following the City's receipt of the related Franchise Fee under this Agreement. To the extent permitted by law, the City agrees to treat as confidential the information disclosed by Grantee.

(g) All books and records subject to examination by the City Auditor and Comptroller, or other person designated by the City, shall be kept within the County of San Diego, or in such other place as the reasonable convenience of Grantee may require. If it becomes necessary for the City Auditor and Comptroller, or any representative designated by the City to make such examination at any place other than within the County of San Diego, then, in that event, all increased costs and expenses to the City

necessary or incident to such examination and resulting from such books and records not being available within such County, shall be paid to the City by Grantee on demand.

(h) If Grantee fails to pay the Franchise Fee on or before the dates due as set forth above, Grantee shall pay as additional consideration both of the following amounts:

(i) A sum of money equal to one percent (1%) of the amount due.

This amount is required in order to defray those additional expenses and costs incurred by the City by reason of the delinquent payment including, but not limited to, the cost of administering, accounting and collecting said delinquent payment and the cost to the City of postponing services and projects necessitated by the delay in receiving revenue.

(ii) A sum of money equal to three-quarters of one percent (0.75%) of the amount due per month as interest and for loss of use of the money due.

(iii) The sanctions of this Section 8(h) are not exclusive and do not preclude action by the City under the terms of this Agreement in the event payments become overdue by more than sixty (60) days.

#### **Section 9. COMPLIANCE WITH LAWS AND VENUE**

Grantee shall comply with all laws, ordinances, regulations, and policies of the federal, state, and local governments applicable to this Agreement. This Agreement shall be interpreted in accordance with the laws of the State of California, and the venue for any suit or proceeding concerning this Franchise, the interpretation or application of any of its terms, or any related disputes shall be in the County of San Diego, State of California.

The construction, maintenance, use, or removal of the Chilled Water System pursuant to the provisions of the Franchise granted herein shall be accomplished in accordance

with the ordinances, rules and regulations of the City now or as hereafter adopted or prescribed, and such rules or regulations as are promulgated under the laws of the State of California or other governmental authority having jurisdiction in the premises.

#### **Section 10. CONSTRUCTION PRACTICES**

(a) Standards. Grantee agrees to perform all construction in accordance with the San Diego Municipal Code, state and federal laws and all applicable industry construction practices and procedures while constructing, operating, and maintaining its System within the public-right-of-way. Such construction practices shall include, but not be limited to the most current version of: (i) Current Standard Specifications for Public Works Construction Including Regional and the City of San Diego Supplement Amendments, (ii) Standard Special Provisions for Signals, Lighting, and Electrical Systems of the City of San Diego, (iii) Current City of San Diego Standard Drawings, (iv) City Utility Coordination Committee Policies and Procedures Manual, (v) CPUC General Order 95 and General Order 128, (vi) National Electrical Code, (vii) National Electrical Safety Code and all future policies, procedures, rules and regulations as may be required by the City, state, or federal requirements.

(b) No Burden on Public right-of-Way. Grantee shall not erect, install, construct, repair, replace or maintain the Chilled Water System in such a fashion as to unduly burden the present or future use of the public-right-of-way. If the City in its reasonable judgment determines that any portion of the Chilled Water System is imposing an undue burden, Grantee at its expense, shall modify the Chilled Water System, or take such other actions as the City may determine are in the public interest, to

remove or alleviate the burden, and Grantee shall do so within the time period established by the City and at no cost to the City.

(c) Restoration of Property. At its sole cost and expense, Grantee shall restore, as required by the San Diego Municipal Code, any portion of the public-right-of-way that is in any way disturbed by the construction, operation, maintenance or removal of the Chilled Water System to the same or better condition than that which existed prior to the disturbance, and shall, at its sole cost and expense, immediately restore and replace any other property, real or personal, disturbed, damaged or in any way injured by or on account of Grantee, or by its acts or omissions, to the same or better condition as such property was in immediately prior to the disturbance, damage or injury. Such restoration required by this section shall start promptly but no more than fifteen (15) days after Grantee, its officers, employees or agents, becomes aware of the problem, and shall be diligently performed until completion.

(d) Relocation of Facilities. Grantee shall at its own cost and expense, protect, support, disconnect or remove from the public-right-of-way any portion of the Chilled Water System when required to do so by the City or Agency as provided in San Diego Municipal Code.

(e) Private Property. Grantee shall be subject to all laws and regulations regarding private property in the course of constructing, installing, operating, maintaining, or removing the Chilled Water System.

(f) Street Trench Cut Moratorium/Warrantee. Grantee shall pay all fees and comply with all the provisions of the San Diego Municipal Code and related procedures

established by the City Engineer pertaining to street cut moratoriums and street cut warrantees.

#### **Section 11. HOLD HARMLESS**

With respect to any liability, including but not limited to claims asserted or costs, losses, attorney fees, or payments for injury to any Person or property caused or claimed to be caused by the acts or omissions of the Grantee or Grantee's employees, agents, and officers, arising out of, or alleged to have arisen out of, in whole or in part, or in connection with the provision of Service, or any other services performed pursuant to this Franchise, Grantee agrees to defend, indemnify, protect, and hold harmless the City, its agents, officers, or employees from and against all liability, including any liability arising from, connected with, caused by, or claimed to be caused by the active or passive negligent acts or omissions of the City, its agents, officers, or employees which may be in combination with the active or passive negligent acts or omissions of Grantee, its employees, agents or officers, or any third party. Grantee's duty to defend, indemnify, protect, and hold harmless shall not include any claims or liabilities arising from the sole negligence or established sole willful misconduct of the City, its agents, officers or employees.

#### **Section 12. REPAIR COSTS**

Grantee shall pay to the City on demand an amount equal to the cost of all repairs to City property made necessary by any of the operations of Grantee under this Franchise; provided, however, that Grantee may itself make repairs to Streets, sidewalks, curbs and gutters at its own cost in accordance with City specifications, regulations and applicable permits for installation, if the same can be done without undue inconvenience to the public use of the Streets.

### **Section 13. FORFEITURE**

This Franchise is granted upon each and every condition herein contained, and shall be strictly construed against Grantee. Nothing shall pass by the Franchise to Grantee unless it be granted in plain and unambiguous terms. Each of said conditions is a material and essential condition to the granting of the Franchise. If Grantee shall fail, neglect or refuse to comply with any of the conditions of the Franchise, and if such failure, neglect or refusal shall continue for more than (i) thirty (30) days for a monetary default after written demand by the City Manager for payment or (ii) sixty (60) days for a non-monetary default after written demand by the City Manager for compliance therewith (or such longer period of time as may be reasonably required to cure a matter which, due to its nature, cannot reasonably be rectified within sixty (60) days, provided that Grantee has commenced and is diligently pursuing the actions or remedies necessary to cure the default), then City, if directed by the City Council, in addition to all rights and remedies allowed by law, may terminate the Franchise, and all the rights and privileges of Grantee granted hereby shall be at an end. If a written request has been delivered to the City by a lender having a security interest in the Chilled Water Facility or the Chilled Water System, then concurrently with giving any notice of default to Grantee, the City shall give written notice of such default to such lender and, if Grantee has failed to cure a default within the requisite period, such lender shall have an additional sixty (60) days within which to cure the same or, if such default cannot be cured within that period, such additional time as may be necessary if actions or remedies necessary to cure the default involved, in which case the Franchise shall not be terminated so long as such actions or remedies are being diligently pursued by such lender. No provision herein made for the purpose of securing the enforcement of the terms and conditions of the Franchise shall be deemed an exclusive remedy or to afford the exclusive

procedure for the enforcement of said terms and conditions, but the remedies and procedure outlined herein or provided, including forfeiture, shall be deemed to be cumulative.

#### **Section 14. ACQUISITION AND VALUATION**

Nothing in this Agreement or in the Franchise shall be construed as in any way impairing the City's rights to acquire property of Grantee through the exercise of the City's power of eminent domain or through voluntary agreement between the City and Grantee. If the City chooses to exercise its power of eminent domain, it shall do so in accordance with the procedures provided by the general law of the State of California for the condemnation of property. The valuation of such property for condemnation purposes shall be in accordance with such general law.

#### **Section 15. PUBLICATION EXPENSE**

Grantee shall pay to the City a sum of money sufficient to reimburse it for all publication expenses incurred by it in connection with the granting of the Franchise; such payment to be made within thirty (30) days after the City shall have furnished to Grantee a written statement of such expenses.

#### **Section 16. AUTHORITY FOR GRANT**

Notwithstanding any other provisions contained herein, this Franchise is granted solely and exclusively under Sections 103, 104 and 105 of the San Diego City Charter and under no other authority.

#### **Section 17. TRANSFER AND ASSIGNMENT**

(a) Consent of City Required. Except as specifically set forth in this Agreement, no Transfer may occur, and the Franchise may not be assigned or otherwise

conveyed to any Person, without the express written consent of the San Diego City Council, which consent may not be unreasonably withheld or delayed.

(b) Transfer.

(i) A Transfer occurs when there is a change in the Person exercising management authority over Grantee, or when any Person obtains a fifty percent (50%) or greater voting or equity interest in Grantee when such Person did not previously have a fifty percent (50%) or greater voting or equity interest. The word "control", as used in this Section 17 is not limited to major stockholders but includes *de facto* control (as more specifically set forth below). For the avoidance of doubt, a change in the officers, directors, managers or employees of any entity that has control shall not constitute a change in control.

(ii) A presumption that a Transfer has occurred, including a transfer of control in fact (i.e., transfer of *de facto* control), shall arise upon the acquisition or accumulation by any Person, or group of Persons, of fifty percent (50%) of the voting or equity interest of a publicly held Grantee, or of the Person exercising management authority over such a publicly held Grantee, or of fifty percent (50%) of the voting or equity interest of a privately held Grantee, or of the Person exercising management authority over such a privately held Grantee, where the Person or group of Persons previously did not own such a fifty percent (50%) interest.

(c) Transfer or Assignment Without Consent. Any Transfer or assignment or other conveyance of the Franchise without the prior consent of the City Council shall be null and void unless later ratified by the San Diego City Council, and shall be deemed a

material breach of this Agreement until such time as the San Diego City Council approves the Franchise assignment or conveyance, or Transfer, or if not approved, until the prior ownership, control or other status quo ante is restored to a condition satisfactory to the San Diego City Council. If the San Diego City Council affirmatively acts to withhold or deny its consent to an assignment or conveyance of the Franchise or a Transfer requiring the City's approval, and such action has nevertheless been effected, the San Diego City Council may terminate this Franchise.

(d) No Waiver of City Rights. The consent or approval of the San Diego City Council to any Transfer, or assignment or other conveyance of the Franchise shall not constitute a waiver or release of any of the rights of the City unless the San Diego City Council specifically releases or waives such rights. In no event shall such a consent or approval result in an estoppel, release, or waiver of any power vested in the City or the waiver of the right to exercise such vested power.

(e) Successor-In-Interest. In no event shall a Transfer, or assignment or other conveyance of this Franchise be approved without the successor-in-interest becoming a signatory to this Agreement, or such amended Agreement as may be satisfactory to both the San Diego City Council and successor-in-interest.

(f) Management Transfer. Except as to any contract or other arrangement for the management of the Chilled Water System as may exist on the Effective Date, Grantee shall not, without the prior consent of the San Diego City Council, enter into any contract or other arrangement whereby the management of the Chilled Water System will be undertaken by another Person not under the *de facto* control of the Grantee as defined in this Agreement.

(g) Circumstances or Transactions not Requiring the City's Prior Consent.

Notwithstanding the other provisions of this Section 18, any financial institution having a pledge of interest in Grantee or its assets for the advancement of money for the construction, recapitalization and/or operation of the Chilled Water System shall have the right, but not the obligation, to (a) take control and operate the Chilled Water System in the event of a Grantee default of its financial obligations, or (b) designate a designee reasonably satisfactory to the City to take control of and operate the Chilled Water System in the event of a Grantee default of its financial obligations, and if such financial institution designates a designee reasonably satisfactory to the City to take control of and operate the Chilled Water System or if such financial institution takes control of and operates the Chilled Water System, then such financial institution shall notify the City thereof. However, said financial institution shall also agree in writing to comply with all obligations set forth in this Agreement during the term the financial institution exercises control over the Chilled Water System, and upon such financial institution transferring control over the Chilled Water System to any other Person the financial institution shall be relieved of its obligations hereunder. Furthermore, the granting of a security interest in any Grantee assets, or any mortgage hypothecation, or assignment of any right, title or interest in the Chilled Water System, or use of the Chilled Water System as collateral in order to secure indebtedness, shall not require the consent of the San Diego City Council. The consent of the San Diego City Council shall not be required for an intra-corporate or intra-company transfer from one wholly-owned subsidiary of Grantee to another wholly-owned subsidiary of Grantee. However, in the event that a parent of Grantee desires to assign or otherwise convey the Franchise to another subsidiary, the San Diego City

Council may require a written guarantee from the parent stating that the parent will be ultimately responsible for the performance of all Agreement obligations.

(h) Surety, Bond, Insurance, and Similar Franchise Agreement Provisions.

Before a Transfer, or assignment or other conveyance of the Franchise may be effective, the successor-in-interest must demonstrate to the City that the successor-in-interest has satisfied all surety, bond, insurance, and similar provisions contained in this Agreement.

(i) Release of Liability and Obligations. In the event a Transfer, assignment or other conveyance of the Franchise is approved by the City Council, or there is a Transfer, assignment or other conveyance as set forth in Section 17(f), above, then from and after such Transfer, assignment or other conveyance, all liability and obligations under the Franchise shall vest in the successor-in-interest, and the prior Grantee shall be relieved of any such liability or obligations, except as to any liability or obligations that arose prior to the effective date of the Transfer, assignment or other conveyance.

**Section 18. APPLICATIONS FOR TRANSFER OR ASSIGNMENT**

Grantee shall meet the following specifications with regard to any action or proposed action requiring consent of the San Diego City Council under Section 17.

(a) Grantee shall notify the City of any proposed action requiring consent of the San Diego City Council pursuant to Section 17 and in accordance with applicable law.

(b) Grantee shall submit to the San Diego City Council an original application and four copies, which application shall comprehensively describe the terms and conditions of the action or proposed action subject to Section 17, and shall clearly state

the basis on which the application should be approved. The application shall also contain all documentation and information required by subsection (e) below.

(c) At any time during the review process, the City shall have the right to require that Grantee or any other Person involved in the action or proposed action under review provide to the City information or documentation necessary for such review. Grantee shall assist the City in its inquiry into any proposed successor's capabilities concerning the qualifications addressed in Sections 17 and 18.

(d) The San Diego City Council shall render a final decision on an application requiring the San Diego City Council's consent under Section 17 within 120 days after the City's receipt of a complete application (including all initial information required by the City pursuant to this Agreement), provided that: (i) if the City brings any deficiencies in the original application to the attention of the applicant(s) within thirty (30) days after the City's receipt of the original application, the running of this 120-day period shall not begin until the City's receipt of all information requested by the City; or (ii) the City Manager and Grantee may mutually agree to an extension of this deadline for a final decision. Applicant shall be required to deliver any additional information requested by the City within ten (10) days after being notified.

(e) An application for the City's consent to the types of transactions described in Section 17 shall be presumed to be valid and deemed approved if the San Diego City Council fails to render a final decision on the application by the deadline required in this Section 18 or by a mutually agreed deadline.

(f) The San Diego City Council may deny such an application only upon a determination of: (i) Grantee's failure to timely submit the information required by this

Section 18; (ii) Grantee's inability or refusal to correct existing deficiencies in Grantee's performance of its obligations under this Agreement brought to Grantee's attention by the City, prior to the San Diego City Council granting its approval of the application; (iii) the inability or refusal of a proposed successor in interest to the Franchise to provide written assurances reasonably satisfactory to the City concerning the timely and full correction of any existing deficiencies in Grantee's performance of its obligations under this Agreement; or (iv) the demonstrated inability of the proposed successor to satisfy the duties and obligations of this Agreement.

(g) In an initial application, a proposed assignee or transferee must demonstrate that it possesses the legal, financial and technical qualifications necessary to perform all the terms, conditions, and obligations under this Agreement for the remaining term hereof. The City may request, and assignee or transferee shall provide, all reasonable financial data relative to the transfer, including, but not limited to, any information reasonably related to the assignee's or transferee's acquisition of Grantee's Chilled Water System and related assets which is needed to demonstrate the qualifications of the assignee or transferee to perform all the terms, conditions, and obligations under this Agreement and such additional obligations reasonably required of the proposed assignee or transferee by the San Diego City Council for the specific and limited purpose of assuring the performance by the proposed assignee or transferee of all the terms, conditions, and obligations of this Agreement. The proposed assignee or transferee shall agree to comply with all provisions of this Agreement, as well as such reasonable requirements as the City Council may impose for the specific and limited

purpose of assuring the proposed assignee's or transferee's compliance with such provisions.

#### **Section 19. INSURANCE**

During the term of this Agreement, Grantee shall maintain, or cause to be maintained, in full force and effect and at its sole cost and expense, the following types and limits of insurance:

(a) For all of Grantee's operations, including contractual, broad form property damage, completed operations, and independent consultant's liability, Grantee shall keep in full force and effect, during any and all work and operations, all applicable insurance to cover personal injury, bodily injury and property damage, providing coverage to a combined single limit of one million dollars (\$1,000,000) per occurrence, subject to an annual aggregate of ten million dollars (\$10,000,000) for general liability, completed operations and personal injury other than bodily injury.

(b) For all of Grantee's employees who perform work that is subject to this Agreement, but only to the extent required by the State of California, Grantee shall keep in full force and effect, a worker's compensation policy. That policy shall provide a minimum of five hundred thousand dollars (\$500,000) of employer's liability coverage, and shall provide an endorsement that the insurer waives the right of subrogation against the City and its respective elected officials, officers, employees, agents, and representatives.

(c) The City and its representative elected officials, officers, employees, agents, and representatives shall be named as additional insureds under all policies of insurance required under this Section 19 (except for Section 19(b)). The City's additional

insured status must be reflected on an additional insured endorsement form, which shall be submitted and reasonably acceptable to the City.

(d) All insurance required by express provision of this Agreement shall not be canceled nor shall stated limits stated in the policy be reduced except after thirty (30) days prior written notice (ten (10) days notice for non-payment of premium) by Grantee to the City, as reflected in an endorsement submitted to the City.

(e) Prior to performing any work under this Franchise, Grantee shall provide to the City all Certificates of Insurance accompanied by all required endorsements. Grantee shall provide current Certificates of Insurance with the City throughout the term of this Franchise.

(f) All insurance required by express provision of this Agreement shall be carried only by responsible insurance companies that have been given at least an "A-" & "V" rating by AM BEST, that are authorized to do business in the State of California, and that have been approved by the City, which approval shall not be unreasonably withheld.

## **Section 20. ALTERNATIVE DISPUTE RESOLUTION PROCEDURES**

(a) Mandatory Non-binding Mediation. Except as otherwise provided in Section 7 hereof, if a dispute arises out of, or relates to this Agreement, or a breach thereof, and if said dispute cannot be settled through normal contract negotiations, the Parties agree to first endeavor to settle the dispute in an amicable manner, using mandatory mediation under the Mediation Rules of the American Arbitration Association or any other neutral organization agreed upon, before seeking recourse in a court of law.

(b) Mandatory Mediation Costs. The expenses of witnesses for either side shall be paid by the Party producing such witnesses. All other reasonable expenses of the

mediation, including required traveling and expenses of the mediator, and the cost of any proofs or expert advice produced at the direct request of the mediator, shall be borne equally by the Parties, unless they agree otherwise.

(c) Selection of Mediator. A single mediator that is acceptable to both Parties shall be used to mediate the dispute. The mediator will be knowledgeable in construction aspects and may be selected from lists furnished by the American Arbitration Association [AAA] or any other agreed upon mediator. To initiate mediation, the initiating Party shall serve a request for mediation on the opposing Party. If the mediator is selected from a list provided by AAA, the initiating party shall concurrently file with AAA a request for mediation along with the appropriate fee, a list of three requested mediators marked in preference order, and a preference for available dates.

If AAA is selected to coordinate the mediation [Administrator], within ten (10) days after the receipt of the initiating Party's request for mediation, the opposing Party shall file a list of preferred mediators listed in preference order, after striking any mediators to which they have any factual objection, and a preference for available dates. If the opposing party strikes all of the initiating Party's preferred mediators, the opposing Party shall submit a list of three preferred mediators listed in preference order to the initiating Party and Administrator. The initiating Party shall file a list of preferred mediators listed in preference order, after striking any mediators to which it has any factual objection. This process shall continue until both sides have agreed upon a mediator. The Administrator will appoint the highest, mutually preferred, mediator from the individual parties' lists who is available to serve within the designated time frames.

If the parties agree not to use AAA, then a mutually agreed upon mediator, date and place for the mediation shall be agreed upon.

(d) Conduct of Mediation Sessions. Mediation hearings will be conducted in an informal manner and discovery shall not be allowed. All discussion, statements, or admissions will be confidential to the Party's legal position. The Parties may agree to exchange any information they deem necessary.

Both Parties must have an authorized representative attend the mediation. Each representative must have the authority to recommend entering into a settlement. Either Party may have attorney(s) or expert(s) present. Upon reasonable demand, either Party may request and receive a list of witnesses and notification whether attorney(s) will be present.

Any agreements resulting from mediation shall be documented, in writing. All mediation results and documentation, by themselves, shall be "non-binding" and inadmissible for any purpose in any legal proceeding, unless such admission is otherwise agreed upon, in writing, by both Parties. Mediators shall not be subject to any subpoena or liability and their actions shall not be subject to discovery.

## **Section 21. SECURITY FUND**

(a) Grantee shall establish and provide to the City a fund [Security Fund], as security for the faithful performance by Grantee of all provisions of this Agreement. The Security Fund shall be available to the City to satisfy all claims, liens, fees, and/or taxes Grantee owes the City and which arise by reason of the operation or maintenance of the Chilled Water System, and to satisfy any actual or liquidated damages arising out of a breach or default of this Agreement. The Security Fund shall consist of any one of two

(2) instruments which shall be in the amount of at least fifty thousand dollars (\$50,000) and shall either be in the form of an irrevocable standby letter of credit, or a cash deposit established in a local bank in an interest-bearing account payable to the order of the City as trustee for Grantee, with all interest distributed to Grantee.

(b) The Security Fund shall be maintained at a minimum level of fifty thousand dollars (\$50,000) throughout the term of this Agreement. Grantee shall pay all fees or other charges required to keep any such letter of credit or cash deposit in force and shall, within thirty (30) days after any draw by the City, restore the face value of any such instrument to the original amount. Failure to replenish the Security Fund shall be deemed a material breach of this Agreement.

(c) The Security Fund instruments must be issued by an institution approved by the City Manager and must incorporate wording approved by the City Manager (in each case, which approval shall not be unreasonably withheld, conditioned or delayed), enabling the City to draw such sums from time to time as the City may find necessary to satisfy any defaults of Grantee or to meet any payments due the City under or in connection with this Franchise, upon ten (10) days prior written notice to Grantee. All such Security Fund instruments shall further require the provision of thirty (30) days written notice by its issuer to the City of any pending expiration or cancellation, or other language acceptable to the City Attorney; with respect to the Security Fund, the delivery of said written notice shall, without further cause, constitute reason for the City to draw the full sum to be held in its own accounts until such Security Fund shall be re-established in good and satisfactory form to the City.

(d) Nothing herein shall constitute a waiver of the normal permit and bonding requirements pertaining to all entities working within the City's public right-of-way.

(e) Notwithstanding anything else in this Section 21 to the contrary, Grantee shall have no obligation to establish a Security Fund if a guarantor reasonably acceptable to the City, provides a personal guaranty of the faithful performance of all of Grantee's obligations under this Agreement in form and substance reasonably acceptable to the City; provided that the guarantor's obligations under such guaranty shall not exceed fifty thousand dollars (\$50,000).

#### **Section 22. POSSESSORY INTEREST TAX**

By accepting this Franchise, Grantee acknowledges that notice is hereby given to Grantee that use or occupancy of any public property pursuant to the authorization herein set forth may create a possessory interest which may be subject to the payment of property taxes levied upon such interest. Grantee shall be solely liable for, and shall pay and discharge prior to delinquency, any and all possessory interest taxes or other taxes levied against Grantee's right to possession, occupancy or use of any public property pursuant to any right of possession, occupancy or use created by this Franchise, and shall hold the City harmless, and free and clear of any liability for such tax.

#### **Section 23. REGULATION OF CUSTOMER SERVICE STANDARDS**

The San Diego City Council shall have the power and right at all times for the duration of this Franchise to require Grantee to conform to reasonable rules and regulations now or hereafter adopted by the San Diego City Council to regulate and establish reasonable customer service standards for Service provided under this Agreement. The establishment of such rules and regulations shall be discretionary with the San Diego City Council. The establishment of

customer service standards shall only be made subsequent to appropriate public proceedings affording due process, all in accordance with the City's established rules and regulations for public hearings. However, Grantee may establish its own customer service procedures for services for which the San Diego City Council has not affirmatively established standards.

#### **Section 24. RECORDS**

Grantee shall prepare and furnish to the City Manager or the City Manager's designee in a form prescribed by the City Manager such reports with respect to Grantee's operations, affairs, transactions, or property as may be reasonably necessary or appropriate to the performance of any of the duties of the City Manager or designee in connection with this Franchise.

#### **Section 25. NOTICES**

Any notice, required to be given hereunder shall be in writing, and may be served personally or by certified (return receipt requested) United States mail, postage prepaid, addressed to Grantee at:

c/o JMI Realty  
12680 High Bluff Drive, Suite 200  
San Diego, CA 92130  
Attention: Bryant Burke, Esq.

with a copy to:

c/o JMI Realty  
12680 High Bluff Drive, Suite 200  
San Diego, CA 92130  
Attention: Jim Chatfield

or at such other address designated in writing by Grantee; and to the City as follows:

City of San Diego  
202 C Street, 9<sup>th</sup> floor  
San Diego, CA 92101  
Attention: City Manager

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

**Section 26. NO WAIVER**

No failure of either the City or the Grantee to insist upon the strict performance by the other of any covenant, term or condition of this Agreement, nor any failure to exercise any right or remedy upon a breach of any covenant, term, or condition of this Agreement, shall constitute a waiver of any such breach of such covenant, term or condition. No waiver of any breach shall affect or alter this Franchise, and each and every covenant, condition, and term hereof shall continue in full force and effect to any existing or subsequent breach. The failure of the City on one or more occasions to exercise a right under this Agreement or any applicable law, ordinance, rule, or regulation shall not constitute a waiver of such right unless the City has specifically waived such right in writing and the term "waive" or its equivalent is used in such a writing.

**Section 27. SEVERABILITY**

Each section, part, term, covenant, or condition of this Agreement shall be considered severable, and if, for any reason, any section, part, term, covenant, or condition herein is determined to be invalid and contrary to, or in conflict with, any existing or future law or regulation, such invalidity, contravention or conflict shall not impair the operation or affect any remaining portion, section, part, term, covenant, or condition of this Agreement, and the latter will continue to be given full force and effect and bind the parties hereto; and said invalid section, part, term, covenant, or condition shall be deemed not to be part of this Agreement.

**Section 28. CAPTIONS**

The section headings, and captions for various sections and paragraphs of this Agreement shall not be held to define, limit, augment, or describe the scope, content, or intent of any or all parts of this Agreement.

**Section 29. ENTIRE UNDERSTANDING**

This Agreement contains the entire understanding of Grantee and City. Grantee and City agree that any other written or oral understanding between them with respect to the matters covered in this Agreement is hereby superseded by this Agreement in its entirety with respect to those matters. Each of Grantee and City 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 Agreement. No modification, amendment, or alteration of this Agreement will be valid unless it is in writing and approved by the San Diego City Council, and by Grantee.

**Section 30. COMPANY AUTHORITY**

Each individual executing this Agreement on behalf of Grantee represents and warrants that to the best of such individual's knowledge he/she is duly authorized to execute and deliver this Agreement on behalf of Grantee; that this Agreement is binding upon Grantee; and that all steps have previously been taken to qualify Grantee to do business and perform operations undertaken pursuant to the grant of this Agreement.

**Section 31. MUNICIPAL POWER**

Nothing contained in this Agreement shall be construed as a limitation upon the powers of the City as a Chartered City of the State of California.

**Section 32. DRAFTING AMBIGUITIES**

The Parties agree that they are aware that they have the right to be advised by counsel with respect to the negotiations, terms and conditions of this Agreement, and the decision of whether or not to seek advice of counsel with respect to this Agreement, is a decision which is the sole responsibility of each Party. This Agreement shall not be construed in favor of or against either Party by reason of the extent to which each Party participated in the drafting of the Agreement.

IN WITNESS WHEREOF, this Agreement is executed by the CITY OF SAN DIEGO, acting by and through its City Manager, pursuant to Ordinance No. 0-19489 authorizing such execution, and by JMIR-CHILLED WATER LLC.

THE CITY OF SAN DIEGO

By: [Signature]  
Name: R.F. HAAS  
Title: DEPUTY CHIEF OF PUBLIC WORKS  
Date: 6-8-06

JMIR-CHILLED WATER LLC

By: [Signature]  
Name: John C. Kratzer  
Title: President

Approved as to form and legality on June 5, 2006:

MICHAEL J. AGUIRRE, City Attorney, San Diego

By: [Signature]  
Deputy City Attorney

ORDINANCE NUMBER O- 19489 (NEW SERIES)

DATE OF FINAL PASSAGE MAY 10 2006

AN ORDINANCE APPROVING A NONEXCLUSIVE  
CHILLED WATER FRANCHISE AGREEMENT BETWEEN  
THE CITY OF SAN DIEGO AND JMIR-CHILLED WATER  
LLC.

WHEREAS, under California law and the San Diego City Charter, the City of San Diego [City] has the right to grant a franchise to any person, firm, or corporation for the right to use the City's public right-of-way for the purpose of constructing, maintaining, and operating works for a Chilled Water System; and

WHEREAS, JMIR-Chilled Water LLC desires to obtain a non-exclusive franchise to locate, place, install, operate, control, and maintain a Chilled Water System in the City's public right-of-way for the purpose of serving temperature controlled water for, among other purposes, heat transfer, to facilities located in the Ballpark District in the City of San Diego; and

WHEREAS, the right to occupy portions of the City's Streets for the purpose of providing the temperature controlled water is a valuable economic privilege, the economic benefit of which should be shared with all the taxpayers of the City; and

WHEREAS, JMIR-Chilled Water LLC is willing to compensate the City in exchange for a grant of location and the right to use and physically occupy portions of the City's Streets; and

WHEREAS, the City has determined that entering into this non-exclusive Chilled Water Franchise Agreement on the terms set forth therein shall serve the public interest by providing the City and its residents with temperature controlled water in the Ballpark District; NOW, THEREFORE,

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

Section 1. Whenever in this ordinance the following capitalized words or phrases are used, they have the respective meanings assigned to them in the following definitions:

- (a) "Ballpark District" means that certain portion of the City as so designated by the San Diego City Council on February 9, 2004, in Ordinance Number O-19262, and set forth in San Diego Municipal Code section 59.0102.
- (b) "Chilled Water Facility" means that certain facility, as it may be modified, improved, or replaced from time to time, for the manufacture of temperature controlled water and circulation of water for, among other purposes, heat transfer purposes located on that certain property in the City of San Diego more particularly described as Parcel 9 of Parcel Map No. 18855 filed in the office of the County Recorder of San Diego County on December 7, 2001.
- (c) ~~"Chilled Water System" means pipes, pipelines, mains, services, traps, vents,~~  
vaults, manholes, meters, gauges, regulators, relief valves, valves, conduits, appliances, attachments, appurtenances, and without limitation to the foregoing, any other property located in, upon, along, across, under, or over Streets, and used or useful in transmitting or distributing temperature controlled water.
- (d) "Exempt Gross Receipts" means all gross operating revenues received by Grantee from the sale of the Service to Exempt Projects within the Ballpark District, to the extent that gross operating revenues are derived from Service which requires the use by Grantee of the Chilled Water System under the terms and conditions of the non-exclusive Chilled Water Franchise

Agreement, a copy of which is on file in the Office of the City Clerk as  
Document Number OO- 19489.

- (e) "Exempt Projects" means: (a) projects or properties which (i) Padres, L.P., JMI Realty, or a Padres/JMI Realty Affiliate controls, or in which Padres, JMI Realty or any Padres/JMI Realty Affiliate has a substantial ownership interest (constituting an ownership interest of twenty-five percent (25%) or more), and (ii) are developed as part of Phase 1 (as defined in that certain Memorandum of Understanding approved by the voters of the City on November 3, 1998 and executed among the City, the Redevelopment Agency of the City [the Agency], Centre City Development Corporation [CCDC] and the Padres, as amended [the MOU]), or which obtained a development and disposition agreement or other development permit prior to the Opening Date (as defined in the MOU) and are diligently completed thereafter pursuant to such development and disposition agreement or development permit; (b) the residential condominiums constructed as part of a hotel, condominium and related improvements developed on Lots 2 and 3 of the Metropolitan Project in the City of San Diego, County of San Diego, State of California, according to Map thereof No. 14378 filed in the Office of the County Recorder of San Diego County on April 26, 2002, as it may be modified, improved or replaced from time to time; and (c) any facilities owned or controlled by the City, the Agency, CCDC (including the ballpark and related improvements to be developed by the City and the Padres pursuant to the MOU) or The Metropolitan Transit Development Board.

- (f) "Franchise" means the nonexclusive right to use the Streets for the purpose of constructing, maintaining, and operating a Chilled Water System for the provision of service in the Ballpark District.
- (g) "Grantee" means JMIR-Chilled Water LLC, its successors or assigns.
- (h) "Non-Exempt Gross Receipts" means Total Gross Receipts less Exempt Gross Receipts.
- (i) "Non-Exempt Transfer" means a Transfer of the Chilled Water Facility to a person that is not a Padres/JMI Realty Affiliate.
- (j) "Padres/JMI Affiliate" means any entity controlled by or under common control with Padres L.P or JMI Realty Inc.
- (k) "Service" means the provision of temperature controlled water to customers through the use of the Chilled Water System.
- (l) "Streets" means the public freeways, highways, streets, ways, alleys, any and all other dedicated rights-of-way, and places as the same now or may hereafter exist within the Ballpark District.
- (m) "Total Gross Receipts" means all gross operating revenues received by Grantee from the sale of the Service with points of service within the Ballpark District, to the extent that said gross operating revenues are derived from Service which requires the use by Grantee of the Chilled Water System under the terms and conditions of the Franchise granted herein.
- (n) "Transfer" means a transfer of ownership or control of the Chilled Water Facility to any person.

Section 2. That the Mayor be and he is hereby authorized and empowered to execute, for and on behalf of the City, a non-exclusive Chilled Water Franchise Agreement between the City of San Diego and JMIR-Chilled Water LLC, under the terms and conditions set forth in the Chilled Water Franchise Agreement, on file in the office of the City Clerk as Document No. OO- 19489, and by this reference incorporated herein.

Section 3.

- (a) The Franchise, subject to all terms and conditions contained in the Chilled Water Franchise Agreement, is hereby granted to Grantee for the term of fifty years. The rights and privileges in the Chilled Water Franchise Agreement granted are upon the express condition that for the first thirty-five (35) years of the Franchise Grantee, as consideration therefor and as compensation for the use of the Streets as herein authorized and permitted, shall pay each year to the City in lawful money of the United States a sum equal to five percent (5%) of Non-Exempt Gross Receipts for as long as there is no Non-Exempt Transfer [Franchise Fee]. If a Non-Exempt Transfer occurs, from and after the date of the Non-Exempt Transfer the Franchise Fee shall be five percent (5%) of Total Gross Receipts.
- (b) For the last fifteen (15) years of the term of the Franchise, Grantee, as consideration and compensation for the rights and privileges herein granted and for the use of the streets of the City as herein authorized and permitted, shall pay each year to the City in lawful money of the United States a sum equal to an amount to be determined as set forth below of Grantee's Non-Exempt Gross Receipts during the preceding calendar year, or a fractional

year, for the remainder of the term of the Franchise by the dates, in the manner, and on the conditions as set forth below.

- (c) Determination of the amount to be paid as set forth in Section 7(b) of the Chilled Franchise Agreement shall be made by good faith negotiation between the City and Grantee commencing not less than six (6) months prior to the expiration of the first thirty-five (35) year period. In the event that at the conclusion of the first thirty-five (35) year period said good faith negotiation does not result in a determination of the amount to be paid by Grantee during the last fifteen (15) years (or 14 years, 6 months, as the case may be) of the term of this Franchise, then this question (and no other) shall be submitted to binding arbitration as hereinafter set forth; provided, however, that no later than fifteen (15) days prior to the end of the first thirty-five (35) year period the parties may mutually agree to extend the time for said "good faith" negotiation for an additional six (6) months if they so desire, during which time Grantee shall continue to pay a sum equal to five percent (5%) of Grantee's Non-Exempt Gross Receipts as consideration for the rights and privileges herein granted. Unless the City and Grantee mutually agree in writing to a modification prior to the conclusion of the first thirty-five (35) year period (or at the conclusion of the additional six (6) month period as provided for above) then the determination of the number of arbitrators, the time and mode of their selection, and the rules of practice and procedure to be followed shall be as set forth in Section 7 of the Chilled Water Franchise Agreement.

- (d) If the parties are unable to agree on the consideration for the final fifteen (15) years of the Franchise term as provided in subsection (c) above, then within thirty (30) days after the end of the first thirty-five (35) year period or within thirty (30) days after the six (6) month extension provided for above, as the case may be, Grantee and the City shall each appoint a person to serve as an arbitrator and shall give written notice to the other party of such appointment.
- (e) The two persons so appointed shall then agree upon and secure a third arbitrator. If the third arbitrator should not be secured within thirty (30) days from the selection of the arbitrators by Grantee and the City respectively, then upon application in writing by either the City or Grantee to the Chief Justice of the California State Supreme Court, said Chief Justice shall be empowered to appoint a third arbitrator. No person shall be eligible for appointment by said Chief Justice who is an officer or employee of the City or Grantee, or a shareholder of Grantee.
- (f) The arbitrators so appointed shall hear evidence submitted by both the City and Grantee and may call for additional information, which additional information the City or Grantee shall furnish to the extent feasible. An award, decision or determination in writing and signed by a majority of the arbitrators shall be made within sixty (60) days after the selection of the third arbitrator and shall be conclusive with respect to the issue submitted and shall be binding upon both the City and Grantee.
- (g) Except as otherwise provided in Section 7 of the Chilled Water Franchise Agreement, the arbitration shall be governed by the rules of practice and

procedure of the American Arbitration Association from time to time in force, except that, if such rules and practice shall conflict with the California Code of Civil Procedure or any other provision of California law then in force, such California rules and provisions shall govern. This submission and agreement to arbitrate shall be specifically enforceable. The award of the arbitrators or a majority of them upon the question submitted to them hereunder shall be final and binding upon the parties to the extent and in the manner provided by the California Code of Civil Procedure.

- (h) Each party shall bear the fee and personal expenses of the arbitrator appointed by it together with the fees and expenses of its own counsel and of its own witnesses. All other costs and expenses of the arbitration, including the cost and expense incurred by reason of selection of the third arbitrator, as hereinabove provided, shall be borne equally by the City and Grantee.

Section 4. That this activity is not subject to the California Environmental Quality Act [CEQA] pursuant to CEQA Guidelines section 15378(b)(4) because this activity is the creation of a government funding mechanism that does not involve any commitment to any specific project that may result in a potentially significant impact on the environment.

Section 5. That a full reading of this ordinance is dispensed with prior to its final passage, since a written or printed copy having been available to the City Council and the public a day prior to its final passage.

Section 6. That this ordinance shall take effect and be in force on the thirtieth day from  
and after its final passage.

APPROVED: MICHAEL J. AGUIRRE, City Attorney

By Frederick M. Ortlieb  
Frederick M. Ortlieb  
Deputy City Attorney

KJS:FMO:pev  
02/03/06  
02/23/06 Cor. Copy  
04/6/06 Cor. Copy2  
Or. Dept. City Atty  
O-2006-97

I hereby certify that the foregoing Ordinance was passed by the Council of the City of San  
Diego, at its meeting of MAY 02 2006.

ELIZABETH S. MALAND  
City Clerk

By Manuel E. Ketelham  
Deputy City Clerk

Approved: 5-10-06  
(date)

Jerry Sanders  
JERRY SANDERS, Mayor

Vetoed: \_\_\_\_\_  
(date)

\_\_\_\_\_  
JERRY SANDERS, Mayor

Passed by the Council of The City of San Diego on MAY 02 2006 by the following vote:

YEAS: PETERS, FAULCONER, ATKINS, YOUNG, MAIENSCHIEIN, FRYE, MADAFFER, HUESO.

NAYS: NONE.

NOT PRESENT: NONE.

AUTHENTICATED BY:

JERRY SANDERS  
Mayor of The City of San Diego, California

ELIZABETH S. MALAND  
City Clerk of The City of San Diego, California

(Seal)

By: Mary Cepeda Deputy

I HEREBY CERTIFY that the above and foregoing is a full, true and correct copy of  
ORDINANCE NO. 0-19489 (New Series) of The City of San Diego,  
California.

I FURTHER CERTIFY that said ordinance was not finally passed until twelve calendar days had  
elapsed between the day of its introduction and the day of its final passage, to wit, on  
APR 17 2006 and on MAY 10 2006

I FURTHER CERTIFY that the reading of said ordinance in full was dispensed with by a vote of  
not less than a majority of the members elected to the Council, and that there was available for  
the consideration of each member of the Council and the public prior to the day of its passage a  
written or printed copy of said ordinance.

ELIZABETH S. MALAND  
City Clerk of The City of San Diego, California

(Seal)

By: Mary Cepeda Deputy