



Office of the City Manager

CONSENT CALENDAR

October 25, 2005

To: Honorable Mayor and
Members of the City Council

From: *PK* Phil Kamlarz, City Manager

Submitted by: Marc Seleznow, Director, Parks and Waterfront

Subject: License: Use of Building at 91 Bolivar Drive, Aquatic Park, by Fix Our Ferals

RECOMMENDATION

Adopt a Resolution authorizing the City Manager to execute a license with Fix Our Ferals for short-term use of the Rod and Gun Club, a vacant Aquatic Park building at 91 Bolivar Drive, as a pre and post sterilization recovery room for free-roaming cats for the period November 1, 2005 through March 31, 2006.

FISCAL IMPACTS OF RECOMMENDATION

Minimal, as only a de minimus license fee will be collected from Fix Our Ferals and no expenses to the City will be incurred. The city-owned Rod and Gun Club at 91 Bolivar at Aquatic Park is currently vacant and therefore no loss of rental revenue will occur. By decreasing the number of cats impounded at the City's Animal Shelter, the City will see cost savings in the following areas: veterinary expenses, board and care and a reduction of staff time spent on field service calls. In return for use of the building at Aquatic Park, volunteers from Fix Our Ferals will empty the building of the unwanted contents, perform general cleaning of the property, install a complaint disabled access ramp, and ensure that the property is maintained so that no further deterioration takes place while under license. CMS No. APZWM

CURRENT SITUATION AND ITS EFFECTS

While Fix Our Ferals has been working closely with Berkeley Animal Care Services to assist neighborhood residents in trapping cats for sterilization, the current number of animals in need of sterilization far outstrips the number of homes available for recovery. If action is not taken by November of this year, the problem will be greatly compounded by Spring of 2006.

The space at the vacant Rod and Gun Club building at 91 Bolivar Drive at Aquatic Park is essential for this project to move forward because it is ideal for the waiting and recovery functions. After three to five days, the cats are released back to their neighborhoods where they were trapped. At no time will feral cats trapped in other sections of the community be released in Aquatic Park.

The terms of the proposed license to Fix Our Ferals are as follows (in the Resolution, see Exhibit A: License Agreement):

1. Term: November 1, 2005 thru March 31, 2006.
2. License Fee: \$40.00
3. Deposit: \$0.00
4. Insurance: To be provided by Fix Our Ferals, including public liability and property damage insurance with a combined limit of \$1,000,000 and the City of Berkeley is an additional insured.
5. Use: As a feral cat holding and recovery area prior to and after spay/neuter surgeries.
6. Utilities: PG&E, water and garbage paid by Fix Our Ferals.
7. Possessory Interest: Fix Our Ferals is liable if applicable.
8. Maintenance: Fix Our Ferals will cover this. No further deterioration of building may occur while under license. Fix Our Ferals will add a compliant disabled access ramp to the front door for accessibility.
9. Holding Over: No holding over provision is included. Fix Our Ferals must vacate the building by March 31, 2006, or, with prior written approval, no later than October 31, 2006.

BACKGROUND

Fix Our Ferals (FOF) is a nonprofit group of volunteers who rescue and sterilize feral cats from the Berkeley Animal Care Shelter. These activities reduce the numbers of homeless/unwanted cats brought to the Berkeley Animal Care Shelter and also help control feral cat populations in Berkeley neighborhoods.

Despite the spay-neuter services offered by both the Fix Our Ferals free clinics and the Berkeley Spay/Neuter your Pet program (SNYP), there still exist many “problem areas” where free-roaming cats (feral and stray) continue to breed uncontrolled. The resultant flood of kittens and cats into the Berkeley Animal Shelter causes numerous problems: overcrowding at the Shelter; numbers of animals that exceed the number of homes available for adoption, and a financial burden to the City of Berkeley.

RATIONALE FOR RECOMMENDATION

This program will lead to a direct reduction in the number of service calls to the Animal Shelter regarding disruptive and dead cats and makes good use of a currently vacant city-owned property. The success of the program can be determined by comparing statistics from this season with those of preceding years.

ALTERNATIVE ACTIONS CONSIDERED

Fix Our Ferals does not have the resources to obtain rental space for the annual five month breeding season.

CONTACT PERSON

Kate O'Connor, City Manager's Office – Animal Care Services, 981-6601
William Foley, Public Works – Real Estate, 981-6337
Marc Selznow, Parks and Waterfront Director, 510-981-6300

Attachments:

- 1: Resolution
Exhibit A: License Agreement

RESOLUTION NO. ##,###-N.S.

LICENSE AGREEMENT WITH FIX OUR FERALS FOR THE USE OF CITY PROPERTY
LOCATED AT 91 BOLIVAR DRIVE IN AQUATIC PARK AS A PRE AND POST
STERILIZATION RECOVERY ROOM FOR FREE-ROAMING CATS

WHEREAS, there is great need for spay and neuter services for feral cats in and around Berkeley due to feral cat overpopulation; and

WHEREAS, the resultant flood of kittens and cats into the Berkeley Animal Shelter causes numerous problems, including: overcrowding at the Shelter; numbers of animals that exceed the number of homes available for adoption; and, posing a financial burden to the City of Berkeley; and

WHEREAS, The City of Berkeley has a vacant building at 91 Bolivar Drive in Aquatic Park that could be used to house feral cats before and after spay and neuter surgeries; and

WHEREAS, Fix Our Ferals is willing to clean the property; construct a compliant disabled access ramp; and, will vacate the property by March 31, 2006.

NOW THEREFORE, BE IT RESOLVED, that the Council of the City of Berkeley authorizes the City Manager, or his designee, to execute a license agreement and any amendments with Fix Our Ferals, for use of the Rod and Gun Club, a vacant Aquatic Park building at 91 Bolivar Drive, as a pre and post sterilization recovery room for free-roaming cats for the period November 1, 2005 through March 31, 2006, which license agreement shall be substantially in the same form attached hereto as Exhibit A. A record signature copy of the agreement and any amendments is to be on file in the Office of the City Clerk.

CITY OF BERKELEY

LICENSE

Between

THE CITY OF BERKELEY, A CHARTER CITY
ORGANIZED AND EXISTING UNDER THE LAWS
OF THE STATE OF CALIFORNIA

as Licensor,

and

FIX OUR FERALS

as Licensee.

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LICENSE

THIS LICENSE is made by and between the CITY OF BERKELEY, a Charter City organized and existing under the laws of the State of California ("City") and FIX OUR FERALS a California non-profit corporation P. O. BOX 13083 Berkeley, CA

WITNESSETH:

City hereby licenses to Licensee, and Licensee hereby licenses from City, the Property for the term and subject to the terms, covenants, agreements and conditions set forth below, to each and all of which City and Licensee hereby mutually agree.

1. DEFINITIONS.

Unless the context otherwise specifies or requires, the following terms shall have the meanings herein specified:

- A. "Affiliate," as to any person, shall mean such person's partners, members, commissioners, officers, employees, volunteers and agents.
- B. "Building" shall mean the building on the Property as described in Exhibit B.
- C. "Aquatic Park" shall mean the Aquatic Park as defined in Chapter 6.04 of the Berkeley Municipal Code ("B.M.C."), as amended or succeeded, and any buildings and other improvements constructed or to be constructed therein. Without limiting the provisions of Paragraph 34 of this License, Licensee acknowledges it is not relying on any representations or warranties made by City, City's agents or anyone else in regard to the size or configuration of Aquatic Park or in regard to the nature, location, or appearance of any buildings, improvements, or unimproved property therein.
- D. "Main Lagoon" or "Aquatic Park Lake" shall mean that body of water lying between West Bolivar Drive on the west, Addison Street on the north, the Southern Pacific railroad tracks on the east, and the service road on the south.
- E. "Property" shall mean the property described on Exhibit B.

2. TERM.

- A. Term. This License shall take effect once duly approved by the Berkeley City Council and executed by both City and Licensee ("The Effective Date"). The License Term will expire at midnight March 31, 2006 ("The Termination Date").

3. **FEE.**

A. Fee. There is a \$40 (forty dollar) fee payment for this license.

4. **USE OF PROPERTY AND THE AQUATIC PARK MAIN LAGOON.**

A. The Property shall be used solely by members of Fix our Ferals or by other persons specifically authorized by the Organization. The Property may be used for any lawful activity related to the goals and purposes of the Organization, as described in the Organization's By-Law's. Licensee's permission to use the Property is subject to the terms and conditions of this License, including but not limited to the provisions of Paragraph 6 hereof.

B. Licensee shall operate its business in the Property in a manner consistent with the use permitted herein and the standards promulgated by City.

C. Licensee shall not, without the written consent of City:

1. Place, construct or maintain in, on, or about the Property or within Aquatic Park any advertisement media, including without limitation, searchlights, flashing lights, loudspeakers, or other similar media or device;

2. Use or permit any portion of the Property to be used as living or sleeping quarters; and

3. Sell, distribute, display or offer for sale any item, which, in City's good faith judgment, may tend to detract from the image of Aquatic Park.

D. Licensee shall not do or permit to be done in, on, or about the Property anything which is prohibited by or may conflict with any law, statute, ordinance or governmental rule or regulation now in force or hereafter enacted or promulgated, which is prohibited by the standard forms of special form or commercial general liability insurance or which may cause a cancellation of any insurance policy covering Aquatic Park or the Property or any of its contents, or (except with the prior written consent of City) which may increase the existing rate of or affect any special form or commercial general liability insurance or other insurance upon Aquatic Park or the Property, or any of its contents. In the event Licensee does or permits to be done anything or keeps or permits to be kept anything on or about the Property or the Aquatic Park which increases the existing rate of such insurance upon Aquatic Park or the Property or any of its contents, Licensee shall pay the amount of any such increase promptly upon City's demand. Licensee shall not do or permit anything to be done which will in any way obstruct or interfere with the rights of other lawful users of Aquatic Park, including, without limitation, Licensees, their employees or invitees, disturb or annoy them, or use or allow the Property to be used for any improper, unlawful or objectionable purpose. Licensee shall not maintain or permit

any nuisance in or about the Property or commit or suffer to be committed any waste in or upon the Property or the Property.

H. Licensee shall not use or permit the Property to be used in any manner or permit anything to be brought into or kept therein which would (i) violate the certificate of occupancy for the Property; (ii) make it impossible or extraordinarily difficult to obtain special form coverage, commercial general liability or other insurance required to be furnished by Licensee under this License; (iii) cause structural injury to any part of the Property or the Building; (iv) impair or interfere with the proper operation and maintenance of the Property and/or Aquatic Park; or (v) violate any of Licensee's other obligations under this License.

I. If any governmental License or permit, other than a certificate of occupancy, shall be required for the proper and lawful conduct of Licensee's business, Licensee shall procure and maintain such License or permit and submit the same for inspection by City. Licensee at all times shall comply with the terms and conditions of each such License or permit.

J. Nothing shall be done in or about the Property by Licensee or anyone having a contractual relationship with Licensee that will result in substantial interference, by themselves or third parties, with normal operation and use of Aquatic Park or the means of ingress and egress thereto ("Substantial Interference"). Licensee shall use every effort to eliminate Substantial Interference, including legal action. If Licensee fails to bring an immediate halt to any Substantial Interference, City shall have the right (i) to designate action to Licensee, which Licensee will undertake to eliminate such Substantial Interference and (ii) to commence any legal action to eliminate such Substantial Interference. Any agreement entered into by Licensee with regard to use of the Property shall contain a provision reserving to Licensee all of the necessary rights and remedies to permit Licensee to comply with its obligations under this provision and authorizing City to enforce the terms of such provision if Licensee fails to do so.

K. Licensee shall, upon expiration or earlier termination of this License, if requested, execute and deliver to City a good and sufficient quitclaim deed to the rights arising hereunder. Should Licensee fail or refuse to deliver to City a quitclaim deed, a written notice by City reciting the failure or refusal of Licensee to execute and deliver such quitclaim deed shall from the date of recordation of said notice be conclusive evidence against Licensee and all persons claiming under Licensee, of the termination of this License.

5. USE OF AQUATIC PARK PROPERTY: PUBLIC TRUST.

A. The parties acknowledge that Licensee has, as a member of the general public, the non-exclusive right, in common with others duly authorized by City, and subject to all generally applicable laws and regulations, to use Aquatic Park, including the Main Lagoon.

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 Property or Aquatic Park, 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 Aquatic Park (other than the Building) from time to time 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 Property, except temporarily during periods of construction. City shall have the right to establish, promulgate and enforce such reasonable rules and regulations concerning Aquatic Park as it may deem necessary or advisable for the proper 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 Aquatic Park, including, without limitation, the right to lease, license or permit the use of space within Aquatic Park to persons for 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 caused by the gross negligence or willful misconduct of City, its agents, servants or employees. Licensee is solely responsible for the security of the Property, and for the safety of those using the Property and/or the Main Lagoon pursuant to this License or any permits or Licenses from the City. Licensee acknowledges that if City provides security guards or police patrols for Aquatic Park or any portion thereof, City does not represent, guarantee or assume responsibility that Licensee or any person or entity will be secure from losses caused by the illegal acts of third parties and does not assume responsibility for any such illegal 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 arising from the performance of such security agents. City shall not be obligated to provide any public liability or property damage insurance for the benefit of Licensee or any other person or entity, each such party being responsible for its own insurance.

F. Licensee acknowledges that City holds the Property and Aquatic Park in trust pursuant to Chapter 347 of the California Statutes of 1913, as amended ("the Grant"), subject to the conditions, restrictions, limitations, rights, powers, and 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 Building and the Property consistently with and in a manner that shall not result in a violation of the Grant or of provisions of the Berkeley City Charter, California law or the California Constitution.

G. City reserves to itself and the right to grant to others in the future nonexclusive utility easements over, under, through, across or on the Property in locations that will not unreasonably interfere with Licensee's access to or use of the Property. Any interference shall be temporary, and all work on the Property shall proceed expeditiously. Licensee shall be given reasonable notice before commencement of any work on the Property. In the event the installation or maintenance of such future utility lines in such easements causes any damage to the Property, or any portion thereof, or to the Building, or other facilities located upon the Property, 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 lessees or sub-Licensees.

H. Licensee agrees that it shall not interfere with the free and unobstructed access by the people to the waters of the Main Lagoon in Aquatic Park. Licensee shall not preclude other users of the Main Lagoon from exercising a different use without first obtaining any and all appropriate permits. Licensee shall be obligated to permit such access as required for consistency with applicable laws of the State of California, the Grant, 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.

6. SERVICES.

A. City shall provide and maintain water and sewer service to the Property. Licensee shall maintain the water and sewer lines inside the Building. City shall pay the costs of the water and sewer service. Licensee shall pay for and be responsible for all other utility services, including electric, gas, and telephone and all fees and periodic charges related thereto. City shall provide garbage service.

B. City makes no representation or warranty that the supply of any utility or service to the Property and/or the Building will not be interrupted, delayed or reduced.

C. City shall not be liable for damages to either person or property; nor shall City be deemed to have evicted Licensee; nor shall there be any abatement of any rent; nor shall Licensee be relieved from performance of any covenant on its part to be performed hereunder by reason of any (i) breakdown of equipment or machinery utilized in supplying utilities or services; (ii) interruption of or failure to supply or delay in supplying any such utilities or services; (iii) the limitation, rationing or restriction on use of water, electricity, gas, or telecommunications service serving the Property, the Building or Aquatic Park, (iv) failure to repair or cure any of the foregoing, except in the case of City's gross negligence or willful misconduct.

7. ALTERATIONS AND IMPROVEMENTS.

A. Licensee acknowledges that City owns the Building(s). Licensee accepts the Building(s) from City in their "as is" conditions, the conditions that exist as of the Effective Date of this License. Licensee acknowledges that City makes no representation or warranty

concerning (i) the physical condition of the Building(s); (ii) the Property's suitability for Licensee's proposed use; or (iii) the presence of any Hazardous Substance in or about the Property or the Building(s), except as otherwise expressly set forth in this License. City has encouraged Licensee to make its own physical inspection of all aspects of the Property and the Building(s) and to conduct its own investigation as to the suitability of the Property and the Building(s) for Licensee's use. Licensee shall construct a disabled access ramp to the building.

B. To the extent that Licensee's Work shall require a building permit or other permits from the City of Berkeley, Bay Conservation and Development Commission ("BCDC") and/or any other governmental agency, Licensee shall not perform any of Licensee's Work until Licensee has obtained all requisite permits. Licensee further shall comply with all prevailing wage requirements of California Labor Code Sections 1720 et seq.; to the extent such requirements are applicable to Licensee's work.

C. Except as otherwise expressly provided in this License, Licensee shall not repair, replace or modify any utility system located within the Building without the City's prior written consent. Licensee is responsible for the repair of any damage to any utility system, structural element of the Building(s), facilities of City or any other facilities arising out of Licensee's construction activities or Licensee's negligence or willful misconduct; provided, however, such provision is not intended to and shall not be interpreted to make any other person or entity a third party beneficiary thereof.

D. 1. Licensee agrees that to the extent it is required to comply with the prevailing wage requirements, Licensee shall assure that all workers are paid the prevailing rate of per diem wages, and travel and subsistence payments (defined in applicable collective bargaining agreements filed in accordance with Section 1773.8 of the California Labor Code), in effect on the date of City's first approval of a building permit or other approval of the work. Copies of the applicable prevailing rate of per diem wages are on file at City's principal office and will be made available to any interested party on request. Licensee agrees to post a copy of the prevailing rate of per diem wages at the Property. Licensee, as a penalty to City, shall forfeit Twenty-Five Dollars (\$25) for each calendar day, or portion thereof (or such other sum as specified from time to time by Section 1775 of the California Labor Code), for each worker paid less than the applicable prevailing rates for such work or craft in which such worker is employed. The difference between such prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by Licensee.

2. Licensee agrees to keep or cause to be kept by each contractor and subcontractor an accurate payroll record for each worker employed on Licensee's Work covered by this subparagraph D showing all of the information specified in subsection (a) of Section 1776 of the California Labor Code. All such payroll records shall be certified, available for inspection and filed in accordance with the procedures specified in subsections (b)-(e) inclusive of Section 1776 of the California Labor Code. In the event of noncompliance with the foregoing requirements concerning payroll records which continues for more than ten (10) days after City gives Licensee written notice specifying in what respects Licensee must comply, Licensee shall forfeit, as a penalty to City, for each worker Twenty-Five Dollars (\$25) for each calendar day, or

portion thereof, until strict compliance is effectuated. Licensee shall be responsible for complying with Section 1777.5 of the California Labor Code concerning apprentice able occupations, with respect to all work covered by that section. For purposes of the prevailing wage requirements of this subparagraph, Licensee shall be deemed to be a “contractor” as that term is used in Sections 1720 et seq., of the California Labor Code. Except where the context otherwise requires, the definitions of terms and phrases contained in the State prevailing wage law, Sections 1720 et seq., of the California Labor Code, and in the implementing administrative regulations, shall apply to the same terms and phrases which are used in the prevailing wage requirements of this subparagraph D.

8. LIENS.

Licensee shall keep the Property, the Building, and Aquatic Park free from any liens arising out of any work performed, materials furnished or obligations incurred by Licensee. In the event that Licensee shall not cause any such liens to be released of record, City shall have, in addition to all other remedies provided herein or by law, the right (but not the obligation) to cause the same to be released by such means as City shall deem proper, including payment of the claim giving rise to such lien. All sums paid and all expenses incurred by City in connection therewith shall be reimbursed by Licensee promptly on demand. City shall have the right to post and keep posted on the Property any notices (including, without limitation, notices of non-responsibility pursuant to California Civil Code Section 3094) that City may deem proper for protection of City, and the Property. Licensee shall give City at least ten (10) business days’ prior notice of the date of commencement of any Licensee’s work on or in the Property to allow City to post such notices.

9. LICENSEE AND CITY MAINTENANCE OBLIGATIONS.

A Except as provided for in subparagraph F below, Licensee agrees that during the entire term of this License, at its own cost and expense, it shall keep and maintain the Building(s) on the Property, and all licensehold improvements, fixtures, furniture, equipment and other improvements located on the Property in good-quality order, repair and condition. Except as otherwise provided in this License, Licensee shall perform, at its own cost and expense, any and all maintenance, repairs, or rehabilitation to the Building(s), whether required by deterioration or by operations of Tenant or otherwise. This obligation includes any repairs to the roof.

B. To the extent applicable, Licensee hereby waives the provisions of Civil Code Sections 1941 and 1942, and any other provision of law now or hereafter in effect, with regard to the Licensee ability of the Property and the Building.

C. “Good-quality order, repair and condition”, as used herein, shall mean the maintenance, repair, or renovation of the Building, equipment, furniture, fixtures, outdoor lighting, signage, and appurtenances necessary to keep and maintain the Building in efficient and attractive condition, given the nature and age of the Building, at any time during the term of this License.

D. Licensee shall provide its own janitorial service for the Property, and all of

Licensee's rubbish shall be removed by Licensee to such location(s) on the Property or within Aquatic Park as may be designated by City for pick-up and disposal by the City.

In the event City fails to maintain the Property as provided for herein Licensee's only remedy against City shall be the right to terminate this License, effective ninety (90) days from the delivery of written notice to City.

F. City shall use good faith efforts in providing for the safe and reasonable use of the Main Lagoon. In the event of a dispute and City and Licensee can not informally resolve the dispute, Licensee's only remedy against City shall be the right to terminate this License, effective thirty (30) days from the delivery of written notice to City.

G. Nothing in this Paragraph 10 shall be deemed to affect or impair City's rights under Paragraph 7 of this License. Licensee acknowledges that City has no obligation and has made no promises to alter, remodel, improve, repair, decorate or paint the Building or to improve the Property, or any part thereof. City has made no representations respecting the condition of the Building, the Property, or Aquatic Park, except as specifically set forth in this License.

10. DAMAGE OR DESTRUCTION.

A. In the event the Property is damaged by fire, earthquake, act of God, the elements or other casualty, then (unless this License is terminated pursuant to this Paragraph 11) Licensee shall forthwith repair the same, at its sole expense. In this event, Licensee shall be solely responsible for the loss, repair, and replacement of its all equipment and licensehold improvements.

B. Anything in subparagraph A to the contrary notwithstanding, neither Licensee nor City shall have any obligation to repair or rebuild the Property or the Buildings, as the case may be, following damage or destruction thereto if the damage or destruction is due to any cause or casualty other than one against which the responsible party is required to carry insurance or actually does carry insurance and such party reasonably estimates that the cost of repair or rebuilding exceeds ten percent (10%) of the then replacement cost of the Property or Buildings, as the case may be. If the responsible party elects not to repair any damage or destruction pursuant to this provision, such party shall give the other party notice of such election within sixty (60) days after the date of such damage or destruction; and this License shall terminate as of the date of such damage or destruction.

C. Licensee hereby waives the provisions of California Civil Code Sections 1932 and 1933 and any other statutes now or hereafter in effect which relate to termination of a license when licensed property is damaged or destroyed and agrees that such event shall be governed by the terms of this License.

11. INDEMNIFICATION.

City and its Affiliates shall not be liable to Licensee and, to the fullest extent permitted by law, Licensee hereby waives all claims against each of them, for any injury to or death of any

person or damage to or destruction of property in or about the Property, the Building or Aquatic Park by or from any cause whatsoever, including, without limitation, gas, fire, oil, electricity or leakage or invasion of water or contaminants of any character from the roof, walls, basement, subsurface or other portion of the Property, the Building or Aquatic Park, except any injury to or death of any person or damage to or destruction of any property which is caused solely by the willful misconduct of City or its Affiliates. Licensee shall indemnify each of said parties and hold them harmless from and against any and all penalties, liability, claims, losses, damages, (including consequential damages), injury, cost and expense, including attorneys' fees and disbursements, arising out of or related to (i) Licensee's breach of any obligations under this License, or (ii) claims of injury to or death of persons or damage to property resulting directly or indirectly from Licensee's use or occupancy of the Property or activities of Licensee, its employees, agents, contractors or invitees in or about the Property, Building or Aquatic Park or (iii) claims of injury to or death of persons or damage to property by Licensee or third parties (except City) resulting from any cause or causes whatsoever while in or upon the Property or the Building. Such indemnity shall include, without limitation, the obligation to reimburse all costs of defense, including the legal fees for counsel selected by City.

12. INSURANCE.

A. Licensee, at its sole expense, shall procure and maintain the following insurance coverage:

1. Commercial general liability insurance insuring Licensee against any liability arising out of its use, occupancy, repair or maintenance of the Property, the Building, or the Main Lagoon, with a combined single limit of not less than \$1,000,000 for injury to or death of one or more persons in anyone accident or occurrence and property damage in anyone accident or occurrence. Such comprehensive general liability insurance shall include fire liability coverage and public liability and property damage insurance, including personal injury, broad form property damage, blanket contractual, and other coverage as may be reasonably required by City. City shall have the right, from time to time, to require Licensee to increase the amount of its comprehensive general liability insurance coverage if, in City's reasonable opinion, the amount of such coverage is not sufficient in light of the risks insured and Licensee's use of the Property or Aquatic Park.

B. All policies of insurance and all renewals thereof shall be approved as to form and sufficiency by City's Risk Manager and shall be issued by good and responsible companies qualified to do and doing business in California and rated A+: XIII or better in the most recent version of Best's Insurance Guide. Each of the required insurance coverage except for workers compensation (i) shall name City and each of its Affiliates as additional insured's and, with respect to casualty insurance, as their respective interests may appear and (ii) shall provide that it may not be canceled or altered by the insurer in such manner as to adversely affect the coverage unless sixty (60) days' prior notice is given by certified mail to City at the address set forth in Paragraph 33 below, or to such place as City may from time to time designate in a notice to Licensee.

C. An original certificate of each policy of insurance shall be delivered to City prior to the date the Property is delivered to Licensee and from time to time during the Term. If Licensee shall fail to procure or maintain any insurance required hereunder or shall fail to furnish to City any duplicate policy or certificate, City may obtain such insurance; and any premium or cost paid by City for such insurance shall be reimbursed by Licensee promptly upon City's demand. Licensee shall make good faith efforts to ensure that at least sixty (60) days prior to the expiration of any such policy, an extension endorsement showing that such insurance coverage has been or will be renewed or extended shall be delivered to City and if, despite such good faith efforts, such extension endorsement cannot be timely delivered, Licensee shall cause to be delivered to City within said time other reasonable documentary evidence of renewal of coverage and shall continue exercising diligent efforts to deliver to City the required extension endorsement. If such coverage is canceled or reduced, Licensee, within ten (10) days after receipt of written notice of such cancellation or reduction in coverage but in no event later than the effective date of cancellation or reduction, shall deliver to City a certificate showing that the required insurance has been reinstated or provided through another insurance company(ies). Upon Licensee's failure to so deliver such certificate, City may, without further notice and at its option, (1) exercise City's rights as provided in this License or (2) procure such insurance coverage at Licensee's expense and Licensee shall promptly reimburse City for such expense.

D. If any of the insurance required in this Paragraph 13 is provided under a claims-made form of policy, Licensee shall maintain such coverage continuously throughout the Term and without lapse for a period of not less than five (5) years beyond the termination of this License, to the effect that should occurrences during the Term give rise to claims made after termination of this License, such claims shall be covered by such claims-made policies.

E. Licensee hereby releases City with respect to any claim (including a claim for negligence) which Licensee might otherwise have against City for loss, damage or destruction of Tenant's property occurring during the Term to the extent to which Licensee is insured under a policy(ies) containing a waiver of subrogation or agreement or permission to release liability, as provided in E. above. If, notwithstanding the recovery of insurance proceeds by Licensee for such loss, damage or destruction, City is liable to Licensee with respect thereto or is obligated under this License to make replacement, repair, restoration or payment, then (provided Licensee's right of full recovery under its insurance policies is not thereby prejudiced or otherwise adversely affected) the amount of the net proceeds of the Licensee's insurance against such loss, damage or destruction shall be offset against City's liability to Licensee therefore or shall be available to City to pay for replacement, repair or restoration, as the case may be. Nothing contained herein shall relieve either party of any duty to repair, restore or rebuild imposed elsewhere in this License or shall nullify any abatement of rent provided for elsewhere in this License.

F. 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 Tenant's subLicensee, if any; 3) name and address of Licensee's liability insurance

carrier; and 4) a detailed description of the accident, including whether any of City's equipment, tools or materials were involved.

13. COMPLIANCE WITH LAWS.

A. Licensee, at its sole expense, shall promptly comply with all laws, ordinances, rules, regulations, permits or requirements now or hereafter in effect (whether foreseen or unforeseen by City or Licensee), with the requirements of any board of fire underwriters or similar body now or hereafter constituted; with any occupancy certificate issued by any public officer and with the provisions of all recorded documents affecting the Property, insofar as any of the foregoing relate to or affect the condition, use or occupancy of the Property. Such compliance by Licensee shall include, without limitation, compliance with all obligations to alter, maintain, or restore the Property (and, as applicable, the Building), or construct improvements in or to the Property, regardless of cost and regardless of when during the term of the License the work is required.

B. Licensee acknowledges that conducting its operations at the Property and making certain alterations and improvements may require an authorization, approval or permit (collectively, "Regulatory Approval") from a governmental authority having jurisdiction over the Property, including but not limited to BCDC. Licensee shall be solely responsible for obtaining any such Regulatory Approval, and Licensee shall not seek any Regulatory Approval without first obtaining the approval of City. All costs associated with applying for and obtaining any necessary Regulatory Approval shall be borne by Licensee. Licensee shall be solely responsible for complying with any and all conditions imposed by regulatory agencies as part of a Regulatory Approval; however, City shall not take any action that would materially interfere or prevent Licensee from complying with all such conditions. Any fines or penalties imposed as a result of the failure of Licensee to comply with the terms and conditions of any Regulatory Approval shall be paid and discharged by Licensee, and City shall have no liability, monetary or otherwise, for said fines and penalties, except to the extent that such fines or penalties were caused by the willful acts or omissions of City. To the fullest extent permitted by law, Licensee agrees to indemnify and hold City and its officers, agents and employees harmless from and against any loss, expense, cost, damage, attorneys' fees, penalties, claims or liabilities which City may incur as a result of Licensee's failure to timely obtain or comply with the terms and conditions of any Regulatory Approval. City agrees to cooperate (but only to the same extent and in the same manner as a non-public entity could so cooperate, and not as an exercise of City's police or regulatory power) with Licensee in filing, processing and obtaining all Regulatory Approvals, and upon request of Licensee, to join with Licensee as co-applicant in filing, processing and obtaining all Regulatory Approvals; provided, however, that City may refuse to file, process or obtain Regulatory Approvals or to join Licensee as a co-applicant if City determines in its sole and absolute discretion that it is not in City's best interest to do so. Nothing contained herein shall be deemed to limit or otherwise constrain City's discretion, powers and duties as a regulatory agency with certain police powers.

C. Licensee understands and agrees that City is entering into this License in its capacity as a landowner with a proprietary interest in the Property and not as a regulatory agency of the City of Berkeley with certain police powers. City's legal status shall in no way limit the

obligation of Licensee to obtain any required approvals from City's departments, boards or commissions that have jurisdiction over the Property. By City's entering into this License, neither City nor any of City's Council, boards, commissions, agencies, departments, or Affiliates obligates itself to any other governmental agent, board, commission or agency, or to Licensee, or to any other individual or entity, with regard to any discretionary action relating to development or operation of the Property or Aquatic Park. Discretionary action includes but is not limited to rezoning, variances, environmental Clearances, or any other governmental agency approvals that may be required or desirable for the improvement, alteration, or operation of the Property or Aquatic Park. By entering into this License, City is in no way modifying or limiting the obligation of Licensee to cause the Property to be used and occupied in accordance with all laws.

14. ASSIGNMENT AND SUBLICENSE.

A. Any provision of this License to the contrary notwithstanding, Licensee shall not directly or indirectly, by operation of law or otherwise, transfer, assign, pledge, encumber or hypothecate this License or all or any portion of the Property or Licensee's interest in and to the Property (collectively, an "Assignment") or sublet the Property or any portion thereof or permit the Property or any portion thereof to be used, occupied or managed by anyone other than Licensee pursuant to any License, use or concession agreement or otherwise (collectively, a "Sublicense").

B. Neither this License nor any interest therein shall be assignable or transferable in proceedings in attachment, garnishment or execution against Licensee, in voluntary or involuntary proceedings in bankruptcy or insolvency or receivership taken by or against Licensee or by any process of law. Possession of the Property shall not be divested from Licensee in such proceedings or by any process of law without the prior written consent of City.

C. Licensee expressly waives any rights that it might otherwise be deemed to possess pursuant to applicable law, including without limitation, Section 1997.040 of the California Civil Code, to limit any remedy of City pursuant to Section 1951.2 or 1951.4 of the Code by means of proof that enforcement of a restriction on use of the Property would be unreasonable.

15. INSPECTION.

City may enter the Property at all reasonable times (with reasonable advance notice except in case of emergency) (i) to inspect the same; (ii) to exhibit the same to prospective purchasers, mortgagees or Licensees; (iii) to conduct tests, inspections and surveys to determine whether Licensee is complying with all of its obligations hereunder; (iv) to post notices of nonresponsibility or other notices that may be permitted hereunder; (v) to post "to License" signs of reasonable size upon the Property during the last ninety (90) days of the Term; and (vi) to make repairs required or permitted to be made by City or repairs to any adjoining space or any utility systems or to make repairs, alterations or additions to any other portion of the Building or Aquatic Park; provided, however, that all such work shall be done as promptly and with as little interference to Licensee as reasonably possible. Licensee hereby waives all claims against City for any injury or inconvenience to or interference with Licensee's business or any loss of occupancy or quiet enjoyment of the Property resulting from City's entry into the Property or

any work performed therein by City. City shall at all times have a key to all doors in and about the Property (excluding Licensee's vaults, safes and similar areas designated by Licensee in writing in advance), and City shall have the right to use any and all means which City may deem proper in an emergency to obtain entry to the Property. Licensee also shall provide City with written notice of the name, address, telephone number and Licensee's account number of the burglar alarm company (if any) utilized by Licensee for the Property. Any entry to the Property by any of said means or otherwise shall not under any circumstances be deemed a forcible or unlawful entry into or a detainer of the Property or an eviction (actual or constructive) of Licensee from the Property.

16. DEFAULT.

The occurrence of any one of the following shall constitute an event of default on the part of Licensee:

A. Failure To Use Property. Failure to use the Property as specified in Paragraphs 5 and 6

B. Other Obligations. Failure to perform any obligation, agreement or covenant under this License, such failure having continued for thirty (30) days after notice of such failure from City or such longer period as is reasonably necessary to remedy such default, provided that Licensee has commenced to remedy the default within such thirty (30) day period and shall continuously and diligently pursue such remedy until such default is cured.

C. General Assignment. A general assignment by Licensee for the benefit of creditors.

D. Bankruptcy. The filing of a voluntary petition in bankruptcy by Licensee, or the filing of an involuntary petition by Licensee's creditors, which involuntary petition remains undischarged for a period of thirty (30) days. In the event that under applicable law the trustee in bankruptcy or Licensee has the right to affirm this License and to continue to perform the obligations of Licensee hereunder, such trustee or Licensee, in such time period as may be permitted by the bankruptcy court having jurisdiction, shall cure all defaults of Licensee hereunder outstanding as of the date of affirmance and shall provide to City such adequate assurances as may be necessary to ensure City of the continued performance of Licensee's obligations hereunder. Any transferee (by operation of law or otherwise) must provide City with adequate assurance of its future performance under this License. In the event of Licensee's bankruptcy, insolvency or reorganization, the parties specifically intend that the actions of the trustee or Licensee in assuming and/or assigning this License shall be governed by Section 365 of Title 11 of the United States Code applicable to shopping center licenses.

E. Receivership. The employment of a receiver to take possession of all or substantially all of Tenant's assets in the Property.

F. Insolvency. The attachment, execution or other judicial seizure of all or substantially all of Tenant's assets in or on the Property; the admission by Licensee in writing of

its inability to pay its debts as they become due; the filing by Licensee of a petition seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any present or future law or regulation; the filing by Licensee of an answer admitting or failing timely to contest a material allegation of a petition filed against Licensee in any such proceeding or if, within thirty (30) days after the commencement of any proceeding against Licensee seeking reorganization or arrangement, composition, readjustment, liquidation, dissolution or similar relief under any present or future law or regulation; such proceeding shall not have been dismissed.

H. Release of Hazardous or Toxic Substances or Materials. Any release or discharge in, on, under, around, or from the Property and/or Aquatic Park by Licensee, its agents or employees of Hazardous Substances which has not been fully cleaned up within ten (10) days after such release or discharge.

17. REMEDIES UPON DEFAULT.

A. Termination. In the event of the occurrence of any event of default, City shall have the right immediately to terminate this License by written notice and at any time thereafter to recover possession of the Property or any part thereof and to expel and remove Licensee, any other person or party occupying the same and all property located therein, by any lawful means and to reenter the Property without prejudice to any of the remedies that City may have under this License or under law or equity.

B. Continuation After Default. In the event of any default, this License shall continue in effect for so long as City does not terminate this License under subparagraph A above. In such case, City may enforce all its rights and remedies under this License, including without limitation, the right to recover rent as it becomes due, and all of its rights and remedies under law. Acts of maintenance, preservation, efforts to relet the Property for Licensee's account or the appointment of a receiver upon application of City to protect City's interest under this License shall not constitute an election to terminate this License or Licensee's right to possession.

C. Damages Upon Termination. Should City terminate this License pursuant to subparagraph A above, in addition to any other rights and remedies to which it may be entitled under applicable law, City shall be entitled to recover from Licensee: (i) the worth at the time of the award of the unpaid rent and other amounts which had been earned at the time of termination; plus (ii) the worth at the time of the award of the amount by which the unpaid rent which would have been earned after termination until the time of the award exceeds the amount of such rent loss that Licensee proves reasonably could have been avoided; plus (iii) the worth at the time of the award of the amount by which the unpaid rent for the balance of the Term after the time of award exceeds the amount of such rent loss that Licensee proves reasonably could be avoided; plus (iv) any other amount necessary to compensate City for all the detriment proximately caused by Licensee's failure to perform its obligations under this License or which, in the ordinary course of things, would likely result there from, including without limitation, the costs and expenses (including brokerage commissions and advertising costs) incurred by City, with or without terminating the License, (1) in retaking possession of the Property, (2) in

cleaning and making repairs and alterations to the Property reasonably necessary to return the Property to good condition for the use permitted by this License and otherwise to prepare the Property for reletting, (3) in removing all persons and property from the Property and transporting and storing any of Licensee's property left at the Property, although City shall have no obligation to remove, transport, or store any of such property, and (4) in reletting the Property for such term, at such rent and upon such other terms and conditions as City in its sole discretion may deem advisable; plus (v) such other amounts in addition to or in lieu of the foregoing as may be permitted from time to time under California law. The "worth at the time of award" of the amounts referred to in (i) and (ii) shall be computed with interest at the maximum rate allowed by law. The "worth at the time of award" of the amount referred to in (iii) shall be computed by discounting such amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of the award plus one percent (1%).

D. Computation of Rent For Purposes of Default. For purposes of computing unpaid rent which would have accrued and become payable pursuant to subparagraph C above, unpaid rent shall include the total rent for the balance of the term of the License.

E. Remedies Cumulative. All rights, privileges and elections or remedies of the parties are cumulative and not alternative to the extent permitted by law and except as otherwise specifically provided herein.

F. No Waiver. City's waiver of any breach of a covenant or condition hereof, or City's failure to declare any default immediately upon occurrence thereof or a delay in taking any action in connection therewith shall not waive such breach or such covenant or condition or any subsequent breach thereof. The subsequent acceptance of rent or other monies by City shall not be deemed a waiver of any preceding default by Licensee, other than the failure of Licensee to pay the particular rent or other sum so accepted, regardless of City's knowledge of such default at the time of its acceptance of rent.

G. No Right of Redemption. Licensee waives any right of redemption or relief from forfeiture under California Code of Civil Procedure Sections 1174 and 1179 or any other present or future law in the event Licensee is evicted or City takes possession of the Property by reason of Licensee's default.

18. ENVIRONMENTAL OBLIGATIONS.

A. Licensee shall not, without City's prior written consent (which consent may be granted or denied in City's sole discretion), install, bring into or release or discharge in, on, under, around, or from the Property any (i) asbestos-containing materials, (ii) electrical transformers, fluorescent light fixtures with ballasts or other equipment containing PCB's or (iii) materials which constitute hazardous, extremely hazardous or toxic materials under the Resource Conservation and Recovery Act, the California Hazardous Waste Control Act, the Comprehensive Environmental Response Compensation and Liability Act, the California Safe Drinking Water and Toxic Enforcement Act of 1986 or any other applicable law or regulation concerning hazardous or toxic materials, (collectively "Hazardous Substances") and has not done so prior to the effective date of this License. Any Hazardous Substances which are used, stored,

treated, disposed of or released from the Property by Licensee or its representatives, agents, employees or invitees, shall be used, stored, treated, release and disposed of in accordance with all applicable laws and regulations.

B. If Licensee knows or has reasonable cause to believe that any Hazardous Substance has been release on or beneath the Property, Licensee shall immediately notify the Berkeley Police Department and the Toxic Management Office and promptly give written notice of same to City. If Licensee knows or has reasonable cause to believe that such substance is an imminent and material danger to public health or safety, Licensee shall take all actions necessary to alleviate such danger. Licensee shall provide to City as promptly as possible, and in any event within five business days after Licensee first receives or sends the same, copies of all claims, reports, complaints, notices, warnings or asserted violations relating in any way to the Property or Licensee's use thereof and concerning Hazardous Substances. Licensee shall not negotiate or enter into any settlement agreement, consent decree or other compromise in respect of Hazardous Substances affecting the Property or the Property without first giving City prior written notice and full opportunity to appear, intervene or otherwise protect City's rights and interests.

C. Without limitation of the provisions of Paragraph 12 hereof, Licensee shall indemnify, defend and hold City and its Affiliates harmless from any and all claims, judgments, damages, penalties, fines, costs, liabilities or losses which arise during or after the term of this License as a result of the handling of Hazardous Substances on the Property, the Property or Aquatic Park by Licensee, its agents or invitees, including without limitation, all costs of monitoring, investigating, and remediation of the same, damages for diminution in the value of the Property, damages for the loss or restriction on use of rentable or usable space or of any amenity of the Property, damages arising from any adverse impact on marketing of any such space and sums paid in settlement of claims, attorneys' fees, consultant fees and expert fees. This indemnification by Licensee includes, but is not limited to, costs incurred in connection with any investigation of site conditions or any clean-up, remediation, removal or restoration work requested by City or required by any federal, state or local governmental agency or political subdivision because of Hazardous Substance present in the soil or groundwater in, on or under the Property or in any improvements. Without limiting the foregoing, if the presence of any Hazardous Substance in, on, under or about the Property caused or permitted by Licensee results in any contamination of the Property or Aquatic Park, Licensee, at its sole expense, promptly shall take all action that is necessary to return the Property to the condition existing prior to the introduction of such Hazardous Substance in, on, under or about the Property; provided that City's approval of such actions shall first be obtained, which approval shall not be unreasonably withheld so long as such actions could not potentially have any material adverse effect upon the Property. Licensee's obligations under this Paragraph 19.C. shall survive the expiration or termination of this License.

19. CITY'S RIGHT TO CURE.

All covenants to be performed by Licensee shall be performed at Licensee's sole cost and expense and without abatement of rent. Without limiting City's rights under any other provision of this License, if Licensee shall fail to pay any sum of money or shall fail to perform any other act and such failure shall have become an event of default under Paragraph 17, City, without

waiving or releasing Licensee from any of its obligations, may make (but shall not be obligated to make) any such payment or perform any such other act. All sums so paid by City and all necessary incidental costs shall be deemed additional rent and shall be payable to City immediately upon City's written demand.

20. EMINENT DOMAIN.

A. If all or any part of the Property shall be taken as a result of the exercise of the power of eminent domain, this License shall terminate as to the part so taken on the earlier of the date title vests in the condemning authority or such authority takes possession of the Property. In the case of a partial taking, either City or Licensee shall have the right to terminate this License as to the balance of the Property by written notice to the other within thirty (30) days after such date of taking; provided, however, that Licensee shall have no right to terminate this License unless the portion of the Property taken shall be of such extent and nature as substantially to impede or impair Licensee's use of the balance of the Property. In the event of any such taking, City shall be entitled to all compensation, damages, income; rent, awards and interest that may be paid or made in connection with such taking. Licensee shall have no claim against City for the value of any unexpired Term; however, City shall cooperate with Licensee if Licensee seeks to recover, at its sole expense, proceeds or awards paid to compensate for damage to the "goodwill" associated with Licensee's business. Any such amounts recovered shall belong to Licensee.

B. If any part of the Property shall be so taken and this License shall not be terminated, then this License shall continue in full force and effect, except that the Rent shall be reduced in the same proportion that the rentable area of the Property taken bears to the original rentable area of the Property. City, upon receipt of the award, shall make all necessary repairs and alterations (exclusive of Licensee's trade fixtures, furniture, furnishings, personal property, decorations, signs and contents) to restore the portion of the Property remaining to as near its former condition as the circumstances will permit and to restore the Building to the extent necessary to constitute the portion of the Building not so taken a complete architectural unit. City, in any event, shall not be required to spend for such repairs and alterations an amount in excess of the amount received by City as damages for the taking of such part of the Property and/or Building; and Licensee, at its sole cost and expense, shall make all necessary repairs and alterations to Licensee's trade and lighting fixtures, furniture, furnishings, personal property, decorations, signs and contents.

C. As used herein, the "amount received by City" shall mean that portion of the award received by City as damages from the condemning authority which is free and clear of all prior claims or collections by City and less reasonable attorneys' and appraisers' fees and expenses.

21. SUBORDINATION.

A. This License shall be subject and subordinated to (i) all ground or underlying licenses which have been or may hereafter be executed affecting the Property, (ii) any Declaration of Covenants, Conditions and Restrictions now or hereafter recorded affecting Aquatic Park, all without the necessity of having further instruments executed on behalf of

Licensee to effectuate such subordination.

B. Licensee agrees to execute and deliver upon demand such further instruments or documents as may reasonably be required by City to evidence any such subordination of this License. Licensee hereby constitutes and appoints City as Licensee's attorney-in-fact, coupled with an interest, to execute and deliver any such instrument(s) on behalf of Licensee.

22. NO MERGER.

The voluntary or other surrender of this License by Licensee, or a mutual cancellation thereof, shall not work a merger and shall, at the option of City, terminate all or any existing sublicenses or subtenancies or operate as an assignment to it of any or all such sublicenses or subtenancies.

23. TRANSFER BY CITY.

In the event the original City or any successor owner of Aquatic Park shall sell or convey the Property or the Building, or any portion thereof that includes the Property, all liabilities and obligations on the part of the original City or such successor owner shall terminate. All such liabilities and obligations thereupon shall be binding only upon the new owner. Licensee agrees to attorn to such new owner.

24. ESTOPPEL CERTIFICATES.

From time to time, Licensee shall execute and deliver to City promptly upon request a certificate certifying (i) that this License is unmodified and in full force and effect or, if there has been any modification, that this License is in full force and effect as modified, and stating the date and nature of each such modification, (ii) the date to which rent and other sums payable hereunder have been paid, (iii) that no notice has been received by Licensee of any default which has not been cured, except as to defaults specified in such certificate, (iv) that City is not in default under this License and that Licensee has no claims, charges, offsets or defenses against City, or specifying the nature of any such default or claim, charges, offsets or defense and (v) such other matters as may be reasonably requested by City. Any such certificate may be relied upon by any prospective purchaser, vendee or other party. If Licensee fails to execute and deliver any such certificate within ten (10) business days after City's written request, such failure, at City's election, shall be conclusive against Licensee that this License is in full force and effect, without modification (except as may be represented by City), that there are no uncured defaults in City's performance, and that not more than one month's rent has been paid in advance.

25. HOLDING OVER.

If, without objection by City, Licensee holds possession of the Property after expiration of the Initial Term of the License, Licensee shall become a Licensee from month-to-month upon all provisions of this License applicable immediately prior to the expiration of such Term, or as otherwise fixed from time to time by City. Each party shall give the other at least thirty (30) days' written notice of its intention to terminate such month-to-month tenancy.

26. CHANGES BY CITY.

A. The description of the Property and the location of any Property utility system(s), including without limitation electrical, plumbing, shall be subject to such minor changes as City determines to be necessary or desirable in the course of any construction performed by or under the authorization of City. No such changes shall invalidate or affect this License. City shall effect such changes using reasonable efforts not to disturb Licensee's business. Licensee shall have no claim against City for abatement of rent or loss of business as a result of any such disturbance.

B. City shall have the right in its sole discretion to, among other things, change permitted land uses, install, maintain and remove public improvements, change the arrangement, character, use or location of entrances or passageways, walkways, streets, sidewalks, parking areas, stairs, landscaping, toilets, and other facilities and portions of Aquatic Park, and to change the name, number or designation by which the Building is commonly known. None of the foregoing shall be deemed an actual or constructive eviction of Licensee, nor shall it entitle Licensee to any reduction of rent hereunder or result in any liability of City to Licensee; provided, however, City shall not unreasonably obstruct or interfere with access to or the lines of sight toward the Property.

C. City reserves to itself and the right to grant to others in the future non-exclusive utility easements over, under, through, across or on the Property in locations that will not unreasonably interfere with Licensee's access to or use of the Property. Any interference shall be temporary, and all work on the Property shall proceed expeditiously. Licensee shall be given reasonable notice before commencement of any work on the Property. In the event the installation or maintenance of such future utility lines in such easements causes any damage to the Property, or any portion thereof, or to any other buildings, structures or facilities located upon the Property, 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 other wrongful act or omission by Licensee.

27. GOVERNING LAW.

This License shall be governed by the laws of the State of California.

28. SECURITY DEPOSIT.

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

29. SIGNAGE.

The size, design, material and location of any sign, marquee, awning, decoration or other attachment, advertising material or lettering on the Property or on the exterior of the Building (collectively "signage") shall be subject to City's prior written approval. All such signage shall

comply with the criteria outlined in City's General Design Requirements (if any) and shall be subject to the following provisions:

A. Licensee, at its sole expense, shall submit to City a written description of all proposed signage, including dimensions, color, proposed location and other pertinent information ("Signage Proposal"). City shall review the Signage Proposal and shall notify Licensee in writing of its approval, or reason(s) for its disapproval, within thirty (30) business days after City's receipt of the Signage Proposal. If disapproved, Licensee shall make all required modifications to the Signage Proposal and shall resubmit the same to City within seven (7) days after its receipt of City's disapproval.

B. Within ten (10) days after City's approval of the Signage Proposal, Licensee, at its sole expense, shall cause to be prepared and submitted to City two (2) sets of plans ("Sign Plans") reflecting in detail the information contained in the approved Signage Proposal. City shall review the Sign Plans within thirty (30) days after City's receipt of the same. Upon City's approval of the Sign Plans, City shall issue a sign permit to Licensee authorizing installation of the sign(s) reflected on the Sign Plans.

C. Upon Licensee's receipt of its sign permit from City, Licensee shall construct and/or install all signage shown on the Sign Plans; in any event, however, Licensee shall complete such construction and/or installation not later than thirty (30) days after the sign permit is issued.

D. At City's request, Licensee immediately shall remove any signage that Licensee has placed or permitted to be placed in, on or about the Property or Building contrary to the terms of this Paragraph 30. If Licensee fails to do so, City may enter upon the Property and remove the same at Licensee's expense. Licensee, at its sole expense, shall maintain and replace all approved signage and shall repair, at its sole expense, any damage to the Building caused by the erection, maintenance or removal of any signage, including any damage caused by Licensee's removal of its signage at the expiration or earlier termination of the License. Licensee also shall comply with such regulations as may from time to time be promulgated by City governing the signage of all Licensees in Aquatic Park.

30. NO PARTNERSHIP.

It is expressly understood and agreed that City shall not be deemed in any way or for any purpose a partner, agent or principal of Licensee, in the conduct of its business or otherwise, or a joint venturer or member of a joint enterprise with Licensee.

31. NO WAIVER.

City's waiver of Licensee's breach of any covenant or condition shall not be deemed a waiver of any subsequent breach of the same or any other covenant or condition, nor shall any custom or practice which may develop between the parties in the administration of the terms hereof be construed to waive or to lessen the right of City to insist upon Licensee's performance in strict accordance with the terms of this License.

32. NOTICES.

All notices, demands, consents or approvals which may be required to be given by either party shall be in writing and shall be deemed to have been received when delivered personally or on the earlier of the date of actual receipt or two (2) business days following deposit in the United States mail, registered or certified, postage prepaid, addressed as follows:

To Licensee: **Fix our Ferals**
Linda McCormick
P. O. BOX 13083
Berkeley, CA 94712

To City: Public Works Department
C/o Real Property Administrator
City of Berkeley
1947 Center Street, 4th Floor
Berkeley, CA 94704

Notices to City regarding Hazardous Substances required by Paragraph 19 hereof shall be sent both to the above addresses and to such other place as either party may from time to time designate in a written notice to the other party, or in the case of Licensee, delivered to the Property.

Licensee hereby appoints Linda McCormick as its agent to receive the service of all proceedings, demands and notices hereunder the person in charge of or occupying the Property at the time. If no person shall be in charge of or occupying the same, then such service may be made by attaching the same on the main entrance of the Property.

33. COMPLETE AGREEMENT.

This License is intended by the parties as the final expression of their agreement with respect to such terms as are included herein and may not be contradicted by evidence of any prior or contemporaneous agreement. The parties further intend that this License constitutes the complete and exclusive statement of its terms, and no extrinsic evidence whatsoever may be introduced in any judicial or other proceeding involving this License. The language and all parts of this License shall be construed as a whole and in accordance with its fair meaning and not restricted for or against either party. This License may be modified or amended only by a written instrument signed by both parties.

34. REQUESTS FOR CONSENT: WAIVER OF CLAIM.

Licensee hereby waives any claim for damages against City that it may have based upon any assertion that City unreasonably has withheld or has delayed any consent or approval, and Licensee's sole remedy shall be an action for specific performance of such provision, injunction or declaratory judgment. In the event of a final determination in Licensee's favor, the requested

consent or approval shall be deemed to have been granted.

35. INTERPRETATION.

The use of masculine, feminine, or neuter genders shall include the other genders, and the singular shall include the plural and vice-versa. Headings are intended for convenience only and shall not be referred to in construing any provision. If there be more than one party as Licensee, the obligations imposed upon Licensee shall be joint and several. If any provision(s) of this License shall be found, to any extent, to be invalid or unenforceable the remainder of the License shall not be affected thereby.

36. SUCCESSORS AND ASSIGNS.

This License shall be binding upon and shall inure to the benefit of City, its successors and assigns, and shall be binding upon and shall inure to the benefit of Tenant, its heirs, successors and (to the extent assignment may be permitted hereunder) assigns.

37. AUTHORITY.

If Licensee is a corporation or partnership, each of the persons executing this License on behalf of Licensee covenants and warrants that Licensee is a duly authorized and existing corporation or partnership, that Licensee has and is qualified to do business in California, that Licensee has full right and authority to enter into this License and that each person signing on behalf of Tenant is authorized to do so.

38. UNAVOIDABLE DELAYS.

A. In the event that Licensee or City is delayed, directly or indirectly, from the performance of any act or thing required to be done or performed under the terms or conditions hereof by acts of the other party to this License, acts of God, fire, floods, inclement weather, governmental action, restrictions, priorities or allocations of any and all kinds, strikes or labor difficulties of any and all kinds, shortages of or delay in the delivery of materials, acts of war, riot and civil commotion, or by any other cause beyond the reasonable control of Tenant or City, as the case may be, such failure shall not be deemed to be a breach of this License or a violation of any such covenants or conditions and the time within which Licensee or City must perform any such act shall be extended by a period of time equal to the period of delay arising from any of such causes.

B. Notwithstanding any provision of this Paragraph 39 or any other provision of this License to the contrary, it is understood and agreed that there shall be no abatement of, or delay in the commencement of, payment of any sum due to City under this License.

39. TIME OF THE ESSENCE.

Time is of the essence of each and every covenant and condition of this License.

40. BROKERAGE.

City and Licensee hereby represent and warrant, each to the other, that they have not disclosed this License or the subject matter hereof to, and have not otherwise dealt with, any broker, finder or any other person, firm, corporation or other legal entity so as to create any legal right or claim of whatsoever kind or nature for a commission or similar fee or compensation with respect to the Property or this License. City and Licensee hereby indemnify each other against, and agree to hold each other harmless from, any liability or claim (and all expenses, including attorneys' fees, incurred in defending any such claim or in enforcing this indemnity) for a real estate brokerage commission or similar fee or compensation arising out of or in any way connected with any claimed dealings with the indemnitor and relating to the Property or this License.

41. CITY NON-DISCRIMINATION ORDINANCE.

A. Licensee hereby agrees to comply with the provisions of the Berkeley Municipal Code ("B.M.C."), including without limitation Chapter 13.26, as amended from time to time. In the performance of its obligations under this License, Licensee agrees as follows:

1. 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.

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

B. Licensee understands that this License is governed by City Council Resolution No. 58,664 -N.S., attached hereto as Exhibit D. This resolution, as may be amended from time, stipulates that Licensee's memberships policies may be reviewed by the City for compliance therewith at any time, and that unsatisfactory membership policies may result in non-renewal of this License or other appropriate action by the City.

42. 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 of Licensee’s activities must be in accordance with these laws, ordinances, codes, and regulations, and Licensee shall be solely responsible for complying therewith.

43. CONFLICT OF INTEREST PROHIBITED.

A. In accordance with California 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 as an elected officer, an employee, or a committee or commission member of City, who has directly or indirectly influenced the making of this License.

B. In accordance with California 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 Licensee, or immediate family member of any of the preceding, shall make or participate in a decision made by City or any of its boards, commissions or committees, if it is reasonable 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, except to the extent permitted by 2 California Code of Regulations, Section 18700(c)(2).

C. Interpretation of this paragraph shall be governed by the definitions and provisions use 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, as amended from time to time.

44. 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.

45. RESTRICTIONS UPON USE OF WOOD AND PAPER.

A. Recycled Paper for Written Reports

If Licensee is required by this License to prepare written reports, Licensee shall use recycled paper for said reports 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, City shall use white paper. Written reports prepared under this License shall be printed on both sides of the page whenever practical.

B. Tropical Hardwoods

If Licensee makes any improvements to the Property with City funds, Licensee will comply with the terms of Resolution No. 58, 291-N.S (attached hereto as Exhibit H), as it may be amended from time to time. Except as expressly permitted by the application of Sections 3.B and 4.B. of Resolution No. 58, 291-N.S., Licensee shall not provide any items to the City in performance of this License which are tropical hardwoods or tropical wood products. The City urges Licensee to refrain from importing, purchasing, obtaining, or using for any purposes, any tropical hardwood or tropical hardwood product, and urges Licensee to purchase wood that is certified "sustainably" produced lumber. Failure to comply with Resolution No. 58, 291-N.S. shall constitute a default for which City may terminate this License and deem Licensee a non-responsible bidder for five years thereafter, and subject Licensee to liquidated damages pursuant to Section 7 of said Resolution.

C. Redwood

If Licensee makes any improvements to the Property with City funds, Licensee will comply with the City Council's October 26, 1996, directive not to purchase virgin redwood for such work and will in its place purchase and use redwood that has been previously used or certified "sustainably" harvested redwood, as the preferred alternative to virgin or non-certified redwood, and not pressure-treated lumber of other species as an alternative to redwood.

46. OPPRESSIVE STATES.

A. In accordance with Resolution No. 59,853-N.S., Licensee certifies that it has no contractual relations with, and agrees during the term of this License to forego 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 pursuant to Paragraph 17. 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.

47. BERKELEY LIVING WAGE ORDINANCE (LWO).

A. Licensee agrees to comply with Berkeley Municipal Code Chapter 13.27, the Berkeley Living Wage Ordinance. 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 City mandated minimum compensation during the term of this license, as defined in B.M.C. Chapter 13.27, and well as comply with the terms enumerated herein.

B. Licensee shall be required to maintain all reasonable records and documents that would establish whether Licensee is subject to Berkeley's Living Wage Ordinance (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 licensed premises. These records shall include the total number of hours worked, the number of hours spent providing service on the licensed property, 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 Section shall be made available upon the City's request. The failure to produce these records upon demand shall be considered a default, subject to the provisions contained in section 17 herein.

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 premises. 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 licensed property.

D. If Licensee fails to comply with the requirements of this the LWO and this license, the City shall have the rights and remedies described in this Section, in addition to any rights and remedies provided by law or equity.

Licensee's failure to comply with this Section shall constitute default of the license, upon which City may terminate this license pursuant to Section 17.

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 any 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 of forfeiture for Licensee's breach.

48. BERKELEY EQUAL BENEFITS ORDINANCE (EBO).

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 license, as defined in RM. 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. Failure to do so shall be a considered a default, subject to the provisions of Section 17 of this license.

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 or equity.

Licensee's failure to comply with this Section shall constitute default of the license, upon which City may terminate this license pursuant to Section 17.

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.

49. AUDIT.

The City Auditor's Office, or its designee, may conduct an audit of Licensee's financial and compliance records maintained in connection with the operations and services performed under this License, and with the payments made under this License. In the event of such audit, Licensee agrees to make all such financial and compliance records available to the Auditor's Office, or to its designee. City agrees to provide Licensee an opportunity to discuss and respond to any findings before a final audit report is filed.

50. CITY BUSINESS LICENSE. PAYMENT OF 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 due. Licensee certifies under penalty of perjury that the taxpayer identification number written below is correct.

51. SURVIVAL.

The provisions of Paragraphs 8, 9, 10, 12, 14, 19, and 40 and any other obligation of Licensee that, by its terms or nature, is to be performed after or is to survive termination of this License

IN WITNESS WHEREOF, the parties hereto have executed this License at Berkeley, California effective as of the Effective Date.

LICENSEE:

FIX OUR FERALS.

CITY:

CITY OF BERKELEY
a municipal corporation

By: _____

By: _____
Philip Kamlarz, City Manager

Approved as to form:

Registered by:

City Attorney

City Auditor

Attest:

Sara Cox,
City Clerk

LICENSEE INFORMATION

Tax Identification No.

Incorporated: Yes No

Certified Woman Business Enterprise: Yes

Certified Minority Business Enterprise: Yes

If yes, state ethnicity:

Certified Disadvantaged Business Enterprise: Yes No.

City Business License No. _____, or Exempt pursuant to B.M.C. Section

EXHIBIT B

PROPERTY DESCRIPTION

The Property is located within Aquatic Park in the City of Berkeley, CA. The Property consists of land lying adjacent to the western shoreline of Aquatic Park Lake (“Lake”) and includes one wood frame building whose address is 91 Bolivar Drive. The Property does not include any portion of the Lake, or any docks or other appurtenances that extend into the Lake. It does not include use of any of the surrounding Aquatic Park land.