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DATE: September 17, 2008

TO: Honorable Mayor and City Councilmembers

FROM: Economic and Community Development Department

SUBJECT: **APPROVAL OF AMENDMENT 2 TO THE LEASE AGREEMENT WITH RUBY'S DINER, INC., AND AUTHORIZATION FOR THE CITY MANAGER TO EXECUTE THE AMENDMENT**

**SYNOPSIS**

Staff recommends that the City Council approve of Amendment 2 to the Percentage Lease Agreement with Ruby's Diner, Inc., for the use of city-owned real property located at the end of the Oceanside Pier, which among other items extends the term of the lease to expire June 30, 2013, changes the percentage rent structure, and provides for capital improvements to the property; and authorize the City Manager to execute the amendment.

**BACKGROUND**

The City of Oceanside and Ruby's Diner, Inc. ("Ruby's"), entered into a Percentage Lease Agreement for the building at the end of the Oceanside Pier, effective July 1, 1996, and amended by a First Amendment to the Percentage Lease Agreement, executed on March 20, 1996 (collectively "Lease"). The original term of the Lease was for ten years and expired on June 30, 2007. Ruby's has been occupying the premises on a month-to-month basis since July 1, 2007. Under the terms of the Lease, Lessee has three consecutive five-year options to extend the term of the Lease.

Ruby's has informed the City that they are interested in exercising the first of the three consecutive five-year options to extend the term of the Lease. Due to the slow progress of the redevelopment of the downtown area until recently, together with the age of the building and the need to make capital improvements and repairs, Ruby's also requested a change in some of the terms of the Lease. According to Ruby's these changes are needed to help Ruby's remain competitive in the marketplace until such time as the downtown area begins to reap the benefits of the recent redevelopment activity.

**ANALYSIS**

The essential terms and conditions of the proposed Amendment 2 to the Lease are as follows:

- 1) Extend the term of the Lease for an additional five years, expiring June 30, 2013.
- 2) Change the Percentage Rent structure as follows:

<u>Gross Sales per Year</u>	<u>Proposed % Rate</u>	<u>Current % Rate</u>
\$0 - \$1,500,000	6%	6%
\$1,500,001 - \$1,750,000	6%	7%
\$1,750,001 - \$2,000,000	6%	8%
\$2,000,001 - \$2,500,000	6%	9%
\$2,500,001 - \$2,750,000	7%	9%
\$2,750,001 - \$3,000,000	8%	9%
\$3,000,001 & above	9%	9%

- 3) Should the City decide to make tram service available on the Pier in the future, the City will provide a tram and Ruby's will provide the personnel, operate the tram service and maintain and repair the tram. The City will reimburse Ruby's for the cost of the personnel to operate the tram estimated at approximately \$13,000 per season.
- 4) Provide for a capital improvement project to the building and a reimbursement plan for a portion of the capital improvements performed by Ruby's.

The changes requested by Lessee will provide some initial rent relief to Ruby's by a change in the Percentage Rent structure and by offsets for reimbursement against the Percentage Rent. These changes are in lieu of having Ruby's leave after the expiration of the initial term of the Lease or provide a reduced level of service. It is anticipated that the capital improvements together with the completion of the recent and proposed redevelopment activity will allow the City to continue to have Ruby's as a tenant while allowing for the potential to collect an increased amount of revenue by restructuring the Percentage Rent language under the Lease.

### **FISCAL IMPACT**

Inasmuch as the Minimum Rent amounts under the Lease will not change, the City will continue to receive at minimum \$87,500 per year through June 30, 2011 and increased to \$95,000 as of July 1, 2011. The five year extension of the Lease provides a total minimum rent amount of \$445,000. The total rental to the City based on percentage rent payments subject to the proposed adjustments thereto, will most likely exceed said amount. This assumption is based on the percentage rent payments made by Ruby's during the initial term of the Lease; however, the exact amount cannot be determined at this time.

**INSURANCE REQUIREMENTS**

Ruby's will be required to maintain the City's standard insurance requirement over the term of the lease.

**COMMISSION OR COMMITTEE REPORT**

Does not apply.

**CITY ATTORNEY ANALYSIS**

The referenced documents have been reviewed by the City Attorney and approved as to form.

**RECOMMENDATION**

Staff recommends that the City Council approve of Amendment 2 to the Percentage Lease Agreement with Ruby's Diner, Inc., for the use of city-owned real property located at the end of the Oceanside Pier, which among other items extends the term of the lease to expire June 30, 2013, changes the percentage rent structure, and provides for capital improvements to the property; and authorize the City Manager to execute the amendment.

PREPARED BY:

  
\_\_\_\_\_  
Douglas E. Eddow  
Real Estate Manager

SUBMITTED BY:

  
\_\_\_\_\_  
Peter A. Weiss  
City Manager

REVIEWED BY:

Michelle Skaggs Lawrence, Deputy City Manager

Jane McVey, Economic & Community Development Director

Donald L. Hadley, Deputy City Manager

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\_\_\_\_\_

## SECOND AMENDMENT TO LEASE

This Second Amendment to Percentage Lease Agreement ("Second Amendment") dated July 16, 2008, is made by and between the City of Oceanside ("City") and Ruby's Diner, Inc., a California corporation, ("Lessee").

### RECITALS

WHEREAS, City and Lessee entered into that certain Percentage Lease Agreement on City-owned Real Property Located at the end of the Oceanside Pier, executed on March 20, 1996, and amended by the First Amendment to the Percentage Lease Agreement, dated June 5, 1996 (hereinafter collectively the "Lease");

WHEREAS, Pursuant to Section 2.02 of the Lease, Lessee was granted three (3) consecutive five (5) year options to extend the term of the Lease;

WHEREAS, the original term of the Lease expired on June 30, 2007, and Lessee has been occupying the Premises as a month-to-month tenancy;

WHEREAS, Lessee has notified City that it is desirous of exercising the first of the three (3) consecutive five (5) year options to extend the term of the Lease; and

WHEREAS, City and Lessee are desirous of amending certain provisions of the Lease as part of Lessee's exercise of the first of the three (3) consecutive five (5) year options to extend the term of the Lease.

NOW, THEREFORE, in consideration of the covenants and conditions contained herein, the parties hereto agree as follows:

### AGREEMENT

1. SECTION 1: USES, Subsection 1.02 Uses. The following language is added after the first sentence in said Subsection:

"The City is agreeable to allowing Lessee to utilize a portion of the second floor space for additional storage, provided Lessee prepares a detailed diagram and description of the use of the space for City's prior written approval. Lessee will comply with all applicable ordinances and regulations."

2. SECTION 2: TERM, Subsection 2.01 Commencement. This subsection is deleted in its entirety and is replaced with the following:

“The original ten (10) year term of the Lease commenced on July 1, 1996 with an original expiration date of June 30, 2007, which was extended on a month-to-month basis from July 1, 2007 to June 30, 2008. The term of the Lease is hereby extended an additional five (5) years, expiring at 11:59 p.m. on June 30, 2013.”

3. SECTION 2: TERM, Subsection 2.02 Renewal Options. This subsection is amended by deleting the first sentence in its entirety and replacing the same with the following:

Lessee shall have two (2) remaining consecutive five (5) year options to extend the term of this Lease provided that Lessee is not in default of this Lease at the time of exercise of any such option.

All other terms of Subsection 2.02 shall remain in full force and effect, except that the reference to “third option” in the third paragraph of Section 2.02 is hereby changed to “final option.”

4. SECTION 3: RENT, Subsection 3.02 Rent. Subsection c is hereby deleted in its entirety and replaced with the following:

“c. Percentage Rent. Beginning July 1, 2008, during the term of this Lease and any extension thereof, Lessee shall pay to City monthly, per the Lease, Percentage Rent equal to the percentage rate set forth below multiplied by the corresponding level of Gross Income (as defined in Subsection 3.02d below) for the prior month, less Minimum Rent paid for such prior month. Lessee shall pay Percentage Rent commencing when Lessee is open for business.

<u>Gross Sales per Year</u>	<u>Percentage Rate</u>
\$2,500,000 and below	6%
\$2,500,001 - \$2,750,000	7%
\$2,750,001 - \$3,000,000	8%
\$3,000,001 and above	9%”

5. SECTION 7: SPECIAL PROVISIONS, Subsection 7.11 Tram. This Subsection is deleted in its entirety and replaced with the following:

“7.11 Tram.

“a. Tram Service. If and when the City decides, in its sole discretion, to make tram service available, City may ask Lessee to provide the tram service, and Lessee shall provide tram service on the pier to transport Lessee’s patrons and other persons using the pier in accordance with the terms and conditions set forth herein. City shall, at no charge to Lessee, provide Lessee with one (1) tram in good condition and repair for such purpose. City shall also, at no charge to Lessee, provide an area adjacent to the pier, which location does not cause the tram to travel on public streets in which to store the tram during non-operating hours. The tram shall operate only on the pier and not on

public streets. Lessee agrees to comply with all applicable ordinances, rules and regulations.

“b. Related Expenses. All other costs to operate the tram shall be the responsibility of the Lessee, which costs shall include, but not be limited to, employing the operators of the tram, maintaining and servicing the tram, and providing insurance for tram operations. City shall reimburse Lessee (via a rent credit as set forth below) for the hourly labor cost to operate the tram (defined as a base wage plus all related benefits and costs, including without limitation, Workers’ Compensation Insurance, taxes, benefits, etc.), which total cost shall not exceed Fifteen and No/100 Dollars (\$15.00) per hour for the period ending June 30, 2009, plus annual increases, which Lessee shall make commercially reasonable efforts in its labor negotiations to minimize; provided, however, with respect to each twelve (12) month period following June 30, 2009, in no event shall reimbursement by City for such labor costs exceed an amount equal to Seventeen and No/100 Dollars (\$17.00) per hour plus the increase in the Consumer Price Index (“CPI”) since July 1, 2008. The CPI shall be the Consumer Price Index published for the San Diego Metropolitan Area. Each month Lessee shall deduct from Minimum Rent coming due the total labor costs incurred by Lessee to operate the tram during the prior month, provided Lessee submits to City a written report which itemizes the hourly labor costs incurred for said previous month. For purposes of calculating Percentage Rent, any such deduction from Minimum Rent shall be deemed Minimum Rent paid.

“c. Other. Lessee may charge for the tram service on the pier (which amount shall be subject to City’s prior reasonable approval) and Lessee shall be entitled to keep all revenue generated from the operation of the tram service on the pier to help defray Lessee’s cost to maintain and service the tram. Lessee shall provide a detailed monthly report to City, which report shall set forth the daily number of users of the tram service and the revenue related thereto. The hours of operation for the tram service shall be at the sole but commercially reasonable discretion of City, provided, however, (i) Lessee shall not be obligated to operate the Tram during any part of January, February, March, April, October, November, December, the period from May 1 through the Friday immediately preceding Memorial Day, and the period starting with the day immediately after Labor Day and ending September 30 and (ii) should City decide that the tram service needs to be operated by Lessee during the period beginning with the Saturday immediately preceding Memorial Day and ending Labor Day, the City shall do so based on a specific number of consecutive days of the week during said period and the hours of each day, but no less than an eight (8) hour continuous time period on any given day. The intent of selecting the period of operation by such criteria is to give Lessee sufficient opportunity to staff the operation of the tram, allow the City and Lessee to budget accordingly and to provide ample time to notify the users of the tram service of its availability. The City shall give Lessee at least thirty (30) days written notice prior to the beginning of said period in each lease year of its decision to have the tram operational. Revenue related to tram operations shall not be Gross Income.”

6. Additional Lease Language. The following is added to SECTION 7: SPECIAL PROVISIONS:

“7.14 Capital Improvements.

“a. Capital Improvement Requirements. Lessee has performed, or shall perform within the next twelve (12) months, the following capital improvements and/or replacements to the Premises: roof repair/replacement; rebuild/replace flooring & subfloor; repair/replace HVAC system; repair/replace water and wastewater related items; and repair/replace other items at the Premises to operate and maintain said Premises in a reasonable condition similar to other Ruby’s Restaurant location on piers (collectively, “Capital Improvements”). Lessee shall provide to City a detailed list of the scope of Capital Improvements that Lessee has performed or will perform and the related cost thereof for City’s prior written approval. Lessee shall perform said work in compliance with all applicable ordinances, rules and regulations.

“b. Capital Improvement Reimbursements. Upon written approval of the scope of the Capital Improvements (and the related costs thereof), and upon the completion of said work to City’s reasonable satisfaction, City shall reimburse Lessee the following, but in no event more that the Reimbursement Maximum for each category of Capital Improvements:

<u>“Capital Improvement Item</u>	<u>Reimbursement Maximum</u>
Roof repair/replacement	\$18,000
All other Capital Improvements	\$20,000

“c. Reimbursement Procedure. The costs of each Capital Improvements, as limited by Subsection b above, shall be amortized on a straight-line basis without any interest (i) over five (5) years as to expenditures incurred prior to July 1, 2008, and (ii) over the remainder of the extension period (defined as July 1, 2008 through June 30, 2013) as to expenditures made on or after July 1, 2008. During the extension period Lessee shall offset said amortized amount against the monthly Percentage Rent due”.

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7. All other terms, conditions, covenants and provisions of the Lease shall remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto for themselves, their successors and assigns do hereby agree to all of the terms, covenants, conditions and provisions as set forth herein as of the date first written above.

“CITY”

City of Oceanside

APPROVED AS TO FORM

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

By:  ASST.  
City Attorney

“LESSEE”

Ruby’s Diner, Inc.  
a California corporation

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

Name: Douglas S. Cavanaugh

Title: President

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

Name: Ralph L. Kosmides

Title: Secretary

**NOTARY ACKNOWLEDGEMENT OF LESSEE’S SIGNATURE(S) MUST BE ATTACHED**

**Certificate Of Acknowledgment**

State of California

County of Orange

On June 26, 2008, before me, Genel McLaughlin  
(name and title of the officer)

personally appeared Douglas S. Cavanaugh

who proved to me on the basis of satisfactory evidence to be the person(s) whose name 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 *Genel McLaughlin*

(Seal)



**ALL-PURPOSE ACKNOWLEDGMENT**

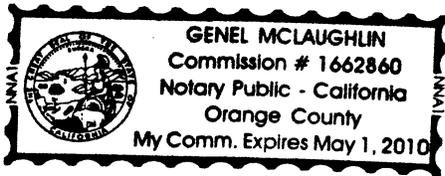
State of California

County of Orange

On June 27, 2008, before me, Genel McLaughlin, Notary Public,  
personally appeared Ralph L. Kosmides, 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/she executed the same in his/her authorized capacity, and that by his/her 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.

Genel McLaughlin  
Notary Signature

**FIRST AMENDMENT TO THE  
PERCENTAGE LEASE AGREEMENT  
BETWEEN THE CITY OF OCEANSIDE  
AND RUBY'S DINER, INC.**

This Amendment is to that certain Percentage Lease Agreement by and between the CITY OF OCEANSIDE, and RUBY'S DINER, INC., executed on March 20, 1996.

The parties hereto mutually desire to and do hereby agree to amend the Lease as follows:

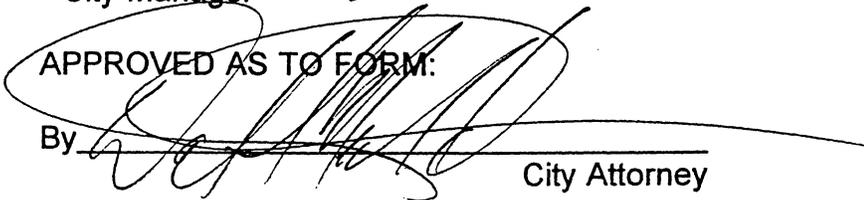
1. Section 7.13 Liquor License of the Lease is amended by deletion in its entirety.

**CITY**  
THE CITY OF OCEANSIDE

Date 6-5-96

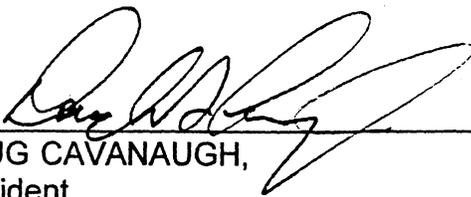
By   
City Manager

APPROVED AS TO FORM:

By   
City Attorney

**LESSEE**  
RUBY'S DINER, INC.

Date 5-17-96

By   
DOUG CAVANAUGH,  
President

By   
RALPH L. KOSMIDES  
Secretary

**PERCENTAGE LEASE AGREEMENT**

**BY AND BETWEEN**

**THE CITY OF OCEANSIDE**

**AND**

**RUBY'S DINER, INC.**

**ON CITY OWNED REAL PROPERTY**

**LOCATED AT THE**

**END OF THE OCEANSIDE PIER**

**CITY OF OCEANSIDE  
PERCENTAGE LEASE AGREEMENT  
WITH RUBY'S**

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**CITY OF OCEANSIDE  
PERCENTAGE LEASE AGREEMENT  
WITH RUBY'S**

THIS PERCENTAGE LEASE AGREEMENT, hereinafter called "Lease," is executed between the **CITY OF OCEANSIDE**, a municipal corporation, hereinafter called "CITY," and **RUBY'S DINER, INC.**, a California corporation, hereinafter called "LESSEE."

**R E C I T A L S**

WHEREAS, CITY is the lawful owner of that certain real property as more particularly described hereinbelow; and

WHEREAS, CITY, for the consideration hereinafter set forth, hereby leases to LESSEE and LESSEE hereby hires said real property from CITY for the term and upon the conditions hereinafter set forth.

**A G R E E M E N T**

NOW THEREFORE, the parties hereto do mutually agree as follows:

**SECTION 1:        USES**

**1.01 Premises.** CITY hereby leases to LESSEE and LESSEE hereby leases from CITY, in accordance with the terms, conditions, covenants, and provisions of this Lease, the restaurant and kiosk at the hammerhead of the Oceanside Pier situated in the City of Oceanside, County of San Diego, State of California, as shown in Exhibit "A" attached hereto and by this reference made part of this Lease. Said real property is hereinafter called the "PREMISES."

**1.02 Uses.** It is expressly agreed that the PREMISES is leased to LESSEE solely and exclusively for the purpose of food service sales, and for such other related or incidental purposes as may be first approved in writing by the City Manager and for no other purpose what so ever.

LESSEE covenants and agrees to actively and continuously use and operate the PREMISES for the above specified, limited and particular exclusive use and to diligently pursue said purposes throughout the term of this Lease, except for failure to so use caused by reasons or events beyond the reasonable control of LESSEE and acts of God. Said active and continuous use and operation enhances the value of the public's asset, provides needed public services, additional employment, taxes and other benefits to the

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WITH RUBY'S

general economy of the area. In the event that LESSEE fails to continuously use the PREMISES for said purposes, or uses the PREMISES for purposes not expressly authorized herein, LESSEE shall be deemed in default under this Lease. LESSEE shall not use the PREMISES in any manner which disrupts the quiet enjoyment of surrounding property owners use of their property.

**1.03 Related Discretionary Actions.** By the granting of this Lease, neither CITY nor the City Council is obligating itself to any other governmental agent, board, commission, or agency with regard to any other discretionary action relating to development or operation of the PREMISES. Discretionary action includes, but is not limited to rezoning, variances, conditional use permits, environmental clearances or any other governmental agency approvals which may be required for the development and operation of the PREMISES.

**1.04 Quiet Possession.** LESSEE, paying the rent and performing the covenants and agreements herein, shall at all times during the term hereof peaceably and quietly have, hold and enjoy the PREMISES.

If CITY for any reason cannot deliver possession of the PREMISES to LESSEE at the commencement of the term of this Lease, or if during the term hereof LESSEE is temporarily dispossessed through action or claim of a title superior to the City of Oceanside, then and in either of such events, this Lease shall not be voidable nor shall CITY be liable to LESSEE for any loss or damage resulting therefrom, but there shall be determined and stated in writing by the City Manager a proportionate reduction of the rate of rent for the period or periods during which LESSEE is prevented from having the quiet possession of all or a portion of the PREMISES. In the event that such dispossession causes an extraordinary economic burden on LESSEE, LESSEE shall have the option to terminate this Lease by submitting to the City Manager a **30 day** written notice together with its justifications for such termination. The City Manager shall have the right to approve such termination and shall provide LESSEE with a written determination thereof. Said approval shall not be unreasonably withheld.

**1.05 Reservation of Rights.** CITY shall not unreasonably or substantially interfere with LESSEE's use of the PREMISES while LESSEE is in possession of the PREMISES, however the CITY specifically retains the following rights:

**a. Subsurface Rights.** CITY hereby reserves all rights, title and interest in any and all subsurface natural gas, oil, minerals and water on or within the PREMISES.

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x b. **Easements.** CITY reserves the right to grant and use easements or to establish and use rights-of-way over, under, along and across the PREMISES for utilities, thoroughfares, or access as it deems advisable for the public good.

c. **Right to Enter.** CITY has the right to enter the PREMISES for the purpose of performing maintenance, inspections, repairs or improvements, or developing municipal resources and services.

CITY will not reimburse LESSEE for damages, if any, to the permanent improvements, located on the PREMISES resulting from the CITY exercising the rights reserved in this Lease. CITY will pay the costs of the maintenance and repair of all CITY installations made pursuant to these reserved rights.

**SECTION 2: TERM**

**2.01 Commencement.** This Lease shall commence on the date of full execution and shall terminate ten (10) years from delivery of possession.

**2.02 Renewal Options.** LESSEE is granted three (3) consecutive options to extend the term of this Lease each for a five (5) year period provided that LESSEE is not in default of this Lease. Occupation of the premises under any option period shall be under the same terms, covenants and conditions as applicable to the original term at the rent specified in this Lease.

In order to exercise an option, LESSEE must provide CITY written notice which must be received by the City Manager no later than **180** days prior to the expiration of the then existing term. LESSEE shall have no right to exercise an option if, at the time LESSEE attempts to exercise the option, LESSEE is in default and does not cure the default within thirty (30) days or LESSEE fails to notify CITY as provided above. LESSEE waives all subsequent options if any prior option is not exercised. The options granted in this provision are personal to LESSEE (and approved assignees of LESSEE) and may not be exercised or be assigned, voluntarily or involuntarily, by and to any other person or entity other than LESSEE and the option is not assignable separate and apart from the Lease.

In order to exercise an option that extends the term beyond twenty (20) years, LESSEE must also agree to pay Minimum Annual Rent and Percentage Rent equal to the Fair Market Rent as calculated by CITY if so demanded in writing by CITY within **60**

CITY OF OCEANSIDE  
PERCENTAGE LEASE AGREEMENT  
WITH RUBY'S

days of receipt by CITY of LESSEE'S request to exercise its third option. Fair Market Rent shall equal the rent received for similar premises in similar locations, but in no event less than the total rent by LESSEE for the preceding year, whichever is more.

In no event shall the term of this Lease be extended in excess of **15 years** beyond the expiration of the initial term of this Lease without the mutual agreement of the parties and the prior approval of the City Council.

**2.03 Termination Provisions.** No special termination options are available except those described elsewhere in this Lease.

**2.04 Holdover.** Any holding over by LESSEE after expiration or termination shall not be considered as a renewal or extension of this Lease. The occupancy of the PREMISES by LESSEE or by LESSEE's property after the expiration or termination of this Lease constitutes a month-to-month tenancy, and all other terms and conditions of this Lease, including rental adjustments, shall continue in full force and effect. In the event of any holding over, LESSEE shall pay the sum of: 1) the minimum monthly rent for the preceding annual term, and 2) a prorated amount of overage percentage rent for the extent of the holdover period. In addition to the minimum and percentage rent, LESSEE shall, in the event of any holding over beyond **90 days**, pay an increase in the minimum rent or percentage rent equal to the product of: 1) the minimum rent or percentage rent, whichever is the higher amount, and 2) **five percent (5%)** per year for each year of the term of Lease counting from the original commencement date of the Lease to the expiration or termination date of the Lease.

**2.05 Quitclaim of LESSEE's Interest.** On termination of this Lease for any reason, CITY shall provide LESSEE with and LESSEE shall deliver to CITY a quitclaim deed in recordable form quitclaiming all its rights in and to the PREMISES. LESSEE or its successor in interest shall deliver the same within **five (5) days** after receiving written demand therefor. CITY may record such deed only on the expiration or earlier termination of this Lease. If LESSEE fails or refuses to deliver the required deed, the CITY may prepare and record a notice reciting LESSEE's failure to execute this lease provision and the notice will be conclusive evidence of the termination of this Lease and all LESSEE's rights to the PREMISES.

**2.06 Surrender of Premises.** At the expiration or earlier termination of this Lease, LESSEE shall surrender the PREMISES to CITY free and clear of all liens and encumbrances created by LESSEE, except those liens and encumbrances which existed

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on the date of the execution of this Lease by CITY. The PREMISES, when surrendered by LESSEE, shall be in a safe and sanitary condition and, subject to casualty, condemnation and matters that are CITY'S obligation, shall be in as good or better condition as the condition at commencement of this Lease, absent normal wear and tear.

**2.07 Time is of Essence.** Time is of the essence of all of the terms, covenants, conditions and provisions of this Lease.

**SECTION 3: RENT**

**3.01 Time and Place of Payment.** LESSEE shall make all minimum rental payments monthly in advance on or before the **first (1st) day** of each month. In the event the commencement of this Lease is after the **first (1st) day** of the month, the first month's minimum rent shall be prorated based on a **30 day** proration formula.

Percentage Rent payments shall be due to CITY and payable by LESSEE in arrears on or before the **twentieth (20th) day** of the month following the month for which the Percentage Rent is calculated. In addition LESSEE shall provide CITY with a Percentage Rent statement on or before the 20th day of the month following the month for which Percentage Rent is calculated showing how the Percentage Rents were calculated. Also, LESSEE shall, concurrently with the filing of its quarterly State Board of Equalization tax statement, provide CITY with a copy of said statement. There shall be an annual reconciliation of Percentage Rent and Minimum Rent paid together with a Percentage Rent Statement explaining same provided on the 20th day following the first anniversary of the commencement of this Lease and each year thereafter. The requirements of this section shall survive the expiration or sooner termination of this Lease.

Checks should be made payable to the City of Oceanside and delivered to the CITY at the address set forth in Section 6 of this Lease. The place and time of payment may be changed at any time by CITY upon **30 days** written notice to LESSEE. LESSEE assumes all risk of loss and responsibility for late payment charges. LESSEE agrees to pay CITY an additional **\$15** for any returned check which is not honored by the financial institution from which the check is drawn.

**3.02 Rent.**

a. **General.** The total annual rent amount shall be equal to the Minimum

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Annual Rent (as defined by Subsection 3.02b through 3.02d) or the Percentage Rent (as defined by Subsection 3.02e), whichever is higher.

**b. Minimum Rent.** The Minimum Annual Rent shall be payable in equal monthly installments in advance on the **first day** of each new month. Rent shall commence on the date LESSEE is open for business or July 1, 1996, if possession is obtained by LESSEE no later than May 1, 1996, and if not, two months after LESSEE obtains possession, whichever is sooner. Minimum Annual Rent is as follows:

- \$65,000.00 per year until June 31, 2001;
- \$77,500.00 per year commencing July 1, 2001;
- \$87,500.00 per year commencing July 1, 2006;
- \$95,000.00 per year commencing July 1, 2011

**c. Percentage Rent.** LESSEE shall pay to CITY Percentage Rent equal to the percentage rate set forth below multiplied by its Gross Income (as defined in Subsection 3.02d), for the term of this Lease, and any extension thereof. LESSEE shall pay Percentage Rent commencing when LESSEE is open for business.

<u>Gross Sales Per Year</u>	<u>Percentage Rent</u>
From \$0 - \$1,500,000	6%
\$1,500,001 - \$1,750,000	7%
\$1,750,001 - \$2,000,000	8%
\$2,000,001 & Above	9%

**d. Gross Income.** Gross income as used herein shall mean all income received by LESSEE from the sale of goods or services on or from the PREMISES or any other income received by LESSEE as a result of the use and occupancy of the PREMISES. Gross income shall include the amount of any manufacturer's or importer's excise tax included in the price of any property or material sold, even though the manufacturer or importer is also the retailer thereof, and it is immaterial whether the amount of such excise tax is stated as a separate charge. Possessory interest taxes or other property taxes shall not be deducted by LESSEE in computing gross income. The amount of such taxes and refunds shall be clearly shown on the books and records of LESSEE. Gross income shall include income received by LESSEE from any sublessee, permittee or licensee, or their agents, for use and occupancy of said PREMISES. The monthly gross income shall be calculated at the end of each month of the term of this

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Lease. The first monthly gross income calculation shall be made one month after the commencement date of this Lease.

Gross Income shall not include:

1) Federal, state or municipal taxes collected from the consumer, regardless of whether the amount thereof is stated to the consumer as a separate charge, and paid over periodically by LESSEE to a governmental agency accompanied by a tax return or statement as required by law.

2) Refunds for goods returned for resale on the PREMISES or refunds of deposits.

**3.03 Inspection of Records.** LESSEE shall maintain accurate financial books and records for the operation of its business provided at, or from, the PREMISES. Said books and records shall be maintained on an accrual basis in accordance with good accounting practice and standards within the industry. The records must be supported by source documents of original entry such as sales invoices, cash register tapes, purchase invoices, or other pertinent documents.

All retail sales shall be recorded by means of cash registers which display to the customer the amount of the transaction and automatically issue a receipt. All cash registers shall be equipped with sales totalizer counters for all sales categories, as herein provided, and a sequential transaction counter, which counters are locked in, constantly accumulating, and which cannot be reset. Said registers shall further contain tapes upon which sales details and sequential transaction numbers are imprinted. Beginning and ending sales totalizer readings shall be made a matter of daily record. Retail sales may be recorded by a system other than cash registers provided such system is approved in writing by the City Manager. In addition to the above, in the event of admission, cover charges, rentals, and any other fares or charges, whatsoever, LESSEE shall also issue serially numbered tickets for each such charge and keep an adequate record of said tickets, both issued and unissued.

LESSEE agrees to make any and all records and accounts available to CITY for inspection at all reasonable times, so that CITY can determine LESSEE's compliance with this Lease. These records and accounts will be made available by LESSEE at the PREMISES or CITY'S offices, at LESSEE'S discretion, and will be complete and accurate showing all income and receipts from LESSEE's use of the PREMISES.

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LESSEE's failure to keep and maintain such records and make them available for inspection by CITY shall be deemed a default of this Lease. These records shall include, but are not limited to, Federal quarterly and annual income statements, the California State Board of Equalization income statements, sales statements, cash register tapes, purchase invoices, or other pertinent documentation, and all other generally accepted business books, documents, and records. CITY shall have the discretion to require the installation of any reasonable additional accounting methods or controls it may deem necessary. Notwithstanding anything stated above, LESSEE'S federal, state and local income tax returns shall not be records available for inspection.

CITY shall have the right, upon reasonable notice to LESSEE to audit LESSEE'S records on an annual basis and in the event the audit discloses an underpayment of more than five percent (5%), LESSEE shall reimburse CITY for the cost of the audit. Any underpayment found during an audit shall be paid by LESSEE to CITY and CITY shall reimburse LESSEE for any overpayment found during an audit. Any information obtained by CITY pursuant to its audit rights under this Agreement shall be held confidential.

LESSEE shall maintain all such books, records and accounts for a minimum period of **three (3) years**. This provision shall survive the expiration or sooner termination of this Lease.

**3.04 Delinquent Rent.** If LESSEE fails to pay the rent within **7 days** of when due, LESSEE will pay in addition to the unpaid rents, **five percent (5%)** of the delinquent rent. If the rent is still unpaid at the end of **15 days**, LESSEE shall pay an additional **five percent (5%)** [being a total of **ten percent (10%)**] which is hereby mutually agreed by the parties to be appropriate to compensate CITY for loss resulting from rental delinquency, including lost interest, opportunities, legal costs, and the cost of servicing the delinquent account.

In the event that the CITY audit, if applicable, discloses that the rent for the audited period has been underpaid in excess of **five percent (5%)** of the total required rent, then LESSEE shall pay CITY the cost of the audit plus **ten percent (10%)** per year on the amount by which said rent was underpaid in addition to the unpaid rents as shown to be due CITY as compensation to CITY for administrative costs and loss of interest as previously described herein. LESSEE agrees to pay such amount and further agrees that the specific late charges represent a fair and reasonable estimate of the costs that CITY will incur from LESSEE's late payment. Acceptance of late charges and

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any portion of the late payment by CITY shall in no event constitute a waiver by CITY of LESSEE default with respect to late payment, nor prevent CITY from exercising any of the other rights and remedies granted in this lease.

**SECTION 4: INSURANCE RISKS/SECURITY**

**4.01 Indemnity.** LESSEE shall indemnify and hold harmless the CITY and its officers, agents and employees against all claims for damages to persons or property arising out of the conduct of the LESSEE or its employees, agents, or others in connection with its use and occupation of the PREMISES and tram under this Lease, except only for those claims arising from the sole negligence or sole willful conduct of the CITY, its officers, agents, or employees. LESSEE's indemnification shall include any and all costs, expenses, attorneys' fees and liability incurred by the CITY, its officers, agents, or employees in defending against such claims, whether the same proceed to judgment or not. Further, LESSEE at its own expense shall, upon written request by the CITY, defend any such suit or action brought against the CITY, its officers, agents, or employees.

**4.02 Insurance.** LESSEE shall, at its sole expense, take out and maintain at all times during the term of this Lease, insurance as follows:

**a. General Liability.** LESSEE shall maintain on the PREMISES either comprehensive general liability insurance or commercial general liability insurance applying to the use and occupancy of the PREMISES or any area adjacent thereto, in the business operated by LESSEE or any other occupant. Such insurance shall include broad form contractual liability insurance coverage insuring all of LESSEE'S indemnity obligations under this Lease. Such coverage shall have minimum combined single limit of liability of at least \$1,000,000 and a general aggregate limit of \$2,000,000. All such policies shall be written to apply to all bodily injury, property damage, personal injury and other coverage loss, however occasioned, occurring during the policy term.

**b. Fire.** LESSEE shall obtain and maintain fire, extended coverage, and vandalism insurance covering the PREMISES. Said insurance shall be in an amount equal to 90% of the full replacement value of any building, structure, equipment, and improvements.

**c. Workers' Compensation.** LESSEE shall maintain California Workers' Compensation insurance with statutory limits for all employees of LESSEE.

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d. All insurance companies affording coverage to the LESSEE shall be insurance organizations acceptable to the CITY, and authorized by the Insurance Commissioner of the State Department of Insurance to transact business of insurance in the State of California.

e. All insurance companies affording coverage shall provide **30 days** written notice to the City of Oceanside should the policy be cancelled before the expiration date. For the purposes of this notice requirement, any material change in the policy coverage prior to the expiration shall be considered a cancellation.

f. LESSEE shall provide evidence of compliance with the insurance requirements listed above by providing a certificate of insurance, in a form satisfactory to the City Attorney, concurrently with the submittal of this Lease.

g. LESSEE shall provide a substitute certificate of insurance no later than **10 days** prior to the policy expiration date. Failure by the LESSEE to provide such a substitution and extend the policy expiration date shall be considered a default by LESSEE and may subject the LESSEE to a termination of this Lease.

h. Maintenance of insurance by the LESSEE as specified in this Lease shall in no way be interpreted as relieving the LESSEE of any responsibility whatever and the LESSEE may carry, at its own expense, such additional insurance as it deems necessary.

i. If LESSEE fails or refuses to take out and maintain the required insurance, or fails to provide the proof of coverage, CITY has the right, after at least 5 days notice to LESSEE, to obtain the insurance. LESSEE shall reimburse CITY for the premiums paid with interest at the maximum allowable legal rate then in effect in California. CITY shall give notice of the payment of premiums within **30 days** of payment stating the amount paid, names of the insurer(s) and rate of interest. Said reimbursement and interest shall be paid by LESSEE on the **first (1st) day** of the month following the notice of payment by CITY.

Notwithstanding the preceding provisions of this Subsection, any failure or refusal by LESSEE to take out or maintain insurance as required in this Lease, or failure to provide the proof of insurance, shall be deemed a default under this Lease.

j. CITY, at its discretion, may require the revision of amounts and coverage

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at any time during the term of this Lease by giving LESSEE **60 days** prior written notice. CITY'S requirements shall be designed to assure protection from and against the kind and extent of risk existing on the PREMISES. LESSEE also agrees to obtain any additional insurance required by CITY for new improvements, in order to meet the requirements of this Lease.

**4.03 Accident Reports.** LESSEE shall, within **72 hours** after occurrence, report to CITY any accident causing property damage or any serious injury to persons on the PREMISES. This report shall contain the names and addresses of the parties involved, a statement of the circumstances, the date and hour, the names and addresses of any witnesses and other pertinent information.

**SECTION 5: IMPROVEMENTS/ALTERATIONS/REPAIRS**

**5.01 Acceptance of Premises.** LESSEE represents and warrants that it has independently inspected the PREMISES and made all tests, investigations, and observations necessary to satisfy itself of the condition of the PREMISES. LESSEE acknowledges it is relying solely on such independent inspection, tests, investigations, and observations in making this Lease. LESSEE further acknowledges that the PREMISES are in the condition called for by this Lease and that LESSEE does not hold CITY responsible for any defects in the PREMISES.

**5.02 Waste, Damage, or Destruction.** LESSEE shall give notice to CITY of any fire or other damage that occurs on the PREMISES within **5 business days** of such fire or damage. LESSEE shall not commit or suffer to be committed any waste or injury or any public or private nuisance, agrees to keep the PREMISES clean and clear of refuse and obstructions, and to dispose of all garbage, trash, and rubbish in a manner satisfactory to CITY. If the PREMISES shall be damaged by any cause which puts the PREMISES into a condition which is not decent, safe, healthy and sanitary, LESSEE agrees to make or cause to be made full repair of said damage and to restore the PREMISES to the condition which existed prior to said damage; or, at CITY's option, and upon receipt of written demand thereof, LESSEE agrees to clear and remove from the PREMISES all debris resulting from said damage and rebuild the PREMISES in accordance with plans and specifications previously submitted to CITY and approved in writing in order to replace in kind and scope the operation which existed prior to such damage. LESSEE shall be responsible for all costs incurred in the repair and restoration, or rebuilding of the PREMISES.

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**Destruction of Pier.** In the event that the Pier, any part thereof or access-routes to the Pier is damaged or destroyed by fire or any other cause, so as to render the PREMISES or a material portion thereof inaccessible and such damage or destruction cannot reasonably be repaired within six months after the date of the casualty, CITY or LESSEE shall have the right to either (i) terminate this Lease by giving to LESSEE written notice thereof (which notice shall be given, if at all, within thirty (30) days following the date of the casualty), in which case this Lease shall be terminated as of the date of the casualty, or (ii) give written notice to LESSEE within thirty (30) days following the date of the casualty of CITY'S intention to repair such damage as soon as reasonably possible at CITY'S expense, in which event this Lease shall continue in full force and effect; however, Minimum Annual Rent shall be abated for the period from the occurrence of the damage to the completion of the repairs.

If CITY agrees to repair or restore the Pier under the provisions of the Section and shall not commence such repair or restoration within one hundred twenty (120) days after giving LESSEE written notice of its intention or agreement to repair, LESSEE may, at LESSEE'S option, cancel and terminate this Lease by giving CITY written notice of LESSEE'S election to do so at any time prior to the commencement of such repair or restoration. In such event, this Lease shall terminate as of the date of such notice from LESSEE to CITY, and CITY shall have no liability under this Lease.

**5.03 Maintenance.** Provided LESSEE is not in default, CITY shall maintain in good and tenable condition the Pier and the utilities, to, but not in, the PREMISES including all sump, sewer and discharge equipment and will be responsible for necessary replacement of such systems when required.

Except for CITY'S duties provided above, LESSEE agrees to assume full responsibility and cost for the operation, maintenance, including painting, and repair of the PREMISES, throughout the term of this Lease and without expense to CITY. LESSEE shall perform all maintenance, repairs, replacements, improvements and retrofitting as may be necessary to maintain and preserve the PREMISES in a decent, safe, healthy, and sanitary condition satisfactory to CITY and in compliance with all applicable laws. LESSEE shall contract with a service company for the monthly maintenance of the heating, ventilation, air conditioning equipment and elevator. If LESSEE obtains prior written approval of the cost of said maintenance contracts, LESSEE shall be entitled to a rent credit for the actual cost thereof. LESSEE further agrees to provide approved containers for trash and garbage and to keep the PREMISES free and clear of rubbish and litter, or any other fire hazards. LESSEE

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waives all right to make repairs at the expense of CITY as provided in Section 1942 of the California Civil Code and all rights provided by Section 1941 of said code.

For the purpose of keeping the PREMISES in a good, safe, healthy and sanitary condition, CITY shall always have the right, but not the duty, to enter, view, inspect, determine the condition of, and protect its interests in, the PREMISES. In the event that CITY finds that the PREMISES are not in a decent, safe, healthy, and sanitary condition, LESSEE must perform the necessary maintenance, repair or replacement work within **ten (10) days** after written notice from CITY. In the event LESSEE fails to perform such work, CITY shall have the right, upon written notice to LESSEE, to have any necessary maintenance work done at the expense of LESSEE, and LESSEE shall promptly pay any and all costs incurred by CITY in having such necessary maintenance work done, in order to keep said PREMISES in a decent, safe, healthy, and sanitary condition. LESSEE shall make payment no later than **ten (10) days** after CITY's written demand therefor. CITY shall not be required at any time to perform maintenance, or to make any improvements or repairs whatsoever, on or for the benefit of the PREMISES. The rights reserved in this section shall not create any obligations or increase obligations for CITY elsewhere in this Lease.

**5.04 Improvements/Alterations.** No improvements, structures, or installations shall be constructed on the PREMISES, and the PREMISES may not be altered by LESSEE without prior written approval by the City Manager. Further, LESSEE agrees that major structural or architectural design alterations to approved improvements, structures, or installations may not be made on the PREMISES without prior written approval by the City Manager and that such approval shall not be unreasonably withheld. This provision shall not relieve LESSEE of any obligation under this Lease to maintain the PREMISES in a decent, safe, healthy, and sanitary condition, including structural repair and restoration of damaged or worn improvements. CITY shall not be obligated by this Lease to make or assume any expense for any improvements or alterations.

LESSEE shall not have the right to contract for the inclusion of artworks protected under federal or state law as part of or a fixture to the PREMISES without first obtaining a written waiver by the artist of the artist's rights under federal and state law and obtaining the consent of the CITY.

**5.05 Utilities.** LESSEE agrees to order, obtain, and pay for all utilities and service and installation charges in connection with the development, occupation and operation of the PREMISES, including but not limited to, electrical, gas, telephone, water,

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sewage, trash and waste removal. If said charges are not separately assessed, LESSEE agrees to pay its equitable share within 15 days of written notice thereof by CITY.

**5.06 Liens.** LESSEE shall not, directly or indirectly, create, incur, assume or suffer to exist any mortgage, pledge, lien, charge, encumbrance or claim on or with respect to all or any portion of the PREMISES without the prior written consent of the City Manager. LESSEE shall promptly, at its own expense, take such action as may be necessary to duly discharge or remove any such mortgage, pledge, lien, charge, encumbrance or claim on or with respect to all or any portion of the PREMISES for which LESSEE does not have the prior written consent of the City Manager.

**5.07 Encumbrance.** Upon receiving prior consent by the City Manager, LESSEE may encumber this Lease, its leasehold estate and its improvements thereon by deed of trust, mortgage, chattel mortgage or other security instrument to assure the payment of a promissory note or notes of LESSEE, upon the express condition that the net proceeds of such loan or loans be devoted exclusively to the purpose of developing and/or improving the PREMISES. However, a reasonable portion of the loan proceeds may be disbursed for payment of incidental costs of construction, including but not limited to the following: off-site improvements for service of the PREMISES; on-site improvements; escrow charges; premiums for hazard insurance, or other insurance or bonds required by CITY; title insurance premiums; reasonable loan costs such as discounts, interest and commissions; and architectural, engineering and attorney's fees and such other normal expenses incidental to such construction.

Any subsequent encumbrances on the PREMISES or on any permanent improvements thereon, shall also have prior approval in writing of City Manager. Such subsequent encumbrances shall also be for the exclusive purpose of development of the PREMISES or otherwise to the benefit of the CITY at the discretion of the City Manager. Any deed of trust, mortgage or other security instrument shall be subject to all of the terms, covenants and conditions of this Lease and shall not amend or alter any of the terms, covenants or conditions of this Lease.

**5.08 Taxes.** LESSEE shall pay, before delinquency, all taxes, assessments, and fees assessed or levied upon LESSEE or LESSEE'S interest in the PREMISES, or LESSEE'S machines, equipment, appliances, or other improvements or property of any nature whatsoever erected, installed, or maintained by LESSEE or levied by reason of the business or other LESSEE activities related to the PREMISES, including any licenses or permits.

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LESSEE recognizes and agrees that this Lease may create a possessory interest subject to property taxation, and that LESSEE may be subject to the payment of taxes levied on such interest, and that LESSEE shall pay all such possessory interest taxes.

**5.09 Signs.** LESSEE shall not erect or display any banners, pennants, flags, posters, signs, decorations, marquees, awnings, or similar devices or advertising without the prior written consent of the City Manager and device(s) shall conform to all City of Oceanside ordinances and regulations and be consistent with the Harbor District's design standard. If any such unauthorized item is found on the PREMISES, LESSEE shall remove the item at its expense within **24 hours** of written notice thereof by CITY, or CITY may thereupon remove the item at LESSEE's cost.

**5.10 Ownership of Improvements and Personal Property.**

a. Any and all improvements, trade fixtures, structures, and installations or additions to the PREMISES now existing or constructed on the PREMISES by LESSEE, excepting such fixtures which may be removed without causing damage to the PREMISES, such as signs installed by LESSEE, shall at Lease expiration or termination be deemed to be part of the PREMISES and shall become, at CITY's option, CITY's property, free of all liens and claims except as otherwise provided in this Lease.

b. If CITY elects not to assume ownership of all or any improvements, trade fixtures, structures and installations, CITY shall so notify LESSEE in writing **30 days** prior to expiration or termination of this Lease, and LESSEE shall remove all such improvements, structures and installations as directed by CITY at LESSEE's sole cost and expense on or before Lease expiration or termination. If LESSEE fails to remove any improvements, structures, and installations as directed, LESSEE agrees to pay CITY the full cost of any removal.

c. LESSEE owned machines, appliances, equipment (other than trade fixtures), and other items of personal property shall be removed by LESSEE by the date of the expiration or termination of this Lease. Any said items which LESSEE fails to remove will be considered abandoned and become CITY's property free of all claims and liens, or CITY may, at its option, remove said items at LESSEE's expense.

d. If any removal of such personal property by LESSEE results in damage to the remaining improvements on the PREMISES, LESSEE shall repair all such damage.

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**5.11 Eminent Domain.** If all or part of the PREMISES or Pier are taken through condemnation proceedings or under threat of condemnation by any public authority with the power of eminent domain, the interests of CITY and LESSEE (or beneficiary or mortgagee) will be as follows:

**a. Total Taking.** In the event the entire PREMISES or Pier are taken, this Lease shall terminate on the date of the transfer of title or possession to the condemning authority, whichever first occurs.

**b. Partial Taking.** In the event of a partial taking, if, in the opinion of LESSEE, the remaining part of the PREMISES is unsuitable for the lease operation, this lease shall terminate on the date of the transfer of title or possession to the condemning authority, whichever first occurs.

In the event of a partial taking, if, in the opinion of LESSEE, the remainder of the PREMISES is suitable for continued lease operation, this lease shall terminate in regard to the portion taken on the date of the transfer of title or possession to the condemning authority, whichever first occurs, but shall continue for the portion not taken. The minimum rent shall be equitably reduced to reflect the portion of the PREMISES taken.

**c. Award.** From any award received in the taking of the PREMISES, LESSEE shall be entitled to that portion of the award that represents the market value of LESSEE'S leasehold interest and CITY shall be entitled to the remainder provided, however, that the remainder interest shall equal or exceed the present worth of the future net income to CITY for the life of the Lease and the present worth of the value of the improvements at the expiration of the Lease and the present worth of the land at the expiration of the Lease. Provided LESSEE'S award does not reduce or effect CITY'S award, LESSEE'S right to receive a condemnation award for the taking of its merchandise, personal property, goodwill, relocation expenses and/or interest other than the real property taken shall not be effected. CITY shall have no liability to LESSEE for any loss, damage or injury for which LESSEE was not compensated by the condemning authority.

**d. Transfer.** CITY has the right to transfer CITY'S interests in the PREMISES in lieu of condemnation to any authority entitled to exercise the power of eminent domain. If a transfer occurs, LESSEE shall retain whatever interest it may have in the fair market value of any improvements placed by it on the PREMISES in accordance with this lease.

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e. **No Inverse Condemnation.** The exercise of any CITY right under this lease shall not be interpreted as an exercise of the power of eminent domain and shall not impose any liability upon CITY for inverse condemnation so long as such rights do not unreasonably or substantially interfere with LESSEE's operations.

**SECTION 6: GENERAL PROVISIONS**

**6.01 Notices.** All notices, demands, requests, consents or other communications which this Lease contemplates or authorizes, or requires or permits either party to give to the other, shall be in writing and shall be personally delivered or mailed to the respective party as follows:

To CITY:

CITY OF OCEANSIDE  
Property Management  
300 North Coast Highway  
Oceanside, CA 92054

Federal Tax Id# \_\_\_\_\_

To LESSEE:

RUBY'S DINERS, INC.  
110 Newport Center Drive  
Suite 100  
Newport Beach, CA 92660  
Attn: Doug Cavanaugh or Ralph L. Kosmides  
Federal Tax Id# 33-0569104

Hewitt & McGuire  
19900 MacArthur Boulevard, Suite 1050  
Irvine, CA 92715  
Attention: Dean Dunn-Rankin

Either party may change its address by notice to the other party as provided herein.

Communications shall be deemed to have been given and received on the first

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to occur of: i) actual receipt at the offices of the party to whom the communication is to be sent, as designated above; or (ii) **five (5) working days** following the deposit in the United States Mail of registered or certified mail, postage prepaid, return receipt requested, addressed to the offices of the party to whom the communication is to be sent, as designated above.

**6.02 CITY Approval.** The City Manager shall be the CITY's authorized representative in the interpretation and enforcement of all work performed in connection with this Lease. The City Manager may delegate authority in connection with this Lease to the City Manager's designee(s). For the purposes of directing LESSEE in accordance with this Lease, which does not result in a change to this Lease, the City Manager delegates authority to the CITY's Senior Property Agent.

**6.03 Nondiscrimination.** LESSEE agrees not to discriminate in any manner against any person or persons on account of race, marital status, sex, religious creed, color, ancestry, national origin, age, or physical handicap in LESSEE's use of the PREMISES.

**6.04 Equal Opportunity.** LESSEE shall take affirmative action to assure applicants are employed and that employees are treated during employment without regard to race, color, religion, sex or national origin. LESSEE shall certify in writing to CITY that LESSEE is in compliance and throughout the term of this Lease will comply with Title VII of the Civil Rights Act of 1964, as amended, the California Fair Employment Practices Act, and any other applicable Federal, State and Local law, regulation and policy (including without limitation those adopted by CITY) related to equal employment opportunity and affirmative action programs, including any such law, regulation, and policy hereinafter enacted.

Compliance and performance by LESSEE of the equal employment opportunity and affirmative action program provision of this Lease is an express condition hereof and any failure by LESSEE to so comply and perform shall be a default of this Lease and CITY may exercise any right as provided herein and as otherwise provided by law.

**6.05 Entire Agreement.** This Lease comprises the entire integrated understanding between CITY and LESSEE concerning the use and occupation of the PREMISES and supersedes all prior negotiations, representations, or Agreements. Each party has relied on its own examination of the PREMISES, advice from its own attorneys, and the warranties, representations, and covenants of the Lease itself.

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**6.06 Interpretation of the Agreement.** The interpretation, validity and enforcement of the Lease shall be governed by and construed under the laws of the State of California. The venue of any judicial action brought to enforce any condition, covenant or provision of this Lease shall be in San Diego County, California.

The LESSEE shall be responsible for complying with all Local, State, and Federal laws relating to LESSEE'S use of the PREMISES, except as otherwise set forth herein, whether or not said laws are expressly stated or referred to herein.

Should any provision herein be found or deemed to be invalid, the Lease shall be construed as not containing such provision, and all other provisions which are otherwise lawful shall remain in full force and effect, and to this end the provisions of this Lease are severable.

This Lease shall inure to the benefit of and be binding upon the parties hereto and their respective heirs, successors, and assigns.

**6.07 Agreement Modification.** This Lease may not be modified orally or in any manner other than by an Agreement in writing signed by the parties hereto.

**6.08 Waiver.** Any waiver by CITY or LESSEE of a default is not a waiver of any other default. Any waiver of a default must be in writing and be executed by the City Manager in order to constitute a valid and binding waiver. CITY or LESSEE'S delay or failure to exercise a remedy or right is not a waiver of that or any other remedy or right under this lease. The use of one remedy or right for any default does not waive the use of another remedy or right for the same default or for another or later default. CITY'S acceptance of any rents is not a waiver of any default preceding the rent payment. CITY and LESSEE specifically agree that the property constituting the PREMISES is CITY-owned and held in trust for the benefit of the citizens of the City of Oceanside and that any failure by the City Manager or CITY staff to discover a default or take prompt action to require the cure of any default shall not result in an equitable estoppel, but CITY shall at all times, subject to applicable statute of limitations, have the legal right to require the cure of any default when and as such defaults are discovered or when and as the City Council directs the City Manager to take action or require the cure of any default after such default is brought to the attention of the City Council by the City Manager or by any concerned citizen.

**6.09 Attorney Fees.** In the event a suit is commenced by either party to

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enforce the terms, covenants and conditions of this Lease or concerning the leasehold estate, the prevailing party shall be entitled to all costs expended in any action together with reasonable attorney's fees to be fixed by the Court.

**6.10 Assignment and Subletting.** LESSEE shall not transfer, assign, sublet, enter into license or concession agreements or change ownership of this Lease or LESSEE's interest in and to the Premises without first procuring the written consent of CITY. Any attempted transfer, assignment, subletting, license or concession agreement or change of ownership without CITY's written consent shall be void and confer no rights upon any third person. CITY's consent shall not be unreasonably withheld. However, it shall be reasonable that LESSEE notify CITY sixty (60) days prior to any assignment with the terms of the intended assignment or transfer, and documentation reasonably necessary to identify the prospective assignee, the prospective assignee's financial condition, business history and qualifications to use and operate the leased Premises as provided in this Lease.

It shall be reasonable for CITY to refuse assignment if the prospective assignee fails to cooperate in providing adequate and complete documentation of its qualifications. It shall be reasonable to require that the proposed assignee have the expertise, knowledge, ability and qualifications to operate and use the Premises in a respectable, quality and profitable manner at a level equal to or greater than LESSEE's existing operation or, if the existing operation is not profitable, at a level LESSEE and CITY anticipated when the Lease was entered into. It shall be reasonable for CITY to refuse to accept a proposed assignee if the proposed assignee, or its agents, employees, officers, directors, partners or associates had prior transactions with CITY, which CITY objectively deemed unsatisfactory. In no event shall CITY be obligated to accept an assignee without adequate assurances that the Rent payable to CITY will not decline. It shall be reasonable for CITY to require LESSEE to provide adequate assurances that the proposed assignee has financial ability, qualifications, resources and assets to use the leased Premises in a profitable manner, maintain a respectable establishment and be able to comply with the monetary obligations of the Lease. CITY reserves the right to refuse to give such consent unless LESSEE remains fully liable during the unexpired term of the Lease, and CITY further reserves the right to refuse to give such consent if, in CITY's reasonable business judgment, the quality of the operation is, or may in any way adversely be, affected during the term of the Lease, or the prospective assignee does not have the expertise, knowledge, or financial ability to continue the existing operation in the manner and at a level equal to that anticipated or projected when CITY and LESSEE entered into this Lease. It shall be reasonable for CITY to refuse

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assignment if the debt or proposed debt of the prospective assignee is commercially unreasonable in light of the income or anticipated income or if the Lease or leasehold is or will be encumbered beyond seventy (70) percent of its fair market value.

LESSEE agrees to assist and be responsible for providing the documentation and information required in this section and LESSEE agree to reimburse CITY for CITY's reasonable attorney fees incurred in connection with the negotiation, processing, and documentation of any requested transfers, assignment, subletting, or change of ownership of this Lease or LESSEE's interest in and to the PREMISES.

**6.11 Defaults and Termination.** Should LESSEE at any time be in default hereunder with respect to any Rent payments or other charges payable by LESSEE hereunder, and should such default continue for a period of **10 days** after written notice from CITY to LESSEE; or should LESSEE be in default in the prompt and full performance of any other of its promises, covenants or agreements herein contained and should such default or breach of performance continue for more than a reasonable time after written notice thereof from CITY to LESSEE specifying the particulars of such default or breach of performance; or should LESSEE vacate or abandon the Premises; then CITY may treat the occurrence of any one or more of the foregoing events as a breach of this Lease, and in addition to any or all other rights or remedies of CITY hereunder and by the law provided, it shall be, at the option of CITY, without further notice or demand of any kind to LESSEE or any other person:

(a) The right of CITY to declare the term hereof ended and to re-enter the PREMISES and take possession thereof and remove all persons therefrom, and LESSEE shall have no further claim thereon or thereunder; or

(b) The right of CITY without declaring this Lease ended to re-enter the PREMISES and occupy the whole or any part thereof for and on account of LESSEE and to collect said Rent and any other Rent that may thereafter become payable.

(c) The right of CITY, even though it may have re-entered the PREMISES, to thereafter elect to terminate this Lease and all of the rights of LESSEE in or to the PREMISES.

Should CITY have re-entered the PREMISES under the provisions of subparagraph (b) above, CITY shall not be deemed to have terminated this Lease, or the liability of LESSEE to pay Rent thereafter to accrue, or its liability for damages under

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any of the provisions hereof, by any such re-entry or by any action in unlawful detainer, or otherwise, to obtain possession of the PREMISES, unless CITY shall have notified LESSEE in writing that it has so elected to terminate this Lease, and LESSEE further covenants that the service by CITY of any notice pursuant to the unlawful detainer statutes of California and the surrender of possession pursuant to such notice shall not (unless CITY elects to the contrary at the time of or at any time subsequent to the serving of such notices and such election be evidenced by a written notice to LESSEE) be deemed to be a termination of this Lease. In the event of any entry or taking possession of the PREMISES as aforesaid, CITY shall have the right, but not the obligation, to remove therefrom all or any part of the personal property located therein and may place the same in storage at a public warehouse at the expense and risk of the owner or owners thereof.

A written notice in compliance with the Unlawful Detainer Statutes of California shall be sufficient compliance with the notice requirements contained in this Lease and no additional notice will be required of CITY before CITY can prosecute an unlawful detainer action to evict LESSEE if CITY so elects.

Should CITY elect to terminate this Lease under the provisions of subparagraphs (a) or (c) above, CITY may recover from LESSEE as damages:

(i) the worth at the time of award of any unpaid Rent which had been earned at the time of such termination; plus

(ii) the worth at the time of award of the amount by which the unpaid Rent which would have been earned after termination until the time of award exceeds the amount of such Rent loss LESSEE proves could have been reasonably avoided; plus

(iii) the worth at the time of award of the amount by which the unpaid Rent for the balance of the term after the time of award exceeds the amount of such Rent loss that LESSEE proves could be reasonably avoided; plus

(iv) any other amount necessary to compensate CITY for all the detriment proximately caused by LESSEE'S failure to perform his obligations under this Lease or which in the ordinary course of things would be likely to result therefrom, including but not limited to any costs or expenses incurred by CITY in maintaining or preserving the PREMISES after such default, preparing the PREMISES for reletting to a new LESSEE, any repairs or alterations to the PREMISES for such reletting, leasing

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commissions, or any other costs necessary or appropriate to relet the PREMISES.

(v) at CITY'S election such other amounts in addition to or in lieu of the foregoing as may be permitted from time to time by the laws of the State of California.

As used in subparagraphs (i) and (ii) above, the "worth at the time of award" is computed by allowing interest at the rate of ten percent (10%) per annum. As used in subparagraph (iii) above, the "worth at the time of award" is computed by discounting such amount at the discount rate of the Federal Reserve Bank nearest to the location of the Old California Center at the time of award plus one percent (1%).

In the event of default, all of LESSEE'S fixtures, furniture, equipment, improvements, additions, alterations, and other personal property, shall remain on the PREMISES and in that event, and continuing during the length of said default, CITY shall have the right to take the exclusive possession of same and to use same, rent or charge free, until all defaults are cured or, at its option, at any time during the term of this Lease, to require LESSEE to forthwith remove same.

Notwithstanding any other provisions of this Section, CITY agrees that if the default complained of, other than for the payment of monies, is of such a nature that the same cannot be rectified or cured within the thirty (30) day period requiring such rectification or curing as specified in the written notice relating thereto, then such default shall be deemed to be rectified or cured if LESSEE within such period of thirty (30) days shall have notified CITY in writing with a reasonable explanation as to why said cannot be cured within thirty (30) and give an estimate of when it will be cured and shall commence the rectification and curing thereof and shall continue thereafter with all due diligence to cause such rectification and curing and does so complete the same with the use of such diligence as aforesaid.

The remedies given to CITY in this Section shall be in addition and supplemental to all other rights or remedies which CITY may have under the laws then in force.

The waiver by CITY of any breach of any term, covenant or condition herein contained shall not be deemed to be a waiver of such term, covenant or condition or any subsequent breach of the same or any other term, covenant or condition herein contained. The subsequent acceptance of Rent hereunder by CITY shall not be deemed to be a waiver of any preceding breach by LESSEE of any term, covenant or condition of this Lease, other than the failure of LESSEE to pay the particular Rent so accepted,

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regardless of CITY'S knowledge of such preceding breach at the time of acceptance of such Rent. No covenant, term, or condition of this Lease shall be deemed to have been waived by CITY, unless such waiver be in writing by CITY.

In the event CITY consents to an encumbrance of the Lease for security purposes in accordance with Section 5.07 of this Lease, it is understood and agreed that CITY shall furnish copies of all notices of defaults to the beneficiary or mortgagee under said encumbrance by certified mail contemporaneously with the furnishing of such notices to LESSEE, and in the event LESSEE shall fail to cure such default or defaults within the time allowed above, said beneficiary or mortgagee shall be afforded the right to cure such default at any time within **five (5) days**, if the default is for the failure to submit rent as required, or within **15 days** following the expiration of the period within which LESSEE may cure such default, provided, however, CITY shall not be required to furnish any further notice of default to said beneficiary or mortgagee.

**6.12 Bankruptcy.** In the event LESSEE becomes insolvent, makes an assignment for the benefit of creditors, becomes the subject of a bankruptcy proceeding, reorganization, arrangement, insolvency, receivership, liquidation, or dissolution proceedings, or in the event of any judicial sale of LESSEE's interest under this Lease, CITY shall have the right to declare this Lease in default.

The conditions of this section shall not be applicable or binding on LESSEE or the beneficiary in any deed of trust, mortgage, or other security instrument on the demised PREMISES which is of record with CITY and has been consented to by resolution of the City Council, or to said beneficiary's successors in interest consented to by resolution of the City Council, as long as there remains monies to be paid by LESSEE to such beneficiary under the terms of such deed of trust; provided that such beneficiary or its successors in interest, continuously pay to CITY all rent due or coming due under the provisions of this Lease and the PREMISES are continuously and actively used in accordance with Section 1.02 of this Lease.

**6.13 Section Headings.** The Table of Contents and the section headings contained herein are for convenience in reference and are not intended to define or limit the scope of any provision thereof.

**6.14 Gender/Singular/Plural.** The neuter gender includes the feminine and masculine, the masculine includes the feminine and neuter, and the feminine includes the masculine and neuter, and each includes corporation, partnership, or other legal

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entity when the context so requires. The singular number includes the plural whenever the context so requires.

**SECTION 7: SPECIAL PROVISIONS**

**7.01 Standards of Operation.** LESSEE agrees that it shall operate and manage a full service restaurant with services and facilities offered upon or from the PREMISES in a first class manner. Food operations shall be operated in such a manner as to maintain a Health Inspection rating of "A".

**7.02 Hours of Operation.** The LESSEE agrees that it shall conduct business on the PREMISES, at a minimum, from 9:00 am to 9:00 pm daily from Memorial Day to Labor Day and 11:00 am to 9:00 pm for the remainder of the year. LESSEE may be closed for Christmas and Thanksgiving, otherwise, LESSEE may only close during periods of severe inclement weather and shall open immediately thereafter until close of its normal hours of operation or such time as agreed to by CITY. LESSEE shall install a sign at the base of the pier anytime it is closed during normal hours of operation.

**7.03 Manner of Providing Service.** LESSEE shall provide an experienced and well qualified "on-site" supervisor to oversee all operations conducted by LESSEE on the PREMISES. Said supervisor shall be empowered with authority to act on behalf of LESSEE in response to reasonable requests from CITY to perform maintenance, repairs, and replacements on the PREMISES to insure the public's health, safety, and welfare. LESSEE shall ensure that its employees shall at all times conduct themselves in a creditable and dignified manner, and they shall conform to all laws, rules, regulations and requirements, as well as all rules and regulations as hereafter may be promulgated, or put into operation by the CITY. LESSEE shall maintain a staff in adequate size and number, to effectively operate, maintain and administer all services offered and facilities located on the PREMISES.

**7.04 Merchandise and Equipment.** CITY retains the right to require the LESSEE to discontinue the sale or use of those items that are of a quality unacceptable to the CITY.

**7.05 Continued Occupancy.** LESSEE covenants and agrees to, and it is the intent of this Lease that the LESSEE shall, continuously and uninterruptedly during the term of the Lease, occupy and use the PREMISES for the purposes hereinabove specified, except while PREMISES are untenable by reason of fire, flood, or other

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unavoidable casualty, and, in that event, CITY shall be promptly notified by LESSEE.

**7.06 Controlled Prices.** LESSEE shall at all times maintain a complete list or schedule of the prices charged for all goods or services, or combinations thereof, supplied to the public on or from the PREMISES whether the same are supplied by LESSEE or by LESSEE's sublessee(s), assignee(s), concessionaire(s), permittee(s) or licensee(s).

**7.07 Exclusivity.** Except for the rights granted to LESSEE pursuant to this Lease, LESSEE shall not have the exclusive right to provide food and beverage services at or near the Oceanside Pier. LESSEE is aware that other concessions currently exist, and/or in the future may exist, and operate in close proximity to the PREMISES, which sell or may sell food and beverage items. CITY reserves the right to permit any and all services it deems to be in the best interest of the public. Should CITY determine to grant a concession or license for the service of food and beverage on the Oceanside Pier, LESSEE shall have the first right of refusal to operate the designated food and beverage service facility. CITY shall notify LESSEE in writing of this right and provide LESSEE with a copy of the license or concession agreement. LESSEE shall, in order to exercise this right, notify CITY in writing within 30 days of receipt of notice of its unconditional acceptance. If the City Manager has not received a written notice from LESSEE within 30 days, LESSEE releases all rights hereunder. This right is personal to LESSEE and the approved assignees of LESSEE and may not be assigned or transferred or exercised separate and apart from this Lease. LESSEE may not exercise the right if it is in default of the Lease.

LESSEE is also aware that CITY arranges or permits special events and concerts in the Pier Plaza area and many of those event organizers provide their own food and beverage concessions. LESSEE agrees that such activities are not a violation of the rights granted to LESSEE by this Lease. CITY may, but is not obligated to, encourage the promoters and organizers of special events to use LESSEE for any concession needs.

**7.08 Hazardous Substances.** No goods, merchandise or material shall be kept, stored or sold in or on the PREMISES which are in any way explosive or hazardous; and no offensive or dangerous trade, business or occupation shall be carried on therein or thereon, and nothing shall be done on said PREMISES, which will cause an increase in the rate of or cause a suspension or cancellation of the insurance upon said or other premises and the improvements thereon.

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No machinery or apparatus shall be used or operated on or about the PREMISES which will in any way injure the PREMISES or improvements thereon, or adjacent or other premises, or improvements thereon, or to persons; provided, however, that nothing contained in this section shall preclude LESSEE from bringing, keeping or using on or about the PREMISES such materials, supplies, equipment and machinery as are appropriate or customary in carrying on its said business, or from carrying on its business in all usual respects, including retention of normal cleaning supplies and small amounts of hazardous substances normally associated with LESSEE's business.

Open flame burning, gasoline, or other fuel storage is expressly prohibited without prior written consent of the CITY.

**7.09 Tenant Improvements.** LESSEE shall be allowed up to \$200,000.00 as and for tenant improvement allowance in accordance with the budget attached hereto. This allowance is only for amounts verified by receipts for renovation and remodeling and shall not include overhead operating expenses, inventory or advertising. CITY shall disburse payments to LESSEE using standard construction draw procedure for these tenant improvements up to the sum of \$175,000.00 upon receipts for work actually performed or material actually installed and by giving LESSEE a credit of \$25,000.00 against installments of rent until the total is credited in full. Should CITY require any retainer, it shall be held as part of the rent credit until the work is satisfactorily completed. Should the Lease terminate prior to the expiration of the initial term at the fault of LESSEE, CITY shall have no obligation to LESSEE to reimburse LESSEE for tenant improvements and LESSEE shall reimburse CITY for tenant improvements paid by CITY to LESSEE in accordance with the following schedule:

- If the termination is during the first year of the term hereof, \$180,000.00;
- If the termination is during the second year of the term hereof, \$140,000.00;
- If the termination is during the third year of the term hereof, \$100,000.00;
- If the termination is during the fourth year of the term hereof, \$60,000.00;
- If the termination is during the fifth year of the term hereof, \$20,000.00.

**7.10 Parking.** LESSEE may reimburse its patrons, up to the maximum of \$3.00 if they have paid for parking on CITY controlled property and if they present LESSEE with a receipt for same. This cost LESSEE may deduct from its rent provided it separately itemizes said deductions and retains the receipt from the patron. LESSEE may impose a reasonable minimum purchase requirement of \$10.00 of a patron before issuing a reimbursement.

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CITY agree to provide parking for LESSEE, its employees and its patrons, subject to normal charges for patron parking as required of the general public and subject to CITY's right to relocate or designate new or different parking, provided it is reasonably adjacent to access to the PREMISES. Should CITY fail to provide sufficient parking upon within sixty (60) days after written demand by LESSEE, rent shall abate in proportion to the interference and LESSEE may terminate the Lease if adequate parking is not provided in a reasonable time, no later than one hundred and twenty (120) days.

LESSEE is also granted an option to utilize valet parking on Pacific Street for valet pickup and a lot on CITY owned property in the general vicinity for parking. This option may be exercised by LESSEE upon sixty (60) days written notice to CITY. CITY has the right to terminate valet parking in a non-discriminating manner upon sixty (60) days notice to LESSEE.

**7.11 Tram.** CITY shall provide LESSEE with two tram vehicles in good condition and repair to transport patrons and other persons using the pier. The tram shall travel to and from the restaurant and parking area. LESSEE shall pay all costs of maintaining, operating and the tram, including the driver and necessary insurance and CITY will pay one-half the cost thereof payable as credit against rent in accordance with a written accounting up to a maximum of Eight Thousand Dollars per year. CITY shall replace the tram when reasonably required. LESSEE may charge for riding on the tram at an amount agreed to in writing by CITY which is calculated to lower the cost of operation while still considering the public benefit provided.

**7.12 Smallware, Appliances, Equipment and Supplies.** Attached hereto to the Lease is a list of smallware, appliances, furniture, fixtures, equipment, supplies and a delivery truck, the possession of which CITY is transferring to LESSEE in its existing condition, "AS IS". This Attachment will be supplemented or modified after the execution of this Lease to specify only that property which LESSEE desires to acquire. All changes and modifications to the Attachment will be initialed by a representative of the parties. LESSEE agrees to repair, replace and maintain said items during the term of the Lease and redeliver them to CITY, reasonable wear and tear excepted, at the expiration of the Lease in the same condition. LESSEE shall maintain necessary licenses and insurance on the delivery truck. Should any equipment or appliances be required to be replaced within the last year of the Lease, LESSEE shall notify CITY and return to CITY the then existing equipment or appliance if so demanded by CITY and LESSEE may retain any equipment or appliance that LESSEE purchases to replace the removed item.

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**7.13 Liquor License.** LESSEE shall have the option to acquire from the current operator of the restaurant its liquor license for the sum of \$1.00. CITY shall diligently arrange and take necessary steps to cause the existing operator to transfer the liquor license to LESSEE but all costs incurred by LESSEE in processing the necessary applications with the Alcohol Beverage Control Board and any other government agencies that it must be licensed or monitored by shall be the sole cost and responsibility of LESSEE, including but not limited to, attorney fees incurred in that process. At the termination of the Lease, LESSEE, upon CITY'S written demand, shall assign and transfer the liquor license to a designatee of the CITY for the sum of \$1.00 and shall agree to cooperate with the CITY in effecting that transfer.

CITY OF OCEANSIDE  
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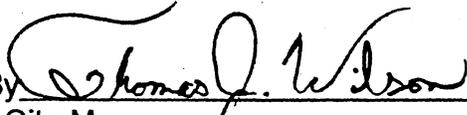
SECTION 8: SIGNATURES

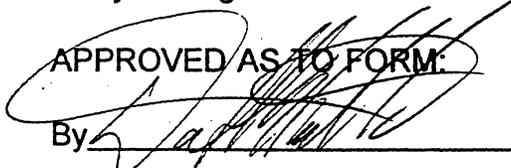
**8.01 Signature Page.** The individuals executing this Lease represent and warrant that they have the right, power, legal capacity and authority to enter into and to execute this Lease on behalf of the respective legal entities of the LESSEE and the CITY.

IN WITNESS WHEREOF the parties hereto for themselves, their heirs, executors, administrators, successors, and assigns do hereby agree to the full performance of the covenants herein contained and have caused this Percentage Lease to be executed by setting hereunto their signatures on the day and year respectively written hereinbelow.

CITY  
THE CITY OF OCEANSIDE

Date \_\_\_\_\_

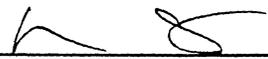
By  \_\_\_\_\_  
City Manager

APPROVED AS TO FORM:  
By  \_\_\_\_\_  
City Attorney

LESSEE  
RUBY'S DINER, INC.

Date 3-19-96

By  \_\_\_\_\_  
DOUG CAVANAGH,  
President

By  \_\_\_\_\_  
RALPH L. KOSMIDES  
Secretary

NOTARY ACKNOWLEDGMENTS OF LESSEE'S SIGNATURE(S) MUST BE ATTACHED

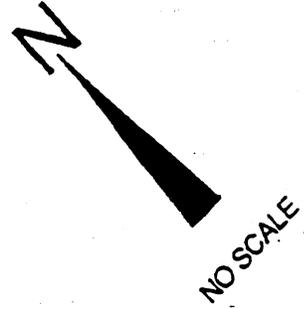
**CITY OF OCEANSIDE  
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**EXHIBITS**

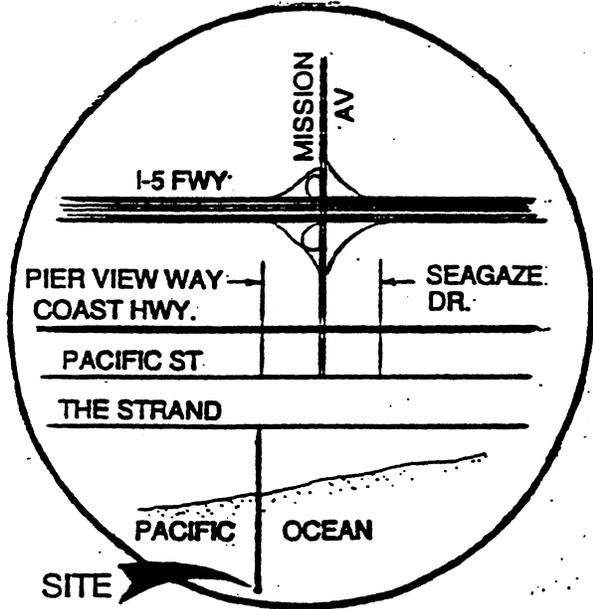
Exhibit "A". A sketch of the PREMISES attached hereto and incorporated herein by reference.

PACIFIC

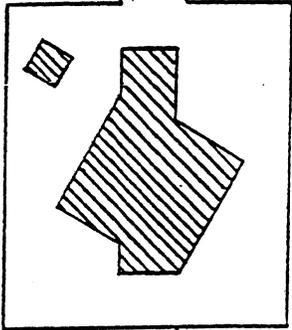
OCEAN



PIER



VICINITY MAP  
NO SCALE



PIER HAMMERHEAD

**LEGEND**

 LEASED PREMISES

Revision	By	Approved	Date

**CITY OF OCEANSIDE**

EXHIBIT "A"

LEASED PREMISES  
PIER RESTAURANT  
LESSEE: RUBY'S

**CALIFORNIA ALL-PURPOSE KNOWLEDGMENT**

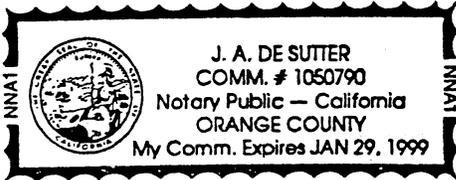
State of CALIFORNIA

County of ORANGE

On 3-19-96 before me, JUDY DE SUTTER NOTARY  
Date Name and Title of Officer (e.g., "Jane Doe, Notary Public")

personally appeared DOUG CAVANAUGH + RALPH KOSMIDES  
Name(s) of Signer(s)

personally known to me – OR –  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.



WITNESS my hand and official seal.

Judy De Sutter  
Signature of Notary Public

**OPTIONAL**

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

**Description of Attached Document**

Title or Type of Document: LEASE + LEASE RIDER

Document Date: 3-19-96 Number of Pages: 46

Signer(s) Other Than Named Above: \_\_\_\_\_

**Capacity(ies) Claimed by Signer(s)**

Signer's Name: D. CAVANAUGH

Signer's Name: R. KOSMIDES

- Individual
- Corporate Officer
- Title(s): PRESIDENT + CEO
- Partner —  Limited  General
- Attorney-in-Fact
- Trustee
- Guardian or Conservator
- Other: \_\_\_\_\_

- Individual
- Corporate Officer
- Title(s): EXEC VP + CFO
- Partner —  Limited  General
- Attorney-in-Fact
- Trustee
- Guardian or Conservator
- Other: \_\_\_\_\_

Signer Is Representing:  
\_\_\_\_\_  
\_\_\_\_\_



Signer Is Representing:  
\_\_\_\_\_  
\_\_\_\_\_



## RIDER TO LEASE

This RIDER TO LEASE (this "Rider") is made to that certain Percentage Rent Lease Agreement and the related Exhibits and documents referenced therein dated as of March 20, 1996 (collectively, the "Lease"), by and between The City of Oceanside ("City"), and RUBY'S DINER, INC., a California corporation ("Lessee").

Lessee and City hereby agree that notwithstanding anything contained in the Lease to the contrary, the provisions set forth below will be deemed to be a part of the Lease and shall supersede, to the extent appropriate, any contrary provision in the Lease. All capitalized terms used in this Rider, unless otherwise defined in this Rider, shall have the same meaning as the terms used in the Lease.

Rider 1.01 Premises. Lessee's lease of the Premises shall include all applicable easements for access and utilities. City represents that the permitted use of the Premises does not conflict with any applicable laws, covenants, conditions, restrictions or certificates affecting use or occupancy of the Premises, and City is unaware of any reason why Lessee would be unable to obtain all required permits, licenses and approvals from the appropriate governmental authorities for such permitted use (and City shall cooperate with Lessee in obtaining same).

Rider 1.02 Uses. Lessee's use may include the sale of merchandise as an incidental part of its business.

Rider 1.05 Reservation of Rights. City, in exercising its rights and fulfilling its obligations under the Lease, shall provide reasonable prior notice to Lessee (at least 24 hours except in an emergency) and shall use best efforts to minimize any interruption with Lessee's business operations and shall repair any damage to the Premises caused in the exercise of such rights. If City's maintenance, repair, remodeling or entry unreasonably interferes with Lessee's use of, and business operations at, the Premises, and Lessee does not use, the Premises or any material portion thereof, for 2 consecutive business days (or for more than 5 days in any 3 month period) because of such failure, interruption or interference, then Lessee's rent shall be abated or reduced, as the case may be, after expiration of the applicable period of time described above until the interruption or interference is remedied.

Rider 2.01 Commencement. City shall use best efforts to tender the Premises to Lessee, broom clean and ready for Lessee's work, on or before the anticipated delivery date of May 1, 1996. If the Premises are not delivered to Lessee in such condition by June 7, 1996, Lessee may, by written notice to City, terminate the Lease or extend the date for delivery date for up to another sixty (60) days. In the case of a termination, such termination shall be effective as of the date of such election and upon such termination Lessee shall have no further or continuing obligation related to the Lease and City shall return to Lessee, within ten (10) days after such termination, any and all amounts paid by Lessee to City in connection with the Lease. The ending dates set forth in Section 3.02(b) for Minimum Annual Rent shall be extended by one day for each day of delay beyond June 30, 1996 in the delivery of the Premises to Lessee.

In addition, the dates set forth for in Section 3.02(b) for commencement of rental payments by Lessee shall be extended by one day for each day that Lessee's initial improvement work in the Premises or opening for business in the Premises is delayed by City's acts or omissions or delays outside the reasonable control of Lessee.

Rider 2.02 Renewal Options. Fair Market Rent for the third option term shall be determined as set forth in Schedule A attached hereto. City shall notify Lessee at least 30 days prior to the last date on which Lessee may exercise each of its options.

Rider 3.02(c) Percentage Rent. By way of example, only, assuming that gross income during the first full Lease year equal \$1,800,000, then \$46,500 would be payable during the first full Lease year as percentage rent, determined as follows: 6% on the first \$1,500,000 of gross income (\$90,000), 7% on the next \$250,000 of gross income (\$17,500) and 8% on the next \$50,000 of gross income (\$4,000), for a total of \$111,500, minus the \$65,000 Minimum Annual Rent for the first full Lease year, equals \$46,500 in percentage rent. Percentage rent payments shall be paid monthly once the gross income "breakpoint" is reached for the year (i.e., the Minimum Annual Rent divided by 6%), with annual reconciliation.

Rider 3.02(d) Gross Income. "Gross income" also shall not include the following: uncollected or uncollectible credit accounts, bounced checks and other bad debts; charges or discounts (on payments to Lessee) made by credit card issuers in connection with credit card sales accepted by Lessee at the Premises; the selling price of merchandise returned by customers and accepted for full credit or the amount of discounts and allowances made thereon; goods returned to sources or transferred to another store or warehouse owned by or affiliated with Lessee; sums and credits received in the settlement of claims for loss of or damage to merchandise; cash refunds made to customers in the ordinary course of business; value added taxes, if any; sales of fixtures, equipment or property which are not stock in trade; sales made by concessionaires, licensees, subtenants or other occupants, except that all sums paid by such others to Lessee shall be included in Gross Sales; meals served upon the Premises to Lessee's employees during their daily periods of work; and tips and/or gratuities given to Lessee's employees by patrons and all service charges collected and turned over to such employees in lieu of such tips and/or gratuities; the value of any promotional devices used by Lessee for the benefit of its customers and without charge to its customers upon redemption of same; and donations made by Lessee to recognized tax-exempt charities or organizations which represent a portion of sales made as part of charity benefits or other fund-raising events for such charities or organizations held in the Premises.

Rider 4.01 Indemnity. Likewise, City shall indemnify and hold harmless Lessee and its officers, agents and employees against all claims for damages to persons or property arising out of the conduct of the City or its employees, agents or other agents in connection with City's use of the Premises or surrounding areas, except only for those claims arising from the negligence or willful conduct of Lessee, its officers, agents or employees. City's

indemnification shall include any and all costs, expenses, attorneys' fees and liability incurred by Lessee, its officers, agents or employees in defending against such claims, whether the same proceed to judgment or not. Further, City at its own expense shall, upon written request by Lessee, defend any such suit or action brought against Lessee, its officers, agents or employees.

Rider 4.02(j) Insurance Increases. In no event may City increase the specified limits of insurance or require Lessee to carry additional insurance coverage unless the additional coverage is available at commercially reasonable rates to other similar businesses in the area and such additional insurance is also generally being carried by lessees leasing similar space in similar risk areas in California for uses similar to Lessee's.

Rider 5.01 Acceptance of Premises. City represents that (a) the Premises is in full compliance with all governmental regulations, ordinances, and laws existing as of the date hereof, including, but not limited to, laws pertaining to Hazardous Material and handicapped access laws, including without limitation the Americans with Disabilities Act, assuming Lessee's use and occupancy. In the event that, because the Premises did not comply with current life-fire safety codes, codes pertaining to the physical handicapped, and codes pertaining to earthquake safety, and because of current code or legal requirements applicable to new construction and required of Lessee, Lessee is reasonably required to incur increased design or construction costs that would not have been incurred had the Premises already been in compliance with the applicable current (without regard to grandfather type exceptions) life-fire safety codes, physical handicap codes, and earthquake safety codes applicable to new construction, then City shall be responsible therefor and such increased costs shall be borne by City (and not deducted from the improvement allowance).

Rider 5.02 Waste, Damage or Destruction. If (i) during the last two (2) years of the term of the Lease or any extension thereof, twenty percent (20%) or more of the Premises or Pier therefor is damaged or destroyed, or (ii) any damage or repair which Lessee or City elects or is obligated under the Lease to undertake is uninsured or reasonably expected to take more than 120 days to repair, Lessee shall have the right to terminate the Lease as of the date of such damage or destruction by written notice to City, given within thirty (30) days after such damage or destruction. In the event of any termination, all sums paid to City by Lessee for any period after the date of such termination shall be promptly returned to Lessee, and Lessee shall have no further obligations under the Lease except for covenants and conditions that survive the termination of the Lease. Rent under the Lease shall immediately abate following damage or destruction proportional to the loss of use and continue until Lessee has been given commercially reasonable time, and sufficient access, to the Premises, to rebuild the portion of the Premises it is required to rebuild, to install its property, furniture, fixtures, and equipment and to reopen; provided that Lessee shall proceed diligently to rebuild the portion of the Premises it is required to rebuild.

Rider 5.02 Destruction of Pier. Any termination by City following damage or destruction to the Pier under this Section shall be exercised in good faith and not merely to benefit from higher market rates or in circumstances in which City intends to rebuild the Pier such that the Premises would be suitable for Lessee's continued use.

Rider 5.03 Maintenance. If Lessee provides written notice to City of an event or circumstance which, under the terms of this Lease, requires the action of City with respect to repair and/or maintenance, and City fails to provide such action within a reasonable period of time, given the circumstances, after the receipt of such written notice but in any event such action must be commenced not later than twenty-one (21) days after receipt of such written notice, and diligently and continuously pursued to completion, then Lessee may proceed to take the required action upon delivery of an additional ten (10) business days' written notice to City specifying that Lessee is taking such required action, and if such action was required under the terms of the Lease to be taken by City, then Lessee shall be entitled to prompt reimbursement by City of Lessee's reasonable costs and expenses in taking such action plus interest thereon. Lessee shall submit to City an invoice setting forth a reasonably particularized breakdown of its costs and expenses in connection with the taking of the action Lessee claims should have been taken by City. In the event of repairs of an emergency nature which are necessary, in Lessee's reasonable opinion, to allow Lessee to continue to use the Premises, then Lessee may immediately make such repairs without regard to such time period set forth above and, if such repairs were required to be made by City under the Lease, then City shall reimburse Lessee for the reasonable cost of such repairs.

Rider 5.04 Improvements/Alterations. City approves the preliminary plans or schematics for certain improvements to the Premises attached hereto. City Manager's approval shall not be required for non-structural alterations which do not exceed \$100,000 in cost in any one year, which do not lower the value of the Premise and which are not visible from the outside of the Premises. No bonds or surety of any kind shall be required for any work to be performed by Lessee or on Lessee's behalf.

Rider 5.05 Utilities. No sewer or other utility tap-in fees or costs shall be charged to Lessee in connection with the Premises or the Lease and any such fees or costs shall be borne by City. In the event of any impairment, interruption, stoppage or other interference with utilities or services, City shall cooperate with Lessee and shall take all reasonable steps requested by Lessee to remedy the same.

Rider 5.06 Liens. Lessee may, at the sole expense of Lessee, contest in good faith the amount or validity of any law, tax, lien or assessment, provided that Lessee shall continue to comply with such law and reimburse City for City's payment of any such tax or assessment in accordance with the terms of the Lease, unless such proceedings shall operate to prevent or stay such payment and the collection of the tax or assessment so contested. If required by any applicable law, City shall join in any such proceeding and, if requested by Lessee, City shall

execute or join in the execution of any instrument or document necessary or advisable in connection with any such contest. Lessee shall pay City all costs reasonably incurred by City if City is required to be joined.

Rider 5.09 Signs. City approves the signage design, size, materials and color scheme attached hereto. No sign shall be placed on the Premises by City. Lessee may use a portion of the Allowance for said signage. In the event that Lessee, after the execution and delivery of the Lease by City and Lessee, changes its trade name from "Ruby's" or any variation thereof, City will allow signage changes to reflect such name change. City shall allow Lessee to install neon signage on the Premises and on the bridge between the lifeguard towers. In addition, City shall allow, at Lessee's election, prominent sandblasted signage for "Ruby's" at the base of the Pier and below the Pier near the Strand Parking lot. Lessee shall also, at Lessee's request, be included in any Pier signage at least as prominently as the other tenants on the Pier. Except for any allowance, the cost of signs shall be borne by Lessee.

Rider 5.10 Ownership of Improvements and Personal Property. Except for the signage described above, City may not require Lessee to remove the initial tenant improvements constructed by Lessee or any other alterations or improvements installed by Lessee and approved by City (unless at the time of plan approval for such alterations or improvements, City notified Lessee that it would require the removal of same). In addition, Lessee may remove (provided Lessee repairs any damage caused by such removal) any of Lessee's personal property, furniture, furnishings, trade fixtures and any materials or equipment that Lessee has installed specifically for use in connection with Lessee's business (such as intercom systems, security systems, cash registers, camera and computer equipment, lamps, ovens, refrigerators, cold-storage, portable air conditioning, stand-alone heaters or fans, electrical devices and the like).

Rider 6.04 Equal Opportunity. City shall not be entitled to terminate the Lease for any default or alleged default of Section 6.03 or 6.04, but shall be limited to an action for damages and/or injunctive relief.

Rider 6.10 Assignment and Subletting. City shall consent to, and Lessee shall be permitted to assign the Lease or sublease all or any portion of the Premises during the initial Term or any renewal term to any substantially related entity, parent company, subsidiary, franchisee or affiliate, or any assignment resulting from a consolidation, merger or purchase of substantially all of Lessee's assets, or a transfer to a new entity or a transfer of stock as part of a public offering. Without limitation, City acknowledges that Lessee intends to assign the Lease to a limited partnership of which Lessee or a permitted assignee is the general partner and City hereby consents to such assignment.

Rider 7.05 Continued Occupancy. Lessee's covenant to operate shall also be tolled during periods of restoration, reconstruction, remodeling, emergencies, or by reason of Lessee's

compliance with laws. Lessee shall have the right from time to time to open for hours in addition to those specified in the Lease.

Rider 7.07 Exclusive. City hereby grants to Lessee the exclusive right to operate on the hammerhead of the Pier a business whose primary business involves the sale of hamburgers or diner-style classic American food.

Rider 8.01 Additional Provisions.

(a) Consent/Duty To Act Reasonably. Except for an assignment or sublease for which City's consent is required (which shall be covered by the reasonableness standards set forth in Section 6.10 of the Lease), and except for matters which would have an adverse effect on the (i) structural integrity of the Premises; (ii) the Premise's plumbing, heating, life safety, ventilating, air conditioning, or electrical systems, or (iii) which could affect the exterior appearance of the Premises, including signage, except to the extent specifically permitted by this Lease (whereupon in each such case City's duty is to act in good faith and in compliance with the Lease), any time the consent or approval of City or the City Manager is required, such consent shall not be unreasonably withheld, conditioned or delayed. Whenever the Lease grants City the right to take action or exercise discretion, or grants City the right to establish rules and regulations or grants City the right to make allocations or other determinations, City shall in the frustration of the reasonable expectations of a sophisticated tenant concerning the benefits to be enjoyed under the Lease.

(b) Parking. City shall use reasonable efforts to ensure that sufficient parking shall be available for customers and other users of the Pier and the Premises throughout the Term.

(c) Default. Whenever the term "default" is used in the Lease, it shall mean a default beyond applicable notice and cure periods.

(d) Brokers. The parties agree that no real estate commissions or other similar fees or charges shall be paid by Lessee in connection with the Lease.

(e) Conditions. The Lease is expressly conditioned upon, for the benefit of Lessee: availability of the liquor license and all permits required to operate a Ruby's restaurant from the Premises; availability of all required utilities in required sizes and quantities supplied to the Premises, prior to the commencement of the Term, necessary for Lessee's normal business activity; and approval by Ruby's Board of Directors of the final terms and conditions of the proposed Lease. Should any of these conditions not be satisfied, Lessee's sole remedy is to terminate this Lease, for which City shall have no liability to Lessee. Should Lessee not terminate this Lease prior to the date that Minimum Rent is first due, Lessee waives all such conditions.

(f) Letter Agreement. The Lease shall incorporate by reference the terms set forth in (i) the letter dated March 14, 1996 from Richard Nagler to Ruby's Diner, Inc. and (ii) the letter dated March 19, 1996 from Ruby's Diner, Inc. to Richard Nagler. Both of such letters are attached hereto as Schedule B.

## Schedule A

### Determination of Fair Market Rent

For purposes of determining Fair Market Rent for the 3rd option term, City shall determine the same by using its good faith judgment and shall provide written notice of such amount to Lessee at least five (5) months prior to the expiration of the Lease. Lessee shall have fifteen (15) days (the "Lessee's Review Period") after receipt of City's notice of the new rental within which to accept such rental. If Lessee fails to accept in writing such rental proposed by City then such proposal shall be deemed rejected, and City and Lessee shall attempt to agree upon such Fair Market Rent, using their best good faith efforts. If City and Lessee fail to reach agreement within fifteen (15) days following Lessee's Review Period (the "Outside Agreement Date"), then each party shall make their final written proposal as to Fair Market Rent and such determination shall be submitted as described below. If City fails to timely generate the initial written notice of City's opinion of the Fair Market Rent which triggers the negotiation period of this paragraph, then Lessee may commence such negotiations by providing the initial notice, in which event City shall have fifteen (15) days ("City's Review Period") after receipt of Lessee's notice of the new rental within which to accept such rental. If City fails to accept in writing such rental proposed by Lessee, then such proposal shall be deemed rejected, and City and Lessee shall attempt in good faith to agree upon such Fair Market Rent, using their best good faith efforts. If City and Lessee fail to reach agreement within fifteen (15) days following City's Review Period (which shall be, in such event, the "Outside Agreement Date" in lieu of the above definition of such date), then each party shall make their final written proposal as to Fair Market Rent and notify the other party of the final proposal and either party may then submit the matter as an agreed case pursuant to the Code of Civil Procedure Section 1138, allowing the court to appoint a neutral referee to determine the sole issue "Which party's proposal is closest to the Fair Market Rent?" The parties shall pay one half of the cost of said case. Rent shall be set at the nearest proposal or the existing Rent for the prior period, whichever is higher. City and Lessee agree that the amount of Rent determined pursuant to this Section shall be final, binding and not subject to appeal (except that Lessee may elect to rescind its renewal option provided Lessee pays for all the appraisers costs). In the event the procedures continue past the commencement of the extended Term, until such procedures are final, Lessee shall pay to City Rent in the amount which Lessee was required to pay during the month immediately preceding the commencement of the extended Term, and upon completion of the foregoing appraisal procedure, if the Fair Market Rent is greater than the Rent being paid by Lessee, Lessee shall forthwith pay to City the difference between said Rent and the Fair Market Rent calculated on a monthly basis, multiplied by the number of months or partial months elapsed since the commencement of the extended Term.

RUBY'S RESTAURANT  
INVENTORY LIST  
PAGE 1

RESTAURANT

<u>ITEM #</u>	<u>QTY.</u>	<u>DESCRIPTION</u>
1.	1	WALK-IN COOLER - CUSTOM
2.	1	WALK-IN FREEZER - CUSTOM
3.	1	REFRIGERATION SYSTEM WALK-IN COOLER - CUSTOM
4.	1	REFRIGERATION SYSTEM FOR WALK-IN FREEZER-CUST
5.	1	REFRIGERATOR W/HALF DOORS - DIG & WAR
6.	1	EXHAUST HOOD - COPPER - CUSTOM S/S (OYSTER BAR)
7.	1	EXHAUST SYSTEM - CUSTOM
8.	1	MAKE-UP AIR SYSTEM - CUSTOM
9.	2	FIRE SYSTEM - CUSTOM
10.	1	REMOTE CONDENSER - CUSTOM
11.	1	EXHAUST HOOD - CUSTOM S/S (KITCHEN)
12.	1	EXHAUST SYSTEM - CUSTOM
13.	1	MAKE-UP AIR SYSTEM - CUSTOM
14.	2	DISPOSER W/ARSS 2 - SALVAJOR 300-SA
15.	1	JANITORS SINK
16.	1	HANDSINK
17.	1	OVERSHELF - TABCO WS-12-72
18.	1	OVERSHELF - TABCO WA-12-60
19.	2	DBL. OVERSHELF - CUSTOM S/S
20.	1	CABINET BASE COUNTER - CUSTOM S/S
21.	1	DBL. OVERSHELF - CUSTOM S/S
22.	2	OVERSHELF - CUSTOM S/S
23.	1	OVERSHELF - CUSTOM
24.	1	WORK TOP & BACK BAR - CUSTOM WD
25.	1	FRONT BAR - CUSTOM WD
26.	1	STORAGE SHELVING
27.	1	UNDERBAR SINK - CUSTOM S/S
28.	1	BEER COOLER
29.	1	SOFT DRINK RACKS
30.	1	SOFT DRINK SYSTEM
31.	2	21" TELEVISIONS
32.	2	MIXER - HAMILTON BEACH 908
33.	1	HOT WATER HEATER
34.	1	BRASS RAILING - CUSTOM BRASS
35.	1	ELEVATOR
36.	42	PATIO TABLES

RUBY'S RESTAURANT  
INVENTORY LIST  
PAGE 2

OFFICE

<u>ITEM #</u>	<u>QTY.</u>	<u>DESCRIPTION</u>
1.	1	CALCULATOR - CANNON MP21d
2.	3	AT&T TELEPHONES
3.	1	TELEPHONE SYSTEM

RUBY'S RESTAURANT  
INVENTORY LIST  
PAGE 3

KIOSK

<u>ITEM #</u>	<u>QTY.</u>	<u>DESCRIPTION</u>
1.	1	EXHAUST HOOD
2.	1	EXHAUST SYSTEM
3.	1	FIRE SYSTEM FOR ITEM #1
4.	1	MAKE-UP AIR FOR ITEM #1
5.	1	FORMICA WORK TABLE
6.	1	TWO COMPARTMENT SCULLERY SINK
7.	1	HAND WASHING SINK
8.	3	OVERSHELVES
9.	1	32" GRIDDLE - GAS
10.	1	36" WORK TABLE W/UNDERSHELF