

RESOLUTION NO. 2019-105

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MARINA
APPROVAL OF A CONCESSION AGREEMENT BETWEEN THE CITY OF
MARINA AND WATER CITY ROLLER HOCKEY, INC.; AND AUTHORIZE
THE MAYOR TO EXECUTE AGREEMENT ON BEHALF OF THE CITY
SUBJECT TO FINAL REVIEW AND APPROVAL BY THE CITY ATTORNEY

WHEREAS, the City of Marina has had a long-standing concession agreement with Water City Roller Hockey, Inc.; and,

WHEREAS, events have occurred which caused Water City Roller Hockey, Inc. to not fully pay its rent; and,

WHEREAS, it is in the best interest of the City of Marina and Water City Roller Hockey, Inc. to develop a method to continue operations and pay the rents due the City; and,

WHEREAS, Water City Roller Hockey, Inc.'s ability to pay past due rents is based upon its continued operations;

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Marina directs the Mayor to sign a new Concessionaire Agreement with Water City Roller Hockey, Inc.

PASSED AND ADOPTED by the City Council of the City of Marina at a regular meeting duly held on the 1st day of October 2019 by the following vote:

AYES, COUNCIL MEMBERS: Berkley, Urrutia, O'Connell, Morton, Delgado

NOES, COUNCIL MEMBERS: None

ABSENT, COUNCIL MEMBERS: None

ABSTAIN, COUNCIL MEMBERS: None

Bruce C. Delgado, Mayor

ATTEST:

Anita Sharp, Deputy City Clerk

EXHIBIT A

CONCESSION AGREEMENT

BETWEEN

THE CITY OF MARINA

AND

WATER CITY ROLLER HOCKEY, INC.

CONCESSION AGREEMENT

THIS CONCESSION AGREEMENT, made and entered into this ____ day of _____ 2019 , by and between the CITY OF MARINA, a California municipal corporation (the City"), and WATER CITY ROLLER HOCKEY, INC. (the Concessionaire), a corporation of the State of Delaware, currently registered to do business within California by the California Secretary of State, as follows:

Recitals:

This Agreement is entered into with reference to the following facts and circumstances, which are hereby found and determined by the parties:

1. The City has a recreational facility located on the former Fort Ord Military Reservation and within the City.
2. Concessionaire has previously occupied and utilized the facility under the terms of interim agreements from the U.S. Army and the City.
3. Concessionaire desires to continue to occupy and utilize this facility, Building T-2248, which was formerly utilized by the U.S. Army as a gymnasium and sports arena, for use as a site for Concessionaire's recreational skating business.
4. It is mutually agreed that this Agreement is upon and subject to the following terms, covenants, conditions and provisions and Concessionaire covenants, as a material part of the consideration of this Agreement, to keep, perform and comply with each and all of said terms, covenants, conditions and provisions to be kept, performed and complied with, and this Agreement is made upon the condition of such performance and compliance.

Conditions Precedent

The following approvals and actions are conditions precedent which must take place prior to this Agreement becoming effective:

1. Approval of the terms and conditions of this Agreement by the City Council.

Terms and Conditions

1. Purpose. The purpose of this Agreement is that the property utilized hereunder will be used and maintained for the public purposes for which it was conveyed in perpetuity to the City. As such, the public use of and ingress and egress across all the premises and also to building and facilities thereon subject to reasonable restrictions and conditions will be authorized by Concessionaire.

2. Premises . City hereby delivers to Concessionaire, and Concessionaire hereby accepts from the City this Agreement for exclusive possession and use of the premises and facilities, described as Building T-2248 comprising approximately 29,570 square feet of interior space, located on Second Avenue, Marina, Monterey County, California, as identified and shown on "Exhibit A", which is attached hereto and made a part hereof. Concessionaire will be entitled to full and exclusive possession of the Premises.

Parking for automobiles contiguous and appurtenant to Building as indicated and shown on "Exhibit A".

The foregoing rights will terminate simultaneously on expiration or sooner termination of this Agreement.

3. Reservation & Easements.

a) Public Utility Easements. The property is subject to the fire lane and public utility easements as set forth in the Area Master Plan as of the date of this Agreement and as they may be amended. Such public utility easements, together with the right to enter thereon, for any purpose in connection with the construction or maintenance of improvements and facilities located thereon are hereby reserved by City for the benefit of itself and for the benefit of all other persons or entities occupying buildings on the City's former Fort Ord properties. In connection with the fire lanes, Concessionaire agrees that it will not cause or permit any vehicle, or other equipment to be parked within the boundaries of such fire lanes or use the fire lanes in a manner which would interfere with equipment and personnel traversing same in the course of fire suppression activities.

b) Reservation . The City reserves the right to install, lay, construct, maintain, repair and operate such sanitary sewers, drains, storm water sewers, pipelines, manholes, and connections; water, oil and gas pipelines; telephone, telegraph, digital, fiber optic or electrical power lines; and the appliances and appurtenances necessary or

convenient in connection therewith, in, over, upon, through, across and along any and all portions of the premises. City will restore any of Concessionaire's improvements altered or disturbed due to City's exercise of any rights under this section to substantially the same condition in which they existed prior to the City's entry on to the premises.

4. Use - Temporary Use. Concessionaire is entitled to use Building T-2248 for roller skating, in-line skating and roller hockey and other types of recreational opportunities approved in advance and in writing by the City's Recreation Director or such person so designated by the City's Director of Public Safety. The facility must provide the general public with recreational opportunities focused on the youth of the City including, but not limited to, leagues, clinics, tournaments and camps at the facility. Concessionaire is not to use the Building for any other purpose without the prior written consent of the City, such consent not to be unreasonably withheld. The facilities will be made available to the general public on a fee basis for public assembly purposes during such times as they are not otherwise in use or required for Concessionaire's use. Concessionaire agrees to require from any other users of the Building general liability insurance consistent with the insurance provisions of this Agreement, naming as additional insureds the parties to this Agreement.

This use is intended by the parties to be a temporary use as that term is used in the City's Ordinance No. 99-05 at section 2(a).

5. Term . The term of this Agreement will be month-to-month which commenced on October 1, 2019 and shall terminate as set forth under the provisions of this Agreement. Concessionaire has had occupancy and use of the facilities under previous operating agreements.

6. Cancellation of Agreement. Either the City or the Concessionaire may cancel this Agreement, and Concessionaire must vacate the Building and the premises, at any time by providing one hundred twenty (120) days' prior written notice of cancellation of the Agreement to the other party.

7. Time and Place of Payment of Fee . Concessionaire must pay all fees, reimbursement of fire insurance and other charges and all other obligations due to the City

under this Agreement every month in advance on or before the first day of the month during the term of this Agreement at the office of the City Finance Director, City Hall, 211 Hillcrest Avenue, Marina, California 93933. The fee and reimbursements due for certain months of this Agreement may be prorated. For purposes of calculating and prorating fees due, each month will be considered to have 30 days.

8. Concession Fee Amount . The monthly fee payable upon execution of this Agreement is \$3,500. Payment of this fee amount shall continue on the first of each month hereafter. It is agreed to by the City and the concessionaire that an additional \$500.00 per month concession fee shall be assessed on the first day of each month for the first twelve months of this Agreement. Commencing on the thirteenth month of this Agreement the additional concession fee assessed on the first day of each month shall be \$1,000. If, at any time during the term of this agreement, the Concessionaire fails to pay the monthly concession fee (\$3,500.00) plus the additional concession fee in full, the 120 day notice of termination requirement (Section 6) shall not apply and the City will proceed with terminating this agreement by issuing a Three-Day Notice to Pay Rent or Quit.

Fee Increase . On October 1st of every year of this Agreement commencing on October 1, 2020 and continuing throughout that year, the portion of the monthly fee that is applied to the payment of the current rent obligation (i.e. not the additional concession fee) will be adjusted using the U.S. Department of Labor, Bureau of Labor Statistics, Consumer Price Index ("CPI") for all urban consumers ("CPI-U"), not seasonally adjusted, all items index, for the San Francisco-Oakland-San Jose California statistical area. The new monthly fee payable for the next fee period under this Agreement pursuant to this paragraph will be calculated as follows: The fee previously in effect (\$3,500.00 for purposes of calculating the first increase) will be multiplied by a fraction, the numerator of which is the CPI of the August calendar month prior to when the adjustment is to take effect (or the month following the adjustment date if no CPI data is published for the calendar month), and the denominator of which is the CPI for the August calendar month (or the preceding month prior to the adjustment date if no CPI data is

published for the calendar month) one year prior to the date of the adjustment. The sum so calculated will constitute the new monthly fee throughout the second fee period (October through September) under this Agreement. Monthly fee payment increases for succeeding fee periods of this Agreement will be calculated in like manner. Provided, however, in no event will any such new monthly fee be less than the fee payable for the month immediately preceding the date for the fee adjustment.

Concessionaire will continue to pay the fee at the rate previously in effect until the increase, if any, is determined. Within ten days following the date on which the increase is determined, Concessionaire must make such payment to the City as will bring the increased fee current, commencing with the effective date of such increase through the date of any fee installments then due. Thereafter, the fee will be paid at the increased rate until the next adjustment date.

In the event the compilation or publication of the CPI is transferred to any other governmental department or bureau or agency or is discontinued, the index most nearly the same as the CPI will be used to make such calculations.

10. Fire Insurance Coverage Provided by the City. The City shall obtain and maintain continuously in effect at all times during the term of this Agreement, fire insurance coverage (See Section 41b, below). The Concessionaire, however, will be responsible for maintaining contents coverage for any of the business' equipment or furnishings within the building.

11. Delinquency Charge. Concessionaire acknowledges that the late payment of fees or other amounts due under this Agreement will cause the City to incur accounting and other processing costs not contemplated by this Agreement, the exact amount of which is extremely difficult and impracticable to fix. Therefore, should any payments due under this Agreement remain unpaid after the due date of such payment, a penalty of 10% will be added to any payments past due and owing. City and Concessionaire agree that this late charge represents a fair and reasonable estimate of costs that the City will incur by reason of the late payment of fees by the Concessionaire. Acceptance of any such late charge will not constitute a waiver of Concessionaire's default with respect to the

overdue amount, nor prevent the City from exercising any of the other rights and remedies available to it by reason of such default. Interest on any unpaid fees, concessionaire fee arrearages, charges and any penalty will accrue at the rate of 1% per month thereafter until paid.

12. Fort Ord Reuse Authority Fees. Concessionaire is responsible for payment of development fees assessed by the Fort Ord Reuse Authority (FORA), if any, and must furnish evidence to the City that all such fees have been paid prior to commencing any construction. Concessionaire must comply with all FORA regulations which pertain to the payment of prevailing wages for projects within FORA's jurisdiction.

13. Commissions . City will not be liable for the payment of any brokerage commissions or fees associated with this Agreement to engineers, contractors, or attorneys working on behalf of Concessionaire.

14. Possessory Interest . Concessionaire must meet all expenses and payments in connection with the use of the Premises and the rights and privileges herein granted including any possessory interest tax (Revenue & Taxation Code '107.6) created by this Agreement, permits and license fees, it being understood by Concessionaire that although the public property is held in public ownership, Concessionaire's interest therein may be taxable as a possessory interest. Concessionaire must pay personal property taxes, if any, levied on Concessionaire's inventory, furnishings, or trade fixtures. Concessionaire may, at its sole expense and cost, contest any tax or fee. All taxes, fees, assessments, charges, etc. must be paid prior to their delinquency date and satisfactory evidence that such taxes have been paid will be furnished to the City.

15. Joint Assessment . If the Premises are not separately assessed, Concessionaire's liability will be an equitable portion of the possessory interest taxes for all of the land and improvements included within the tax parcel assessed, such proportion to be determined by the City from the respective valuations assigned in the assessor's work sheets or such other information as may be reasonably available. The City's reasonable determination thereof, in good faith, will be conclusive.

16. Department of the Interior Deed Terms. This Agreement, and the use of the premises covered hereby, is subject to the terms, conditions and restrictions set forth in the Quitclaim Deed from the United States to the City of Marina dated April 30, 1998. Any such use of the premises must be consistent with the terms, conditions and restrictions of that Deed. Concessionaire, by signing this Agreement, acknowledges that it has received and reviewed a copy of the Quitclaim Deed and will abide by its terms.

17. Termination by Prior Right of the United States. The City makes no representation of the title and if for any reason the Agreement should terminate because of prior rights reserved by the United States Government, then all property belonging to Concessionaire must be removed within 180 days of exercise of said prior rights.

18. Property Rules & Regulations. From and after the date first written above, the City releases to Concessionaire the use of the Building and Concessionaire accepts the Building, and agrees to comply with all of the following conditions:

a) Concessionaire will at all times maintain a written schedule of the usual days and hours of operation for each activity conducted on or from the Building and, upon request will furnish that schedule to the City's Recreation Director.

b) A schedule of prices charged for rental of all or a part of the facilities for public assembly will also be maintained. Concessionaire must furnish its accommodations on a fair, equal and non-unjustly discriminatory basis to all users thereof and charge fair, reasonable and non-unjustly discriminatory prices for those accommodations. Fees charged to the public for use of the facilities must not be inconsistent with those charged by the City for similar accommodations. Primary consideration will be given to the public's benefit in implementing this clause.

c) A 10% or greater discount on the price of admission, on fees for services and programs, and for participation in leagues will be given to residents of the City. Proof of residency must be provided to the Concessionaire. A written list of those residents who have received a discount will be provided to the Recreation Director within 30 days of his request.

d) The Concessionaire for itself, its heirs, personal representatives,

successors in interest and assigns, as a part of the consideration hereof, does hereby covenant and agree "as a covenant running with the land" that no person on the grounds or race, color, sex or national origin shall be excluded from participation in, denied the benefits of, or be otherwise subjected to discrimination in the use of the Building. That in the construction of any improvements to the Building and the furnishing of services thereon, no person on the grounds of race, color, religion, sex or national origin shall be excluded from participation in, denied the benefits of, or otherwise be subject to discrimination. That in the event of breach of any of the above nondiscrimination covenants, City will have the right to terminate this Agreement and to reenter and repossess the Building and hold the same as if this Agreement had never been made or issued.

e) Noncompliance with any of the nondiscrimination covenants above will constitute a material breach thereof and in the event of such noncompliance the City will have the right to terminate this Agreement without liability therefore or at the election of the City or the United States either or both of said governments will have the right to judicially enforce provisions.

f) Concessionaire agrees that it will insert these provisions regarding nondiscrimination in any agreement by which the Concessionaire grants a right or privilege to any person, firm or corporation to render accommodations or services to the public.

g) Concessionaire must retain qualified, competent personnel to supervise Concessionaire's operations and will require that its employees or volunteers be properly dressed, clean, courteous and neat in appearance at all times.

h) Concessionaire will not do or permit to be done upon the premises any act or thing which constitute waste or nuisance and agrees that within seventy-two (72) hours from receiving written notice by the City that such condition exists, to abate or otherwise cause said condition to be cured. In the event Concessionaire has not taken corrective action within seventy-two (72) hours, the City may enter and abate said condition at the expense of Concessionaire without any liability whatsoever to City for monetary loss of Concessionaire or others.

i) Concessionaire has the right, at its expense, to place in or on the Building a sign or signs identifying Concessionaire. Sign or signs must be of a size, shape and design, and at a location or locations, approved in advance by the City and in conformance with any overall directional graphics or sign program established by the City. City's approval will not be withheld unreasonably. Notwithstanding any other provision of this Agreement, any signs will remain the property of Concessionaire. Concessionaire must remove, at its own expense, all lettering, signs and placards so erected on the Building upon termination of this Agreement.

j) Concessionaire agrees that when alternative forms of packaging are available, only items packaged in a manner most compatible with the goal of reducing litter and preserving the environment will be sold. Concessionaire agrees that the sale or consumption of alcoholic beverages is prohibited at all times in and around Building T-2248.

k) Concessionaire has the right, at its expense, to place in or on the Building trade fixtures, furnishings, personal property, equipment and materials necessary to perform any services required or authorized hereunder. Said trade fixtures, furnishings, personal property, equipment and materials will remain the property of Concessionaire, except that the floor previously installed and presently existing in the building shall be, and is, the property of the City. Concessionaire must provide a written list to the Recreation Director of the trade fixtures, furnishings, personal property, equipment and materials owned by Concessionaire which are subject to removal upon termination of this Agreement. Equipment subject to removal will include the roller hockey rink and the dasher boards.

l) Concessionaire will comply with all federal, state and local laws, rules and regulations which may apply to the conduct of the activities provided for and authorized hereunder. Concessionaire will maintain in effect and post in a prominent place all necessary or required licenses or permits, prior to commencing repairs, occupancy or operations.

m) Concessionaire will prepare an Emergency Action/Fire Protection Plan. Current plan will be kept on file with the City's Department of Public Safety.

n) Concessionaire agrees at its own expense to keep and maintain

within the Building portable fire extinguishers of such number type and material as may be prescribed from time to time by the regulations of the City's Department of Public Safety.

o) Any damage to the Building as a result of Concessionaire's activities, including but not limited to holes drilled into the maple flooring to facilitate the installation of the dasher board for the roller hockey rink, must be repaired and the Building must be returned to its condition as of January 1, 1997, with the following exceptions: a) reasonable wear and tear; b) damage by the elements, the repair of which is not provided for herein and which is not caused by Concessionaire's negligence; c) those improvements and modification for which permits have been issued by the City and which have been approved as completed and signed off by the City's building inspector; and, d) the skating rink floor left at the term of the agreement.

p) Concessionaire will, in good faith use its best efforts to efficiently utilize the facilities covered by this Agreement in a competent and efficient manner and remain cognizant that a primary purpose for the City in entering into this Agreement is to promote the development of, and make available services for the benefit of the public.

19. Acceptance of Premises . Concessionaire understands that the Premises were formerly used by the federal government as part of an Army base, that surrounding lands which were also part of such Army base have, in the past been found to contain concentrations of volatile organic chemicals which exceed standards prescribed by the environmental agencies and the state and federal governments. Pursuant to Health & Safety Code section 25359.7(a) Concessionaire is provided this notice that the structure may contain asbestos materials and lead-based paints.

Concessionaire acknowledges that City has granted to Concessionaire the right to review all maps and records of the old Army base presently on file in the office of the City's Planning Department as well as the right to inspect the Premises and perform any tests of the soils and improvements thereon or the groundwater there under, all in order to afford Concessionaire a full and complete opportunity to investigate and determine whether the Premises can be used for the purposes intended. The City has provided to the Concessionaire an asbestos survey report prepared by the U.S. Army Corps of Engineers for Building T-2248, which is attached hereto as "Exhibit B" and by this reference made a part hereof. Concessionaire has been provided with a copy of the environmental

assessment and remediation report for lead-based paint and asbestos present in the structure.

20. Concessionaire has installed a floor in the subject property that shall remain the property of the Concessionaire for a three-year period commencing from the date that this agreement is fully executed by the parties upon condition that:

1. Concessionaire does not give notice to terminate this agreement within the three-year period;
2. Concessionaire does not vacate or abandon the subject property during the three-year period;
3. Concessionaire does not default in any of the terms and conditions of the agreement.

If any one of the three conditions set forth in this paragraph happens, the subject floor shall be, and is agreed to by the parties to be, the sole and separate property of the City. Independent of the three conditions set forth herein, upon the expiration of the three (3) year period the floor shall become the sole and separate property of the City. During the entire period of this agreement the Concessionaire shall be solely responsible for the maintenance of the subject floor.

21. No Warranty . Concessionaire further understands and agrees that no representation, statement, or warranty, express or implied, has been made by or on behalf of the City as to the condition of the Building or the suitability of the Building for its intended use, save and except for the representation and warranty that no City officer, employee, or agent has caused any condition of pollution or contamination which may now exist. Such representation and warranty, however, will not extend to any condition of pollution or contamination caused by the federal government or by any other contractor or Concessionaire of City. Concessionaire agrees to accept the premises in their present condition and "as is" with respect to all conditions which may now exist. Moreover, Concessionaire agrees to waive any claim or right of action against the City which Concessionaire now has or hereafter may acquire arising out of the condition of the Building, the soils or the groundwater underlying the property, including but not limited to any claim of indemnity which Concessionaire may have by reason of costs incurred by

Concessionaire arising out of the abatement or cleanup of any pollution or contamination condition discovered on the premises hereinafter required under applicable state, federal or city laws or regulations save and except for a claim or right of action arising out of a condition of pollution or contamination caused by an officer, employee or agent of the City.

22. Duty Imposed by Law to Alter Building . Concessionaire will be responsible for all improvements required for permit approval including landscaping and access requirements mandated by the Americans with Disabilities Act (ADA), energy conservation and as required by the Uniform Building and Fire Codes. City has no obligation to make any such required improvements, except as provided for herein. In the event Concessionaire cannot, or elects not to, undertake any of the improvements required for permit approval when required by federal, state or local laws, rules and regulations and this Agreement, the Concessionaire must provide sixty (60) days written notice of its intention to vacate the Building and to terminate this Agreement. If at any time during the initial or any extended term of this Agreement, any law or regulation requires any alteration, addition, or other change to the Building, appurtenances, or any part thereof, the same may be made by Concessionaire or in the alternative, Concessionaire may elect to give the City sixty (60) days prior written notice of its intention to vacate the Building and terminate this Agreement.

Building T-2248 described in this Lease and the real property of which it is a part has not undergone inspection by a certified access specialist (CAsp) and has not been determined to meet all applicable construction-related accessibility standards pursuant to California Civil Code Section 55.53. In accordance with a written agreement between the City and the Concessionaire per California Civil Code section 1938(b). Concessionaire understands and acknowledges that, with the exception of an ADA compliant path of travel from the public way to inside the building, including common area the City makes no representation concerning the premises compliance with the ADA. A CAsp can inspect the premises and determine whether the subject premises comply with all of the applicable construction-related accessibility standards under state law. Although state law does not require a CAsp inspection of the subject premises, the commercial property owner or lessor may not prohibit the lessee or tenant from obtaining a CAsp inspection of the subject premises for the occupancy or potential occupancy of the lessee or tenant if

requested by the lessee or tenant. The parties shall mutually agree on the arrangements for the time and manner of the CASp inspection, the payment of the fee for the CASp inspection, and the cost of making any repairs necessary to correct violations of construction-related accessibility standards within the premises. Tenant is solely responsible for determining whether or not Tenant's intended use of Building T-2248 will be or is in compliance with the ADA. The City and Concessionaire acknowledge that certain portions of Building T-2248 remain inaccessible for some disabled individuals. Upon the Effective Date of this Agreement, Concessionaire shall be responsible for the leased premises compliance with the ADA and Tenant shall hold the City harmless for any liability, loss, damages or claim arising out of or related to compliance with the ADA.³ Hazardous Materials Study . Concessionaire may, at its sole option at its sole cost and expense, arrange for a hazardous material studies of the property. City will provide Concessionaire any documents, drawings and data in its possession relating to environmental analysis of the property. Concessionaire and City agree that the City will have no obligation, except as provided for herein by this Agreement, to remove any hazardous materials in, on or under the property, including any required remediation identified in any study Concessionaire may choose to make following Concessionaires occupancy of the premises.

In the event that hazardous materials are discovered on or under the property which materially affect Concessionaire's ability to safely utilize the Building for the purpose provided for herein, neither the City nor the Concessionaire will have any liability for removal of anything not brought onto the premises by Concessionaire and Concessionaire may terminate this agreement upon sixty (60) days prior written notice to the City.

24. Hazardous Substances . Pursuant to Health and Safety Code section 25359.7, Concessionaire must notify City in writing within a reasonable time, of any material release of hazardous substances and of any hazardous substances that have come to be located on or beneath the property.

25. Removal . Prior to the expiration of this Agreement or when terminated earlier by either party in accordance with its terms, Concessionaire must, at its sole expense, remove all items of personal property, including but not limited to all flammable substances and hazardous materials and wastes brought onto the premises by the

Concessionaire as defined by state or federal law.

26. Inspection of Records . Concessionaire will make available for inspection to the City, all records relating to the maintenance, release, mitigation and cleanup for any hazardous substances on the premises.

27. Compliance. Concessionaire must comply with all federal, state and local laws and regulations relating to hazardous materials and wastes, and will timely comply with the orders of any governmental agencies relating thereto or must provide sixty (60) days written notice of its intent to exercise its rights as provided herein to vacate the Building and terminate this Agreement.

28. Right to Inspect . The City, in its proprietary capacity, agrees to give reasonable notice in accordance with the general laws of the City, prior to entering upon and inspecting the Building at any time.

29. Improvements to Property . During the term of this Agreement, Concessionaire must not make any additions or alterations to the improvements, including landscaping, to the Building without the prior written consent of the City, such consent not to be unreasonably withheld. Moreover, upon receiving consent to make an addition or alteration to the improvements on the property, Concessionaire may not commence work on the construction or installation of such added or altered improvements until plans and specifications for same have been submitted to and approved by the City.

30. Performance Bond . Concessionaire will cause to be made, executed and delivered to City prior to the date of commencement of any work in or on the Building, a performance bond approved as to form and as to surety by the City, with Concessionaire's contractor or contractors as principal, and the City specifically named as an additional insured, each in the sum of one hundred percent (100%) of the amount of the contract for all work costing in excess of \$10,000.00 for a) the said required work in accordance with the approved plans and specifications and b) to provide that if Concessionaire or its contractor or contractors fail to pay for any materials, provisions or other supplies, used in or upon, for or about the performance of the work to be done, or for any work or labor thereon of any kind, that the surety will pay the same, in an amount not exceeding the sum specified in the bond, and also, in case suit is brought upon the bond, a reasonable attorney's fee as set by the court.

31. Title to Improvements . Upon termination of this, all additions or alterations to the Building made by Concessionaire will become the property of City without payment of any compensation therefore; provided, however, that upon termination of this Agreement, City will have the option to require Concessionaire to remove any or all added improvements or restore any altered improvement to the same condition as it was at the commencement of the term of this Agreement, all at Concessionaire's sole cost and expense.

32. Concessionaire's Obligations Under this Agreement

- a) Maintenance, repair or replacement of all interior systems and components for the electrical, plumbing, heating and ventilation, fire suppression, and mechanical systems.
- b) Interior and exterior glass, glazing and doors.
- c) All interior walls, stairways, ceiling, floors, bathrooms, drains and other structures or components.
- d) Maintaining in compliance with regulations issued by the City's Fire Department, all fire interior safety system alarms and controls.
- e) All communication systems and components.
- f) All security alarm systems and components.
- g) Maintenance, sweeping and keeping clear of refuse.
- h) Concessionaire will promptly repair any damage to sidewalks, driveways, asphalt parking areas, the building structure or components or damage caused by the concessionaire or its invitees.
- i) Concessionaire must arrange for trash and waste removal services as required.
- j) Other general maintenance and upkeep of the premises not specified herein.

33. Destruction or Substantial Damage of Premises . If, during term of this Agreement, the Building or any part thereof is substantially damaged or destroyed by a fire or other casualty beyond Concessionaire's control (but not including damage caused by the willful acts or negligence of Concessionaire or Concessionaire's employees which damage Concessionaire must promptly repair, replace or restore at Concessionaire's sole

cost and expense), covered by the fire and extended hazard insurance hereinafter provided for by this Agreement, then this Agreement will continue in full force and effect without any abatement of rent and City will proceed to apply the full amount of the insurance coverage to restore the damage, however, if those proceeds are inadequate to completely repair the existing premises, the City reserves the right to determine how those proceeds will be applied to the repair of the premises or to cancel this Agreement.

34. Damage Not Covered by Insurance . Moreover, if during the term of this Agreement, the Building is damaged by a casualty not covered by the fire and extended hazard insurance hereinafter provided for by this Agreement, and the cost to repair such improvements is less than or equal to 10% of the replacement value of all the improvements on the property immediately prior to the occurrence of such damage or destruction, this Agreement will also continue in full force and effect without any abatement of fees due, and Concessionaire will repair and restore such damaged or destroyed improvements according to the plan thereof at the time of such damage or destruction, or in accordance with such modified plan therefore as approved by the City, all at Concessionaire's sole cost and expense.

35. Obligation to Repair . However, if during the term of this Agreement the Building is damaged by a casualty not covered by fire and extended hazard insurance hereinafter provided for by this Agreement, and the cost to repair such improvements exceeds 10% of the replacement value of the Building immediately prior to the occurrence of such damage or destruction, then Concessionaire may elect to terminate this Agreement by giving notice of such termination to City not later than ten (10) days after determining such repair or restoration costs and such replacement value. In the event Concessionaire makes an election to terminate this Agreement, then City, within ten (10) days after receiving Concessionaire's notice of termination, may elect to pay the difference between the cost of repairing or restoring the damaged or destroyed Building and 10% of the replacement value of the Building immediately prior to the occurrence of such damage or destruction, in which case this Agreement will remain in full force and effect and Concessionaire must repair and restore such damaged or destroyed improvements in the manner required by this section. In the event Concessionaire makes an election to terminate this Agreement and City does not make an election to contribute towards the

costs of repair or restoration as hereinbefore provided by this section this Agreement will terminate. Concessionaire will be released thereby without further obligation to the City upon surrender of possession of the premises, except for obligations which have theretofore accrued and are then unpaid or unperformed.

36. Waiver . Except as otherwise specifically provided in this section, Concessionaire specifically waives the provisions of Sections 1932 and 1933 of the California Civil Code with respect to the termination of the hiring of a thing by virtue of the perishing or destruction of the thing being hired.

37. Payment of Utilities. Concessionaire agrees to pay directly to the utility providers for all utility services provided under the terms of any contract between the Concessionaire and the utility provider and to the City for all utility services provided under the terms of any contract between the City and a utility provider which serve the Building through existing lines and connections. Concessionaire is responsible to provide and pay for all new connection equipment and any fees required. Concessionaire must pay all utility charges within twenty (20) days of receipt of invoice and will provide evidence of payment when requested to do so in writing by the City's Recreation Director. In the event Concessionaire fails to pay any utility bill when due, the City may, at its option, pay the same and collect from Concessionaire's performance deposit the amounts so disbursed, plus interest at the rate of 12% per month or fraction thereof.

38. Compliance with Regulations of Local Agencies. It is the responsibility of the Concessionaire under this Agreement to contact, consult and comply with any regulation applicable to Concessionaire's activities on the property which are now or may be promulgated by a local public or private utility provider or regulator having jurisdiction over activities or utility services, including, but not limited to, the Monterey Regional Water Pollution Control Agency, Marina Coast Water District, and Monterey Bay Unified Air Pollution Control District.

39. Insurance. Concessionaire is the insuring party, and as such agrees that it will provide and it will require its contractors to provide insurance in accordance with the requirements set forth here. The following coverages will be provided by Concessionaire

and maintained on behalf of the City and in accordance with the requirements set forth herein.

a) Commercial General Liability/Umbrella Insurance. Total limits will be as approved by the City's Risk Manager, but in no event less than two million dollars per occurrence for all coverages and two million dollars general aggregate. City, its Council, boards and commissions, officers, employees, agents and volunteers must be added as additional insureds (in no event will City accept an endorsement form with an edition date later than 2010). Coverage will apply on a primary non-contributing basis in relation to any other insurance or self-insurance, primary or excess, available to the City or any agent of City. Coverage will not be limited to the vicarious liability or supervisory role of any additional insured. Umbrella Liability Insurance (over primary) will apply to bodily injury/property damage, personal injury/advertising injury, at a minimum, and will include a drop down provision providing primary coverage above a maximum \$25,000.00 self-insured retention for liability not covered by primary policies but covered by the umbrella policy. Coverage must be following form to any underlying coverage. Coverage will be provided on a "pay on behalf" basis, with defense costs payable in addition to policy limits. There must be no cross-liability exclusion. Policies must have concurrent starting and ending dates.

Concessionaire will reimburse the City for the full cost, if any, of all additional insurance assessments required by City's insurer due to any hazardous activities by Concessionaire on the leased property.

b) Business Auto/Umbrella Liability Insurance. Primary coverage will be written on ISO Business Auto Coverage form. Limits must be no less than One million dollars (\$1,000,000.00) per accident. Starting and ending dates must be concurrent. If Concessionaire owns no autos, a non-owned auto endorsement to the General Liability policy described above is acceptable.

c) Workers' Compensation/Employers' Liability. Workers' compensation and employers' liability coverage must be written on a policy form providing workers' compensation statutory benefits as required by law. Employers' liability limits must be no less than one million dollars (\$1,000,000.00) per accident or disease. Employers' liability coverage must be scheduled under any umbrella policy described above. Unless

otherwise agreed, this policy must be endorsed to waive any right of subrogation as respects the City, its Council, boards and commissions, officers, employees, agents and volunteers.

d) Concessionaire and City further agree as follows:

- 1) This section supersedes all other sections and provisions of this Agreement to the extent that any other section or provision conflicts with or impairs the provisions of this section.
- 2) Nothing contained in this Section is to be construed as affecting or altering the legal status of the parties to this Agreement. The insurance requirements set forth in this Section are intended to be separate and distinct from any other provision in this Agreement and will be interpreted as such.
- 3) All insurance coverage and limits provided pursuant to this Agreement will apply to the full extent of the policies involved, available or applicable. Nothing contained in this Agreement or any other agreement relating to the City or its operations limits the application of such insurance coverage.
- 4) Requirements of specific coverage features or limits contained in this Section are not intended as a limitation on coverage, limits or other requirements, or a waiver of any coverage normally provided by any insurance. Specific reference to a given coverage feature is for purposes of clarification only and is not intended by any party to be all inclusive, or to the exclusion of other coverage, or a waiver of any type.
- 5) For purposes of insurance coverage only, this Agreement will be deemed to have been executed immediately upon any party hereto taking any steps that can be deemed to be in furtherance of or towards performance of this Agreement.

- 6) All general or auto liability insurance coverage provided pursuant to this Agreement, or any other agreements pertaining to the performance of this Agreement, will not prohibit Concessionaire, Concessionaire's employees, or agents from waiving the right of subrogation prior to a loss. Concessionaire hereby waives all rights of subrogation against the City.
- 7) Unless otherwise approved by City, Concessionaire's insurance will be written by insurers authorized to do business in the State of California with a minimum AM Best Insurance Guide Rating of "A:VII". Self-insurance will not be considered to comply with these insurance specifications.
- 8) In the event any policy of insurance required under this Agreement does not comply with these requirements or is canceled and not replaced, City has the right but not the duty to obtain the insurance it deems necessary and any premium paid by City will be promptly reimbursed by Concessionaire.
- 9) Concessionaire agrees to provide evidence of the insurance required herein, satisfactory to City, consisting of certificate(s) of insurance evidencing all of the coverages required and an additional endorsement to Concessionaire's general liability and umbrella liability policies (if any) certificate(s) are to reflect that the insurer will provide thirty (30) days' notice of any cancellation of coverage. Concessionaire agrees to require its insurer to modify such certificates to delete any exculpatory wording stating that failure of the insurer to mail written notice of cancellation imposes no obligation, and to delete the word "endeavor" with regard to any notice provisions. Concessionaire agrees to provide complete copies of policies to City upon request.
- 10) Concessionaire must provide proof that policies of insurance required herein expiring during the term of this Agreement have been renewed or replaced with other policies providing at least the same coverage.

Such proof will be furnished at least two weeks prior to the expiration of the coverages.

- 11) Any actual or alleged failure on the part of the City or any other additional insured under these requirements to obtain proof of insurance required under this Agreement in no way waives any right or remedy of City or any additional insured, in this or any other regard.
- 12) Concessionaire agrees to require all subcontractors or other parties hired for this project to provide general liability insurance naming as additional insureds all parties to this Agreement. Concessionaire agrees to obtain certificates evidencing such coverage and make reasonable efforts to ensure that such coverage is provided as required here. Concessionaire agrees to require that no contract used by any subcontractor, or contracts Concessionaire enters into on behalf of City, will reserve the right to charge back to City the cost of insurance required by this Agreement. Concessionaire agrees that upon request, all agreements with subcontractors or others with whom Contractor contracts with on behalf of City, will be submitted to City for review. Failure of City to request copies of such agreements will not impose any liability on City, its Council, boards and commissions, officers, employees, agents and volunteers.
- 13) If Concessionaire is a Limited Liability Company, general liability coverage must be amended so that the Limited Liability Company and its Managers, Affiliates, employees, agents and other persons necessary or incidental to its operation are insureds.
- 14) Concessionaire agrees to provide immediate notice to City of any claim or loss against Concessionaire that includes City as a defendant. City assumes no obligation or liability by such notice, but has the right (but not the duty) to monitor the handling of any such claim or claims if they are likely to involve the City.

40. Review of Insurance Coverage. City is entitled at any time during the term of this Agreement to review the type, form and coverage limits of the insurance requirements. If in the opinion of the City, the insurance provisions of this Agreement are not sufficient to provide adequate protection for the City and the members of the public, the City may require Concessionaire to maintain insurance sufficient to provide such adequate protection. Insurance requirements will be applied uniformly to all parties engaged in similar-type operations on the City's former Fort Ord properties, and such requirements will be consistent with industry standards. City will notify Concessionaire in writing of any changes in the insurance provisions necessary to provide adequate protection. If Concessionaire does not deposit acceptable certificates evidencing valid insurance policies acceptable in form and content to the City, incorporating such changes within ten (10) days of receipt of such notice this Agreement will be in default. The procuring of such policy of insurance will not be construed to be a limitation upon Concessionaire's liability nor as a full performance of its part of the indemnification provisions of this Agreement; Concessionaire's obligation being, notwithstanding said policy or policies of insurance, the full and total amount of any damage, injury or loss caused by the negligence or neglect connected with the operation under this Agreement.

41. Indemnity. Concessionaire and City agree that City, its elected and appointed Council, boards and commissions, officers, employees, agents, and volunteers, should to the extent permitted by law, be fully protected from any loss, injury, damage, claim, lawsuits, cost, expense, attorneys fees, litigation costs, defense costs, court costs or any other cost arising out of or in any way related to the performance of this Agreement. Accordingly, the provisions of this indemnity provision are intended by the parties to be interpreted and construed to provide the fullest protection possible under the law to the City. Concessionaire acknowledges that City would not enter into this Agreement in the absence of the commitment from Concessionaire to indemnify and protect City as set forth here.

To the full extent permitted by law, Concessionaire must defend, indemnify and hold harmless City, its Council, boards and commissions, officers, employees, agents, and volunteers, from any liability, claims, suits, actions, arbitration proceedings, administrative proceedings, regulatory proceedings, losses, expenses or costs of any kind, whether actual, alleged or threatened, actual attorney fees incurred by City, court costs, interest,

defense costs including expert witness fees and any other costs or expenses of any kind whatsoever without restriction or limitation incurred in relation to, as a consequence of or arising out of or in any way attributable actually, allegedly or impliedly, in whole or in part to the performance of this Agreement. All obligations under this provision are to be paid by Concessionaire as they are incurred by the City.

Without affecting the rights of the City under any provision of this Agreement or this section, Concessionaire will not be required to indemnify and hold harmless City as set forth above for liability attributable to the sole fault of City, provided such sole fault is determined by agreement between the parties or the findings of a court of competent jurisdiction. This exception will apply only in instances where the City is shown to have been solely at fault and not in instances where Concessionaire is solely or partially at fault or in instances where City's fault account for only a percentage of the liability involved. In those instances, the obligation of Concessionaire will be ~~al~~/ inclusive and City will be indemnified for all liability incurred, even though a percentage of the liability is attributable to conduct of the City.

The obligations of Concessionaire under this or any other provision of this agreement will not be limited by the provisions of any workers' compensation act or similar act. Concessionaire expressly waives its statutory immunity under such statutes or laws as to City, its Council, boards and commissions, officers, employees, agents, and volunteers.

Concessionaire agrees to obtain executed indemnity agreements with provisions identical to those set forth in this section from any assignee, subcontractor or any other person or entity involved by, for, with or on behalf of Concessionaire in the performance or subject matter of this agreement. In the event Concessionaire fails to obtain such indemnity obligations from others as required here, Concessionaire agrees to be fully responsible according to the terms of this section.

Failure of the City to monitor compliance with these requirements imposes no additional obligations on City and will in no way act as a waiver of any rights hereunder. This obligation to indemnify and defend City as set forth herein is binding on the successors, assigns, or heirs of Concessionaire and will survive the termination of this Agreement or this section.

42. Liens and Claims. Concessionaire must not suffer or permit to be enforced against City's fee title to the property, or any part thereof, any lien, claim or demand arising from any work of construction, repair, restoration, maintenance or removal as herein provided, or otherwise arising (except liens, claims or demands suffered by or arising from the actions of City).

43. Concessionaire to Pay Liens & Claims. Concessionaire must pay all liens, claims and demands before any action is brought to enforce same against said land. Concessionaire agrees to hold City and said land free and harmless from all liability for any and all such liens, claims or demands, together with all costs and expenses in connection therewith.

44. Payment of Liens & Claims by City. Should Concessionaire fail or refuse to pay any lien, claim, or demand arising out of the construction, repair, restoration maintenance and use of the Building or any other claim, charge or demand which Concessionaire has agreed to pay under the covenants of this Agreement, Concessionaire must, within thirty (30) days written notice from City to Concessionaire of its said encumbrance, pay and discharge the same or furnish to City, in a form satisfactory to City, sufficient security for such lien, claim or demand and all costs and expenses in connection therewith. Should Concessionaire or its said encumbrancer within said thirty (30) day period, not pay and discharge said lien, claim or demand, or not provide said security to City, then City may, ~~at its option, either~~ treat such failure or refusal as a breach of or default under this Agreement.

45. Assignments, Transfers, and Encumbrances Prohibited. Concessionaire shall not sell, assign, transfer, or encumber this Agreement or any interest of Concessionaire in and to the property. It is expressly agreed between the City and Concessionaire that Concessionaire will not pledge any interest in this Agreement to secure repayment of debt.

46. Compliance With Laws, Permits and Licenses . Concessionaire's business will be conducted and maintained in strict compliance with all applicable laws, ordinances, regulations, and other requirements of federal, state, county, city or other governmental agencies having jurisdiction over the premises. Similarly, Concessionaire will obtain and pay for all necessary permits, licenses and other consents for the operation of Concessionaire's business. A refusal or failure by the City to issue any permit, license or

approval sought by the Concessionaire will not constitute a breach of this Agreement, whether or not any such refusal or failure was wrongful. Concessionaire's sole remedy for a wrongful refusal or failure by the City to issue any permit, license or approval sought by Concessionaire will be a petition for writ of mandate; and such a refusal or failure by the City will not give rise to an action for money damages by the Concessionaire.

Concessionaire represents and warrants that it has full power and authority to enter into this Agreement and perform hereunder, and holds all permits and licenses which are required by law or regulation for complete performance in accordance with the terms of this Agreement.

47. Independent Status . Concessionaire is an independent entity. Concessionaire is solely responsible for the acts and omissions of its officers, agents, employees, contractors and subcontractors, if any. Nothing in this Agreement will be construed as creating a partnership or joint venture between City and Concessionaire. Neither Concessionaire nor its officers, employees, agents or subcontractors will obtain any rights to retirement or other benefits which accrue to City employees.

48. Confidentiality . To the extent allowed by law, the City will not disclose Concessionaire's financial statement or confidential financial condition. Concessionaire acknowledges that the City is a municipal corporation and has limited powers to withhold information from the public.

49. Attorney's Fees and Costs . Should it become necessary for either party to enforce or interpret any of the terms and conditions of this Agreement by means of court action or administrative enforcement, the laws of the State of California will govern the interpretation of the terms and conditions of this Agreement and such action will be brought in a court of proper jurisdiction in Monterey County. The prevailing party, in addition to any other remedy at law or in equity available to such party, will be awarded all reasonable costs and reasonable attorney's fees in connection therewith, including the fees and costs of experts reasonably consulted by the attorneys for the prevailing party.

50. Litigation Involving Agreement . In the event the City is made a party to any litigation concerning this Agreement or the premises by reason of any act or omission by Concessionaire, Concessionaire must indemnify and hold the City harmless from all loss or liability, including reasonable attorney's fees, incurred by the City in such litigation.

51. Force Majeure; Waiver . Concessionaire will not be in default under this Agreement in the event that the activities of Concessionaire are temporarily interrupted for any of the following reasons: riots; war or national emergency declared by the President or Congress and affecting the City of Marina; sabotage; civil disturbance; insurrection; explosion; natural disasters such as floods, earthquakes, landslides; strikes, lockouts and other labor disturbances or other catastrophic events which are beyond the reasonable control of Concessionaire. "Other catastrophic events" does not include the financial ability of Concessionaire to perform or failure of Concessionaire to obtain any necessary permits or licenses from other governmental agencies or the right to use facilities of any public entity where such failure occurs because Concessionaire has failed to exercise reasonable diligence.

52. Abandonment . Concessionaire must not vacate or abandon the property or any part thereof for a period in excess of thirty (30) days ~~during any time during~~ the term of this Agreement. If Concessionaire abandons, vacates or surrenders the premises or is dispossessed by process of law or otherwise, any property belonging to Concessionaire and left on the property shall be deemed, at the option of City, to be abandoned. Upon relinquishing possession, Concessionaire will be in default of this Agreement and City is entitled to terminate this Agreement and Concessionaire's rights in and to the Building in the manner hereinafter provided by this Agreement.

53. Default . Concessionaire will be deemed in default under this Agreement:

a) Upon breach of any of the covenants and conditions of the Quitclaim Deed from the United States with respect to discrimination on the grounds of race, creed, color, national origin, sex, or age; with respect to economic discrimination; with respect to physical disability; with respect to the sale, assignment, transfer, encumbrance, or subletting of the property which is the subject matter of this Agreement; ~~with respect to the bankruptcy~~ or insolvency of Concessionaire; or, with respect to any other covenant or condition of this Agreement, which breach cannot be cured, within forty-eight (48) hours upon being given notice thereof by City.

b) Upon failure to pay any fees or any other consideration required under this Agreement to be paid by Concessionaire to City within ten (10) days following the date those obligations are due, or upon failure to provide evidence of the insurance when due, within forty-eight (48) hours after being given written notice thereof by City.

c) Upon the breach of any of Concessionaire's other duties and obligations under this Agreement, which breach can be cured, if such breach is not cured within forty-eight (48) hours after being given written notice thereof by City.

54. Remedies on Default

a) City's Right to Terminate Agreement. Upon Concessionaire's default of this Agreement, City is entitled, without further notice, to terminate this Agreement as well as Concessionaire's rights in and to the Building, to enter upon and retake possession of the Building, including all improvements thereon and facilities appurtenant thereto, by legal proceedings ~~or otherwise~~, and to recover from Concessionaire, at the time of such termination, the excess, if any, of the amount of fees to be paid by Concessionaire under this Agreement for the balance of the Agreement term.

b) City's Right to Repossess or Operate the Property for Concessionaire's Account. Upon Concessionaire's default under this Agreement, City is entitled, without further notice and without terminating this Agreement, to enter upon and retake possession of the Building, including all improvements thereon and fixtures appurtenant thereto, by legal proceedings and to take, operate, or re-let the same in whole or in part for the account of Concessionaire at such rental, on such conditions, and to such Concessionaire or Concessionaires as City, in good faith, may deem proper. City will receive all proceeds from fees accruing from such operating or re-letting of the property and will apply the same first to the payment of all costs and expenses incurred by City in the operation of the Building and any alterations or repairs reasonably necessary to enable City to operate the property, and then to the payment of all such amounts as may be due or become due under the provisions of this Agreement. In the event proceeds from rentals received by City under the provisions of this section are insufficient to pay all costs and expenses and all amounts due and becoming due hereunder, Concessionaire must pay to City, on demand by City, such deficiency as may from time-to-time occur or exist. Notwithstanding any such operation without terminating this Agreement, City may, at any time thereafter, elect to terminate this Agreement in the event that Concessionaire remains in default hereunder at such time.

c) City's Right to Perform. Notwithstanding any provisions as to notice of default in this Agreement to the contrary, if, in City's judgment, a continuance of any default by Concessionaire for the full period of the notice otherwise provided for will jeopardize the Building or the rights of City, City may, without notice, elect to perform those acts in respect of which Concessionaire is in default at Concessionaire's expense and Concessionaire must thereupon reimburse City, with interest at the rate of 10% per annum, upon ten (10) days' written notice by City to Concessionaire. Concessionaire,

however, will not be required to reimburse the City for the cost to remediate any preexisting hazardous condition within, on or under the Building or for any hazardous condition not caused by Concessionaire or by Concessionaire's occupancy and use of the Building.

d) Other Remedies. All rights, options, and remedies of City contained in this Agreement will be construed and held to be cumulative and not one of them will be exclusive of the other, and City will have the right to pursue any one or all of such remedies or any other remedy or relief which may be provided for by law, whether or not stated in this Agreement.

55. Waiver of Default . Any waiver by City of a default of this Agreement arising out of the breach of any of the covenants, conditions, or restrictions of this Agreement will not be construed or held to be a waiver of any succeeding or preceding default arising out of a breach of the same or any other covenant, condition, or restriction of this Agreement.

56. City's Right of Entry . The City, in its proprietary capacity, reserves the right to inspect the Building and agrees to give reasonable written notice in accordance with the general laws of the City, prior to entering upon and inspecting the Building at any time. The Department of the Interior reserves the right to inspect the Building at any reasonable time for the purpose of determining compliance with the terms of this Agreement and the above-referenced Quitclaim Deed. Concessionaire will permit City and any agents and employees of City to enter the Building at all reasonable times for the purpose of inspecting the same, or for the purpose of posting notices of non-responsibility for improvements, alterations, additions, or repairs, without any rebate of fees and without any liability to Concessionaire for any loss of occupation or quiet enjoyment of the Building thereby occasioned. The City will attempt to provide twenty-four (24) hours written notice to Concessionaire prior to any such non-emergency entry.

57. Notices . All notices required or permitted to be given under this Agreement will be in writing and must be personally delivered ~~or sent by telecopier or~~ United States certified mail, postage prepaid, return receipt requested, addressed as follows:

To City: City of Marina
City Hall
Office of the City Manager

211 Hillcrest Avenue
Marina, California 93933
Telecopier Number: (831) 384-0425

Copy to: City Attorney
City of Marina
Law Offices of Robert R. Wellington
857 Cass Street, Suite D.
Monterey, California 93940
Telecopier Number: (831) 373-7106

To Concessionaire: Water City Roller Hockey, Inc.
Attn: Mark Tanous
2800 Second Avenue
Marina, California 93933
Telecopier Number: (831) 384-0170

or to such other address as either party may from time-to-time designate by notice to the other given in accordance with this section. Notice will be deemed effective on the date personally served or, if mailed, three (3) business days from the date such notice is deposited in the United States mail.

58. Amendment or Modification . This Agreement may be amended, altered or modified only by a writing, specifying such amendment, alteration or modification, executed by authorized representatives of both of the parties hereto.

59 No Relocation Benefits. This Agreement creates no rights under the California Government Code Sections 7260 to 7277 or the Federal Uniform Relocation Assistance Act for Concessionaire to receive relocation assistance upon termination of this Lease.

60. Construction of Agreement . Whenever the singular number is used in this Agreement and when required by the context, the same will include the plural, and the masculine gender will include the feminine and neuter genders. If there is more than one Concessionaire designated in or signatory to this Agreement, the obligations hereunder imposed upon Concessionaire are joint and several; and the term "Concessionaire" as used herein refers to each and every of said signatory parties, severally as well a jointly.

61. Covenant & Condition . Each term and provision of this Agreement performable by Concessionaire will be construed to be both a covenant and a condition.

62. Time . Time is and will be of the essence of each term and provision of this Agreement.

63. Material Breach . Each and every term, condition, covenant and provision of this Agreement is and will be deemed to be a material part of the consideration for the City's entry into this Agreement, and any breach hereof by Concessionaire will be deemed to be a material breach.

64. Heirs and Successors . All of the covenants, agreements, conditions and undertakings herein contained will apply to and bind the representatives, heirs, executor, administrators, or successors-in-interest of all the parties hereto and all the parties hereto will be jointly and severally liable hereunder.

65. Further Actions . Each of the parties agree to execute and deliver to the other such documents and instruments, and to take such actions, as may reasonably be required to give effect to the terms and conditions of this Agreement including such information and reports as may be required by the City for inclusion in its biennial report to the National Park Service, United States Department of the Interior.

66. Interpretation . This Agreement has been negotiated by and between the representatives of both parties. Accordingly, any rule of law (including Civil Code section 1654) or legal decision that would require interpretation of any ambiguities in this Agreement against the party that has drafted it is not applicable and is waived. The provisions of this Agreement must be interpreted in a reasonable manner to affect the purpose of the parties and this Agreement.

67. Opportunity to Consult with Counsel. The City and Concessionaire hereby represent and acknowledge that they have each been provided with the opportunity to discuss and review the terms of this Agreement with their respective attorneys before signing it and that they are freely and voluntarily signing this document in exchange for the benefits provided herein. The City and Concessionaire further represent and acknowledge that they have been provided a reasonable period of time within which to review the terms of this Agreement.

68. Captions . Titles or captions of the sections contained in this Agreement are inserted only as a matter of convenience and for reference, and in no way define, limit, extend or describe the scope of this Agreement or the intent of any provision of it.

69. Severability . If any of the provisions of this Agreement are determined to be invalid or unenforceable, those provisions will be deemed severable from the remainder

of this Agreement and will not cause the invalidity or unenforceability of the remainder of this Agreement, unless this Agreement without the severed provisions would frustrate a material purpose of either party in entering into this Agreement.

70. Waiver . No waiver of any right or obligation of either party hereto will be effective unless made in a writing, specifying such waiver and executed by the party against whom such waiver is sought to be enforced. A waiver by either party of any of its rights under this Agreement on any occasion will not bar the exercise of the same right on any subsequent occasion or of any other right at any time.

71. Counterparts . This Agreement may be executed in two counterparts, each of which will be deemed an original, but both of which will be deemed to constitute one and the same instrument.

72. Corporate Authority. The individual executing this Agreement on behalf of WATER CITY ROLLER HOCKEY, INC., represents and warrants they are duly authorized to execute and deliver this Agreement on behalf of the corporation and that Agreement is binding upon the corporation in accordance with its terms. Within 10 days of executing this Lease, WATER CITY ROLLER HOCKEY, INC. shall deliver to the City a certified copy of a resolution by its Board of Directors authorizing or ratifying the execution of this Lease.

73. Entire Agreement. This Agreement constitutes the entire and complete agreement between the parties regarding the subject matter hereof, and supersedes all prior or contemporaneous negotiations, understandings or agreements of the parties, whether written or oral, with respect to the subject matter.

IN WITNESS WHEREOF, this Agreement has been executed by the duly authorized officers or representatives of each of the parties on the date first shown above.

[Signature page follows]

ATTEST

MARINA, a municipal corporation

Anita Shepherd- Sharp
Deputy City Clerk

By: _____

Bruce C. Delgado
Mayor

Date: _____ 2019

APPROVED AS TO FORM:

WATER CITY ROLLER HOCKEY, INC:

City Attorney

Mark Tanous
President

Date: _____ 2019

EXHIBITS

EXHIBIT A

**A PLAT OF THE BUILDING & PROPERTY
WHICH IS THE SUBJECT OF THIS AGREEMENT
(INCLUDING PARKING)**

Exhibit A

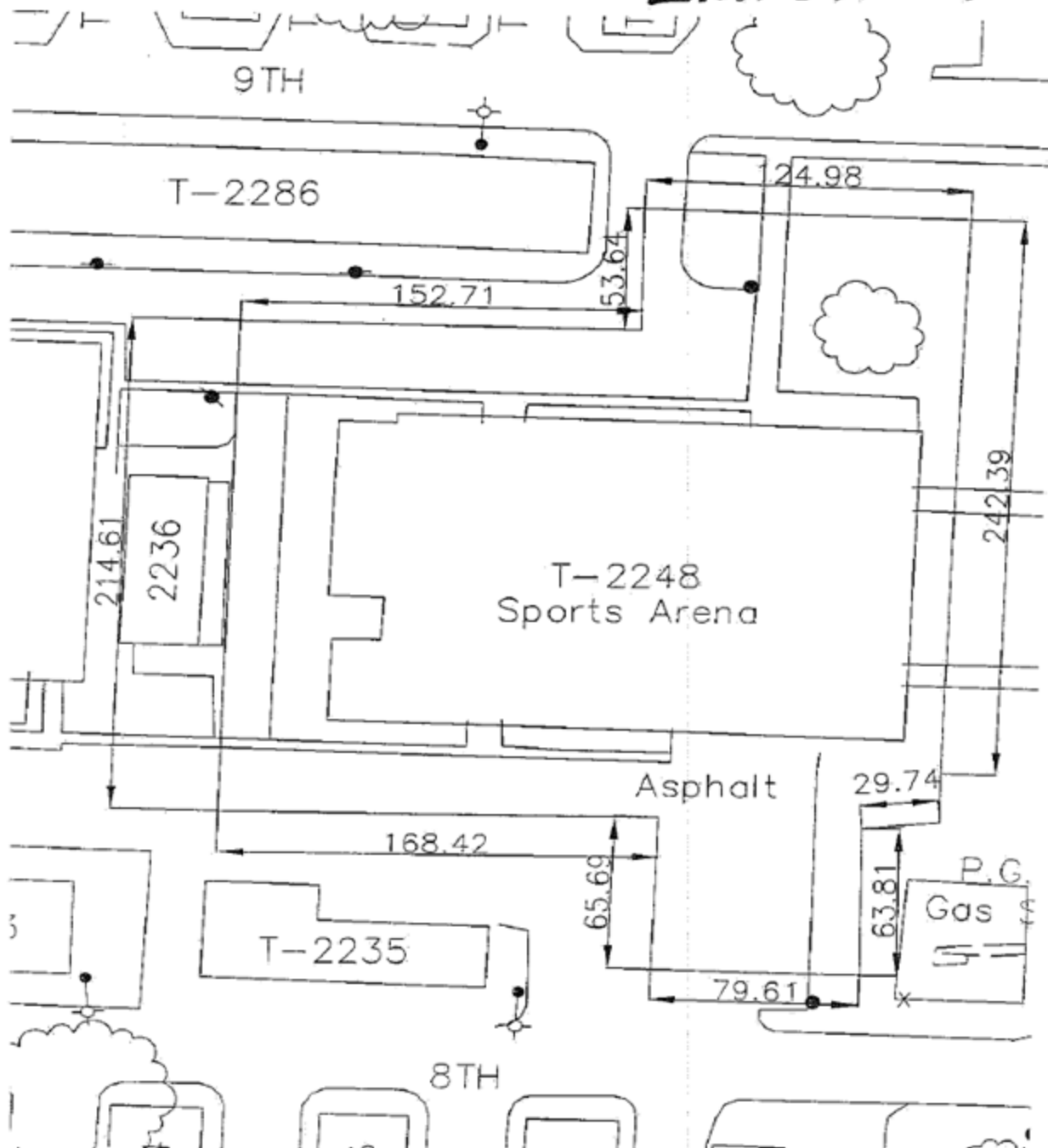


EXHIBIT B

ASBESTOS SURVEY REPORT FOR BUILDING T-2248

NOTICE
TO PROSPECTIVE LESSEES/CONCESSIONAIRES
OF THE CITY OF MARINA

THE CITY OF MARINA, AS THE OWNER OF THE PROPERTY WHICH IS THE SUBJECT OF LEASE OR CONCESSION AGREEMENT NEGOTIATIONS, IS CONSIDERING ENTERING INTO A LEASE OR CONCESSION AGREEMENT WITH YOU IN ITS PROPRIETARY CAPACITY.

AS SUCH, NEITHER THE DELIVERY OF A DRAFT LEASE OR AGREEMENT NOR THE FINAL LEASE OR AGREEMENT, WHEN EXECUTED BY BOTH PARTIES, GUARANTEES OR IMPLIES THAT ANY REQUIRED REGULATORY APPROVALS FOR YOUR PROPOSED ACTIVITIES ON THE PREMISES WILL BE GRANTED BY THE CITY, ACTING IN ITS REGULATORY CAPACITY, OR BY ANY OTHER OF THE REGULATORY BODIES FROM WHICH APPROVALS CONCERNING YOUR PROPOSED ACTIVITIES ON THE PREMISES MUST BE SOUGHT.

YOU, AS A PROSPECTIVE LESSEE OR CONCESSIONAIRE, ARE RESPONSIBLE FOR CONTACTING THE VARIOUS AGENCIES AND CITY DEPARTMENTS, SUBMITTING APPLICATIONS, PAYING ANY FEES AND SECURING THE RECEIPT OF ALL INSPECTIONS, APPROVALS, LICENSES OR PERMITS APPLICABLE TO YOUR PROPOSED ACTIVITIES ON THE PREMISES. THESE AGENCIES AND DEPARTMENTS MAY INCLUDE, BUT ARE NOT LIMITED TO, THE FORT ORD RE-USE AUTHORITY (FORA), THE MONTEREY REGIONAL AIR POLLUTION CONTROL DISTRICT, THE MARINA COAST WATER DISTRICT, PACIFIC GAS & ELECTRIC COMPANY AND THE CITY OF MARINA'S DEPARTMENTS OF BUILDING INSPECTION, PLANNING, DESIGN REVIEW, PUBLIC WORKS AND PUBLIC SAFETY.

PLEASE READ THE CONDITIONS PRECEDENT AND THE TERMS AND CONDITIONS OF YOUR LEASE OR CONCESSION AGREEMENT CAREFULLY CONCERNING REQUIRED APPROVALS.

I HAVE READ AND UNDERSTAND THE FOREGOING:

DATE: _____

Signature: _____

September 25, 2019

Item No: **8g(3)**

Honorable Mayor and Members
of the Marina City Council

City Council Meeting
of October 1, 2019

**CITY COUNCIL TO CONSIDER ADOPTING RESOLUTION NO. 2019-,
APPROVAL OF A CONCESSION AGREEMENT BETWEEN THE CITY OF
MARINA AND WATER CITY ROLLER HOCKEY, INC.; AND AUTHORIZE
THE MAYOR TO EXECUTE AGREEMENT ON BEHALF OF THE CITY
SUBJECT TO FINAL REVIEW AND APPROVAL BY THE CITY
ATTORNEY**

REQUEST: It is requested that the City Council:

1. Adopt Resolution No. 2019-, approving a concession agreement between the City of Marina and Water City Roller Hockey, Inc; and
2. Authorize the Mayor to execute agreement on behalf of the City subject to final review and approval by the City Attorney

BACKGROUND:

Water City Roller Hockey, Inc. concessionaire provides recreational opportunities at the City's building located 2801 2nd Ave. in Marina. The offerings include:

- Open Roller Skating
- Monterey Derby Dames Bouts
- Roller Hockey
 - Two Youth Leagues
 - 3 Co-ed Adult Leagues
- A number of other special events
- Support for City and School programs such as practice area of the Marina High School Basketball teams (this will be ending shortly).

The City has had a long-term agreement with Water City Roller Hockey, Inc. dating back to 2002. The concessionaire at times, has been delinquent in paying the full rent, partly due to the poor business environment that occurred as part of the 2008 recession. In effort to move forward, the new agreement requires both a payment for current rent (\$3,500) and amount for past rents (Starting at \$500/month for the first year and increasing to \$1,000/month after the first year) The agreement provides that if the lease payments become delinquent, the City will provide a 72 hour notice for Water City to quit the facility. Otherwise, the agreement calls for a 4-month notice by either party to terminate the agreement.

ANALYSIS:

Water City Roller Hockey, Inc. has not been paying the full monthly payment required in their concessionaire agreement. To move forward, the City is requiring that the concessionaire make monthly payments beyond the monthly lease amount of \$3,500 a month. As of October 1, 2019, an additional \$500 a month will be paid towards back rents. In one year, that additional payment will increase to \$1,000 a month beyond the base rent of \$3,500 a month.

Some of the other notable provisions of the agreement are:

- Annual increases to the base rent indexed to the SF-CPI and adjusted each October 1.
- If the agreement is in good standing, either party may quit the agreement without cause upon a 120-day notice. This clause is important to both parties because a 120-day notice would allow Water City to complete a hockey season while still permitting the City to reuse the facility if the City decides to remodel the building for other uses.
- If the lease is not paid promptly each month, the City will provide a 72-hour notice to the concessionaire to quit the building.
- The concessionaire has installed a roller-skating floor in the building. If the agreement continues for at least three years, the building floor will become the City's floor.

The agreement, signed by Mark Tanous, President for Water City Roller Hockey, Inc., is attached.

Although a past due amount exists on the Water City concession agreement, the ability to collect the past due amount limited and difficult. The alternative is what is proposed in the lease: an additional amount paid monthly toward past due amounts. Further, by proceeding with this lease, the users of Water City will still have access to the roller rink which includes public open skating used by many in Marina,

Council Priorities

At the March 2019 City Council retreat, the council identified a number of priorities. This item addresses one of these priorities. A summary of the priority item 29, assigned to the Finance department, is as follows:

29	High	a	City Lease Management	Fin	The objective of this project is to implement a program to review all leases periodically and manage the leases so the rent amounts are properly calculated and, when not paid, take steps to work with the lessee to rectify the situation.
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FISCAL IMPACT:

Under the terms of the agreement, Water City, Inc. will pay \$4,000 per month, increasing to \$4,500 account as of October 1, 2020. The lease monies are deposited into the National Park Service fund. This will mean \$42,000 will come from Water City this next year.

CONCLUSION:

This request is submitted for City Council consideration and possible action.

Respectfully submitted,

Eric Frost
Finance Director
City of Marina

REVIEWED/CONCUR:

Layne Long
City Manager
City of Marina

SOURCE OF FUNDING: National Park Service Fund (225)