

ORIGINAL



**CITY OF SAN DIEGO FIRST AMENDMENT TO
NONPROFIT LEASE**

BY AND BETWEEN

**THE CITY OF SAN DIEGO,
A CALIFORNIA MUNICIPAL CORPORATION**

AND

**YMCA OF SAN DIEGO,
A CALIFORNIA 501(C)(3) NONPROFIT PUBLIC BENEFIT CORPORATION**

DOCUMENT NO. **308561**
FILED **NOV 05 2013**
OFFICE OF THE CITY CLERK
SAN DIEGO, CALIFORNIA

CITY ATTORNEY

13 DEC 11 PM 2:42

CIVIL DIVISION

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
CLERK OF COURT
100 WALL STREET
NEW YORK, N.Y. 10038

ORIGINAL

FIRST AMENDMENT TO NONPROFIT LEASE

This First Amendment to Nonprofit Lease agreement is entered into by and between by THE CITY OF SAN DIEGO, a California municipal corporation [CITY], and the YMCA OF SAN DIEGO COUNTY, a California nonprofit corporation [LESSEE], to be effective as of November 1, 2012 [Effective Date], when signed by the parties hereto and approved by the San Diego City Attorney.

RECITALS

- A. By that certain written Nonprofit Lease agreement dated March 9, 1987, filed in the Office of the City Clerk of San Diego as Document No. 269515 [the Lease or Lease Agreement], LESSEE leased from CITY the premises located at 7877 Herschel Avenue, La Jolla, California [the Premises], as more particularly described in the Lease.
- B. Pursuant to Section 2.03 of the Lease, LESSEE shall have the right of first refusal for one extension of the Lease for an additional term of twenty-five (25) years, subject to all the terms, covenants and conditions of the Lease, provided the current City Council determines that the LESSEE may continue to use the Premises as a nonprofit community center at a nominal rental rate, and provided LESSEE is not then in default of the Lease.
- C. The City Council has met and determined that it is in the best interest of the CITY to extend the term of the Lease for an additional twenty-five year term so that LESSEE may continue to use the Premises as a nonprofit community center/YMCA, at a nominal rental rate.
- D. The Lease is in full force and effect and CITY has no actual knowledge of any default or breach by LESSEE under the Lease.

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained, and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, CITY and LESSEE hereby agree as follows:

AGREED UPON AMENDMENTS

1. SECTION 2: TERM

CITY and LESSEE hereby agree that from and after the Effective Date hereof, the following text shall be deemed inserted into the Lease as a new section, Section 2.05 Extension, which shall read as follows:

- 2.05 Extension. The term of this lease shall be extended, pursuant to the rights granted in Section 2.03 Right to Extend, above, for one additional term of twenty-five (25) years, which term shall commence on November 1, 2012, and terminate on October 31, 2037.

2. SECTION 3: CONSIDERATION

CITY and LESSEE hereby agree that from and after the Effective Date hereof, Section 3.01 Consideration is deleted in its entirety and the following text shall be deemed inserted into the Lease as a new Section 3.01, which shall read as follows:

3.01 Rent. LESSEE shall pay rent to CITY in the amount of Three Thousand Two Hundred Fifty Dollars (\$3,250) per lease year, paid annually in advance. LESSEE shall pay the rent for the first lease year within thirty (30) days after the Effective Date, and thereafter on each anniversary of the Effective Date. The rent shall be adjusted annually, upward only, based on increases in the Consumer Price Index (CPI) as provided below.

a. CPI Adjustments. On each anniversary of the Effective Date, the rent shall be adjusted upward only to reflect any increase in the Consumer Price Index for "All Urban Consumers" for Los Angeles/Riverside/Orange County, California (the "CPI") based on the average of the then three most recently published monthly indices just prior to each adjustment. If the CPI is no longer published, the index for adjustment shall be the U.S. Department of Labor's "Comprehensive Official Index" most comparable to the CPI.

i. If rent adjustment is calculated using an index from a different base year than 1982-84, which equaled a base figure of 100 for the CPI, the base figure used shall first be converted under a formula supplied by the Bureau of Labor Statistics or its successor.

ii. If the Department of Labor indices are no longer published, CITY may use another index deemed by CITY to be reasonably comparable to the CPI, which shall then be the "CPI" under this Lease.

iii. CITY's failure to deliver timely notice of any rent adjustment shall not constitute a waiver by CITY of its rights hereunder.

b. CPI Adjustment Computation. The rent shall be calculated as follows:

The "adjustment multiplier" shall be calculated by dividing the "current index" by the "base index" as defined below:

The "base index" denominator for the calculation is 178.5. This is a fixed number representing the three (3) month average of the CPI indices for the months of July, August and September 2001.

The "current index" numerator for the calculation is a variable number that shall be the three (3) month average of the CPI indices for the months of July, August and September of the calendar year preceding the adjustment date.

The "base figure" for purposes of calculating the annual adjustment shall be a fixed amount of two thousand five hundred dollars (\$2,500).

Example Calculation

Current Index (Third Quarter 2011)	232.053
	÷
Base Index (Third Quarter 2001)	178.8=
Adjustment Multiplier	1.300

The base figure is then multiplied by the adjustment multiplier to determine the new rent. Using the foregoing example, the adjusted rent is calculated as follows:

\$2,500.00	(Base Figure)
X 1.300	(Adjustment Multiplier)
\$3,250.00	(Adjusted Rent)

Delinquent Payments. If LESSEE fails to make any payment under this Lease when due, LESSEE shall pay to CITY, in addition to the unpaid amount, five percent (5%) of the unpaid amount, which shall be additional rent. If any amount of such payment remains unpaid after fifteen (15) days past due, LESSEE shall pay to CITY an additional five percent (5%) of the unpaid amount [being a total of ten percent (10%)], which shall be additional rent. Notwithstanding the foregoing, in no event shall the charge for late payment of rent be less than Twenty-Five Dollars (\$25). After thirty (30) days past due, unpaid amounts due CITY under this Lease may be referred to the San Diego City Treasurer for collection, and shall be subject to San Diego Municipal Code section 22.1707, as may be amended from time to time. LESSEE shall pay to CITY any collection-referral fee and all other fees and charges plus interest as may then be charged by the CITY's City Treasurer under authority of the San Diego Municipal Code. Acceptance of late charges and any portion of the late payment by CITY shall neither constitute a waiver of LESSEE's breach or default with respect to the late payment nor prevent CITY from exercising any other rights and remedies available at law or in equity. As required by law, LESSEE is hereby notified that a negative credit report may be submitted to a credit reporting agency if amounts due CITY are not paid when due.

- a. **Time and Place of Payment.** All payments to be paid by LESSEE under this Lease shall be made payable to the City Treasurer and be mailed to:

San Diego City Treasurer
P.O. Box 129030
San Diego, California 92112-9030

or hand delivered to:

The Office of the City Treasurer
Civic Center Plaza
1200 Third Avenue, First Floor
San Diego, California 92101

CITY may change the place of payment at any time upon thirty (30) days written notice to LESSEE. Mailed payments shall be deemed paid upon the date the payment is postmarked by the postal authorities. If postmarks are illegible, the payment shall be deemed received only upon actual receipt.

3. SECTION 3: CONSIDERATION

CITY and LESSEE hereby agree that from and after the Effective Date hereof, Section 3.03 Unauthorized Use Charge, is deleted in its entirety and the following text shall be deemed inserted into the Lease as a new Section 3.03, which shall read as follows:

3.03 Unauthorized Use Charge. LESSEE shall pay CITY one hundred (100%) of the gross receipts from any use of the premises that is not allowed by this lease and of which CITY had no prior knowledge, regardless of any related penalties charged LESSEE by competent governmental authorities. Such unauthorized use charge shall be payable to CITY within thirty (30) days after LESSEE receives such gross receipts. The unauthorized use charge shall be considered "rent" under this lease. The existence of such unauthorized use charge and CITY's acceptance thereof shall not constitute authorization for the use in question, and shall not waive any of CITY's rights under this lease.

4. SECTION 5: INSURANCE RISKS/SECURITY

CITY and LESSEE hereby agree that from and after the Effective Date hereof, Section 5.01 Indemnity, is deleted in its entirety and the following text shall be deemed inserted into the Lease as a new Section 5.01, which shall read as follows:

5.01 Indemnification & Hold Harmless. LESSEE shall protect, defend, indemnify, and hold CITY and its elected officials, officers, employees, representatives, and agents harmless from and against any and all claims asserted or liability established for damages or injuries to any person or property, including injury to LESSEE's officers, employees, invitees, guests, agents, or contractors, which arise out of or are in any manner directly or indirectly connected with LESSEE's acts or omissions in the performance of its obligations under this lease, and all expenses of investigating and defending against same, including without limitation attorneys' fees and costs; provided, however, that LESSEE's duty to indemnify and hold CITY harmless shall not include any claims or liability arising from the sole gross negligence or intentional misconduct of CITY, its

elected officials, officers, employees, representatives, and agents.

5. SECTION 5: INSURANCE RISKS/SECURITY

CITY and LESSEE hereby agree that from and after the Effective Date hereof, Section 5.02 Insurance, is deleted in its entirety and the following text shall be deemed inserted into the Lease as a new Section 5.02, which shall read as follows:

5.02 Insurance. LESSEE shall deliver to CITY's Real Estate Assets Department a current certificate of insurance for:

- i. Commercial General Liability Insurance, providing coverage for bodily injury, including death, personal injury, and property damage with limits of at least Two Million Dollars (\$2,000,000) per occurrence, subject to an annual aggregate of at least Four Million Dollars (\$4,000,000);
 - ii. Automobile Liability Insurance, providing coverage for all bodily injury and property damage, with a limit of at least One Million Dollars (\$1,000,000) per occurrence. Such insurance shall cover liability arising out of any vehicle (including owned, hired, and non-owned vehicles) operated in performing any and all work pursuant to this lease. Coverage shall be written on *ISO form CA 00 01 12 90*, or a substitute form providing equivalent liability coverage; and
 - iii. Workers' Compensation Insurance, as required by the laws of the State of California for all of LESSEE's employees who are subject to this lease, with Employers' Liability coverage with a limit of at least One Million Dollars (\$1,000,000).
- a. Additional Insureds. Pursuant to a separate endorsement [CG2010 (11/85) or equivalent form], "The City of San Diego, its elected officials, officers, employees, representatives, and agents" shall be named as additional insureds in all policies. LESSEE shall ensure that "The City of San Diego, its elected officials, officers, employees, representatives, and agents" shall be named as additional insureds on any insurance LESSEE requires of its consultants, contractors and subtenants, if any.
 - b. Primary & Non-Contributory. Insurance policies shall be endorsed such that the coverage is primary and non-contributory to any coverage carried or maintained by CITY.
 - c. Qualified Insurer(s). All insurance required by the terms of this lease must be provided by insurers licensed to do business in the State of California which are rated at least "A-, VI" by the current AM Best Ratings Guide and which are acceptable to CITY. Non-admitted surplus lines insurers may be accepted provided they are included on the most recent list of California eligible surplus lines insurers (LESLI list) and otherwise meet CITY requirements.

- d. Deductibles/Retentions. All deductibles and self-insured retentions on any insurance policy are the sole responsibility of LESSEE and must be disclosed and acceptable to CITY at the time evidence of insurance is provided.
- e. Continuity of Coverage. All policies shall be in effect on or before the first day of the Term, except "course of construction fire insurance" shall be in force on commencement of all authorized construction, and full applicable fire insurance coverage shall be effective upon completion of each insurable improvement. The policies shall be kept in force for the duration of the term. At least thirty (30) days prior to the expiration of each insurance policy, LESSEE shall furnish a certificate(s) showing that a new or extended policy has been obtained which meets the requirements of this lease. LESSEE shall provide proof of continuing insurance at least annually during the term. If insurance lapses or is discontinued for any reason, LESSEE shall immediately notify CITY and obtain replacement insurance as soon as possible.
- f. Modification. To assure protection from and against the kind and extent of risk existing with the lease Uses or the premises, CITY, at its discretion, may require the revision of amounts and coverage at any time during the term by giving LESSEE thirty (30) days prior written notice. LESSEE shall also obtain any additional insurance required by CITY for new improvements, changed circumstances, or CITY's reasonable re-evaluation of risk levels related to this lease or the premises.
- g. Accident Reports. LESSEE shall immediately report to CITY any accident causing property damage or injury to persons and related to this lease or the premises. Such report shall contain the names and addresses of the involved parties, a statement of the circumstances, the date and hour of the accident, the names and addresses of any witnesses, and other pertinent information.
- h. Causes of Loss – Special Form Property Insurance. LESSEE shall obtain and maintain, at its sole cost, Causes of Loss – Special Form Property Insurance on all of LESSEE's insurable property related to this lease or the premises in an amount to cover 100 percent (100%) of the replacement cost. LESSEE shall deliver to CITY a certificate of such insurance.

6. SECTION 7: GENERAL PROVISIONS

CITY and LESSEE hereby agree that from and after the Effective Date hereof, Section 7.01 Notices, is deleted in its entirety and the following text shall be deemed inserted into the Lease as a new Section 7.01, which shall read as follows:

- 7.01 Notices. Any notice required or permitted to be given under this lease shall be in writing and may be served personally or by United States mail, postage prepaid, addressed as follows:

If to LESSEE:

YMCA OF SAN DIEGO COUNTY
Attn: President
3708 Ruffin Road
San Diego, CA 92123

If to CITY:

THE CITY OF SAN DIEGO
Attention: Director, Real Estate Assets Department
1200 Third Avenue, Suite 1700, MS 51A
San Diego, California 92101

SECTION 7: GENERAL PROVISIONS

CITY and LESSEE hereby agree that from and after the Effective Date hereof, the following three new sections shall be deemed inserted into the Lease as the new Section 7.18, Section 7.19 and Section 7.20, which shall read as follows:

- 7.18 Equal Benefits: LESSEE shall comply with San Diego Municipal Code sections 22.4301-22.4308, which require lessees of City-owned property to offer the same employment benefits to employees with spouses and employees with domestic partners. LESSEE shall certify that it will maintain such equal benefits throughout the term of this Lease. LESSEE's failure to maintain equal benefits shall be a default of this lease.
- 7.19 Disabled Access Compliance. LESSEE shall, as applicable to the premises and LESSEE's possession, use and occupancy thereof, comply with the California Government Code, Sections 11135-11139.5; the Federal Rehabilitation Act of 1973, Section 504, Title V; the Americans with Disabilities Act of 1990 (ADA); and any other applicable state and federal laws and regulations hereafter enacted protecting the rights of people with disabilities. LESSEE's compliance shall include but not necessarily be limited to the following:
- a. LESSEE shall not discriminate against qualified persons with disabilities in any aspects of employment, including recruitment, hiring, promotions, conditions and privileges of employment, training, compensation, benefits, discipline, layoffs, and termination of employment.
 - b. No qualified individual with a disability may be excluded on the basis of disability from participation in, or be denied the benefits of, services, programs, or activities of LESSEE.
 - c. LESSEE shall post a statement addressing the requirements of the ADA in a prominent place at the work site.

d. Where required by law, any improvements made to the Premises by LESSEE shall comply with municipal disabled access requirements by bringing up to code and making accessible any areas of the Premises which deny access to disabled persons. All improvements and alterations shall be at the sole cost of LESSEE.

e. LESSEE shall include language in each sublease agreement which indicates the sublessee's agreement to abide by the foregoing provisions. LESSEE and sublessees shall be individually responsible for their own ADA employment programs.

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

7.20 Water Quality Assurances: LESSEE shall comply with San Diego Municipal Code Article 3, Division 3: Stormwater Management and Discharge Control (the "Stormwater Code"), and employ "Best Management Practices" including a "Storm Water Pollution Prevention Plan" as those terms are defined by the Stormwater Code (collectively, "Prevention Plan") and as approved by CITY under its Stormwater Management Program. Within the first thirty (30) days of the term, LESSEE shall submit a Prevention Plan satisfactory to CITY that will control erosion and reduce the amount of "Pollutants," as defined by the Stormwater Code, and other sediments discharged from the premises. CITY may review the Prevention Plan periodically. Within thirty (30) days after written notice from CITY requesting an update of the Prevention Plan, LESSEE shall submit an updated Prevention Plan to CITY's satisfaction. LESSEE shall implement all changes to the Prevention Plan as required by CITY and to ensure compliance with all applicable laws, ordinances, and regulations. LESSEE shall inform its employees, contractors, subcontractors, agents and vendors of the Prevention Plan and ensure their compliance therewith.

This First Amendment to Nonprofit Lease agreement, on file with the City Clerk as Document No. 338561, is executed by CITY, acting by and through its Mayor, or his designee, and by LESSEE, acting by and through its lawfully authorized officers.

THE CITY OF SAN DIEGO, a California municipal corporation

Date 12/11/13

BY: [Signature]
Name: James F. Barwick, CCIM
Title: Director, Real Estate Assets

Date 2/1/2013

YMCA OF SAN DIEGO COUNTY
BY: [Signature]
Name: Brian Herdew-Decker
Title: President/CEO

Environmental Analysis Section Environmental Clearance:

Categorically Exempt from CEQA pursuant to State CEQA Guidelines, Section 15301 (Existing Facilities).

Date: March 12, 2012

BY: [Signature]
Name: Elizabeth Shearer-Nguyen
Title: Senior Planner

Approved as to form and legality this
12th day of December, 2013.

JAN I. GOLDSMITH, City Attorney

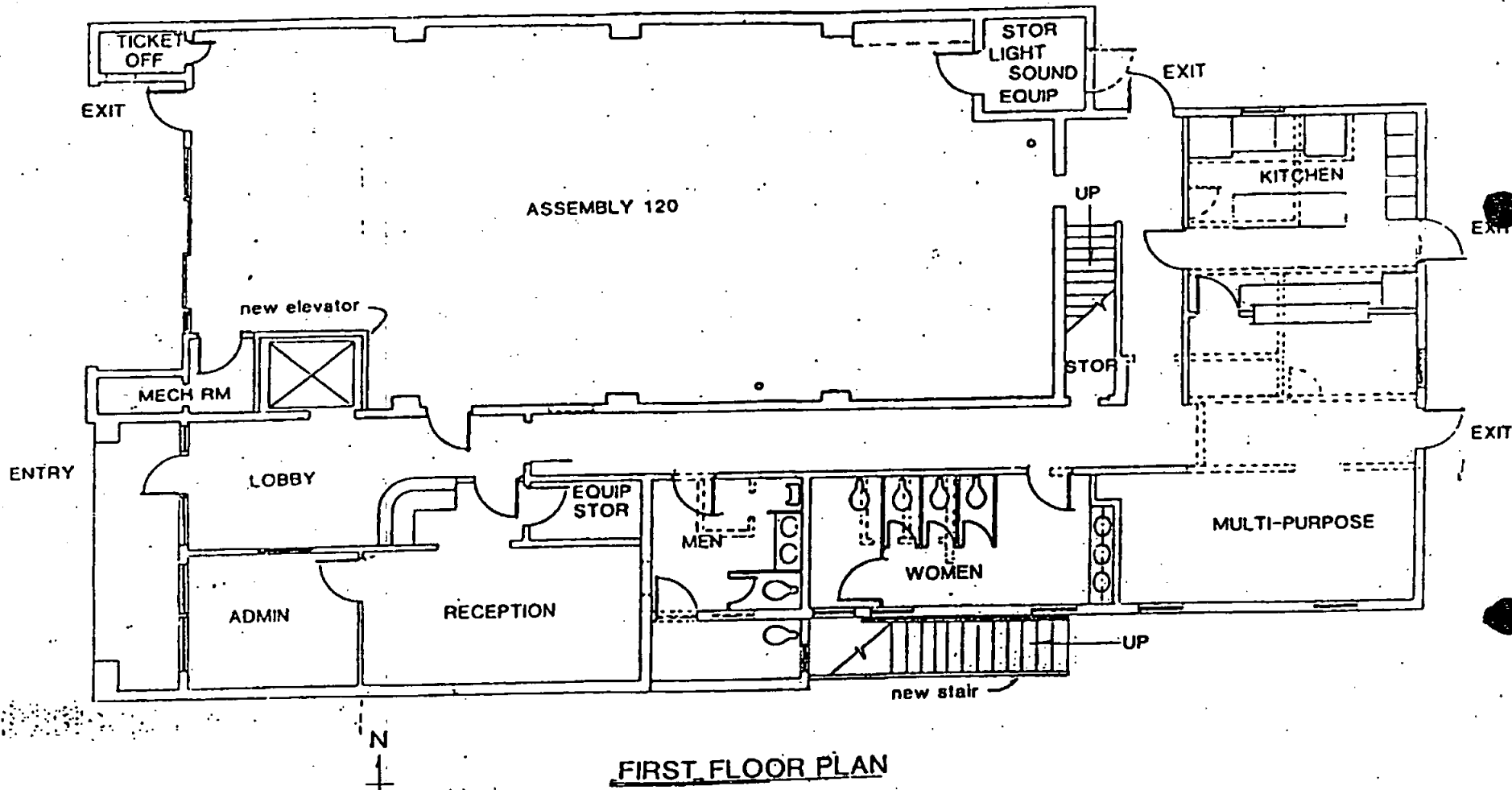
BY: [Signature]
Name: Jeremy Fonseca
Title: Deputy City Attorney

CRG/cb
01-15-13
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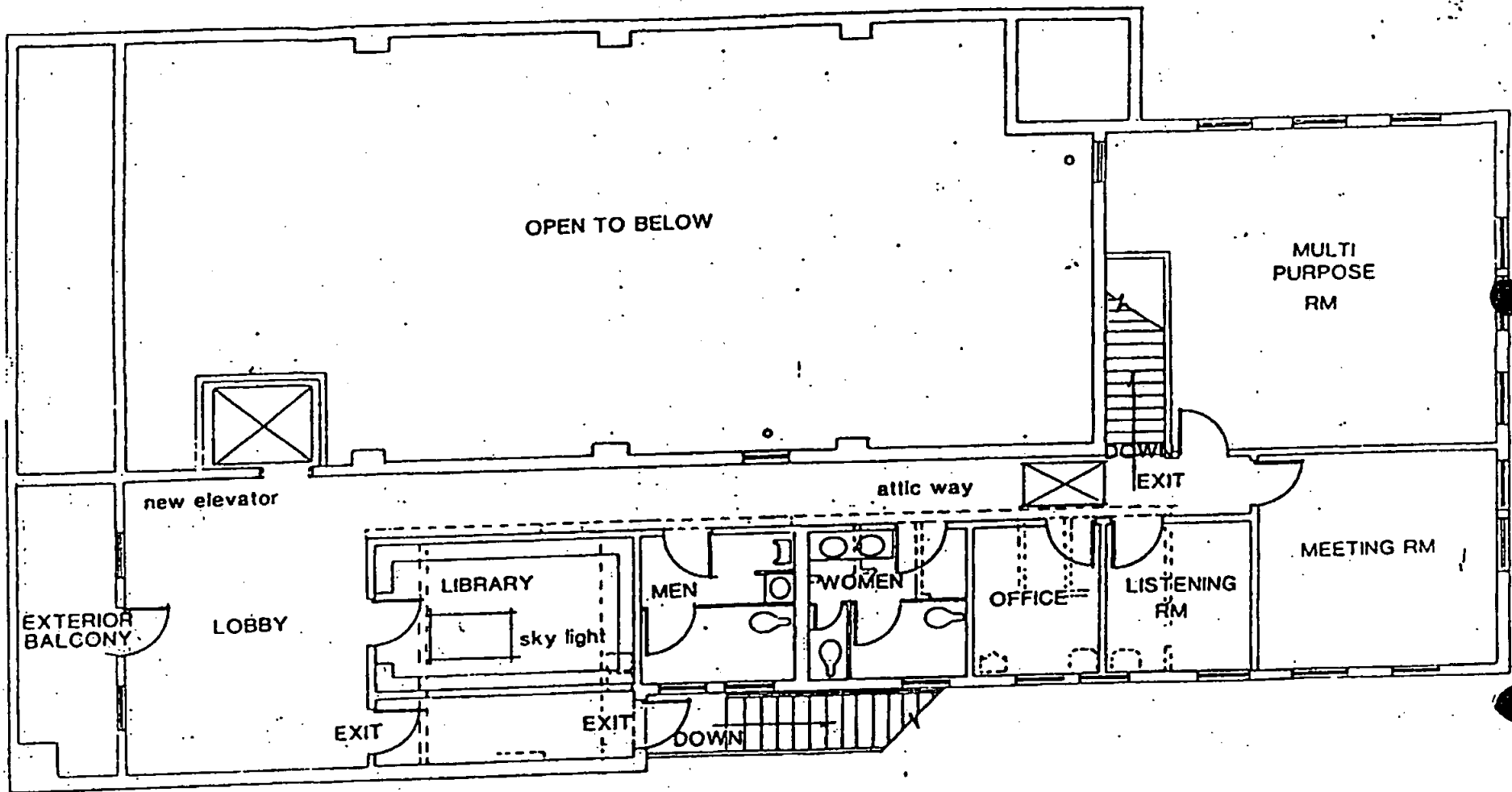
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Exhibit "A"

6-87-482



FIRST FLOOR PLAN



SECOND FLOOR PLAN

SECOND FLOOR PLAN

6-87-402

RESOLUTION NUMBER R- 308561DATE OF FINAL PASSAGE NOV 21 2013

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN DIEGO AUTHORIZING AND DIRECTING THE EXECUTION OF A 25-YEAR LEASE EXTENSION WITH THE YMCA OF SAN DIEGO COUNTY FOR THE CONTINUED LEASE OF THE OLD FIREHOUSE PROPERTY LOCATED AT 7877 HERSCHEL AVENUE, SAN DIEGO, CALIFORNIA, FOR THE PURPOSE OF OPERATING A YMCA COMMUNITY CENTER.

WHEREAS, the City of San Diego (City) owns the real property located at 7877 Herschel Avenue, San Diego, California, which was formerly the location of City Fire Station 13 (Property); and

WHEREAS, the Property was originally leased in 1987 to the YMCA of San Diego County, a California nonprofit public benefit corporation (the YMCA), for the purpose of renovating the Property and constructing and operating a YMCA community center for recreational, educational, and cultural uses by YMCA members and the general public (Original Lease). The community center on the Property is commonly known as the "Firehouse YMCA"; and

WHEREAS, the Original Lease contained a right of first refusal to extend the leasehold on the same terms and conditions for an additional twenty-five (25) years on condition the City Council votes, in its sole discretion, to continue use of the Property as a nonprofit community center at a nominal rental rate; and

WHEREAS, the YMCA has timely requested that the City Council consider whether the Property should continue to be used for a nonprofit community center at a nominal rental rate; and

WHEREAS, the YMCA has well-provided a public purpose through the continued operation of the community center at the Property; and

WHEREAS, City staff has negotiated with the YMCA an amendment and extension of the Original Lease for the additional twenty-five year term (Amendment). The Amendment adds current City-standard terms and conditions to the Original Lease and replaces certain outdated provisions. The Amendment includes a new requirement that the YMCA annually pay the City \$3,250, adjusted annually for Consumer Price Index increases, reflecting the City's annual administrative costs involving the lease; and

WHEREAS, Council Policy 700-12 provides that fair market value shall be obtained for leases of City-owned property to non-profit entities and that the only discount should be for direct offsets to otherwise-required City expenditures; and

WHEREAS, the market value of the subject real estate is between \$14,000 and \$16,800 per month; NOW, THEREFORE,

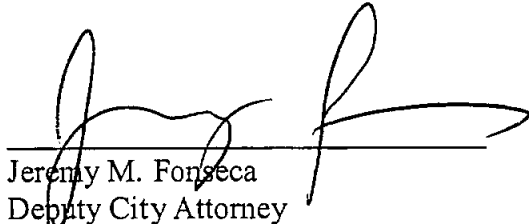
BE IT RESOLVED, that the Council President in his capacity under Charter section 265(i), or his designee, is authorized and directed to execute that certain "City of San Diego First Amendment to Nonprofit Lease," which is on file with the City Clerk as Document No. RR-308561, with the YMCA of San Diego County, a California nonprofit public benefit corporation, for the continued operation of a YMCA community center at 7877 Herschel Avenue, San Diego, California, to provide recreational, health, social, educational and cultural benefits to YMCA members and the general public.

BE IT FURTHER RESOLVED, that the Council President in his capacity under Charter section 265(i), or his designee, is authorized to execute and deliver all such agreements and all other instruments to effect and complete the transaction contemplated by this Resolution.

BE IT FURTHER RESOLVED, that, given the recreational, health, social, educational, cultural and other public benefits to be afforded by continued use of the property located at 7877 Herschel Avenue as a YMCA community center, Council Policy 700-12 is hereby waived to the extent that the Property shall be leased at less than fair market value as authorized hereby.

APPROVED: JAN I. GOLDSMITH, City Attorney

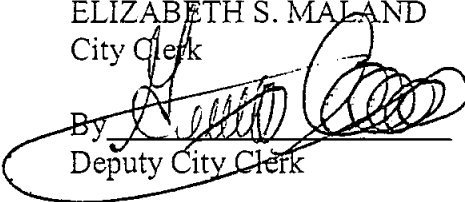
By


Jeremy M. Fonseca
Deputy City Attorney

JMF:mcm
9/30/2013
Or.Dept:Real Estate Assets Dept.
Doc. No.: 641818

I hereby certify that the foregoing Resolution was passed by the Council of the City of San Diego, at this meeting of NOV 05 2013.

ELIZABETH S. MALAND
City Clerk


By _____
Deputy City Clerk

Approved pursuant to Charter section 265(i):

(date)

TODD GLORIA, Council President

Passed by the Council of The City of San Diego on NOV 05 2013, by the following vote:

Councilmembers	Yeas	Nays	Not Present	Recused
Sherri Lightner	☒	☐	☐	☐
Kevin Faulconer	☒	☐	☐	☐
Todd Gloria	☐	☐	☒	☐
Myrtle Cole	☒	☐	☐	☐
Mark Kersey	☒	☐	☐	☐
Lorie Zapf	☒	☐	☐	☐
Scott Sherman	☒	☐	☐	☐
David Alvarez	☒	☐	☐	☐
Marti Emerald	☒	☐	☐	☐

Date of final passage NOV 21 2013

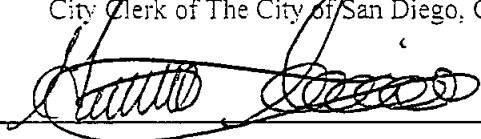
(Please note: When a resolution is approved by the Council President as interim Mayor, the date of final passage is the date the approved resolution was returned to the Office of the City Clerk.)

AUTHENTICATED BY:

TODD GLORIA, COUNCIL PRESIDENT
as interim Mayor of The City of San Diego, California.

(Seal)

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

By , Deputy

Office of the City Clerk, San Diego, California

Resolution Number R- 308561

Passed by the Council of The City of San Diego on November 5, 2013 by the following vote:

YEAS: **LIGHTNER, FACULCONER, COLE, KERSEY, ZAPF,
SHERMAN, ALVAREZ, EMERALD.**

NAYS: **NONE.**

NOT PRESENT: **GLORIA.**

VACANT: **NONE.**

RECUSED: **NONE.**

AUTHENTICATED BY:

TODD GLORIA, COUNCIL PRESIDENT
as Interim Mayor of The City of San Diego, California

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

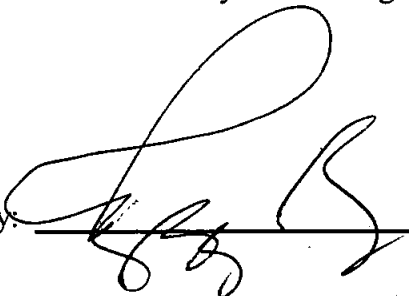
(Seal)

By: Peggy Rogers, Deputy

I HEREBY CERTIFY that the above and foregoing is a full, true and correct copy of
RESOLUTION NO. R-308561 approved by the Council of the City of San Diego, California on
November 21, 2013

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

(SEAL)

By: , Deputy