



Office of the City Manager

CONSENT CALENDAR

January 22, 2013

To: Honorable Mayor and Members of the City Council
From:  Christine Daniel, City Manager
Submitted by: Scott Ferris, Acting Director, Parks, Recreation & Waterfront
Subject: License Agreement: Alameda County Community Food Bank

RECOMMENDATION

Adopt a Resolution authorizing the City Manager to execute a license agreement with the Alameda County Community Food Bank for a five year term, starting January 2013, to use an area at the Berkeley Marina to distribute food to member agencies in Berkeley and the surrounding area.

FISCAL IMPACTS OF RECOMMENDATION

There will be an annual license fee of \$1.00 and the City will incur no costs for this license agreement. The annual revenue will be deposited into account 825-5903-363.80-00. CMS No. VHS1U.

CURRENT SITUATION AND ITS EFFECTS

Currently, agencies that receive food from the Alameda County Community Food Bank are required to pick it up from the Food Bank warehouse located near the Oakland Airport. In order to reduce the cost and effort expended by member agencies, the Food Bank is establishing distribution points at specific locations and times throughout the county. They have begun to pilot this effort by currently using an area provided by the Doubletree Hotel at the Berkeley Marina on a temporary basis once a week on Thursday mornings. For the five-year license agreement, City staff has allocated space at the concrete pier (“the Old Ferry Dock”) at the Berkeley Marina for this purpose. Licensee shall have no specific parking space reserved and the City shall always have the right to direct the Licensee to leave the Premises or to move its operation to a different parking space, or, alternatively to the southwestern half of the “M” parking lot at the Berkeley Marina. Staff recommends Council approval of a license agreement to allow the Alameda County Community Food Bank to use an area at the Berkeley Marina to distribute food to its member agencies.

BACKGROUND

The Alameda County Community Food Bank distributes food for 300,000 meals per week to member agencies throughout Alameda County such as food pantries, soup kitchens, child-care centers, senior centers, after-school programs, and other community-based organizations. Its main food distribution warehouse is located near

the Oakland Airport. To better serve its member agencies, the Food bank is establishing distribution points at specific locations and times throughout the county.

CONTACT PERSON

John Mann, Waterfront Manager, 981-6737

Attachments:

1: Resolution

Exhibit A: License Agreement

RESOLUTION NO. -N.S.

LICENSE AGREEMENT: ALAMEDA COUNTY COMMUNITY FOOD BANK TO USE AN AREA AT THE BERKELEY MARINA TO DISTRIBUTE FOOD TO MEMBER AGENCIES

WHEREAS, the Alameda County Community Food Bank distributes food for 300,000 meals per week to member agencies throughout Alameda County such as food pantries, soup kitchens, child-care centers, senior centers, after-school programs and other community-based organizations. Its main food distribution warehouse is located near the Oakland Airport; and

WHEREAS, in order to reduce the cost and effort expended by member agencies, the Food Bank is establishing distribution points at specific locations and times throughout the county; and

WHEREAS, it has begun to pilot this effort by currently using an area provided by the Doubletree Hotel at the Berkeley Marina on a temporary basis once a week on Thursday mornings; and

WHEREAS, for the five-year license agreement, City staff has allocated space at the concrete pier (“the Old Ferry Dock”) at the Berkeley Marina for this purpose. The Licensee shall have no specific parking space reserved and the City shall always have the right to direct Licensee to leave the Premises or to move its operation to a different parking space, or, alternatively to the southwestern half of the “M” parking lot at the Berkeley Marina; and

WHEREAS, the license will take effect in January 2013 for a five year term. There will be an annual license fee of \$1.00 and the City will incur no costs for this license agreement. The annual revenue will be deposited into account 825-5903-363.80-00. CMS No. CMS No. VHS1U.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that the City Manager is authorized to execute a license agreement and any amendments with Alameda County Community Food Bank to use an area at the Berkeley Marina for food distribution activities to member agencies within Berkeley and the surrounding area.

Exhibits

A: License Agreement

LICENSE AGREEMENT

This AGREEMENT is entered into by and between the CITY OF BERKELEY, a Charter City organized and existing under the laws of the State of California (“City”) and The Alameda County Community Food Bank, a California non-profit corporation doing business at 7900 Edgewater Drive, Oakland, CA (“Licensee”).

1. LICENSE

a. City hereby grants a license to Licensee, subject to all the terms and conditions herein, for the non-exclusive use of the City’s property located on the western half (1/2) of the concrete dock known as the “Old Ferry Pier” located at the Berkeley Marina, Berkeley, California, (the “Premises”), as more particularly described in and shown on the map attached hereto as Exhibit A and made a part hereof.

b. Licensee has the non-exclusive right to use the Premises to park a truck and to distribute food to community organizations. Licensee shall have no specific parking space reserved and the City shall always have the right to direct Licensee to leave the Premises or to move its operation to a different parking space, or, alternatively to the southwestern half of the “M” parking lot at the Berkeley Marina (hereinafter “the Alternate Location”). Licensee agrees to comply with all applicable traffic and parking regulations.

c. Licensee is a non-profit corporation. Licensee has the non-exclusive right to use the Premises for the distribution of food to community organizations and as more particularly described in Exhibit B, attached hereto and made a part hereof.

d. This License is granted for the purpose of Licensee using the Premises to distribute food to community organizations, as further described in Exhibit B attached hereto and made a part hereof. If Licensee fails to use the Premises for such purposes, or to provide the community services described herein, or uses the Premises for any unauthorized purpose, City may, in its sole discretion, immediately terminate this License.

e. Licensee acknowledges that this License grants it the personal privilege to occupy and use the Premises for the purposes stated herein, but does not convey an estate in land or a leasehold interest in the Premises does not create a Lessor/Lessee relationship and is not a lease.

2. TERM

This License shall take effect once duly approved by the Berkeley City Council (the “Effective Date”) and executed by both the City and the Licensee, subject to the following:

a. The License Term will expire at midnight on **December 31, 2017**. Each twelve month period that ends on December 31 shall be considered a “License Year” and the First License Year shall be the period from the Effective Date until December 31, 2013. For purposes of determining the fee under Paragraph 3 below, the First License Year shall be pro-rated for any partial year.

b. Either party may terminate this License for any reason with sixty (60) days prior written notice to the other party.

c. The City has the right to terminate this License with thirty (30) days prior written notice to Licensee upon Licensee's failure to comply with any of the terms and conditions herein set forth or to terminate this License immediately if, in the City Manager's exercise of reasonable discretion, revocation is necessary in the interest of public health or safety.

3. FEE

In consideration for the rights conveyed by this License and the services rendered by Licensee, Licensee shall pay to City a fee of **ONE Dollar (\$1.00)** per year, payable in advance, thirty (30) days prior to the beginning of each License Year. Licensee shall make payments to City in accordance with the provisions described in Exhibit C, attached hereto.

4. SECURITY DEPOSIT

City and Licensee acknowledge that there shall be no security deposit.

5. NOTICES

A written notice shall be deemed served upon mailing said notice to the other party and depositing the same with the U.S. Post Office, first class mail, with postage paid. For purposes of this License, all notices to the City shall be addressed to:

City of Berkeley
Real Property Administrator
1947 Center Street, 4th Floor
Berkeley, CA 94704

with a copy sent to:

John Mann
Waterfront Manager
Parks Recreation and Waterfront Department
Marina Office
201 University Avenue
Berkeley, CA 94710

For purposes of this License, all notices to Licensee shall be addressed to the address below. Licensee shall promptly notify City of any change of address within two weeks of any such change.

Narmin Nuru, M.S.W.
Alameda County Community Food Bank
Agency Capacity Building Program Manager
P.O. Box 2599

6. MAINTENANCE AND ALTERATIONS

a. Licensee shall, to the City's satisfaction, maintain the Premises surrounding its operations in good order and reasonably free and clear of all debris, trash and rubble. Licensee agrees to repair any damage to the Premises caused by Licensee's use of the Premises or its operations on the Premises.

b. Licensee accepts the Premises (and the Alternate Location) from City in its "as is" condition, the conditions that exist as of the Effective Date of this Lease. Licensee acknowledges that City makes no representation or warranty concerning (i) the physical condition of the Premises or the Alternate Location; (ii) the suitability for Licensee's proposed use; or (iii) the presence of any Hazardous Substance in or about the Property or the Premises, except as otherwise expressly set forth in this Lease. City has encouraged Licensee to make its own physical inspection of all aspects of the Premises and the Alternate Location and to conduct its own investigation as to their suitability for Licensee's use.

c. Licensee shall not construct any facilities or improvements, install any equipment, or make any alterations to the Premises without the City's prior written consent, which consent shall not be unreasonably withheld.

d. Licensee shall otherwise surrender the Premises to City in the same condition as at the commencement of this License, subject to reasonable wear and tear.

7. ACCESS AND ENTRY TO THE PROPERTY BY OTHERS

The City, its agents, employees, and representatives, have the right to enter the Premises at any time, provided such entry does not cause unreasonable interference with Licensee's activities.

8. USE OF PUBLIC PROPERTY

a. Licensee shall keep any public and/or common areas in, around or adjacent to the Premises free and clear of any obstructions, barricades or barriers placed or created by Licensee or resulting from Licensee's operations or use of the Premises.

b. Licensee agrees that except as otherwise provided in this License, it is not a covenant or condition of this License or of any other agreement with Licensee that City undertake or cause to be undertaken any development or redevelopment of the Premises or surrounding areas or any improvement thereto, and City shall incur no liability whatsoever to Licensee for failure to undertake such development or redevelopment.

c. City at all times shall have the right and privilege of making such changes in and to the Premises and adjacent areas which in its sole opinion are deemed to be desirable or appropriate, including the location and relocation of stairways, sidewalks, pathways, driveways,

streets, entrances, exits, automobile parking spaces, the direction and flow of traffic, designation of prohibited areas, landscaped areas, utilities and all other facilities; provided, however, that the foregoing is not intended to entitle City to unreasonably effect changes that would materially and adversely affect access to or visibility of the Premises, except temporarily during periods of construction. City shall have the right to establish, promulgate and enforce such reasonable rules and regulations concerning the Premises and adjacent areas as it may deem necessary or advisable for the proper, safe and efficient management, operation, maintenance and use thereof, and Licensee shall comply with the same.

d. City at all times shall have the sole and exclusive management and control of the Premises, including without limitation, the right to lease, license or permit the use of space within the Premises and adjacent areas to persons for, including but not limited to, the sale/rental of merchandise and/or services and the right to permit advertising displays, educational/art displays, and promotional activities and entertainment.

e. Nothing contained herein shall be deemed to create any liability to City for any personal injury, or any damage to motor vehicles, vessels, or other property of Licensee's members, employees or others, unless solely caused by the gross negligence or willful misconduct of City, its agents, servants or employees. Licensee is solely responsible for the security of the Premises, and for the safety of those using the Premises. Licensee acknowledges that if City provides security guards or police patrols for the Premises or any portion thereof, City does not represent, guarantee or assume responsibility that Licensee or any person or entity will be secure from losses or injury caused by the acts of third parties and does not assume responsibility for any such acts. To induce City to provide such security, if any, as City in its sole discretion deems reasonable, appropriate and economically feasible, Licensee hereby waives any present or future claims Licensee may have against City, whether known or unknown, for bodily injury or property damage or loss arising from the performance of such security agents. City shall not be obligated to provide any public liability or property damage or loss insurance for the benefit of Licensee or any other person or entity.

f. Licensee acknowledges that City holds the Property and the Marina in trust pursuant to Chapter 347 of the California Statutes of 1913, as amended (the "Grant") subject to the conditions, restrictions, limitations, right, powers, duties, reversionary rights and other rights created or reserved in the Grant. Licensee agrees that, notwithstanding anything in this License to the contrary, Licensee shall use the property consistently with and in a manner that shall not result in a violation of the Grant or of the provisions of the Berkeley City Charter, California law and/or the California Constitution.

g. City reserves to itself the right to grant to others in the future nonexclusive utility easements over, under, through, across or on the Premises in locations that will not unreasonably interfere with Licensee's access to or use of the Premises. Any interference shall be temporary, and all work on the Premises shall proceed expeditiously. Licensee shall be given reasonable notice before commencement of any work on the Premises. In the event the installation or maintenance of such future utility lines in such easements causes any damage to the Premises, or any portion thereof, or to the Building, or other facilities located upon the Premises, including but not limited to pavement, curbs and sidewalks, the same shall be repaired by City at its

expense, if not so repaired by the party installing and maintaining the line. City shall hold harmless and indemnify Licensee from all claims arising out of the grant or use of such a utility easement, except to the extent they result from the negligence or willful misconduct of Licensee or its sub-licensees.

h. Licensee agrees that it shall not interfere with the free and unobstructed access by the people to the waters of the San Francisco Bay and the waterfront of such waters; provided, however, that Licensee shall be obligated to permit such access only as required for consistency with applicable laws of the State of California, Alameda County, the City of Berkeley, the Grant, and/or City of Berkeley's and/or City's plans adopted from time to time; however, this sentence is not intended to, and shall not be construed to, confer any right of action upon any third party.

9. TAXES, ASSESSMENTS, AND OTHER CHARGES

Licensee shall pay all applicable taxes, assessments and other charges lawfully levied on account of personal property owned by Licensee on the Premises, and pay any in-lieu, possessory interest, or use taxes lawfully imposed by reason of Licensee's use or occupancy of the Premises. Licensee shall obtain and pay for all local, state and federal permits and licenses necessary for the operation of its business.

10. UTILITIES AND SERVICE FEES

Licensee acknowledges that there is no access to utilities or services apart from those available to the public at large.

11. ASSIGNMENT AND SUBLICENSING PROHIBITED

This License is personal to Licensee. Licensee may not assign or sublicense this License in whole or in part, and any attempt to assign or sublicense this License shall terminate it.

12. INDEMNIFICATION

a. To the fullest extent permitted by law, Licensee shall (1) immediately defend and (2) indemnify City, and its directors, officers, and employees from and against all liabilities regardless of nature, type, or cause, arising out of or resulting from or in connection with the License. Liabilities subject to the duties to defend and indemnify include, without limitation, all claims, losses, damages, penalties, fines, and judgments; associated investigation and administrative expenses; defense costs, including but not limited to reasonable attorneys' fees; court costs; and costs of alternative dispute resolution. The Licensee's obligation to indemnify applies regardless of whether a liability is a result of the negligence of any other person, unless it is adjudicated that the liability is caused by the sole gross negligence or sole willful misconduct of an indemnified party.

b. The duty to defend is a separate and distinct obligation from the Licensee's duty to indemnify. The Licensee shall be obligated to defend, in all legal, equitable, administrative, or special proceedings, with counsel approved by the City, the City and its directors, officers, and

employees, immediately upon submittal to the Licensee of the claim in any form or at any stage of an action or proceeding, whether or not liability is established. A determination of comparative active negligence or willful misconduct by an indemnified party does not relieve the Licensee from its separate and distinct obligation to defend City. The obligation to defend extends through final judgment, including exhaustion of any appeals. The defense obligation includes an obligation to provide independent defense counsel if Licensee asserts that liability is caused in whole or in part by the negligence or willful misconduct of the indemnified party. If it is finally adjudicated that liability was caused by the sole active negligence or sole willful misconduct of an indemnified party, Licensee may submit a claim to the City for reimbursement of reasonable attorneys' fees and defense costs.

c. The review, acceptance or approval of any of Licensee's work or work product by any indemnified party shall not affect, relieve or reduce the Licensee's indemnification or defense obligations. This Section survives the termination of this License. The provisions of this Section are not limited by and do not affect the provisions of this License relating to insurance.

d. Liabilities subject to this Section include any claim of discrimination or harassment, including but not limited to sexual harassment, arising from the conduct of the Licensee or any of the Licensee's officers, employees, agents, licensees, or subcontractors. In the event of a discrimination or harassment complaint against any employee, agent, licensee or subcontractor of the Licensee or its subcontractors, the Licensee shall take immediate and appropriate action in response to such complaint, including, but not limited to termination or appropriate discipline of any responsible employee, agent, licensee or subcontractor.

13. INSURANCE

a. Licensee, at its own expense, shall maintain at all times during the performance of this License a commercial general liability insurance policy with a combined single limit of not less than \$1,000,000 for injury or death to one or more persons in any one accident or occurrence and an automobile liability insurance policy of not less than \$1,000,000 to cover any claims arising out Licensee's use of the Premises and performance of services under this License. All such insurance shall insure performance by Licensee of the preceding indemnity provisions. All insurance shall name the City of Berkeley, its officers, agents, volunteers and employees as additional insureds and shall provide primary coverage with respect to the City.

b. If the insurance referred to above is written on a Claims Made Form, then following termination of this license, coverage shall survive for a period of not less than five years. Coverage shall also provide for retroactive date of placement coinciding with the effective date of this license.

c. Licensee at its cost shall maintain on all its personal property, Licensee's improvements, and alterations, in on, or about the premises, a policy of standard fire and extended coverage insurance, with vandalism and malicious mischief endorsements. This coverage shall be considered primary, and the proceeds from any such policy shall be used by Licensee for the replacement of personal property or the restoration of Licensee's improvements or alterations.

d. If Licensee employees any person, it shall carry workers' compensation and employer's liability insurance and shall provide a certificate of insurance to the City. The workers' compensation insurance shall: provide that the insurance carrier shall not cancel, terminate, or otherwise modify the terms and conditions of said insurance except upon thirty (30) days prior written notice to the City; provide for a waiver of any right of subrogation against City to the extent permitted by law; and be approved as to form and sufficiency by the City's Risk Manager.

e. Licensee shall annually forward all certificates, waiver of subrogation or other insurance documents to:

City of Berkeley
Real Property Administrator
1947 Center Street, 4th Floor
Berkeley, CA 94704

14. RISK OF LOSS

Licensee bears all risk of loss under this License.

15. CONFORMITY WITH LAW

a. Licensee shall observe and comply with all applicable laws, ordinances, codes and regulations of governmental agencies, including federal, state, municipal and local governing bodies having jurisdiction over any or all of the activities of Licensee hereunder, including the Occupational Safety and Health Act of 1979 as amended, all California Occupational Safety and Health, and all applicable federal, state, municipal and local regulations relating to health, safety, noise, environmental protection, waste disposal, hazardous materials, water and air quality. All activities conducted by Licensee on the Premises must be in accordance with these laws, ordinances, codes and regulations. Licensee shall defend, indemnify and hold harmless City, its officers, agents, volunteers and employees from any and all damages, liability, fines, penalties and consequences from any noncompliance or violation by Licensee, or its officers, employees, partners, directors, agents, invitees, or guests, of any laws, ordinances, codes or regulations.

b. If a death, serious personal injury or substantial property damage occurs in connection with the performance of this License, Licensee shall immediately notify the City's Risk Manager. If any accident occurs in connection with this License, Licensee shall promptly submit a written report to City, in such form as the City may require. This report shall include the following information: 1) name and address of the injured or deceased person(s); 2) name and address of Licensee's liability insurance carrier; and 3) a detailed description of the accident, including whether any City's equipment, tools or materials were involved.

c. If a release of hazardous materials or hazardous waste occurs in connection with the performance of this License, Licensee shall immediately notify the Berkeley Police

Department and the City's Toxics Management office, in addition to any other entities as required by law.

d. Licensee shall not store hazardous materials or hazardous waste within the City of Berkeley without a proper permit from the City.

16. INDEPENDENT CAPACITY

For purposes of this License, and for the duration of this License, Licensee, including its agents and employees shall be, and are, an independent contractor and not an agent or employee of the City. Licensee has and shall retain the right to exercise full control and supervision of the services, and full control over the employment, direction, compensation and discharge of all persons assisting Licensee in the performance of this License. Licensee shall be solely responsible for all matters relating to the payment of its employees, including compliance with Social Security, withholding, and all other regulations governing such matters, and shall be solely responsible for its own acts and those of its agents and employees.

17. CITY NON-DISCRIMINATION ORDINANCE

Licensee hereby agrees to comply with the provisions of the Berkeley Municipal Code (B.M.C.) Chapter 13.26 as amended from time to time. In the performance of this License, Licensee agrees as follows:

a. Licensee shall not discriminate against any employee or applicant for employment because of race, color, religion, ancestry, national origin, age (over 40), sex, pregnancy, marital status, disability, sexual orientation or AIDS.

b. Licensee shall permit the City access to records of employment, employment advertisements, application forms, EEO-1 forms, affirmative action plans and any other documents which, in the opinion of the City, are necessary to monitor compliance with this nondiscrimination provision. In addition, Licensee shall fill out in a timely fashion, forms supplied by the City to monitor this non-discrimination provision.

18. CITY NON-DISCRIMINATION AGAINST PERSONS WITH DISABILITIES

a. If Licensee provides any aid, service or benefit to others on the City's behalf, Licensee shall, in the provision of such aid, service or benefit, observe and comply with all applicable provisions of Title II of the Americans with Disabilities Act of 1990 and any amendments thereto. Licensee shall further observe and comply with all applicable federal, state, municipal and local laws, ordinances, codes and regulations prohibiting discrimination against individuals with disabilities or ensuring that individuals with disabilities are not excluded from participating in or receiving benefits, services or activities of the City.

b. If Licensee is or becomes a "public accommodation" as defined in Title III of the Americans with Disabilities Act of 1990, Licensee shall observe and comply with all applicable

provisions of the Act and any amendments thereto, and all applicable federal, state, municipal and local laws, ordinances, codes and regulations prohibiting discrimination on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations offered by the Licensee. All Licensee's activities must be in accordance with these laws, ordinances, codes and regulations and Licensee shall be solely responsible for complying therewith.

19. CONFLICT OF INTEREST PROHIBITED

a. In accordance with Government Code section 1090, Berkeley City Charter section 36, and B.M.C. Chapter 3.64, neither Licensee nor any employee, officer, director, partner or member of Licensee, or immediate family member of any of the preceding, shall have served with the City as an elected officer, an employee, or a City board, committee or commission member, who has directly or indirectly influenced the making of this License.

b. In accordance with Government Code section 1090 and the Political Reform Act, Government Code section 87100 et seq., no person who is a director, officer, partner, trustee, employee or consultant of the Licensee, or immediate family of any of the preceding, shall make or participate in a decision made by the City or a City board, commission or committee, if it is reasonably foreseeable that the decision will have a material effect on any source of income, investment or interest in real property of that person or Licensee.

c. Interpretation of this section shall be governed by the definitions and provisions used in the Political Reform Act, Government Code section 87100 et seq., its implementing regulations, manuals and codes, Government Code section 1090, Berkeley City Charter section 36 and B.M.C. Chapter 3.64.

20. RECYCLED PAPER FOR WRITTEN REPORTS

If Licensee is required by this License to prepare a written report or study, Licensee shall use recycled paper for said report or study when such paper is available at a cost of not more than ten percent (10%) more than the cost of virgin paper, and when such paper is available at the time it is needed. For the purposes of this License, recycled paper is paper that contains at least fifty percent (50%) recycled product. If recycled paper is not available, Licensee shall use white paper. Written reports or studies prepared under this License shall be printed on both sides of the page whenever practical.

21. AUDIT

Pursuant to Section 61 of the Berkeley City Charter, the City Auditor's Office may conduct an audit of Licensee's financial, performance and compliance records maintained in connection with the operations and services performed under this License. In the event of such audit, Licensee agrees to provide the City Auditor with reasonable access to Licensee's employees and make all such financial, performance and compliance records available to the Auditor's Office. City agrees to provide Licensee an opportunity to discuss and respond to any findings before a final audit report is filed.

22. SETOFF AGAINST DEBTS

Licensee agrees that City may deduct from any payments due to Licensee under this License any monies that Licensee owes City under any ordinance, agreement or resolution for any unpaid taxes, fees, licenses, unpaid checks or other amounts.

23. GOVERNING LAW

The laws of the State of California shall govern this License. The parties agree that in any dispute venue shall be in Alameda County, California.

24. AMENDMENTS

The terms of this License shall not be altered or otherwise modified except by a written amendment to this License executed by City and Licensee.

25. CITY BUSINESS LICENSE, PAYMENT TAXES, TAX I.D. NUMBER

Licensee has obtained a City business license as required by B.M.C. Chapter 9.04 and its license number is written below; or, Licensee is exempt from the provisions of B.M.C. Chapter 9.04 and has written below the specific B.M.C. section under which it is exempt. Licensee shall pay all state and federal income taxes and any other taxes lawfully assessed and due. Licensee certifies under penalty of perjury that the taxpayer identification number written below is correct.

26. SEVERABILITY

If any part of this License or the application thereof is declared invalid for any reason, such invalidity shall not affect the other terms of this License which can be given effect without the invalid provision or application, and to this end the provisions of this License are declared to be severable.

27. WAIVER

Failure of City to insist on strict performance shall not constitute a waiver of any of the provisions of this License or a waiver of any other default of Licensee.

28. BERKELEY LIVING WAGE ORDINANCE

a. Licensee agrees to comply with B.M.C. Chapter 13.27, the Berkeley Living Wage Ordinance (LWO). If Licensee employs six (6) or more part-time, full-time or stipend employees, and generates \$350,000 or more in annual gross receipts, Licensee will be required to

provide all eligible employees with the City of Berkeley mandated minimum compensation during the term of this License, as defined in B.M.C. Chapter 13.27, as well as comply with the terms as enumerated herein.

b. Licensee shall be required to maintain all reasonable records and documents that would establish whether Licensee is subject to the LWO. If Licensee is subject to the LWO, as defined therein, Licensee shall be further required to maintain monthly records of those employees located on the Premises. These records shall include the total number of hours worked, the number of hours spent providing service on the Premises, the hourly rate paid, and the amount paid by Licensee for health benefits, if any, for each of its employees providing services under the License. The records described in this Paragraph shall be made available upon the City's request. The failure to produce these records upon demand shall be considered a default of the License.

c. If Licensee is subject to the LWO, Licensee shall include the requirements of the ordinance, as defined in B.M.C. Chapter 13.27, in any and all sublicenses in which Licensee enters with regard to the subject Property. Sublicensees shall be required to comply with this ordinance with regard to any employees who spend 25% or more of their compensated time on the Premises.

d. If Licensee fails to comply with the requirements of the LWO and this License, the City shall have the rights and remedies described in this Paragraph, in addition to any rights and remedies provided by law or equity. Licensee's failure to comply with this Paragraph shall constitute default of the License, upon which City may terminate this License.

e. In addition, at City's sole discretion, Licensee may be responsible for liquidated damages in the amount of \$50 per employee per day for each and every instance of an underpayment to an employee. It is mutually understood and agreed that Licensee's failure to pay all of its eligible employees at least the applicable living wage rate will result in damages being sustained by the City; that the nature and amount of the damages will be extremely difficult and impractical to fix; that the liquidated damages set forth herein is the nearest and most exact measure of damage for such breach that can be fixed at this time; and that the liquidated damage amount is not intended as a penalty or forfeiture for Licensee's breach.

29. BERKELEY EQUAL BENEFITS ORDINANCE

a. Licensee hereby agrees to comply with the provisions of the Berkeley Equal Benefits Ordinance, B.M.C. Chapter 13.29. If Licensee is currently subject to the Berkeley Equal Benefits Ordinance, Licensee will be required to provide all eligible employees with City mandated equal benefits during the term of this lease, as defined in B.M.C. Chapter 13.29, as well as comply with the terms enumerated herein.

b. If Licensee is currently or becomes subject to the Berkeley Equal Benefits Ordinance, Licensee agrees to supply the City with any records the City deems necessary to determine compliance with this provision.

c. If Licensee fails to comply with the requirements of this Section, City shall have the rights and remedies described in this Section, in addition to any rights and remedies provided by law and equity. Licensee's failure to comply with this Paragraph shall constitute default of the License.

In addition, at City's sole discretion, Licensee may be responsible for liquidated damages in the amount of \$50.00 per employee per day for each and every instance of violation of this Section. It is mutually understood and agreed that Licensee's failure to provide its employees with equal benefits will result in damages being sustained by City; that the nature and amount of these damages will be extremely difficult and impractical to fix; that the liquidated damages set forth herein is the nearest and most exact measure of damages for such breach that can be fixed at this time; and that the liquidated damage amount is not intended as a penalty or forfeiture for Licensee's breach.

30. NUCLEAR FREE BERKELEY

Licensee agrees to comply with B.M.C. Chapter 12.90, the Nuclear Free Berkeley Act, as amended from time to time.

31. OPPRESSIVE STATES

a. In accordance with Resolution No. 59,583-N.S., Licensee certifies that it has no contractual relations with, and agrees during the term of this License to forgo contractual relations to provide personal services to, the following entities:

- (1) The governing regime in any Oppressive State.
- (2) Any business or corporation organized under the authority of the governing regime of any Oppressive State.
- (3) Any individual, firm, partnership, corporation, association, or any other commercial organization, and including parent-entities and wholly-owned subsidiaries (to the extent that their operations are related to the purpose of this License) for the express purpose of assisting in business operations or trading with any public or private entity located in any Oppressive State.

b. For purposes of this License, the Tibet Autonomous Region and the provinces of Abo, Kham, and V-Tsang shall be deemed Oppressive States.

c. Licensee's failure to comply with this paragraph shall constitute a default of this License and City may terminate this License. In the event that City terminates this License due to a default under this provision, City may deem Licensee a non-responsible bidder for five (5) years from the date this License is terminated.

32. EFFECT ON SUCCESSORS AND ASSIGNS

This License shall be binding on and inure to the benefit of the heirs, executors, administrators, successors, and assigns of the parties hereto.

33. PESTICIDES

All use of pesticides on the Premises shall be in compliance with the City of Berkeley's Pesticide Use Policy as it exists at the time of such use.

34. SIGNS

Licensee shall not install or letter any signs on the Premises without the prior written consent of City. All signs on the Premises shall conform to the provisions of B.M.C. Chapter 20.04 and any other City design guidelines for signs.

35. REVIEW OF AGREEMENT BY COUNSEL; FAMILIARITY WITH CONTENTS AND EFFECT

Licensee and City each represent that in entering into this Agreement, it has relied upon the legal advice of its attorneys, if it so chooses. Licensee further represents that the terms of this Agreement have been completely read by it, and that these terms are fully understood and voluntarily accepted by it, and if applicable, its attorneys.

36. AGREEMENT JOINTLY DRAFTED

Licensee and City and counsel for each, if applicable, has reviewed and revised, or had the opportunity to revise this Agreement, and accordingly the normal rule of construction that any ambiguities are to be resolved against the drafting party is not applicable and therefore shall not be employed in the interpretation of this Agreement or any amendment to it.

37. ENTIRE AGREEMENT

a. The terms and conditions of this License, all exhibits attached and any documents expressly incorporated by reference represent the entire agreement between the parties with respect to the subject matter of this License. This License shall supersede any and all prior agreements, oral or written, regarding the subject matter between City and Licensee. No other agreement, statement, or promise relating to the subject matter of this License shall be valid or binding except by a written amendment to this License.

b. If any conflicts arise between the terms and conditions of this License and the terms and conditions of the attached exhibits or any documents expressly incorporated, the terms and conditions of this License shall control.

IN WITNESS WHEREOF, City and Licensee have executed this License as of the date written below.

Approved as to form:

CITY OF BERKELEY

City Attorney

By: _____
City Manager

Date: _____

Date: _____

Registered by:

Attest:

City Auditor

City Clerk

Date: _____

Date: _____

LICENSEE

By: _____

Its: _____

Date: _____

LICENSEE INFORMATION

Tax Identification No.

Berkeley Business License

Incorporated: Yes___ No ___

Approved as to form: Yes___ No ___

Certified Woman Business Enterprise: Yes___ No ___

Certified Minority Business Enterprise: Yes___ No ___

Certified Disadvantaged Business Enterprise: Yes___ No ___

EXHIBIT A

DESCRIPTION OF PROPERTY

City hereby grants a license to Licensee, subject to all the terms and conditions herein, for the non-exclusive use of the City's property located on the western half (1/2) of the concrete dock known as the "Old Ferry Pier" located at the Berkeley Marina, Berkeley, California, (the "Premises"), as more particularly described in and shown on the map attached hereto as Exhibit A and made a part hereof.

EXHIBIT B

USE OF PROPERTY

Licensee shall only use the Property described on Exhibit A attached as follows:

1. Licensee's use of the Premises shall be non-exclusive.
2. Licensee is responsible for obtaining any necessary permits or licenses required by state and local regulations or laws.
3. Licensee shall not engage in the sale or distribution of alcoholic beverages.
4. Licensee may use the Premises for a four (4) hour period on Thursdays at a time that has been scheduled in advance with Marina management.
5. Licensee shall use the Premises on a consistent basis in accordance with a schedule approved by the City at the start of each License Year.
6. Licensee shall maintain the Premises reasonably free and clean of all debris, trash and rubble.
7. Licensee shall keep any public and/or common areas of the Marina adjacent to the Premises free and clear of any obstructions, barricades or barriers placed or created by Licensee or resulting from Licensee's operations or use of the Premises.
8. Licensee shall park in the public parking area of the Premises.
9. Licensee's use of the Premises is limited to one (1) legal parking space.
10. Licensee's access to a parking space is on a first come, first served basis.
11. Licensee shall not reserve a specific parking space in the specified area.
12. City shall have the right to redirect Licensee to leave the Premises.
13. City shall have the right to direct Licensee to move its operation to a different parking space at the Premises, or, alternatively to the southwestern 1/2 of the "M" parking lot.
14. Licensee shall comply with all applicable traffic and parking regulations.

EXHIBIT C

PAYMENT

1. The License Fee described in Paragraph 3 of the License Agreement shall be paid in advance each License Year. Payments must be received no later than thirty (30) calendar days prior to the start of each License Year. Any payment received after this thirty (30) day time period will be assessed a ten percent (10%) late penalty.
2. Payments shall be made payable to the “City of Berkeley” and paid in person or by mail to the

Finance Department
Customer Service Counter
1947 Center Street, 1st Floor
Berkeley, CA 94704
3. Failure of Licensee to make full payments on time is grounds for termination of this License by the City.