



# AGENDA REPORT

SAN CLEMENTE CITY COUNCIL MEETING  
Meeting Date: July 20, 2021

Agenda Item 24  
**Approvals:**  
City Manager ES 18  
Dept. Head \_\_\_\_\_  
Attorney \_\_\_\_\_  
Finance JAN

**Department:** Economic Development Department  
**Prepared By:** Jonathan Lightfoot, Economic Development Officer

**Subject:** *FEE FOR CONTINUED OUTDOOR DINING OPERATIONS ON PRIVATE PROPERTY*

**Fiscal Impact:** Yes, potentially adding \$20,000 - \$30,000 in new revenues to the General Fund. Staff recommends implementing a fee for displaced parking on private property due to outdoor dining or other operations. Revenues from the fees could offset costs from mobility improvements, such as extended days or hours of trolley operations.

**Summary:** Staff recommends that Council consider approving the form of an agreement with restaurants seeking to continue outdoor operations program on private property which displaces required off street parking (per San Clemente Municipal Code, section 17.64.050), increasing demand for public parking resources. Council previously approved a resolution authorizing the continuation of the Outdoor Operations program from June 15 – November 15 at their June 1, 2021 regular meeting. Attachment 1 includes a Resolution to adopt a standardized agreement to allow ongoing participation in the Temporary Outdoor Operations Program while accounting for the costs to the City of providing additional mobility and parking resources.

**Background:** Council previously approved Resolutions 21-18 and 21-19 at their June 1, 2021 regular meeting, which authorized the continuation of the Outdoor Operations program from June 15 – November 15. They directed staff to return with a proposal for an arrangement that compensates the City for the costs relating to parking caused by expanded outdoor dining on private property as these operations similarly impact the availability of the total available parking supply available to residents and visitors. Any revenue collected would go to the General Fund and can be used to support parking and mobility improvements during the duration of the program.

**Discussion:** **Rationale for Implementing Fees for Outdoor Dining**

Due to increased business activity and traffic, City Council authorized an early start to the summer Trolley which began operating mid-May. Trolley capacity increased with the move to the Yellow tier (May 19), and the trolley operations shifted from weekend only to daily operations in June. To offset additional costs associated with operating the trolley on additional days or for additional hours, staff recommends implementing agreements with the restaurants that wish to continue to use parking resources as temporary operations or dining areas. Fees from the agreements could also be used to support City leases of additional private parking lots. While the initial intent for the outdoor dining program was to offset capacity restrictions implemented by the State or County Health Departments, those restrictions ended on June 15.

### **Implementation of License Fee Agreement for Public Spaces**

At its June 1, 2021 regular meeting, the City Council established a license agreement, allowing businesses to “rent” areas within the public right of way at a rate of \$200 per parking spot (or prorated equivalent) per month. The outdoor dining program and the corresponding fee are set to expire on November 15, 2021. Some restaurants (Nicks, Muse Sushi, Café Mimosa) chose to withdraw from the street, returning some parking supply to Avenida Del Mar. The majority of restaurants, however, opted to enter into an agreement with the City.

### **Outdoor Seating on Private Property**

Outdoor dining that takes up private parking areas also impacts on-street public parking facilities. For instance, a restaurant that uses its eight private parking stalls for tables and chairs potentially displaces eight on-street parking spaces. As these restaurants see a benefit from continued outdoor operations, staff believes that it would be equitable to charge a baseline “parking displacement fee” as a condition of continued participation in the Temporary Outdoor Operations program. Staff believes that compensation to the City of \$100/parking spot is reasonable (see following section). This fee would affect businesses such as Pizza Port or Sonny’s, which have set up tables within their required parking areas on private property. Staff estimates that there are about 80 parking spots currently displaced by dining uses on private property. If all businesses opt to continue using these spaces for dining, the City could see up to \$8,000 per month for the 4-month period at the \$100 per space rate. Businesses that opt to continue utilizing their expanded outdoor areas will need to enter into a limited term “Parking Relief Agreement” (Attachment 2) with the City. This agreement is similar to the license agreement used for dining areas on public property, which was approved by Council on June 1, 2021.

### *Fee Rationale*

A monthly fee would assist in paying a fair share contribution towards the mobility improvements from the new General Fund revenues. Staff worked with the City Attorney to review any nexus and noticing requirements that may apply. BBK determined that, because the fee is paid voluntarily, and pursuant to an agreement where it is paid in consideration for certain agreed upon privileges and benefits, such a fee is not “imposed” for purposes of California law.

Council entered into licensing agreements previously, whereby businesses paid the City \$200 per public parking space per month on June 1, 2021. This fee represented approximately 20% of the market rate for leasable commercial space in the area. (A review of market leasing rate for commercial space near downtown showed that leases ranged from \$25-40 per square foot per year.) Council opted not to charge a market competitive rate, recognizing that there is public benefit in maintaining outdoor dining. The program has been very popular with both residents and visitors and improves the street life near the pier and downtown. Therefore, a significant downgrade of the rental rate was warranted.

Staff believes that a lower fee is appropriate for the dining areas on private property. These private dining areas have similar impacts on the general availability of parking resources for visitors. However, the distinction of operating within property lines versus on public property warrants consideration of an alternate fee. Staff recommends a rate of \$100 per month per parking spot. Staff estimates that there are about 80 parking spots currently displaced by dining uses on private property. If all businesses opt to continue using these spaces for dining, the city could see up to \$8,000 per month for the 4-month period at the \$100 per space rate.

Participation in this program is entirely voluntary and pursuant to the terms of the attached form of agreement. The total revenues from the optional continuation of outdoor dining (on both private and public property) will likely amount to about \$60,000. These funds can be used to support the City's ongoing rental of private parking lots for public use (budgeted at \$42,000 per year) or for additional weekends of trolley service (about \$9,000 per weekend beyond September) or for other mobility improvements or services. The City has already expended an additional \$18,500 to begin the trolley service mid-May as opposed to the original intended start date (May 28, 2021). Council gave this direction in direct response to providing additional mobility support for residents and visitors in recognition of the temporary lower supply of available parking and the increase in traffic as the summer season began.

**Recommended**

**Actions:** STAFF RECOMMENDS THAT the City Council:

1. Adopt Resolution 21-\_\_\_ approving the modifications to the Temporary Outdoor Operations Program by approving the form of a limited term parking relief agreement.
2. Authorize the Economic Development Officer to execute the limited term parking relief agreements with participating restaurants in consultation with the City Attorney with a term beginning on July 20, 2021 and not to extend beyond November 15, 2021.

**Attachments:** **1. Resolution 21-\_\_\_, A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SAN CLEMENTE, CALIFORNIA ADOPTING A FORM AGREEMENT FOR LIMITED TERM PARKING REGULATION RELIEF TO ALLOW FOR THE OPTIONAL CONTINUATION OF EXPANDED OUTDOOR DINING ON PRIVATE PROPERTY WITHIN DEDICATED PARKING AREAS.**

**Notification:** San Clemente Chamber of Commerce; Downtown Business Association; Businesses with an active Temporary Outdoor Operations Permit

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# ATTACHMENT 1

## RESOLUTION NO. 21-

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SAN CLEMENTE, CALIFORNIA ADOPTING A FORM AGREEMENT FOR LIMITED TERM PARKING REGULATION RELIEF TO ALLOW FOR THE OPTIONAL CONTINUATION OF EXPANDED OUTDOOR DINING ON PRIVATE PROPERTY WITHIN DEDICATED PARKING AREAS.

WHEREAS, on March 17, 2020, as empowered by California Government Code section 8630 and San Clemente Municipal Code chapter 8.12, the City Council adopted Resolution No. 20-13 proclaiming a local emergency regarding novel coronavirus (COVID-19); and

WHEREAS, with Resolution No. 20-13 section 3, the City Council authorized the City Manager, as Director of Emergency Services, to furnish information, to promulgate orders and regulations necessary to provide for the protection of life and property pursuant to California Government Code section 8634, to enter into agreements and to take all actions necessary to obtain State emergency assistance to implement preventive measures to protect and preserve the residents of the City within the scope of the local emergency; and

WHEREAS, on March 30, the City Council adopted Resolution No. 20-24 and, on April 21, the City Council adopted Resolution No. 20-30, which both supplement its proclamation to further address the local emergency; and

WHEREAS, on June 2, 2020, the City Council adopted Resolution 20-41, which authorized and directed the Director of Emergency Services to implement certain zoning-related small business assistance strategies including the permitting of outdoor dining intended to help businesses operate safely and successfully following social distancing and other guidelines; and

WHEREAS, on June 1, 2021 the City Council adopted Resolution 21-18 Proclaiming a Local Emergency Regarding Economic Stabilization and Recovery from the impacts of the Coronavirus Pandemic, finding that small businesses have been disproportionately impacted by the effects of the pandemic and by closures or operational modifications mandated by the State or County Health Departments and that they were not necessarily provided relief from rent or debt payment obligations during the pandemic as they faced these disproportionate impacts, with many still facing the need to recover economic ground and to re-employ and re-train their workforce lost during the pandemic; and

WHEREAS, on June 1, 2021 the City Council adopted Resolution 21-19 to authorize and direct the Director of Emergency Services, or designee, to implement a

license agreement as appropriate for the continuation of outdoor business operations which supplant public space or parking facilities;

AND WHEREAS, the City Council desired to likewise to authorize and direct the Director of Emergency Services, or designee, to implement a standard agreement for the continuation of outdoor business operations which supplant municipal code required private parking facilities which impact the total supply of visitor parking within the City;

NOW, THEREFORE, BE IT RESOLVED, by the City Council of the City of San Clemente, California resolves as follows:

Section 1. Temporary Outdoor Operations on Private Property

The City Council hereby authorizes and directs the Director of Emergency Services and/or the Economic Development Officer to enter into standardized Limited Term Parking Relief Agreements [Exhibit A] with those businesses desiring to continue outdoor operations beyond July 20, 2021 until November 15, 2021. The agreement incorporates compensation of \$100 per parking spot per month, or proration thereof, to be collected monthly, calculated by the Economic Development Officer, in advance of continued participation in the Temporary Outdoor Operations program.

Section 2. Duration

The City Council's authorization and direction to the Director of Emergency Services shall last for the duration of the local emergency, currently authorized through November 15, 2021, or until terminated by the City Council. Any action taken by the Director pursuant to this authorization and direction shall last for the duration of the local emergency, or until terminated by the Director or City Council.

Section 3. Powers of Government

During the existence of said local emergency, the powers, functions, and duties of the emergency organization of this City shall be those prescribed by state law, ordinances, and resolutions of this City of San Clemente.

Section 4. Certification

The City Clerk shall certify to the passage and adoption of this resolution and enter it into the book of original resolutions.

ATTEST:

\_\_\_\_\_  
City Clerk of the City of  
San Clemente, California

\_\_\_\_\_  
Mayor of the City of San  
Clemente, California

STATE OF CALIFORNIA     )  
COUNTY OF ORANGE     ) §  
CITY OF SAN CLEMENTE    )

I, JOANNE BAADE, City Clerk of the City of San Clemente, California, do hereby certify that Resolution No. \_\_\_\_\_ was adopted at a regular meeting of the City Council of the City of San Clemente held on the 20th day of July, 2021, by the following vote:

AYES:

NOES:

ABSENT:

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of the City of San Clemente, California, this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
CITY CLERK of the City of  
San Clemente, California

Approved as to form:

\_\_\_\_\_  
City Attorney

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## Exhibit A

### LIMITED TERM PARKING RELIEF AGREEMENT BY AND BETWEEN THE CITY OF SAN CLEMENTE AND [BUSINESS NAME]

#### PARTIES AND DATE

This Agreement (“Agreement”) is entered into as of July 20, 2021 (“Effective Date”) by and between the City of San Clemente, a California municipal corporation (the “City”) and \_\_\_\_\_ [Business Name], a \_\_\_\_\_ [Entity Description], (the “Business”). The City and Business are sometimes hereinafter individually referred to as “Party” and hereinafter collectively referred to as the “Parties.”

#### RECITALS

- A. The San Clemente Municipal Code (SCMC), Section 17.64.050 requires that private businesses provide dedicated parking for their use as indicated therein. Restaurants typically are required to provide a dedicated parking stall for every 4-5 customer seats on premise.
- B. As a result of COVID-19, certain code provisions were suspended under the City’s Emergency Order, which was enacted by Resolution 20-13 on March 17, 2020. The City established a Temporary Outdoor Operations Program to support social distancing and al fresco dining.
- C. On June 1, 2021, the City Council of the City of San Clemente enacted Resolution 21-18 proclaiming a local emergency regarding economic stabilization and recovery from the impacts of the Coronavirus pandemic, which empowered the Director of Emergency Services to “...promulgate orders and regulations necessary to provide for the protection of life and property pursuant to California Government Code section 8634...”.
- D. The City Council wishes to temporarily suspend full enforcement of SCMC 17.64.050 to offer businesses the option to utilize a portion or all of their dedicated outdoor parking areas for outdoor dining.
- E. Businesses may opt to either: 1) meet their code-required off-street parking requirements; or 2) contribute a fixed monthly payment of \$100 per parking stall that is no longer available for parking to the City’s general fund which may be used to offset parking and mobility impacts within the City.
- F. \_\_\_\_\_ [Business name], with a place of business located at \_\_\_\_\_ [address], in the City of San Clemente, County of Orange, State of California (the “Property”), which is more particularly described in Exhibit A (Property Description), wishes to contribute the fixed monthly payment commencing on July 20, 2021 and ending on November 15, 2021. The full period shall be considered 4 full months for the purposes of billing.
- G. The City desires to accommodate the Business’s request, subject to the terms and conditions set forth in this Agreement.

#### TERMS

Now therefore, in consideration of the mutual covenants and obligations of the parties herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Relief.

1.1. Grant. The City hereby grants relief to the Business, and the Business's representatives and agents, from SCMC 17.64.050 for the limited purpose of conducting the Permitted Activities described in Section 3 (Permitted Activities). The Parties hereby acknowledge and agree that use of the Property by Business, as set forth in this Agreement, is with the consent of the City and shall be considered permissive.

1.2. No Transfer of Interest. Nothing in this Agreement shall be interpreted as, or otherwise deemed to be, a transfer or conveyance of any interest in the Property whatsoever between the City and the Business. The Parties hereby acknowledge and agree that nothing in the Agreement shall be interpreted as an agreement for the lease or other use of the Property by Business.

1.3. Agreed Parking Relief Compensation. The City will invoice the Business \$100 per parking spot (or proportional curb space) per month. This expense shall be payable monthly in advance on the 15th of each month, or if such date falls on a weekend, the business day preceding the 15th day of the month, for a 4-month period. \_\_\_\_\_ (Business) is utilizing \_\_\_\_\_ (insert number) parking spaces for outdoor dining/operations. Therefore, this agreement entails a monthly payment of \$ \_\_\_\_\_ to the City.

2. Term. The term of this License shall commence on the Effective Date and shall, unless otherwise modified, continue until the earlier of the City's termination of the Temporary Outdoor Operations program or November 15, 2021 per Section 11 (Termination, Default, and Restoration).

3. Permitted Activities and Other Uses.

3.1. Permitted Activities. Business is authorized to conduct the following activities on the Property ("Permitted Activities"):

3.1.1. Maintain or establish an outdoor dining area with a footprint approved by the City through a Temporary Outdoor Operations Permit.

3.1.2. Serve food and beverages within the outdoor dining area. Alcoholic beverages may be served in these areas with ABC approval of the Covid-19 Temporary Catering Authorization Application<sup>1</sup>. Alcoholic beverages may not be consumed outside of the permitted outdoor dining area.

3.1.3 Nothing in this section shall be construed to supersede any State or Federal regulations.

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<sup>1</sup> [COVID-19 Temporary Catering Authorization Application \(ABC-218 CV19\)](#)



- 3.2. Time. All Permitted outdoor activities are limited to the time of 6 am to 10 pm daily and may continue until 11 pm on Friday and Saturday evenings and on federally recognized holidays.
4. Required Approvals and Compliance.
- 4.1. Required Approvals. The use of the property by the Business for Permitted Activities pursuant to this Agreement is subject to Business obtaining, at its sole cost and expense, and maintaining throughout the term of this License, all approvals and permits required by any federal, state, or local government agency, including the City Approvals listed in Section 4.2 (City Approvals) (“Required Approvals”).
- 4.2. City Approvals. The Business must apply for and obtain the following approvals from the City (“City Approvals”):
- 4.2.1. Temporary Outdoor Operations Permit
- 4.3. City Review. The City does not make any representation that it will issue or otherwise assist in the issuance of any Required Approval. The City shall have no obligation or liability to verify whether Business has obtained all Required Approvals.
- 4.4. Compliance. The Business’ rights under this Agreement shall be conditioned upon, and Business shall, at their sole cost and expense, comply with each and every federal, state and local law, regulation, standard, court decision, ordinance, rule, code, order, decree, directive, guideline, permit and permit condition, together with any declaration of covenants, conditions and restrictions that are recorded in any official or public records with respect to the Property or any portion thereof, each as currently existing and as amended, enacted, issued or adopted from time to time, that are applicable to the Permitted Activities and the Property.
5. Standard of Performance. All Permitted Activities shall be performed in accordance with the highest standards and practices in the industry.
6. Hazardous Materials. The Business shall not under any circumstances store or bring onto the Property any Hazardous Materials. As used in this Agreement, the term “Hazardous Material” means any substance, material or waste which is (1) defined as a “hazardous waste,” “hazardous material,” hazardous substance,” “extremely hazardous waste,” or “restricted hazardous waste” under any provision of California law; (2) petroleum or petroleum products; (3) asbestos; (4) polychlorinated biphenyls; (5) radioactive materials; (6) designated as a “hazardous substance” pursuant to Section 311 of the Clean Water Act, 33 U.S.C. section 1251 et seq. (33 U.S.C. §1321) or listed pursuant to Section 307 of the Clean Water Act (33 U.S.C. §1317); (7) defined as a “hazardous substance: pursuant to the Resource Conversation and Recover Act, 42 U.S.C. section 6901 et seq. (42 U.S.C. §6903) or its implementing regulations; (8) defined as a “hazardous substance” pursuant to Section 101 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. section 9601 et seq. (42 U.S.C. §9601); or (9) determined by

California, federal or local governmental authority to be capable of posing a risk of injury to health, safety or property.

7. No Duty to Warn. The City has no duty to inspect the Property and no duty to warn the Business or any person of any other latent or patent defect, condition or risk that might be incurred in entering the Property. The Business has inspected or will inspect the Property and hereby accept the condition of the Property "AS IS." The Business acknowledges that neither the City, nor any employee, agent or representative of the City, has made representations or warranties concerning the condition of the Property. All persons entering the Property under this Agreement do so at their own risk.
8. Liability for Damage. With respect to Business' rights under this Agreement, the Business shall be responsible for any damage done to any person, or to the Property or any other property, caused by the Business, their officers, directors, employees, agents, independent contractors, insurers, lenders, representatives, successors or permitted assigns of the Business, and the other users.
9. Insurance. Each Business shall maintain in effect during the entire term of this Agreement each of the following:

9.1. Insurance Coverage.

9.1.1. Commercial General Liability. The City requires Commercial General Liability, personal injury and property damage liability, with minimum combined liability limits of One Million Dollars (\$1,000,000) per occurrence. Any deductible or self-insured retention in excess of Five Thousand Dollars (\$5,000) shall be declared to the City and requires the prior approval. An additional insured endorsement to the general liability policy is required and shall name and list the City of San Clemente, its officials, officers, employees, agents and volunteers as additional insured.

9.1.1.1. Provide that the insurance is primary and non-contributing with any other valid and collectible insurance or self-insurance available to City.

9.2. Evidence of Insurance. The Business shall provide to City, upon request, a Certificate(s) of Insurance evidencing such coverage together with copies of the required policy endorsements at least fifteen (15) business days prior to the expiration of any policy. Coverage shall not be suspended, voided, cancelled, reduced in coverage or in limits, non-renewed, or materially changed for any reason, without thirty (30) days prior written notice thereof given by the insurer to City by U.S. mail, or by personal delivery, except for nonpayment of premiums, in which case ten (10) days prior notice shall be provided.

9.3. Endorsements.

9.3.1. Valid Endorsements. A statement on an insurance certificate will not be accepted in lieu of the actual endorsement. Insurance policies shall not be in compliance if they include any limiting provision or endorsement that has not been submitted to the City for approval.

9.3.2. Additional Insured Endorsements Additional Insured Endorsements shall not:

9.3.2.1. Be limited to "Ongoing Operations."

9.3.2.2. Exclude "Contractual Liability."

9.3.2.3. Restrict coverage to the "Sole" liability of Business.

9.3.2.4. Contain any other exclusion contrary to the Agreement.

9.4. Acceptability of Insurers. Each policy shall be from a company with current A.M. Best's rating of A VII or higher and authorized to do business in the State of California or approved in writing by the City.

10. Liens.

10.1. No Liens Due to Business's Activities. Business shall not permit to be placed against the Property, or any part thereof, any design professionals', mechanics', materialmen's, contractors' or subcontractors' liens due to Business's construction activities thereon or use thereof. Business shall indemnify, defend and hold the City harmless from all liability for any and all liens, claims and demands, together with the costs of defense and reasonable attorneys' fees, related to same.

10.2. Failure to Defend. In addition to, and not in limitation of, the City's other rights and remedies under this Agreement, should Business fail either to discharge any lien or claim related to Business' construction activities on or use of the Property or to bond for any lien or claim to the reasonable satisfaction of the City, or to indemnify, hold harmless and defend the City from and against any loss, damage, injury, liability or claim arising out of Business use of the Property, then the City, at its option, may elect to pay any lien, claim, loss, demand, injury, liability or damages, or settle or discharge any action or satisfy any judgment and all costs, expenses and attorneys' fees incurred in doing so shall be paid to the City by Business upon written demand, together with interest thereon at the rate of ten percent (10%) per annum from the date incurred or paid through and including the date of payment by Business.

11. Termination, Default, and Restoration.

11.1. Termination Without Cause. This Agreement may be terminated by either Party without cause by giving Fourteen (14) days' written notice to the other Party.

11.2. Termination for Cause. In addition to the rights described in Section 11.1 (Termination Without Cause), the City shall have the right to terminate this Agreement immediately upon the Business' Default.

11.2.1. Default. "Default" means the failure of the Business to perform or violation of any term, condition, covenant or agreement of this Agreement, and the continuation of such failure or violation for a period

of ten (10) days after the City shall have given the Business written notice specifying the same, or in the case of a situation in which the default cannot reasonably be cured within ten (10) days, if the Business shall not promptly, within ten (10) days after receipt of such notice, commence to remedy the situation by a means that can reasonably be expected to remedy the situation within a reasonable period of time, not to exceed thirty (30) days from the notice of Default, and diligently pursue the same to completion.

11.2.2. Termination. In the event of any Default by Business, including expiration of any applicable cure period, the City may terminate the Agreement.

11.3. Restoration of Land to Original Condition. Upon termination of the Agreement, the Business shall be responsible for removing all improvements the Business placed upon the land. The Business shall promptly initiate and exercise due diligence in removing said improvements until all improvements have been removed, which shall be completed by November 15, 2021 or not more than thirty (30) days following termination of this Agreement if terminated earlier than November 15, 2021.

11.4. Effect of Termination. Termination of this Agreement shall in no way prejudice any of the rights and remedies available to the City at law or in equity, and the Business acknowledge and agree that all of the obligations and responsibilities of Business under this Agreement shall continue and survive such termination.

12. Miscellaneous.

12.1. Indemnification.

12.1.1. Indemnification of the City by the Business. The Business shall defend, indemnify and hold the City, its officials, officers, employees, and agents (the "Indemnified Parties") free and harmless from any and all liability from loss, damage, or injury to property or persons, including wrongful death, in any manner arising out of or incident to acts, omissions, and/or operations by the Business, its officials, officers, personnel, employees, contractors, and/or subcontractors as well as its contractors' and/or subcontractors' officials, officers, employees, and agents. Further, the Business shall defend at its own expense, including attorneys' fees, the Indemnified Parties in any legal action based upon such acts, omissions and/or operations.

12.1.2. The Business's Obligations. The Business's obligations under this Section 12.1 (Indemnification) shall apply to all damages and claims for damages of every kind suffered, or alleged to have been suffered, regardless of whether or not the City has prepared, supplied, or approved any plans or for the uses allowed by this Agreement, and regardless of whether or not such insurance policies shall have been determined to be applicable to any of such damages or claims for damages.

- 12.1.3. The City's Rights. The City does not and shall not waive any rights against the Business that the City may have under the indemnification provision in this Section 12.1 (Indemnification) because of the City's acceptance of any security deposits or insurance policies.
- 12.1.4. Survival. The indemnification provision in this Section 12.1 (Indemnification) shall survive the termination or expiration of this Agreement.
- 12.2. Attorneys' Fees. If any legal action or proceeding arising out of or relating to this Agreement is brought by either party to this Agreement, the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorneys' fees, costs, and expenses incurred in the action or proceeding by the prevailing party.
- 12.3. Governing Law and Venue. This Agreement shall be governed by the laws of the State of California. Venue shall be in Orange County.
- 12.4. Waiver. The City's failure to insist upon strict compliance with any provision of this Agreement or to exercise any right or privilege provided herein, or the City's waiver of any breach hereunder, shall not relieve the Business of any of its obligations hereunder, whether of the same or similar type. The foregoing shall be true whether the City's actions are intentional or unintentional. Further, the Business agrees to waive as a defense, counterclaim, or setoff any and all defects, irregularities, or deficiencies in the authorization, execution, or performance of this Agreement as well as any laws, rules, regulations, ordinances, or resolutions of the City with regard to this Agreement.
- 12.5. Supplement, Modification, and Amendment. No supplement, modification, and/or amendment of this Agreement shall be binding unless executed in writing and signed by both Parties.
- 12.6. Assignment or Transfer.
- 12.6.1. No Assignment without the City's Consent. The Business shall not assign, hypothecate, or transfer, either directly or by operation of law, this Agreement or any interest herein without prior written consent of the City. Any attempt to do so shall be null and void, and any assignee, hypothecate, or transferee shall acquire no right or interest by reason of such attempted assignment, hypothecation, or transfer. Unless specifically stated to the contrary in the City's written consent, any assignment, hypothecation, or transfer shall not release or discharge the Business from any duty or responsibility under this Agreement.
- 12.6.2. Merger. The transfer of a majority of the ownership interests in the Business, however accomplished, and whether in a single transaction or in a series of related or unrelated transactions, or the merger of the Business into any other entity in which the Business is not the surviving entity, or the sale of all or substantially all of the Business's assets, shall be deemed an assignment of the Business's rights hereunder subject to the

requirements of Section 12.6.1 (No Assignment without the City's Consent).

12.7. Construction, References, and Captions.

12.7.1. Simple Construction. It being agreed the Parties or their agents have participated in the preparation of this Agreement, the language of this Agreement shall be construed simply, according to its fair meaning, and not strictly for or against any Party.

12.7.2. Section Headings. Section headings contained in this Agreement are for convenience only and shall not have an effect in the construction or interpretation of any provision.

12.7.3. Calendar Days. Any term referencing time, days, or period for performance shall be deemed calendar days and not work days.

12.7.4. References to the City. All references to the City shall include, but shall not be limited to, City Council, City Manager, City Attorney, City Engineer, or any of their authorized representatives. The City shall have the sole and absolute discretion to determine which public body, public official or public employee may act on behalf of the City for any particular purpose.

12.7.5. References to the Business. All references to the Business shall include all officials, officers, personnel, employees, agents, contractors, and subcontractors of Business, except as otherwise specified in this Agreement

12.8. Notices. All notices to be given hereunder shall be in writing and may be made either by personal delivery or by registered or certified mail, postage prepaid, return receipt requested. Mailed notices shall be addressed to the parties at the addresses listed below. Notices delivered personally will be deemed communicated as of actual receipt; mailed notices will be deemed communicated as of two (2) days after mailing.

**To City:**

City of San Clemente  
910 Calle Negocio  
San Clemente, CA 92672  
Attn: Jonathan Lightfoot

**To Business:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_

12.9. Entire Agreement and Severability.

12.9.1. Entire Agreement. This Agreement contains the entire Agreement of the parties with respect to the subject matter hereof, and supersedes all prior

negotiations, understandings or agreements, either written or oral, express or implied.

12.9.2. Severability. The invalidity in whole or in part of any provision of this Agreement shall not void or affect the validity of any other provision of this Agreement.

12.10. Binding Effect.

12.10.1. The Parties. Each and all of the terms and conditions of this Agreement shall be binding on and shall inure to the benefit of the Parties, and their successors, heirs, personal representatives, or assigns.

12.10.2. Successors and Assigns. This Agreement shall be binding on the successors and assigns of the Parties.

12.10.3. Recordation. The Business acknowledges and agrees that the City may cause a copy of this Agreement to be recorded in the Orange County Recorder's Office.

12.10.4. Not Authorization to Assign. This Section 3.10 (Binding Effect) shall not be construed as an authorization for any Party to assign any right or obligation under this agreement other than as provided in Section 3.6 (Assignment or Transfer).

**Signatures on next page.**

**SIGNATURE PAGE TO LICENSE AGREEMENT  
BY AND BETWEEN THE CITY OF SAN CLEMENTE  
AND \_\_\_\_\_ [BUSINESS]**

In witness thereof, the Parties here to have executed this Agreement:

**City of San Clemente**

**Business:** \_\_\_\_\_

By: \_\_\_\_\_  
Jonathan Lightfoot,  
Economic Development Officer

By: \_\_\_\_\_  
NAME: \_\_\_\_\_  
POSITION: \_\_\_\_\_

ATTEST:

By: \_\_\_\_\_  
Joanne Baade,  
City Clerk

By: \_\_\_\_\_  
NAME: \_\_\_\_\_  
POSITION: \_\_\_\_\_

APPROVED AS TO FORM:

By: \_\_\_\_\_  
Scott Smith,  
City Attorney



**EXHIBIT A  
PROPERTY DESCRIPTION**

To be included.