



Office of the City Manager

CONSENT CALENDAR  
January 27, 2026

To: Honorable Mayor and Members of the City Council

From: Paul Buddenhagen, City Manager

Submitted by: Scott Ferris, Director, Parks Recreation & Waterfront

Subject: Option Agreement with TSA Holding Group, LLC for 199 Seawall Drive

RECOMMENDATION

Adopt a Resolution authorizing the City Manager to execute the Option Agreement and any amendments with TSA Holding Group, LLC for a two-year term with two one-year options to extend.

SUMMARY

The City and TSA executed an Exclusive Negotiating Agreement (ENA) on February 6, 2025, for the property at 199 Seawall Drive in order to negotiate lease terms. As part of leasing the property, TSA is proposing extensive renovations and improvements to the property. Before TSA and the City can execute a lease agreement authorizing those improvements, the review of any potential environmental impacts per the California Environmental Quality Act (CEQA) is required.

The Option Agreement allows TSA to complete the necessary environmental review and enumerates the conditions that must be met in order for TSA to exercise the option of executing the Ground Lease Agreement. The Option Agreement has a term of up to two years, with two one-year extensions. TSA can only exercise the option after the City conducts CEQA review including consideration of alternatives and mitigation measures. The option agreement does not limit the City's ability to approve, deny, or impose mitigation measures on the project.

If TSA meets the conditions and exercises the Option, staff would submit the Ground Lease Agreement – materially similar to the Lease attached as Exhibit B to this Option Agreement – for Council approval of the lease ordinance. The Ground Lease would have a duration of 45 years with two options to extend for an additional 10 years each; it would authorize on-site and off-site improvements; and would generate revenue for the Marina Fund including base rent of \$200,000 in Year 5, \$350,000 in Year 6, escalating by 3% per year thereafter; and starting in Year 10, percentage rent of 6% of annual gross receipts, less base rent.

FISCAL IMPACTS OF RECOMMENDATION

There would be minimal fiscal impact on the City during the Option period because the Agreement does not transfer possession or responsibility for the operational costs of 199 Seawall Drive, which cost the City approximately \$200,000 per year. However, the Agreement would allow TSA, at their own cost, to perform City-approved repairs to the

existing building to prevent irreparable damage. The Agreement would also require TSA to reimburse the City for staff time, consultant costs, and review expenses related to design and environmental review of the proposed 199 Seawall Drive renovation.

If TSA exercises the option to enter into the Ground Lease Agreement, there will be more significant fiscal impact, as the tenant will assume full financial responsibility for the property, resulting in savings of \$200,000 per year to the City. The City will additionally receive \$200,000 in base rent in Year 5, \$350,000 in Year 6, and an additional 3% per year thereafter; and 6% of gross receipts (less base rent) starting in Year 10. These savings and new revenue will accrue to the Marina Fund.

In addition to renovation of the leased premises, the Ground Lease requires TSA to complete a value of \$17 million in off-site improvements, which includes improvements and maintenance of the entire Seawall Parking Lot, portions of the Bay Trail and Seawall Drive, or other Waterfront areas. In exchange for the off-site improvements, TSA is granted 150 exclusive-use parking stalls at the Seawall Lot for 45 years, the initial lease term. With improvements as required by this lease agreement, the 199 Seawall Lot is anticipated to have between 430-450 total parking spaces, pending final design.

#### CURRENT SITUATION AND ITS EFFECTS

The City entered into an Exclusive Negotiating Agreement (ENA) with TSA on February 6, 2025 for the lease of the City's property on 199 Seawall Drive, the former Hs Lordships restaurant. TSA has proposed to conduct a comprehensive renovation of the existing building. Due to the extent of the proposed improvements, the review of any potential environmental impacts per the California Environmental Quality Act (CEQA) is required prior to entering into a long-term lease and starting construction on the improvements.

The Option Agreement provides TSA entry to the property to allow for the completion of environmental review, design and engineering studies, permitting, and City-approved building repairs. While the City will serve as the lead agency in the environmental review, TSA will cover the cost for the environmental review and reimburse the City for staff time and consultant fees. The City will continue to be responsible for the property's operational costs during the term of the Option Agreement.

In order for TSA to exercise the option to enter into a Ground Lease agreement, TSA must meet the following conditions:

- a) Conduct investigations, tests, and studies to determine if all the needed entitlements (permits, regulatory approvals, etc.) can be obtained in an acceptable form to develop and construct the proposed improvements. Exhibits C and D of the Option Agreement provide performance milestones and administrative guidelines.
- b) Provide documentation that the proposed construction of off-site improvements will comply with the requirements for judicial streamlining of legal challenges brought under CEQA.

- c) Obtain all necessary studies for the proposed improvements to ensure CEQA compliance.

Once these conditions are met, TSA must provide written notice to the City of their intent to exercise the option to enter into a Ground Lease Agreement, provide evidence of financial ability to carry out the project, and sign a Ground Lease agreement materially consistent with the terms found in Exhibit B of the Option Agreement.

The Ground Lease is for a term of 45 years, with two options to extend for an additional 10 years each. If executed, the tenant will begin paying base rent in Year 5 for \$200,000, which will increase to \$350,000 in Year 6, and an additional 3% per year thereafter; and 6% of annual gross receipts (less base rent) starting in Year 10. This revenue will accrue to the Marina Fund. Executing the Ground Lease would transfer all possessory interest and operational responsibilities to the tenant.

Additionally, the Ground Lease requires the tenant to complete off-site improvements with a value of \$17 million, which includes improvements and maintenance of the entire Seawall Lot, portions of the Bay Trail and Seawall Drive, or other Waterfront areas. In exchange for the off-site improvements, TSA is granted 150 exclusive-use parking stalls at the Seawall Lot.

#### BACKGROUND

In 1967, the City and Specialty Restaurant Corporation entered into a 50-year ground lease to develop a restaurant and event space that opened in 1969 as “Hs Lordships.” While the lease was set to expire in August 2019, Specialty Restaurant Corporation closed Hs Lordships on July 1, 2018, and terminated their lease 13 months early.

The City has attempted to lease the property for the past seven years. In 2018, the City entered into an agreement with Colliers Parish International to help the City find entities to lease the space (Contract Number 10960). Five proposals were received between 2018 and 2021. None of these prospective tenants were able to reach a lease agreement with the City. Issues cited included: structural uncertainty about the building, uncertainty over permitting, the high investment required, COVID-19, and the economy.

In 2022, the City entered into a 6-month ENA with Innovation Properties Group (IPG), which was extended later that year by an additional 15 months, (Council Resolutions 70,043-N.S. and 70,481-N.S.). IPG created renderings of the property’s development potential and toured numerous prospective tenants through the building. They direct-marketed the project to restaurateurs nationwide who they deemed to be a good fit for the property. IPG brought forward two proposals. Neither resulted in a lease agreement, for reasons cited above, as well as uncertainty over the remote location, rising interest rates, and challenges with large, indoor restaurants in the post-COVID economy.

In 2024, the City directly received three proposals, all requesting exclusivity to complete due diligence and negotiate a lease. On November 19, 2024, Council adopted Resolution No. 71,571-N.S. authorizing the City Manager to enter into an ENA with TSA Holding Group, LLC. City staff has since been working with TSA to negotiate lease terms. Council reviewed the proposed lease terms in closed session meetings on May 13, 2025 and October 27, 2025.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

If TSA exercises the option to enter into a Ground Lease agreement, following CEQA review and approval by the City, improvements would comply with current City and state regulations bird safe glass, energy efficiency and environmental sustainability. Revenue from the lease agreement would be deposited in the Marina Fund, which funds maintenance and improvements of the Waterfront for continued public access and engagement with the environment, as well as the City's environmental education programs at the Shorebird Park Nature Center.

RATIONALE FOR RECOMMENDATION

The Option Agreement allows for TSA to cover the costs of environmental review, which is needed before a lease for 199 Seawall Drive may be authorized. If the lease is executed, there will be \$200,000 in annual savings to the Marina Fund as operational costs for 199 Seawall will transfer to TSA; and there will be increased annual rent revenue, phased in over a period of 10 years. This will provide a path to long-term annual revenue for the Marina Fund, which has been in a deficit position for many years. The proposed improvements on and around the property could attract additional investment in the Waterfront, which would in turn generate more revenue for the Marina Fund.

ALTERNATIVE ACTIONS CONSIDERED

Council could decline to approve the Option Agreement, which would result in the continued vacancy of the property and require the City to continue funding the property's basic operational costs. This would leave the City without a clear path to the property's rehabilitation or revenue generation.

Council could also direct staff to re-market the site or initiate a new solicitation. However, the City has undertaken multiple marketing and negotiation efforts over the past seven years during which several potential tenants did not move forward with leasing due to the substantial structural upgrades required and the level of private investment needed.

Finally, the City could choose to directly fund repairs or redevelopment of the property. This alternative would require significant capital investment and ongoing operational resources that are not currently available.

CONTACT PERSON

Scott Ferris, Director, Parks Recreation & Waterfront, 981-6700

Attachments:

1: Resolution

Exhibit A: Option Agreement

Exhibit B: Ground Lease Agreement

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

OPTION AGREEMENT WITH TSA HOLDING GROUP, LLC FOR 199 SEAWALL  
DRIVE

WHEREAS, the property at 199 Seawall Drive has been unleased and vacant since 2018;  
and

WHEREAS, Council adopted Resolution No. 71,571-N.S. authorizing the City Manager  
to enter into an Exclusive Negotiating Agreement with TSA Holding Group, LLC on  
November 19, 2024; and

WHEREAS, TSA Holding Group's proposed property improvements must undergo  
environmental impact review per the California Environmental Quality Act (CEQA), and  
the City cannot enter into a lease agreement which authorizes such improvements until  
all the necessary review has been completed; and

WHEREAS, the Option Agreement (Exhibit A) provides TSA access to 199 Seawall  
Drive to conduct necessary studies and investigations for CEQA review and future  
permit applications, and to make City-approved building repairs during the two-year  
term of the agreement; and

WHEREAS, upon meeting the conditions of the Option Agreement, TSA Holding Group  
has the option to enter into a 45-year Ground Lease Agreement with two 10-year  
extensions for the property, materially similar to the Ground Lease Agreement attached  
to the Option Agreement.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that the  
City Manager is authorized to execute the Option Agreement and any amendments with  
TSA Holding Group, LLC for a two-year term with two one-year options to extend. Such  
Option Agreement shall be on substantially the same terms set forth in Exhibit A.

Exhibits:

A: Option Agreement

B: Ground Lease Agreement

Exhibit A: Option Agreement

**GROUND LEASE OPTION AGREEMENT**

**199 Seawall Dr. Berkeley, CA 94710**

This Ground Lease Option Agreement (“Agreement”) is entered into this 1<sup>st</sup> day of February, 2026 (“Effective Date”) by and between the City of Berkeley (“City”) and TSA Holding Group, LLC (“Optionee”). City and Optionee may sometimes hereinafter be referred to as “Party” or jointly as “Parties”.

**RECITALS**

WHEREAS, City is the owner, through a public trust grant of tidelands from the State, of the real property and improvements located at 199 Seawall Dr. in the City of Berkeley, more particularly described and depicted in Exhibit A, attached hereto and incorporated herein by this reference (the “Option Property”).

WHEREAS, City and Optionee desire to enter into a forty-five (45) year ground lease with two options to extend the term for an additional ten (10) years each for the renovation of the property and improvements to the Seawall Lot and portions of Seawall Drive and the Bay Trail Extension (the “Proposed Project”) and for operation of a restaurant and event space.

WHEREAS, City and Optionee shall complete certain due diligence and comply with all applicable state and local law and regulations applicable to the Proposed Project, including the California Environmental Quality Act (“CEQA”) before entering a ground lease of the Option Property.

WHEREAS, repairs to the Option Property may be required during the Option period to prevent irreparable damage to the existing structure, and the City does not have resources to make such repairs.

WHEREAS, this Agreement is not a lease and grants Optionee no real property interest in or right to use or otherwise occupy the Option Property, except as provided herein.

WHEREAS, a ground lease or any other real property interest agreement that binds City to grant a leasehold interest to Optionee shall not be entered into or otherwise executed, if at all, unless and until (i) Optionee properly exercises the option granted herein, and (ii) all conditions and obligations contained herein have been fully satisfied and/or waived in writing by the Party benefitted thereby.

WHEREAS, in order for Optionee to conduct initial investigations to determine the development potential of the Option Property before entering into a ground lease, if at all, Optionee desires to obtain an option to ground lease the Option Property from City and City is willing to grant an option to Optionee to ground lease the Option Property pursuant to the terms and conditions contained in this Agreement.

Exhibit A: Option Agreement

NOW, THEREFORE, in consideration of the above recitals, all of which are incorporated into this Agreement, and for other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the Parties agree as follows:

**AGREEMENT**

1. **Recitals.** The foregoing recitals are hereby incorporated into this Agreement as though fully set forth herein.
2. **Grant of Option.** City hereby grants Optionee the option to ground lease the Option Property from City upon the terms and conditions set forth in this Agreement (the “Option”) during the Option Term (as defined in Section 4, below).
3. **Option Term.** The “Option Term” shall commence upon the Effective Date and shall expire two (2) years from the Effective Date provided however that City in its reasonable discretion reserves the right to extend the Expiration Date for up to two (2) additional one-year periods. This Agreement shall terminate at the earliest to occur of: (a) the effective date of a Ground Lease between City and Optionee; (b) expiration of the Option Term; or (c) termination of the Agreement by City or Optionee as provided in this Agreement.
4. **Proposed Project Changes.** The Proposed Project and proposed use of the Option Property includes the key terms identified in Table A below (“Key Terms”). Optionee must provide notice to City of any proposed change and the unforeseen circumstance that requires the change at the earliest reasonable time, but in any event no later than 30 days after Optionee becomes aware of the proposed change. All proposed changes of Key Terms are subject to review and approval by City. Should City not consent to a proposed change, the Parties mutually agree to work in good faith to come to a resolution acceptable to both Parties. Should the Parties not be able to agree following good faith negotiations regarding a resolution of the proposed change, City shall have the right to terminate this agreement and seek an alternative tenant for the Option Property.

Table A – Key Terms of the Proposed Project and Use of the Option Property

<b>Key term</b>	<b>Description</b>
Term	Forty-five (45) years, with two options to extend for an additional ten (10) years each.
Permitted Use	To maintain and operate the Premises as a full service restaurant and event space.
Annual Rent	A. Base Rent of \$200,000/year starting in the 5 <sup>th</sup> Lease Year; increasing to \$350,000/year starting in the 6 <sup>th</sup>

Exhibit A: Option Agreement

	<p>Lease Year; and increasing by 3% annually starting in the 7<sup>th</sup> Lease Year.</p> <p>B. Percentage Rent starting in the 10<sup>th</sup> Lease Year, equal to 6% of Gross Receipts of the preceding Lease Year minus the Base Rent, due annually on the last day of the first month of the Lease Year.</p>
Parking	<p>Tenant is granted exclusive use of 150 parking stalls in the Seawall Lot adjacent to the Premises, as depicted in <u>Exhibit A</u> of the Ground Lease, in exchange for improvements and maintenance of Off-Site Improvements including but not limited to the entire Seawall Lot and portions of the Bay Trail and Seawall Drive, as described in <u>Exhibit C</u> of the Ground Lease.</p>
Improvements to the Leased Premises	<p>Tenant shall construct or cause to be constructed the improvements described in <u>Exhibit B</u> of the Ground Lease. Tenant shall maintain insurance coverage for removal and disposal of any exoskeleton and related architectural elements. If Tenant terminates the lease prior to the end of the lease term, City shall, in its sole discretion, determine whether removal and disposal is required.</p>
Off-Site Improvements	<p>Tenant shall construct or cause to be constructed the improvements and maintenance of those improvements up to \$17M over the Initial Lease Term, as described in <u>Exhibit C</u> of the Ground Lease.</p>
Labor Peace Ordinance	<p>Tenant shall comply with the provisions of the Labor Peace Policy Ordinance, B.M.C. Chapter 2.102.</p>
Employment Opportunities for Former Staff	<p>Employees of the former Hs. Lordships restaurant will be offered an opportunity to apply for positions in new business operations conducted on the property.</p>

5. Conditions to Exercise Option. To exercise the Option, prior to the expiration of the Option Term, Optionee shall deliver to City (1) written notice of Optionee’s intent to exercise the Option; (2) evidence to City of financial ability to carry out the project; and (3) the Optionee-signed Ground Lease, consistent with the Key Terms in Table A and otherwise materially consistent with the form of Exhibit B attached hereto. The Option may not be exercised until all the conditions set forth below are satisfied.
  - a. Optionee shall conduct investigations, tests and studies (including, without limitation, such inspections required by building codes and other governmental regulations, architectural inspections, engineering tests, economic feasibility studies,

Exhibit A: Option Agreement

environmental testing and investigations) to determine, among other things, if all needed entitlements can be procured in an acceptable form to develop and construct the Project. (See Exhibits C and D for a list of required regulatory approvals). In accordance with Section 15, Optionee has permission from City to conduct due diligence.

- b. Judicial Streamlining Requirements. Optionee shall provide documentation, as reasonably requested by the City, that proposed construction of offsite improvements will comply with the requirements for judicial streamlining of legal challenges brought under CEQA.
  - c. Environmental Requirements. Optionee shall be responsible for obtaining all studies necessary for compliance with CEQA. The Parties agree and acknowledge that City retains full discretion to approve, disapprove or condition the final Project to be developed and constructed at the Option Property, including, but not limited to, requiring additional mitigation measures or alternatives necessary to avoid or substantially lessen the environmental impacts of the Project. Any approval of the Project is expressly conditioned on Optionee's compliance with any applicable CEQA requirements. The Option may not be exercised until CEQA review is complete and City certifies or adopts any environmental review documents produced, including any required mitigation measures or alternatives to the project. (See Exhibit D.) Optionee shall be responsible for obtaining all other necessary entitlements for the Project, but only after CEQA compliance is completed.
6. Ground Lease of the Option Property. If all necessary conditions and obligations contained in this Agreement are satisfied and if Optionee elects to exercise the Option and ground lease the Option Property from City, City and Optionee shall execute a ground lease substantially in the form of Exhibit B attached hereto, with any necessary mitigation measures resulting from CEQA review. If a ground lease cannot be agreed upon by the Parties, this Agreement will terminate upon written notice to the non-terminating Party with no fault attributed to either Party.
  7. No Construction. Optionee shall not, directly or through any of its consultants, employees, or agents, commence any construction on the Option Property until it has received environmental clearance on the Project and entered into the Ground Lease.
  8. Building Repairs. Optionee may, with City's written approval in advance, complete repairs to the Option Property to prevent irreparable damage to the existing structure. Optionee must coordinate with the City to secure all required environmental clearance, building, and regulatory permits before work may begin. All repair costs, including but not limited to

Exhibit A: Option Agreement

design, permitting, City staff review, and repair work, shall be paid by Optionee.

9. Assignment. The qualifications and identity of Optionee are of particular concern to City. It is because of those unique qualifications and identity that City has entered into this Agreement. Accordingly, Optionee's rights and obligations under this Agreement are not assignable or transferable, and any purported voluntary or involuntary assignment or transfer of Optionee's rights or obligations hereunder shall be null and void. Notwithstanding the foregoing, Optionee may assign this Agreement with the prior written consent of City, to an entity which controls, is controlled by, or is under common control with Optionee. If City consents to the aforesaid assignment and assumption, Optionee is neither released nor discharged from any of its obligations under the Option Agreement, arising from and after the Effective Date.
  
10. Costs of the Parties; Cooperation of the Parties. Each Party shall be responsible for its own costs to comply with this Option Agreement, and, if Optionee exercises its Option, complete the Ground Lease. Optionee shall be responsible for the costs to conduct CEQA review, complete due diligence, and comply with all applicable state and local law and regulation related to its proposed use of the Option Property. Notwithstanding the foregoing, (a) City shall cooperate with Optionee in Optionee's efforts to complete due diligence and comply with all applicable state and local law and regulation related to Optionee's proposed use of the Option Property, so long as such cooperation does not result in material cost to City; and (b) City shall initiate and lead any required permitting processes as described in Exhibit D, Table 1: Permitting Requirements. The Parties agree that no applications for permits, entitlements, or approvals will be submitted, to the City or any other agency, prior to completion of CEQA review, including certification or adoption by City Council of the EIR or other CEQA document, as applicable.
  
11. Reimbursement and Payment. Optionee and City agree to the following reimbursement and payment plan for City costs that are Optionee's responsibility as noted in Sections 8 and 10.
  - a. Payment for City consultants. City shall provide Optionee with consultant cost estimate in advance. Optionee shall submit a lump sum to City equal to the cost estimate within 90 days. Consultant work shall not begin until Optionee submits lump sum payment. When the work is completed, any excess funds will be refunded by City to Optionee within 30 days. City shall periodically bill Optionee in amounts equal to any change orders or added costs as needed, and Optionee shall promptly submit payment within 30 days.  
Payment for City staff and/or related resources: Optionee agrees to provide progress payments to cover the costs of any City staff, City Attorney, or use of City resources. The City shall provide periodic statements listing the City's expenditures relating to

Exhibit A: Option Agreement

City staff, City Attorney or resources used for the Project. Optionee agrees to remit payment within 30 days of receipt of such a statement.

12. Exclusivity. During the Option Period, the City shall not market the Option Property, or entertain any offer or negotiate with any party other than Optionee to develop, lease, or otherwise transfer the Option Property or any portion thereof, to any party other than Optionee.
13. Termination of the Option Agreement. If Optionee determines during the Option Term that the costs to develop and operate the Proposed Project are unreasonable, uneconomic, or otherwise unfavorable to Optionee for any reason, Optionee may terminate this Option Agreement by written notice to City. City shall have the right, though not the obligation, to terminate this Agreement should Optionee fail to perform any of its obligations in accordance with the Performance Milestones established in Exhibit C. Optionee shall furnish City with all investigations, tests, studies, plans, drawings, as-builts, evaluations and reports to the City in their complete or most complete state.
14. Hold Harmless. The Optionee agrees to indemnify, protect, defend with counsel selected by the City, and hold harmless, the City, and any agency or instrumentality thereof, and its elected and appointed officials, officers, employees and agents, from and against any and all liabilities, claims, actions, causes of action, proceedings, suits, damages, judgments, liens, levies, costs and expenses of whatever nature, including reasonable attorney's fees and disbursements (collectively, "Claims") arising out of or in any way relating to the approval of this Agreement, any actions taken by the City related to this Agreement, or any environmental review conducted under the California Environmental Quality Act, Public Resources Code Section 210000 et seq., with respect to this Agreement, the Ground Lease, and related actions. The indemnification shall include any Claims that may be asserted by any person or entity, including the Optionee, arising out of or in connection with the approval of this Agreement, whether or not there is concurrent, passive or active negligence on the part of the City, and any agency or instrumentality thereof, and its elected and appointed officials, officers, employees and agents. The Optionee's duty to defend the City shall not apply in those instances when the Optionee has asserted the Claims, although the Optionee shall still have a duty to indemnify, protect and hold harmless the City.
15. Right to Enter City Property.
  - a. Commencing with the execution of this Option Agreement, Optionee (and/or its contractors and consultants), after providing written notification to City with respect to each entry, shall be allowed access to the Option Property prior to the exercise of the Option, at all reasonable times for the purposes of conducting investigations,

Exhibit A: Option Agreement

obtaining data, and making inquiries, inspections, tests, audits, studies, and analyses, that Optionee deems necessary or desirable in connection with completing due diligence and complying with all applicable state and local law and regulation related to the Project.

- b. Optionee shall cause any contractor or consultant entering the Option Property for the purpose of conducting invasive environmental, soils, or geological tests or building repairs pursuant to this Agreement to procure and maintain: (a) workers' compensation insurance required by the laws of the State of California; and (b) commercial general liability insurance in the amount of at least Two Million Dollars and No/100 (\$2,000,000) combined single limiting, naming City as an additional insured and containing a cross-liability endorsement or severability of interest clause. Optionee shall furnish certificates of such insurance coverage to City upon reasonable request. Such certificates shall contain a clause providing for thirty (30) days' advance written notice of cancellation or material change in coverage.
- c. Optionee shall indemnify and hold harmless City of and from any and all mechanic's liens, claims, actions, liabilities, costs, expenses, including attorneys' fees, and damages of any type or nature arising out of or in any way related to access to the Option Property by Optionee (and/or its contractors and consultants) during the Option Term pursuant to this Section 14, excluding (a) any losses or damages, including but not limited to a reduction in the value of the Option Property, resulting from any finding or results of any investigations, data, inquiries, inspections, tests, audits, studies, or analyses, whether or not negligent; and (b) any losses or damages resulting from the gross negligence or willful misconduct of City.

16. Miscellaneous Provisions.

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

City of Berkeley  
Parks, Recreation & Waterfront Department  
2180 Milvia Street, 3<sup>rd</sup> Floor  
Berkeley, California 94704  
PRW@berkeleyca.gov

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

Exhibit A: Option Agreement

Name  
Address  
Email

The Parties also shall endeavor to provide a courtesy copy of any notice via electronic mail.

- b. Successor and Assigns. This Agreement shall be binding upon and inure to the benefit of the Parties, their respective successors, personal representatives, and assigns.
- c. Superiority. To the extent of any inconsistencies between the Ground Lease and the Agreement from and after the effective date of the Ground Lease, the Ground Lease shall prevail.
- d. Further Acts. The Parties agree to perform such further acts as may be reasonably necessary to carry out the provisions of this Agreement.
- e. Authority to Enter and Bind. City and Optionee represent that each, respectively, and the individuals signing on behalf of each Party, has the full right, power, and authority to execute this Agreement and bind the Party.
- f. Section Headings and References. Section headings of this Option Agreement are solely for convenience of reference and shall not govern the interpretation of any of the provisions of this Option Agreement.
- g. Governing Law; Venue. California law shall govern this Agreement. Any action to enforce or interpret this Option Agreement shall be brought in a court of competent jurisdiction in Alameda County, California.
- h. Partial Invalidity; Severability. If any term of this Agreement is found to be void or unenforceable, such invalidity shall not affect the remaining terms of this Agreement, which shall continue in full force and effect.
- i. Counterparts; Electronic Signatures. This Agreement may be executed in several counterparts, each of which shall be deemed an original, and all of which taken together shall constitute one and the same instrument. Unless otherwise prohibited by law or policy, the Parties agree that an electronic signature to this Agreement and an electronic copy of this Agreement have the same force and legal effect as an original

Exhibit A: Option Agreement

ink signature transmitted in hard copy (e.g., transmission via email of a .pdf file containing a scanned or digitally applied signature).

- j. Memorandum of Option. Concurrently with the execution of this Agreement, the Parties shall execute and acknowledge a Memorandum of Option which Optionee, at its sole expense, shall be entitled to record.
- k. Submission of Option Agreement. The submission of this Option Agreement to City or its agents or attorneys for review will not be deemed an offer to lease the Option Property by Optionee, and no agreement with respect to the Option will exist unless and until this Agreement is executed and delivered by both City and Optionee.

IN WITNESS WHEREOF, this Agreement was executed by the Parties as of the Effective Date.

**OPTIONEE:**

**CITY:**

TSA Holding Group, LLC

City of Berkeley

By: \_\_\_\_\_

By: \_\_\_\_\_

City Manager

Date: \_\_\_\_\_

Date: \_\_\_\_\_

Exhibit A: Option Agreement

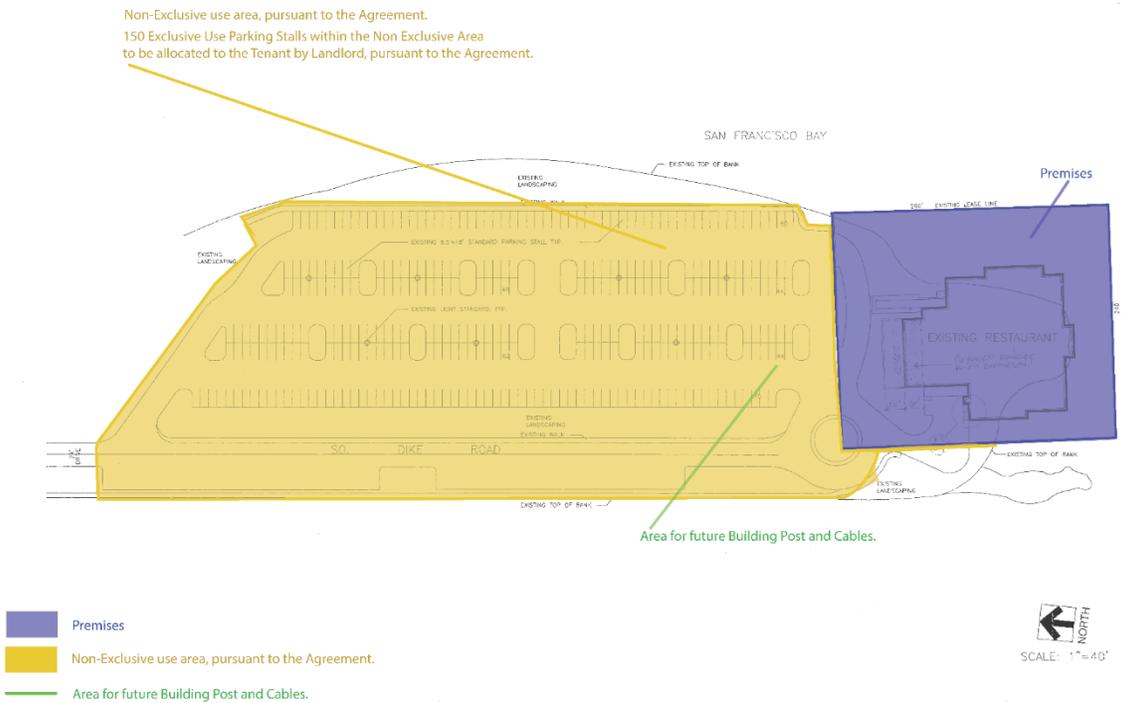
EXHIBIT A

Site Map and Premises Description

“Premises” of Option Property includes the approximately 1.543 acre parcel commonly known and referred to as 199 Seawall Drive on the Berkeley Marina, Berkeley, California (being a portion of APN 60-2545-1), shown below. Premises include the approximately 25,000 square feet free-standing building, as well as support pilings, rip-rap, landscaping and pathways and all other improvements of any type.

Non-exclusive use areas outside the Option Property include the Seawall Parking Lot, Bay Trail, and Seawall Drive section shown above. The potential Ground Lease would grant Tenant exclusive use of 150 parking spaces in the Seawall Lot in exchange for construction of improvements and maintenance of the non-exclusive use areas shown here. Specific location of exclusive use parking spaces may be adjusted throughout the Lease term with mutual agreement of Tenant and Landlord.

Tenant may place a post and cables for potential exoskeleton structure in the parking lot (non-exclusive area), with Landlord approval of location and design. Tenant agrees to give Landlord access to the leased portion of the Premises for City work and public access to the shoreline, trails and turnaround areas, as noted in Section 5.7 and 5.8 of the attached Lease.



Original Map Source: 6/15/1998 RW; HS Lordships Restaurant; Site Plan Sheet A1  
Specialty Restaurants Corporation; 4155 La Palma Ave, Suite 250, Anaheim, CA 92807; (714) 579 3900  
Modified by City of Berkeley for 2025 Lease Agreement | 199 Seawall Drive, Berkeley, CA 94701

Exhibit A: Option Agreement

**EXHIBIT B**

**Form of the Ground Lease**

Exhibit A: Option Agreement

EXHIBIT C

Performance Milestones

**Obligations (Deliverables to the City)**

**Timelines**

Designation of a qualified Project Manager

30 Days after execution of  
Option Agreement

A list of qualified prime consultant & subconsultants

30 Days after execution of  
Option Agreement

Kickoff Meeting

60 Days after execution of  
Option Agreement

Overall Project Schedule

14 days after Kickoff  
Meeting

Conceptual Design

30 Days after Kickoff  
Meeting

Consultation with Permitting Agencies

30 Days after Conceptual  
Design

Revised Conceptual Design

60 days after Consultation  
with Permitting Agencies

30% Design

60 days after Revised  
Conceptual Design

Administrative Draft CEQA Document

90 days after 30% Design

60% Design

60 days after Draft CEQA  
Document

90% Design

60 days after 60% Design

Draft Submittal of Permits for City Review

90 days after 90% Design

Revised Administrative Draft CEQA Document

60 days after receipt of initial  
City comments on  
Administrative Draft CEQA  
Document (preliminary  
feedback)

Final CEQA Document

60 days after receipt of City  
comments on revised

Exhibit A: Option Agreement

Administrative CEQA  
Document

Definitions:

Qualified Project Manager: 5 years of experience in coordinating and facilitating decision making process who had led projects with similar complexity and scope

Qualified Prime Consultant: Either as a licensed architect, civil engineer, or landscape architect to lead the design team on CEQA and permitting who had led projects with similar complexity and scope

Qualified Subconsultants: Any specialized planners, environmentalists, geotechnical engineers, structural engineers, etc. to support the prime consultant on specialized design elements, CEQA and permitting, with experience of similar complexity and scope.

Exhibit A: Option Agreement

**EXHIBIT D**

**Administrative Guidelines**

During this Option period, the Optionee will fund all analyses and review required to evaluate potential environmental impacts of potential improvements to the Premises envisioned in the draft Ground Lease, and to comply with other permitting requirements as summarized in Table 1.<sup>1</sup> The Optionee shall adhere to the following administrative guidelines:

1. General

Design of potential Improvements is subject to Landlord review and approval, California Environmental Quality Act (CEQA) review and certification, and regulatory approvals; see Table 1 for permitting requirements. Tenant may modify design in response to feedback through this permitting phase, and provide updated plans for Landlord review and approval.

2. Environmental Review

Environmental review must be complete prior to exercising the Ground Lease option. Optionee shall conduct any required environmental studies in accordance with CEQA, and City shall review, evaluate, and, if necessary, certify the CEQA document. As required by CEQA, the project will implement all feasible mitigation measures to reduce any significant environmental impacts of the project. If City Council declines to certify the CEQA document because significant environmental impacts remain, the Option Agreement will terminate, subject to Section 13.

Optionee shall pay all costs for CEQA analysis and determination, including reimbursing City for cost of CEQA consultant to evaluate project CEQA requirements and to complete CEQA documentation and reimbursing the City for the cost of City Attorney's Office staff time to review CEQA documentation.

3. Design Phase Approval Process

Optionee shall provide stamped submittals of the 199 Seawall Project at the 30%, 65%, and 90% design level to the City's Director of Parks, Recreation, and Waterfront Department ("the Director") as shown in Exhibit C, for review and approval. Optionee shall conduct project progress meetings with the Director after each submittal upon the Director's request.

At any stage of design, if City determines that additional environmental review is required due to a change in information or project conditions, Optionee will fund and conduct such analyses and submit for City review and evaluation.

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<sup>1</sup> Note that permitting requirements must be complete before construction, but not necessarily during the option period. Also note that Table 1 includes a list of permits typically required, but other permits may be required depending on the specific project elements.

**Exhibit A: Option Agreement**

4. Design Standards

Final Design shall meet all applicable and latest building codes, stormwater quality requirements, regulatory agency requirements, City polices and standards, and any other applicable standards.

5. Regulatory Permits

The Optionee shall complete all regulatory permit applications and supporting documents (see Table 1) and submit the draft documents to the City for review prior to submitting to regulatory agencies. The Optionee is responsible for permit fees. Any meetings with regulatory agencies shall be jointly conducted with the City. Comments from regulatory agencies that would affect CEQA determination shall be incorporated into the administrative draft CEQA document.

Restricted

Table 1: Permitting Requirements

<b>Regulatory Approval</b>	<b>Tenant's Responsibility</b>	<b>Landlord (PRW)'s Responsibility</b>	<b>Approving Body</b>	<b>Approval Needed Prior to Construction</b>	<b>Cost</b>
<b>Design &amp; Engineering</b>	To Perform	To Review and Approve	PRW	PRW	Borne by the Tenant
<b>Alameda Countywide Clean Water Program</b>	To Complete Technical Checklist and all needed info	To Review and facilitate permit submittal process	Building Permit/Public Works	C3 Checklist	Borne by the Tenant
<b>Construction Erosion Control Plan</b>	To Perform	To Review and facilitate permit submittal process	PRW/Building Permit/Public Works	Building Permit	Borne by the Tenant
<b>Pedestrian and Vehicular Traffic Handling Plan</b>	To Perform	To Review and Approve	PRW	PRW	Borne by the Tenant
<b>Construction Staging Area Plan with BMPs</b>	To Perform	To Review and Approve	PRW	PRW	Borne by the Tenant
<b>Tree Pruning or Removal Permit</b> ( <a href="https://berkeleyca.gov/sites/default/files/documents/Tree-Pruning-Removal-Permit_1.pdf">https://berkeleyca.gov/sites/default/files/documents/Tree-Pruning-Removal-Permit_1.pdf</a> )	To Complete Tree Removal Form	To Review and Approve	PRW	Tree Removal Permit	Borne by the Tenant

Restricted

Regulatory Approval	Tenant's Responsibility	Landlord (PRW)'s Responsibility	Approving Body	Approval Needed Prior to Construction	Cost
CEQA	To Complete Analysis and Documentation	To Review, Approve, and otherwise conduct CEQA process as lead agency	City	City Council, if Initial Study/Mitigated Declaration or Environmental Impact Report	Borne by the Tenant
BCDC Permit	To Complete Permit Application and provide all needed information	To Review, and facilitate permit submittal process	BCDC	Major, administrative, regionwide, or abbreviated regionwide permit	Borne by the Tenant
Army Corps of Engineers Permit	To Complete Permit Application and provide all needed information	To Review, and facilitate permit submittal process	Army Corps of Engineers	Nationwide Permit, or others	Borne by the Tenant
Regional Water Quality Board	To Complete Permit Application and provide all needed information	To Review, and facilitate permit submittal process	Regional Water Quality Board	401 Water Quality Certification or others	Borne by the Tenant
CA Fish and Wildlife Permit	To Complete Permit Application and	To Review and facilitate	CA Fish and Wildlife	TBD	Borne by the Tenant

Restricted

Regulatory Approval	Tenant's Responsibility	Landlord (PRW)'s Responsibility	Approving Body	Approval Needed Prior to Construction	Cost
	provide all needed information	permit submittal process			
<b>City of Berkeley Zoning and Design Review</b>	To Complete Permit Application and provide all needed information	To Review and facilitate permit submittal process	Planning Commission, Zoning Adjustments Board, Design Review Committee	Use Permit amendment	Borne by the Tenant
<b>City of Berkeley Building Permit</b>	To Complete Permit Application and provide all needed information	To Review and facilitate permit submittal process	Planning & Development Department	Building Permit	Borne by the Tenant

**GROUND LEASE**

**by and between**

**CITY OF BERKELEY  
("Landlord")**

**and**

**TSA HOLDING GROUP, LLC  
("Tenant")**

Dated \_\_\_\_\_, \_\_\_\_\_

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**LIST OF EXHIBITS**

<u>Exhibit A</u>	Site Map and Premises Description
<u>Exhibit B</u>	Improvements to the Leased Premises
<u>Exhibit C</u>	Off-Site Improvements Exhibit C.1: 30% Design Plan for Off-Site Improvements
<u>Exhibit D</u>	Memorandum of Ground Lease

**BASIC LEASE INFORMATION  
(Ground Lease)**

1. **“Landlord”** CITY OF BERKELEY, a public body corporate and politic
- Notice Address:  
City of Berkeley  
2180 Milvia Street  
Berkeley, California 94704  
Attention: City Manager  
Telephone: (510) 981-7000  
Facsimile: (510) 981-7099
- With a copy to:  
City of Berkeley  
2180 Milvia Street  
Berkeley, California 94704  
Attention: City Attorney  
Telephone: (510) 981-6991  
Facsimile: (510) 981-6960
2. **“Tenant”** TSA HOLDING GROUP, LLC, a California limited liability company
- Notice Address:  
TSA Holding Group, LLC  
2345 Balboa Street  
San Francisco, California 94121  
Attention:  
Telephone:  
Email:
- With a copy to:
3. **“Effective Date”** The later of (i) the date of last execution and (ii) the date that is 30 days after the Landlord’s City Council’s adoption of the Ordinance by which this Ground Lease is approved.
4. **“Premises” and “Facility”** The **“Premises”** are the approximately 1.543 acre parcel of land commonly known and referred to as 199 Seawall Drive on the Berkeley Marina, Berkeley, California (being a portion of APN 60-2545-1), shown on the map attached hereto as Exhibit A (**“Site Map”**). The Premises includes the **“Facility”**, which includes without limitation the approximately 25,000 rentable square feet free standing restaurant building located on the Premises as generally depicted in Exhibit A attached hereto, and all other

**BASIC LEASE INFORMATION  
(Ground Lease)**

improvements of any type constructed in accordance with the terms of this Ground Lease.

5. **“Exclusive Use” and “Non-Exclusive Use”** Tenant is granted **“Exclusive Use”** during the Initial Term of 150 parking stalls in the Seawall Lot adjacent to the Premises, in exchange for up to \$16M for improvements and maintenance in the entire Seawall Lot and portions of the Bay Trail and Seawall Drive or other Waterfront areas, (**“Non-Exclusive Use”** areas, as described in Exhibits A and C). If Options to Extend are exercised, Tenant may continue to have Exclusive Use of 150 parking spaces in exchange for rent or maintenance, see 2.3 and Exhibit C. Tenant may utilize the Exclusive Use parking spaces and any connected architecture to generate income for purpose of covering the maintenance costs, see 5.14.E.
6. **“Permitted Use”** To maintain and operate the Premises as a full service restaurant and event space for the convenience and promotion of commerce, navigation, and fishery in the Berkeley Marina and for no other purpose.
7. **“Commencement Date”** The Effective Date.
8. **“Term”** Forty-five (45) years commencing on the Commencement Date, plus the first partial month if the Commencement Date is other than the first day of the month (**“Initial Term”**). Tenant has two options to extend the Initial Term for an additional ten (10) years each (each, an **“Extension Term”**), subject to Section 2.3 (**“Options to Extend”**). **“Lease Year”** shall be the twelve (12)-month period commencing with the Commencement Date and each anniversary thereof. The **“Expiration Date”** is the date the Term expires.
9. **“Early Termination”** As provided in Section 2.2, either Tenant or Landlord may initiate the process of dissolving the Ground Lease if Tenant is not granted regulatory or Landlord approval for designs of the Improvements on the Premises (as defined in Section 7.1) and Landlord determines that no feasible alternative exists. This provision may only be exercised within the first lease year.
10. **“Annual Rent”**
  - A. Generally. Payable as provided in Section 3 below, both:
  - B. **“Base Rent”** commencing in the fifth Lease Year at the amount of Two-Hundred Thousand Dollars (\$200,000) per year; and Three-Hundred Fifty Thousand Dollars (\$350,000) per year commencing in the sixth Lease Year; and
  - C. **“Percentage Rent”**. Commencing in the tenth Lease Year, Percentage Rent is equal to six percent (6%) of the sum of Gross Receipts of the preceding Lease Year minus the Base Rent;

**BASIC LEASE INFORMATION  
(Ground Lease)**

Percentage Rent is due in the first month of the Lease Year.

D. **“Base Rent Adjustment”**. Base rent will increase by three percent (3%) annually commencing in the seventh Lease Year, as provided in Section 3.3 below.

- 11. **“Gross Receipts”** See Section 3.5.
- 12. **“Improvements to the Leased Premises”** See Section 7.1 and Exhibit B.
- 13. **“Capital Contribution”** Tenant shall provide the equivalent of \$1M in off-site improvements as a capital contribution.
- 14. **“Off-Site Improvements”** Tenant shall complete \$17M in off-site improvements during the Initial Term (\$16M for exclusive use parking plus \$1M as capital contribution) including initial construction of off-site improvements as described in Exhibit C, maintenance of those or other Waterfront improvements. See Section 7.2 and Exhibit C.
- 15. **“Labor Peace Ordinance”** See Section 16.39.
- 16. **“Employment Opportunities for Former Staff”** Employees of the former Hs. Lordships restaurant will be offered an opportunity to apply for positions in new business operations conducted on the property.

The Basic Lease Information set forth above and the Exhibits attached hereto are incorporated into and made a part of the following Ground Lease. In the event of any conflict between the Basic Lease Information and terms of the Ground Lease, the terms of the Ground Lease shall control.

**LANDLORD'S INITIALS** \_\_\_\_\_

**TENANT'S INITIALS** \_\_\_\_\_

## GROUND LEASE

THIS GROUND LEASE (“**Ground Lease**”) is made and entered into this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, to be effective on the “**Effective Date**” (as defined in the Basic Lease Information), by and between the Landlord and Tenant identified in the Basic Lease Information, who agree as follows:

### ARTICLE 1. PROPERTY AND BACKGROUND

#### 1.1 Overview.

A. Premises. Landlord owns the Premises (as defined in the Basic Lease Information). The Facility is included in the Premises.

B. Improvements. Landlord owns the Facility that exists at the commencement of the lease (as described in the Basic Lease Information). “Improvements” as used in this Lease is defined as the improvements constructed by Tenant pursuant to Section 7.1 and Exhibit B.

C. Occupancy. Tenant currently leases and occupies the entire Premises and Facility under the Ground Lease. No subtenancies are permitted without express written consent of Landlord.

1.2 Ground Lease. For and in consideration of the payment of Rent and the performance of all the covenants and conditions of this Ground Lease, Landlord hereby leases and demises to Tenant, and Tenant hereby leases and hires from Landlord, the Premises, for the Term (as defined below) and upon the covenants and conditions set forth herein.

### ARTICLE 2. TERM

2.1 Term. The “Initial Term” of this Ground Lease shall be as set forth in the Basic Lease Information and shall commence as of the Commencement Date as set forth in the Basic Lease Information. The Initial Term together with any Extension Term(s), if any, are collectively referred to herein as the “Term.”

#### 2.2 Early Termination

. Either Tenant or Landlord may initiate the process of dissolving the Ground Lease if Tenant is not granted regulatory or Landlord approval for the design of the Improvements on the Premises as described in Exhibit B, and Landlord determines that no feasible alternative exists. This provision may only be exercised within the first lease year.

2.3 Options to Extend. Provided that Tenant is not in default under the terms of this Lease beyond any applicable notice and cure period, Tenant shall have two (2) consecutive options to extend the Term of this Lease for an additional ten (10) years each (each, a “Renewal Option”). To exercise a Renewal Option, Tenant must deliver written notice to Landlord no later than six (6) months before the then-scheduled expiration of the Term. Base Rent to be paid by Tenant during each Renewal Option Term shall be determined on the first day of such Renewal Option Term, and be adjusted annually based on the “Base Rent Adjustment”

methodology described in 3.4 below. Exclusive use parking may continue in the option periods, provided that Tenant pays rent for those spaces or provides maintenance in lieu of rent, as described in Exhibit C.

**ARTICLE 3.  
RENT AND SECURITY**

**3.1**            **Rent.** Rent shall be paid as set forth in this Article 3. This Ground Lease is a net lease, and Base Rent, Percentage Rent and Annual Rent (as provided in Basic Lease Information or in Section 2.3), and other payments due and payable hereunder to or on behalf of Landlord (collectively, "Rent") shall be paid without notice or demand, and, except as specifically provided for in this Ground Lease, without offset, deduction or credit. Any monthly payment of Annual Rent for any period during the Term which is for less than one month shall be a pro rata portion of the then-monthly portion of Annual Rent, based upon the actual number of days in the month.

**3.2**            **Annual Rent.** During the Initial Term and any Renewal Terms, and commencing on the Effective Date (as defined in the Basic Lease Information), Tenant shall pay to Landlord Annual Rent.

**3.3**            **Payment of Annual Rent.**

A.        Tenant shall pay Base Rent commencing with the fifth Lease Year in the amount of \$16,666.67 per month (\$200,000 per year) to Landlord in monthly installments in advance on or before the first day of each month. Commencing with the sixth Lease Year, Tenant shall pay Base Rent in the amount of \$29,166.67 per month (\$350,000 per year) to Landlord in monthly installments in advance on or before the first day of each month.

B.        Commencing with the tenth Lease Year, Tenant shall pay Percentage Rent equal to 6% of the sum of Gross Receipts of the preceding Lease Year minus the annual Base Rent. Percentage Rent is due in the first month of the Lease Year. For example, at the beginning of the tenth Lease Year, Percentage Rent for the Gross Receipts of the ninth Lease Year will be due. Except as otherwise expressly provided in this Ground Lease, Percentage Rent shall be calculated (and paid) on an annual basis by the first month of the Lease Year.

**3.4**            **Base Rent Adjustments**

. Beginning on the first day of the seventh Lease Year ("Adjustment Date"), and every one year thereafter, the Base Rent shall increase by an annual amount determined by multiplying the annual base rent for the immediately preceding Lease Year by a factor equal to 3%.

**3.5**            **Gross Receipts.**

A.        **Definition.** "**Gross Receipts**" includes the gross selling price of all food, alcohol, merchandise, goods and services sold, leased or rented in or from the Premises or exclusive-use parking area outside leased premises by Tenant and (if any) its subtenants, licensees and concessionaires; whether for cash or on credit; whether the order is received directly by on-site personnel, or is received by telephone, facsimile, email or other electronic or other ordering system at the Premises or at another location, as long as the order is either received at or filled at or from the Premises (orders delivered from the Premises, whether by Tenant employee, independent contractors or third parties, are deemed filled at the Premises);

includes the gross sale prices from approved vending and other machines on or at the Premises; and regardless of whether bookkeeping, payment or collection of any account may take place away from the Premises. Any installment or credit sale shall be treated as a sale for the full cash price at time of sale.

B. Exclusions from Gross Receipts. Gross Receipts excludes the following:

1. The amount of deposits or prepayments until applied, and the selling price of gift certificates or vouchers until redeemed;
2. Interest, service or sales carrying charges or other charges, however denominated, paid by customers for extension of credit on sales where not included in the original sales price, but not charges or expenses in connection with credit cards or bank cards (or other similar devices or systems now or hereafter developed), whether paid by the customer or by Tenant;
3. The selling price of all items returned by customers and accepted for full credit and refunds to customers, or the amount of discounts and allowances made thereon, but only if the selling price of such items were previously included in Gross Receipts, and further provided that all such credits, discounts and allowances shall again be included in Gross Receipts when used or redeemed for merchandise or other items;
4. Tenant's service of food or liquor for promotion purposes or to employees for which Tenant makes no charge, but which is shown on Tenant's books of account as sales;
5. State, county or city sales, use, excise, gross receipts or similar taxes (including any such future taxes), but only if separately denominated from the selling price and collected from customers;
6. Sums and credits received in settling claims for loss of or damage to inventory, merchandise, fixtures, equipment or furniture located within the Premises;
7. Sales of fixtures, equipment or property which is not inventory or stock in trade;
8. Amounts uncollected due to bad checks or uncollectible credit accounts;
9. Tips and gratuities received by Tenant's employees;
10. Proceeds received from insurance policies, condemnation awards and the like;
11. The amount of sales for merchandise, beverages (alcoholic or non-alcoholic) and food where no money is collected for such sales (commonly known in the industry as "comps" or "complimentaries") (with sales for such purposes not to exceed four percent (4%) of Gross Receipts per Lease Year);

12. The amount of sales for merchandise, beverages (alcoholic and non-alcoholic) and food where no money is collected for such sales due to damage, spoilage, plunder or breakage (commonly known as "spills");

13. Fees and charges paid to credit card, bank processing and check verification companies (including without limitation, Visa, MasterCard, American Express and Telecheck);

14. Proceeds from the sale of Tenant's business in whole;

15. The amount of any discounts or credits on sales provided to customers pursuant to any promotion, loyalty or rewards programs offered by Tenant or its affiliates from time to time;

16. Revenue from the sale of memberships in any loyalty or rewards programs offered by Tenant or its affiliates or similar memberships;

17. Sales where and solely to the extent that, the proceeds are donated to charitable or non-profit organizations provided that such amounts do not exceed three percent (3%) of Gross Receipts in any Lease Year; and

18. A surcharge customarily charged to customers in Berkeley, CA by restaurant operators used to reimburse operators for costs and other employee expenses including healthcare.

C. At Landlord's request, Tenant shall, within fifteen (15) days of request, furnish Landlord with an unaudited statement of Gross Receipts for the requested timeframe. Such statements shall not be used to compute Percentage Rent under this Ground Lease.

D. Tenant shall, not later than the date set forth in Section 2.3.B above, deliver to Landlord a detailed and accurate accounting in accordance with generally accepted accounting principles ("**GAAP**") consistently applied, certified as correct under penalty of perjury by an officer of Tenant, showing the basis of computation of Gross Receipts and Percentage Rent for the applicable Lease Year. The accounting shall be accompanied by copies of all Tenant monthly state sales tax returns for the applicable Lease Year.

E. Tenant, on behalf of itself and its affiliated entities, shall maintain complete electronic books and records of its operations at its corporate office headquarters in San Francisco, California. Tenant shall keep all electronic books and records containing any or all of the foregoing information, for not less than five years from the end of the Lease Year to which they pertain. Landlord and its agents and employees shall have the right at any time during regular business hours to examine and inspect all Tenant books and accounts relating to Gross Receipts, including without limitation sales tax reports, tax returns, and other reports to any governmental agency, for the purpose of verifying the accuracy of any statement of Gross Receipts provided under this Ground Lease. If requested in writing by Landlord, within ten (10) business days of such request, Tenant shall deliver (at Tenant's sole cost and expense) all electronically maintained books and records (i) in the form of fully readable (i.e., without requiring conversion to another type of file) electronic data files, or (ii) in the form of hard-copy (paper) printouts of the same.

F. Audit Rights and Obligations.

1. For purposes of verifying Percentage Rent payments due Landlord, Landlord shall have the right (not more than once in any five-Lease Year period) to require Tenant to submit full financial statements, prepared by a third-party certified public accountant, supporting Tenant's computations of Gross Receipts and Percentage Rent for the applicable Lease Year. Landlord shall notify Tenant at least 30 days prior to expiration of the applicable Lease Year of the requirement to submit full financial statements for such Lease Year. Tenant shall submit such full financial statements to Landlord within 45 days following the end of the applicable Lease Year.

2. Additionally, Landlord's representatives shall have the right (not more than once in any three-Lease Year period, unless a prior audit within that period revealed a discrepancy greater than the amount set forth below) to inspect Tenant's books, leases, subleases, contracts, and all other pertinent records, and independently audit the results of Tenant's operations, during reasonable business hours, on 10 business days' written notice to Tenant. Tenant shall make all such records available to Landlord's representatives for such audit. If as a result of an audit by an independent certified public accountant hired by Landlord, additional Percentage Rent is due Landlord for any Lease Year which exceeds by 4% the Percentage Rent actually paid for such Lease Year, the reasonable cost of such audit shall be paid by Tenant, and the additional amount of Percentage Rent owed Landlord shall bear interest from the date it should have been paid until paid at the lesser of 10% per annum compounded annually or the maximum rate permitted by Law ("**Interest Rate**"). If the discrepancy is less than 4%, Tenant need not pay any interest on the delinquent Percentage Rent as long as Tenant pays it within 30-days of issuance of the audit; otherwise, it will bear interest at the Interest Rate from the date it should have been paid until paid.

**3.6** Late Charge. The late payment of any Base Rent will cause Landlord to incur additional costs, including administration and collection costs and processing and accounting expenses and increased debt service ("Delinquency Costs"). If Landlord has not received any installment of Base Rent within five days after its due date, Tenant shall pay a late charge of five percent of the delinquent amount immediately. The parties agree that this five percent late charge represents a reasonable estimate of the Delinquency Costs incurred by Landlord in the event of a late Base Rent payment. Landlord's acceptance of late Base Rent, partial Base Rent and late charges does not equate with a waiver of Tenant's default with respect to the overdue amount, or prevent Landlord from exercising any rights and remedies available under this Ground Lease and/or by operation of Law.

**3.7** Application of Payments. All payments received by Landlord from Tenant shall be applied to the oldest obligation owed by Tenant to Landlord. No designation by Tenant, either in a separate writing, on a check or money order, or otherwise shall modify this Section or have any force or effect.

#### ARTICLE 4. TAXES AND ASSESSMENTS

**4.1** Personal Property Taxes. Tenant shall pay before delinquency all taxes, assessments, license fees and other charges ("Taxes") levied and assessed against Tenant's personal property installed or located in or on the Facility or the Premises which become payable during the Term. On demand by Landlord, Tenant shall furnish Landlord with satisfactory evidence of these payments. Notwithstanding the foregoing, Tenant shall have the

right to contest the imposition or collection of any such Taxes which Tenant reasonably believes was improperly assessed or calculated.

**4.2 Statement Regarding Possessory Interest Tax.** This Ground Lease creates a possessory property interest in Tenant. Tenant acknowledges and agrees that Tenant's leasehold and/or other real property interests may be subject to property taxation, and Tenant or the party in whom the possessory property interest is vested may be subject to the payment of property taxes levied on the interest. Such taxes are referred to herein as "Possessory Interest Taxes," and shall be paid by Tenant as part of Real Property Taxes as provided in Section 4.3 below.

**4.3 Real Property Taxes.** Tenant shall pay all real property taxes and general and special taxes including Possessory Interest Taxes (collectively, "Real Property Taxes"), levied and assessed against the Premises or Facility or any portion thereof. Tenant shall, semiannually, pay the Real Property Taxes not later than the Taxing Authority's (as defined below) delinquency date. If, at any time during the Term, any authority having the power to tax, including any federal, state or county government or any political subdivision thereof (collectively, "Taxing Authority"), shall alter the methods and/or standards of taxation and assessment against the legal or equitable interests of Landlord in the Premises or Facility or any other improvements located or constructed thereon, in whole or in part, so as to impose a monetary obligation on Landlord in lieu of or in addition to the taxes and assessments in existence as of the date of this Ground Lease, such taxes or assessments based thereon, including: (a) any tax, assessment, excise, surcharge, fee, levy, penalty, bond or similar imposition (collectively, "Impositions"), on Landlord's right to rental or other income from the Premises or Facility or as against Landlord's leasing of the Premises, (b) any Impositions in substitution or in lieu, partially or totally, of any Impositions assessed upon real property prior to any such alteration, (c) any Impositions allocable to or measured by the area of the Facility and/or Premises or the rental payable hereunder, including any Impositions levied by any Taxing Authority with respect to the receipt of such rental or with respect to the possession, leasing, operation, management, maintenance, alteration, repair, use or occupancy by Tenant or any subtenant of the Premises or Facility or any portion thereof, (d) any Impositions upon this lease transaction or any document to which Tenant is a party which creates or transfers any interest or estate in or to the Facility and/or Premises or any portion thereof, or (e) any special, unforeseen or extraordinary Impositions which, although not specifically described above, can fairly be characterized as a real property tax or a substitute for real property tax, shall be considered as Real Property Taxes for the purposes of this Ground Lease. Real Property Taxes shall exclude, however, all general income taxes, gift taxes, inheritance taxes and estate taxes, if any, owed by Landlord.

**4.4 Assessments.** Tenant also shall be responsible for and shall pay prior to delinquency all assessments imposed against the Premises or Facility by Landlord. Tenant acknowledges that Landlord has established certain assessment districts within the City of Berkeley and that all properties within the assessment districts are subject to annual assessments. Landlord reserves the right to create additional districts and to terminate any such district(s). Landlord shall provide Tenant with written notice of each such assessment not later than sixty (60) days before such assessment is due and payable.

**4.5 Tenant's Tax Liability Prorated.** Tenant's liability to pay Real Property Taxes and assessments shall be prorated on the basis of a 365-day year to account for any fractional portion of a fiscal tax year included in the Term at its inception and expiration or earlier termination in accordance with this Ground Lease.

**4.6 Real Property Tax Contest.** Without Landlord's prior written consent, Tenant shall not seek a reduction in the assessed valuation of the Premises or Facility, or contest any Real Property Taxes that are to be paid by Tenant. Landlord's consent may be given or withheld in Landlord's sole discretion. If Landlord consents and Tenant seeks a reduction or contests the Real Property Taxes, Tenant shall remain obligated to pay all Real Property Taxes prior to delinquency, and shall at all times protect Landlord from foreclosure of any lien. Landlord shall not be required to join in any proceeding or contest brought by Tenant.

**ARTICLE 5.  
USE, CHARACTER, OPERATION AND MAINTENANCE COVENANTS**

**5.1 General.** Tenant covenants and agrees on behalf of itself and its successors and assigns that Tenant shall continuously use and operate the Premises and Facility for the Permitted Use and for no other purpose.

**5.2 Use Obligations.** Tenant shall, during such hours and on all such days as comparable restaurants are customarily open for business, continuously use and operate the Facility and Premises as a first class restaurant and event space, and at all times will carry a full and complete stock of food and beverages offered for sale at competitive prices and maintain adequate personnel for the efficient service of customers, and for no other purpose. In connection with Tenant's use and operation of the Facility, Tenant shall comply with all of the following:

A. Tenant shall employ its best judgment, efforts and abilities to operate the business in a manner calculated to produce the maximum profitable volume of sales, rents and transactions obtainable and to enhance the reputation and attractiveness of the Berkeley Marina.

B. Except for emergencies or holidays on which most comparable restaurants the City of Berkeley are also closed, Tenant shall be open for full business not fewer than six days per week, not fewer than 10 hours per day. Tenant may close on nationally recognized holidays in its sole discretion.

C. Tenant shall not do or permit to be done anything which in any way unreasonably interferes with the normal operation and use of any portion of the Berkeley Waterfront (as defined in Section 5.10) or the means of ingress and egress thereto ("**Substantial Interference**"). Tenant shall use every effort to eliminate Substantial Interference, including taking prompt legal action if appropriate. If Tenant fails to bring an immediate halt to any Substantial Interference, Landlord shall have the right (i) to designate the required action for Tenant to take, or (ii) to commence itself any legal action to eliminate the Substantial Interference, in either case at Tenant's sole cost and expense. Any agreement entered into by Tenant with regard to use of the Premises or Facility shall contain a provision reserving to Tenant all of the necessary rights and remedies to permit Tenant to comply with its obligations under this subsection and authorizing Landlord to enforce it if Tenant fails to do so.

**5.3 General Use Prohibitions.** Tenant covenants and agrees that in connection with the use and operation of the Premises and Facility, and any portion thereof (including without limitation parking areas and pedestrian and bicycle paths), Tenant will not:

A. Use or permit the use of any reasonably objectionable advertising medium including any loudspeakers, phonographs, public address systems, sound amplifiers, radio or

broadcast within the Facility in such manner that any sounds reproduced, transmitted or produced shall be directed primarily beyond the interior of the Facility (provided, however, that nothing herein shall be deemed to prohibit the installation and use of a public address system for security purposes, or for the use of a reasonable level of music for outdoor dining areas or plaza areas), and will keep all mechanical apparatus free of unreasonable vibration and noise which may be transmitted beyond the interior of the Facility;

- B. Permit undue accumulations of garbage, trash, rubbish or any other refuse;
- C. Create, cause, maintain or permit any nuisance (as the same may be defined by applicable Law) in, on or about the Premises or Facility;
- D. Commit or suffer to be committed any waste in, on or about the Premises or Facility;
- E. Use or allow the Premises or Facility to be used for any unlawful purpose, or for any purpose which violates the terms of any recorded instrument affecting the Premises;
- F. Cause or permit any insurance coverage on the Premises or Facility to become void or voidable or make it impossible to obtain any required insurance at commercially reasonable rates;
- G. Intentionally cause or knowingly permit any material structural damage to or deterioration of the Premises or Facility or to any adjacent public or private property or improvements;
- H. Permit any auction, fire, bankruptcy, distress, clearance, or going-out-of-business sale to be conducted thereon, or the posting of any sign or advertisement regarding any such activity; or
- I. Violate any Law, ordinance or regulation applicable to the Premises or Facility.

**5.4 Non-Discrimination.** Tenant covenants and agrees that there shall be no discrimination against or segregation of any person or group of persons on account of race, color, creed, religion, sex, marital status, sexual orientation, source of income, age, physical or mental handicap, medical condition, national origin or ancestry in the sublease, transfer, use, occupancy, tenure or enjoyment of the Premises, the Facility or any portion thereof, nor shall Tenant, or any person claiming under or through Tenant, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, sublessees, subtenants, vendees, users or customers in the Premises, the Facility, or any portion thereof. Tenant shall refrain from restricting the use, occupancy, rental or sublease of the Premises, the Facility, or any portion thereof on account of race, color, creed, religion, sex, marital status, sexual orientation, source of income, age, physical or mental handicap, medical condition, national origin or ancestry of any person. All subleases and contracts made relative to the Premises, the Facility, or any portion thereof, shall contain or be subject to substantially the following nondiscrimination clause:

- A. **In subleases:** "The lessee herein covenants by and for himself or herself, his or her heirs, executors, administrators and assigns, and all persons claiming under or through

him or her, that there shall be no discrimination against or segregation of any person or group of persons on account of race, color, creed, religion, sex, marital status, sexual orientation, source of income, age, physical or mental handicap, medical condition, national origin or ancestry in the leasing, subleasing, transferring, use, occupancy, tenure or enjoyment of the premises herein leased, nor shall the lessee himself or herself, or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, sublessees, subtenants or vendees in the Premises, the Facility thereon, or any part thereof, herein leased.”

B. **In contracts:** “There shall be no discrimination against or segregation of any person or group of persons on account of race, color, creed, religion, sex, marital status, sexual orientation, source of income, age, physical or mental handicap, medical condition, national origin or ancestry in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the Premises, the Facility or any portion thereof, nor shall the transferee himself or herself, or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, sublessees, subtenants or vendees in the Premises, the Facility thereon, or any part thereof.”

**5.5 General Standards of Maintenance.** Tenant covenants and agrees that it shall maintain, or cause to be maintained, the Premises, Facility, On-Site Improvements, and Off-Site Improvements as depicted in Exhibits A, B and C. This includes the building, support pilings, rip-rap, landscaping and pathways on the leased premises; as well as maintenance responsibility for off-site improvements as described in Exhibit C. All portions of the Premises, the Facility, and Non-Exclusive Use Areas shall be maintained in first-class condition and repair, subject only to normal wear and tear. To accomplish such maintenance, Tenant shall either staff or contract with and hire licensed and qualified personnel to perform such maintenance work, including the provision of labor, equipment, materials, support facilities, and any and all other items necessary to comply with the requirements of this Section 5.5. All maintenance work shall conform to all applicable Federal and State Occupation Safety and Health Act standards and regulations for the performance of maintenance. All Maintenance work on Off-Site Improvements shall be reviewed and approved in writing by the Landlord in advance. When parking lot or street closures are necessary, notice shall be given 7 days in advance. Landlord shall review and authorize work, if appropriate, 72-hours in advance of work commencement.

**5.6 Governmental Requirements.** Tenant, at Tenant's expense, shall comply with all applicable Hazardous Materials Laws (as defined in Section 6.2 below), statutes, laws, codes, rules, orders, zoning, ordinances, directions, regulations, permits, or other requirements of federal, state, county, municipal, or other governmental authorities having jurisdiction, now in force or which may hereafter be in force, and with all requirements of any board or fire insurance underwriters or other similar bodies, now or hereafter adopted, enacted or made applicable, (individually "Law" and collectively "Laws"), which shall impose any duty upon Landlord or Tenant with respect to the use, occupancy, or alteration of the Premises or Improvements or any portion thereof, including those requiring alterations or additions to be made to, or safety appliances or devices to be maintained or installed in, on or about the Premises or Improvements or any portion thereof, and payment of any fees, charges or assessments arising out of or in any way related to the Premises or Improvements or any portion thereof as a source of adverse environmental impacts or effects.

**5.7 Landlord Access Rights.** During the Term of this Ground Lease, Landlord and its designated representatives shall have the right, but not the obligation, to enter

the Premises and Facility for the purpose of constructing, maintaining, replacing or adding underground utility facilities, including but not limited to water mains, sanitary sewer mains, storm drain mains, gas mains, telephone and electrical distribution facilities and fire alarm circuits; or for City work around the shoreline, trails, and turnaround areas. Landlord shall replace at its cost such surface improvements constructed by Tenant if and to the extent they may be disturbed by such construction, maintenance, replacement or addition to the condition of such improvements as of the time such disturbance occurred. If as a result of the foregoing work by Landlord or its designated representatives, Tenant is unable to operate its business in the Premises and Facility or any portion thereof as a result of being denied access to the Premises or Facility or any stoppage or interruption in any of the basic services to be provided by Landlord hereunder, Tenant is entitled to a pro rata abatement of Base Rent to the extent to such denial of access or stoppage or interruption interferes with the normal conduct of Tenant's business.

**5.8 Access to Public Amenities.** Tenant shall maintain public access to the shoreline, trails, and other public amenities located on the Premises.

**5.9 Landlord Use of Event Facilities.** Landlord shall have the right to use the "Event Facilities" (as defined below) for purposes of hosting Landlord's in-house training programs, and/or accommodating other community events, as follows and in a manner consistent with the State Tidelands Grant, public trust uses, and applicable Laws:

A. Event Days. Tenant shall accommodate up to two event days per Lease Year, upon reasonable prior written notice by Landlord as set forth below.

B. Event Facilities. Any room or space on the Premises that can be reserved for events.

C. Facility Reservation. Landlord shall provide Tenant with a written request to use Event Facilities. The request shall identify the component(s) of the Event Facilities needed and dates desired ("**Reservation Request**"). Landlord shall provide all Reservation Requests not more than 45-days in advance of the requested date(s). Subject to availability, Tenant shall make the Event Facilities available to Landlord as specified in the applicable Reservation Request. If the specified Event Facilities are not available on the requested date(s), Tenant shall notify Landlord in writing within five business days of the Reservation Request as well as propose and reserve for Landlord at least two alternative dates as close as possible to the requested date(s) ("**Response**"). Tenant may determine whether to honor any Reservation Request received more than 45-days in advance in its reasonable discretion.

D. No Cost to Landlord. Landlord shall accept or reject the proposed alternative date(s) within five (5) business days of Tenant's Response. Landlord's failure to respond within such 5-business day period shall be deemed rejection of Tenant's Response. Landlord's use of the Event Facilities shall be at no cost or expense (including set up fees) to Landlord; provided, however, that Landlord will pay for any food and beverage service requested by Landlord. Tenant shall not be entitled to any abatement or reduction of Rent related to Landlord's use of the Event Facilities.

**5.10 Use of Berkeley Waterfront Property; Public Trust.**

For purposes of this Ground Lease, "**Berkeley Marina**" means the Premises and all other lands subject to the State Tidelands Grant (also referred to as "**State Grant Lands**"). "Berkeley Marina," includes the areas bound by the following:

- On the south by a westerly extension of Channing Way
- On the north by the north edge of Cesar Chavez Park, and a westerly extension thereof
- On the west by a north-south line through the end of the Municipal Fishing Pier
- On the east by the east edge of Cesar Chavez Park, and by the west edge of the Meadow area of Eastshore State Park and a southerly extension thereof.

A. Tenant agrees that except as otherwise provided in this Ground Lease, it is not a covenant or condition of this Ground Lease or of any other agreement with Tenant that Landlord undertake or cause to be undertaken any development or redevelopment of the Premises or the Berkeley Waterfront, and Landlord shall incur no liability whatsoever to Tenant for failure to undertake such development or redevelopment.

B. Landlord at all times shall have the right and privilege of making such changes in and to the Berkeley Waterfront (other than the Premises) from time to time which in its sole opinion are deemed to be desirable or appropriate, including the location and relocation of stairways, sidewalks, pathways, driveways, streets, entrances, exits, automobile parking spaces, the direction and flow of traffic, designation of prohibited areas, landscaped areas, landscaping, toilets, utilities and all other facilities; provided, however, that the foregoing is not intended to entitle Landlord to unreasonably effect changes that would materially and adversely affect access or lines of sight to the Premises, except temporarily during periods of construction. Any changes or additions by Landlord to the Berkeley Waterfront shall be performed in such a manner so as not to unreasonably interfere with Tenant's use of the Premises and shall not change in a material, adverse way the access to the Premises. If as a result of the foregoing work by Landlord or its designated representatives, Tenant is unable to operate its business in the Premises and Facility or any portion thereof as a result of being denied access to the Premises or Facility or any stoppage or interruption in any of the basic services to be provided by Landlord hereunder, Tenant is entitled to a pro rata abatement of Base Rent to the extent that such denial of access or stoppage or interruption interferes with the normal conduct of Tenant's business. Landlord shall have the right to establish, promulgate, and enforce such reasonable rules and regulations concerning the Berkeley Waterfront, as it may deem necessary or advisable for the proper and efficient management, operation, maintenance and use thereof, and Tenant shall comply with the same.

C. Landlord at all times shall have the sole and exclusive management and control of the Berkeley Waterfront, including, without limitation, the right to lease, license or permit the use of space within the Berkeley Waterfront to persons for the sale of merchandise and/or services and the right to permit advertising displays, educational displays, displays of art, and promotional activities and entertainment.

D. Nothing contained herein shall be deemed to create any liability to Landlord for any personal injury, or any damage to motor vehicles, vessels, or other property of Tenant's principals, employees or others, unless caused by the gross negligence or willful misconduct of Landlord, its agents, servants or employees. Tenant is solely responsible for the security of the Premises and Facility, and for the safety of those using the Premises and Facility pursuant to this Ground Lease or any permits or licenses from the City. Tenant acknowledges that if Landlord provides security guards or police patrols for the Berkeley Waterfront or any portion thereof, Landlord does not represent, guarantee or assume responsibility that Tenant or any person or entity will be secure from losses caused by the illegal acts of third parties and

does not assume responsibility for any such illegal acts. To induce Landlord to provide such security, if any, as Landlord in its sole discretion deems reasonable, appropriate and economically feasible, Tenant hereby waives any present or future claims Tenant may have against Landlord, whether known or unknown, for bodily injury or property damage arising from the performance of such security agents. Landlord shall not be obligated to provide any public liability or property damage insurance for the benefit of Tenant or any other person or entity, each such party being responsible for its own insurance.

#### **5.11 Public Trust Tidelands Requirements.**

A. Tenant acknowledges that the Premises are located on State tidelands held by the City of Berkeley in trust for the promotion of commerce, navigation, and fishery pursuant to Chapter 347 of the California Statutes of 1913, as amended (the “Grant”), subject to the conditions, restrictions, limitations, rights, powers, and duties reversionary rights and other rights created or reserved in the Grant. Tenant agrees that, notwithstanding anything in this Ground Lease to the contrary, Tenant shall use the Facility and Premises consistently with and in a manner that shall not result in a violation of the Grant or of provisions of the Berkeley City Charter, the California Constitution or other applicable Laws.

B. Landlord reserves to itself and the right to grant to others in the future nonexclusive utility easements over, under, through, across or on the Premises in locations that will not unreasonably interfere with Tenant’s access to or use of the Premises or Facility. Landlord may make changes in any utility system serving the Facility or Premises as Landlord determines to be necessary or desirable in the course of any construction performed by or under the authorization of Landlord. Any interference to Tenant’s use of the Facility or Premises shall be temporary, and all work on the Premises shall proceed expeditiously. Tenant shall be given reasonable notice before commencement of any work on the Premises. No such work shall invalidate or affect this Ground Lease or give Tenant any claim against Landlord for abatement of Rent or loss of business as a result thereof unless the work continues for more than three (3) days in which event Tenant shall be entitled to a pro rata abatement of Base Rent thereafter until completion of such work. In the event the installation or maintenance of utility lines in such easements causes any damage to the Premises, or any portion thereof, or to the Facility, or other facilities located upon the Premises, including but not limited to pavement, curbs and sidewalks, the same shall be repaired by Landlord at its expense, if not so repaired by the party installing and maintaining the line. Landlord shall hold harmless and indemnify Tenant from all claims arising out of the grant or use of such utility easements, except to the extent they result from the negligence or willful misconduct of Tenant.

**5.12 Landlord’s Status as a Landowner.** Tenant understands and agrees that Landlord is entering into this Ground Lease in its capacity as a landowner with a proprietary interest in the Premises and Facility and not as a regulatory agency of the City of Berkeley with certain police powers. Landlord’s legal status shall in no way limit the obligation of Tenant to obtain any required approvals from Landlord’s departments, boards or commissions that have jurisdiction over the Premises or Facility. By Landlord’s entering into this Ground Lease, neither Landlord nor any of Landlord’s Council, boards, commissions, agencies, departments, or affiliates obligates itself to any other governmental agent, board, commission or agency, or to Tenant, or to any other individual or entity, with regard to any discretionary action relating to development or operation of the Premises, Facility or Berkeley Waterfront. Discretionary action includes but is not limited to rezonings, variances, environmental clearances, or any other governmental agency approvals that may be required or desirable for the improvement, alteration, or operation of the Premises, Facility or Berkeley Waterfront. By entering into this

Ground Lease, Landlord is in no way modifying or limiting the obligation of Tenant to cause the Premises and Facility to be used and occupied in accordance with all Laws.

**5.13 Regulatory Approvals Generally.** Tenant acknowledges and agrees that this Ground Lease does not guarantee that Landlord, in its regulatory capacity, will grant any particular request for a license, permit or other regulatory approval. Tenant understands that Landlord may grant or deny such request in its sole discretion, and may impose such terms and conditions as it deems consistent with that discretion.

**5.14 Covenants Regarding Improvements.**

Tenant acknowledges and agrees that the Improvements will be maintained as follows:

A. Building. Tenant shall provide and install all furniture, fixtures, and accessories necessary for the operation of a full service restaurant and event space. Tenant shall maintain in good condition all aspects of the building, including but not limited to building systems and structural elements.

B. Pilings. Tenant acknowledges that restaurant building is situated over the water, and is supported by pilings in the Bay. Tenant will maintain these pilings in good condition and provide periodic assessment and maintenance to assure they remain in good condition.

C. Landscaping. Tenant shall install and maintain such landscaping as may be reasonably required to provide an attractive development consistent with a full service restaurant.

D. Off-Site Improvements. Tenant shall maintain all off-site improvements as described in Exhibit C for the duration of the Lease Term.

E. Exclusive Use Parking. Subject to any permits or conditions required or imposed by regulatory agencies, Tenant may utilize the Exclusive Use parking spaces and any connected architecture to generate income for purpose of covering the maintenance costs. Revenue will be included in calculation of gross receipts, per Section 3.5.

**ARTICLE 6.  
CONDITION OF PROPERTY**

**6.1 Landlord's Disclaimers and Tenant's Acknowledgements.** The Premises are being leased to Tenant in their current, existing, "AS-IS" condition. Except as expressly set forth in this Ground Lease, Landlord makes no representations or warranties as to any matters concerning the Premises or Facility, including without limitation: (i) matters relating to soils, subsoils, geology, the presence or absence of fill, groundwater, drainage, and flood zone designation; (ii) the existence, quality, nature, adequacy and physical condition of utilities serving the Premises or Facility; (iii) the development potential of the Premises or Facility, or their uses, habitability, merchantability, or fitness, suitability, value or adequacy for any particular purpose, (iv) the zoning or other legal status of the Premises or Facility or any other public or private restrictions on their use, (v) the adequacy, condition, repair status, or remaining useful life of the Facility's electrical, plumbing, HVAC, utility, mechanical or safety systems ("Facility Systems"), (vi) the adequacy, condition, repair status, or remaining useful life of the Facility's roof, walls, foundation, pilings, or other structural components, any other structures within the Premises, parking lot, the drive aisle and associated parking stall, loading stalls,

pathways, and landscaping, and drive aisle between Lot and the restaurant (vii) the compliance of the Premises or Facility with Hazardous Materials Laws, covenants, conditions or restrictions of any governmental or quasi-governmental entity or of any other person or entity, (viii) the presence or removal of Hazardous Materials (as defined in Section 6.2) or wastes on, under or about the Premises or Facility; or (ix) the compliance of the Premises or Facility under any other Laws, including without limitation the ADA and other Disability Laws. It is specifically understood and agreed that Landlord has no obligation and has made no promises to alter, remodel, improve, decorate or paint the Premises or Facility, repave the adjacent parking lot, construct or install any improvements or Alterations (as defined in Section 7.3), repair or replace any Facility Systems, or otherwise alter or improve the Premises, Facility, or any portion thereof. By entering onto the Premises or Facility, Tenant represents and confirms that it is familiar with the existing legal and physical condition of the Premises and Facility, fully approves the same, and acknowledges that except as expressly provided in this Ground Lease Landlord has made no representation or warranty regarding the condition thereof. Tenant acknowledges and agrees that Tenant is leasing the Premises and accepting the Premises and Facility on the basis of Tenant's own investigation, and will act only upon information obtained by it directly from such investigation and from materials or records from independent third parties. Tenant assumes the risk that adverse physical and environmental conditions may not have been revealed by its own investigation, that below-ground improvements or facilities may still be located under the Premises, and that Hazardous Materials may subsequently be discovered upon, under or about the Premises. Tenant further acknowledges that neither Landlord, nor its officers, elected officials, agents, employees, or representatives ("Landlord's Parties") have made any representation or warranty of any kind in connection with any matter relating to the condition, value, fitness, or suitability of the Premises, Facility or other improvements thereon, upon which Tenant has relied directly or indirectly for any purpose.

## 6.2 Hazardous Materials

A. General Compliance. Tenant shall, at its sole cost and expense, comply with all laws, codes, rules, orders, ordinances, directives, regulations, permits, or other requirements of federal, state, county, municipal or governmental authorities having jurisdiction, now in force or which may hereafter be in force (collectively, "**Hazardous Materials Laws**") concerning the management, use, generation, storage, transportation, presence, discharge or disposal of any and all pollutants, wastes, flammables, explosives, radioactive materials, hazardous or toxic materials, hazardous or toxic wastes, hazardous or toxic substances, carcinogenic materials or contaminants and all other materials governed, monitored, or regulated by any Federal, State or local law or regulation, including but not limited to the Comprehensive Environmental Response, Compensation and Liability Act, the Hazardous Substances Account Act, and/or the Resources Conservation and Recovery Act. "**Hazardous Materials**" include asbestos, asbestos-containing materials, hydrocarbons, polychlorinated biphenyl ("**PCB**") or PCB-containing materials, petroleum, gasoline, petroleum products, crude oil or any fraction, product or by-product thereof. Except for routine substances which are used in the normal and customary operation of a restaurant for the Permitted Use, including such substances technically constituting Hazardous Materials, neither Tenant nor Tenant's Parties shall use, handle, store, transport, treat, generate, release or dispose of any Hazardous Materials anywhere in, on, under or about the Premises or the Facility. Tenant shall cause any and all Hazardous Materials brought onto, used, generated, handled, treated, stored, released, or discharged on or under the Premises or the Facility to be removed from the Premises and Facility and transported for disposal in accordance with applicable Hazardous Materials Laws. Landlord shall have the right to enter the Premises from time to time to conduct tests, inspections and surveys concerning Hazardous Materials and to monitor Tenant's compliance

with its obligations concerning Hazardous Materials and Hazard Materials Laws. Tenant shall immediately notify Landlord in writing of: (i) any release or discharge of any Hazardous Material; (ii) any voluntary clean-up or removal action instituted or proposed by Tenant, (iii) any enforcement, clean-up, removal or other governmental or regulatory action instituted or threatened, or (iv) any claim made or threatened by any person against Landlord, Tenant, the Premises, or the Facility or any portion thereof relating to Hazardous Materials or Hazardous Materials Laws. Tenant shall also supply to Landlord as promptly as possible, and in any event within five business days after Tenant receives or sends same, copies of all claims, reports, complaints, notices, warnings or asserted violations relating in any way to the Premises or Facility or Tenant's use thereof and concerning Hazardous Materials or Hazardous Materials Laws. In the event Tenant institutes a cleanup or removal action, Tenant shall provide to Landlord in a timely manner copies of all workplans and subsequent reports submitted to the governmental agency with jurisdiction over such action.

B. Tenant's Indemnification. Except to the extent caused by Landlord's sole negligence or willful misconduct, Tenant shall indemnify, defend and hold Landlord harmless from any and all claims, causes of action, liabilities, losses, damages, injunctions, suits, fines, penalties, costs or expenses (including attorneys' fees and expenses and consultant fees and expenses) caused or alleged to have been caused by the presence of Hazardous Materials in, on, under, about, or emanating from the Premises or the Facility, including, without limitation, any bodily injury, death, property damage, natural resource damage, decrease in value of the Premises or the Facility, caused or alleged to have been caused by Tenant or Tenant's Parties' use, storage, handling, treatment, generation, presence, discharge or release of Hazardous Materials in violation of Tenant's obligations under this Ground Lease, whether such claims, causes of action or liabilities are first asserted during the Term or thereafter, and including without limitation, claims made against Landlord with respect to bodily injury, death or property damage sustained by third parties caused or alleged to have been caused by Tenant or Tenant's Parties' use, storage, handling, treatment, generation, presence, discharge or release of Hazardous Materials.

## ARTICLE 7. CONSTRUCTION AND LIENS

### 7.1 Improvements to the Leased Premises.

A. Construction. Tenant shall construct or cause to be constructed the improvements described in Exhibit B ("**Improvements to the Leased Premises**") within the time and in the manner set forth in Exhibit B. Except as otherwise provided in this Section 7.1, Tenant shall diligently prosecute, complete, and accomplish the Improvements without cost or expense to Landlord, by licensed contractors, in compliance with all applicable Laws and permits, and in a first-class and workmanlike manner, as provided in Exhibit B and this Article 7.

B. Timely Completion. Tenant shall take all steps necessary to enable it to commence, and will commence the construction of the Improvements and will diligently prosecute and complete maintenance on improvements necessary to maintain the Facility and Premises in good condition. In the event Tenant fails to improve or maintain the Premises and Facility in good condition, and does not cure such failure within 60 days of receipt of written notice from Landlord of such failure (or, if such failure cannot be cured within that 60 day period, Tenant has failed to commence the cure within 60 days and thereafter diligently and continuously pursue such cure to completion), at Landlord's election, exercisable in its

reasonable discretion, this Ground Lease shall terminate, and be null and void, and of no further force or effect.

**7.2 Off-Site Improvements.** For improvements outside of Premises as described in Exhibit C, Off-Site Improvements, the following conditions apply:

A. Judicial Streamlining. Tenant will ensure that construction of the Off-Site Improvements described in Exhibit C complies with all the requirements of the Governor of California's Judicial Streamlining Program for Environmental Leadership Development Projects, codified in Section 21183 of the California Public Resources Code.

B. Construction. Tenant shall construct or cause to be constructed the improvements described in Exhibit C ("**Off-Site Improvements**") within the time and in the manner set forth in Exhibit C. Except as otherwise provided in this Section 7.2, Tenant shall diligently prosecute, complete, and accomplish the Improvements without cost or expense to Landlord, by licensed contractors, in compliance with all applicable Laws and permits, and in a first class and workmanlike manner, as provided in Exhibit C and this Article 7.

C. Timely Completion. Tenant shall take all steps necessary to enable it to commence and complete the construction of the Improvements upon approved plans and permits and will diligently complete maintenance on the improvements described in Exhibit C in good condition. In the event Tenant fails to complete construction of the Improvements within the timelines established in Exhibit C, or the Tenant fails to maintain the Improvements in good condition, and does not cure such failure within 60 days of receipt of written notice from Landlord of such failure (or, if such failure cannot be cured within that 60 day period, Tenant has failed to commence the cure within 60 days and thereafter diligently and continuously pursue such cure to completion), at Landlord's election, exercisable in its reasonable discretion, this Ground Lease shall terminate, and be null and void, and of no further force or effect.

**7.3 Alterations on Premises or Facility.** Any construction, reconstruction, alterations, additions, or improvements or remodeling, in, on, or about the Facility or the undertaken by or on behalf of Tenant from and after the Commencement Date (including without limitation the Improvements, "Alterations") shall be governed by this Ground Lease. All Alterations, including exterior elevations and color thereof, and all such other improvements, shall be architecturally and aesthetically compatible and harmonious with the Facility, Premises, and any other buildings and improvements thereon to create a uniform general plan for the entire Berkeley Marina. Any Alterations shall be in compliance with applicable Laws and permits, shall at all times be of first class construction and architectural design, and shall be in accordance with all plans and specifications therefor submitted to and approved by Landlord as set forth below. No material changes to such approved plans and specifications shall be made without Landlord's prior written approval. All Alterations shall be diligently prosecuted, completed, and accomplished without cost or expense to Landlord, by licensed contractors, and in a first-class and workmanlike manner.

A. Alterations, Other than Minor Alterations. Except with Landlord's prior written consent, which may be granted or denied in Landlord's discretion, Tenant shall not make or cause to be made any Alterations except for Minor Alterations as set forth below. If Tenant at any time following the Commencement Date desires to undertake any Alterations (other than Minor Alterations), Tenant shall, prior to the commencement of such work, prepare or cause to be prepared, at its sole expense, and shall submit to Landlord for its review, cost estimates, plans and specifications for such work, showing, without limitation, scaled elevations, scaled

floor plans, design concepts, dimensions, material selection, colors, signing (if any) and such additional information as is reasonably requested by Landlord to make an informed decision on such submission. The plans and specifications shall comply with this Ground Lease and shall be in compliance with applicable Laws. Landlord shall approve or disapprove such submitted plans within 30 days of receipt of complete plans and specifications meeting the requirements of this subsection. Failure of the Landlord to approve or disapprove such plans and specifications within such 30-day period shall be deemed to be Landlord's disapproval.

B. Minor Alterations. Tenant shall have the right without Landlord's consent (but subject to all other provisions of this Ground Lease and upon 30 days prior written notice to Landlord), to undertake nonstructural alterations or remodeling of the Facility not visible from the outside or affecting exterior appearance and not altering the preexisting location of the Facility on the Premises, not exceeding \$150,000 individually or \$300,000 in cumulative costs during the Term of this Ground Lease ("**Minor Alterations**"). Notwithstanding the foregoing, and regardless of the cost thereof, Landlord's prior consent is required for any Alteration involving utility work, or attachment or any fixture or equipment to the Facility.

C. No Alterations to Off-Site Improvements. Tenant may not alter the design and construction specifications of Off-Site Improvements, unless as directed by Landlord in writing. Tenant must construct the Off-Site Improvements with the City's specifications, as discussed in Exhibit C. If Tenant proposes any change to off-site improvements, such proposal must be made in writing. Landlord will review and Landlord shall retain sole discretion to modify off-site improvement plans. Tenant would be responsible for any additional cost and permitting requirements, as described in 7.4.D.

**7.4 Construction Standards.** Unless expressly provided otherwise in this Article or Exhibit B or Exhibit C, the following standards shall apply to the design and construction of all Alterations under this Ground Lease.

A. Insurance. Tenant's designers, contractors and subcontractors shall maintain in force workman's compensation and such other employee, liability and property insurance as is customary for similar construction projects, and Tenant's designers, contractors and subcontractors shall also maintain in force professional liability insurance as is customary for similar construction projects. Other than worker's compensation and professional liability insurance, Landlord and Landlord Parties shall be named as additional insureds on all such insurance and Tenant shall provide certificates of insurance confirming such additional insured status prior to commencement of any Alterations work other than Minor Alterations.

B. Utility Work. Any work performed by or on behalf of Tenant or any occupant or sublessee to connect to, repair, relocate, maintain or install any storm drain, sanitary sewer, water line, gas line, telephone conduit or any other public utility service shall be performed so as to minimize interference with the provision of such services to other occupants and users of the Berkeley Marina.

C. Contracts, Plans and Specifications. With the exception of Minor Alterations, all contracts with any architect, other design professional, or any general contractor for the Alterations shall provide, in form and substance reasonably satisfactory to Landlord, for the assignment thereof to Landlord as security to Landlord for Tenant's performance hereunder, and Landlord shall be furnished with any such agreement, together with the further agreement of the parties thereto, that if this Ground Lease is terminated due to Tenant's default, Landlord may use any plans and specifications to which Tenant is then entitled pursuant to any such

contract without payment of any further sums to any party thereto. Tenant shall additionally furnish the City with all plans, specifications, studies, drawings, as-built drawings, evaluations, and documents in their complete or most complete state.

D. Permits and Approvals. To the extent that any Alterations require a building permit or other permits from the City of Berkeley, Bay Conservation and Development Commission (“**BCDC**”) and/or any other governmental agency, Tenant shall not perform any Alterations until Tenant has obtained all requisite permits and approvals. This includes compliance with the California Environmental Quality Act (CEQA).

E. Construction Safeguards. Tenant shall erect and properly maintain at all times, as required by the conditions and the progress of work performed by Tenant, all necessary safeguards for the protection of workers and the public.

F. Prevailing Wage Laws. Tenant shall comply with all prevailing wage requirements of California Labor Code Sections 1720 *et seq.*, to the extent such requirements are applicable to Alterations. Tenant agrees that to the extent it is required to comply with the prevailing wage requirements, Tenant shall assure that all workers are paid the general prevailing rate of per diem wages and the general per diem prevailing rate for holiday and overtime work as defined by applicable Laws (including without limitation Labor Code Section 1773.1) in effect from time to time. Copies of the applicable prevailing rate of per diem wages are on file at Landlord’s principal office and will be made available to any interested party on request. Tenant agrees to post a copy of the prevailing rate of per diem wages at the Premises. Tenant, as a penalty to Landlord, shall forfeit \$200 for each calendar day, or portion thereof (or such other sum as specified from time to time by Section 1775 of the California Labor Code), for each worker paid less than the applicable prevailing rates for such work or craft in which such worker is employed. The difference between such prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by Tenant.

G. Landlord’s Rights. Nothing herein shall limit any Landlord right under this Ground Lease, including without limitation those under Sections 5.10 and 5.11 above.

H. Completion. Upon completion of any Alterations (including Minor Alterations), Tenant shall deliver to Landlord two sets of final as-built plans and specifications, and copies of all permits, for the applicable work.

I. Tenant Costs. Except as otherwise expressly provided in this Ground lease, all Alterations shall be without cost or expense to Landlord.

**7.5** Protection of Landlord. Nothing in this Ground Lease shall be construed as constituting the consent of Landlord, expressed or implied, to the performance of any labor or the furnishing of any materials in connection with any Alterations by any contractor, subcontractor, laborer or materialman, nor as giving Tenant or any other person any right, power or authority to act as agent of, or to contract for or permit the rendering of, any services, or the furnishing of any materials, in such manner as would give rise to the filing of mechanics’ liens or other claims against the Premises or Facility. Landlord shall have the right at all reasonable times to post, and keep posted, on the Facility and the Premises any notices which Landlord may reasonably deem necessary for the protection of Landlord and of the Premises and Facility from mechanics’ liens or other claims. Tenant shall give Landlord 10 days’ prior written notice of the commencement of any Alterations to be done on or about the Facility or Premises to enable

Landlord to post such notices. In addition, Landlord may in its discretion require Tenant to furnish to Landlord at Tenant's expense reasonable improvement security, including performance and labor and materials bonds, prior to commencement of any Alterations. Tenant shall make, or cause to be made, prompt payment of all monies due and legally owing to all persons doing any Alterations or furnishing any materials or supplies to Tenant or any of its contractors or subcontractors in connection therewith.

**7.6**            **Liens and Stop Notices.** Tenant shall keep the Premises and Facility free and clear of all stop notices, mechanics' liens, and other liens on account of any Alterations done for Tenant or persons claiming under it. Tenant shall indemnify and save Landlord harmless against liability, loss, damages, costs, attorneys' fees, and all other expenses on account of claims of lien of laborers or materialmen or others for Alterations performed or materials or supplies furnished to Tenant or persons claiming under it. If a claim of a lien or stop notice is given or recorded affecting the Premises or Facility, Tenant shall within 30 days of such recording or service:

- A.     Pay and discharge the same;
- B.     Affect the release thereof by recording and delivering to Landlord a lien release bond in customary form and amount which results in the removal of such lien from the Facility and the Premises; or
- C.     Otherwise obtain or effect the release thereof.

**7.7**            **Notice.** Should any claims of lien be filed against the Premises or Facility thereon, or any action be commenced affecting the title to such property, the party receiving notice of such lien or action shall forthwith give the other party written notice thereof.

**7.8**            **Reimbursement and Payment.** For Landlord costs arising from Tenant improvements to the premises or off-site improvements, Tenant agrees to reimburse or pay the Landlord directly for those costs.

A.     Payment for Landlord's consultants: Landlord shall provide Tenant with consultant cost estimate in advance. Tenant shall submit a lump sum to Landlord equal to the cost estimate within 30 days of receiving the estimate. When the work is completed, any excess funds will be refunded by Landlord to Tenant within 30 days. Landlord shall periodically bill Tenant in amounts equal to any change orders or added costs, and Tenant shall promptly submit payment within 30 days.

B.     Payment for Landlord staff and/or related resources: Tenant agrees to provide progress payments to cover the costs of any Landlord staff or use of City resources. Landlord shall provide periodic statements listing Landlord's expenditures relating to staff or resources used for the Project and Tenant shall remit payment within thirty (30) days.

## **ARTICLE 8. OWNERSHIP OF IMPROVEMENTS AND PERSONAL PROPERTY**

**8.1**            **Ownership of Facility During Term.** The Facility shall remain the property of the Landlord during the Term.

**8.2 Ownership of Improvements at Termination or Expiration.** Upon the expiration or other termination of this Ground Lease, all improvements on the Premises, without compensation to Tenant, shall become Landlord's property free and clear of all claims to or against them by Tenant or any third person, and Tenant shall defend, indemnify, and hold Landlord harmless against any and all claims, liability and losses arising from such claims or from Landlord's exercise of the right conferred by this Section 8.2.

**8.3 Removal and Ownership of Personal Property at Termination or Expiration.** Parties agree that all attached, wired, plumbed, affixed, or mounted furniture, fixtures and equipment, including stoves, hoods, refrigeration, and other booths, bars, and kitchen equipment which are located in the Premises on the date of this Lease are the property of the City. Should Tenant purchase and install replacements for any item listed above during the Term of this Lease, then at Tenant's election, Tenant may remove such item(s) at the termination of the Term. At the expiration or sooner termination of the Term, Landlord may, at Landlord's election, require Tenant to remove from the Premises, at Tenant's sole cost and expense, all personal property. Tenant shall be entitled to remove from the Premises, at Tenant's sole cost and expense, at the expiration or sooner termination of the Term, all of Tenant's personal property, inventory, books and records, artwork, and any of Tenant's proprietary items or those which contain any of Tenant's intellectual property, Tenant shall be liable to Landlord for costs incurred by Landlord in effecting the removal of such personal property (including fixtures) which Tenant has failed to remove after demand pursuant to this section.

A. Tenant may, from time to time during the Term, remove any personal property (other than fixtures) that may be removed without damage to the structural integrity of the Premises or Facility. Tenant shall repair all damage caused by any such removal.

B. Any personal property owned by Tenant and not removed by Tenant prior to the expiration or earlier termination of the Term shall be deemed to be abandoned by Tenant and shall, without compensation to Tenant, become the Landlord's property, free and clear of all claims to or against them by Tenant or any other person, but subject to the rights of third party lenders and equipment lessors as to which Landlord has notice.

## **ARTICLE 9. UTILITIES**

Tenant shall be solely responsible for contracting for, and shall promptly pay all charges for telephone, computers and cable lines, wiring, materials, security, heat, air conditioning, water, gas, sewer, electricity, refuse, sewage, garbage, pest control services, and any other utility service supplied to the Facility, the Premises or any portion thereof, or any other improvements located thereon ("Utilities"). Tenant shall indemnify, defend, and hold Landlord harmless from and against any and all demands, liabilities, claims, actions, damages, costs, and expenses, including reasonable attorneys' fees, arising out of or connected with the provision and payment of the Utilities.

## **ARTICLE 10. INSURANCE AND INDEMNITY**

### **10.1 General Insurance Requirements.**

A. During the entire Term of this Ground Lease, Tenant shall provide the following forms and amounts of insurance with respect to the Facility and the Premises, and shall provide evidence of such coverage to Landlord on an annual basis. Such insurance shall be primary to and not contributing with any other insurance, self-insurance, or joint self-insurance maintained by the Landlord, shall name the Landlord as an additional insured, and shall include, but not be limited to:

1. Fire and Extended Coverage Insurance in All-Risk form, with vandalism and malicious mischief endorsements, covering the Facility including all Alterations and the Premises against loss or damage in an amount equal to not less than 100% of the replacement cost of the Facility, including all Alterations and fixtures, with such commercially reasonable deductible as may be approved by Landlord in its reasonable discretion; provided however, Tenant maintains a deductible or self-insured retention of \$500,000.00 and the same is approved by Landlord. Such insurance shall include coverage for cost of demolition and increased cost of construction by reason of changes in applicable ordinances and laws and shall not contain a co-insurance clause.

2. Business Interruption Insurance on an "all risk" basis which will provide recovery for a minimum of 12 months of Tenant's continuing Rent obligations, (including without limitation Percentage Rent which likely would have been payable in the absence of the interruption).

3. Broad Form Commercial General Liability Insurance protecting Tenant against claims for bodily injury, personal injury and property damage based upon, or arising out of, the ownership, use, occupancy or maintenance, directly or indirectly, of the Premises and Facility and all areas appurtenant thereto. Such insurance shall be written on an "occurrence" policy form providing single limit coverage in an amount not less than \$2,000,000 per occurrence and umbrella/excess liability insurance in the amount of \$5,000,000. Tenant shall add Landlord and its officers, agents, employees, and representatives (together, "**Landlord Parties**") as additional insureds by means of an endorsement at least as broad as the Insurance Service Organization's "Additional Insured-Managers or Landlords of Premises" endorsement and coverage shall also be extended to include damage caused by heat, smoke or fumes from a hostile fire. The policy shall not contain any intra-insured exclusions as between insured persons or organizations, but shall include coverage for liability assumed under this Ground Lease as an "insured contract" for the performance of Tenant's indemnity obligations under this Ground Lease. The limits of this insurance shall not, however, limit the liability of Tenant nor relieve Tenant of any obligation hereunder. Tenant shall provide a "per location" endorsement on its liability policy or policies that provides that the general aggregate and other limits apply separately and specifically to the Premises and Facility.

4. Auto Liability Insurance endorsed for all owned and non-owned vehicles in the initial amount of \$2,000,000, combined single limit.

5. Worker's Compensation Insurance in an amount and form to meet all applicable requirements of the Labor Code of the State of California.

6. Lender Insurance. Any additional policy of insurance required by any lender providing permanent financing for the Facility or any Alterations.

7. Removal Insurance. Tenant shall secure and maintain insurance coverage for any costs to remove and dispose of exoskeleton and related elements, and any

costs of resulting repairs to the building and premises to the City's satisfaction. Landlord, in its sole discretion, may require such removal, disposal and repair in the event that Tenant defaults or terminates prior to the end of the lease term.

8. Other Insurance. Any additional policy of insurance required by any Exhibit to this Ground Lease.

B. Review. The liability insurance requirements may be reviewed by Landlord every five years, for the purpose of increasing (in consultation with its insurance advisors) the minimum limits of such insurance from time to time to limits which shall be reasonable and customary for similar facilities of like size and operation in accordance with generally accepted insurance industry standards, but in no event will Tenant be required to increase the amount of cumulative or single occurrence coverage by more than 50% for any five-year period.

C. General. Companies writing the insurance required hereunder shall be licensed to do business in the State of California. Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A:VII. The commercial general liability and automobile liability policies hereunder shall name Landlord and Landlord Parties as additional insureds. Tenant shall furnish Landlord with a certificate of insurance evidencing the required insurance coverage and a duly executed endorsement evidencing such additional insured status. The certificate shall contain a statement of obligation on the part of the carrier to notify Landlord of any material change, cancellation or termination of the coverage at least 30 days in advance of the effective date of any such material change, cancellation or termination. Upon Landlord's request, Tenant shall provide certified copies of all insurance policies, including declarations pages. Coverage provided hereunder by Tenant shall be primary insurance and shall not be contributing with any insurance, self-insurance or joint self-insurance maintained by Landlord or City, and the policy shall so provide. The insurance policies shall contain a waiver of subrogation for the benefit of the Landlord and other additional insureds. The required certificate and endorsement shall be furnished by Tenant to Landlord prior to the Commencement Date, and prior to each anniversary thereof. If Tenant fails to purchase, renew or maintain any insurance policies required herein, Landlord shall have the right to so purchase any such insurance.

**10.2** Indemnity. To the greatest extent permitted by Law (including without limitation Civil Code Section 2782 if and to the extent applicable), Tenant shall protect, indemnify, defend and hold Landlord and Landlord Parties harmless from and against any and all demands, liability, claims, actions and damages to any person or property, costs and expenses, including attorneys' fees, arising out of or connected with: (i) a default by Tenant of its obligations under this Ground Lease; (ii) the use or occupancy of the Facility, the Premises, the improvements thereon including any Alterations, or any portion thereof, by Tenant or Tenant's Parties, other than those attributable to the sole negligence or willful misconduct of Landlord or Landlord Parties; and (iii) the release, use, generation, discharge, storage or disposal of any Hazardous Materials on, under, in or about, or the transportation of any such Hazardous Materials to or from, the Premises in violation, or alleged violation, of any Laws, which occurs at any time during the Term. The indemnity obligation in clause (iii) above shall include any demands, liability, claims or actions for tangible or intangible property damage; compensation for lost wages, business income, profits or other economic loss; damage to the natural resource or the environment; nuisance; trespass; and/or contamination, leak, spill, release or other adverse effect on the environment. Tenant's indemnity obligations under this Section shall survive the expiration or termination of this Ground Lease.

**ARTICLE 11.  
DAMAGE OR DESTRUCTION**

**11.1            Restoration.**

A.     Insured Damage. No loss or damage by fire or any other cause resulting in either partial or total destruction of the Facility or any other improvements now or hereafter located on the Premises, including any fixtures, personal property, equipment or machinery used or intended to be used in connection with the Premises or Facility, shall (except as otherwise provided in Sections 11.1.B or 11.2, below) operate to terminate this Ground Lease or to relieve or discharge Tenant from the payment of any Rent, or other amounts payable hereunder, as and when they become due and payable, or from the performance and observance of any of the agreements, covenants and conditions herein contained to be performed and observed by Tenant. Provided however, Rent shall abate during any period of time after the occurrence of such casualty if Tenant can no longer operate its business in the Facility. Tenant covenants to repair, reconstruct, and/or replace or cause to be repaired, reconstructed and/or replaced the Facility and any other improvements now or hereafter located on the Premises, including any fixtures, personal property, equipment or machinery used or intended to be used in connection with the Premises or Facility, so damaged or destroyed. Subject to the rights of any Ground Leasehold Mortgagee (as defined in Section 14.2 below) Tenant also covenants that all insurance proceeds will be deposited with the Insurance Trustee and applied to the repair, reconstruction and/or replacement described herein. Tenant's failure to make such full repair, restoration and replacement under any conditions in which it was elected or required so to do shall constitute a default by Tenant under this Ground Lease.

B.     Facility Uninsured Damage. Notwithstanding the provisions of Section 11.1.A, if, during the Term, (i) the Facility is totally destroyed or rendered inaccessible or if the remaining portion of the Facility is rendered unsuitable (as defined herein) for Tenant's continued use, from a risk not covered 90% by the insurance required to be carried by Tenant under this Ground Lease, and (ii) the cost of restoration exceeds 50% of the then replacement value of the Facility as reasonably determined by Landlord, Tenant can elect to terminate this Ground Lease by giving notice to Landlord within 30 days after Landlord's determination of the restoration cost and replacement value. The Facility shall be deemed unsuitable for Tenant's continued use if, following a reasonable amount of reconstruction, Tenant's business in the Facility could not be operated at an economically feasible level. If Tenant elects to terminate this Ground Lease, Landlord in Landlord's sole and absolute discretion may, within 90 days after receiving Tenant's notice to terminate, elect to pay the difference between 90% of the replacement value of the Facility and the actual cost of restoration, in which case Tenant shall restore the Facility. Promptly following Landlord's election to contribute, Landlord shall deposit the amount of its contribution with the Insurance Trustee provided for in subsection C below. If Tenant elects to terminate this Ground Lease and Landlord in its sole and absolute discretion does not elect to contribute toward the cost of restoration as provided in this Subsection 11.1.B, this Ground Lease shall terminate as of the 91st day following Tenant's notice.

C.     Establishment of Insurance Trust and Disbursement Procedures. Except as may otherwise be required by any Ground Leasehold Mortgagee, Tenant shall make the loss adjustment with the insurance company insuring the loss and on receipt of the proceeds shall immediately pay them to a builder's control company, title company, or bank selected by the mutual agreement of the parties ("**Insurance Trustee**"). To the extent Landlord in its sole and absolute discretion elects to contribute to the restoration costs as provided in subsection B above, Landlord shall deposit with the Insurance Trustee its contribution toward the cost of

restoration. All sums deposited with the Insurance Trustee shall be held for the following purposes and the Insurance Trustee shall have the following powers and duties:

1. The sums shall be paid in installments by the Insurance Trustee to the contractor retained by Tenant as construction progresses, for payment of the cost of restoration. Any final retention provided for in the contract with such contractor will be paid to the contractor on completion of restoration, payment of all costs, expiration of all applicable lien periods, and proof that the restored Facility and the Premises are free of all mechanics' liens and lienable claims.

2. Payments shall be made on presentation of certificates or vouchers from the architect or engineer retained by Tenant showing the amount due. If the Insurance Trustee, in its reasonable discretion, determines that the certificates or vouchers are being improperly approved by the architect or engineer retained by Tenant, the Insurance Trustee shall have the right to appoint an architect or an engineer to supervise construction and to make payments on certificates or vouchers approved by the architect or engineer retained by the Insurance Trustee. The reasonable expenses and charges of the architect or engineer retained by the Insurance Trustee shall be paid by the Insurance Trustee out of the trust fund.

3. If the sums held by the Insurance Trustee are not sufficient to pay the actual cost of restoration, Tenant shall deposit the amount of the deficiency with the Insurance Trustee within ten (10) business days after request by the Insurance Trustee indicating the amount of the deficiency.

4. Any undisbursed funds after compliance with the provisions of this Subsection 11.1.C shall be delivered to Landlord to the extent of Landlord's contribution to the fund, and the balance, if any, shall be paid to Tenant.

5. All actual costs and charges of the Insurance Trustee shall be paid by Tenant.

6. If the Insurance Trustee resigns or for any reason is unwilling to act or continue to act, the parties shall substitute a new trustee in the place of the designated Insurance Trustee.

7. Both parties shall promptly execute all documents and perform all acts reasonably required by the Insurance Trustee to perform its obligations under this Subsection 11.1.C.

**11.2 Right to Terminate Upon Destruction Near the End of the Term.** If, during the last year of the Term, the Facility is totally or partially destroyed, and if the cost of restoration exceeds 20% of the replacement cost of the Facility immediately before the damage or destruction, Tenant may elect to terminate this Ground Lease, provided that Tenant complies with all of the following conditions:

A. Tenant gives Landlord written notice of the damage or destruction within 30-days after the event causing such damage or destruction;

B. Tenant is not in default under this Ground Lease;

C. Tenant transfers to Landlord all insurance proceeds resulting from the casualty, net of any cost incurred by Tenant in collecting such insurance proceeds and/or in complying with the provisions of Subsection 11.2.E below and net of the portion of such proceeds that are payable to any Ground Leasehold Mortgagee pursuant to the Ground Leasehold Mortgage; and

D. Tenant delivers possession of the Premises, the Facility and all other improvements located on the Premises to Landlord and quitclaims to Landlord all of Tenant's right, title and interest therein.

E. If Tenant so elects to terminate this Ground Lease under this Section, then Tenant shall, at its expense, promptly remove all debris and put the Facility, the Premises and all improvements thereon in a safe condition. Following Tenant's satisfactory performance of the foregoing requirements, this Ground Lease shall terminate and the parties shall have no further obligations to each other excepting those previously accrued but theretofore unsatisfied and those obligations which by their terms survive expiration or termination of this Ground Lease.

**11.3** Waiver. The provisions of this Article 11 shall govern the rights of the parties in the event of any full or partial destruction of the Facility and any improvements thereon. Tenant hereby waives the provisions of Civil Code Section 1932(2) and Civil Code Section 1933(4) and any similar successor statute or Law with respect to any destruction of the Facility.

**11.4** Determination of Extent of Destruction, Interference with Use. For purposes of this Article 11, the extent of destruction of the Facility shall be determined by dividing the estimated cost of replacement or restoration as evidenced by estimates prepared by licensed general contractors acceptable to Landlord by the full replacement cost of the Facility, as reasonably determined by Landlord.

**11.5** Procedures for Repair and Restoration. In the event of any damage or destruction, Tenant shall promptly give Landlord written notice of such damage or destruction and the date on which such damage or destruction occurred. Tenant shall promptly make proof of loss and shall proceed promptly to collect, or cause to be collected, all valid claims which Tenant may have against insurers or others based upon any such damage or destruction. Except as otherwise provided above, amounts received on account of any losses pursuant to insurance policies shall be used and expended for the purpose of fully repairing or reconstructing the portions of the Facility which have been destroyed or damaged. Tenant shall commence and complete or cause to be commenced and completed, in a good and workmanlike manner and in accordance with Article 7, the reconstruction or repair of any part of the Facility damaged or destroyed, after Landlord has approved Tenant's plans, drawings, specifications, construction schedule and permits for such reconstruction or repair.

## ARTICLE 12. CONDEMNATION

### 12.1 Definitions.

A. **"Condemnation"** means: (1) the exercise of any governmental power in eminent domain, whether by legal proceedings or otherwise, by a condemnor, and (2) a voluntary sale or transfer to any condemnor, either under threat of condemnation or while legal proceedings for condemnation are pending.

B. **“Date of taking”** means the date the condemnor has the right to possession of the property being condemned.

C. **“Award”** means all compensation, sums or anything of value awarded, paid or received on a total or partial condemnation.

D. **“Condemnor”** means any public or quasi-public authority, or private corporation or individual, having the power of condemnation.

**12.2 Parties’ Rights and Obligations to be Governed by Ground Lease.** If during the Term there is any taking of all or any part of the Premises, the Facility or any other improvements on the Premises or any interest in this Ground Lease by condemnation, the rights and obligations of the parties shall be determined pursuant to the provisions of this Article 12.

**12.3 Total Taking.** If the Premises or Facility is totally taken by condemnation, this Ground Lease shall terminate on the date of taking.

**12.4 Effect of Partial Taking.** If a portion of the Facility or Premises or any other improvements thereon are taken by condemnation, this Ground Lease shall remain in effect, except that Tenant may elect to terminate this Ground Lease if the remaining portion of the Premises or Facility is rendered unsuitable (as defined herein) for Tenant’s continued use. The remaining portion of the Facility or the Premises shall be deemed unsuitable for Tenant’s continued use if, with a reasonable amount of reconstruction, Tenant’s business in the Facility could not be operated at an economically feasible level. Tenant must exercise its right to terminate by giving Landlord written notice of its election within 90 days after the nature and extent of the taking have been finally determined. Such notice shall also specify the date of termination, which shall not be prior to the date of taking. Failure to properly exercise the election provided for in this Section 12.4 will result in this Ground Lease continuing in full force and effect. Provided however, if the Ground Lease continues in effect as aforesaid, the Base Rent shall be equitably abated based on the remaining area of the Facility or the Premises bears to the pre-condemnation area of the Facility or the Premises.

**12.5 Restoration of Facility.** If in Tenant’s judgment it is reasonably possible and economically feasible to do so, Tenant shall be entitled to use that portion of the award allocable to the Facility (but not any portion allocable to the Premises) as is necessary to restore or to add on to the Facility so that the area and approximate layout of the Facility will be substantially the same after the date of taking as it was before the date of taking. If it is not reasonably possible and economically feasible to so restore the area and layout of the Facility, the remaining provisions of this Article 12 shall govern the rights of the parties. If Tenant fails to promptly commence any reasonably required repair, restoration or reconstruction of the Facility and diligently prosecute such repair, restoration or reconstruction to completion, and such failure is not remedied within 30 days of written notice from the Landlord to Tenant, this Ground Lease may be terminated by the Landlord.

**12.6 Waiver of CCP Section 1265.130.** Each party waives the provisions of the Code of Civil Procedure Section 1265.130 allowing either party to petition the Superior Court of the County of Alameda, State of California to terminate this Ground Lease in the event of a partial taking of the Premises.

**12.7 Award.** If all or any portion of the Premises is taken in connection with a condemnation, the entire portion of the award allocable to the Premises shall belong to

Landlord. Subject to the provisions of Section 12.5, and subject to the rights of any Ground Lease Mortgagee, if all or any portion of the Facility or any other improvements on the Premises is taken in connection with a condemnation, the award for the Facility or such other improvements shall belong to Landlord, except as hereinafter provided. Tenant, or any subtenant, as applicable, shall be entitled to receive only: (a) the value of any leasehold improvements, merchandise, personal property, and furniture, fixtures and equipment owned by Tenant or its subtenant that are taken in connection with such condemnation; and (b) loss of Tenant's or its subtenant's business goodwill, if agreed to be paid by the condemning authority or awarded by a court. Neither Tenant nor any subtenant shall have any right to receive any amount on account of any loss of any other interest in this Ground Lease, including without limitation any so-called "leasehold bonus value" or other amount due to differences between the Rent payable hereunder and the then current fair market rental value of Tenant's interest in this Ground Lease. Nothing in this Section 12.7 shall be deemed a waiver or surrender by Tenant or any subtenant of any right to receive relocation assistance under Government Code Section 7260, et seq., or compensation for moving of personal property under Code of Civil Procedure Section 1263.260.

### **ARTICLE 13. QUALITY, ASSIGNMENT AND SUBLETTING**

#### **13.1            Quality Expectations.**

A.        Tenant shall operate a high quality, full-service restaurant and event space that meets a community need.

B.        Tenant shall provide the City with advance notice in the event that a name change or other change is requested. The request shall include the reason for the request, along with supporting documentation that the proposed concept will continue to facilitate a high quality, full-service restaurant and event space that meets a community need and comparable revenue expectations to the prior use. The City shall have 3 months to review the proposal, request additional information. However, the City's approval shall not be unreasonably withheld, conditioned, or delayed.

#### **13.2            Assignment.**

A.        Tenant shall not assign, sublet or otherwise transfer, whether voluntarily or involuntarily or by operation of Law, this Ground Lease, the Facility or any part thereof (collectively an "**assignment**") without Landlord's written consent, which shall not unreasonably be withheld, conditioned or delayed. The merger of Tenant with any other entity or the assignment or transfer of any controlling or managing ownership or beneficial interest in Tenant, or the assignment or transfer of a substantial portion of the assets of Tenant, whether or not located at the Premises, shall constitute an "assignment" hereunder. Tenant agrees that it shall not be unreasonable for Landlord to condition its approval upon, among other things, the proposed assignee having a financial net worth, according to a current financial statement prepared by a certified public accountant, which is equal to or greater than that of Tenant at the date of execution of this Lease or at the time of assignment, whichever is higher, upon the proposed assignee having a reputation for and experience and qualifications in operating and maintaining restaurant properties comparable to the Facility, and upon the proposed assignee having a first-class business reputation. In evaluating the acceptability of the net worth of a proposed assignee, Landlord may require that the assignee's net worth be sufficient to carry out the performance of Tenant's obligation under this Ground Lease. Subject to the foregoing,

Landlord agrees that it will not withhold its consent to Tenant's assignment of its interest in this Ground Lease if Tenant demonstrates to Landlord's reasonable satisfaction that such assignee has a net worth equal to or exceeding that of Tenant as of the Effective Date or the assignment date (whichever is greater), has a reputation for and at least five years' experience and qualifications in operating and maintaining at least three similar restaurants of comparable quality, has a first-class business reputation in the restaurant industry, and will provide a restaurant that serves the community well. Tenant shall promptly provide Landlord with any information reasonably requested by Landlord relating to the identity of any proposed assignee, the nature of such assignee's business and the proposed assignee's financial responsibility. Landlord's consideration should be limited to the proposed assignee's financial condition, its business experience and reputation, and the standard of operation of its existing restaurants, in determining whether to grant consent to the assignment.

B. Notwithstanding Subsection 13.1.A above, Landlord's consent is not required for any assignment to an Affiliate of Tenant (as defined below), as long as the following conditions are met: (i) Landlord receives written notice of the assignment (as well as any documents or information reasonably requested by Landlord regarding the assignment or assignee); and (ii) the assignee assumes in writing all of Tenant's obligations under this Ground Lease. For purposes of this Section, "**Affiliate**" means an entity which controls, is controlled by or under common control with Tenant. For the purposes of this definition, "control" means the direct or indirect ownership of more than 50% of the voting securities of an entity or possession of the right to direct the entity's day-to-day affairs. Notwithstanding Subsection 13.1.A above, Landlord's consent is not required for (A) a transfer of any ownership interest in connection with a proposed public offering by Tenant or an Affiliate or parent or holding company; or (B) the merger or consolidation with or the sale of substantially all of the assets of Tenant or Tenant's parent to a third party who shall assume Tenant's obligations under this Lease; in such event, Tenant shall notify Landlord in writing of the occurrence of either of the foregoing events, and shall provide a true and correct copy of the assignment and assumption agreement, together with such other documentation supporting or evidencing said event as may be reasonably requested by Landlord.

C. No partial assignments of this Ground Lease shall be permitted. Assignments of this Ground Lease shall only be made pursuant to a written assignment and assumption agreement in a form reasonably acceptable to Landlord. Landlord's consent to any one assignment shall not constitute consent to any other assignment, and shall not constitute a waiver of the right to give or withhold consent in accordance with this Section 13.2.

D. In the event Tenant shall assign this Ground Lease or request the consent of Landlord to any assignment, or if Tenant shall request the consent of Landlord for any other act Tenant proposes to do, then Tenant shall pay Landlord's reasonable attorneys' fees incurred in connection with each such request.

**13.3 Subleases.** Tenant shall not sublease all or any portion of the Facility or the Premises without Landlord's prior written consent, which may not be unreasonably withheld, conditioned or delayed.

## ARTICLE 14. TENANT DEFAULTS AND LANDLORD'S REMEDIES

**14.1 Defaults by Tenant.** Tenant shall be in default under this Ground Lease upon occurrence of any of the following:

A. Tenant shall at any time be in default in the payment of Rent or any other monetary sum called for by this Ground Lease for more than 10 days following written notice from Landlord to Tenant; or

B. Tenant shall at any time be in default in the keeping and performing of any of its other covenants or agreements herein contained, and should such other default continue for 30 days after written notice thereof from Landlord to Tenant specifying the particulars of such default, or if such other default is of a nature that curing such default will take more than 30 days Tenant has failed to commence such cure within such 30-day period and to thereafter diligently and continuously pursue completion of such cure; or

C. Tenant fails to have timely Commenced Construction or achieved substantial completion of the Improvements as required by Exhibit B and Exhibit C; or

D. Tenant abandons or substantially suspends the Improvements prior to completion thereof and such default is not cured within 30 days of written notice from Landlord to Tenant; or

E. Tenant assigns, sells, transfers, conveys, encumbers, hypothecates or leases the whole or any part of the Facility, the Premises, or any other improvement constructed thereon in violation of the Ground Lease; or

F. Except as otherwise expressly permitted in this Ground Lease there is any change in control of Tenant, or any other act or transaction involving or resulting in a change in the identity of the parties in control of Tenant or the degree of such control; or

G. Tenant fails to pay promptly when due each and every installment of principal and interest on any private loan encumbering Tenant's interest in this Ground Lease or any improvements on the Premises for which Tenant is responsible, and such failure continues beyond (i) the expiration of any applicable grace or cure period, and (ii) the date by which Tenant must make payment to cure any notice of default received from the holder of such private loan; or

H. Any Ground Leasehold Mortgagee or any other holder of any private loan encumbering Tenant's interest in this Ground Lease, or any improvements on the Premises initiates a foreclosure of the deed of trust by which such loan is secured, and Tenant fails to cause such foreclosure proceedings to be dismissed prior to the earlier to occur of (i) the trustee under the deed of trust giving notice of the trustee's sale, or (ii) within 30 days of Tenant's receipt of written notice from Landlord..

**14.2 Remedies.** Subject to the rights of any Ground Leasehold Mortgagees permitted under Article 15, upon the occurrence of any such default, in addition to any and all other rights or remedies of Landlord hereunder, or by Law or in equity provided, Landlord shall have the sole option to exercise the following rights and remedies:

A. Terminate this Ground Lease by giving Tenant thirty (30) days prior written notice of termination. Thirty days after the giving of such notice, all of Tenant's rights in the Premises, Facility and any other improvements located thereon, shall terminate. On the 30<sup>th</sup> day Immediately following delivery of the notice of termination, Tenant shall surrender and vacate the Premises, including the Facility and any other improvements located thereon, leaving them in broom-clean condition; and, subject to Subsection 14.2.B, below, respecting the right of certain

subtenants to remain, Landlord may reenter and take possession of the Premises and Facility and eject all parties in possession or eject some and not others, or eject none. Termination under this subsection shall not relieve Tenant from the payment of any sum then due to Landlord or from any claim for damages previously accrued or then accruing against Tenant.

B. Without terminating this Ground Lease, Landlord may at any time and from time to time relet the Premises, including the Facility, or any part or parts thereof for the account and in the name of Tenant or otherwise. Any reletting may be for the remainder of the Term or for a longer or shorter period. Landlord may execute any leases made under this provision either in Landlord's name or in Tenant's name, and shall be entitled to all rents from the use, operation, and occupancy of the Premises, Facility and any other improvements thereon. Tenant hereby appoints Landlord its attorney-in-fact for purpose of such leasing. Tenant shall nevertheless pay to Landlord on the due dates specified in this Ground Lease the equivalent of all sums required of Tenant under this Ground Lease, less the revenue received by Landlord from any reletting or attornment, plus Landlord's expenses, including (by way of example), but not limited to, remodeling expenses, Landlord's brokerage and advertising costs and attorneys' fees and costs. No act by or on behalf of Landlord under this subsection shall constitute a termination of this Ground Lease unless Landlord gives Tenant written notice of termination.

C. Even though Landlord may have relet all or any portion of the Premises, including the Facility and any other improvements thereon, Landlord may thereafter elect to terminate this Ground Lease and all of Tenant's rights in or to the foregoing.

**14.3 Damages.** Should Landlord elect to terminate this Ground Lease, Landlord shall be entitled to recover from Tenant, as damages:

A. The worth at the time of the award of the unpaid Rent that had been earned at the time of termination of this Ground Lease;

B. The worth at the time of the award of the amount by which the unpaid Rent that would have been earned after the date of termination of this Ground Lease until the time of award exceeds the amount of the loss of Rent that Tenant proves could have been reasonably avoided;

C. The worth at the time of the award of the amount by which the unpaid Rent for the balance of the Term of this Ground Lease after the time of award exceeds the amount of the loss of Rent that Tenant proves could have been reasonably avoided; and

D. Any other amount (and court costs) necessary to compensate Landlord for all detriment proximately caused by Tenant's default, including costs of alterations and improvements in connection with reletting.

E. Computing Worth at the Time of Award. The "worth at the time of the award," as used in Subsections 14.3.A and 14.3.B, is to be computed by allowing interest at the maximum rate permitted by Section 1(2) of Article XV of the California Constitution. The "worth at the time of the award," as referred to in Subsection 14.3.C, is to be computed by discounting the amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of the award, plus one percent.

F. Landlord shall mitigate its damages by making reasonable efforts to relet the Premises on reasonable terms, including engaging a listing broker to market the Leased

Premises and publishing the space as “available” in real estate databases commonly used by commercial brokers in the San Francisco/Berkley, CA market. Landlord may relet for a shorter or longer period of time than the Term and make any necessary repairs or alterations. If Landlord relets for a period of time shorter or longer than the current Term or at a lower rental rate than the Base Rent herein, then Tenant shall be liable for any lost Rent and expenses related to the new lease limited to leasing commissions, and reasonable tenant improvements. However, the cost of the leasing commissions and tenant improvements shall be amortized over the entire reletting term so that Tenant shall only be liable for such costs and expenses allocated to the remaining term of the Lease.

**14.4**            **Landlord’s Right to Cure Tenant’s Default.** Landlord, at any time after Tenant commits a default which Tenant has failed to cure within the time established therefor, may cure the default at Tenant’s cost. If Landlord at any time, by reason of Tenant’s default, pays any sum, the sum paid by Landlord shall be due immediately from Tenant to Landlord at the time the sum is paid, and if paid at a later date, shall bear interest at the maximum rate permitted under Section 1(2) of Article XV of the California Constitution from the date the sum is paid by Landlord until Landlord is reimbursed by Tenant.

## **ARTICLE 15. MORTGAGEE PROTECTION PROVISIONS**

**15.1**            **Ground Leasehold Mortgage Authorized.** As provided and defined in this Article, Tenant may mortgage or otherwise encumber Tenant’s interest in this Ground Lease to an “Institutional Investor” under one or more Ground Leasehold Mortgage(s) and assign this Ground Lease as security for such mortgage(s). The Ground Leasehold Mortgage(s) shall affect only Tenant’s interest in this Ground Lease and shall be subject to all of the terms and provisions of this Ground Lease. Landlord’s fee interest shall not be encumbered or subordinated.

**15.2**            **Notice to Landlord.** If Tenant shall mortgage Tenant’s interest in this Ground Lease to an Institutional Investor, and if the holder of such Ground Leasehold Mortgage shall provide Landlord with notice of such Ground Leasehold Mortgage, together with a true copy of such Ground Leasehold Mortgage, the note and all other documents relating to such Ground Leasehold Mortgage, and the name and address of the holder, Landlord and Tenant agree that, following receipt of such notice by Landlord, the provisions of this Article 15 shall apply with respect to such Ground Leasehold Mortgage. In the event of any assignment of a Ground Leasehold Mortgage, or in the event of a change of address of the holder thereunder or of an assignee of such holder, notice of the new name and address shall be provided to Landlord. Tenant shall thereafter also provide Landlord from time to time with a copy of each amendment or other modification or supplement to such instruments. All recorded documents shall be certified as true and correct copies of official records by the Alameda County Recorder and all nonrecorded documents shall be accompanied by a certification by Tenant or the holder that such documents are true, complete, and correct copies of the originals.

**15.3**            **Definitions.** As used in this Article 15:

A.        **“Institutional Investor”** means any lender which has assets in excess of \$100 Million at the time the Ground Leasehold Mortgage or similar loan is made.

B.        **“Ground Leasehold Mortgage”** includes a mortgage, deed of trust or other security instrument authorized in favor of an (except as provided in Section 15.3)

Institutional Investor by which Tenant's interest in this Ground Lease are mortgaged, conveyed, assigned or otherwise transferred to secure a debt or other obligation.

C. **"Mortgagee"** shall refer to a holder of a Ground Leasehold Mortgage under with respect to which the notice provided for by Section 15.2 has been given and received and as to which the provisions of this Article 15 are applicable.

**15.4** **Consent of Ground Leasehold Mortgagee Required.** No cancellation, surrender or modification of this Ground Lease shall be effective as to any Ground Leasehold Mortgagee unless consented to in writing by such Ground Leasehold Mortgagee.

**15.5** **Notice to Ground Leasehold Mortgagee.** With respect to any Ground Leasehold Mortgage, whenever Landlord shall deliver any notice to Tenant with respect to any default by Tenant hereunder, Landlord shall at the same time deliver a copy of such notice to each Ground Leasehold Mortgagee authorized by this Ground Lease. No notice of default shall be effective as to the Ground Leasehold Mortgagee unless such notice is given. Each Ground Leasehold Mortgagee shall (insofar as the rights of Landlord are concerned) have the right, at its option, within 60 days after the receipt of the copy of the notice, to cure or remedy or commence to cure or remedy any such default. In the event possession of the Facility or the Premises, or any portion thereof, is required to effectuate such cure or remedy, the Ground Leasehold Mortgagee shall be deemed to have timely cured or remedied if it commences the proceedings necessary to obtain possession thereof within 60 days after receipt of the copy of the notice, diligently and continuously pursues such proceedings to completion, and, after obtaining possession, diligently and continuously completes such cure or remedy. The provisions of Section 15.7 below shall apply if, during such 60-day termination notice period, the Ground Leasehold Mortgagee shall

A. Notify Landlord of such Ground Leasehold Mortgagee's desire to nullify such notice, and

B. Pay or cause to be paid all Rent, and other payments then due and in arrears as specified in the termination notice to such Ground Leasehold Mortgagee and which may become due during such 60-day period, and

C. Comply, or in good faith, with diligence and continuity, commence to comply, with all nonmonetary requirements of this Ground Lease then in default and reasonably susceptible of being complied with by such Ground Leasehold Mortgagee; provided, however, that in the event such Ground Leasehold Mortgagee shall commence foreclosure proceedings within such 60-day period, such Ground Leasehold Mortgagee shall not be required during such 60-day period to cure or commence to cure any default consisting of Tenant's failure to satisfy and discharge any lien, charge or encumbrance against the Tenant's interest in this Ground Lease junior in priority to the lien of the Ground Leasehold Mortgage held by such Ground Leasehold Mortgagee.

D. Any notice to be given by Landlord to a Ground Leasehold Mortgagee pursuant to any provision of this Article 15 shall be deemed properly addressed if sent to the Ground Leasehold Mortgagee who served the notice referred to in Section 15.2 at the address stated in such notice unless notice of a change of mortgage ownership has been given to Landlord pursuant to Section 15.2.

**15.6**            **Ground Leasehold Mortgagee Foreclosure.** If Landlord shall elect to terminate this Ground Lease by reason of any default of Tenant and the Ground Leasehold Mortgagee shall have proceeded in the manner provided for by Section 15.5, the specified date for termination of this Ground Lease as fixed by Landlord in its termination notice shall be extended for a period of six months, provided that such Ground Leasehold Mortgagee shall, during such six-month period:

A.        Pay, or cause to be paid, Rent (including the Base Rent, Percentage Rent, and any other monetary obligations of Tenant under this Ground Lease) as the same become due, and continue its good faith efforts to perform all of Tenant's other obligations under this Ground Lease; and

B.        If not enjoined or stayed, take steps to acquire or sell Tenant's interest in this Ground Lease by foreclosure of the Ground Leasehold Mortgage or other appropriate means and prosecute the same to completion with diligence.

If, at the end of such six-month period, such Ground Leasehold Mortgagee is diligently complying with this Section 15.6, this Ground Lease shall not then terminate, and the time for completion by such Ground Leasehold Mortgagee of its proceedings shall continue so long as such Ground Leasehold Mortgagee is enjoined or stayed and thereafter provided such Ground Leasehold Mortgagee continues to meet its obligations under Subsection 15.6.A above, and proceeds to complete steps to acquire or sell Tenant's interest in this Ground Lease by foreclosure of the Ground Leasehold Mortgage or by other appropriate means with reasonable diligence and continuity. Nothing in this Section 15.6, however, shall be construed to extend this Ground Lease beyond the Initial Term (or, if applicable, any then-effective Extension Term), nor to require a Ground Leasehold Mortgagee to continue such foreclosure proceedings after the default has been timely cured. If the default shall be timely cured and the Ground Leasehold Mortgagee shall discontinue such foreclosure proceedings, this Ground Lease shall continue in full force and effect as if Tenant had not defaulted under this Ground Lease.

**15.7**            **Purchaser at Foreclosure.** If the Ground Leasehold Mortgagee is complying with Section 15.6, upon the acquisition of the entirety of Tenant's interest in this Ground Lease by such Ground Leasehold Mortgagee or its designee or any other purchaser at a foreclosure sale or otherwise (and the discharge or extinguishment of any lien, charge or encumbrance against Tenant's interest in this Ground Lease which is junior in priority to the lien of the Ground Leasehold Mortgage held by such Ground Leasehold Mortgagee and which the Tenant is obligated to satisfy and discharge by reason of the terms of this Ground Lease), this Ground Lease shall continue in full force and effect as if Tenant had not defaulted under this Ground Lease. Any such purchaser, including the Ground Leasehold Mortgagee or the transferee under any instrument of assignment or transfer in lieu of the foreclosure of the Ground Leasehold Mortgage, shall be deemed to have agreed to perform all of the terms, covenants and conditions on the part of the Tenant to be performed hereunder from and after the date of such purchase and assignment.

**15.8**            **Ground Leasehold Mortgagee's Right to Sell.** If such Ground Leasehold Mortgagee acquires title to Tenant's interest in this Ground Lease pursuant to foreclosure, assignment in lieu of foreclosure or other proceedings, such Ground Leasehold Mortgagee, upon acquiring Tenant's interest in this Ground Lease, may sell and assign the combined entirety of Tenant's interest in this Ground Lease only on such terms and to such persons and organizations as are reasonably acceptable to Landlord. If such Ground Leasehold

Mortgagee's proposed transferee is acceptable to Landlord, in the exercise of Landlord's commercially reasonable discretion, then from and after the date of such sale and assignment the Ground Leasehold Mortgagee shall be relieved of all obligations under this Ground Lease as if such transferee has delivered to Landlord its written agreement to be bound by all of the provisions of this Ground Lease.

**15.9** **Holder Not Obligated to Construct Improvements.** The holder of any Ground Leasehold Mortgage authorized by this Ground Lease shall not be obligated by the provisions of this Ground Lease to construct or complete the Improvements or to guarantee such construction or completion. Nothing in this Ground Lease shall be deemed to or be construed to permit or authorize any such Ground Leasehold Mortgagee to devote the Facility or the Premises to any uses or to construct any improvements thereon or therein other than those uses and improvements provided for and authorized by this Ground Lease.

**15.10** **Right of Landlord to Cure Ground Leasehold Mortgage Default.** If a Ground Leasehold Mortgage default or breach by Tenant occurs prior to completion of the Improvements, and the Ground Leasehold Mortgagee has not exercised its option to cure the default, Landlord may cure the default following prior notice thereof to Tenant. In such event, Tenant shall be liable for, and Landlord shall be entitled to reimbursement from Tenant of, all costs and expenses incurred by Landlord associated with and attributable to the curing of the Ground Leasehold Mortgage default or breach. Landlord shall also be entitled to record a lien against Tenant's interest in this Ground Lease to the extent of such incurred costs and disbursements. Any such lien shall be subject and subordinate to all prior Ground Leasehold Mortgages and encumbrances.

## **ARTICLE 16. MISCELLANEOUS**

**16.1** **Holding Over.** If Tenant shall hold over in the Facility or on the Premises after the expiration of the Term hereof with the consent of Landlord, such holding over shall be construed to be only a tenancy from month to month, subject to all the covenants, conditions and obligations contained in this Ground Lease. Tenant hereby agrees to pay to Landlord as monthly rental 1/12th of the amount which is 125% of the highest amount of total Annual Rent paid by Tenant to Landlord during the Term.

**16.2** **Attorneys' Fees.** In the event that any action is brought by either party hereto against the other for the enforcement or declaration of any right or remedy in or under this Ground Lease or for the breach of any covenant or condition of this Ground Lease, the prevailing party shall be entitled to recover, and the other party agrees to pay, all fees and costs to be fixed by the court therein including, but not limited to, attorneys' fees.

**16.3** **Quiet Possession.** Landlord agrees that so long as Tenant is not in default under this Ground Lease and is paying the Rent and performing all of the covenants and conditions of this Ground Lease, Tenant shall quietly have, hold and enjoy the Premises throughout the Term hereof without interruption or disturbance from Landlord or any other persons claiming by, through or under Landlord.

**16.4** **Force Majeure.** Except as to the payment of Rent, subject to the limitations set forth below, performance by either party hereunder shall not be deemed to be in Default, and all performance and other dates specified in this Ground Lease shall be extended, where delays are due to: war; insurrection; strikes; lockouts; riots; floods; earthquakes; fires;

casualties; acts of God; acts of the public enemy; epidemics; quarantine restrictions; freight embargoes; governmental restrictions or priority; unusually severe weather; lack of reasonable availability of labor or materials; acts or omissions of the other party; or acts or failures to act of the City or any other public or governmental agency or entity (other than the acts or failures to act of Landlord which shall not excuse performance by Landlord). An extension of time for any such cause shall be for the period of the enforced delay and shall commence to run from the time of the commencement of the cause, if notice by the party claiming such extension is sent to the other party within 30 days of the commencement of the cause. Times of performance under this Ground Lease may also be extended in writing by the mutual agreement of Landlord and Tenant. Tenant expressly agrees that adverse changes in economic conditions, either of Tenant specifically or the economy generally, changes in market conditions or demand, and/or Tenant's inability to obtain financing or other lack of funding, or to complete the Improvements shall not constitute grounds of force majeure delay pursuant to this Section 16.4. Tenant expressly assumes the risk of such adverse economic or market changes and/or financial inability, whether or not foreseeable as of the Commencement Date.

If, at any time during the Term, fifty percent (50%) or more of the indoor dining room portion of the Premises cannot be utilized as a seated indoor dining restaurant for more than three (3) days as a result of any local, state, or federal order, regulation, law, directive or other mandate (each a "Government Order"), then Base Rent payable thereafter shall abate commencing as of the date on which such Government Order takes effect, and expiring on the date on which such Government Order is lifted. In the event that the Government Order has not ceased within 180 days from the first date on which the Government Order takes effect, Tenant shall have the right to elect to terminate this Lease at any time thereafter upon written notice to Landlord at any time after the expiration of such 180 day period, and both parties shall be relieved of all further obligations hereunder except for those obligations which expressly survive any termination hereof.

**16.5**            **Notices.** Any notice to be given or other document to be delivered by either party to the other hereunder shall be in writing and shall be deemed to have been duly given and received (i) upon personal delivery, (ii) as of the third business day after mailing by United States registered or certified mail, return receipt requested, postage prepaid, addressed as set forth below, or (iii) the immediately succeeding business day after deposit with Federal Express or other equivalent overnight delivery system, addressed to the party for whom intended, as indicated in the Basic Lease Information. Any party hereto may from time to time, by written notice to the other, designate a different address which shall be substituted for the one above specified.

**16.6**            **Waiver.** No waiver of any breach of any of the terms, covenants, agreements, restrictions or conditions of this Ground Lease shall be construed to be a waiver of any succeeding breach of the same or other terms, covenants, agreements, restrictions and conditions hereof.

**16.7**            **Surrender.** Upon the expiration or sooner termination of the Term of this Ground Lease, and notwithstanding anything herein contained to the contrary, Tenant shall surrender to Landlord the Facility, the Premises and any improvements thereon, broom clean and in good condition and repair, reasonable wear and tear excepted.

**16.8**            **Binding.** Subject to the restrictions set forth herein regarding assignment of , Tenant's interest in this Ground Lease, each of the terms, covenants and conditions of this Ground Lease shall extend to and be binding on and shall inure to the benefit of not only

Landlord and Tenant, but to each of their respective heirs, administrators, executors, successors and assigns. Whenever in this Ground Lease reference is made to either Landlord or Tenant, the reference shall be deemed to include, wherever applicable, the heirs, administrators, executors, successors and assigns of such parties, the same as if in every case expressed.

**16.9**            **Landlord's Right to Enter Premises and Facility.** Landlord and its authorized representatives shall have the right to enter the Premises and Facility at all reasonable times, after giving Tenant 24 hours prior written notice (except in emergency in which case no notice shall be required), for any purpose, including: to determine whether the Premises, the Facility, or any other improvements on the Premises is in good condition and whether Tenant is complying with its obligations under this Ground Lease; to do any necessary maintenance and to make any restoration to the Facility or any other improvements upon the Premises that Landlord has the right or obligation to perform; to serve, post or keep posted any notices required or allowed under the provisions of this Ground Lease; and to do any act or thing necessary for the safety or preservation of the Facility and the Premises if any excavation or other construction is undertaken or is about to be undertaken on any adjacent property or nearby street.

A.        Landlord shall not be liable in any manner for any inconvenience, disturbance, loss of business, nuisance, or other damage arising out of Landlord's entry on the Premises and Facility as provided in this Section other than any property damage, bodily injury, or death caused by the sole active negligence or willful misconduct of Landlord, its agents, employees or contractors.

B.        Tenant shall not be entitled to an abatement or reduction of Rent if Landlord exercises any rights reserved in this section but only if Landlord's exercise of such rights does not prevent Tenant from operating its business in the Premises in the ordinary course.

**16.10**           **Disclaimer of Partnership.** The relationship of the parties hereto is that of Landlord and Tenant, and it is expressly understood and agreed that Landlord does not in any way nor for any purpose become a partner of Tenant or a joint venturer with Tenant in the Improvements or in the conduct of Tenant's business or otherwise.

**16.11**           **Memorandum.** Landlord and Tenant shall execute a Memorandum of this Ground Lease or any amendment or modification thereof for recordation in the official records of the County of Alameda, California, in substantially the form attached hereto as Exhibit D.

**16.12**           **Quitclaim.** At the expiration or earlier termination of the Term, Tenant shall execute, acknowledge and deliver to Landlord within 15 days after Landlord's written demand to Tenant, any quitclaim deed or other document reasonably required by Landlord or any reputable title company to remove the cloud of this Ground Lease from the Premises and confirm Landlord's title to the Facility.

**16.13**           **Interpretation.** The titles to the sections of this Ground Lease are not a part of this Ground Lease and shall have no effect upon the construction or interpretation of any part of this Ground Lease. As used in this Agreement, masculine, feminine or neuter gender and the singular or plural number shall each be deemed to include the others where and when the context so dictates. The word "including" shall be construed as if followed by the words "without limitation." This Agreement shall be interpreted as though prepared jointly by both parties.

**16.14 Severability.** If any term, provision, condition or covenant of this Ground Lease or its application to any party or circumstances shall be held, to any extent, invalid or unenforceable, the remainder of this Ground Lease, or the application of the term, provision, condition or covenant to persons or circumstances other than those as to whom or which it is held invalid or unenforceable, shall not be affected, and shall be valid and enforceable to the fullest extent permitted by Law.

**16.15 Computation of Time.** The time in which any act is to be done under this Ground Lease is computed by excluding the first day, and including the last day, unless the last day is a holiday or Saturday or Sunday, and then that day is also excluded. The term "holiday" shall mean all holidays as specified in Sections 6700 and 6701 of the California Government Code. If any act is to be done by a particular time during a day, that time shall be Pacific Time Zone time.

**16.16 Legal Advice.** Each party represents and warrants to the other the following: they have carefully read this Ground Lease, and in signing this Ground Lease, they do so with full knowledge of any right which they may have; they have received independent legal advice from their respective legal counsel as to the matters set forth in this Ground Lease, or have knowingly chosen not to consult legal counsel as to the matters set forth in this Ground Lease; and, they have freely signed this Ground Lease without any reliance upon any agreement, promise, statement or representation by or on behalf of the other party, or their respective agents, employees, or attorneys, except as specifically set forth in this Ground Lease, and without duress or coercion, whether economic or otherwise.

**16.17 Time of Essence.** Time is expressly made of the essence with respect to the performance by Landlord and Tenant of each and every obligation and condition of this Ground Lease.

**16.18 Nonliability of Landlord's Officials and Employees.** No member, official or employee of Landlord shall be personally liable to Tenant, or any successor in interest, in the event of any default or breach by Landlord or for any amount which may become due to Tenant or its successors, or on any obligations under the terms of this Ground Lease. Tenant hereby waives and releases any claim it may have against the members, officials or employees of Landlord with respect to any default or breach by Landlord or for any amount which may become due to Tenant or its successors, or on any obligations under the terms of this Ground Lease.

**16.19 Assignment by Landlord.** Landlord may assign or transfer any of its interests hereunder at any time without Tenant's consent, provided any such assignee shall assume in writing all of Landlord's obligations under this Lease, and shall provide written notice to Tenant of any such assignment, and the notice and payment addresses of such assignee.

**16.20 Applicable Law.** The laws of the State of California, including all statutes of limitations but without regard to conflict of laws principles, shall govern the interpretation and enforcement of this Ground Lease.

**16.21 Agent for Service of Process.** Tenant expressly agrees and understands that if it is not a resident of this State, or is an association or partnership without a member or partner resident of this State, or is a foreign corporation or company, then Tenant shall file with Landlord a designation of a natural person residing in the County of Alameda, State of California, giving his or her name, residence, and business address as Tenant's agent

for the purpose of service of process in any court action between Tenant and Landlord arising out of or based upon this Ground Lease, and the delivery to such agent of a copy of any process in any such action shall constitute valid service upon such Tenant. Tenant further expressly agrees, covenants and stipulates that if for any reason service of such process upon such agent is not possible, or Tenant fails to maintain such an agent, then in such event Tenant may be personally served with such process out of the State of California, and that such service shall constitute valid service upon such Tenant; and it is further expressly agreed that Tenant is amenable to the process so served, submits to the jurisdiction of the court so acquired, and waives any and all objection and protest thereto.

**16.22**            **Covenants and Conditions.** Each obligation of the parties hereunder, including, without limitation, Tenant's obligation for the payment of Rent, shall be construed to be both a covenant and a condition of this Ground Lease.

**16.23**            **Integration.** This Ground Lease, together with all exhibits and attachments hereto, constitute the entire agreement between the parties and there are no conditions, representations or agreements regarding the matters covered by this Ground Lease which are not expressed herein.

**16.24**            **Estoppel Certificates.** From time to time, Tenant shall execute and deliver to Landlord within 20 days of request a certificate certifying (i) that this Ground Lease is unmodified and in full force and effect or, if there has been any modification, that this Ground Lease is in full force and effect as modified, and stating the date and nature of each such modification; (ii) the date to which Rent and other sums payable hereunder have been paid; (iii) that no notice has been received by Tenant of any default which has not been cured, except as to defaults specified in such certificate; (iv) that Landlord is not in default under this Lease and that Tenant has no claims, charges, offsets or defenses against Landlord, or specifying the nature of any such default or claim, charges, offsets or defense; and (v) such other matters as may be reasonably requested by Landlord. Any such certificate may be relied upon by any prospective purchaser, vendee or other party. If Tenant fails to execute and deliver any such certificate within ten business days after Landlord's written request, such failure, at Landlord's election, shall be conclusive against Tenant that this Lease is in full force and effect, without modification (except as may be represented by Landlord), that there are no uncured defaults in Landlord's performance, and that not more than one month's rent has been paid in advance. In the event that Tenant requests Landlord to execute a certificate pursuant to this 16.25, then Tenant shall pay Landlord's reasonable attorneys' fees and consultant costs incurred in connection with each such request in an amount not to exceed \$1,500, which amount shall be increased by annual CPI adjustments.

**16.25**            **Amendments to this Ground Lease.** Landlord and Tenant agree to mutually consider reasonable requests for amendments to this Ground Lease that may be made by either of them, lending institutions or bond counsel or financial consultants to Landlord or Tenant, provided such requests are consistent with this Ground Lease and would not materially alter the basic business terms included herein. Tenant shall pay Landlord's reasonable attorneys' fees and third-party costs incurred in connection with any amendment requested by or on behalf of Tenant. No amendment shall be effective unless in writing and signed by the parties hereto. Amendments are subject to approval by the City Council in its sole discretion.

**16.26**            **Brokerage Commissions.** Landlord and Tenant each represents that it has not been represented by any broker in connection with this Ground Lease, and that no real estate broker's commission, finder's fee or other compensation (individually and collectively,

“Brokerage Commission”) is due or payable. Landlord and Tenant each agrees to indemnify and hold the other harmless from any claims or liability, including reasonable attorneys’ fees, in connection with a claim by any person for a Brokerage Commission based upon any statement, representation or agreement of the other party.

**16.27            City Non-Discrimination Ordinance.** Tenant hereby agrees to comply with the provisions of the Berkeley Municipal Code (“**B.M.C.**”), including without limitation Chapter 13.26, as amended from time to time. In the performance of its obligations under this Ground Lease, Tenant agrees as follows:

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

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

**16.28            Non-Discrimination Against Persons With Disabilities.**

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

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

**16.29            Conflict of Interest Prohibited.**

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

B.        In accordance with California Government Code Section 1090 and the Political Reform Act, (Government Code Section 87100 et seq.,) no person who is a director, officer, partner, trustee, employee or consultant of Tenant, or immediate family member of any of the preceding, shall make or participate in a decision made by Landlord or any of its boards,

commissions or committees, if it is reasonable foreseeable that the decision will have a material effect on any source of income, investment or interest in real property of that person or Tenant, except to the extent permitted by 2 California Code of Regulations, Section 18700(c)(2).

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

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

**16.31**            **Required Accessibility Disclosure.**

A. Landlord hereby advises Tenant that the Premises and Facility have not undergone an inspection by a certified access specialist, and except to the extent expressly set forth in this Ground Lease, Landlord shall have no liability or responsibility to make any repairs or modifications to the Premises or the Project in order to comply with accessibility standards. The following disclosure is hereby made pursuant to applicable California law:

B. "A Certified Access Specialist (CASp) can inspect the subject 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." [Cal. Civ. Code Section 1938(e)]. Any CASp inspection shall be conducted in compliance with reasonable rules in effect at the Premises with regard to such inspections and shall be subject to Landlord's prior written consent.

**16.32**            **Oppressive States.**

A. In accordance with Resolution No. 59,853-N.S., Tenant certifies that it has no contractual relations with, and agrees during the Term of this Ground Lease to forego contractual relations to provide personal services to, the following entities:

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

B. For purposes of this Ground Lease, the Tibet Autonomous Region and the provinces of Abo, Kham, and U-Tsang shall be deemed oppressive states.

C. Tenant's failure to comply with this Section shall constitute a default of this Ground Lease and Landlord may terminate this Ground Lease pursuant to Article 14. In the event that Landlord terminates this Ground Lease due to a default under this provision, Landlord may deem Tenant a non-responsible bidder for five years from the date this Ground Lease is terminated.

**16.33 Berkeley Living Wage Ordinance (LWO).**

A. Tenant agrees to comply with Berkeley Municipal Code Chapter 13.27, the Berkeley Living Wage Ordinance. If Tenant employs six or more part-time or full-time employees, and generates \$350,000 or more in annual gross receipts, Tenant will be required to provide all eligible employees with City mandated minimum compensation during the Term of this Ground Lease, as defined in B.M.C. Chapter 13.27, and well as comply with the terms enumerated herein.

B. Tenant shall be required to maintain all reasonable records and documents that would establish whether Tenant is subject to Berkeley's Living Wage Ordinance ("**LWO**"). If Tenant is subject to the LWO, as defined therein, Tenant shall be further required to maintain monthly records of those employees located on the leased Premises. These records shall include the total number of hours worked, the number of hours spent providing service on the leased Premises, the hourly rate paid, and the amount paid by Tenant for health benefits, if any, for each of its employees providing services under the lease. The records described in this Section shall be made available upon the Landlord's request. The failure to produce these records upon demand shall be considered a default, subject to the provisions contained in Article 14 herein.

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

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

E. Tenant's failure to comply with this Section shall constitute a default of the Ground Lease, upon which City may terminate this Ground Lease pursuant to Article 14.

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

**16.34 Berkeley Equal Benefits Ordinance (EBO).**

A. Tenant hereby agrees to comply with the provisions of the Berkeley Equal Benefits Ordinance, B.M.C. Chapter 13.29. If Tenant is currently or becomes subject to the Berkeley Equal Benefits Ordinance, Tenant will be required to provide all eligible employees with City mandated equal benefits during the Term of this Ground Lease, as defined in B.M.C. Chapter 13.29, as well as comply with the terms enumerated herein.

B. If Tenant is currently or becomes subject to the Berkeley Equal Benefits Ordinance, Tenant agrees to supply the City with any records the City deems necessary to determine compliance with this provision. Failure to do so shall be considered a default, subject to the provisions of Article 14.

C. If Tenant fails to comply with the requirements of this Section, City shall have the rights and remedies described in this Section, in addition to any rights and remedies provided by law or equity. Tenant's failure to comply with this Section shall constitute default of the Ground Lease, upon which City may terminate this Ground Lease pursuant to Article 14.

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

**16.35 Berkeley Marina Zone Worker Retention Ordinance.** As a "Marina Zone Business" (as defined in the Berkeley Marina Zone Worker Retention Ordinance, B.M.C. Chapter 13.25 "Marina Zone Ordinance"), Tenant shall comply with such Ordinance. Without limiting the foregoing, during the Ground Lease Term, Tenant shall cause any "New Operator" (as defined in the Marina Zone Ordinance) to comply with such Ordinance.

**16.36 Pests and Pesticide Management.** All use of pesticides on or about the Premises shall be in compliance with the City of Berkeley's Pest/Pesticide Management Policy.

**16.37 Berkeley Sanctuary City Ordinance.**

Tenant hereby agrees to comply with the provisions of the Sanctuary City Contracting Ordinance, B.M.C. Chapter 13.105. In accordance with this Chapter, Tenant agrees not to provide the U.S. Immigration and Customs Enforcement Division of the United States Department of Homeland Security with any Data Broker or Extreme Vetting Services as defined herein:

A. "Data Broker" means either of the following: (1) The collection of information, including personal information about consumers, from a wide variety of sources for the purposes of reselling such information to their customers, which include both private-sector business and government agencies; (2) the aggregation of data that was collected for another purpose from that for which it is ultimately used.

B. "Extreme Vetting" means data mining, threat modeling, predictive risk analysis, or other similar services. Extreme Vetting does not include: (1) The City's computer-network health and performance tools; (2) Cybersecurity capabilities, technologies and systems used by the City of Berkeley Department of Information Technology to predict, monitor for, prevent, and protect technology infrastructure and systems owned and operated by the City of Berkeley from potential cybersecurity events and cyber-forensic based investigations and prosecutions of illegal computer-based activity.

**16.38 Labor Peace Ordinance.** Tenant hereby agrees to comply with the provisions of the Labor Peace Policy Ordinance, B.M.C. Chapter 2.102. In accordance with this Chapter, Tenant agrees that any future Lease, and any potential sublease agreements, shall include provisions that a hospitality operation at the 199 Seawall Drive property shall be required to provide evidence satisfactory to the City that it is party to a labor peace agreement that protects the City's proprietary interest in the property.

**16.39 Employment Opportunities for Former Staff.** Tenant agrees to provide employees of the former Hs. Lordships restaurant located at 199 Seawall Drive employed at the time of the restaurant's closure an opportunity to apply for positions in new business operations conducted on the property.

**16.40 Audit.** In addition to any other Landlord audit right herein, the City Auditor's Office, or its designee, may conduct an audit of Tenant's financial and compliance records maintained in connection with the operations and services performed under this Ground Lease, and with the payments made under this Ground Lease. In the event of such audit, Tenant agrees to make all such financial and compliance records available to the Auditor's Office, or to its designee. City agrees to provide Tenant an opportunity to discuss and respond to any findings before a final audit report is filed.

**16.41 City Business License, Payment of Taxes, Tax I.D. Number.** Tenant has obtained a City business license as required by B.M.C. Chapter 9.04, and its license number is written below; or, Tenant is exempt from the provisions of B.M.C. Chapter 9.04 and has written below the specific B.M.C. section under which it is exempt. Tenant shall pay all state and federal income taxes and any other taxes due. Tenant certifies under penalty of perjury that the taxpayer identification number written below is correct.

**16.42 Survival.** The provisions of Sections 4.3 (Real Property Taxes), 4.4 Assessments, 5.5 (General Standards of Maintenance), 5.7 (Governmental Requirements), 6.2 (Hazardous Materials), 7.2 (Alterations on Premises), 7.5 (Liens and Stop Notices), 10.2 (Indemnity), 16.7 (Surrender) and any other obligation of Tenant that, by its terms or nature, is to be performed after or is to survive expiration or termination of this Ground Lease, shall survive such expiration or termination.

IN WITNESS WHEREOF, Landlord and Tenant have caused this Ground Lease to be executed on their behalf by their respective officers thereunto duly authorized as of the dates set forth below.

*[Signature Page Follows]*

Internal

**TENANT:**

By: \_\_\_\_\_

Date: \_\_\_\_\_

**LANDLORD:**

CITY OF BERKELEY, a public body corporate and politic

By: \_\_\_\_\_  
City Manager

Date: \_\_\_\_\_

**Approved as to form:**

\_\_\_\_\_  
Farimah Brown, City Attorney

**Registered by:**

\_\_\_\_\_  
\_\_\_\_\_, City Auditor

**Attest:**

\_\_\_\_\_  
\_\_\_\_\_, City Clerk

**TENANT INFORMATION**

Tax Identification No.

Incorporated:

Certified Woman Business Enterprise:

Certified Minority Business Enterprise:

Certified Disadvantaged Business Enterprise:

City Business License No. \_\_\_\_\_, or

Exempt pursuant to B.M.C. Section \_\_\_\_\_

**EXHIBIT A**

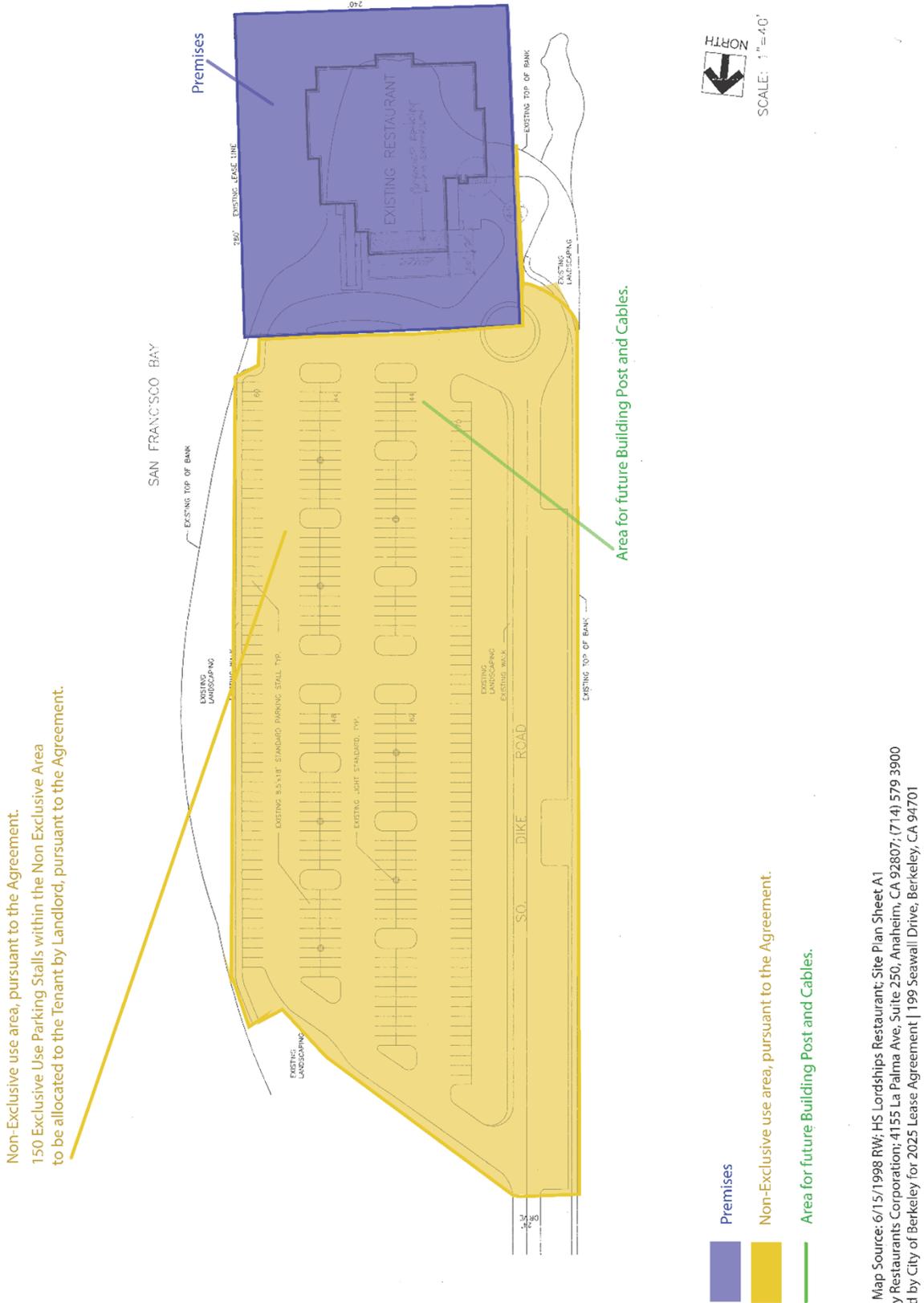
**SITE MAP AND PREMISES DESCRIPTION**

Leased "Premises" include the approximately 1.543 acre parcel of land commonly known and referred to as 199 Seawall Drive on the Berkeley Marina, Berkeley, California (being a portion of APN 60-2545-1), shown below. Leased Premises include the approximately 25,000 square feet free-standing building located on the Premises shown above, as well as support pilings, rip-rap, landscaping and pathways.

Non-Exclusive Use Areas outside the leased Premises include the Seawall Parking Lot, Bay Trail, and Seawall Drive section below. This Lease grants Tenant exclusive use of 150 parking spaces in the Seawall Lot in exchange for construction of improvements and maintenance of the non-exclusive use areas shown here. Specific location of exclusive use parking spaces may be adjusted throughout the lease term with mutual agreement of Tenant and Landlord.

Both parties agree that Tenant may place a post and cables for potential exoskeleton structure in the parking lot (non-exclusive area) contingent upon Landlord approval of location and design. Tenant agrees to provide Landlord access to the Leased Premises for City work and public access to the shoreline, trails and turnaround areas, as noted in Section 5.7 and 5.8 of the Lease.

Exhibit A: Site Map



Non-Exclusive use area, pursuant to the Agreement.  
 150 Exclusive Use Parking Stalls within the Non Exclusive Area  
 to be allocated to the Tenant by Landlord, pursuant to the Agreement.

- Premises
- Non-Exclusive use area, pursuant to the Agreement.
- Area for future Building Post and Cables.

Original Map Source: 6/15/1998 RW; HS Lordships Restaurant; Site Plan Sheet A1  
 Specialty Restaurants Corporation; 4155 La Palma Ave, Suite 250, Anaheim, CA 92807; (714) 579 3900  
 Modified by City of Berkeley for 2025 Lease Agreement | 199 Seawall Drive, Berkeley, CA 94701

## EXHIBIT B

### IMPROVEMENTS TO THE LEASED PREMISES

#### 1. General

The Improvements to the Leased Premises will be carried out in the following four consecutive phases: (1) Conceptual Design/Environmental Review; (2) Permitting and Final Design; (3) Construction; and (4) Maintenance. Conceptual Design/Environmental Review will be complete and Permitting/Final Design may be in progress prior to lease execution. The Tenant has secured all necessary funding and resources needed to successfully complete all phases of the Project with sufficient construction quality and workmanship to be accepted by the City.

#### 2. Project Scope

The On Premises Improvements shall provide a comprehensive building renovation to 199 Seawall, including:

- *Necessary Building Improvements:*

These improvements are required to repair the existing building, structure and systems, consistent with current code requirements:

- Piling and riprap repairs beneath and surrounding the building.
- Structural repairs to compromised beams and other structural elements.
- Upgrades to electrical, HVAC, plumbing, and communication systems.
- ADA-compliant access and restroom improvements.

- *Tenant-Specific Exterior Improvements:*

An architectural exoskeleton may be added to the building's exterior. There may be a tall post and cables to support the structure located outside the leased premises.

Tenant will make landscaping and pathway improvements within the leased premises, maintaining public access and connection to the existing pathways along the 199 Seawall peninsula.

- *Tenant-Specific Interior Improvements:*

Tenant shall install furniture, fixtures, and equipment (FF&E), paint, trim, flooring, wall coverings, and lighting elements, tailored to the tenant's restaurant/cafe concepts.

#### 3. Landlord Approval and Permitting Requirements

Final design of On-Premises Improvements is subject to Landlord review and approval, California Environmental Quality Act (CEQA)-compliant review and certification, and regulatory approvals; see Table 1 for permitting requirements. Tenant may modify improvement plans in response to feedback through this permitting phase, and provide updated plans for Landlord review and approval.

Internal

Table 1: Permitting Requirements

**Leased Premises - Design, CEQA and Permitting Phase**

Table below reflects the typical, at the minimum, approvals prior to construction. Tenant is responsible for additional permits and other approvals not listed below.

<b>Regulatory Approval</b>	<b>Tenant's Responsibility</b>	<b>Landlord (PRW)'s Responsibility</b>	<b>Approving Body</b>	<b>Approval Needed Prior to Construction</b>	<b>Cost</b>
<b>Design &amp; Engineering</b>	To Perform	To Review and Approve	PRW	PRW	Borne by the Tenant
<b>Alameda Countywide Clean Water Program</b>	To Complete Technical Checklist and all needed info	To Review and facilitate permit submittal process	Building Permit/Public Works	C3 Checklist	Borne by the Tenant
<b>Construction Erosion Control Plan</b>	To Perform	To Review and facilitate permit submittal process	PRW/Building Permit/Public Works	Building Permit	Borne by the Tenant
<b>Pedestrian and Vehicular Traffic Handling Plan</b>	To Perform	To Review and Approve	PRW	PRW	Borne by the Tenant
<b>Construction Staging Area Plan with BMPs</b>	To Perform	To Review and Approve	PRW	PRW	Borne by the Tenant
<b>Tree Pruning or Removal Permit</b> ( <a href="https://berkeleyca.gov/sites/default/files/documents/Tree-Pruning-Removal-Permit_1.pdf">https://berkeleyca.gov/sites/default/files/documents/Tree-Pruning-Removal-Permit_1.pdf</a> )	To Complete Tree Removal Form	To Review and Approve	PRW	Tree Removal Permit	Borne by the Tenant

Internal

Regulatory Approval	Tenant's Responsibility	Landlord (PRW)'s Responsibility	Approving Body	Approval Needed Prior to Construction	Cost
<b>CEQA<sup>1</sup></b>	To Complete Analysis and Documentation	To Review, Approve, and otherwise conduct CEQA process as lead agency	City	City Council, if Initial Study/Mitigated Declaration, or Environmental Impact Report	Borne by the Tenant
<b>BCDC Permit</b>	To Complete Permit Application and provide all needed information	To Review, and facilitate permit submittal	BCDC	Major, administrative, regionwide, or abbreviated regionwide permit	Borne by the Tenant
<b>Army Corps of Engineers Permit</b>	To Complete Permit Application and provide all needed information	To Review	Army Corps of Engineers	Nationwide Permit, or others	Borne by the Tenant
<b>Regional Water Quality Board</b>	To Complete Permit Application and provide all needed information	To Review, and facilitate permit submittal process	Regional Water Quality Board	401 Water Quality Certification or others	Borne by the Tenant
<b>CA Fish and Wildlife Permit</b>	To Complete Permit Application and provide all needed information	To Review and facilitate permit submittal process	CA Fish and Wildlife	TBD	Borne by the Tenant
<b>City of Berkeley Zoning and Design Review</b>	To Complete Permit Application and provide all	To Review and facilitate permit submittal process	Planning Commission, Zoning Adjustments	Use permit amendment	Borne by the Tenant

<sup>1</sup> Note: CEQA review expected to be complete prior to lease execution. If any subsequent changes occur that require additional environmental review, CEQA will need to be updated.

Internal

Regulatory Approval	Tenant's Responsibility	Landlord (PRW)'s Responsibility	Approving Body	Approval Needed Prior to Construction	Cost
	needed information		Board, Design Review Committee		
<b>City of Berkeley Building Permit</b>	To Complete Permit Application and provide all needed information	To Review	Planning & Development Department	Building Permit	Borne by the Tenant

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Internal

## Leased Premises - Construction Phase

Scope	Tenant's Responsibility	Landlord (PRW)'s Responsibility	Approval Body	Approval Needed Prior to Notice of Project Completion	Cost
<b>Construction</b>	To Perform	To inspect and issue corrective action	Building Permit Department and PRW	Obtain Substantial Construction Completion, Address Punchlist Items	Borne by the Tenant
<b>Construction Management &amp; Inspection</b>	To provide qualified construction manager and inspector	To inspect and issue corrective action	PRW	Qualified construction manager to issue project completion document to PRW	Borne by the Tenant
<b>City of Berkeley Building Permit Inspection &amp; Certificate of Occupancy</b>	To coordinate with Building Department	To receive Certificate of Occupancy from Tenant	Building Permit Department	Building Permit Close Out Document	Borne by the Tenant
<b>Regulatory Permits, including but not limited to BCDC, CA Fish and Wildlife, Army Corps of Engineers</b>	To perform all work in the approved permits, and coordination with regulatory agencies	To inspect and issue corrective action	Regulatory Agencies	Regulatory Permit Close Out Documents	Borne by the Tenant

4. Funding

The Improvements will be fully funded by the Tenant at no cost to the City.

5. Conceptual Design / Environmental Review

Environmental review will be complete prior to lease execution. If there are any changes to the project or surrounding circumstances that require additional environmental review, Tenant shall notify Landlord and pay the cost for review of additional environmental impacts under CEQA.

Tenant shall conduct any required environmental studies in accordance with CEQA, and Landlord shall review, evaluate, and if necessary certify. As required by CEQA, the Project shall implement all feasible mitigation measures. Tenant may modify the project, subject to Landlord review and approval, to mitigate any identified environmental impacts to the extent required by CEQA. If Tenant is unable to modify the project to mitigate identified environmental impacts to the extent required by CEQA, the Lease will terminate, subject to Section 2.2 of the Lease.

6. Design Phase Approval Process

Applicant shall provide stamped submittals of the 199 Seawall Project at the 30%, 65%, 90%, and 100% design level to the City's Director of Parks, Recreation, and Waterfront Department ("the Director") at each submittal stage for review and approval. Applicant shall conduct project progress meetings with the Director after each submittal upon the Director's request.

At any stage of design, if Landlord determines that additional environmental review is required due to a change in project conditions, Tenant will conduct such review according to Section B.1.4. of the Lease.

7. Design Standards

Final Design shall meet all applicable and latest building codes, stormwater quality requirements, City polices and standards, and any other applicable standards.

8. Construction

Tenant shall procure construction contractors at its sole discretion. Tenant shall provide all construction administration and management for the project. Tenant shall provide a qualified project manager to act on the behalf of the Tenant in project coordination and decision making with the City. Any changes to design and/or construction must be approved by the City and require Tenant to secure all necessary regulatory approvals and comply with CEQA.

9. Public Convenience, Safety, and Environmental Protection

All areas outside the leased premises shall remain accessible to the public during construction to the extent feasible. Tenant shall erect and properly maintain at all times all necessary safeguards for the protection of workers and the public, as required in Section 7.4 of the Lease.

10. Changes in Construction

Any changes to construction of the approved 199 Seawall Project that deviate from the prior-approved plans and specifications shall require the prior written approval of the City. The City is

under no obligation to pay for any changes to construction or unforeseen circumstances that affect construction.

11. Acceptance of Construction

Upon completion of construction, Tenant shall submit in writing to the Director to request a "Final" Walkthrough. Acceptance of construction will be issued upon satisfaction of the project by the Director.

12. Course of Construction

Tenant shall purchase at all times during construction maintain, or cause its general contractor to purchase and maintain, All-Risk Course of Construction insurance including damage to property owned by City, Tenant, or third parties caused by fire. Such insurance shall be in the amount of 100 percent of the completed value of the work to be performed under this Exhibit B. Deductible shall not exceed \$25,000.

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EXHIBIT C

OFF-SITE IMPROVEMENTS

1. Amounts and Eligible Expenses:

As described in the Lease (Basic Lease Information, 14. Off-Site Improvements), Tenant agrees to complete off-site improvements valued at \$17M towards construction and maintenance of off-site improvements, in lieu of \$16M in payment for 150 exclusive use parking spaces during the Initial Term and a \$1M capital contribution.

a. Eligible expenses towards that \$17M include:

i. Initial construction of off-site improvements.

Element	30% Design Estimate	Cost
Parking Lot		\$8,624,555
Bay Trail on Seawall Drive		\$1,612,262
Seawall Drive (From 199 Seawall Drive Terminus to University Avenue)		\$1,840,957
<b>Subtotal</b>		<b>\$12,077,774*</b>

\*Cost estimate will continue to be refined as the project moves through Design. Actual scope may change at Landlord's discretion, depending on needs and whether Landlord secures alternative funding sources for these scope elements.

- ii. Annual maintenance to replenish rock in geogrid parking stalls. Estimated to cost \$1,335,726 over 45 years, starting at \$15,000 and escalating 3% per year.
- iii. Microsurfacing of asphalt in Year 10, Year 20, and Year 40. Estimated to cost \$384,222 in total.
- iv. Replacement of asphalt in Year 30, or as needed and approved by City. Estimated to cost \$7,566,534 in total.
- v. At Landlord's sole discretion and with Tenant agreement in advance and in writing, Tenant's completion of other off-site Waterfront improvements may be considered eligible expenses. Landlord will provide cost estimate of improvements to Tenant in advance, and if Tenant concurs with estimate, this estimate will be used to determine eligible credit amount. If any of the initial construction elements described in 1.a.i. above are swapped for other off-site Waterfront improvements, these Waterfront improvements will be completed within the same timeframe as the

improvements described above, pending all necessary regulatory and permitting requirements.

- vi. Landlord estimates for these expenses shall be the credit that Tenant receives towards the \$17M. However, if Tenant provides evidence that the actual costs exceed estimated costs, Landlord at its discretion will apply additional costs as eligible expenses.
- b. If actual eligible costs exceed \$17M, and the City agrees in writing with cost and scope, the parties may negotiate cost share.
- c. If 10-year option periods are exercised, parking lot maintenance in lieu of rent may continue in the same way, (see costs below).
  - i. Option 1 (Years 46-55): \$7.5M parking lot rent<sup>2</sup>
  - ii. Option 2 (Years 56-65): \$10M parking lot rent<sup>3</sup>

## 2. General

Off-Site Improvements will be carried out in the following four consecutive phases: (1) Conceptual Design/Environmental Review; (2) Permitting and Final Design; (3) Construction; and (4) Maintenance. The first two phases are being completed by the Landlord. The Tenant shall complete Construction and Maintenance. The Tenant shall secure all necessary funding and resources needed to successfully complete the Project with sufficient construction quality and workmanship to be accepted by the City.

## 3. Project Scope

In exchange for 150 exclusive use parking spaces in the 199 Seawall Parking Lot, the Tenant agrees to complete and maintain throughout the Lease term the following Off-Site Improvements, located on City property outside the Leased Premises:

- *199 Seawall Drive Parking Lot*: Renovate the parking lot, including parking areas along the adjacent portions of Seawall Drive, with new pavement, surfacing, striping, lighting, and stormwater treatment; as well as any electric vehicle supply equipment and electrical connections at designated parking stalls, as required by code.
- *Bay Trail improvements*: Construct a portion of the planned Bay Trail Extension, from the south end of Seawall Drive to the area across from the northwest end of the 199 Seawall

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<sup>2</sup> When escalated 3%/year, the amount of the original \$172,800/year rent for 150 exclusive use parking spaces will be \$652,011 by Year 46. Over 10 years at continued 3% escalation, the total parking lot rent would be \$7.5M.

<sup>3</sup> By Year 56, the amount of the original \$172,800/year parking lot rent will be \$876,249. Over 10 years at continued 3% escalation, total parking lot rent would be \$10M.

Drive Parking Lot.

- *Seawall Drive improvements*: Implement improvements to Seawall Drive, including re-alignment, repaving, and restriping of the road from the southern terminus to northwest end of the 199 Seawall Drive Parking Lot.

Tenant agrees to construct these improvements according to City design and specifications. The improvements are currently at 30% design, as shown in Exhibit C.1., 30% Design Plan. Note that figures in Exhibit C.1. are preliminary design, and exclude additional features (e.g. striping and materials for Bay Trail; electrical vehicle charging stalls and requirements; tree removals required for construction; etc.) that will be included in later phases of design.

Any off-site improvements performed by the Tenant must be conducted in accordance with the City final design and in full compliance with Judicial Streamlining requirements as described in Section 7.2.A. of the Lease.

Other Waterfront improvements may be included in this project scope, for example, if City secures other funding sources for the improvements listed above. Such a change may be made with mutual agreement in writing by Landlord and Tenant as noted in this 1.a.v., and in accordance with Section 7 of the Lease.

#### 4. Funding

The Improvements will be fully funded by the Tenant at no cost to Landlord.

#### 5. Conceptual Design, Environmental Review and Final Design

Design and environmental permitting for these improvements are underway as part of the Landlord's separate Pier Ferry project. The improvements are currently at 30% design, as shown in Exhibit C.1. Landlord will provide Tenant with Final Design Documents for the off-site improvements listed above, after environmental review and permitting has been completed for those improvements. The Final Design Documents will incorporate all feedback from the permitting process, and be construction-ready.

#### 6. Construction

Tenant shall procure construction contractors at its sole discretion. Tenant shall provide all construction administration for the project. Tenant shall provide a qualified project manager to act on the behalf of the tenant in project coordination and decision making with the City.

Landlord shall provide professional construction management services to represent the City for all aspects of construction at Landlord's sole cost. Landlord's Construction Manager shall have the enforcement authority to ensure that construction conforms with the approved plans and specifications for the project, and shall be given full access to the site and all construction activities, project meetings, and project documents.

No more than 60 days after Landlord's delivery to the Tenant of Final Design Documents for the Off-Site Improvements, the Tenant shall:

- a. Conduct Project Kickoff Meeting with Landlord and Tenant's construction team
- b. Provide for Landlord approval the following submittals: construction sequence and duration schedule, traffic control and pedestrian handling plans, erosion control/stormwater quality control plans, and all construction materials and shop drawing cutsheets.

Upon Landlord approval of submittals, Tenant will provide all required documents listed in the Project Manual such as but not limited to bonds, insurance, and City standard forms.

Landlord will issue notice to proceed with construction. This document will include the number of working days to reach substantial completion.

Time extension request: Upon unforeseen circumstances, such as unforeseen ground conditions and utility conflicts, the Tenant shall request a time extension from Landlord.

Failure to request time extension: Tenant may be subject to additional construction management and inspection fees, and liquidated damages as stipulated in the Project Manual.

Failure to complete improvements in a timely manner, consistent with the Landlord's notice to proceed and any approved time extension requests, shall be addressed per Section 7.2.C. of the lease.

#### 7. Public Convenience, Safety, and Environmental Protection

Tenant shall maximize public access to the shoreline during construction to the extent feasible.

City standard provisions related to public convenience, safety and environmental protection will be included in the Final Design Documents.

#### 8. Changes in Construction

Any changes to construction of the approved 199 Seawall Project that deviate from the prior-approved plans and specifications shall require the prior written approval of the City. The City is under no obligation to pay for any changes to construction or unforeseen circumstances that affect construction.

#### 9. Acceptance of Construction

Upon completion of construction, Tenant shall ask Landlord in writing for a "punch-list" walk-through of the project. After the walk-through, Landlord shall provide a "punch-list" to Tenant within 5 working days. Tenant shall address the punch list within 10 working days, though items need not be completed within that 10-day period.

Upon completion of the punch list items, Tenant shall submit in writing to Landlord a request a "Final" walk-through. Acceptance of construction will be issued upon satisfaction of the project by Landlord.

10. Maintenance

For the duration of the lease term, the Tenant is responsible for maintaining these improvements in good condition at no additional cost to the City, up to the amount described in the Lease: Basic Lease Information, 14. Off-Site Improvements. At the City's discretion, this may include microsurfacing of asphalt every 10 years, replacement of asphalt at 30 years (or earlier as needed), annual maintenance to replenish rock in geogrid parking stalls, maintenance of bioretention areas, and ongoing striping and concrete repairs to keep the improvements in good condition, as additionally described in Section 5.5 of the Lease. Tenant will coordinate with the City before undertaking any maintenance and will not proceed without Landlord approval in writing at each occurrence.

11. Course of Construction

Tenant shall purchase at all times during construction maintain, or cause its general contractor to purchase and maintain, All-Risk Course of Construction insurance including damage to property owned by City, Tenant, or third parties caused by fire. Such insurance shall be in the amount of 100 percent of the completed value of the work to be performed under this Exhibit C. Deductible shall not exceed \$25,000.

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Exhibit C.1: 30% Design for Off-Site Improvements

Figure 3 - North side of Seawall Lot area improvements: shows grading, drainage and bioretention areas.

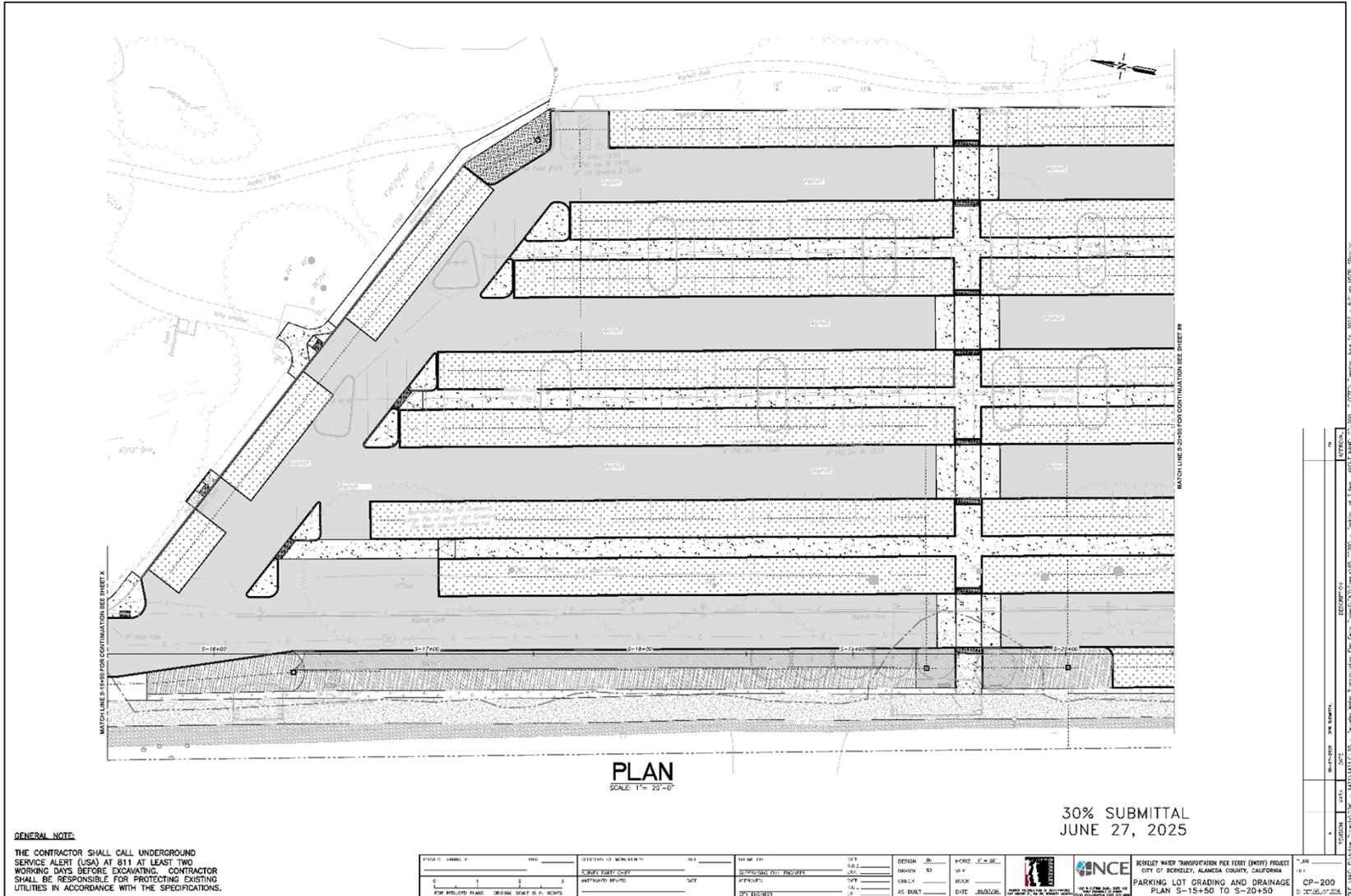


Exhibit C1

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Exhibit C.1: 30% Design for Off-Site Improvements

Figure 4 - South side of Seawall Lot area improvements: shows grading, drainage and bioretention areas.

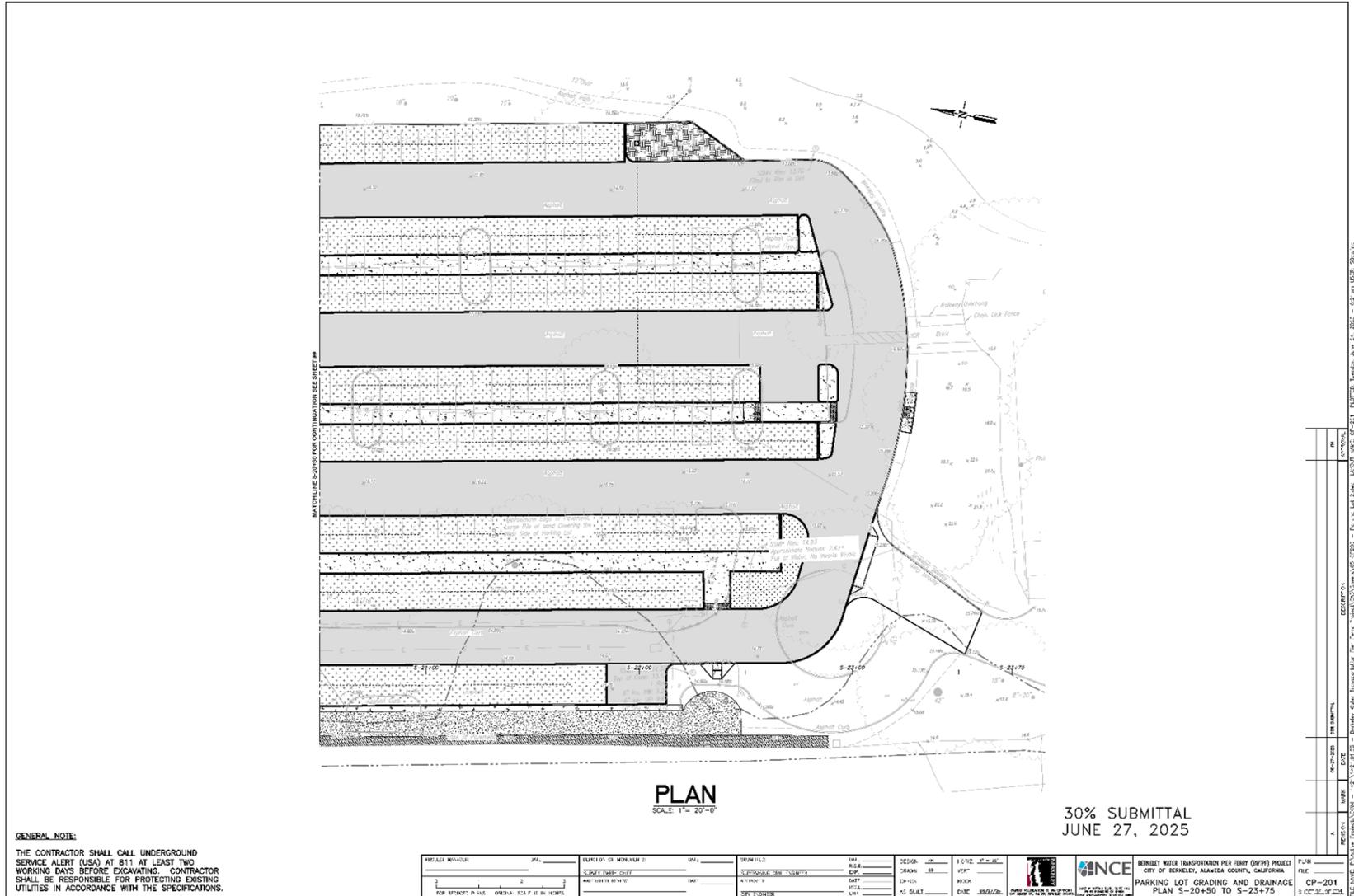


Exhibit C1

Exhibit C.1: 30% Design for Off-Site Improvements

Figure 5 - North side of Seawall Lot area improvements: shows parking lot layout and striping

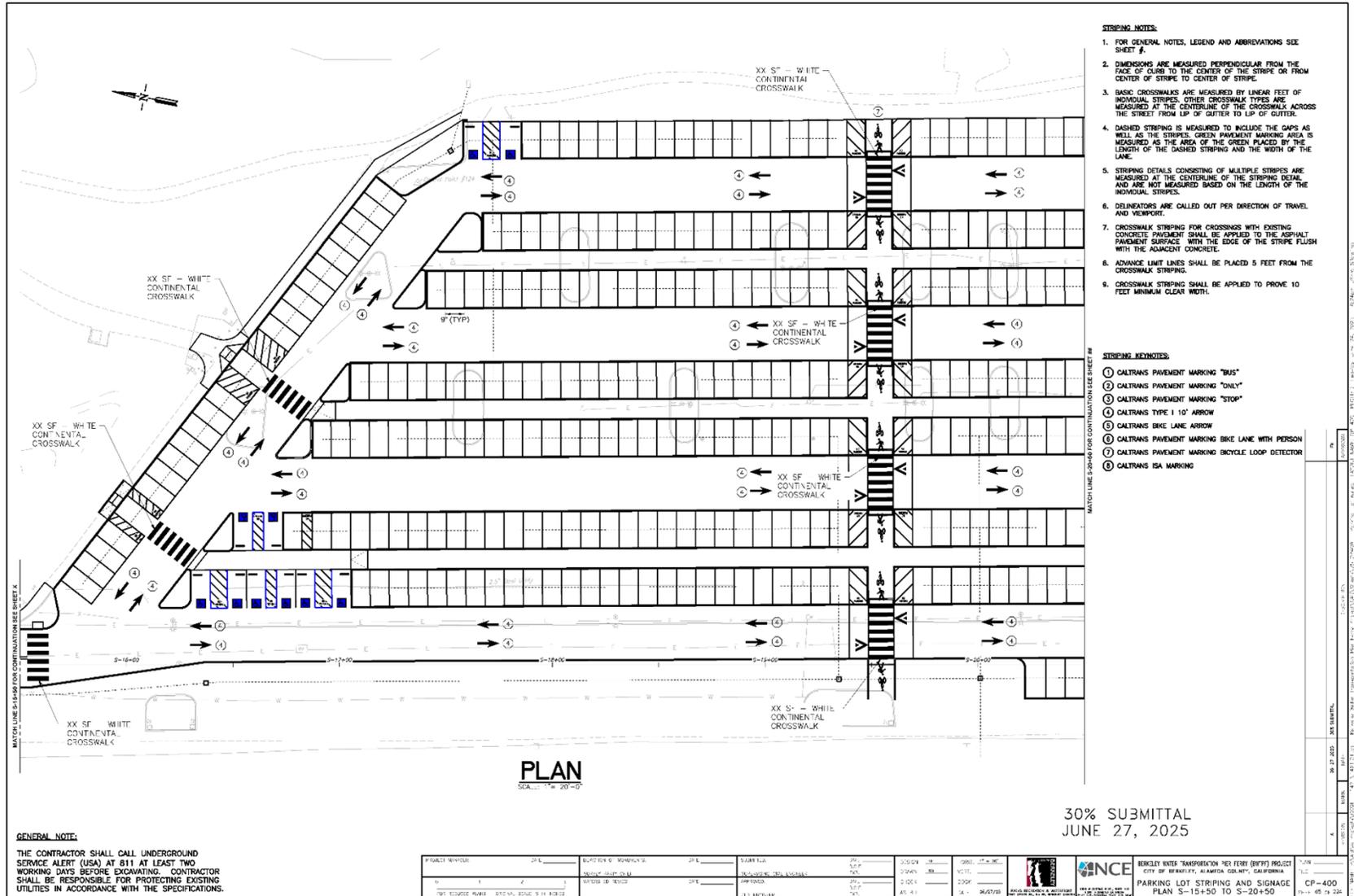


Exhibit C1

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Exhibit C.1: 30% Design for Off-Site Improvements

Figure 6 - South side of Seawall Lot area improvements: shows parking lot layout and striping

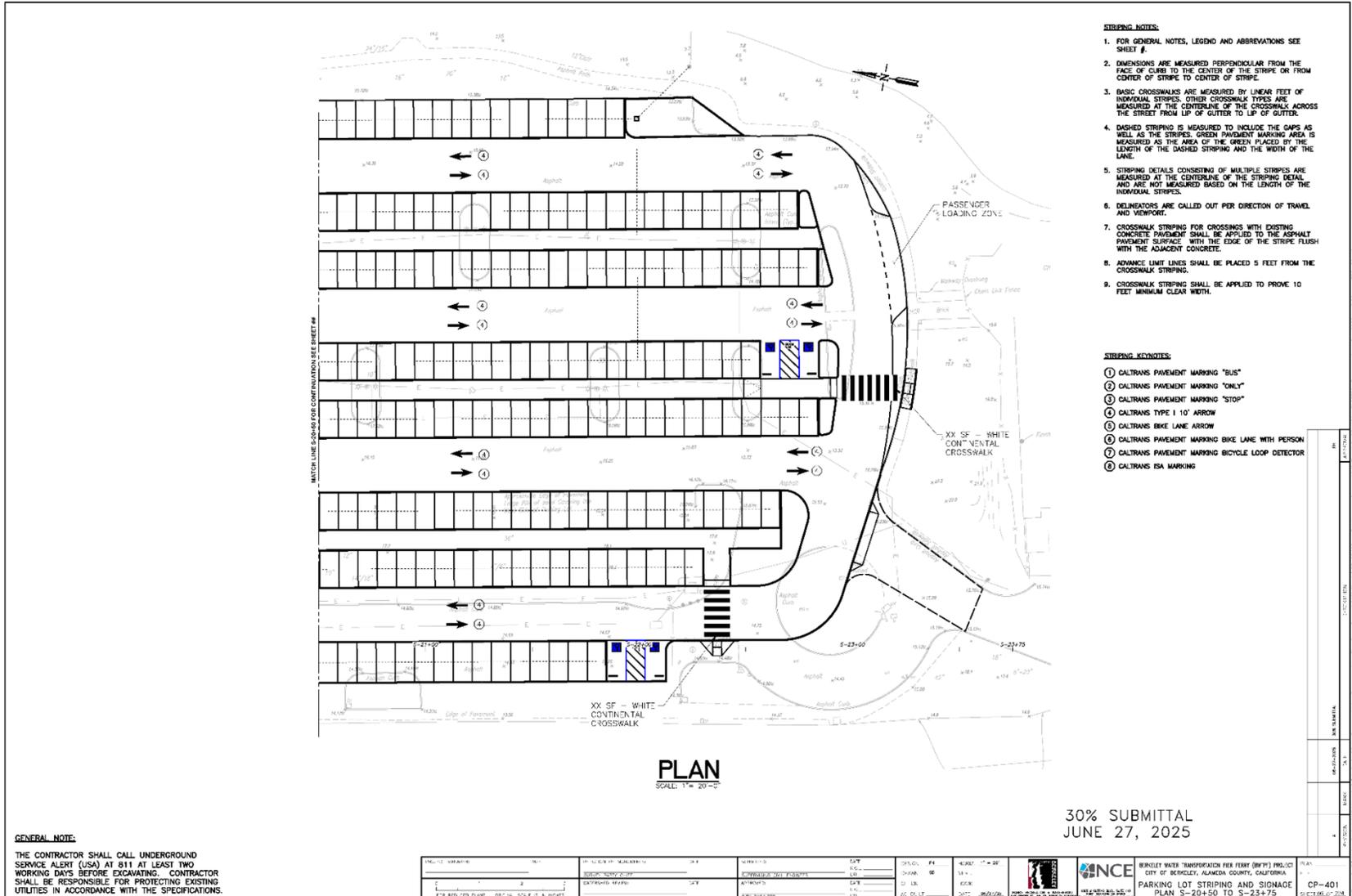


Exhibit C1

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Exhibit C.1: 30% Design for Off-Site Improvements

Figure 7 - North side of Seawall Lot area improvements: shows landscape materials and lighting plan (note: plans do not yet show required electric vehicle charging, which will be included in later phase of design)\*

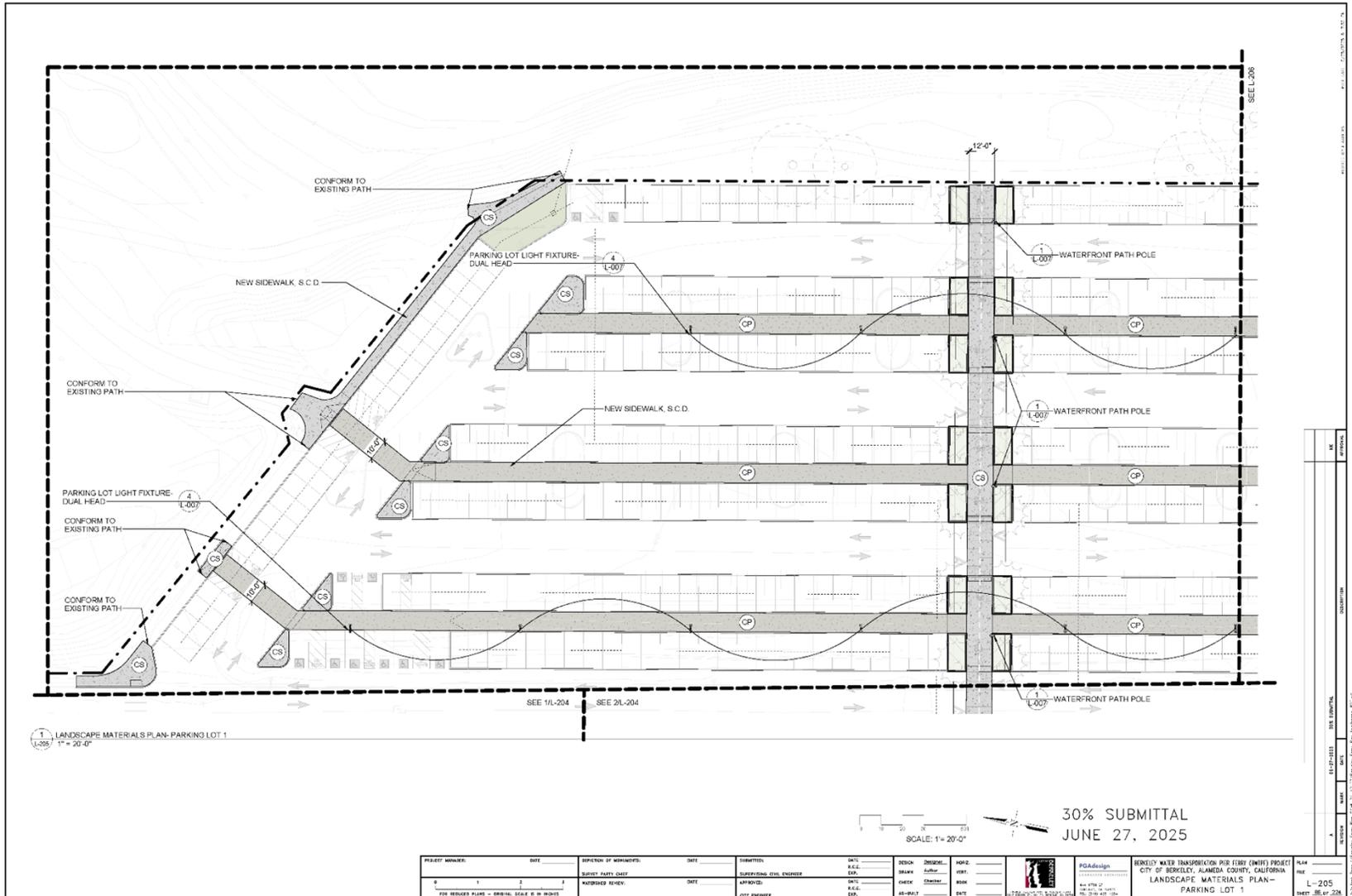


Exhibit C1



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EXHIBIT D

MEMORANDUM OF GROUND LEASE

And When Recorded Mail To:

City of Berkeley  
 2180 Milvia Street, 4th Floor  
 Berkeley, CA 94704

Attn: City Clerk

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*(Space Above This Line for Recorder's Use Only)  
 [Exempt from recording fee per Gov. Code § 27383]*

**MEMORANDUM OF GROUND LEASE**

CITY OF BERKELEY, a public body corporate and politic, as Landlord, has \_\_\_\_\_ as Tenant, the real property described described in Exhibit A attached hereto and incorporated herein by this reference (the “**Premises**”).

1. Landlord and Tenant have now entered into that certain unrecorded Ground Lease dated as of \_\_\_\_\_, 20\_\_ (the “**Ground Lease**”), pursuant to which Landlord has leased the Premises to Tenant. The Ground Lease grants to Tenant the right to continue to use and occupy the Premises until \_\_\_\_\_, \_\_\_\_\_. There are two (2) options to extend the term of the Ground Lease for ten years each (total 20 years). If Tenant properly exercises all options, the term of the Ground Lease could extend until \_\_\_\_\_, \_\_\_\_\_. Notice of the Ground Lease is provided by that certain \_\_\_\_\_ dated \_\_\_\_\_, 20\_\_ and recorded in the Official Records of Alameda County as Instrument No. \_\_\_\_\_ on \_\_\_\_\_, 20\_\_ (the “**Ground Lease Memorandum**”). The Ground Lease granted to Tenant the right to use and occupy the Premises until \_\_\_\_\_, 20\_\_.

2. This Memorandum of Ground Lease supersedes and replaces the Prior Ground Lease Memorandum; and this Memorandum of Ground Lease shall provide record notice of the existence of the Ground Lease with respect to the Premises and of Tenant’s rights with respect thereto.

***[Signature Page Follows]***

Internal

**TENANT:**

By: \_\_\_\_\_

Date: \_\_\_\_\_

**LANDLORD:**

CITY OF BERKELEY, a public body corporate  
and politic

By: \_\_\_\_\_  
City Manager

Date: \_\_\_\_\_

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A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA )  
 ) SS.  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_ before me, \_\_\_\_\_,  
Notary Public, personally appeared \_\_\_\_\_, who proved  
to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are  
subscribed to the within instrument and acknowledged to me that he/she/they executed the  
same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the  
instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the  
instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the  
foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature \_\_\_\_\_

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA )  
 ) SS.  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_, 20\_\_ before me,  
\_\_\_\_\_, Notary Public, personally appeared, who  
proved to me on the basis of satisfactory evidence) to be the person whose name is  
subscribed to the within instrument and acknowledged to me that he executed the same in his  
authorized capacity, and that by his signature on the instrument the person, or the entity upon  
behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the  
foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature \_\_\_\_\_