

**CALENDAR ITEM
C77**

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03/29/12
G09-02.6
M. Andersen

**REVIEW OF CITY OF NEWPORT BEACH PROPOSED BEACON BAY LEASE
INVOLVING LEGISLATIVELY GRANTED FILLED TIDE AND SUBMERGED LANDS
LOCATED IN BEACON BAY, CITY OF NEWPORT BEACH, ORANGE COUNTY**

TRUSTEE:

City of Newport Beach
300 Newport Boulevard
Newport Beach, CA 92658-8915

The City of Newport Beach (City) is trustee of sovereign tide and submerged lands granted to it by the Legislature pursuant to Chapter 74, Statutes of 1978, as amended (statutory trust grant).

BACKGROUND:

The area known as Beacon Bay is owned in part by the City in its capacity as a municipality and in part as a trustee for the State pursuant to Chapter 74, Statutes of 1978, as amended.

Beacon Bay consists of 2.8 acres of land which is divided into 72 residential lots. Of 72 lots to be leased by the City, 38 consist of partially or entirely filled tide and submerged lands granted to the City. The subject leases were specifically authorized by the Legislature pursuant to its statutory trust grant. Section 1(g) of Chapter 74 authorizes a lease for a maximum of 50 years and requires the California State Lands Commission (Commission) to approve the form of lease and range of consideration prior to the issuance of any such lease.

On May 28, 1981, the Commission approved the form of lease and schedule of rents for the City to enter into 50 year leases. On May 26, 1994, the Commission again approved a new form of lease and range of consideration. Those leases entered into after the 1994 Commission meeting are set to expire in 2044.

Beacon Bay also contains streets, walkways, beaches, common landscape areas, and tennis courts known as the Common Areas. The City has negotiated a separate lease for the Common Area with the Beacon Bay Community

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Association. That lease for the Common Area was reviewed and approved by the Commission at its February 17, 2005 meeting.

CURRENT STATUS:

Certain residential lease holders are now interested in terminating their existing leases and entering into new 50-year leases so that they can obtain traditional 30-year mortgages. The City has drafted a new lease with new provisions that reflect current conditions. The consideration to be received by the City for the residential leases is the fair market rental values of such lots as finished subdivided lots with streets constructed and all utilities installed pursuant to the statutory trust grant. The City will allow the current lessees to voluntarily terminate their existing leases and enter into new leases until January 1, 2015. If a lessee chooses not to enter into new lease, the terms and conditions of their existing lease, as authorized to form by the Commission on May 26, 1994, will remain in effect until July 1, 2044.

STAFF ANALYSIS:

In Section 3 of Chapter 74 Statutes of 1978, the Legislature found that the Beacon Bay lots, which are made up of Parcels A, B, and C, (see Exhibit A) had been filled and reclaimed and are no longer needed for purposes of navigation, commerce and fisheries, but shall continue to be held in trust by the City; and all revenues derived from the leasing or administration of the lots shall be used for trust purposes. Except for the specific findings made in the statutory trust grant, which is limited to the Beacon Bay parcels, private residences are generally not authorized on public trust lands.

The City has updated the lease and added a few new provisions, including a process to enter into a new lease and an option fee structure. By statute, the maximum lease term is 50 years. Typical residential financing would be a 30-year mortgage and most lenders would require that the homeowner have 35 years remaining on the lease to obtain financing. It is foreseeable that every 15 or so years some portion of the lessees will want to enter into a new lease with the City.

Appraisal and Option Fee

Under the proposed form of lease, the lessee may apply to the City and in its sole and absolute discretion, the City will decide whether to terminate the current lease and enter into a new lease. The lessee would have to pay an option fee which is calculated as a percentage of the term of the new lease. The lessee will also have to pay for the property to be appraised before they enter into any new lease with the City. The lessee will select one of three California licensed appraisers submitted by the City. Staff of the Commission will review and

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approve the appraisal instructions, to be prepared by the City, for use in the setting of rent.

Annual Rent

Rent is calculated at 2.5% of the appraised value of the property or in the event of a sale, rent is 2.5% of the total of all consideration paid for the property including improvements and structures. The annual rent may be adjusted annually based on CPI. At year 30, the City has the opportunity to reappraise the property. The City has also incorporated strong indemnification and liability language into the lease.

In the opinion of staff, the actions taken by the City as trustee for the statewide public are based upon reasonable administrative and business judgments and the leases are comprehensive and adequately protect the public interest. The proposed lease form provides acceptable terms as to both form of lease and range of consideration. CSLC staff has reviewed the form and range of consideration of the new lease for compliance with Chapter 74 Statutes of 1978, as amended, and recommends that the Commission approve the lease form and range of consideration, substantially as attached.

OTHER PERTINENT INFORMATION:

1. City is the trustee of legislatively granted sovereign lands, pursuant to Chapter 74, Statutes of 1978, and as amended.
2. Pursuant to the Commission's delegation of authority and the State CEQA Guidelines (Cal. Code Regs., tit. 14, § 15061), the staff has determined that this activity is exempt from the requirements of CEQA as a categorically exempt project. The project is exempt under Class 1, Existing Facilities; California Code of Regulations, Title 2, section 2905, subdivision (a)(2).

Authority: Public Resources Code section 21084 and California Code of Regulations, Title 14, section 15300 and California Code of Regulations, Title 2, section 2905.

3. This activity involves lands identified as possessing significant environmental values pursuant to Public Resources Code section 6370 et seq., but such activity will not affect those significant lands. Based upon the staff's consultation with the persons nominating such lands and through the CEQA review process, it is the staff's opinion that the project, as proposed, is consistent with its use classification.

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EXHIBITS:

- A. Site and Location Map
- B. Beacon Bay Lease

RECOMMENDED ACTION:

It is recommended that the Commission:

CEQA FINDING:

Find that the activity is exempt from the requirements of CEQA pursuant to California Code of Regulations, Title 14, section 15061 as a categorically exempt project, Class 1, Existing Facilities; California Code of Regulations, Title 2, section 2905, subdivision (a)(2).

SIGNIFICANT LANDS INVENTORY FINDING:

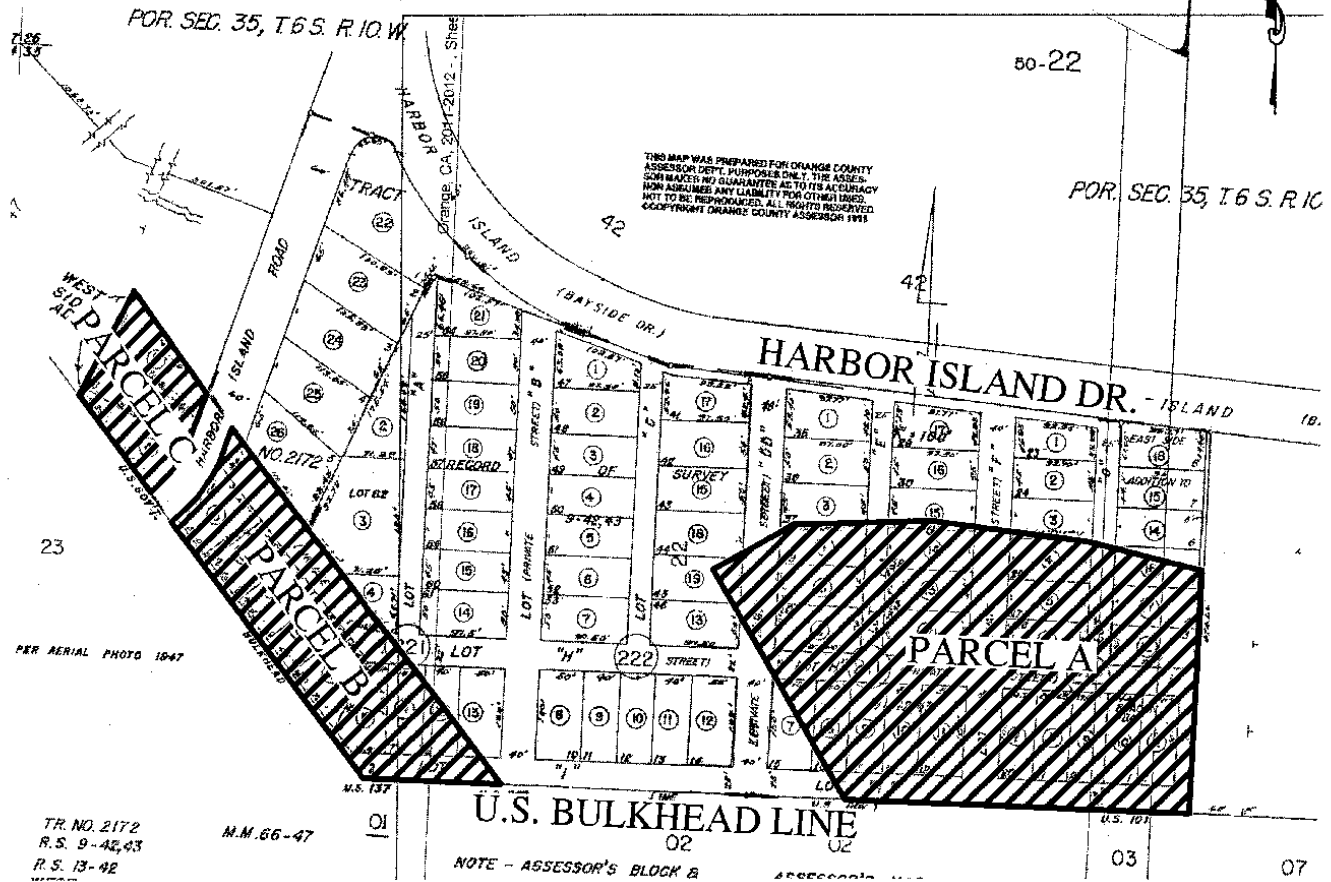
Find that this activity is consistent with the use classification designated by the Commission for the land pursuant to Public Resources Code section 6370 et seq.

AUTHORIZATION:

1. Find that in accordance with Chapter 74, Statutes of 1978, the City of Newport Beach may enter into leases of certain described filled and tide and submerged lands for a period not to exceed 50 years.
2. Approve the City of Newport Beach's proposed form of the lease and range of consideration for the Beacon Bay Lease between the City of Newport Beach and residents of Beacon Bay, substantially, as attached as Exhibit B and authorize the staff of the Commission to review and approve the appraisal instructions, to be prepared by the City of Newport Beach, for use in the setting of rent.

NO SCALE

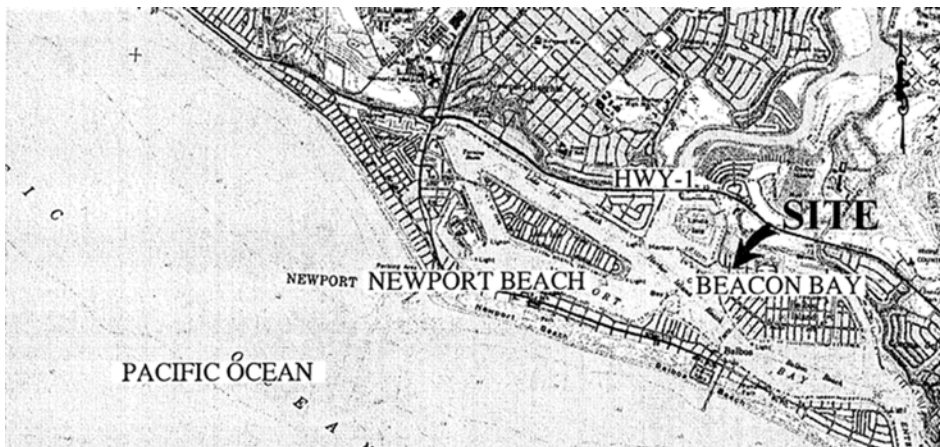
SITE



Review and Approval of New Lease of Tidelands Associated with Waterfront Lots within the Westerly Portion of Beacon Bay, Newport Beach

NO SCALE

LOCATION



MAP SOURCE: USGS QUAD

Exhibit A

G-09-02.6
CITY OF NEWPORT
BEACH
ORANGE COUNTY



MJF 3/12/12

This Exhibit is solely for purposes of generally defining the lease premises, is based on unverified information provided by the Lessee or other parties and is not intended to be, nor shall it be construed as, a waiver or limitation of any State interest in the subject or any other property.

Exhibit B

BEACON BAY LEASE

THIS BEACON BAY LEASE (“Lease”) is entered into as of the ___ day of _____, 20__ (“Effective Date”), by and between the City of Newport Beach, a California municipal corporation, tideland’s trustee, and charter city (“Lessor” or “City”) and _____, a _____ (“Lessee”). Lessor and Lessee are sometimes individually referred to herein as “Party” and collectively as the “Parties.”

RECITALS

A. Lessor by virtue of a 1978 legislative grant found in Chapter 74 of the Statutes of 1978, as amended (“Beacon Bay Bill”), holds the right, title, and interest to certain tidelands and uplands commonly known as Beacon Bay and generally depicted in Exhibit “A” attached hereto and incorporated by reference.

B. The Beacon Bay Bill frees the “Westerly portion” of the filled tidelands from the public trust and specifically authorizes the lease of the property for residential purposes subject to certain express statutory conditions.

C. As required by the Beacon Bay Bill, the consideration to be received by the City for the residential leases is the fair market rental value of such lots as finished subdivided lots with streets constructed and all utilities installed.

D. On November 3, 1987, a majority of the electors in the City approved a measure authorizing the City Council to enter into residential leases in Beacon Bay for a period not to exceed fifty (50) years.

E. On November 3, 1992, a majority of the electors in the City approved Measure M authorizing the City Council to lease tidelands and waterfront property consistent with the provisions of state law.

F. The City Council, pursuant to the authority conferred by the electors and the Beacon Bay Bill, leased out the residential lots within Beacon Bay for fifty (50) year terms.

G. The current residential leases are set to expire on July 1, 2044, which is preventing certain persons with existing leases within Beacon Bay from obtaining a traditional thirty (30) year mortgage.

H. Lessor and Lessee desire a new residential lease for Beacon Bay with a new fifty (50) year term and new provisions that are reflective of current conditions.

I. City has determined this Lease is consistent with the Beacon Bay Bill, the City’s Charter, General Plan, Zoning Ordinances, and all other applicable state and local laws.

J. The California State Lands Commission reviewed the form of this Lease and the range of consideration to be received by the City and determined that the Lease is in conformance with the provisions in the Beacon Bay Bill.

1. AGREEMENT TO LEASE

1.1 Lease. For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Lessor hereby leases to Lessee the real property commonly known as Beacon Bay Lot ____, (“Property”) which is more particularly described in Exhibit “B”, and generally depicted on Exhibit “A”, each attached hereto and incorporated by reference herein. If Lessee is a Limited Liability Corporation (“LLC”) Lessee shall provide Lessor with the name of its majority share holder at the time of execution of this Lease. The LLC may not change its majority shareholder without the prior written consent of the City’s City Manager or his/her designee. If approved, a change of the majority shareholder triggers a re-appraisal of the Property and an adjustment of Base Rent pursuant to the re-appraisal process in Section 3.6(b).

1.2 Reservation of Mineral Rights. Lessor expressly reserves all oil, oil rights, gas, minerals, mineral rights, natural gas rights and other hydrocarbon substances in and under the Property and the right to grant and transfer the same, together with all necessary and convenient rights to explore for, develop, produce and extract and take the same, subject to the express limitation that any and all operations shall be carried on at levels below the depth of five hundred feet (500’) from the surface of the land by means of wells, derricks and other equipment from surface locations on adjoining or neighboring land, and subject further to all restrictions and regulations concerning the drilling for, and production of, oil, gas, minerals, petroleum and other hydrocarbon substances specified in the City’s Charter and Municipal Code.

1.3 Net Lease. This Lease is a net lease, pursuant to which Lessor has no obligation with respect to the payment of taxes, insurance, the cost of maintenance, utilities and repairs or other costs or obligations associated with the Property, except as expressly stated herein.

1.4 Termination of Prior Lease(s). Lessee affirmatively represents that: (a) the persons executing this Lease have a hundred percent (100%) of all interests in any prior lease(s) covering the Property; and (b) have authority to execute this Lease and be bound by the terms herein. Upon the execution of this Lease, any lease(s) between the City and the Lessee or any other party covering the Property shall automatically terminate and be of no further effect. Lessee shall execute and record any document(s) that may be required by City to evidence the termination of any prior lease(s) covering the Property. City shall owe no compensation to Lessee or any other party for the termination of a lease under this section. Lessee shall indemnify and hold the City harmless from any and all liability, loss, expense, damage, or claims which may arise directly or indirectly from or in connection with any allegation that the representations made in this section are false.

2. TERM OF LEASE

2.1 Fixed Term. The term of this Lease shall be for a fixed period of _____ years commencing as of _____, 20__ (“Commencement Date”) and terminating on _____, 20___. The total term may not exceed fifty (50) years pursuant to the Beacon Bay Bill.

2.2 Options. Upon the written request of Lessee and in the sole and absolute discretion of City, this Lease may be terminated and a new lease (with the most current terms approved by the City and/or State Lands Commission) executed with a term not to exceed fifty (50) years pursuant to the payment of the “Option Fee” by Lessee for each year the term is extended. The new lease’s term shall be the cumulative total of the purchased years under this section and the remaining years in this Lease (*i.e.*, if ten (10) years and one (1) month remain in this Lease and five (5) years are purchased under this section the new lease shall be for a term of fifteen (15) years and one (1) month). The Option Fee shall be calculated pursuant to a specified percentage, as provided in Exhibit “C” attached hereto and incorporated by reference, of the fair market value of the Property as determined by an appraisal, multiplied by the number of years that are purchased by the Lessee (*i.e.*, for illustrative purposes, if the specified percentage is one percent (1%) and the appraised Property value is one hundred dollars (\$100) and Lessee desires to extend the term five (5) years, Lessee would owe the City five dollars (\$5) [$\$1 \times 5 \text{ years} = \5]). The Option Fee shall be paid to City by Lessee at the time of execution of the new lease.

The Property appraisal shall be conducted after the City’s approval of the written request submitted by Lessee. The City’s approval of the written request shall be valid for six (6) months or some other time period as may be agreed upon by the parties. Lessor shall submit three (3) California licensed appraisers to Lessee; Lessee shall select one (1) appraiser from the three (3) submitted appraisers to appraise the Property. Lessee shall pay all costs associated with the appraiser and the appraisal. For purposes of the Option Fee calculation, in no event shall the appraised fair market value be less than the Property value used to determine Base Rent (as defined in Section 3.2) in Sections 3.1 and 3.2 of the then effective Lease. Because there will be no sale of the Property, the Base Rent for the new lease shall be calculated pursuant to Section 3.6(b), notwithstanding the appraisal requirement in Section 3.6(b), the parties may rely upon the appraisal conducted pursuant to this section to calculate the Base Rent.

2.3 Holdover. This Lease shall terminate and become null and void without further notice upon the expiration of the term of this Lease. Any holding over by Lessee after the expiration of the term shall not constitute a renewal or extension and shall not give Lessee any rights in or to the Property or any part thereof except as expressly provided in this Lease. Any holding over after the expiration of the term with the consent of Lessor shall be construed to be a tenancy from month-to-month on the same terms and conditions set forth in this Lease insofar as such terms and conditions can be applicable to a month-to-month tenancy, except that the rental for each month or any portion thereof during such holdover period shall be an amount equal to one

hundred fifty percent (150%) of one-twelfth (1/12) of the annual rental for the most recent year paid. The month-to-month tenancy may be terminated by Lessee or Lessor upon thirty (30) calendar days' prior written notice to the other.

3. RENT & TRANSFERABILITY

3.1 Rent Calculation. Annual rent for the Property shall be calculated at the rate of two and half percent (2.5%) of the total of all consideration paid for the Property or the appraised value of the Property, including any improvements or structures, but excluding any consideration paid for the transfer of personal property in connection with such transaction. The annual rent shall be adjusted from time-to-time pursuant to Section 3.3. The rent calculation provided in this section shall serve as the basis for the Base Rent (defined below) in Section 3.2.

3.2 Base Rent. Lessee agrees to pay Lessor rent for the use and occupancy of the Property, in twelve (12) equal monthly installments on the first day of each month ("Base Rent"). Said sums shall be paid in lawful money of the United States of America. If the Commencement Date is other than the first day of a month, rent during any partial month at the beginning and at the end of the lease term will be prorated. Base Rent hereunder will be _____ Dollars (\$_____.00) for an annual total of _____ Dollars (\$_____.00). Base Rent due hereunder will be subject to the rent adjustment provisions of Section 3.3 below. Lessee shall send said rent to the mailing address or send an electronic fund transfer via the web address provided in Section 3.5. Lessee shall be responsible for any delays in the mode of sending the rent payment to Lessor.

(a) Base Rent shall be due on the first day of each month. If said rent is received later than the fifteenth (15th) day of the month, there shall be a delinquency charge equal to five percent (5%) of the month's Base Rent due.

(b) Each monthly installment of Base Rent shall bear interest if not paid promptly on or before the date it becomes delinquent at the rate of five percent (5%) per annum from the date it becomes delinquent until it is paid by Lessee to Lessor. This interest charge shall be in addition to the delinquency charge set forth in Section 3.2(a).

3.3 Rent Adjustments. Monthly Base Rent may be adjusted on July 1st of each Lease Year (the term "Lease Year" as used herein refers to successive twelve (12) month periods, commencing with the Commencement Date of this Lease) to reflect increases or decreases in the cost of living as indicated by the Consumer Price Index described below. Monthly Base Rent may be adjusted if the Consumer Price Index for the Los Angeles – Orange County - Riverside Area, All Urban Consumers, All Items ("Index"), as published by the United States Department of Labor, Bureau of Labor Statistics ("Bureau"), increases or decreases over the Base Period Index. The initial "Base Period Index" shall be the Index for the calendar month which is four (4) months prior to the month of the Commencement Date (thus, _____, 20____, which equals _____). The initial Base Period Index shall be compared with the Index for the same calendar month for each subsequent Lease Year ("Comparison Index"). The Comparison Index used for a given year's adjustment calculation will become the Base Period Index for

purposes of the next annual rent adjustment calculation. If the Comparison Index is higher or lower than the Base Period Index, then Base Rent for the next Lease Year shall be increased or decreased by the amount of such percentage change. Should the Bureau discontinue the publication of the above Index, or publish same less frequently, or alter same in some other manner, then the Parties shall adopt a substitute Index or substitute procedure which reasonably reflects and monitors consumer prices.

Notwithstanding the Index adjustments described above, if Lessor, in its sole and absolute discretion, believes that notwithstanding such adjustments, monthly Base Rent, as adjusted, does not accurately reflect the fair market rental value of the Property, Lessor may elect to further adjust monthly Base Rent at the commencement of the thirtieth (30th) Lease Year. Lessor will provide notice to Lessee not earlier than six (6) months nor later than three (3) months prior to the expiration of the twenty-ninth (29th) Lease Year of Lessor's election to further adjust monthly Base Rent. Within fifteen (15) days thereafter, Lessor and Lessee will attempt to agree upon an adjustment in Base Rent. If Lessor and Lessee are unable to agree, the Property will be appraised to determine its fair market rental value. Lessor shall submit three (3) California licensed appraisers to Lessee; Lessee shall select one (1) appraiser from the three (3) submitted appraisers to appraise the Property. Lessor shall pay all costs associated with the appraiser and the appraisal. The fair market rental value determined by the appraiser will constitute monthly Base Rent for the thirtieth (30th) Lease Year and each successive year remaining on the Lease; provided, however, that in no event will monthly Base Rent so determined be less than that otherwise payable through the annual Index adjustments described above.

3.4 Additional Rent. All other payments from Lessee described in this Lease, whether to Lessor or third parties (i.e., for the payment of taxes, utilities, insurance, maintenance and the like) constitute "Additional Rent." Included within Additional Rent is any service charge incurred by City when processing the Rent (e.g., credit card transaction fee, etc.), such service charged shall be passed onto Lessee without any additional mark-up by the City. All references in this Lease to "Rent" include Base Rent and Additional Rent.

3.5 Place for Payment of Rent. All Rent that becomes due and payable under this Lease shall be paid to Lessor in person or by United States mail at the Cashier's Office located at 3300 Newport Boulevard, Newport Beach, California 92658, or electronically at www.newportbeachca.gov, or at any other place or places that Lessor may designate by written notice to Lessee.

3.6 Calculation of Base Rent for Leases Without Corresponding Sale.

(a) Through January 1, 2015, Lessor will allow current lessees within Beacon Bay to voluntarily terminate their prior lease (that had an effective date of July 1, 1994 and an expiration date of July 1, 2044) and enter into this Lease. No transfers from the prior lease to this Lease are allowed after January 1, 2015. If a current lessee terminates their prior lease and enters into this Lease prior to January 1, 2015 or if

Lessee purchases additional years pursuant to Section 2.2, there will not be a sale price to calculate Base Rent.

(b) The Base Rent shall be calculated at the rate of two and half percent (2.5%) of the appraised fair market value of the Property including any improvements or structures, but excluding any personal property. Lessor shall submit three (3) California licensed appraisers to Lessee; Lessee shall select one (1) appraiser from the three (3) submitted appraisers to appraise the Property. Lessee shall pay all costs associated with the appraiser and the appraisal. In no event shall the Base Rent be less than the dollar amount received by the Lessor under the former lease. The annual Base Rent shall be adjusted from time-to-time pursuant to Section 3.3.

3.7 Prohibition Against Transfer or Assignment. With the exception of the transfer and assignment provisions in Section 7 and Section 3.8, this Lease may not be transferred or assigned by Lessee. Any attempt to transfer or assign this Lease shall be an event of default subject to the remedies provided in Section 13.2. Any purported assignment or transfer in violation of this section shall be null and void.

3.8 Exempt Transfers or Assignments. Notwithstanding the prohibition against transfer and assignment provided in Section 3.7, the Lease may be transferred by Lessee if:

(a) the transfer is caused by the death of a spouse and the full interest of the deceased spouse is transferred to a surviving spouse;

(b) the transfer of an interest in this Lease is between or among tenants in common or joint tenants in ownership of the leasehold estate created by this Lease, and such tenants in common or joint tenants first acquired their respective interests in this Lease simultaneously;

(c) the transfer is caused by the dissolution of the marriage of Lessee and the full interest of one of the spouses is transferred to the other spouse;

(d) the transfer is to an inter vivos trust, living trust, or other similar estate planning arrangement of Lessee and the sole beneficiaries are the Lessee, the Lessee's spouse, or a tenant as contemplated in Section 3.8(b); or

(e) the transfer is to a LLC; provided at the time of transfer the Lessee is the majority share holder of the LLC. The LLC may not change its majority shareholder without the prior written consent of the City's City Manager or his/her designee. If approved, a change of the majority shareholder triggers a re-appraisal of the Property and an adjustment of Base Rent pursuant to the re-appraisal process in Section 3.6(b).

In the event of any transfer under this Section 3.8 the Lease term shall be for the remaining years existing on the Lease prior to the transfer (i.e., the term shall not be extended due to the transfer).

4. LESSOR'S TITLE

Lessor covenants, represents and warrants that Lessee, its guests and permitted successors and assigns shall peaceably and quietly have, hold and enjoy the sole and exclusive use and enjoyment of the Property, or any part thereof, for the full term of this Lease and as the same may be extended as provided herein. This covenant and warranty of quiet enjoyment shall only apply to Lessor and those claiming or acting by, through or under Lessor.

5. USE AND CONDITION OF PROPERTY

5.1 Use of Property. The Property shall be used solely for residential purposes consistent with the City's Zoning and Municipal Code. Lessee may demolish, construct, remodel, reconstruct and maintain structures on the Property for residential purposes so long as the structures and construction are authorized by appropriate City permits and fully comply with all City ordinances, resolutions, regulations, policies, and plans. Lessee shall also obtain permission to construct and/or maintain structures from the Beacon Bay Community Association, California Coastal Commission, and any other private or governmental agency if required by law. Nothing in this section shall be interpreted as a pre-approval of any permit or other approval required for the use of the Property.

5.2 Maintenance of Improvements. Lessor shall not be required to make any changes, alterations, additions, improvements, or repairs in on or about all or part of the Property. Lessee shall, at all times during the term of this Lease and without any cost or expense to Lessor, keep and maintain, the Property, including, without limitation, all structures, facilities, walks, curbs, parkways and other improvements, in good order and repair and in a clean, safe, sanitary and orderly condition. Lessee shall cause to be constructed, maintained and repaired all utilities, pipes, walls, sewers, drains, and other improvements on the Property to the extent required by law or as necessary to maintain the improvement in good order and repair and safe and sanitary condition.

5.3 Compliance with Laws. Lessee shall make, or cause to be made, any additions, alterations or repairs to any structure or improvement on the Property which may be required by, and Lessee shall otherwise observe and comply with, any law, statute, ordinance, plan, resolution or policy applicable to the Property. Lessee shall indemnify, defend and hold Lessor harmless from and against any loss, liability, action, claim or damage, arising out of, or in any way related, to Lessee's failure to comply with, and perform pursuant to provisions of this Lease. All repairs, additions, and alterations to the structures or improvements on the Property shall conform to all applicable laws, ordinances, regulations, plans, policies and resolutions and all work shall be performed with reasonable diligence, completed within a reasonable time, and performed at the sole cost and expense of Lessee.

5.4 As Is Condition of Property. Lessee expressly accepts the Property "as is" and acknowledges that Lessor has made no representations or warranties as to the suitability of the Property or any construction or improvement. Lessee shall conduct all

tests necessary to determine the suitability of the Property for any proposed construction or improvement, including, without limitation, the amount and extent of any fill, and related factors. Lessee expressly acknowledges that Lessor shall not be liable for any damage or loss resulting from any subsurface or soil condition in, on, or under the Property or adjacent property. Lessee expressly acknowledges that, while the legislature of the State of California has purportedly removed the public trust restrictions on use of the Property pursuant to the Beacon Bay Bill, the Property may constitute filled tidelands, and Lessor has made no representation or warranty relative to the validity of the Beacon Bay Bill or the power of the legislature of the State of California to remove public trust restrictions on tidelands through legislation. Notwithstanding the foregoing, in the event of any challenge to the right and power of Lessor to lease the Property for the purposes provided in this Lease, Lessor agrees, at its sole cost and expense, to use all reasonable efforts to resist and defend against such challenge and to seek a ruling or judgment affirming and upholding the right and power of Lessor to lease the Property for the purposes provided in this Lease.

5.5 Tidelands Grant. The Property may be located on land that is the subject of a Tidelands Grant from the State of California to the City. Lessee shall not take any action that would cause the City to be in violation of any provisions of that Tidelands Grant. If the Property is located upon tidelands and the State of California terminates, or modifies the Tidelands Grant to prohibit the uses contemplated under this Lease, this Lease shall terminate as a result and the Parties shall be released from all liabilities and obligations under this Lease and Lessor shall owe no compensation to Lessee.

6. TAXES AND UTILITIES

6.1 Lessee to Pay Taxes. In addition to the Base Rent required to be paid under this Lease, Lessee shall pay any and all real and personal property taxes, including possessory interest tax (California Revenue and Taxation Code § 107.6), assessments, and other charges of any description levied or assessed during the term of this Lease by any governmental agency or entity on or against the Property, any portion of or interest in the Property, or any improvements on the Property.

6.2 Proration of Taxes. In the event that this Lease commences, terminates or expires during a tax year, Lessee shall pay the taxes for the period of such year during which this Lease was in effect.

6.3 Payment Before Delinquency. Any and all taxes and assessments and installments of taxes and assessments required to be paid by Lessee under this Lease shall be paid when due and the official and original receipt for the payment of such tax, assessment, or installment shall be given to Lessor upon request.

6.4 Contest of Tax. Lessee shall have the right to contest, oppose, or object to the amount or validity of any tax, assessment, or other charge levied on or assessed against the Property or any part thereof; provided, however, that the contest, opposition or objection must be filed before the tax, assessment or other charge at which it is directed becomes delinquent and written notice of the contest, opposition or objection

must be given to Lessor at least twenty (20) days before the date the tax, assessment, or other charge becomes delinquent. Furthermore, no such contest, opposition or objection shall be continued or maintained after the date the tax, assessment, or other charge at which it is directed becomes delinquent unless Lessee has:

(a) Paid such tax, assessment, or other charge under protest prior to its becoming delinquent; or

(b) Obtained and maintained a stay of all proceedings for enforcement and collection of the tax, assessment, or other charge by posting such bond or other matter required by law for such a stay; or

(c) Delivered to Lessor a good and sufficient undertaking in an amount reasonably specified by Lessor and issued by a bonding corporation authorized to issue undertakings in California conditioned on the payment by Lessee of the tax, assessment or other charge together with any fines, interest, penalties, costs and expenses that may have accrued or been imposed thereon within thirty (30) days after final determination of Lessee's contest, opposition or objection to such tax, assessment or other charge.

6.5 Tax Returns and Statements. Lessee shall, as between Lessor and Lessee, have the duty of attending to, preparing, making, and filing any statement, return, report, or other instrument required or permitted by law in connection with the determination, equalization, reduction or payment of any taxes, assessments or other charges that are or may be levied on or assessed against the Property, any portion or interest in the Property, or any improvements on the Property.

6.6 Tax Hold-Harmless Clause. Lessee shall indemnify and hold Lessor and the property of Lessor, including the Property and any improvements now or hereafter located thereon, free and harmless from any liability, loss, or damage resulting from any taxes, assessments, or other charges required by this Lease to be paid by Lessee and from all interests, penalties, and other sums imposed thereon and from any sales or other proceedings to enforce collection of any such taxes, assessments, or other charges.

6.7 Utilities. Lessee shall contract in its own name and fully and promptly pay for all water, gas, heat, light, power, telephone service, and other public utilities of every kind furnished to the Property throughout the term hereof, and all other costs and expenses of every kind whatsoever of or in connection with the use, operation, and maintenance of the Property and all activities conducted thereon, and Lessor shall have no responsibility of any kind for any thereof. In the event that it is necessary for Lessor to provide any of the foregoing utilities to Lessee on a pass through basis, Lessee shall provide a separate meter for the Property and shall reimburse Lessor for Lessee's usage of such utility service within ten (10) days of Lessor's invoice to Lessee. Furthermore, Lessee shall be solely responsible for the cost and expense of any upgrade, modification or other utility installation which is required as a result of Lessee's use of the Property.

6.8 Payment by Lessor. Should Lessee fail to pay within the time specified in this Lease any taxes, assessments, or other charges required by this Lease to be paid by Lessee, Lessor may, upon ten (10) days prior written notice and demand to Lessee, pay, discharge or adjust such tax, assessment, or other charge for the benefit of Lessee. In such event, Lessee shall promptly on written demand of Lessor reimburse Lessor for the full amount paid by Lessor in paying, discharging or adjusting such tax, assessment or other charge, together with interest thereon at the rate of ten percent (10%) per annum from the date of payment by Lessor until the date of repayment by Lessee. Where no time within which any charge required by this Lease to be paid by Lessee is specified in this Lease, such charge must be paid by Lessee before it becomes delinquent.

7. ENCUMBERANCES

7.1 Right to Encumber. Lessee may encumber this Lease by deed of trust, mortgage, or similar instrument, in favor of any *bona fide* lender (“Lender” or “Mortgagee”) in a *bona fide* loan transaction for any purpose without the consent of Lessor. To determine whether a loan is a *bona fide* lending transaction, and not an arrangement for transfer of the possession or title to the Property to the putative lender, Lessee and the Lender agree to provide Lessor with all documentation executed between Lessee and the Lender concerning the loan upon request of Lessor. Neither Lessee nor Lessor shall have the power to encumber Lessor’s interest in the Property. Any encumbrance shall be subject to all covenants, conditions and restrictions in this Lease and to all rights and interests of Lessor except as otherwise expressly provided in this Lease. Lessee shall give Lessor prior written notice of any encumbrance.

7.2 Notice to Lender. Lessor shall have no obligation to give any Lender any written notice pursuant to this Lease unless the Lender has given Lessor written notice of its name, address, and nature of encumbrance (“Complying Lender(s)”). Lessor shall give all Complying Lenders a copy of any written notice of default, notice of termination or other notice which may affect Lessee’s rights under this Lease. Notice shall be deemed given by Lessor to Lender five (5) days following deposit in the United States mail, certified and return receipt requested, postage prepaid, and sent to Complying Lender at the address furnished in writing by Complying Lender. Failure by Complying Lender to actually receive notice shall not affect Lessor’s compliance with this section provided notice was deposited in the United States mail.

7.3 Modification. Lessor and Lessee agree that they will not modify, surrender or cancel this Lease by mutual agreement without providing prior written notice to the Lender.

7.4 Rights of Lender. Any Lender holding or the beneficiary of a security interest or lien on this Lease and the leasehold estate created hereby shall have the right, during the term of the Lease, to:

- (a) perform any act required of Lessee pursuant to this Lease;

(b) transfer this Lease to the purchaser at any foreclosure sale, the assignee in the event of an assignment in lieu of foreclosure, or to acquire the interest of Lessee pursuant to foreclosure or assignment and thereafter transfer this Lease to the Lender's successor. Lender shall have no right to transfer this Lease unless and until Lender has cured all defaults requiring the payment or expenditure of money by Lessee.

7.5 Right of Lender to Cure Default. Lessor shall give written notice of any default or breach of this Lease by Lessee to Complying Lenders and afford Complying Lenders the opportunity, after notice, to:

(a) cure the breach or default within ten (10) days after expiration of the time period granted to Lessee for curing the default if the default can be cured by payment of money;

(b) cure the breach or default within thirty (30) days after expiration of the time period granted to Lessee for curing the default when the breach or default can be cured within that period of time; or

(c) cure the breach or default in a reasonable time when something other than money is required to cure the breach or default and cannot be performed within thirty (30) days after expiration of the time period granted to Lessee for curing the default, provided the acts necessary to cure the breach are commenced within thirty (30) days and thereafter diligently pursued to completion by Complying Lender.

7.6 Foreclosure in Lieu of Cure. Complying Lender may forestall termination of this Lease for a default or breach by Lessee by commencing foreclosure proceedings subject to strict compliance with the following:

(a) proceedings are commenced within thirty (30) days after the later of (i) expiration of the time period granted to Lessee for curing the default, or (ii) service on Complying Lender of the notice describing the breach or default;

(b) the proceedings are diligently pursued to completion in the manner authorized by law; and

(c) Complying Lender performs all of the terms, covenants and conditions of this Lease requiring the payment or expenditure of money by Lessee until the proceedings are complete or are discharged by redemption, satisfaction, payment or conveyance of this Lease to Complying Lender.

7.7 New Lease. Notwithstanding any other provision of this Lease, should this Lease terminate or be terminated because of any default or breach by Lessee, Lessor shall enter into a new lease with Lender as lessee provided:

(a) the written request for the new lease is served on Lessor by Lender within thirty (30) days after the termination of this Lease.

(b) the new lease contains the same terms and conditions as this Lease except for those which have already been fulfilled or are no longer applicable.

(c) on execution of the new lease by Lessor, Lender shall pay any and all sums that would be due upon execution of the new lease, but for its termination, and shall fully remedy, or agree in writing to remedy, any other default or breach committed by Lessee that can reasonably be remedied by Lender.

(d) Lender shall, upon execution of the new lease, pay all reasonable costs and expenses (including attorney's fees) incurred in terminating this Lease, recovering possession of the Property from Lessee, in preparing the new lease.

(e) The new lease with Lender shall be for the remainder of the term existing in the prior Lease (*i.e.*, if twenty-five (25) years remain on the Lease at the time of termination/breach the new lease shall be for a term of twenty-five (25) years).

7.8 Miscellaneous. The following provisions shall apply to Lessee and any Lender:

(a) Any Lender shall be liable to perform the obligations of the Lessee under this Lease only so long as the Lender holds title to this Lease; and

(b) Lessee shall, within ten (10) days after the recordation of any trust deed or other security instrument, record, at Lessee's sole expense, Lessor's written request for a copy of any notice of default and/or notice of sale under any deed of trust as provided by state law.

8. RESTORATION AND ENVIRONMENTAL MATTERS

8.1 Restoration of the Property. Should any improvements on the Property be damaged or destroyed by fire or other casualty or any cause whatsoever, Lessee, will cause the commencement of reconstruction to the damaged or destroyed improvements within ninety (90) days, or such other time period as may be mutually agreed upon by the Parties, after such damage and destruction and will thereafter cause such reconstruction to be diligently prosecuted to completion.

8.2 Environmental Matters

(a) Definitions. The following terms will be defined as follows:

(i) Environmental Law. "Environmental Law" shall include all federal, state, and local environmental, health, and safety laws, statutes, ordinances, regulations, rules, judgments, orders, and notice requirements, which were in effect as of the date of closing, which regulate or relate to (a) the protection or clean-up of the

environment; (b) the use, treatment, storage, transportation, handling or disposal of hazardous, toxic or otherwise dangerous substances, wastes or materials; (c) the quality of the air and the discharge of airborne wastes, gases, particles, or other emissions; (d) the preservation or protection of waterways, groundwater, or drinking water; (e) the health and safety of persons or property; or (6) impose liability with respect to any of the foregoing, including without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) [42 USCS §§ 9601 et seq.]; the Resource Conservation and Recovery Act of 1976 (RCRA) [42 USCS §§ 6901 et seq.]; the Clean Water Act, also known as the Federal Water Pollution Control Act (FWPCA) [33 USCS §§ 1251 et seq.]; the Toxic Substances Control Act (TSCA) [15 USCS §§ 2601 et seq.]; the Hazardous Materials Transportation Act (HMTA) [49 USCS §§ 1801 et seq.]; the Insecticide, Fungicide, Rodenticide Act [7 USCS §§ 136 et seq.]; the Superfund Amendments and Reauthorization Act [42 USCS §§ 6901 et seq.]; the Clean Air Act [42 USCS §§ 7401 et seq.]; the Safe Drinking Water Act [42 USCS §§ 300f et seq.]; the Solid Waste Disposal Act [42 USCS §§ 6901 et seq.]; the Surface Mining Control and Reclamation Act [30 USCS §§ 1201 et seq.]; the Emergency Planning and Community Right to Know Act [42 USCS §§ 11001 et seq.]; the Occupational Safety and Health Act [29 USCS §§ 655 and 657]; the California Underground Storage of Hazardous Substances Act [H & S C §§ 25280 et seq.]; the California Hazardous Substances Account Act [H & S C §§ 25300 et seq.]; the California Hazardous Waste Control Act [H & S C §§ 25100 et seq.]; the California Safe Drinking Water and Toxic Enforcement Act [H & S C §§ 24249.5 et seq.]; the Porter-Cologne Water Quality Act [Water C §§ 13000 et seq.] together with any amendments of or regulations promulgated under the statutes cited above.

(ii) Hazardous Materials. “Hazardous Materials” shall include any substance which falls within the definition of hazardous substance, hazardous waste, hazardous material, toxic substance, solid waste, or pollutant or contaminant, under any Environmental Law.

(b) Lessee’s Obligations. Lessee will not use, occupy, or permit any portion of the Property to be used or occupied in violation of any Environmental Law or to store any Hazardous Material.

(c) Environmental Indemnity. Lessee shall indemnify, defend, and hold Lessor and Lessor’s, City Council, officers, appointees, volunteers, employees, agents, successors and assigns free and harmless from and against all Damages (as defined below) that may at any time be imposed upon, incurred by, or asserted or awarded against Lessor or any of them in connection with or arising from any breach of Lessee’s obligations hereunder or out of any violation by Lessee of any Environmental Law; or resulting in the imposition of any lien or claim for the recovery of any costs for environmental cleanup or other response costs relating to the release or threatened release of Hazardous Materials due to the construction of any improvements on the Property or the use or misuse of the Property by the Lessee. The term “Damages” shall mean all liabilities, demands, claims, actions or causes of action, regulatory, legislative or judicial proceedings, assessments, levies, losses, fines, penalties, damages, costs and expenses, in each case as awarded by a court or arbitrator, including, without

limitation: (i) reasonable attorneys', accountants', investigators', and experts' fees and expenses sustained or incurred in connection with the defense or investigation of any such liability, and (ii) costs and expenses incurred to bring the Property into compliance with Environmental Laws. The term "Damages" also includes, expressly, those Damages that arise as a result of strict liability, whether arising under Environmental Laws and regulations or otherwise. Lessee's obligations hereunder will survive the expiration or sooner termination of this Lease.

9. INDEMNITY

9.1 Indemnity Agreement. In addition to the Environmental Indemnity provided above, except to the extent caused by the sole negligence and/or willful misconduct of the Lessor, Lessee shall defend, indemnify and hold Lessor and Lessor's City Council, officers, appointees, volunteers, employees, agents, successors and assigns free and harmless from any and all liability, claims, loss, damages, or expenses resulting from Lessee's occupation and use of the Property, specifically including, without limitation, any liability, claim, loss, damage, or expense arising by reason of:

(a) The death or injury of any person, including any person who is a guest or invitee of Lessee, or by reason of the damage to or destruction of any property, including property owned by Lessee or by any person who is a guest or invitee of Lessee, from any cause whatever while such person or property is in or on the Property or in any way connected with the Property or with any of the improvements or personal property on the Property;

(b) The death or injury of any person, including any person who is a guest or invitee of Lessee, or by reason of the damage to or destruction of any property, including property owned by Lessee or any person who is a guest or invitee of Lessee, caused or allegedly caused by either (i) the condition of the Property, or improvements on the Property, or (ii) some act or omission on the Property by Lessee or any person in, on, or about the Property with or without the permission and consent of Lessee;

(c) Any work performed on the Property or material furnished to the Property at the request of Lessee or any person or entity acting for or on behalf of Lessee; or

(d) Lessee's failure to comply with any material legal or other requirement validly imposed on Lessee or the Property by a governmental agency or authority having jurisdiction over the Property.

10. CONDEMNATION

10.1 Definitions of Terms.

(a) The term "total taking" as used in this Lease shall mean the taking of the entire Property under the power of eminent domain or the taking of so much of the Property as to prevent or substantially impair the use thereof by Lessee for residential purposes.

(b) The term “partial taking” shall mean the taking of only a portion of the Property which does not constitute a total taking as defined above.

(c) The term “taking” shall include a voluntary conveyance by Lessor to an agency, authority or public utility under threat of a taking under the power of eminent domain in lieu of formal proceedings.

(d) The term “date of taking” shall be the date upon which title to the Property or portion thereof passes to and vests in the condemner.

10.2 Effect of Taking. If, during the term hereof, there shall be a total taking or partial taking under the power of eminent domain, then the leasehold estate of the Lessee in and to the Property or the portion thereof taken shall cease and terminate as of the date of taking of said Property. If this Lease is so terminated in whole or in part, all Rent and other charges payable by Lessee to Lessor hereunder and attributable to the Property or portion thereof taken shall be paid by Lessee up to the date of taking by the condemner, and the Parties shall thereupon be released from all further liability in relation thereto.

10.3 Allocation of Award for Total Taking. All compensation and damages awarded for the total taking of the Property and Lessee’s leasehold interest therein shall be allocated as follows:

(a) The Lessor shall be entitled to an amount equal to the sum of the following:

(i) The fair market value of the Property as improved (exclusive of the dwelling and appurtenances to such dwelling) as of the date of taking, discounted by multiplying such fair market value by the factor for the present worth of one dollar (\$1.00) at five percent (5%) per annum compound interest for the number of years remaining from the date of taking to the date of the expiration of the term of this Lease; and

(ii) The present worth of Rent due during the period from the date of taking to the date of the expiration of the term of this Lease, computed by multiplying the annual rent then payable by the factor for the present worth of one dollar (\$1.00) per annum at five percent (5%) per annum compound interest (Inwood Coefficient) for the number of years in such period.

(b) The Lessee and the Mortgagee, if any shall be entitled to the amount remaining of the total award after deducting therefrom the sums to be paid to Lessor as hereinafter provided. Lessee and Mortgagee may decide between themselves how an award will be divided between them. In the event of any dispute between the Lessee and Mortgagee as to the division of an award the City may satisfy its responsibilities under this Lease by transferring any money due under this section to

Lessee. Lessee shall indemnify City from any and all claims or actions brought by Mortgagee or any other party for any award under this section.

10.4 Allocation of Award for Partial Taking. All compensation and damages awarded for the taking of a portion of the Property shall be allocated and divided as follows:

(a) The Lessor shall be entitled to an amount equal to the sum of the following:

(i) The proportionate reduction of the fair market value of the Property as improved (exclusive of the dwelling and appurtenances to such dwelling) as of the date of taking, discounted by multiplying such proportionate reduction in fair market value by the factor for the present worth of one dollar (\$1.00) at five percent (5%) per annum compound interest for the number of years remaining from the date of taking to the date of expiration of the term of this Lease; and

(ii) The present worth of the amount by which the Rent is reduced computed by multiplying the amount by which the annual Rent is reduced by the factor for the present worth of one dollar (\$1.00) per annum at five percent (5%) per annum compound interest (Inwood Coefficient) for the number of years remaining from the date of taking to the date of expiration of the term of this Lease.

(b) The Lessee and the Mortgagee, if any shall be entitled to the amount remaining of the total award after deducting therefrom the sums to be paid to Lessor as hereinabove provided. Lessee and Mortgagee may decide between themselves how an award will be divided between them. In the event of any dispute between the Lessee and Mortgagee as to the division of an award the City may satisfy its responsibilities under this Lease by transferring any money due under this section to Lessee. Lessee shall indemnify City from any and all claims or actions brought by Mortgagee or any other party for any award under this section.

10.5 Reduction of Rent on Partial Taking. In the event of a partial taking, the Rent payable by Lessee hereunder shall be adjusted from the date of taking to the date of the expiration of the term of this Lease. Such rental adjustment will be made by reducing the Base Rent payable by Lessee in the ratio that the Fair Market Rental Value of the Property at the date of taking bears to the Fair Market Rental Value of the Property immediately thereafter.

11. BEACON BAY COMMUNITY ASSOCIATION

11.1 Membership in Association. As a material part of the consideration of this Lease, and as an express condition to the continuance of any of the rights of Lessee pursuant to this Lease, Lessee agrees to become, and during the term of this Lease to remain, a member in good standing of the Beacon Bay Community Association ("Association").

11.2 Compliance with Rules and Regulations. Lessee agrees to abide by the articles of incorporation, bylaws, covenants, conditions and restrictions and any amendment thereto ("CC&Rs") attached hereto as Exhibit "D" and incorporated herein by reference, and all rules and regulations of the Association, and to pay to the Association, before delinquency, all valid dues, fees, assessments and other charges properly levied or assessed by the Association. Lessee's failure to comply with the provisions of Section 11.1 or 11.2 shall constitute a material breach of this Lease.

11.3 Use of Common Area. Lessee shall have the right to use the streets, beaches, walkways, tennis courts, docks, piers, and common landscaped areas in Beacon Bay (as depicted on Exhibit "A") and which are leased to the Association by Lessor in consideration of the maintenance thereof by such Association and Rent to be paid by individual Lessees under their respective leases.

11.4 Maintenance of Infrastructure. Lessor has no obligation to install, improve, repair, or maintain streets, curbs, gutters, water lines, sewer lines, drainage facilities, street lighting or other facilities used by the residents of Beacon Bay (Infrastructure). Lessor reserves the right to maintain streets, curbs, gutters, water lines, sewer lines, drainage facilities, street lighting, telephone and electricity lines and other Infrastructure facilities in Beacon Bay at its initial cost and to assess Lessee for a pro rata share of such costs, and to collect such costs from Lessee in the form of Rent over the remaining term of this Lease. Subject to a public health, safety, and welfare finding, Lessor reserves the right to commence improvements to the streets, curbs, gutters, water lines, sewer lines, drainage facilities, street lighting, telephone and electricity lines and other Infrastructure facilities in Beacon Bay. If Lessor constructs any improvements Lessor has the right to assess Lessee for a pro rata share of such costs, and to collect such costs from Lessee in the form of Rent over the remaining term of this Lease.

11.5 Lessor Maintenance of Common Areas. If the Association, after receiving prior written notice from Lessor, fails or ceases to maintain community facilities, Lessor may, at its option and without obligation, assume the obligations of the Association to maintain, repair, install or improve community facilities. In such event, Lessee shall pay a pro rata share of Lessor's reasonable expenses in maintaining and operating the community facilities, including a reasonable management fee or the fee charged by a management agent. Lessee's pro rata share shall be determined by dividing Lessor's costs by the number of residential lots within Beacon Bay (currently seventy-two (72) lots). Lessee's pro rata share of the annual costs incurred by Lessor shall be paid within thirty (30) days after written notice of the amount due, and any failure to pay shall constitute a material breach of this Lease. The costs of maintaining and operating community facilities shall be determined annually and solely from the financial records of Lessor.

12. INSURANCE

12.1 General Conditions. All insurance required to be carried pursuant to this Lease shall be obtained from reputable carriers licensed to conduct business in the

State of California. Each policy required to be carried pursuant to this Lease shall name Lessee and Lessor as additional named insureds, and shall provide that the policy may not be surrendered, cancelled or terminated, or coverage reduced, without less than twenty (20) days prior written notice to Lessor.

12.2 Fire Insurance. Lessee shall, during the term of this Lease, insure all structures and improvements on the Property against loss or damage by fire or other risk for residential structures. The insurance shall provide coverage to one hundred percent (100%) of the full insurable replacement value of all improvements on the Property, with the loss payable to Lessee and Lessor unless this Lease is terminated by Lessor for default of Lessee in which case the proceeds of insurance shall be paid to Lessor.

12.3 Liability Insurance. Lessee shall, at Lessee's sole cost and expense, procure and maintain during the term of this Lease, a broad form comprehensive coverage policy of public liability insurance which insures Lessee and Lessor against any loss or liability caused by, or in any way related to, the condition, for Lessee's use and occupation, of the Property in amounts not less than:

- (a) \$1,000,000 per occurrence for injury to or death of, one (1) person;
- (b) \$1,000,000 for damage to or destruction of property.

These dollar amounts may be adjusted by Lessor with no less than ninety (90) days prior written notice to Lessee.

12.4 Primary Insurance Coverage. Lessee's insurance coverage shall be primary insurance and/or primary source of recovery as respects to City, its elected or appointed officers, agents, officials, employees and volunteers as respects to all claims, losses, or liability arising directly or indirectly from the Lessee's use and occupation of Property. Any insurance or self-insurance maintained by City, its officers, officials, employees and volunteers shall be excess of the Lessee's insurance and shall not contribute with it.

13. DEFAULT

13.1 Events of Default. The occurrence of any one (1) or more of the following events shall constitute a material default and breach of this Lease by Lessee:

(a) The maintenance of the Property in violation of any applicable provisions of the City's Municipal Code and Zoning Code, State Law, Federal Law, and/or the Association's CC&Rs;

(b) The failure by Lessee to make any payment of Rent when due if the failure continues for three (3) days after written notice has been given to Lessee. In the event that Lessor serves Lessee with a Notice to Pay Rent or Quit pursuant to

applicable unlawful detainer statutes, such Notice to Pay Rent or Quit shall also constitute the notice required by this paragraph;

(c) The failure by Lessee to perform any of the provisions of this Lease and any Exhibits attached hereto to be performed by Lessee, if the failure to perform continues for a period of thirty (30) days after written notice thereof has been given to Lessee. If the nature of Lessee's default is such that more than thirty (30) days are reasonably required for its cure, then Lessee shall not be in default if Lessee commences the cure within said thirty (30) day period and thereafter diligently prosecutes the cure to completion; or

(d) The making by Lessee of any general assignment, or general arrangement for the benefit of creditors; the filing by or against Lessee of a petition to have Lessee adjudged a bankrupt or a petition for reorganization or arrangement of any law relating to bankruptcy unless the same is dismissed within sixty (60) days; the appointment of a trustee or receiver to take possession of substantially all of Lessee's assets located at the Property or of Lessee's interest in the Lease, where possession is not restored to Lessee within thirty (30) days; or the attachment, execution or other judicial seizure of substantially all of Lessee's assets located at the Property or of Lessee's interest in the Lease, where such seizure is not discharged within thirty (30) days. Notices given under this paragraph shall specify the alleged default and the applicable Lease provisions, and shall demand that Lessee perform the provisions of this Lease or pay the rent that is in arrears, as the case may be, within the applicable period of time. No such notice shall be deemed a forfeiture or a termination of this Lease unless Lessor so elects in the notice.

13.2 Lessor's Remedies. In the event of any default by Lessee as defined in this Lease, Lessor may, in addition to any rights or remedies permitted by law, do the following:

(a) Terminate Lessee's right to possession of the Property by any lawful means, in which case this Lease shall terminate and Lessee shall immediately surrender possession of the Property to Lessor. In such event, Lessor shall be entitled to recover from Lessee all amounts to which Lessor is entitled pursuant to Section 1951.2 of the California Civil Code, or any other provision of law, including, without limitation, the following:

(i) The worth at the time of award of the amount by which the unpaid Rent for the balance of the term after the time of award exceeds the amount of the loss that Lessee proves could be reasonably avoided: and

(ii) Any other amount necessary to compensate Lessor for all detriment proximately caused by Lessee's failure to perform obligations pursuant to this Lease or which in the ordinary course of things would be likely to result from the breach, including, without limitation, the cost of recovering possession, expenses of reletting (including necessary repair, renovation and alteration, and any other reasonable costs.

The “worth at the time of award” of all rental amounts other than that referred to in clause (i) above shall be computed by allowing interest at the rate of five percent (5%) per annum from the date amounts accrue to Lessor. The worth at the time of award of the amount referred to in clause (i) shall be computed by discounting such amount at one (1) percentage point above the discount rate of the Federal Reserve Bank of San Francisco at the time of award.

(b) Without terminating or affecting the forfeiture of this Lease or, in the absence of express written notice of Lessor’s election to do so, relieving Lessee of any obligation pursuant to this Lease, Lessor may, but need not, relet all or a portion of the Property at any time, or from time-to-time, and on such terms and conditions as Lessor, at its sole discretion, deems appropriate. Whether or not the Property is relet, Lessee shall pay all amounts required by this Lease up to the date that Lessor terminates Lessee’s right to possession of the Property. Lessee shall make such payments at the time specified in the Lease and Lessor need not wait until termination of the Lease to recover sums due by legal action. If Lessor relets all or a portion of the Property, the reletting shall not relieve Lessee of any obligation pursuant to this Lease; provided, however, Lessor shall apply the Rent or other proceeds actually collected by virtue of the reletting against amounts due from Lessee. Lessor may execute any agreement reletting all or a portion of the Property and Lessee shall have no right to collect any proceeds due Lessor by virtue of any reletting. Lessor shall not, by any reentry or reletting or other act, be deemed to:

- (i) Have accepted any surrender by Lessee of this Lease or the Property;
- (ii) Have terminated this Lease; or
- (iii) Have relieved Lessee of any obligation pursuant to this Lease unless Lessor has given Lessee express written notice of Lessor’s election to do so.

(c) Lessor may terminate this Lease by express written notice to Lessee of its election to do so. The termination shall not relieve Lessee of any obligation which has accrued prior to the date of termination. In the event of termination, Lessor shall be entitled to recover the amounts specified in this Lease.

13.3 Default By Lessor. Lessor shall not be in default under this Lease unless Lessor fails to perform obligations required of Lessor within a reasonable time, but in no event later than thirty (30) days after written notice by Lessee to Lessor specifying wherein Lessor has failed to perform such obligation. If the nature of Lessor’s obligation is such that more than thirty (30) days are required for performance, then Lessor shall not be in default if Lessor commences performance within such thirty (30) day period and thereafter diligently prosecutes the same to completion. Alternatively, Lessor may in its sole and absolute discretion decide not to cure a default and instead elect to terminate this Lease. In the event of termination under this section Lessor shall owe no compensation to Lessee.

(a) No Damages. The parties acknowledge that Lessor would not have entered into this Lease if it were to be liable in damages under, or with respect to, this Lease or any of the matters referred to in this Lease. Accordingly, Lessee covenants on behalf of itself and its successors and assigns, not to sue Lessor (either in its capacity as lessor in this Lease or in its capacity as the City of Newport Beach) for damages or monetary relief for any breach of this Lease by Lessor or arising out of or connected with any dispute, controversy, or issue between Lessor and Lessee regarding this Lease or any of the matters referred to in this Lease or any future amendments or enactments thereto, or any land use permits or approvals sought in connection with the Property, the parties agreeing that declaratory and injunctive relief, mandate, and specific performance shall be Lessee's sole and exclusive judicial remedies.

13.4 Stay of Obligations. Neither Party shall be under any obligation to perform or comply with its obligations pursuant to this Lease after the date of any default by the other Party.

13.5 Determination of Rental Value. In any action or unlawful detainer commenced by Lessor, the reasonable rental value of the Property shall be deemed to be the amount of Rent and/or additional monies due (such as reimbursement for costs of Infrastructure improvements or the payment of taxes or assessments) for the period of the unlawful detainer, unless Lessee shall prove to the contrary by competent evidence.

13.6 Waiver of Rights. The failure or delay of either Party to exercise any right or remedy shall not be construed as a waiver of such right or remedy or any default by the other Party. Lessor's acceptance of any Rent shall not be considered a waiver of any preexisting breach of default by Lessee other than the failure to pay the particular Rent accepted regardless of Lessor's knowledge of the preexisting breach of default at the time Rent is accepted.

13.7 Waiver of Right of Redemption. Lessee waives any right of redemption or relief from forfeiture pursuant to California Code of Civil Procedure Sections 1174 and 1179 and/or pursuant to any existing or future statutory or decisional law in the event Lessee is evicted or Lessor takes possession of the Property by reason of Lessee's default.

14. SURRENDER OF POSSESSION UPON EXPIRATION OR TERMINATION

14.1 Surrender of Property. Upon the expiration or termination of this Lease. Lessee agrees to peaceably deliver possession of, and agrees to vacate without contest, legal or otherwise, the Property. Lessor, at its sole discretion, may record a document evidencing the expiration or termination of the leasehold interest. Lessee waives any right to receive relocation assistance or similar form of payment from Lessor.

14.2 Removal of Improvements. Upon the expiration of the term of this Lease, and on condition that Lessee is not then in default of any of the provisions of this Lease, Lessee shall have the right to remove from the Property all buildings and improvements built or installed on the Property. Removal of any building or improvement shall be at the sole cost and expense of Lessee and removal must be complete no later than ninety (90) days after expiration of the term of this Lease. Lessee shall fill all excavations and remove all foundations, debris and other parts of the buildings or improvements remaining after removal and surrender possession of the Property to Lessor in a clean and orderly condition. In the event any of the buildings and improvements are not removed within the time provided in this paragraph they shall become the property of Lessor without the payment of any consideration to Lessee.

15. NO ATTORNEYS' FEES

Should either Party be required to employ counsel to enforce the terms, conditions and covenants of this Lease, the prevailing Party shall not be entitled to attorneys' fees.

16. REMEDIES CUMULATIVE

The rights, powers, elections and remedies of the Lessor or Lessee contained in this Lease shall be construed as cumulative and no one (1) of them shall be considered exclusive of the other or exclusive of any rights or remedies allowed by law, and the exercise of one (1) or more rights, powers, elections or remedies shall not impair or be deemed a waiver of Lessor's or Lessee's rights to exercise any other.

17. NO WAIVER

No delay or omission of either Party to exercise any right or power arising from any omission, neglect or default of the other Party shall impair any such right or power or shall be construed as a waiver of any such omission, neglect or default on the part of the other Party or any acquiescence therein. No waiver of any breach of any of the terms, covenants, agreements, restrictions or conditions of this Lease shall be construed as a waiver of any succeeding breach of the same or of any of the terms, covenants, agreements, restrictions or conditions of this Lease.

18. COMPLIANCE WITH LAWS

Lessee covenants and agrees to comply with all rules, regulations, statutes, ordinances and laws of the State of California. County of Orange, City of Newport Beach, or any other governmental body or agency having lawful jurisdiction over the Property.

19. NOTICES

Any notice or notices provided for by this Lease or by law, to be given or served by Lessee, may be given or served by mail, registered or certified, with postage prepaid, on the City of Newport Beach, addressed to the City Manager and City Clerk, 3300 Newport Boulevard, P.O. Box 1768. Newport Beach. California 92659-1768. or at such

other address as may be hereafter furnished to Lessee in writing. If notice is intended to be served by Lessor on Lessee, it may be served either

(a) By delivering a copy to the Lessee personally; or

(b) By depositing the notice in the United States Mail, registered or certified, with postage prepaid, to the Property or business address furnished by Lessee; or

(c) If the Lessee is absent from the Property by leaving a copy with some person of suitable age and discretion who may be occupying the Property; or

(d) If no one can be found, then by affixing a copy of the notice in a conspicuous place on the Property and also sending a copy through the mail addressed to the Lessee at the Property. Such service upon Lessor or Lessee shall be deemed complete upon the earlier of (i) actual delivery, or (ii) the expiration of seventy-two (72) hours from and after the deposit in the United States mail of such notice, demand or communication.

20. SEVERABILITY

If any term or provision of this Lease shall, to any extent be invalid or unenforceable, the remainder of this Lease shall not be affected thereby, and each term and provision of this Lease shall remain valid and enforceable to the fullest extent permitted by law.

21. MISCELLANEOUS

21.1 Representations. Lessee agrees that no representations as to the Property have been made by Lessor or by any person or agent acting for Lessor. Lessor and Lessee agrees and acknowledges that this document contains the entire agreement of the Parties, that there are no verbal agreements, representations, warranties or other understandings affecting this Lease, and Lessor and Lessee, as a material part of the consideration of this Lease, waives all claims against the other for rescission, damages, or otherwise by reason of any alleged covenant, agreement or understanding not contained in this Lease.

21.2 Inurement. Each and all of the covenants, conditions and agreements herein contained shall, in accordance with the context, inure to the benefit of Lessor and Lessee and apply to and bind Lessor and Lessee, as the case may be, their respective heirs, legatees, devisees, executors and administrators, successors, assigns, licensees, permittees, or any person who may come into possession or occupancy of the Property or any part thereof in any manner whatsoever.

21.3 Joint Several Liability. If Lessee consists of more than one (1) person, the covenants, obligations and liabilities of Lessee pursuant to this Lease shall be the joint and several covenants, obligations and liabilities of such persons.

21.4 Captions. The section and paragraph captions used in this Lease are for the convenience of the Parties and shall not be considered in the construction or interpretation of any provision.

21.5 Gender. In this Lease, the masculine gender includes the feminine and neuter and the singular number includes the plural whenever the context so requires.

21.6 Governing Law and Venue. This Lease, and all matters relating to this Lease, shall be governed by the laws of the State of California in force at the time any need for interpretation of this Lease or any decision or holding concerning this Lease arises. Venue for any legal action between the parties shall be in Orange County, California or, if appropriate, the nearest federal district court having jurisdiction over the Property.

21.7 Time of Essence. Time is expressly declared to be of the essence in this Lease.

21.8 Memorandum of Lease. Pursuant to California Government Code Section 37393 the Parties shall execute, acknowledge and Lessor may record at any time following the date hereof, a memorandum of this Lease, in the same form as that attached hereto as Exhibit "E" and incorporated herein by reference.

[SIGNATURES ON NEXT PAGE]

IN WITNESS WHEREOF, the Parties have caused this Lease to be executed on the dates written below.

**APPROVED AS TO FORM:
OFFICE OF THE CITY ATTORNEY**
Date:_____

CITY OF NEWPORT BEACH,
A California municipal corporation
Date:_____

By:_____
Aaron Harp
City Attorney

By:_____
David Kiff
City Manager

ATTEST:
Date:_____

LESSEE
Date:_____

By:_____
Leilani I. Brown
City Clerk

By:_____

Date:_____

By:_____

- Attachments: Exhibit "A" – Depiction of Beacon Bay
 Exhibit "B" – Legal Description of Property
 Exhibit "C" – Option Fee Percentages
 Exhibit "D" – CC&Rs
 Exhibit "E" – Memorandum of Lease

[END OF SIGNATURES]

EXHIBIT "A"

DEPICTION OF BEACON BAY

See Attached

EXHIBIT "B"

LEGAL DESCRIPTION OF THE PROPERTY

That certain real property located in the City of Newport Beach, County of Orange, California, described as follows:

EXHIBIT "C"

OPTION FEE PERCENTAGES

LENGTH OF EXTENSION (YEARS)	% OF FAIR MARKET VALUE OF PROPERTY PER YEAR OF EXTENSION
1 - 5	0.10%
6 - 10	0.15%
11 - 50	0.25%

EXHIBIT "D"

CC&Rs

See Attached

EXHIBIT "E"

Recording Requested By
and When Recorded Return To:

City of Newport Beach
3300 Newport Beach Blvd.
P.O. Box 1768
Newport Beach, California 92658-8915
Attn: City Clerk

(Exempt From Recording Fees Pursuant to Government Code § 27383)

(SPACE ABOVE THIS LINE FOR RECORDER'S USE)

MEMORANDUM OF LEASE

THIS LEASE is made and entered into between the City of Newport Beach, a California municipal corporation and charter city ("Lessor") and _____, a _____ ("Lessee").

Lessor hereby leases to Lessee that real property located in the City of Newport Beach, County of Orange, California, described in Exhibit "1" attached hereto ("Property"). The term of the Lease is ____ (__) years, commencing _____, and ending _____.

This Lease is subject to the terms, conditions and provisions of an unrecorded lease between the parties dated _____, which is incorporated herein by reference. Unless extended by a recorded amendment or supplement hereto, this Memorandum of Lease will automatically terminate as of _____, 20__.

APPROVED AS TO FORM:
OFFICE OF THE CITY ATTORNEY
Date: _____

CITY OF NEWPORT BEACH,
A California municipal corporation
Date: _____

By: _____
Aaron Harp
City Attorney

By: _____
David Kiff
City Manager

ATTEST:
Date: _____

LESSEE
Date: _____

By: _____
Leilani I. Brown
City Clerk

By: _____

Date: _____

By: _____

EXHIBIT "1"

LEGAL DESCRIPTION OF THE PROPERTY

That certain real property located in the City of Newport Beach, County of Orange, California, described as follows:

