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DATE: March 5, 2014

TO: Honorable Mayor and City Councilmembers

FROM: Property Management Division

SUBJECT: **APPROVAL OF A FIVE-YEAR PROPERTY USE AGREEMENT WITH TOWER OPTICAL COMPANY, INC. FOR THE OPERATION OF SIX COIN-OPERATED BINOCULAR MACHINES ON THE OCEANSIDE MUNICIPAL PIER**

**SYNOPSIS**

Staff recommends that the City Council approve a five-year property use agreement with Tower Optical Company, Inc. of South Norwalk, Connecticut ("Tower Optical") for the operation of six coin-operated binocular machines on the Oceanside Municipal Pier, for a five-year revenue of approximately \$14,710; and authorize the City Manager to execute the agreement.

**BACKGROUND**

The City first entered into an agreement with Tower Optical in March 1989 for two viewing machines on the pier. Since that time the company has added four viewing machines for a total of six machines for the public. The agreement has been amended from time to time and the current amendment expired on December 30, 2010, and Tower Optical has operated on a month-to-month tenancy.

**ANALYSIS**

Tower Optical desires to enter into a new property use agreement for a total of six coin-operated binocular machines on the pier for a period of five years, effective February 1, 2014, and terminating on January 31, 2020, with provision for two one-year extensions.

The viewing machines do not impede with pedestrian traffic. Four of the machines are located on the first hammerhead, and two of the machines are located at the base of the pier. Tower Optical remains responsible for all the maintenance and upkeep of the machines. The City receives fifty (50) percent of the income generated from the viewing machines.

**FISCAL IMPACT**

The City has received an average of \$2,942 per year from Tower Optical in the past two years. Based on this average, the agreement will result in property use revenue over the five-year term of approximately \$14,710 (account no. 1101.4351.0001).

**INSURANCE REQUIREMENTS**

The City's standard insurance requirements have been met.

**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 approve a five-year property use agreement with Tower Optical Company, Inc. of South Norwalk, Connecticut ("Tower Optical") for the operation of six coin-operated binocular machines on the Oceanside Municipal Pier, for a five-year revenue of approximately \$14,710; and authorize the City Manager to execute the agreement.

PREPARED BY:

SUBMITTED BY:

  
\_\_\_\_\_  
Julie Cook  
Program Specialist

  
\_\_\_\_\_  
Steven R. Jepsen  
City Manager

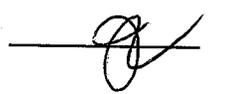
REVIEWED BY:

Michelle Skaggs Lawrence, Deputy City Manager

Douglas E. Eddow, Real Estate Manager

Frank Quan, Harbor & Beaches Coordinator

James Riley, Financial Services Director

  
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**CITY OF OCEANSIDE  
PROPERTY USE AGREEMENT  
WITH TOWER OPTICAL COMPANY, INC.**

This Property Use Agreement, hereinafter called ("Agreement"), dated as of \_\_\_\_\_ is entered between the **CITY OF OCEANSIDE**, a municipal corporation, hereinafter called ("CITY") and **TOWER OPTICAL COMPANY INC.**, hereinafter referred to as ("PERMITTEE").

**RECITALS**

WHEREAS, CITY and PERMITTEE have heretofore entered into a property use agreement whereby PERMITTEE operated coin operated binocular machines for the CITY at the Oceanside Municipal Pier;

WHEREAS, PERMITTEE is desirous of entering into a new property use agreement to continue operating coin operated binocular machines at the Oceanside Municipal Pier; and;

WHEREAS, CITY, for the consideration hereinafter set forth, is also 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:

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

**SECTION 1: USES**

**1.01 Premises.** CITY hereby authorizes PERMITTEE, in accordance with the terms of this Agreement, the non-exclusive use of that certain real property situated in the City of Oceanside, County of San Diego, State of California commonly known as Oceanside Municipal Pier and more particularly described in Exhibit "A" attached hereto and by this reference made part of this Agreement. Said real property is hereinafter 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.

**1.01 Uses.** It is expressly agreed that the PREMISES is used by PERMITTEE solely and exclusively for the purpose of **operating and maintaining six (6) Tower Coin Operated Binocular Machines at the PREMISES**, and for such other related or incidental

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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 shall be for a period of **Five (5) Years** commencing on **February 1, 2014**, and terminating **January 31, 2019**.

**2.02 Extension of Term.**

The PERMITTEE may request an extension of the term of this Agreement for two (2) additional terms of one (1) year each, under the terms and conditions of this Agreement at the CITY's calculated fair market property use payment rate of similar businesses and or services, provided that the PERMITTEE is not in default or breach of any term, condition, or covenant of this Agreement. Any extension must be approved by the City Council.

The PERMITTEE may request extensions of the term of this Agreement provided that written notice from PERMITTEE is received by the Real Estate Manager no later than ninety (90) days prior to the expiration of the term of this Agreement. The option to extend is not automatic and will be decided by the CITY. The City Manager or Real Estate Manager shall notify the PERMITTEE not later than sixty (60) days after receipt of such request whether such request will be recommended to the City Council for approval, at which time the Real Estate Manager shall provide PERMITTEE with CITY's calculated fair market rent property use payment rate value and rental amount which the CITY is willing to accept for PERMITTEE'S use and occupation of the PREMISES during the extension term. In no event shall the property use payment rate be less than that required during the preceeding annual term. The Real Estate Manager's failure to provide the new rental amount within said timeframe shall not defeat CITY's ability to make adjustments to the property use payment rate. Recommendation by the Real Estate Manager does not constitute CITY approval of the extension request. The Real Estate Manager in his capacity as the CITY's authorized representative, shall, in his sole discretion, have the authority to deny any such request. Any such denial shall be sent to PERMITTEE not later than sixty (60) days from receipt of the request for extension.

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The City Council, at its sole discretion, may approve or deny the extension of the term of this Agreement. In the event the City Council is unable to consider the renewal request in sufficient time as to provide PERMITTEE with thirty (30) days notice of termination in the case of denial, the Agreement shall be extended for a period not to exceed thirty (30) days, to allow for such thirty (30) day notice of termination.

**2.03 Termination.** Notwithstanding any other provisions contained in this Agreement, either party may terminate this Agreement by giving the other party at least thirty (30) days prior written notice of such termination.

**2.04 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 Time and Place of Payment.** The PERMITTEE shall make all payments monthly in arrears on or before the tenth (10th) day of each new month. Checks shall be made payable to the City of Oceanside and delivered to the CITY at the address set forth in Section 6.1 of this Agreement. The place and time of payment may be changed at any time by CITY upon thirty (30) days' written notice to PERMITTEE. PERMITTEE assumes all risk of loss and responsibility for late payment charges.

**3.02 Property Use Payment.** The percentage payment shall be **fifty percent (50%) of all monies collected by PERMITTEE from said machines.** The percentage payment shall be payable to CITY as provided in Section 3.01.

**3.03 Delinquent Payment.** If PERMITTEE fails to pay the payment when due, PERMITTEE shall pay in addition to the unpaid payments, 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 hereby is mutually agreed by the parties to be appropriate to compensate CITY 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

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accounts available to CITY for inspection at all reasonable times, so that CITY can determine PERMITTEE's compliance with this Agreement. These records and accounts shall be made available by PERMITTEE at the PREMISES and shall be complete and accurate showing all income and receipts from use of the PREMISES. PERMITTEE's failure to keep and maintain such records and make them available for inspection by CITY 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**

**5.01 Indemnity.** PERMITTEE 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 or related to the conduct of the PERMITTEE or its employees, agents or others in connection with or related to its use and occupation of the PREMISES under this Agreement, except those claims arising from the sole negligence or sole willful misconduct of the CITY, its officers, agents, or employees. PERMITTEE'S indemnification shall include any and all costs, expenses, attorney's 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, PERMITTEE 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.

**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

b. All insurance companies affording coverage to the PERMITTEE shall be required to add 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 CITY, and authorized by the Insurance Commissioner of the State Department of Insurance to transact business of insurance in

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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 **thirty (30) 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, CITY has the right to obtain the insurance. PERMITTEE 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 PERMITTEE on the first (1<sup>st</sup>) day of the month following the notice of payment by CITY.

i. 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.

**5.03 Workers' Compensation Insurance.** PERMITTEE shall also maintain in full force and effect during the full term of this Agreement and any extension thereof, workers' compensation insurance in such amount and with such coverage as is required by law.

**SECTION 6: GENERAL PROVISIONS**

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**6.01 Maintenance.** With respects 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 CITY and in compliance with all applicable laws.

In the event that the PREMISES are not in a decent, safe, healthy, and sanitary condition, CITY 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 CITY 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 CITY. Further, if at any time CITY determines that said PREMISES are not in a decent, safe, healthy, and sanitary condition, CITY may at its sole option, upon written notice, require PERMITTEE to file with CITY 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 CITY 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 CITY or increase obligations elsewhere in this Agreement imposed on CITY.

**6.02 Utilities.** PERMITTEE agrees to order, obtain, and pay for all utilities and service, if any, and installation charges in connection with its, occupation and operations on the PREMISES.

**6.03 Signs.** 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 CITY. 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 CITY, or CITY 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 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

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interest taxes.

**6.05 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 CITY:**

**City of Oceanside  
Property Management  
300 North Coast Highway  
Oceanside, CA 92054**

**To PERMITTEE:**

**Tower Optical Company, Inc.  
P.O. Box 251  
South Norwalk, CT 06855-0251  
FAX: 203 866-2467**

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 (3) 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.

**6.06 CITY Approval.** The City Manager shall be the CITY'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 Real Estate Manager.

**6.07 Entire Agreement.** This Agreement comprises the entire integrated understanding between CITY 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,

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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 CITY.

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, 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.

**6.08 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.

**6.09 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 CITY. Any attempt to assign or delegate this Agreement without the express written consent of CITY shall be void and of no force or effect. A consent by CITY to one assignment, transfer, sublease, or delegation shall not be deemed to be a consent to any subsequent assignment, transfer, sublease, or delegation.

**6.10 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.

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

- PERMITTEE has previously been notified by CITY 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, CITY may immediately enter and take possession of the PREMISES.

**6.11 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 applicative 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.

**SECTION 7: SPECIAL PROVISIONS**

**7.01 Machine Locations.** Exhibit "A" details the CITY approved locations for the machines. The 1st Hammerhead location on the Oceanside Municipal Pier supports two (2) machines each. The two (2) locations at the base of the Oceanside Municipal Pier support one (1) machine each. PERMITTEE shall not move, alter, change, or modify the location of any machine without the prior written approval of the CITY.

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**SECTION 8: SIGNATURES**

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

CITY:  
**CITY OCEANSIDE**  
a municipal corporation

Date \_\_\_\_\_

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

APPROVED AS TO FORM:

By *Barbara Hamilton, 1851*  
City Attorney

PERMITTEE:  
TOWER OPTICAL COMPANY, INC.  
a corporation

Date 1/28/2014

By *[Signature]* Secretary

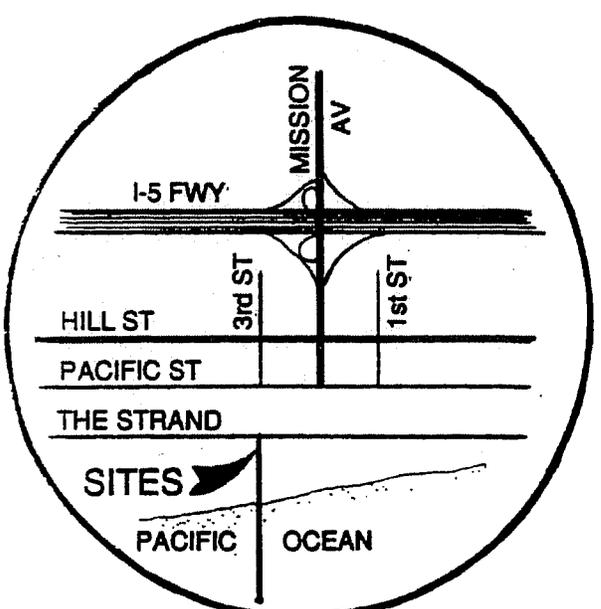
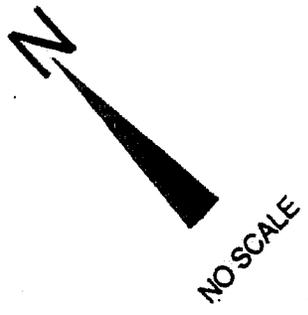
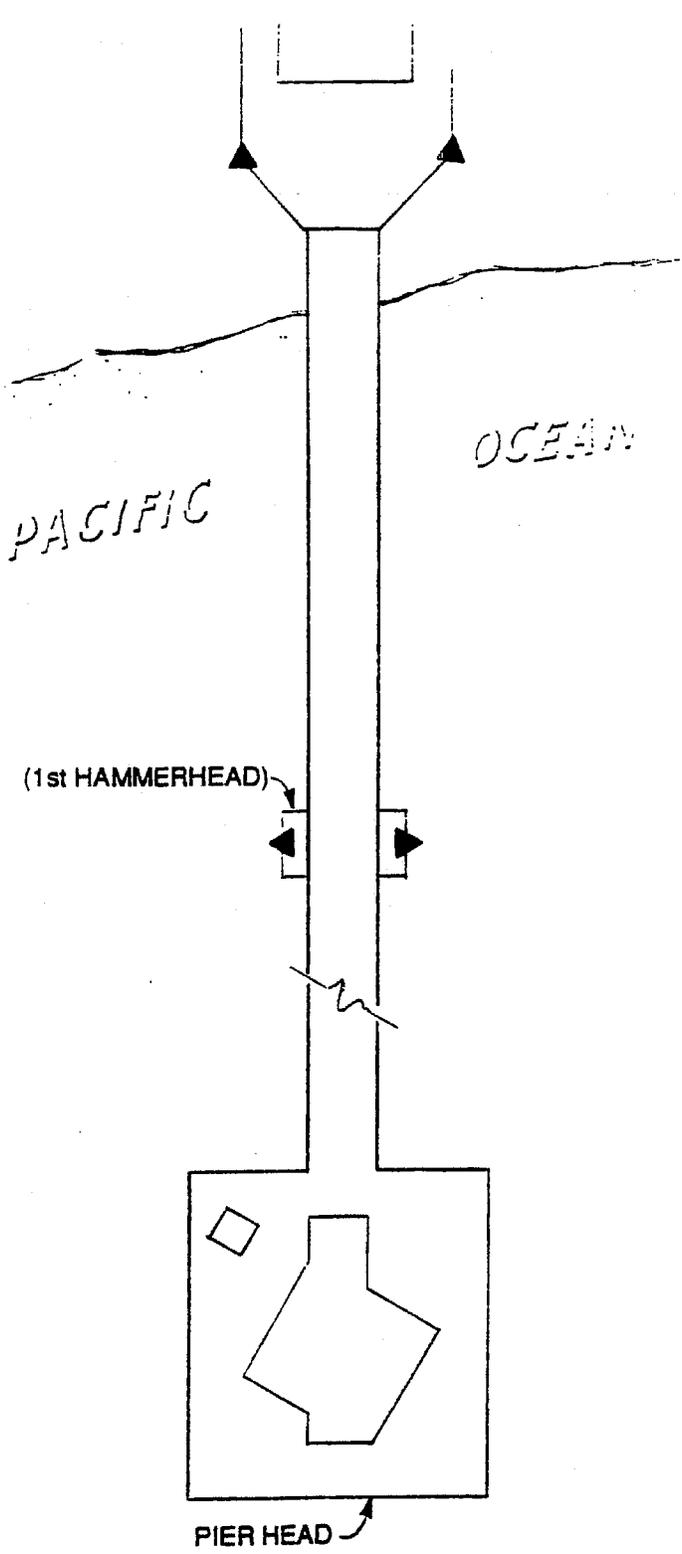
By \_\_\_\_\_

"Subscribed and sworn to before me this 28th day of January, 2014.

*[Signature]* 10  
Date Commission Expires: 5/13/2017

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PROPERTY USE AGREEMENT  
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**Notary acknowledgments and proof of authorization to sign for PERMITTEE must be attached.**



VICINITY MAP  
NO SCALE

**LEGEND**

◀ VIEWING DEVICE

Revision	By	Approved	Date

**CITY OF OCEANSIDE**

SKETCH OF LEASED PREMISES  
CITY OF OCEANSIDE MUNICIPAL PIER  
LESSEE: TOWER OPTICAL

EXHIBIT "A"

4 on 1st Hammerhead  
2 on Base