ITEM NO. 8

STAFF REPORT

CITY OF OCEANSIDE

DATE: January 30, 2013

TO: Honorable Mayor and City Councilmembers
President and Directors of the Harbor Board District

FROM: Property Management Division

SUBJECT: **APPROVAL OF A TEN-YEAR PROPERTY USE AGREEMENT WITH BOAT RENTALS OF AMERICA ON OCEANSIDE SMALL CRAFT HARBOR DISTRICT OWNED PROPERTY**

SYNOPSIS

Staff recommends that the City Council and Harbor District approve a ten-year property use agreement between the Oceanside Small Craft Harbor District and Boat Rentals of America, Inc., for a ten-year minimum total revenue of $165,528; and authorize the City Manager to execute the agreement.

BACKGROUND

Boat Rentals of America, Inc. (Permittee) originally entered into a property use agreement dated April 3, 1997, with the Oceanside Small Craft Harbor District (District), for non-exclusive use of portions of the Transient Vessel Harbor Village Long Dock and Harbor Village Transient Docks. Since that time, Permittee has made building improvements and added transient dock space to provide additional boat rentals and other related watercraft services to the general public. The current agreement expired on March 31, 2012, and Permittee has occupied the premises on a month-to-month basis since April 1, 2012.

ANALYSIS

The proposed agreement, retroactive to July 1, 2012, would extend the agreement for a ten-year term through June 30, 2022, with two options for additional five-year extensions to the property use agreement.

For the first three years of the agreement, Permittee will pay a minimum property use payment of $16,552.80 per year, payable monthly in advance at the rate of $800 for the months of October through March, and $1,958.80 for the months of April through September in addition to a monthly percentage payment equal to 6 percent of gross income, when that amount exceeds the minimum monthly property use payment. Permittee's continued use of the premises will allow the Oceanside Harbor to provide residents and tourists an opportunity to enjoy safe recreational boating.

FISCAL IMPACT

The property use agreement will result in property use revenue for the premises, over the ten-year term, in the minimum amount of $165,528 which will be deposited into account no. 1751.4496-S100358. Approval for an appropriation for FY12-13 in the amount of $6,352.80 is requested. The appropriation of revenue for the remaining term of the agreement will be addressed during the regular budget process each year.

INSURANCE REQUIREMENTS

Permittee will be required to maintain the City's standard insurance requirement over the extended term of the agreement.

COMMISSION OR COMMITTEE REPORT

Does not apply.

CITY ATTORNEY'S ANALYSIS

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

RECOMMENDATION

Staff recommends that the City Council and Harbor District approve a ten-year property use agreement between the Oceanside Small Craft Harbor District and Boat Rentals of America, Inc., for a ten-year minimum total revenue of $165,528, and authorize the City Manager to execute the agreement.

PREPARED BY:

Julie Cook
Program Specialist

SUBMITTED BY:

Peter A. Weiss
City Manager

REVIEWED BY:

Michelle Skaggs Lawrence, Deputy City Manager

Douglas E. Eddow, Real Estate Manager

Frank Quan, Harbor and Beaches Coordinator

Teri Ferro, Financial Services Director

OCEANSIDE SMALL CRAFT HARBOR DISTRICT
PROPERTY USE AGREEMENT
WITH BOAT RENTALS OF AMERICA, INC.

THIS PROPERTY USE AGREEMENT, hereinafter called "Agreement", is executed between the **Oceanside Small Craft Harbor District**, a municipal corporation, hereinafter called "DISTRICT," and **BOAT RENTALS of AMERICA, INC.,** a California corporation hereinafter called "PERMITTEE".

RECITALS

WHEREAS, DISTRICT is the lessee under a ground lease agreement with the City of Oceanside (hereinafter "CITY") for certain real property in the City of Oceanside, County of San Diego, State of California, commonly known as the Oceanside Harbor; and

WHEREAS, PERMITTEE has been doing boat and other related watercraft rental business at the Oceanside Harbor since April 1997;

WHEREAS, the Property Use Agreement dated April 1, 1997, between DISTRICT and PERMITTEE terminated on March 31, 2012;

WHEREAS, PERMITTEE has been occupying that certain real property on a month to month basis since March 31, 2012 and is desirous of entering into a new property use agreement through June 30, 2022;

WHEREAS, DISTRICT, for the consideration hereinafter set forth, is desirous of entering into a new property use agreement pursuant to the terms and conditions hereinafter set forth.

NOW THEREFORE, THE PARTIES HERETO MUTUALLY AGREE AS FOLLOWS:

AGREEMENT

SECTION 1: USES

1.01 **Premises.** DISTRICT hereby authorizes, in accordance with the terms, covenants, conditions and provisions of this Agreement, PERMITTEE'S non-exclusive use of that certain real property situated in the City of Oceanside, County of San Diego, State of California, commonly known as 1) the southerly 33.00 feet of the 102.5 feet of the west side of the Transient Vessel Harbor Village Long Dock; 2) the

south inside ties of the Harbor Village Transient Dock 1, 2, 3, 4, 5 & 6; and 3) approximately 42 feet of the Main Harbor Village Dock that is immediately east of the Harbor Village Transient Dock 1 area, as more particularly illustrated in Exhibit "A", attached hereto and by this reference made part of this Agreement. Said property is hereinafter collectively called the "PREMISES". In return for this permission, PERMITTEE hereby agrees to act in accordance with and abide by the terms, covenants, conditions and provisions of this Agreement.

1.02 **Uses.** It is expressly agreed that the PREMISES shall be used by PERMITTEE solely and exclusively for the purpose of boat and personal watercraft rental and the sale of related boat and personal watercraft merchandise and for such other related or incidental purposes as may be first approved in writing by the City Manager and for no other purpose whatsoever.

PERMITTEE covenants and agrees to use the PREMISES for the above specified purposes and to diligently pursue said purposes throughout the term hereof. In the event that PERMITTEE fails to continuously use the PREMISES for said purposes, or uses the PREMISES for purposes not expressly authorized herein, the PERMITTEE shall be deemed in default under this Agreement.

SECTION 2: TERM

2.01 **Commencement.** The term of this Agreement is for approximately **ten (10) years retroactive to July 1, 2012 and terminating on June 30, 2022**.

2.02 **Renewal Option.** The PERMITTEE shall have the option to extend the term of this Agreement for **two (2)** additional **five (5)** year periods under the terms and conditions of this Agreement at the DISTRICT's calculated fair market property use payment rate of similar businesses, provided that the PERMITTEE is not in default of this Agreement.

The PERMITTEE may request extensions of the term of this Agreement provided that written notice from the PERMITTEE is received by the City Manager no later than **one hundred eighty (180) days** prior to the expiration of the term of this Agreement. No later than **sixty (60) days** from the receipt of PERMITTEE's written election to extend the term of this Agreement the City Manager shall, in writing, provide PERMITTEE with the DISTRICT's calculated fair market property use payment which

the DISTRICT is willing to accept for the PREMISES. No later than **thirty (30) days** after the City Manager provides PERMITTEE with the DISTRICT's determination of its acceptable property use payment rate, PERMITTEE shall provide DISTRICT with its determination of acceptance or rejection of the recalculated property use payment rate. In no event shall the property use payment rate be less than that required during the preceding annual term.

2.03 **Business License.** PERMITTEE agrees to obtain and maintain, at its sole cost and expense, a current Business License issued from the City of Oceanside during the full term of this Agreement, provided such a license is required for PERMITTEE's operations under this Agreement.

SECTION 3: Property Use Payment

3.01 **General.** PERMITTEE shall pay to DISTRICT a property use payment equal to the Minimum Property Use Payment (as defined by Subsections 3.02 through 3.04) or the Percentage Property Use Payment (as defined by Subsection 3.05), whichever is higher, without setoffs or deductions. In the event the commencement of this Agreement is after the **first (1st) day** of the month, the first month's minimum property use payment shall be prorated based on a **thirty (30) day** proration formula.

3.02 **Minimum Property Use Payment.** The Minimum Property use payment amount for the **first three (3) years** of this Agreement shall be **SIXTEEN THOUSAND, FIVE HUNDRED FIFTY-TWO DOLLARS & EIGHTY CENTS ($16,552.80)** per year which shall be payable monthly in advance at the rate of **EIGHT HUNDRED DOLLARS ($800.00) per month for the months of October through March and ONE THOUSAND, NINE HUNDRED FIFTY-EIGHT DOLLARS & EIGHTY CENTS ($1,958.80) per month for the months of April through September**.

3.03 **Minimum Property Use Payment Adjustment Date.** The minimum property use payment shall be adjusted every three (3) years on the anniversary date of the commencement of this Agreement.

3.04 **Minimum Property Use Payment Adjustment Computation.** The minimum property use payment shall be adjusted to equal eighty percent (80%) of the average total annual property use payment payable by PERMITTEE to DISTRICT

for the preceding three (3) years of the term hereof, but in no event will the minimum property use payment be reduced below the minimum property use payment for the preceding period. The adjustment shall be retroactive as of the Minimum Property Use Payment Adjustment Date, for each period.

Example: If the Agreement starts on July 1, 2012, the minimum property use payment adjustment date would be July 1, 2015. Assuming PERMITTEE paid a total of Forty Thousand Dollars ($40,000.00) in property use payments for 2012, a total of $50,000.00 for 2013 and a total of $60,000.00 for 2014, the three year total annual property use payment would be $150,000. To determine the minimum property use payment for the next three (3) years you divide the $150,000 by 3, which equals $50,000, then multiply by 0.8, which gives you a new minimum property use payment of $40,000 for the next three (3) years.

Should there be a decline of more than 25% in Gross Income for any calendar quarter below that for the same calendar quarter for the preceding year, PERMITTEE may apply in writing to DISTRICT for a temporary reduction in minimum property use payments if PERMITTEE can reasonably demonstrate to DISTRICT that said decline was caused by acts of God or by others beyond PERMITTEE's control and was not caused or contributed to by PERMITTEE's actions or failure to act. DISTRICT shall act reasonably in granting or denying said request, but shall have no duty to reduce the minimum property use payment unless and until PERMITTEE provides documentary proof, to DISTRICT's reasonable satisfaction, of said decline, and proof that PERMITTEE is not receiving compensation for said decline from any collateral source, such as business interruption insurance, casualty insurance, or recovery from a person other than DISTRICT. In the event DISTRICT grants a reduction of the minimum property use payment, the minimum property use payment may be adjusted downward to the anticipated percentage property use payment. If an adjustment is granted, it shall not be retroactive for more than two (2) calendar quarters prior to receipt of PERMITTEE's request, and in no case shall the adjustment exceed one (1) year.

3.05 **Percentage Property Use Payment.** PERMITTEE shall pay to DISTRICT, a percentage property use payment equal to **six percent (6%)** of its Gross Income (as defined in Section 3.07) for each month.

3.06 **Time and Place of Payment**.

a. **Minimum Property Use Payment.** The PERMITTEE shall make all minimum property use payments **monthly** in advance on or before the **first day** of each **new month**. Checks should be made payable to the City of Oceanside and delivered to: City of Oceanside, Central Cashiering, 300 N. Coast Highway, Oceanside, CA 92054. The place and time of payment may be changed at any time by DISTRICT upon thirty (30) days' written notice to PERMITTEE. PERMITTEE assumes all risk of loss and responsibility for late payment charges.

b. **Monthly Percentage Property Use Payment**. The monthly percentage property use payment, less the minimum property use payment paid for that month, shall be payable to DISTRICT monthly in arrears not later than **ten (10) days** following the end of each calendar month of the term of this Agreement as required in Section 3.01 hereinabove. Checks should be made payable to the City of Oceanside and delivered to the DISTRICT at the address set forth in Section 3.06 of this Agreement. The place and time of payment may be changed at any time by DISTRICT upon thirty (30) days' written notice to PERMITTEE. PERMITTEE assumes all risk of loss and responsibility for late payment charges.

3.07 **Gross Income.** Gross Income as used herein shall mean all income received by PERMITTEE from the sale of goods or services on or from the PREMISES or any other income received by PERMITTEE as a result of 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, Provided, however, Gross Income shall not include 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 PERMITTEE to a governmental agency accompanied by a tax return or statement as required by law. Possessory interest taxes or other property taxes shall not be deducted by PERMITTEE in computing Gross Income. Gross Income shall not include refunds for goods returned for resale on the PREMISES or refunds of deposits. The amount of such taxes and refunds shall be clearly shown on the books and records of PERMITTEE. Gross Income shall include income received by PERMITTEE or by any subpermittee, permittee or licensee, or their agents, and all Gross Income received by any subpermittee, permittee, licensee, or

other party as a result of occupancy of said PREMISES or the operation. The monthly Gross Income shall be calculated at the end of each month of the term of this Agreement. The first monthly Gross Income calculation shall be made one (1) month after the commencement date of this Agreement.

3.08 **Delinquent Payment.** If PERMITTEE fails to pay the payment when due, PERMITTEE shall pay in addition to the unpaid payment, five percent (5%) of the delinquent payment. If the payment is still unpaid at the end of fifteen (15) days, PERMITTEE 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 DISTRICT for loss resulting from payment delinquency, including lost interest, opportunities, legal costs, and the cost of servicing the delinquent account.

SECTION 4: RECORDS

4.01 **Inspection of Records.** PERMITTEE agrees to make any and all records and accounts available to DISTRICT for inspection at all reasonable times, so that DISTRICT can determine PERMITTEE's compliance with this Agreement. These records and accounts will be made available by PERMITTEE at the PREMISES and will be complete and accurate showing all income and receipts from the use of the PREMISES. PERMITTEE's failure to keep and maintain such records and make them available for inspection by DISTRICT shall be deemed a default of this Agreement. PERMITTEE shall maintain all such records and accounts for a minimum period of five (5) years.

SECTION 5: INSURANCE RISKS/SECURITY

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

brought against the DISTRICT, its officers, agents, or employees.

5.02 **Insurance.** PERMITTEE shall take out and maintain at all times during the term of this Agreement the following insurance at its sole expense:

a. PERMITTEE shall maintain the following minimum limits:

General Liability

Combined Single Limit Per Occurrence	**$1,000,000**
General Aggregate	**$2,000,000***

*General aggregate per year, or part thereof, with respect to losses or other acts or omissions of PERMITTEE under this agreement."

b. All insurance companies affording coverage to the PERMITTEE shall be required to add the Harbor DISTRICT and the City of Oceanside as "additional insured" under the insurance policy(s) required in accordance with this Agreement.

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

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

e. PERMITTEE 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 Agreement.

f. PERMITTEE shall provide a substitute certificate of insurance no later than **ten (10) days** prior to the policy expiration date. Failure by the PERMITTEE to

provide such a substitution and extend the policy expiration date shall be considered a default by PERMITTEE and may subject the PERMITTEE to a termination of this Agreement.

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

h. If PERMITTEE fails or refuses to take out and maintain the required insurance, or fails to provide the proof of coverage, DISTRICT has the right to obtain the insurance. PERMITTEE shall reimburse DISTRICT for the premiums paid with interest at the maximum allowable legal rate then in effect in California. DISTRICT shall give notice of the payment of premiums within **thirty (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 PERMITTEE on the **first (1st) day** of the month following the notice of payment by DISTRICT.

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

i. DISTRICT, at its discretion, may require the revision of amounts and coverage at any time during the term of this Agreement by giving PERMITTEE **sixty (60) days** prior written notice. DISTRICT'S requirements shall be designed to assure protection from and against the kind and extent of risk existing on the PREMISES. PERMITTEE also agrees to obtain any additional insurance required by DISTRICT for new improvements, in order to meet the requirements of this Agreement.

5.03 **Accident Reports.** PERMITTEE shall, within **seventy-two (72) hours** after occurrence, report to DISTRICT 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 of the occurrence, the names and addresses of any witnesses and other pertinent information.

SECTION 6: GENERAL PROVISIONS

6.01 **Maintenance.** With respect to PERMITTEE's operations at or on the PREMISES, PERMITTEE shall make all repairs and replacements necessary to maintain and preserve the PREMISES in a decent, safe, healthy, and sanitary condition satisfactory to DISTRICT and in compliance with all applicable laws.

In the event that the PREMISES are not in a decent, safe, healthy, and sanitary condition, DISTRICT shall have the right, upon written notice to PERMITTEE, to have any necessary maintenance work done at the expense of PERMITTEE, and PERMITTEE shall promptly pay any and all costs incurred by DISTRICT in having such necessary maintenance work done, in order to keep said PREMISES in a decent, safe, healthy, and sanitary condition. PERMITTEE shall make payment no later than **thirty (30) days** after written notice from the DISTRICT. Further, if at any time DISTRICT determines that said PREMISES are not in a decent, safe, healthy, and sanitary condition, DISTRICT may at its sole option, upon written notice, require PERMITTEE to file with DISTRICT a faithful performance bond to assure prompt correction of any condition which is not decent, safe, healthy, and sanitary. Said bond shall be in an amount adequate in the opinion of DISTRICT to correct the said unsatisfactory condition. PERMITTEE shall pay the cost of said bond. The rights reserved in this section shall not create any obligations on DISTRICT or increase obligations elsewhere in this Agreement imposed on DISTRICT.

6.02 **Utilities.** PERMITTEE agrees to order, obtain, and pay for water service and installation charges in connection with the development, occupation and operation of the PREMISES. Electricity shall be paid on a prorated charge to DISTRICT and reasonably determined by DISTRICT.

6.03 **Sign.** PERMITTEE 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 DISTRICT. If any such unauthorized item is found on the PREMISES, PERMITTEE shall remove the item at its expense within twenty-four (24) hours of written notice thereof by DISTRICT, or DISTRICT may thereupon remove the item at PERMITTEE's cost.

6.04 **Taxes.** PERMITTEE shall pay, before delinquency, all taxes, assessments, and fees assessed or levied upon PERMITTEE or the PREMISES,

including, any buildings, structures, machines, equipment, appliances, or other improvements or property of any nature whatsoever erected, installed, or maintained by PERMITTEE or levied by reason of the business or other PERMITTEE activities related to the PREMISES, including any licenses or permits.

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

6.05 **Improvements/Alterations.** No improvements, structures, or installations shall be constructed on the PREMISES, and the PREMISES may not be altered by PERMITTEE without prior written approval by the DISTRICT. Further, PERMITTEE 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 DISTRICT and that such approval shall not be unreasonably withheld. This provision shall not relieve PERMITTEE of any obligation under this AGREEMENT to maintain the PREMISES in a decent, safe, healthy, and sanitary condition, including structural repair and restoration of damaged or worn improvements. DISTRICT shall not be obligated by this Agreement to make or assume any expense for any improvements or alterations.

6.06 **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 PERMITTEE, excepting such fixtures which may be removed without causing damage to the PREMISES, such as signs installed by PERMITTEE, shall at expiration or termination be deemed to be part of the PREMISES and shall become, at DISTRICT's option, DISTRICT's property, free of all liens and claims except as otherwise provided in this Agreement.

b. If DISTRICT elects not to assume ownership of all or any improvements, trade fixtures, structures and installations, DISTRICT shall so notify PERMITTEE in writing thirty (30) days prior to expiration or termination of this Agreement, and PERMITTEE shall remove all such improvements, structures and installations as directed by DISTRICT at PERMITTEE's sole cost and expense on or before Agreement expiration

or termination. If PERMITTEE fails to remove any improvements, structures, and installations as directed, PERMITTEE agrees to pay DISTRICT the full cost of any removal.

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

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

6.07 **Notices.** All notices, demands, requests, consents or other communications which this Agreement 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 DISTRICT:

CITY of Oceanside
Property Management
300 North Coast Highway
Oceanside, CA 92054

To PERMITTEE:

Boat Rentals of America, Inc
125 E. Baker # 143
Costa Mesa, CA 92626

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 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) three 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.

6.08 **DISTRICT Approval.** The City Manager shall be the DISTRICT's authorized representative in the interpretation and enforcement of all services performed in connection with this Agreement. The City Manager may delegate authority in connection with this Agreement to the City Manager's designee(s). For the purposes of directing PERMITTEE in accordance with this Agreement, which does not result in a change to this Agreement, the City Manager delegates authority to the Real Estate Manager.

6.09 **Entire Agreement.** This Agreement comprises the entire integrated understanding between DISTRICT and PERMITTEE 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 Agreement itself.

The interpretation, validity and enforcement of the Agreement shall be governed by and construed under the laws of the State of California. The Agreement does not limit any other rights or remedies available to DISTRICT.

The PERMITTEE shall be responsible for complying with all Local, State, and Federal laws whether or not said laws are expressly stated or referred to herein.

Should any provision herein be found or deemed to be invalid, the Agreement 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 Agreement are severable.

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

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

hereto.

6.11 **Assignment and Subletting-No Encumbrance.** This Agreement and any portion thereof shall not be assigned, transferred, or sublet, nor shall any of the PERMITTEE's duties be delegated, without the express written consent of DISTRICT. Any attempt to assign or delegate this Agreement without the express written consent of DISTRICT shall be void and of no force or effect. A consent by DISTRICT to one assignment, transfer, subagreement, or delegation shall not be deemed to be a consent to any subsequent assignment, transfer, subagreement, or delegation.

6.12 **Defaults and Termination.** If either party ("demanding party") has a good faith belief that the other party ("defaulting party") is not complying with the terms of this Agreement, the demanding party shall give written notice of the default (with reasonable specificity) to the defaulting party and demand the default to be cured within **thirty (30) days** of the notice.

If the defaulting party is actually in default of this Agreement and fails to cure the default within **thirty (30) days** of the notice, or, if more than **thirty (30) days** are reasonably required to cure the default and the defaulting party fails to give adequate assurance of due performance within **ten (10) days** of the notice, the demanding party may terminate this Agreement upon written notice to the defaulting party.

DISTRICT may also terminate this Agreement upon written notice to PERMITTEE in the event that:

- PERMITTEE has previously been notified by DISTRICT of PERMITTEE's default under this Agreement and PERMITTEE, after beginning to cure the default, fails to diligently pursue the cure of the default to completion, or

- PERMITTEE shall voluntarily file or have involuntarily filed against it any petition under any bankruptcy or insolvency act or law, or

- PERMITTEE shall be adjudicated a bankruptcy, or

- PERMITTEE shall make a general assignment for the benefit of creditors.

Upon termination, DISTRICT may immediately enter and take possession of the

PREMISES.

6.13 **Other Regulations.** All use of the PREMISES under this Agreement shall be in accordance with the laws of the United States of America, the State of California and in accordance with all applicable rules and regulations and ordinances of the City of Oceanside now in force, or hereinafter prescribed or promulgated by resolution or ordinance or by State or Federal law.

It is the responsibility of PERMITTEE to obtain and maintain all permits and licenses which are now, or in the future may be required to operate from the PREMISE at no cost to the DISTRICT.

SECTION 7: SPECIAL PROVISIONS

7.01 **Ancillary Uses and Services.** No additional uses or services, other than those provided for under Section 1.02 of this Agreement, shall be provided by PERMITTEE from or at the demised PREMISES.

No retail food service operations shall be provided on or from the PREMISES.

7.02 **Standards of Operation.** PERMITTEE agrees that it shall operate and manage the services and facilities offered upon or from the PREMISES in a first class manner and comparable to other similar facilities within the San Diego County and Southern California areas which provide like products and services.

7.03 **PERMITTEE's Employees.** PERMITTEE shall provide an experienced and well qualified "on-site" supervisor to oversee all operations conducted by PERMITTEE on the PREMISES. PERMITTEE shall ensure that its employees shall at all times conduct themselves in a creditable manner, and they shall conform to all rules, regulations and requirements, as well as all rules and regulations as hereafter may be promulgated, or put into operation by the DISTRICT, provided that such rules, regulations and requirements are not in conflict with the terms of this Agreement. PERMITTEE shall maintain a staff in adequate size and number, to DISTRICT's reasonable satisfaction, to effectively operate, maintain and administer all services offered and facilities located on the PREMISES.

7.04 **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, except that ordinary business materials that may be classified as hazardous may be kept in or on the PREMISES if such materials are stored and disposed of in accordance with all applicable laws; 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 the demised PREMISES or other premises and the improvements thereon; provided, however, that if anything done by PERMITTEE causes an increase in the rate of insurance on the PREMISES, PERMITTEE may, at its option, pay such increase and PERMITTEE shall not thereafter be considered in default under this Agreement.

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

7.05 **Merchandise and Equipment.** DISTRICT retains the right to require the PERMITTEE to discontinue the sale or use of those items that are of a quality unacceptable to the DISTRICT.

7.06 **Continued Occupancy.** PERMITTEE covenants and agrees to, and it is the intent of this Agreement that the PERMITTEE shall, continuously and uninterruptedly during the term of the Agreement, occupy and use the PREMISES for the purposes hereinabove specified, except while PREMISES are untenantable by reason of fire, flood, or other unavoidable casualty, and, in that event, DISTRICT shall be promptly notified by PERMITTEE.

7.07 **Controlled Prices.** PERMITTEE shall at all times maintain a complete list or schedule of the prices and charges for all goods or services, or combinations thereof, supplied to the public on or from the PREMISES whether the

same are supplied by PERMITTEE or by PERMITTEE's subpermittees, assignees, concessionaires, permittees or licensees.

7.08 **OPERATIONAL RESTRICTIONS.** PERMITTEE hereby agrees to the following restrictions, with the understanding that any violation of these restrictions or any safety violation shall be deemed a breach of this agreement and PERMITTEE shall have the right to immediately terminate this Agreement; and that in the event of such termination, PERMITTEE shall have no further rights hereunder and PERMITTEE shall thereupon forthwith remove from said PREMISES and shall have no further right to claim thereto, and PERMITTEE shall immediately thereupon, without recourse to the courts, have the right to reenter and take possession of the PREMISES, without any notice. PERMITTEE shall further have all other rights and remedies as provided by law, including without limitation the right to recover damages from PERMITTEE in the amount necessary to compensate the PERMITTEE for all the detriment proximately caused by the PERMITTEE's failure to perform his obligations under the Agreement or which in the ordinary course of things would be likely to result therefrom:

(a) The DISTRICT is authorized to conduct an on-site safety inspection of all rental vessels and safety equipment without notice;

(b) The rental site and dock shall have fire extinguishers located in glass front cases and marked "For Emergency Use Only". The rental site shall also monitor marine radio channel 16 and have channels 12, 22A and 68 available for use;

(c) A speaker system sufficient to page waiting customers may be utilized, no other loudspeakers or loud music shall be utilized at the rental facility;

(d) Rental operations shall not be conducted during periods when specifically notified by the DISTRICT of hazardous off-shore or entrance conditions, or when local small craft warnings are posted unless specifically approved by the City Manager;

(e) The DISTRICT shall pre-approve the Hold Harmless and Waiver Agreement and the operation and safety brief format which shall be given to any and all operators and passengers prior to each operation/rental of any boat or personal watercraft;

(f) All operators of safety boats and persons giving rental briefings shall have successfully completed a Harbor and Beaches approved course of instruction for safety and operation of the rental craft;

(g) Operator of safety boat shall have a marine radio monitor channel 16 and have channels 12, 22A and 68 available and colored smokes available for emergency use;

(h) All operators/renters of boats and personal watercraft shall be eighteen (18) years of age or older;

(i) All rental boats, personal watercraft and any other vessel which may be operated shall meet all USCG operating and equipment standards; and

(j) All operators/renter of boats and personal watercraft and safety boats shall follow the rules of the road for operation on waters of the United States and any state or local laws, rules, restrictions, etc.

PERMITTEE acknowledges that the paramount use of PREMISES is for public services and civic activities. The DISTRICT reserves the right to schedule and use the PREMISES for community events and other DISTRICT sponsored activities. DISTRICT agrees to coordinate such use of the PREMISES with PERMITTEE so as not to conflict with PERMITTEE's programs and activities.

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OCEANSIDE SMALL CRAFT HARBOR DISTRICT
PROPERTY USE AGREEMENT
WITH BOAT RENTALS OF AMERICA, INC.

SECTION 8: SIGNATURES

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

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 Property Use Agreement to be executed by setting hereunto their signatures on the day and year respectively written hereinbelow.

DISTRICT
THE OCEANSIDE SMALL CRAFT HARBOR DISTRICT

Date _____ By _____
Administrative Officer

APPROVED AS TO FORM:

By _____, ASST.
Harbor Attorney

LESSEE
Boat Rentals of America, Inc.

Date 04/15/13 By _____
Ralph Rodheim
PRESIDENT

By _____
PENELOPE RODHEIM, SEC.

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

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

CIVIL CODE § 1189

State of California

County of ORANGE

On 01/15/2013 (Date) before me, DENNIS RUSSELL CLARKSON, NOTARY PUBLIC (Here Insert Name and Title of the Officer),

personally appeared RALPH RODHEIM AND PENELOPE RODHEIM (Name(s) of Signer(s)),

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

DENNIS RUSSELL CLARKSON
Commission # 1929659
Notary Public - California
Los Angeles County
My Comm. Expires Mar 21, 2015

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: _____ (Signature of Notary Public)

Place Notary Seal Above

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: _____

Document Date: _____ Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____

☐ Corporate Officer — Title(s): _____

☐ Individual

☐ Partner — ☐ Limited ☐ General

☐ Attorney in Fact

☐ Trustee

☐ Guardian or Conservator

☐ Other: _____

Signer Is Representing: _____

RIGHT THUMBPRINT OF SIGNER
Top of thumb here

Signer's Name: _____

☐ Corporate Officer — Title(s): _____

☐ Individual

☐ Partner — ☐ Limited ☐ General

☐ Attorney in Fact

☐ Trustee

☐ Guardian or Conservator

☐ Other: _____

Signer Is Representing: _____

RIGHT THUMBPRINT OF SIGNER
Top of thumb here

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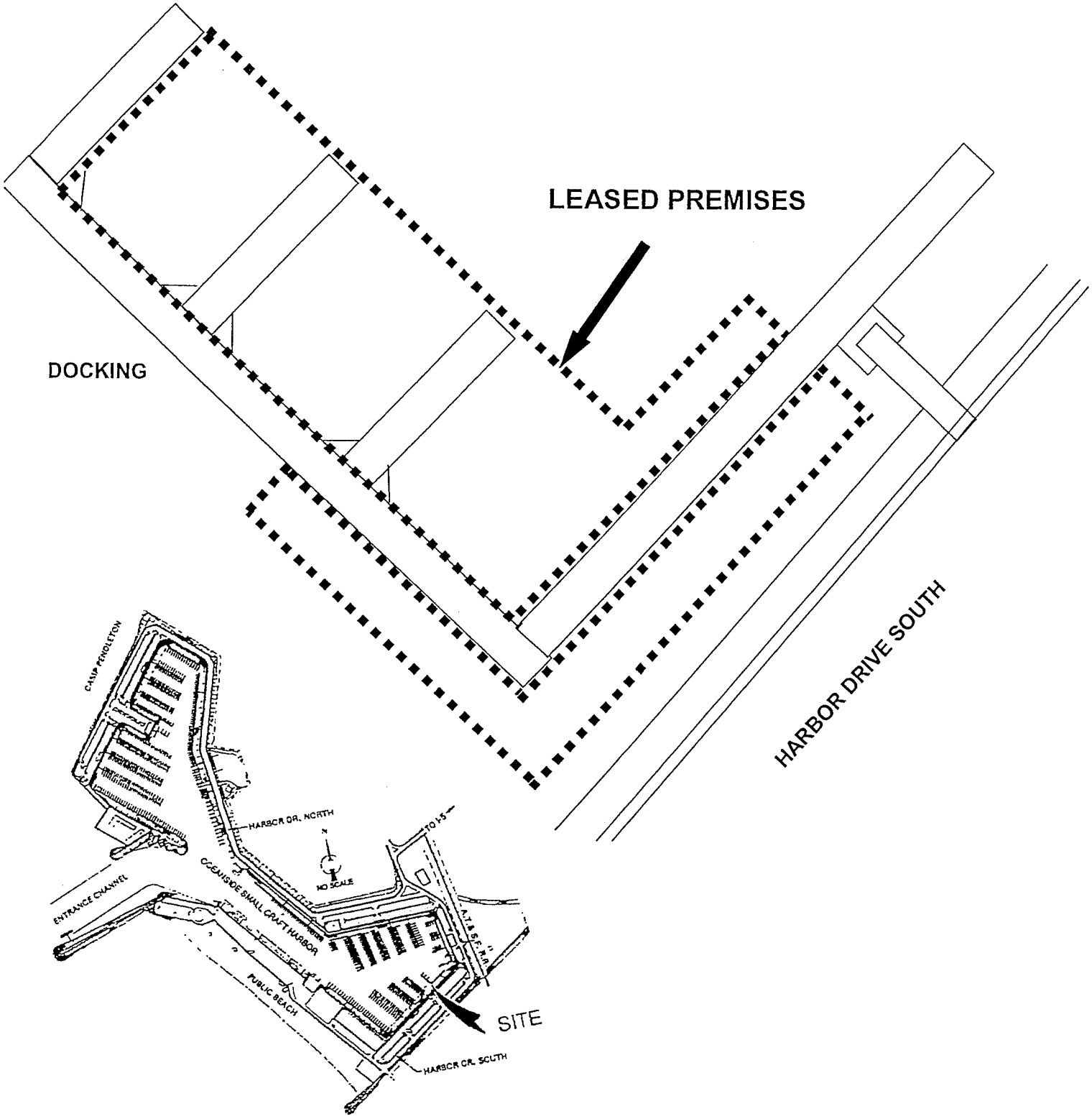
Item #5907

OCEANSIDE SMALL CRAFT HARBOR DISTRICT
PROPERTY USE AGREEMENT
WITH BOAT RENTALS OF AMERICA, INC.

EXHIBITS

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

EXHIBIT- A



OCEANSIDE HARBOR DISTRICT

SKETCH OF PREMISES FOR

USE AGREEMENT WITH

BOAT RENTALS OF AMERICA