

WORKSHOP MEETING OF THE FLAGLER BEACH CITY COMMISSION, FEBRUARY 3, 2011 AT 1:00 P.M.

AGENDA

1. Call the meeting to order.
2. Pledge of Allegiance.
3. Discussion related to the lease agreement with Mr. Ray Barshay for the Pier Restaurant and facilities.
4. Adjournment.

RECORD REQUIRED TO APPEAL: In accordance with Florida Statute 286.0105 if you should decide to appeal any decision the Commission makes about any matter at this meeting, you will need a record of the proceedings. You are responsible for providing this record. You may hire a court reporter to make a verbatim transcript, or you may buy a CD of the meeting for \$3.00 at the City Clerk's office. Copies of CDs are only made upon request. The City is not responsible for any mechanical failure of the recording equipment.

In accordance with the Americans with Disabilities Act, persons needing assistance to participate in any of these proceedings should contact the City Clerk at (386) 517-2000 ext 235 at least 72 hours prior to the meeting.

The City Commission reserves the right to request that all written material be on file with the City Clerk a minimum of three days before the proposed action.

Posted: January 19, 2011

WORKING DRAFT

THIS LEASE AGREEMENT (the "Lease Agreement"), is made and entered into this ____ day of _____, 2011, by and between the City of Flagler Beach, Florida, a municipal corporation (the "Landlord") and _____, a Florida _____ (the "Tenant"), upon the following terms and conditions:

1. Lease of Premises. Landlord hereby leases to Tenant, and Tenant hereby leases from Landlord, the premises described in Exhibit "A" attached hereto and made a part hereof (the "Leased Premises").

Additionally, Landlord and Tenant agree that within one year of issuance of a certificate of occupancy or Tenant otherwise beginning occupancy of the Leased Premises, Tenant shall assume responsibility for the Pier and Bait and Tackle Shop operations as provided in Paragraph 10 of this Lease. In hiring any employees to fulfill this responsibility, Tenant shall consider City employees working at the Pier and Bait and Tackle Shop.

2. Landlord's Title. Landlord represents and warrants that it has ownership of and authority to lease the Leased Premises to Tenant.

3. Acceptance of Leased Premises. Tenant acknowledges that Landlord has not made any representation or warranty with respect to the condition of the Leased Premises or the suitability or fitness of the Leased Premises for any purpose. Tenant agrees to accept the Leased Premises and the Improvements located thereon in their "AS IS" condition without any agreements, representations, understandings, or obligations on the part of Landlord to perform any alterations, repairs, or improvements (or to provide any allowance for same) except as may be expressly provided in this Lease.

4. Tenant's Duty to Repair. Tenant agrees that upon the effective date of this Lease granting Tenant possession of the Leased Premises, Tenant shall institute and follow through to completion all repairs necessary to bring the Leased Premises and the structures located thereon into compliance with all governing building codes, fire codes and other applicable regulations. In the event the cost of these repairs is estimated to exceed \$ _____, either party may terminate this Lease upon written notice to the other party. In the event Tenant completes the repairs provided for in this paragraph Tenant shall be credited the total cost of such repairs up to \$ _____ as Advance Rent. The Advance Rent credit shall be applied toward Tenant's rental payment obligations and any other payments due and unpaid by Tenant to Landlord at the end of the initial Lease Term.

5. Term of Lease; Option to Extend. The term of this Lease shall begin on _____ (the "Commencement Date") and shall end on the _____ anniversary of the Commencement Date (the "Lease Term"). Tenant shall have the option to extend the original Lease Term for three (3) consecutive five (5) year terms. Tenant shall exercise the First Option for an additional five (5) year term by written notice delivered to Landlord on or before nine months prior to the end of the original

WORKING DRAFT

Lease Term. If Tenant exercises the First Option, the original Lease Term will be extended upon the same terms and conditions as set forth herein.

If the Tenant exercises the First Option, it shall, at the end of the term of the First Option, have an additional option to extend the term another five (5) years (the "Second Option"). Tenant shall exercise the Second Option by providing written notice to Landlord of such exercise on or before nine months prior to the end of the First Option period. If Tenant exercises the Second Option, the Lease Term will be extended upon the same terms and conditions as set forth herein.

If the Tenant exercises the Second Option, it shall, at the end of the term of the Second Option, have an additional option to extend the term another five (5) years (the "Third Option"). Tenant shall exercise the Third Option by providing written notice to Landlord of such exercise on or before nine months prior to the end of the Second Option period. If Tenant exercises the Third Option, the Lease Term will be extended upon the same terms and conditions as set forth herein.

Notwithstanding the foregoing, Tenant shall have no right to exercise any Option if: a) Tenant is in default of any term of the Lease at the time Tenant attempts to exercise the Option; b) Tenant is in default of any term of the Lease on the date the Option becomes effective; or c) Tenant has regularly and habitually failed to fully comply with the terms and conditions of the Lease.

6. Base Rent. Tenant agrees to pay Landlord minimum base rent as follows:

(a) Fixed Rent

In years 1 and 2 of this Lease, Tenant shall pay to Landlord \$3,000.00 per month. For all subsequent years, including any exercised option terms, Fixed Rent shall be adjusted annually on the anniversary date of the effective date of this Lease by 3% per annum.

(b) Additional Percentage Rent:

In each of years 1 and 2 of this Lease, Tenant shall pay to Landlord an amount equivalent to 2% of Tenant's gross sales in excess of \$1 million from the Restaurant. In each of years 3 and 4 of this Lease, Tenant shall pay to Landlord an amount equivalent to 2.5% of Tenant's gross sales in excess of \$1 million from the Restaurant. In each year from year five of this Lease forward, including any exercised option periods, Tenant shall pay to Landlord an amount equivalent to 3% of Tenant's gross sales in excess of \$1 million from the Restaurant. Tenant shall on a monthly basis provide the City with a complete report on gross sales. The City holds the right to audit those reports on an annual basis. For purposes of this Lease, "gross sales" shall mean all

WORKING DRAFT

sales derived by the Restaurant that are taxable by any local, County, State or federal entity.

The base rent shall be due and payable to Landlord in advance on the first day of each and every calendar month during the Lease Term. The rent increases set forth in this section shall occur automatically and without notice or demand from Landlord. If the Lease is terminated on any day other than the last day of a calendar month, the Base rent due for that month shall be prorated as of the date the Lease is terminated.

7. Property Taxes. Tenant shall pay all Property Taxes levied or assessed against the Leased Premises prior to delinquency. The term "Property Taxes" shall mean the aggregate amount of all ad valorem real property taxes, excluding special and general assessments, and any other taxes imposed upon the Leased Premises and all improvements located thereon from time to time. Property Taxes shall also include any personal property taxes imposed upon Tenant's furniture, fixtures, machinery, equipment, and appurtenances located upon or used in connection with the Leased Premises.

8. Tenant's Use of the Leased Premises. Tenant shall use the Leased Premises solely for the purpose of operating a restaurant and restaurant related activities serving the general public and for no other purpose. Tenant shall, at its sole cost and expense, obtain all licenses and permits required by any local, County, State or Federal agency. Tenant shall comply with all fire safety codes applicable to the Leased Premises, at Tenant's sole expense.

9. Assumption of Pier collections and Bait and Tackle Shop operations. Within one year of issuance of a certificate of occupancy or Tenant otherwise beginning occupancy of the Leased Premises, Tenant agrees to perform the following duties:

(a) Tenant shall keep the restrooms located within the Flagler Beach Municipal Pier in a clean and sanitary condition and open for public use and shall keep the pier house clean;

(b) Tenant shall, at its own cost and expense, collect all admissions to the pier in cash and turn over to the City Clerk the gross amount collected each week, without any deductions whatsoever for costs or expenses, provided however, the City shall at its own expense provide tickets numbered in numerical order or such other receipts that it may desire Tenant to use in connection with the collecting and remitting any and all monies collected by it;

(c) Tenant shall take over operation of the Pier Bait Shop, keeping same open from dusk to dawn, seven days a week; Tenant shall keep live bait available whenever the same is obtainable, but in any event Tenant shall keep fresh dead bait available at all times; Tenant shall be entitled to all revenue generated by

WORKING DRAFT

sales from the Pier Bait Shop and such revenue shall not be included in any calculation of Additional Rent due Landlord.

10. **Compliance with Laws.** Tenant shall cause the Leased Premises to comply with all laws, ordinances, regulations and directives of any governmental authority having jurisdiction over the Leased Premises including, without limitation, any law, ordinance, regulation or directive which in the future may become applicable to the Leased Premises. Tenant shall not misuse the Leased Premises, or permit the Leased Premises to be used in any manner which: (a) violates any law, ordinance, regulation, or directive; (b) causes or is reasonably likely to cause damage to the Leased Premises; (c) violates a requirement or condition of any fire or extended fire coverage insurance policy covering the Leased Premises or increases the cost of such policy; or (d) constitutes or is reasonably likely to constitute a nuisance, annoyance, or inconvenience to the general public.

11. **Hazardous Materials.** No Hazardous Materials, as defined herein, shall after the signing of this Lease, be permitted within the Leased Premises at any time. Notwithstanding the foregoing, normal quantities of Hazardous Materials customarily used in the conduct of Tenant's business (such as cooking equipment and cleaning supplies) may be brought on the Leased Premises and shall be used strictly in compliance with the manufacturer's instructions. Notwithstanding the obligation of Tenant to indemnify Landlord pursuant to this Lease, Tenant shall, at its sole cost and expense, promptly take all actions required by any governmental authority to remove, dispose of, and clean up after any Hazardous Materials located on the Leased Premises, without regard to the source of the Hazardous Materials, provided the Hazardous Materials were not brought on the Leased Premises by Landlord or prior tenants. Such action shall include, without limitation, the investigation of the environmental condition of the Leased Premises, the preparation of any feasibility studies or reports concerning the location and removal of the Hazardous Materials, and the performance of any cleanup, remedial, removal, or restoration work. Tenant shall obtain Landlord's written approval prior to taking any such actions, which approval shall not be unreasonably withheld. Tenant agrees to execute affidavits, representations and other similar documents from time to time at Landlord's request stating to Tenant's best knowledge and belief there are no Hazardous Materials located upon the Leased Premises. As used herein, the term "Hazardous Materials" means (a) any material or substance which is defined or becomes defined as a "hazardous substance," "hazardous waste," "infectious waste," "chemical mixture or substance," or "air pollutant" under any statutes, laws, ordinances, codes, regulations, rules or orders promulgated by any governmental authority, or (b) any other material or substance displaying toxic, reactive, ignitable, or corrosive characteristics, as all such terms are used in their broadest sense.

12. **Hours of Operation.** Tenant's business operation on the Leased Premises shall be open to the public seven (7) days a week, offering a full service restaurant providing for breakfast lunch and dinner. Tenant shall have the right, upon consent by Landlord, which consent shall not be unreasonably withheld, to alter hours

WORKING DRAFT

of operation based on market conditions and in keeping with good business practices. Notwithstanding the foregoing, Tenant shall the right to close the Leased Premises while the Leased Premises are undergoing reconstruction or repair, when weather conditions may be hazardous to Tenant's customers and the general public. Tenant shall further have the right to close the Leased Premises on Christmas day and any three other days Tenant chooses during the course of any calendar year.

13. Utilities. Except as otherwise provided, Tenant shall be solely responsible for the prompt payment of all charges for any and all utility services to the Leased Premises including, without limitation, electricity, potable water, sewage disposal services, natural gas, trash and garbage collection services, and telephone services. The accounts for all such utility services shall be opened solely in Tenant's name, and Tenant shall be responsible for the payment of all deposits associated with such utilities. Tenant shall indemnify and hold Landlord harmless against any and all liability arising from Tenant's failure to promptly pay for any utility service to the Lease Premises. It is expressly understood and agreed that the Tenant shall not be responsible for any utilities as defined herein for any portion of the Landlord's property except for the Leased Premises. It is further agreed that Tenant shall not be responsible for utility charges due for the Pier Restrooms.

14. Landlord's Maintenance, Repair and Construction Obligations.

(a) After completion of the repairs to be made by Tenant pursuant to Paragraph 4 of this Lease, Landlord shall be responsible for maintenance, repair and restoration of the premises, including all structural portions of the Leased Premises including, but not limited to, the foundation, exterior walls, roof and for items that are related to the structural safety of the pilings and pier infrastructure. The Tenant shall have no responsibility for any maintenance or repair except as set forth in paragraph 15 of this Lease.

(b) The Landlord agrees to build a deck onto the premises measuring 20 feet by 80 feet. Landlord shall immediately upon the execution of this Lease, proceed to obtain the permit for construction of the deck and to immediately commence to build the deck in accordance with State building codes. Landlord's obligation to build said deck shall not include any outdoor utilities, any outdoor utilities installed on the deck shall be at Tenant's sole cost.

15. Tenant's Maintenance and Repair Obligations. Except as otherwise provided in Paragraph 15, above, Tenant shall, at its sole cost and expense, maintain the entire Leased Premises in good order and repair. Tenant's maintenance and repair obligations shall include, without limitation: (a) maintenance, repair and replacement of the non-structural interior improvements to the Leased Premises including partition walls, floor coverings, wall coverings, interior doors, and ceilings; (b) disposal of all rubbish, trash, garbage, and other waste from the Leased Premises in a clean and sanitary manner; (c) maintenance, repair, and replacement of all utility installations serving the Leased Premises only, which are not the express obligation of Landlord;

WORKING DRAFT

(d) maintenance, repair and replacement of all exterior window and door glass and screens; (e) maintenance, repair and replacement of the HVAC system which serves the buildings located on the Leased Premises; (f) repair of any damage caused to the Leased Premises caused by the negligence or intentional acts or omissions of Tenant or Tenant's employees, agents, invitees or guests. (g) Tenant is also responsible for all termite and pest control of the Leased Premises. If Tenant fails to fulfill its maintenance obligations hereunder, Landlord shall have the right, but not the obligation, to perform such maintenance and repair on behalf of Tenant and to charge Tenant the full cost thereof which will become immediately due and payable as additional rent.

16. **Tenant Alterations.** Prior to the execution of this Lease, the Landlord shall approve a plan indicating the improvements and alterations to the Leased Premises. Thereafter, Tenant shall not make or allow to be made any major alterations, additions, or improvements to the Leased Premises (the "Alterations") without first obtaining the written consent of Landlord, which shall not be unreasonably withheld. For purposes of this Lease, "major alteration" shall mean any alteration that requires any permanent structural alteration of the Leased Premises. Prior to commencing any such work, Tenant must furnish Landlord with plans and specifications; names and addresses of contractors; copies of contracts; necessary permits; evidence of contractors' and subcontractors' insurance in a type and amount acceptable to Landlord; and indemnification in form and amount satisfactory to Landlord. All such Alterations shall be installed in a good and workmanlike manner using new materials. Upon completion, Tenant shall furnish "as built" plans, contractor's affidavits, and full and final lien waivers, covering all labor, services, and materials provided in connection with the Alterations. Tenant shall have use and control over the common areas as depicted on the attached diagram of the overall property to ensure that the overall ambiance remains in the best interest of the Tenant and the Landlord. Any major changes to the common areas must be approved by the Landlord. Minor adjustments do not need Landlord approval unless they implicate safety Codes. All Alterations shall comply with all insurance requirements, codes, ordinances, laws and regulations, including the Americans With Disabilities Act. Tenant shall reimburse Landlord upon demand as additional rent for all sums expended by Landlord to examine the architectural, mechanical, electrical, and plumbing plans for any Alterations. Rent due and payable hereunder shall not be abated or reduced during the installation of Alterations.

17. **Construction Liens.** Tenant shall promptly pay for all labor, services and materials furnished to the Leased Premises at the request of Tenant, and shall not permit any construction liens to be recorded against the Leased Premises. Tenant and Landlord acknowledge that as public property, the Leased Premises are not subject to attachment by a construction lien. In the event, however, that any such lien is recorded against the Leased Premises, Tenant shall remove the lien from the Leased Premises within thirty (30) days following written demand from Landlord by either paying the lien or transferring the lien to security in accordance with Florida Construction Lien Law. In the event Tenant fails to remove the lien from the Leased

WORKING DRAFT

Premises within thirty (30) days following written demand, Landlord may, at its sole option and election, pay and satisfy the lien. In such event, all sums paid by Landlord to satisfy the lien shall become immediately due and payable by Tenant by Landlord as additional rent without notice or demand.

18. **Liability Insurance; Indemnification.** Throughout the Lease Term, Tenant shall continuously maintain in full force and effect general liability and property insurance protecting against personal injury, death, or property damage occurring upon the Leased Premises. Such insurance shall have combined single limits of no less than Two Million Dollars (\$2,000,000.00) for each occurrence, shall have a minimum deductible of not more than Ten Thousand Dollars (\$10,000.00) and shall name Landlord as additional named Insured. Such insurance shall be provided by a company authorized to do business in the State of Florida and shall be reasonably acceptable to Landlord. The policy of insurance shall include a provision prohibiting cancellation without at least thirty (30) days prior written notice to Landlord. Tenant shall provide proof to Landlord of the required insurance within fourteen (14) days of the execution of this Lease and shall immediately provide proof of insurance at any time thereafter upon request for same by Landlord. Additionally, Tenant shall indemnify and hold Landlord harmless from and against any and all claims and demands (including attorneys' fees and court costs) for, or in connection with, any accident, injury, or damage whatsoever suffered by any person or caused to any property upon the Leased Premises including, without limitation, claims for loss, injury, or damage resulting from the condition of the Leased Premises, without regard to whether such claim arises in whole or in part from the act, omission, or negligence of Landlord, Tenant, or a third party.

19. **Fire and Casualty Insurance.** Throughout the Lease Term, Landlord shall continuously maintain in full force and effect fire and casualty insurance equal to the full insurable value of the improvements to the Leased Premises. Such insurance shall be maintained at the sole cost and expense of Landlord. The proceeds of such insurance shall be payable solely to Landlord. Landlord agrees to use the proceeds of such insurance to repair and restore the improvements to the Leased Premises following casualty unless this Lease is terminated as a result of the casualty pursuant to Paragraph 20, below.

20. **Damage or Destruction of Leased Premises.** Damage or destruction of the Leased Premises shall be governed by the following provisions:

(a) **Definitions.** For purposes of this Paragraph 21, the term "partial destruction" shall mean damage to the Leased Premises by fire or other casualty which, in Landlord's sole opinion, is reasonably capable of being repaired within one hundred twenty (120) days following the date of the casualty. The term "total destruction" shall mean damage to the Leased Premises by fire or other casualty, which, in Landlord's sole opinion, is not reasonable capable of being repaired within one hundred twenty (120) days following the date of the casualty.

WORKING DRAFT

(b) **Partial Destruction.** In the event of partial destruction of the Leased Premises, Landlord shall promptly and with due diligence repair the damage (exclusive of any Alterations to the Leased Premises made by Tenant) at Landlord's sole cost and expense.

(c) **Total Destruction.** In the event of total destruction of the Leased Premises, Landlord and Tenant shall make a mutually reasonable determination as to whether to rebuild and/or repair the Leased Premises. Such determination shall be made based upon the availability of insurance proceeds, permitting requirements, and the commercial viability of rebuilding, including the need to contract and manage the rebuilding or reconstruction of the Leased Premises. Should the Parties determine that the repair or reconstruction of a total destruction of the Leased Premises be unreasonable based upon a totality of the factors, Tenant shall be entitled to receive an amount up to Three Hundred Fifty Thousand and NO/100 Dollars (\$350,000.00) from the available property insurance proceeds as compensation for Tenant's initial capital investment in the Leased Premises. The amount to be received by Tenant shall be equal to the amount of additional coverage purchased by Landlord through Landlord's property and casualty insurance carrier to cover any capital improvements made to the Leased Premises by Tenant. In the event Landlord purchases such additional insurance, Tenant shall pay to Landlord, as additional rent, an amount equal to the additional insurance premiums Landlord is charged by Landlord's property and casualty carrier for the additional coverage. If Tenant elects to receive payment pursuant to this subparagraph, this Lease shall be terminated and the Parties shall be released each to the other.

(d) **Abatement of Rent upon Casualty.** If a casualty results in partial destruction or total destruction of the Leased Premises, the payment of Rent shall be completely abated from the date of the casualty until the date the Leased Premises are substantially restored by Landlord and possession of the Leased Premises is redelivered to Tenant. The term of this Lease and any extensions thereof and any rent adjustments shall be automatically extended and/or delayed for the time period that the rent is abated. . In no event shall Landlord be liable to Tenant for any damage to, or any inconvenience or interruption of, the business of Tenant conducted on the Leased Premises, which may be occasioned by such casualty. Tenant's sole remedy in the event of a casualty loss to the Leased Premises shall be the abatement of rent specifically set forth herein.

(e) **Repair and Restoration.** If this Lease is not terminated as a result of a casualty loss, Landlord shall promptly and diligently proceed to repair and restore the Leased Premises to a condition substantially similar to that existing prior to the date of the casualty. The restoration and repairs shall be performed in a workmanlike manner in full compliance with all applicable

building codes, ordinances, rules, and regulations. The means and methods by which the repair and restoration is performed shall be in the sole discretion of the Landlord. Landlord reserves the right to repair or reconstruct the Leased Premises in a manner which differs from the original plans and specifications, provided the Leased Premises is repaired or Landlord further reserves the right to repair or reconstruct the Leased Premises using equipment and materials which differ from those used in the original construction of the Leased Premises, provided such changes do not materially affect the quality or general appearance of the Leased Premises.

(f) Availability of Insurance Proceeds. Notwithstanding anything to the contrary set forth in this Paragraph 20, Landlord shall have no obligation to repair or reconstruct the Leased Premises following a casualty loss if the available insurance proceeds are insufficient or unavailable to pay the full cost of such repair or restoration. In the event insurance proceeds are insufficient or unavailable to pay the full cost to repair or restore the damage following a casualty loss, Landlord may elect not to repair or restore the damage without regard to whether the damage constitutes partial destruction or total destruction. If Landlord elects not to repair or restore the damage due to insufficiency or unavailability of insurance proceeds, Landlord shall provide written notice of such decision to Tenant within ninety (90) days following the date of the casualty. In such case, this Lease shall be deemed terminated as of the date of said notice. However, nothing contained herein shall be construed to eliminate, restrict or otherwise limit the Landlord's obligation to the Tenant as set forth in Paragraph 20(c).

(g) Tenant's Repair Obligation. Except as otherwise provided herein, Landlord shall only be obligated to repair or restore the Leased Premises following a casualty loss to its condition as of the date of the loss. Tenant shall be solely responsible for repairing or restoring any Alterations made to the Leased Premises by Tenant and Tenant's fixtures, leasehold improvements, and personal property. Landlord may require Tenant to provide Landlord with acceptable proof that Tenant has funds available to perform such repair or restoration prior to Tenant commencing repair or restoration of alterations made to the Leased Premises prior to the casualty.

21. Assignment and Subletting. Subletting of any portion of the Leased Premises is prohibited. Assignment of this Lease shall be subject to the following terms and conditions:

(a) Restriction. Tenant shall not, either voluntarily or by operation of law, assign or otherwise transfer this Lease of any interest herein, or sublet the Leased Premises or any part thereof, or permit Tenant's business to be operated by anyone other than Tenant and Tenant's employees (hereinafter collectively referred to as a "Transfer"), without the prior written consent of Landlord, which shall not be unreasonably withheld. For purposes of this

WORKING DRAFT

Lease, the term "Transfer" shall also include a change in ownership of more than fifty percent (50%) of the stock issued by Tenant and outstanding as of the date this Lease is executed, and Tenant's issuance of additional stock which results in the transfer of a controlling interest in Tenant.

(b) Landlord's Consent. In the event Tenant desires to Transfer this Lease or any rights hereunder, Tenant shall request Landlord's consent to the Transfer at least sixty (60) days in advance of the date the Transfer is proposed to become effective. Tenant shall provide Landlord with such information as Landlord may request to consider Tenant's proposed Transfer. Any reasonable expenses incurred by Landlord to review Tenant's request to consent to a proposed Transfer, including reasonable legal fees, shall be paid by Tenant as a condition of Landlord's consideration of the request. Landlord's consent to a Transfer must be in writing signed by Landlord.

22. Default by Tenant. Each of the following shall be an event of default ("Event of Default") by Tenant:

(a) If Tenant fails to pay in full any Base Rent, or other monetary sums payable by Tenant to Landlord under this Lease or any part hereof within fifteen (15) days following written demand from Landlord; or

(b) If Tenant fails to comply with any of the agreements, terms, covenants, or conditions in this Lease other than those referred to in the foregoing Subparagraph (a) within thirty (30) days after written notice from Landlord to Tenant specifying the items in default; or

(c) If tenant abandons the Lease Premises, as that term is defined by the non-residential section of the Florida Landlord and Tenant Act at the time of abandonment; if Tenant is named in a petition in bankruptcy, whether voluntary or involuntary; if a receiver is appointed for all or substantially all of Tenant's property; if Tenant takes advantage of any debtor relief proceedings under any present or future laws; or if Tenant makes an assignment for the benefit of creditors.

23. Landlord's Remedies Upon Default. Upon the occurrence of an Event of Default by Tenant, Landlord shall have the option, in Landlord's sole discretion, to pursue any one or more of the following remedies: (a) Landlord shall have the right to cancel and terminate this Lease and immediately dispossess Tenant; (b) Landlord shall have the right, without first terminating or canceling this Lease and without waiving the right to seek immediate possession of the Leased Premises, to declare the Base rent to be accelerated and immediately due and payable in full for the remainder of the Lease Term, and to collect thereafter any and all Percentage Rent and other sums coming due in accordance with the terms and conditions of this Lease; (c) Landlord may elect to enter the Leased Premises and relet the Leased Premises for Tenant's account, holding Tenant liable in damages as set forth in Paragraph 25,

below (d) Landlord may enter upon the Leased Premises and do whatever Tenant is obligated to do under the terms of this Lease (and Tenant agrees to reimburse Landlord on demand for any expenses which Landlord may incur in effectuating compliance with Tenant's obligations under this Lease as additional rent, and Tenant further agrees that Landlord shall not be liable for any damages resulting to Tenant from such action); or (e) Landlord may exercise any and all other rights and remedies permitted under Florida Law, whether at law or in equity. All such remedies of Landlord shall be cumulative, and enforcing one or more of the remedies herein provided upon an Event of Default shall not be deemed or construed to constitute waiver of such default, or an election of remedies.

24. Landlord's Right to Relet Upon Default. Should Landlord elect to enter and relet the Leased Premises for Tenant's account pursuant to Paragraph 23, above, Landlord shall be entitled to make such alterations and repairs to the Leased Premises as may be necessary or desirable in order to relet the Leased Premises, and shall further be entitled to relet the Leased Premises or any part thereof to such tenant or tenants, for such term or terms (which may be for a term extending beyond the Lease Term), at such rental or rentals, and upon such other terms and conditions as Landlord deems advisable, in its sole discretion. Upon reletting, the Tenant shall be released of any and all liability for the payment of any and all obligations called for under this Lease.

25. Landlord's Right to Cure. Notwithstanding the notice provisions set forth in Paragraph 22, above, if Tenant defaults in the performance of any covenant on Tenant's part to be performed pursuant to any provision, agreement, or covenant of this Lease, which default creates a condition which is dangerous to persons or which is likely to cause further damage to the Leased Premises, Landlord may immediately give oral or written notice to Tenant, directing that Tenant perform the same within a reasonable period of time as established by such notice. In the event that Tenant fails to comply with the applicable provision of this Lease within the period of time established by such notice, Landlord shall have the right to perform the same for the account of Tenant, in which event Tenant shall reimburse Landlord for all expenses incurred by Landlord in performing such obligation as additional rent. Landlord's notice to Tenant, when related to conditions which are a danger to persons or which are likely to cause further damage to the Leased Premises and therefore need immediate action by Tenant, may be delivered to Tenant's person in charge of the Leased Premises in addition to the notice provided for in Paragraph 35. Landlord's right to cure as set forth in this Paragraph, shall be in addition to Landlord's other remedies upon the occurrence of an Event of Default, as otherwise provided herein. However, Landlord agrees that it will not pursue any such other remedies until thirty (30) days after Landlord gives tenant written notice to reimburse Landlord for all expenses uncured by Landlord in curing Tenant's default pursuant to this Paragraph.

26. Default by Landlord. Landlord shall be deemed in default of this Lease should Landlord fail to comply with any of the agreements, terms, covenants, or conditions of this Lease for a period of thirty (30) days after notice from Tenant to

WORKING DRAFT

Landlord specifying the items in default; provided, however, if such default cannot reasonably be cured by Landlord through the exercise of due diligence within thirty (30) days following the date of said notice, then Landlord shall have such additional time as is reasonably necessary to cure such default provided Landlord diligently and continuously pursues such action as may be necessary to cure such default. Upon default by Landlord, Tenant shall have the option, in Tenant's sole discretion, to either (a) terminate this Lease on notice to Landlord, or (b) perform the same for the account of Landlord, and demand that Landlord reimburse Tenant for all expenses reasonably incurred by Tenant to cure Landlord's default. If Landlord fails to reimburse Tenant within thirty (30) days following written demand, Tenant shall be entitled to recover its reasonable attorneys' fees and court costs incurred to obtain reimbursement pursuant to Paragraph 30. In no event shall Tenant have the right to deduct or set-off any amounts claimed to be due Tenant from the Base Rent, Percentage Rent, or any other payment from Tenant to Landlord provided in this Lease.

27. **Signage.** All signage located upon the Leased Premises shall be maintained in good condition and repair by Tenant, at Tenant's sole expense. All signage and modifications thereto, except changes to copy, shall require written approval by Landlord, which shall not be unreasonably withheld.

28. **Entry by Landlord.** Landlord and its agents or representatives shall have the right to enter the Leased Premises to inspect the Leased Premises and to maintain or make repairs, alterations, additions, renovations, or restorations to the Leased Premises. If reasonably necessary for the protection and safety of Tenant and its employees, Landlord shall have the right to temporarily close the Leased Premises. Entry by Landlord hereunder shall not constitute a constructive eviction or entitle Tenant to any abatement or reduction of rent except as otherwise expressly provided herein. Landlord agrees to give Tenant at least forty-eight (48) hours notice prior to entering the Leased Premises to make repairs authorized under this Paragraph, unless such repairs are necessary to address a life or safety situation. If Tenant does not provide Landlord with keys to the Lease Premises, and Landlord requires emergency access to the Leased Premises for any reason, Tenant shall be solely responsible for any damage caused by Landlord in obtaining emergency access.

29. **Quiet Enjoyment.** Provided that Tenant performs all its obligations hereunder, Tenant shall have and peacefully enjoy the Leased Premises during the Lease Term free of claims by or through Landlord, subject to all of the terms and conditions contained in this Lease.

30. **Attorneys' Fees.** If either Landlord or Tenant shall commence any action or other proceeding to construe or enforce this Lease, the prevailing party in such action shall be entitled to recover reasonable attorneys' fees and court costs incurred in such action from the non-prevailing party, in addition to any other relief, including fees and costs incurred on appeal.

WORKING DRAFT

31. Indemnification. Should Landlord be made a party to any litigation instituted by Tenant against a party other than Landlord or by a third party against Tenant, Tenant shall indemnify, hold harmless, and defend Landlord from any loss, cost, liability, damage, or expense incurred by Landlord (including attorneys' fees and court costs) in connection with such litigation.

Should Tenant be made a party to any litigation instituted by Landlord against a party other than Tenant or by a third party against Landlord, Landlord shall indemnify, hold harmless, and defend Tenant from any loss, cost, liability, damage, or expense incurred by Tenant (including attorneys' fees and court costs) in connection with such litigation provided that Landlord's duty to indemnify pursuant to this Lease shall be limited to the same amount Landlord's tort liability would be limited to pursuant to Chapter 768, Florida Statutes, as amended from time to time.

32. Surrender of Leased Premises. Upon expiration of the Lease Term or earlier termination of this Lease, Tenant shall surrender the Leased Premises to Landlord in the same condition as on the execution of this Lease, subject to reasonable wear and tear. All Alterations shall be conclusively deemed fixtures of the Leased Premises and shall become the property of Landlord upon the expiration or earlier termination of this Lease. Tenant shall, at its sole expense, remove all business and trade fixtures, machinery and equipment, furniture and other items of personal property owned by Tenant or installed by Tenant in the Leased Premises. Any damage to the Leased Premises caused by such removal shall be repaired by Tenant to the reasonable satisfaction of Landlord. If Tenant fails to remove any such items within forty-five (45) days after the expiration or earlier termination of this Lease, , any items not removed from the Leased Premises by Tenant may be deemed to have been abandoned by Tenant and may be retained or disposed of by Landlord in any manner Landlord may see fit.

33. Holdover Tenancy. If Tenant holds possession of the Leased Premises after the Lease has terminated, by lapse of time or otherwise, Tenant shall become at sufferance upon all of the terms contained herein, except as the to Lease Term and Base Rent. During such holdover period, Tenant shall pay to Landlord a monthly Base Rent equal to 200% of the Base Rent payable by Tenant to Landlord during the last month of the Lease Term. The monthly rent for such holdover period shall in no event be construed as a penalty or as liquidated damages for such retention of possession. The payment of such additional Base Rent, however, shall not be deemed to extend the term of this Lease.

34. Notices. Any notice given or required to be given in connection with this Lease shall be in writing and shall be delivered either by hand delivery, by registered or certified mail with return receipt requested, or by an overnight courier service which provides a receipt or other evidence of delivery; provided, however, oral notice may be given under the circumstances set forth in Paragraph 26. Notices to Landlord shall be delivered at: _____ . Notice to Tenant shall be delivered at: _____ . Notices delivered by registered or certified mail shall be deemed received on the earlier of the third day

WORKING DRAFT

following the date the notice was mailed with sufficient postage prepaid or the delivery date indicated on the return receipt. Either party may change its address by providing the other party with such change via certified mail, return receipt requested. Tenant shall maintain a domestic address for receipt of notice.

35. **Relationship of Parties.** It is understood and agreed that the relationship of the parties hereto is strictly that of Landlord and Tenant, that this Lease is entered into on arms length basis, and in no manner shall this Lease be construed as granting an ownership right to Landlord in Tenant's business. It is further understood and agreed that this Lease is not intended, nor shall it be construed, as creating a joint venture or other business relationship between Landlord and Tenant other than expressly provided in this Lease.

36. **No Counterclaim; Waiver of Jury Trial.** Tenant and Landlord hereby knowingly and voluntarily waive trial by jury in any action whatsoever brought by Landlord or Tenant to construe or enforce this Lease. The foregoing waiver is a material inducement to the willingness of Landlord and Tenant to enter this Lease.

37. **No Pending Claims Against Tenant.** Tenant hereby warrants and represents that there are no administrative claims or lawsuits pending or threatened against Tenant as of the date Tenant has executed this Lease.

38. **No Recordation.** Tenant's recordation of this Lease or any memorandum or short form of it will be void and constitute default under this Lease.

19. **Amendments.** This Lease shall not be amended, changed, or modified except in writing executed by Landlord and tenant. Landlord shall not have waived or released any of its rights hereunder unless in writing and executed by Landlord.

40. **Binding Effect.** Except as expressly provided herein, this Lease shall be binding upon the parties hereto, their respective heirs, personal representatives, successors, and assigns, and all of the terms covenants, and provisions herein shall inure to the benefit of their respective heirs, personal representatives, successors, and assigns.

41. **Interpretation.** Tenant acknowledges that it has read and reviewed this Lease and that it has had the opportunity to confer with counsel in the negotiation of this Lease. Accordingly, this Lease shall be construed neither for nor against Landlord or Tenant, but shall be given a fair and reasonable interpretation in accordance with the meaning of its terms and the intent of the parties.

2. **Independent Covenants.** Each covenant, agreement, obligation, or other provision of this Lease to be performed by Tenant are separate and independent covenants of Tenant and are not depended on any other provision of this Lease.

WORKING DRAFT

43. **Severability.** In the event any provision of this Lease is found to be invalid or unenforceable by a court of competent jurisdiction, the remainder of this Lease shall not be affected, and any provision found to be invalid shall remain unenforceable to the extent permitted by law. The parties agree that in the event two different interpretations may be given to any provision hereunder, one of which will render the provision unenforceable, and one which will render the provision enforceable, the interpretation rendering the provision enforceable shall be adopted.

44. **Governing Law; Venue.** This Lease shall be construed and enforced in accordance with the laws of the State of Florida. Venue for any action or suit brought in connection herewith shall be commenced only in the court of appropriate jurisdiction located in Flagler County, Florida.

45. **Time of the Essence.** Time is of the essence of this Lease and the performance of all obligations hereunder.

46. **Headings.** The headings, captions, titles, and numerical references used herein are inserted merely as a matter of convenience, and shall not alter or have any effect upon the meaning, terms, or substance of this Lease.

47. **Radon Gas.** Radon is a naturally occurring radioactive gas that, when it has accumulated in a building in sufficient quantities may present health risks to persons who are exposed to it over time. Levels of radon that exceed Federal and State guidelines have been found in buildings in Florida. Additional information regarding radon and radon testing may be obtained from your County Health Department.

48. **Number and Gender.** Whenever the context hereof so requires, the single shall include the plural, and the use of masculine or neuter terms shall be construed to include all genders.

49. **Entire Agreement.** This Lease constitutes the sole and only agreement of the parties hereto, and supersedes any prior understandings or written or oral agreements regarding the subject matter contained herein. Landlord has not made, and Tenant is not relying upon, any warranties, representations, promises, or statements made by Landlord or any agent of Landlord except as expressly set forth herein.

50. **Force Majeure.** Neither party shall be liable to the other for failure to perform any obligation or responsibility under this Lease within the time period required for such performance if performance is prevented by the occurrence of an event which is beyond the control of the party, including, without limitation, strike, labor disputes, acts of God, war, or civil insurrection. In such event, the amount of time for the party to perform shall be extended by the amount of time performance is delayed by reason of any force majeure event.

WORKING DRAFT

51. The parties hereto expressly recognize that the Leased Premises are adjacent to the City Pier and beach and that public events and activities consistent with such uses, including festivals, fundraising events and fireworks displays may continue to occur on or over the beach and City Pier and in the airspace over the Leased Premises during the term of this Lease.