



Office of City Manager

CONSENT CALENDAR
September 18, 2007

To: Honorable Mayor and
Members of the City Council

From: *PK* Phil Kamlarz, City Manager

Submitted by: William Rogers, Acting Director, Parks Recreation and Waterfront

Subject: License Amendment: Bait Shop Operation

RECOMMENDATION

Adopt a Resolution approving an amendment to the current license agreement no. R6250 with the Berkeley Marina Charter Boat Association, Inc (BMCBA) to reduce the minimum yearly payment from \$45,000 to \$28,000 and terminate the agreement on December 31, 2007.

FISCAL IMPACT OF RECOMMENDATION

The current license agreement requires a minimum annual payment by the BMCBA to the City of \$45,000, plus the collection and remittance of the City Passenger Loading Fee (based entirely on numbers of actual passengers), which historically has resulted in approximately \$15,000 total per year to the City. This amendment to the license agreement reduces the required minimum annual fee to \$28,000. This, coupled with the City Passenger Loading Fee, should provide approximately \$43,000 in revenue to the Marina Fund (budget code 825-5903-363-80-00). CMS No. U7YEC.

CURRENT SITUATION AND ITS EFFECTS

BMCBA is an organization of business people that offer sport fishing (as opposed to commercial fishing) to the public for a daily fee. They take members of the public on their independently operated fishing boats to fishing grounds both inside and outside the Bay. They also operate a bait shop and answer questions about sport fishing to the general public at the Berkeley Marina, either by walk-in or by telephone.

The City charges a one dollar per passenger fee for every member of the public that pays to fish on the sport fishing boats berthed at the Marina ("City Passenger Loading Fee"). The fee is collected by the sport fishing boat operators, processed through the Bait Shop, and paid to the City.

The existing five-year license agreement with BMCBA commenced in January 2004. At the end of the first year, the operators disputed that under the current license agreement they are

required to submit a minimum payment of \$45,000 a year **plus** collection of City Passenger Loading Fees (approximately \$15,000 annually). Their contention, which is contrary to the express terms of the current license agreement, was that these payments combined made up the minimum fee of \$45,000. Further, in early 2006, the operators raised concerns about their ability to meet the minimum payments due to lower than expected earnings and a shorter than usual fishing season, and requested a reassessment of the fee. Under the current license agreement, either party may provide notice of a desire to reassess the fee, and if the parties are unable to reach agreement on a proposed reassessment either party may terminate the license. After a series of negotiations, the BMCBA and the City have agreed to the following changes to the current license agreement:

1. The license agreement will terminate one year early on December 31, 2007.
2. For 2006 and 2007, the Licensee shall pay to the City the greater of: (a) Five percent (5%) of the gross receipts realized from the operations of its business per month; or (b) \$1,000 per month for the months of January, February, March and April, and \$3,000 per month for the months of May, June, July, August, September, October, November, and December. Note that the BMCBA will continue to collect and remit the City's Passenger Loading Fee over and above the annual license fee.

BACKGROUND

In 2003, the City issued a Request for Proposal and selected the Berkeley Marina Charter Boat Association to provide sports fishing and bait shop services at the Berkeley Marina. On December 9, 2003, the City Council adopted Resolution No. 62,322–N.S. authorizing the City Manager to execute a five-year license agreement with BMCBA to operate the bait shop until December 31, 2008.

The BMCBA was thereafter unable to provide the minimum payment to the City due to a poor fishing season and they submitted a letter to the City in 2006 asking for a re-negotiation of the license terms.

RATIONALE FOR RECOMMENDATION

The Amendment is a compromise between BMCBA and the City of Berkeley that reduces the annual payment to the City and terminates the current agreement one year early, which allows the City to solicit a new provider for this service at the Marina.

ALTERNATIVE ACTIONS CONSIDERED

In 2006, staff considered the option of terminating the current license agreement and instituting legal action to collect the fees in arrears from 2004 and 2005, which totaled \$30,900 at that time. The proposed amendment does not alter the rights of the City regarding the fees in arrears through December 31, 2005. The City Attorney has prepared a separate confidential memorandum to City Council regarding this alternative action.

CONTACT PERSON

Ann Hardinger, Acting Waterfront Manager, 981-6737

William Foley, Public Works – Real Estate, 981-6337

Attachments

1: Resolution

Exhibit A: Proposed Amendment to License Agreement

Exhibit B: License Agreement

RESOLUTION NO.

-N.S.

CONTRACT AMENDMENT: CONTRACT NO. R6250 WITH THE BERKELEY MARINA CHARTER BOAT ASSOCIATION, INC., REDUCTION IN YEARLY PAYMENT

WHEREAS, on December 9, 2003, the City Council adopted Resolution No. 62,322-N.S. authorizing the City Manager to execute a license agreement (Exhibit B) with the Berkeley Marina Charter Boat Association, Inc. to use City property at 225 University Avenue in the Berkeley Marina to operate the bait shop known as the Berkeley Marina Sports Center until December 31, 2008; and

WHEREAS, the efficient operation of a bait shop at the Berkeley Marina is necessary to provide the public with services that support fishing at the Marina; and

WHEREAS, the Berkeley Marina Charter Boat Association raised concerns about the minimum annual license payment; and

WHEREAS, the License permits either party to seek a reassessment of the fee before initiating a termination of the license; and

WHEREAS, a compromise has been reached to amend the license to reduce the minimum annual license payment and to shorten the agreement by one year; and

WHEREAS, revenues will be deposited in the Marina Fund (budget code 825-5903-363-80-00). CMS No. U7YEC.

NOW THEREFORE BE IT RESOLVED by the Council of the City of Berkeley that the City Manager is hereby authorized to execute an amendment to the license agreement no. R6250 with the Berkeley Marina Charter Boat Association, Inc., to use City property at 225 University Avenue in the Berkeley Marina to operate the bait shop known as the Berkeley Marina Sports Center, as follows: 1) the license agreement will terminate one year early on December 31, 2007; and 2) for 2006 and 2007, the Licensee shall pay to the City the greater of: (a) five percent (5%) of the gross receipts realized from the operations of its business per month; or (b) \$1,000 per month for the months of January, February, March and April, and \$3,000 per month for the remainder of the year; and c) the BMCBA will continue to collect and remit the City's Passenger Loading Fee over and above the annual license fee (Exhibit A). A record signature copy of the agreement and any amendments shall be kept on file in the Office of the City Clerk.

EXHIBIT A

AMENDMENT TO LICENSE AGREEMENT

This license amendment ("Amendment") is made on _____, between the CITY OF BERKELEY ("City") and THE BERKELEY MARINA CHARTER BOAT ASSOCIATION, INC. ("Licensee", collectively City and Licensee are "the Parties"), who agree as follows:

This Amendment is made with reference to the following facts and objectives:

A. The City entered into a License Agreement with Licensee on January 12, 2004 ("License") to use the City's property, consisting of use of (a) the name the Berkeley Marina Sports Center, (b) the primary phone numbers for the Berkeley Marina Sports Center, and (c) ground floor space in the building located at 225 University Avenue, as set forth in the License. A copy of the License is attached hereto as Exhibit A.

B. In the License, the Parties agreed to a five-year term, beginning on January 1, 2004 and ending December 31, 2008.

C. A dispute has arisen between the Parties regarding the interpretation of and amount due to the City under Paragraph 2 of the License, entitled FEE. This Amendment does not alter the respective rights of the Parties regarding the appropriate Fee for the period from January 1, 2004 through December 31, 2005.

D. Licensee wishes to reassess the Fee for the remaining term of the License Agreement, and the City wishes to shorten the term of the License by one year.

Therefore, the Parties agree as follows:

Paragraph 2.a.i shall be added to the License immediately after Paragraph 2.a. of the License as follows:

a.i. Paragraph 2.a. applies for the period of the Effective Date of the License through December 31, 2005. For the period of January 1, 2006 through December 31, 2007, Licensee shall pay to City the greater of: (1) FIVE PERCENT (5%) of the Gross Receipts realized from the operations of its business on the Property per month; or (2) \$1,000 per month for the months of January, February, March and April and \$3,000 per month for the months of May, June, July, August, September, October, November and December (the "Minimum Fee"). All payments and documentation shall be made as described in Exhibit C, attached hereto. In addition to the payment described in this section 2.a.i, Licensee agrees to forward to the City the entire Passenger Loading Fees Licensee collected on behalf of the City, as described in Paragraph 2.e.8. and Exhibit B, Paragraph A.2.

The first sentence of Paragraph 3 of the License, entitled TERM, shall be amended as follows, with the remainder of Paragraph 3, including 3.a. through 3.g., remaining in full force and effect:

This License shall take effect as of the Effective Date and shall terminate on

December 31, 2007 (the "Termination Date"), subject to the following:

Exhibit B, Paragraph B.c., entitled "The hours of operation shall be as follows:", shall be amended as follows, with the remainder of Exhibit B, Paragraph B, including B.a., B.b. and B.d., remaining in full force and effect:

Licensee may close its shop all day on Thanksgiving Day and Christmas Day, and may close its shop the entire month of January. Regardless of whether the shop is closed or open, Licensee shall be obligated to pay the applicable Fee for all months during the TERM.

Exhibit C, Paragraph 1.a. shall be added to the License immediately after Exhibit C, Paragraph 1 of the License as follows:

1.a. Exhibit C, Paragraph 1 applies for the period of the Effective Date of the License through December 31, 2005. For the period of January 1, 2006 through December 31, 2007, Licensee shall pay to the City both the Minimum Fee described in Paragraph 2.a.i. of the License and the passenger loading fees (described in paragraph 2.e.8 and Exhibit B, Paragraph A.2.) of this License no later than ten (10) calendar days after the end of each month. For months in which 5% of the Gross Receipts is greater than "the Minimum Fee," Licensee shall pay to the City 5% of Gross Receipts as described in Paragraph 2.a.i. less "the Minimum Fee" if the Minimum Fee has already been paid for the month, within thirty (30) days from the end of each month the License is in effect.

In all other respects, the License Agreement dated January 12, 2004, shall remain in full force and effect.

IN WITNESS WHEREOF, City and Licensee have executed this Amendment as of the date written on the first paragraph above.

CITY OF BERKELEY

BY:

APPROVED AS TO FORM:

City Manager

City Attorney

REGISTERED BY:

ATTEST:

City Auditor

Deputy City Clerk

LICENSEE
THE BERKELEY MARINA CHARTER
BOAT ASSOCIATION, INC.:

By:
Title:

City of Berkeley Business License No.

LICENSE AGREEMENT

This LICENSE AGREEMENT is entered into on **JANUARY 1, 2004** (the "Effective Date") by and between the CITY OF BERKELEY, a Charter City organized and existing under the laws of the State of California ("City"), and THE BERKELEY MARINA CHARTER BOAT ASSOCIATION, INC. located at the Berkeley Marina Sports Center at 225 University Avenue in Berkeley, California ("Licensee").

1. LICENSE

a. City hereby grants an exclusive License to Licensee, subject to all the terms and conditions herein, to use City's property which includes: 1) the name "The Berkeley Marina Sports Center"; 2) the primary phone number(s) for the Berkeley Marina Sports Center ("BMSC"), including 510/849-2727; and 3) ground floor space in the building located at 225 University Avenue (or alternative space, described in section 3.f. below) in the City of Berkeley, California, as more fully described on Exhibit A, attached hereto ("the Property"). Licensee acknowledges that this License grants it the personal privilege to occupy and use the Property for the purposes stated herein, but does not convey an estate in land or a leasehold interest in the Property, does not create a City/Lessee relationship, and is not a Lease.

b. This License is granted for the sole purpose of operating a bait and tackle shop providing goods and services on the Property, as further described in the attached Exhibit B.

c. In consideration of the License, Licensee shall use reasonable diligence in promoting and advertising its services and goods provided on the Property.

d. Licensee agrees that it is a viable legal entity and that it includes, as of the Effective Date of this Agreement, a majority of the charter fishing boats berthed at the Berkeley Marina. Licensee further agrees that if at any time during the term of this agreement the Licensee's Association does not include such a majority, then the City has the sole option to terminate this agreement upon sixty (60) days prior written notice to Licensee.

e. Licensee further agrees that it will maintain in effect throughout the term of this agreement fair and efficient management of the bait shop and will submit a viable management plan to the Waterfront Manager upon the Effective Date of this agreement. This plan will include a method and process to resolve disputes among the charter fishing boats, including any such boats that are not members of Licensee's Association.

2. FEE

a. In consideration for the rights conveyed by this License, Licensee shall pay to City a total of FIVE PERCENT (5%) of the Gross Receipts realized from the operations of its business on the Property or \$45,000 per year, whichever amount is greater (the "Maximum Fee"). Licensee shall pay to the City \$1,000 in any month when Gross Receipts total less than \$20,000 (the "Minimum Fee") as a partial payment towards the Maximum Fee. All payments and documentation shall be made

License Agreement with Charter Boat Association for Bait Shop

as described in Exhibit C, attached hereto.

b. Licensee agrees that, upon the Effective Date of this License, the City will own the rights to any primary phone number(s) of the BMSC. During the term of the Agreement, City allows the Licensee the exclusive right to use this phone number(s) in the performance of its obligations under this Agreement. Upon termination of this License, Licensee agrees and understands that the primary phone number(s) shall remain the City's property.

c. Gross Receipts shall mean the entire amount of the actual sales price, whether for cash, credit or otherwise, of all sales of merchandise or services; the entire amount of the fees, rental, or other charges for all items leased or rented; and all other receipts whatsoever of all business conducted on or from the Property, whether by Licensee or any other person or entity, including but not limited to sublicensees and assigns of Licensee. Gross Receipts includes, without limitation, sales or charges for any services or sales initiated, arranged, performed or completed at the Property, whether or not such service was rendered on the Property or the merchandise sold was delivered to the customer on the Property, including merchandise produced, processed or packaged on or distributed from the Property and sold elsewhere; mail, catalog, telephone or electronic shopping (e.g. on-line) orders made, received or filled at the Property, or credited or attributed to the Property; all deposits which are not refunded to purchasers; orders taken in, on or from the Property, even if such orders may be filled elsewhere; sales of gift certificates, vouchers and the like; sales for credit or exchange; the fair market value of merchandise or services exchanged for other merchandise or services (unless previously included in Gross Receipts); receipts from vending and other machines, including pay telephones (whether or not approved by City); any compensation or bonuses paid pursuant to California Government Code Section 8880.51, or other applicable law, for sales of California State Lottery tickets sold on the Property; sales of or by any sublicensee or concessionaire or other person or entity in or from the Property; and sales as defined and encompassed by this Section. Any sale on an installment basis, or otherwise involving credit, shall be treated as a sale for the full price at the time of the transaction, regardless of the time of payment or when title passes. If any charge shall not be assessed or collected, the proper amount nonetheless shall be included in Gross Receipts.

d. Gross Receipts shall also include all other revenue received by Licensee (unless specifically exempted in paragraph 2.e), including but not limited to any fees paid to Licensee related to reservations made by it or by others for use of charter boats.

e. Gross Receipts shall not include the following:

1. the amount of any sales, excise, license fee, or other tax or fee collected by Licensee from customers and paid by Licensee to any governmental authority;
2. the amount of any actual refunds or credits made by Licensee to a customer for returned merchandise or unaccepted services, the sale of which was previously included in Gross Receipts;
3. actual charges for delivery and shipping;
4. the amount of discounts to Licensee's employees and the value of food and beverages

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provided at no charge to employees or others so long as the total value of all such items in any month does not exceed two percent (2%) of the then current month's sales;

5. tips and gratuities;
6. any monies deposited in vending and other machines by an owner, lessee or licensee of such machines but removed and retained by the owner, lessee or licensee thereof; (if Licensee is an owner, lessee, or licensee of such machines, all such monies shall be included in Gross Receipts, per paragraph 2.c herein);
7. any fees collected by Licensee on behalf of charter boat owners and then distributed by Licensee back to the charter boat owners, after subtracting therefrom any fees due Licensee; and
8. all City passenger loading fees (defined in Exhibit B, paragraph A.(2)) collected by Licensee (Licensee must forward all such fees in their entirety to City, in accordance with the provisions of Exhibit C).

f. Licensee shall furnish City, within thirty (30) days after the end of each License Year, an audited statement of Gross Receipts for such year, prepared under generally accepted accounting principles that are consistently applied. Within fifteen (15) days after the end of each month, Licensee shall also furnish City an unaudited monthly statement of Gross Receipts of business transacted during the preceding month. Such monthly statement will be used for the purpose of computing monthly payments of the Maximum Fee.

g. Licensee shall keep and maintain true and complete records and accounts for each License Year and for a period of at least five (5) years after the end of each License Year, all sales slips, cash register tape readings or other documentation of cash register sales, sales books, rental books, bank books and statements, deposit slips, books of account, and any and all other documents, records, returns, papers and files of Licensee relating to Gross Receipts and business transacted during such License Year and make the same available to City or its authorized agent during such period for examination and auditing purposes.

h. Licensee shall give City, or its authorized agent, access during reasonable hours to such records and accounts described in Subparagraph 2. g. above, including reasonable access to Licensee's employees, for auditing purposes. If City should have an audit made for any period and the Gross Receipts and business transacted shown by Licensee's statement for such period is found to be understated in an amount greater than or equal to two percent (2%), Licensee shall be provided an opportunity to discuss and respond to any findings before an audit report is formally filed. In the event that City performs an audit and it is found that the Gross Receipts and business transacted by Licensee is understated in an amount greater than or equal to two percent (2%), Licensee shall, within five business days, pay to City the cost of such audit as well as the additional fees payable by Licensee to City in addition to any delinquency and late charges provided for in this License. If City's audit shows that Licensee did not understate its Gross Receipts and business transacted, the cost of such audit shall be borne by City.

License Agreement with Charter Boat Association for Bait Shop

3. TERM

This License shall take effect as of the Effective Date and shall terminate on December 31, 2008 (the "Termination Date"), subject to the following:

a. Either party has the right to terminate this License for any reason with sixty (60) days prior written notice to the other party. If either party desires to reassess the Maximum Fee, it shall provide prompt written notice of such intent; if the parties are unable to reach agreement on a proposed reassessment of the Maximum Fee, either party may invoke its termination rights pursuant to this section.

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

c. Should City terminate this License pursuant to sub-paragraphs 3. a. or 3. b. 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 fees 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 fees which would have been earned after termination until the time of the award exceeds the amount of such fees less 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 fees for the balance of the Term after the time of award exceeds the amount of such fees less 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 therefrom, including without limitation, the costs and expenses (including attorneys' fees and disbursements, 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 fees 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%).

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d. So long as Licensee is not in default under this License at the time of the Termination Date, this License can be extended up to five (5) years by mutual consent of the parties. If either party wishes to extend this License, it must give the other party written notice of such intent sixty (60) days prior to Termination Date. Licensee acknowledges that City has complete discretion to deny consent. No extension will be effective unless the parties execute a written agreement extending the term of this License.

e. At the start of the License Agreement, Licensee shall occupy approximately 1,500 SF in the ground floor of the building at 225 University Avenue now used as a bait shop.

f. Licensee acknowledges that the City intends to provide approximately 1,500 SF of renovated space for the bait shop within the building at 225 University Avenue at a time after January 1, 2004 that has yet to be determined. The City intends that the front of this space will be located on the east and south side of the building and that it will be used exclusively for the bait shop. This space will be improved, at no cost to Licensee, to a basic retail shell condition and any additional improvements will be Licensee's responsibility. The City also intends that the bait shop will remain in its present location until the renovation work is completed, thus avoiding any temporary relocation. Although the City will attempt to arrange for the construction of this newly renovated space, Licensee understands that such construction or renovation might not occur and agrees that Licensee's approval and execution of this Agreement is not conditioned on such construction or renovation.

g. If during the renovation of the building at 225-235 University, the City determines it is not feasible to avoid a temporary relocation of the bait shop, the City may require the Licensee to relocate the business into a temporary structure at a nearby location yet to be determined. In that event, City agrees to reimburse Licensee up to a maximum of \$20,000 for Licensee's actual relocation costs to the temporary location. In no event shall the City provide any relocation costs for Licensee to move into a permanent space, whether newly constructed or renovated. City shall give Licensee sixty (60) days written notice before Licensee is required to relocate the business.

4. NOTICES

A written notice shall be deemed served upon mailing said notice to the other party and depositing the same with the U.S. Post Office, first class mail, with postage paid. For purposes of this License, all notices to the City shall be addressed to the Waterfront Manager at the Parks Recreation and Waterfront Department, Marina Office at 201 University Avenue, Berkeley, CA 94710. For purposes of this License, all notices to Licensee shall be addressed to Robert Gallia, c/o Charter Boat Association, at the Berkeley Marina Sport Center, 225 University Avenue, Berkeley, CA 94710.

5. MAINTENANCE

a. Licensee is responsible for ensuring that the Property meets all applicable City of Berkeley codes prior to occupancy. Licensee shall keep and maintain in good order, condition and

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repair (except for reasonable wear and tear) all portions of the Property including without limitation, all fixtures, interior walls, floors, ceilings, plumbing, glass, roof, heating, ventilating and sewage facilities.

Licensee shall keep the Property and City's property adjacent to the Property reasonably free and clean of all debris, trash and rubble.

b. Upon termination of this License, except as provided for in Paragraph 6. c. herein, Licensee shall remove any equipment, improvements, and materials installed by Licensee and shall surrender the Property to City in the same condition as provided to Licensee at the commencement of this License.

6. IMPROVEMENTS

a. Licensee shall not erect additions or structures nor make nor cause to be made any alterations, improvements, additions, or fixtures that affect the exterior or interior of the Property, nor shall Licensee mark, paint, drill or in any way deface any floors, walls, ceilings, or partitions of the Property without first providing thirty (30) days' written notice to City. If City raises no objections within thirty (30) days after receipt of such notice, Licensee may proceed. The City consents to the installation by Licensee of all equipment reasonably necessary for Licensee to effectuate the purposes of the scope of services described in Exhibit B attached hereto.

b. Licensee shall require all contractors to provide a labor and materials bond for the full amount of the contract. Licensee shall pay, when due, all sums of money that may be due or become due for any labor, services, materials, supplies or equipment furnished to or for Licensee, in, at, upon or about the Property and which may be secured by any mechanic's, materialmen's or other lien against the Property or City's interest therein.

c. All alterations, improvements or additions that are now or in the future attached permanently to the Property shall be the property of City and remain with the Property at the end of this License Agreement, except that City can elect within thirty (30) days of the termination of the Agreement to require Licensee, at its cost, to remove any alterations, improvements or additions Licensee has made to the Property.

7. ACCESS TO PROPERTY BY OTHERS

The City, its agents, employees, and other authorized representatives shall have the right to enter the Property at any time, provided such entry does not cause unreasonable interference with Licensee's business. City shall not be liable in any manner for any inconvenience, disturbance, loss of business, nuisance, or other damage arising out of City's entry as provided in this section.

8. TAXES, ASSESSMENTS, AND OTHER CHARGES

Licensee shall pay all personal property taxes levied on account of personal property in the

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Property owned by Licensee, and pay any in-lieu, possessory interest, or use taxes imposed by reason of Licensee's use or occupancy of the Property. Licensee shall pay for all local, state and federal permits and licenses necessary for the operation of its business.

9. UTILITIES

Licensee shall make all arrangements for and pay for all utilities and services furnished to or used by it, including without limitation, telephone, gas, electricity, garbage, water and sewer services, and for any connection charges therefor.

10. ASSIGNMENT AND SUBLICENSING PROHIBITED

This License is personal and exclusive to Licensee. Licensee may not assign or sublicense this License in whole or in part without the City Manager's prior written consent. No reference to sublicensees or assignees elsewhere in this License shall be construed to the contrary. If Licensee attempts to assign or sublicense this License without the City Manager's prior consent, the City Manager shall have the sole option to terminate the License, and at City's election, shall constitute a default. No consent to any assignment or sub-license shall constitute a further waiver of the provisions of this section.

11. INDEMNIFICATION

Licensee shall indemnify, defend and hold City, its officers, agents, volunteers and employees harmless from: 1) all claims of liability for any damage to property or injury or death to any person occurring in, on, or about the Property; 2) all claims of liability arising out of Licensee's failure to perform any provision of this License, or any act or omission by Licensee, its agents, contractors, invitees or employees; and 3) all damages, liability, fines, penalties, and any other consequences arising from any noncompliance or violation of any laws, ordinances, codes, or regulations, including but not limited to the Occupational Safety and Health Act of 1979 and the Americans with Disabilities Act of 1990. Except, however, that City shall hold Licensee harmless from all claims of liability for damage resulting from the acts or omissions of City or its authorized representatives.

12. INSURANCE

a. Licensee, at its own cost, shall maintain at all times during the performance of this License a public liability and commercial general liability insurance policy with a minimum occurrence coverage in the amount of \$1,000,000 to cover any claims arising out of Licensee's performance of services under this License. All insurance shall name the City, its officers, agents, volunteers and employees as additional insureds and shall provide primary coverage with respect to the City.

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All insurance policies shall: 1) provide that the insurance carrier shall not cancel, terminate or otherwise modify the terms and conditions of said policies except upon thirty (30) days' written notice to the City's Risk Manager; 2) be evidenced by the original Certificate of Insurance attached to the City's form endorsement or the insurance carrier's standard form endorsement evidencing the required coverage; and 3) be approved as to form and sufficiency by the City's Risk Manager.

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

c. If Licensee employs any person, it shall carry workers' compensation and employer's liability insurance and shall provide a certificate of insurance to the City. The workers' compensation insurance shall: 1) provide that the insurance carrier shall not cancel, terminate or otherwise modify the terms and conditions of said insurance except upon thirty (30) days' written notice to the City's Risk Manager; 2) provide for a waiver of any right of subrogation against City to the extent permitted by law; and 3) shall be approved as to form and sufficiency by the City's Risk Manager.

d. Licensee shall forward all insurance documents to the Waterfront Manager at the address provided in Paragraph 4 above.

13. RISK OF LOSS

Licensee bears all risk of loss under this License.

14. CONFORMITY WITH LAW AND SAFETY

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

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

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if any; 3) name and address of Licensee's insurance carrier; and 4) a detailed description of the accident, including whether any of City's equipment, tools or materials were involved.

c. If a release of hazardous materials or hazardous waste that cannot be controlled occurs in connection with the performance of this License, Licensee shall immediately notify the Berkeley Police Department and the Toxics Management Office, in addition to complying with all other applicable laws and regulations regarding such a release.

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

15. INDEPENDENT CAPACITY

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

16. NON-DISCRIMINATION AGAINST PERSONS WITH DISABILITIES

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

b. If Licensee is or becomes a "public accommodation" as defined in Title III of the Americans with Disabilities Act of 1990, Licensee shall observe and comply with all applicable provisions of the Act and any amendments thereto, and all applicable federal, state, municipal and local laws, ordinances, codes and regulations prohibiting discrimination on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations offered by the Licensee. All Licensee's activities must be in accordance with these laws, ordinances, codes, and regulations, and Licensee shall be solely responsible for complying therewith.

License Agreement with Charter Boat Association for Bait Shop

17. CITY NON-DISCRIMINATION ORDINANCE

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

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

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

18. CONFLICT OF INTEREST PROHIBITED

a. In accordance with Government Code section 1090, Berkeley City Charter section 36, and BMC 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 City board, committee or commission member, who has directly or indirectly influenced the making of this License.

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

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

19. 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.

License Agreement with Charter Boat Association for Bait Shop

20. 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 its License with the City), 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 Amdo, Kham, and U-Tsang shall be deemed oppressive states.

c. Licensee's failure to comply with this section shall constitute a default of this License and City may terminate this License pursuant to Section 3. In the event that the City terminates Licensee 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.

21. BERKELEY LIVING WAGE ORDINANCE (LWO)

a. Licensee agrees to comply with Berkeley Municipal Code Chapter 13.27, the Berkeley Living Wage Ordinance (LWO), as it may be amended from time to time. 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 of Berkeley (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 the LWO. If Licensee is subject to the LWO, as defined therein, Licensee shall be further required to maintain monthly records of those employees located on the Property. These records shall include the total number of hours worked, the number of hours spent providing service on the 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 Paragraph 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 Paragraph 3.b herein.

License Agreement with Charter Boat Association for Bait Shop

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

d. If Licensee fails to comply with the requirements of the LWO and this License, the City shall have the rights and remedies described in this Paragraph, in addition to any rights and remedies provided by law or equity. Licensee's failure to comply with this Paragraph shall constitute a default of the License, upon which City may terminate this License pursuant to Paragraph 3.

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.

22. BERKELEY EQUAL BENEFITS ORDINANCE (EBO)

a. Licensee hereby agrees to comply with the provisions of the Berkeley Equal Benefits Ordinance (EBO), B.M.C. Chapter 13.29, as may be amended from time to time. If Licensee is currently subject to the EBO, as indicated by the Equal Benefits Certification form, attached hereto, Licensee will be required to provide all eligible employees with City mandated equal benefits, as defined in B.M.C. Chapter 13.29, during the term of this License, as well as comply with the terms enumerated herein.

b. If Licensee is currently or becomes subject to the EBO, Licensee agrees to provide the City with any records the City deems necessary to determine compliance with this provision. Failure to do so shall be considered a default, subject to the provisions of Section 3 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.

d. Licensee's failure to comply with this Section shall constitute a material breach of the License, upon which City may terminate this License pursuant to Section 3.

License Agreement with Charter Boat Association for Bait Shop

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.

23. RECYCLED PAPER FOR WRITTEN REPORTS

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

24. SETOFF AGAINST DEBTS

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

25. GOVERNING LAW

The laws of the State of California shall govern this License.

26. AMENDMENTS

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

27. 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 I.D. number written below is correct.

License Agreement with Charter Boat Association for Bait Shop

28. SEVERABILITY

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

29. WAIVER

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

30. EFFECT ON SUCCESSORS AND ASSIGNS

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

31. ENTIRE AGREEMENT

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

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

32. PESTICIDES

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

33. SIGNS

Licensee shall not install or letter any signs on the Property without the prior written consent of City. All signs on the Property shall conform to the provisions of Berkeley Municipal Code Chapter 20.04 and the Marina design guidelines for signs.

License Agreement with Charter Boat Association for Bait Shop

34. **CONSENT OF PARTIES**

Whenever consent or approval of either party is required, that party shall not unreasonably withhold such consent or approval.

35. **EXECUTION IN COUNTERPARTS**

This License may be executed in two or more counterparts, each of which shall be deemed an original, but all of which, together, shall constitute one and the same document.

IN WITNESS WHEREOF, City and Licensee acknowledge that they have read and understand this License, to be effective on the Effective Date, and hereby execute this License.

Approved as to form:

CITY OF BERKELEY

City Attorney

City Manager

Dated: _____

Dated: _____

Registered by:

Attest:

City Auditor

City Clerk

LICENSEE,
BERKELEY MARINA CHARTER BOAT ASSOCIATION, INC.

By _____
Robert Gallia, President

Dated: _____

LICENSEE INFORMATION

Tax Identification No. _____

Berkeley Business License No. _____ Incorporated: Yes No

Certified Woman Business Enterprise: Yes No

Certified Minority Business Enterprise: Yes No If yes, state ethnicity: _____ Certified

Disadvantaged Business Enterprise: Yes No

License Agreement with Charter Boat Association for Bait Shop

EXHIBIT A

DESCRIPTION OF PROPERTY

The Property which is the subject of this License includes: 1) the name, "The Berkeley Marina Sports Center"; 2) the primary phone number(s) for the Berkeley Marina Sports Center ("BMSC"), including 510/849-2727; and 3) a ground floor space of approximately 1,500 square feet (35 feet X 45 feet) located in the portion of the building which fronts onto University Avenue. The address of the Property is 225 University Avenue, Berkeley, California.

Paragraph 3 of the Agreement describes the possibility of Licensee moving to another location.

License Agreement with Charter Boat Association for Bait Shop

EXHIBIT B

SCOPE OF SERVICES

A. Services Licensee shall operate on the Property a bait and tackle shop from which it shall provide reservation services for charter boats. In the operation of that bait and tackle shop and the provision of those services, Licensee shall be permitted to engage in and conduct the following:

(1) Fishing Boat Chartering and Reservation Center Licensee shall maintain a reservation system and registry of charter fishing boats that choose to use the bait shop as its reservation agent.

(2) Collect City's Passenger Loading Fee Pursuant to Berkeley Municipal Code section 6.20.330.C, as may be amended from time to time, the City charges a "passenger loading fee" for each passenger that boards any charter boat operating from the City's Marina. Licensee shall collect the City's passenger loading fee from all the charter boats that use the Licensee as its reservation agent, and forward the fees, in their entirety, to the City pursuant to the provisions of Exhibit C.

(3) Sale of Fishing Licenses, Bait and Merchandise Licensee shall sell State of California fishing licenses and bait and tackle, including live bait. Licensee shall have the right to maintain live bait tanks at the end on K Dock. Licensee shall be permitted to sell all types of fresh, frozen, and live fishing bait and, in that connection, shall be permitted to install and maintain sufficient tanks, aeration, chiller and other similar equipment necessary to sustain and expand its business.

(4) Rental of Equipment Licensee shall rent fishing tackle and related gear to customers of the charter fishing boats and to other persons. Licensee has the option to rent bicycles, skates, and other recreational equipment.

(5) Licensee shall be permitted to engage in retail and discount sales of fishing and related equipment including, but not limited to, fishing rods, fishing reels, fishing tackle, line winding, bait buckets, nets and other similar equipment together with cigarettes, marine apparel, sunglasses, sunscreen and other similar personal items.

(6) Licensee shall be permitted to build and sell on the Property custom fishing rods and other fishing equipment.

(7) Licensee may use the Property to sponsor events for children which involve the use of the Marina, after obtaining appropriate permits (if any are required), including but not limited to permits from the City which may be granted or denied in the City's sole discretion. The City will not, by granting or denying such permits, assume any responsibility for events sponsored by Licensee. Licensee agrees that the terms of this Agreement, including but not limited to Section 2 (Fee), Section 10 (Indemnification), Section 11 (Insurance), and Section 12 (Risk of Loss) shall apply to such events, and that other conditions

License Agreement with Charter Boat Association for Bait Shop

may be imposed before permits for particular events are granted.

(8) Licensee shall be permitted to sell prepackaged sandwiches, microwaveable packaged foods, hot dogs, candy, bagged chips, snacks and similar items. Licensee shall further be permitted to install and operate a delicatessen and/or grill for made-to-order hot and cold sandwiches together with cold salads and similar foods. Licensee shall further be permitted to sell beverages, such as soft drinks, off sale beer and wine, juices, coffee, tea, and milk.

(9) Licensee may engage in other activities upon the Property consistent with the foregoing, subject to the City Manager's prior written approval, which may be granted or denied in the City's sole discretion.

B. The hours of operation shall be as follows:

(a) Salmon Season: From 5:00 a.m. to 5:00 p.m., seven (7) days a week, weather permitting. If weather does not permit, then the hours of operation shall be from 8:00 a.m. to 5:00 p.m. The State of California, Department of Fish and Game shall determine the dates of the Salmon Season.

(b) Off Season: From 8:00 a.m. to 5:00 p.m., seven (7) days a week.

(c) Licensee may close its shop at 12:00 p.m. on Thanksgiving Day and may be closed all day on Christmas Day.

(d) Licensee, in its sole discretion, may increase the number of hours, days and months of operation to meet market demand. Licensee may reduce its hours and days of operation below those specified in Paragraph 2 above only with the prior written approval of the Waterfront Manager.

EXHIBIT C

PAYMENT

1. Licensee shall pay to the City both the Minimum Monthly Fee described in Paragraph 2 and the passenger loading fees (described in paragraph 2.e.8 and Exhibit B, paragraph A. (2)) of this License no later than ten (10) calendar days after the end of each month. Licensee shall pay to the City the Maximum Fee described in Paragraph 2 within thirty (30) days from the end of each month the License is in effect. If the total Maximum Fee paid in any calendar year is less than \$45,000, Licensee must pay the balance within ten (10) calendar days of submitting its fee for the month of December.
2. Any payments received after the due dates may be assessed a ten percent (10%) late-penalty. A typed statement of gross receipts and expenses for the month covered by the Maximum Fee shall accompany this payment. All payments of the fee owed to the City for the use of the charter fishing boats as described in Exhibit B, Paragraph C, shall be accompanied by a typed statement identifying the source (by date and by boat name).
3. Payments shall be made payable to the "City of Berkeley" and paid at the Finance Department at 1947 Center Street, Berkeley, CA 94704 to the attention of Ms. Mila Serna (981-7272). Copies of all payments and statements of gross receipts shall be provided each month to the City's Waterfront Manager at 201 University Avenue.