

FIRST AMENDMENT TO CITY OF SAN DIEGO PERCENTAGE LEASE

THIS FIRST AMENDMENT to City of San Diego Percentage Lease [First Amendment] is made by and between the CITY OF SAN DIEGO [CITY], a municipal corporation, and BARTELL HOTELS, a Limited Partnership, d/b/a DANA INN & MARINA [LESSEE], to be effective as of the first day of the calendar month following the date of execution by CITY [Effective Date], when signed by the parties hereto and approved by the San Diego City Attorney.

RECITALS

WHEREAS, CITY and LESSEE entered into that certain Percentage Lease filed with the Office of the City Clerk as Document No. RR-294161 [Original Lease], covering the Premises, as more particularly described therein; and

WHEREAS, CITY and LESSEE have agreed to make certain modifications to the Original Lease, as more particularly set forth in this First Amendment.

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

1. Definitions.

- (a) "Holder" shall mean and include (i) any City-approved institutional or non-institutional lender making any loan or loans secured by a mortgage on the leasehold estate of LESSEE, and (ii) the lender's City-approved successors and assigns.
- (b) The term "Lease," as used in this First Amendment, shall mean the Original Lease, as amended by this First Amendment.

2. Leasehold Mortgage Protections. CITY and LESSEE hereby agree that from and after the date hereof, the following text shall be deemed inserted as a new Section 4.8 to the Lease:

4.8 Leasehold Mortgage Protections. Notwithstanding any other provision of this Lease to the contrary, CITY agrees during the Term of the Lease, that as long as

any deed of trust approved by CITY shall remain unsatisfied of record or until written notice of satisfaction is given by the Holder to CITY, the following provisions shall apply:

a. There shall be no termination (except in the event of a default which shall be subject to the notice and cure rights set forth in Section 4.4), cancellation, surrender or modification of the Lease by LESSEE or by joint action of CITY and LESSEE without prior written notification to, with opportunity to cure, each Holder.

b. CITY shall, upon serving LESSEE with any notice of default pursuant to the provisions of the Lease, simultaneously serve a copy of the same upon each Holder which has previously provided its address to CITY. City shall not be held responsible for a Holder's failure to provide correct and/or up-to-date contact information, nor for the failure of said notice to reach a Holder after having properly placed said notice into the United States postal system.

c. Each Holder shall have the right, but not the obligation, at any time prior to termination of the Lease without payment of any penalty, to pay all of the rents due thereunder, to effect any insurance, to pay any taxes or assessments, to make any repairs or improvements, to do any other act or thing required of LESSEE under the Lease, and to do any act or thing which may be necessary and proper to be done in the performance and observance of the agreements, covenants and conditions under the Lease to prevent termination of the Lease. By executing this First Amendment, LESSEE agrees that each Holder and its agents and contractors shall have the full access to the Premises for purposes of accomplishing any of the foregoing. Any of the foregoing done by any Holder shall be as effective to prevent a termination of the Lease as the same would have been if done by LESSEE.

d. Pursuant to Section 4.4, if any default shall occur which, pursuant to any provision of the Lease, entitles CITY to terminate the Lease, CITY shall not be entitled to terminate the Lease, and any notice of termination shall be rendered void, unless (i) CITY, following the expiration of any periods of time given LESSEE in the lease to cure such default or breach, shall have given written notice of default to each Holder stating CITY's intent to terminate the Lease, and (ii) within thirty (30) days after such written notice of default is given, no Holder shall either:

(1) cure the default or breach if the same consists of the nonperformance by LESSEE of a covenant or condition of the Lease requiring the payment of money by LESSEE to CITY; or

(2) if the default or breach does not involve a covenant or condition of the Lease requiring the payment of money by LESSEE to CITY, either (A) cure such default or breach, or (B) commence, or cause any trustee under the mortgage to commence, steps and proceedings to

foreclose on the interests covered by the mortgage (either judicially or nonjudicially), and thereafter diligently pursue to completion such foreclosure and perform or cause the performance of all of the covenants and conditions of the Lease requiring the payment of money by LESSEE to CITY until such time as the leasehold shall be sold upon foreclosure pursuant to the mortgage or shall be transferred upon foreclosure or by deed or assignment in lieu of foreclosure. In the event any default or breach is not susceptible of being cured by Holder within such thirty (30) day period, such period may be extended pursuant to Section 4.4.a. of the Lease for such time as Holder shall diligently pursue to completion a judicial or nonjudicial foreclosure of its interest under its deed of trust, and thereafter diligently pursue to completion all steps in proceeding to cure all defaults or breaches under the Lease which are susceptible of being cured by Holder, and upon such cure, CITY shall not exercise any rights with respect to defaults or breaches (such as LESSEE's bankruptcy) which are not capable of being cured by Holder.

e. All right of CITY to terminate the Lease as the result of the occurrence of any default shall be subject to, and conditioned upon, CITY having first given to each Holder the written notices as required under Section 4.4.a, and all Holders having failed to remedy such default or acquire the leasehold or commence foreclosure or other appropriate proceedings in the nature thereof as set forth in the Lease.

f. If any Holder is prohibited from commencing or prosecuting foreclosure or other appropriate proceedings in the nature thereof by any process or injunction issued by any court or by reason of any action by any court having jurisdiction of any bankruptcy or insolvency proceeding involving LESSEE, the times specified in Section 4.8.d, above, for commencing or prosecuting foreclosure or other proceedings shall be extended for the period of the prohibition; provided that the Holder shall have fully cured any default in the payment of any monetary obligations of LESSEE under the Lease and shall continue to pay currently those monetary obligations as and when the same fall due.

g. CITY agrees that the name of the senior most Holder may be added jointly with CITY (pursuant to Section 5.2 b. a.) as a primary loss payee to the "Loss Payable Endorsement" attached to any and all insurance policies required to be carried by LESSEE under the Lease. However, any proceeds paid for damage or destruction to improvements shall be applied in accordance with the terms of the Lease.

h. In the event of the termination of LESSEE's rights under the Lease by reason of default or the rejection thereof by LESSEE as a debtor-in-possession in a bankruptcy proceeding, or by a receiver, liquidator or trustee for LESSEE or its property, and upon permission of the Bankruptcy Court, CITY, if requested by a Holder, will enter into a new lease of the Premises with the most

senior Holder requesting such a new lease. The new lease shall commence as of the date of termination of LESSEE's right under the Lease and shall run for the remainder of the Lease Term, at the same rent, percentage rent and additional rent and upon the same terms, provisions, and covenants as contained in LESSEE's Lease, and shall be subject to the rights, if any, of any parties then in possession of any part of the Premises [New Lease], provided:

(1) The Holder shall make written request upon CITY for a New Lease within thirty (30) days after the date of notice of default given pursuant to Section 4.8 d.;

(2) The Holder shall pay to CITY at the time of execution and delivery of a New Lease any and all sums which would, at the time of the execution and delivery thereof, be due and unpaid pursuant to the Lease but for its termination, and in addition thereto any expenses, including reasonable attorney's fees, to which CITY shall have been subjected by reason of LESSEE's default;

(3) The Holder shall perform and observe all covenants in the Lease to be performed and observed by LESSEE, and shall further remedy any other conditions which LESSEE was obligated to perform under the terms of the Lease, to the extent the same are curable or may be performed by the Holder;

(4) The Holder under the New Lease shall have the same right, title and interest in and to the buildings and improvements on the Premises as LESSEE had under the terminated Lease immediately prior to its termination;

(5) If a Holder shall select to request a New Lease of the Premises, and such Holder has a right to request a New Lease, CITY may, at its sole discretion, agree, at the request of, on behalf of and at the expense of the Holder, upon an indemnity or other assurance from its satisfactory to CITY in its sole discretion, to institute and pursue diligently to conclusion the appropriate legal remedy or remedies to oust or remove the original LESSEE from the Premises, but not any subtenant actually occupying the premises or any part thereof; and

(6) Unless and until CITY has received notice from the Holder that the Holder elects not to request a New Lease, or until the period therefor has expired, CITY shall not cancel or agree to the termination or surrender of any existing subleases nor enter into any new subleases without notification to the Holder.

i. Any New Lease made pursuant to this Section shall be prior to any mortgage, deed of trust, or other lien, charge or encumbrance on the fee of the Premises and shall be accompanied by a quitclaim conveyance of title

to the improvements (free of any mortgage, deed of trust, lien, charge or encumbrance created by CITY), subject to the reversion in favor of CITY upon expiration or sooner termination of the New Lease.

j. Nothing herein contained shall require any Holder to enter into a New Lease, nor to cure any default of LESSEE referred to above.

k. No amendment or modification of the mortgage or other documents evidencing or securing a Holder's loan, shall require the consent of CITY, or constitute a breach of any provision of, or a default under, the Lease or entitle the CITY to amend any provision of the Lease, or require payment to the CITY of any additional consideration.

l. The proceeds from any insurance policies and the proceeds arising from any condemnation shall be paid and/or applied in accordance with the provisions of the Lease.

m. CITY shall give Holders notice of any arbitration or condemnation proceedings it commences, and said Holder(s) shall have the right to intervene therein and shall be made a party to such proceedings. CITY does hereby consent to such intervention. If any Holder shall not elect to intervene or become a party to the proceedings, that Holder shall receive notice and a copy of any award or decision made in connection therewith.

n. If CITY shall mortgage or otherwise encumber its interest in the Premises, such mortgage or encumbrance shall at all times be subject and subordinate to the Lease.

o. If the leasehold estate covering the Premises herein and the underlying fee estate become vested in the same party, there shall be no merger of estates during the Term of this Lease.

3. Water Quality – Best Management Practices: CITY and LESSEE hereby agree that from and after the date hereof, the section 7.26 found in the Original Lease is deleted in its entirety and replaced with the following text:

7.26 Water Quality – Best Management Practices. The CITY and LESSEE are committed to the implementation of controls (best management practices, or BMPs) to manage activities on the premises in a manner which aids in the protection of the City of San Diego's precious water resources. It is the LESSEE's responsibility to identify and implement an effective combination of BMPs so as not to cause pollutant discharges to the storm drain system in violation of Section 43.03, Stormwater Ordinance.

Therefore, LESSEE shall, at a minimum, implement and comply, as applicable, with the BMPs for industrial and commercial facilities adopted under the San Diego Municipal Code section 43.0307(a).

It is ultimately the LESSEE's responsibility to prevent pollutant discharges to the storm drain system. Therefore, the LESSEE will identify and implement any additional BMPs that may be required to avoid the discharge of pollutants to the storm drain system.

4. San Diego's Strong Mayor Form of Governance: CITY and LESSEE hereby agree that from and after the date hereof, the following text shall be deemed inserted as a new Section 7.27 to the Lease:

7.27 San Diego's Strong Mayor Form of Governance. All references to "City Manager" in this Lease, and in all subsequent amendments to this Lease, shall be deemed to refer to "Mayor." The Strong Mayor Form of Governance became effective on January 1, 2006. This section shall remain in effect for the duration of the time period which the City operates under this form of governance pursuant to Article XV of the City of San Diego City Charter.

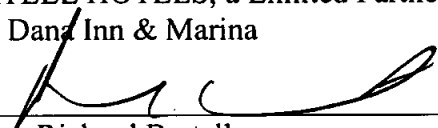
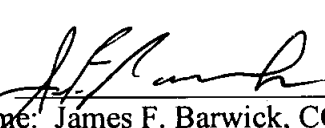
5. Lease in Effect; Representations. Except as modified by this First Amendment, all of the terms and provisions of the Original Lease are unchanged and in full force and effect, that none of CITY's rights as Lessor are waived, and that all of CITY's rights under the Original Lease are reserved. CITY and LESSEE represent and warrant that: (a) the Original Lease is in full force and effect, (b) the Original Lease has not been assigned or encumbered by either party respectively, (c) CITY and LESSEE know of no defense or counterclaim to the enforcement of the Original Lease, and (d) to the knowledge of CITY and LESSEE, neither CITY nor LESSEE is in default under any of its obligations under the Original Lease.

6. Counterparts; Captions. This First Amendment may be executed in any number of counterparts, and each of which when so executed shall be deemed an original, and all of which, taken together, shall constitute one and the same instrument. The section headings set forth in this First Amendment are for convenience of reference only, and do not define, limit or construe the contents of such sections.

7. Prior Negotiations. This First Amendment supersedes all prior negotiations, representations, understandings and agreements of, by or between CITY and LESSEE with respect to the subject matter hereof, all of which shall be deemed fully merged herein.

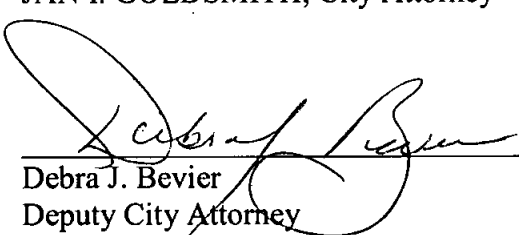
8. Submission of Amendment. Submission of this First Amendment by CITY to LESSEE for examination and/or execution shall not in any manner bind CITY or LESSEE, and no obligation or liability on CITY or LESSEE shall arise under this First Amendment unless and until this First Amendment is fully signed and delivered by LESSEE, CITY and the City Attorney.

IN WITNESS WHEREOF this First Amendment is executed by LESSEE acting by and through its lawful designee, and by CITY acting by and through its Mayor, or his designee.

	LESSEE:
Dated: <u>2/18</u> , 2010	BARTELL HOTELS, a Limited Partnership, d/b/a Dana Inn & Marina By:  Name: Richard Bartell Title: General Partner
	CITY:
Dated: <u>5/27/10</u> , 2010	THE CITY OF SAN DIEGO By:  Name: James F. Barwick, CCIM Title: Real Estate Assets Director

APPROVED AS TO FORM AND LEGALITY
this 1st day of June, 2010.

JAN I. GOLDSMITH, City Attorney


Debra J. Bevier
Deputy City Attorney

VEB/cb

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RESOLUTION NUMBER R- 305825
DATE OF FINAL PASSAGE MAY 18 2010

RESOLUTION AUTHORIZING THE CITY OF SAN DIEGO TO
ENTER INTO A FIRST AMENDMENT TO THE CITY OF SAN
DIEGO PERCENTAGE LEASE WITH BARTELL HOTELS, A
LIMITED PARTNERSHIP, D/B/A DANA INN & MARINA.

WHEREAS, the City of San Diego [City] entered into a percentage lease agreement with the predecessor to Bartell Hotels, a Limited Partnership, in June of 1968. Thereafter, in December, 1986, Bartell Hotels, a Limited Partnership, d/b/a/ Dana Inn & Marina [Dana Inn] acquired the leasehold. In December, 2000, City and Dana Inn entered into a new 50-year lease. The 50-year lease agreement is filed with the Office of the City Clerk as Document No. RR-294161 [Lease Agreement]; and

WHEREAS, in 2004 Dana Inn completed a \$17 million renovation of the leasehold; the renovation added 72 new rooms, remodeled 200 existing guest rooms, and built a new restaurant, two conference rooms, a new lobby, and a pool; and

WHEREAS, between 2004 and 2009 Dana Inn has spent approximately \$3.5 million for additional improvements to the leasehold, including further renovations of existing guest rooms and a second restaurant, construction of a new playground, redesign of the landscaping, and acquisition of new equipment and fixtures; and

WHEREAS, because of Dana Inn's desire to refinance its existing \$30 million loan which encumbers the leasehold with the best possible financing, Dana Inn has requested that

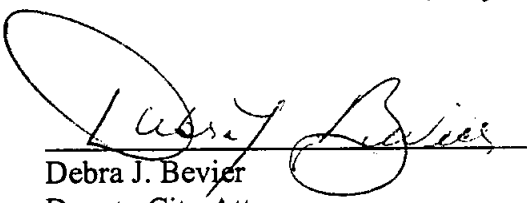
City amend the Lease Agreement to include certain lender-protection lease provisions which are not currently contained within the Lease Agreement; and

WHEREAS, the requested lender-protection lease provisions will allow Dana Inn to apply for the best possible financing options while not adversely affecting the City's interest in the Lease Agreement, and will allow the City to include other updated provisions, as more particularly set forth in the proposed First Amendment to City of San Diego Percentage Lease, which the City would otherwise not be able to implement or enforce during the term of the Lease Agreement; NOW, THEREFORE,

BE IT RESOLVED, that the Mayor, or his designee, is hereby authorized to enter into and execute the First Amendment to City of San Diego Percentage Lease between the City of San Diego and Bartell Hotels, a Limited Partnership, d/b/a/ Dana Inn & Marina.

APPROVED: JAN I. GOLDSMITH, City Attorney

By


Debra J. Bevier
Deputy City Attorney

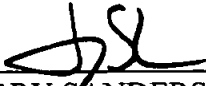
DJB:mm
04/02/2010
Or.Dept:READ
R-2010-720R-
MMS#11878

I hereby certify that the foregoing Resolution was passed by the Council of the City of San Diego, at this meeting of MAY 11 2010.

ELIZABETH S. MALAND
City Clerk

By 
Deputy City Clerk

Approved: 5/18/10
(date)


JERRY SANDERS, Mayor

Vetoed: _____
(date)

JERRY SANDERS, Mayor

Passed by the Council of The City of San Diego on May 11, 2010, by the following vote:

YEAS: LIGHTNER, FAULCONER, GLORIA, DEMAIO, FRYE,
EMERALD, & HUESO.

NAYS: NONE.

NOT PRESENT: YOUNG.

RECUSED: 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)

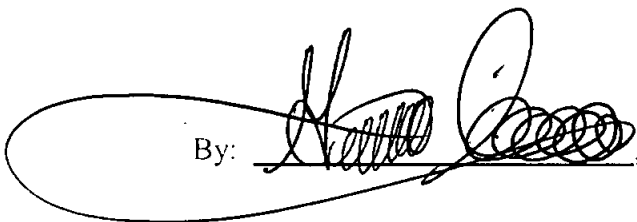
By: GIL SANCHEZ, Deputy

I HEREBY CERTIFY that the above and foregoing is a full, true and correct copy of
RESOLUTION NO. R-305825, approved by the Mayor of The City of San Diego,
California on May 18, 2010.

ELIZABETH S. MALAND

City Clerk of The City of San Diego, California

(SEAL)

By:  Deputy