

Exhibit D - Sample Concession Agreement

CITY OF SAN DIEGO CONCESSION PERMIT

THIS CITY OF SAN DIEGO CONCESSION PERMIT ("Permit") is entered into by and between THE CITY OF SAN DIEGO, a California municipal corporation ("CITY"), and _____ ("CONCESSIONAIRE"), to be effective upon execution by the parties and approval by the San Diego City Attorney (the "Effective Date"), as follows:

1. Incorporated Documents. This Permit is created pursuant to the Kayak REQUEST FOR PROPOSAL ("RFP") issued by the Real Estate Assets Department (_____), CONCESSIONAIRE'S proposal in response to the RFP, dated _____, 2008. The Operating Plan submitted by CONCESSIONAIRE as part of its proposal is attached hereto as Exhibit A and incorporated herein. Also attached and incorporated herein are the following documents: Exhibit B, Kayak Concession Requirements, and Exhibit C, Site Map.
2. Right to Enter. Subject to the terms and conditions of this Permit, CITY hereby grants permission to CONCESSIONAIRE, its employees, agents and contractors to operate Kayak tours ("Concessions") within CITY beach site, in the boat launch zone, and on City controlled waters adjacent the boat launch zone at La Jolla Shores (which extends 125 feet north from the southern end of the westerly extension of Avenida De La Playa). The location of the Site is included under this Permit and designated on the attached Exhibit B.
3. Use of Sites. This Permit is granted to CONCESSIONAIRE for the sole purpose of allowing CONCESSIONAIRE to operate a Kayak concession (Conducting kayak tours as well as delivering and removing rented kayaks) serving the general public under the terms and conditions of this Permit. No solicitation or marketing is permitted on City beaches. Renting or selling of beach equipment or other merchandise is not allowed under this Permit.
4. Maximum Days and Hours of Operation. No Kayak Tour/Rental operations prior to 8 a.m. daily (June 13 - Sept 1) and No operations prior to 9 a.m. (Sept 2- June 12). All Kayaks must be removed from the designated storage area by 8:30 p.m. All Kayak tours are to be completed and out of the water 15 minutes before sunset daily. All operations are permitted seven days a week with the following exceptions:
 - a. Under no circumstances are operations permitted on the 4th of July holiday.

- b. Special Events. Unless otherwise authorized by the CITY Manager, CONCESSIONAIRE shall have no rights within certain areas of the Concession Site or designated portions thereof during days in which special events are scheduled by CITY in this area. CITY shall give CONCESSIONAIRE advance written notice of any such special events.
5. Competent Management. Throughout the term of this Permit, CONCESSIONAIRE shall provide competent management of the Sites for the permitted uses to the satisfaction of the City Manager. CONCESSIONAIRE covenants to operate the Concession for the above-specified purposes and diligently conduct the operations to produce a reasonable and substantial gross income.
6. Term. The term of this Agreement shall be one year commencing on _____, 2009 (“Commencement Date”). “Agreement Year” as used in this Agreement shall mean the twelve-month period commencing on the Commencement Date and any subsequent twelve-month option period(s) exercised in accordance with Section 7 Options to Extend. This Permit may be terminated at any time by either party upon ninety (90) days prior written notice to the other party.
7. Options to Extend. Provided that the CONCESSIONAIRE is not in default of this Agreement, the term of this Agreement may be extended for two (2) one-year options at the consideration specified in Section 11 and subject to all original agreements and conditions. Concessionaire must notify CITY in writing by _____ prior to the expiration of the current term of its intention to exercise an option. All options are subject to the mutual consent of the CITY and Concessionaire.
8. Holding Over. Any use of the Concession Sites by CONCESSIONAIRE after the expiration of this Permit is not permitted. Any extension of the term of the Permit beyond 36 months shall require approval of CITY Council.
9. Revocable License. This Permit is not a lease. It is a license to use CITY-owned property, and may be revoked by CITY, in its sole discretion. CITY shall not be obligated for any loss, financial or otherwise, which may be incurred by CONCESSIONAIRE as a result of such termination of this Permit. CONCESSIONAIRE expressly waives any claim for expense or loss which CONCESSIONAIRE might incur as a result of CITY’S termination of this Permit.
10. Special Provisions
 - a. Operating Plan. The Operating Plan(s) for June 2009 through May 2010 submitted with the CONCESSIONAIRE’S response to the CITY’S Request for Proposal, shall be revised by CONCESSIONAIRE, if required by CITY to meet CITY’S approval, and the final CITY approved Plan(s) shall be incorporated into this Permit as Exhibit A. Beginning June 1,

2010, and for every 12 months thereafter, the CONCESSIONAIRE shall provide the CITY with an Operating Plan for the coming quarter for the CITY'S approval. All Operating Plans submitted to the CITY should be consistent with the format and content of the Plans included as Exhibit A. CITY shall have the right to approve or disapprove the proposed plan. Once approved, CONCESSIONAIRE shall not make any changes to the Plan without prior written approval of CITY. **At all times, the CONCESSIONAIRE shall ensure that all operations permitted under this Permit comply with the Kayak Requirements incorporated herein as Exhibit B.**

- b. Standard of Employees. CONCESSIONAIRE and its employees shall at all times conduct themselves and the operations of the Concession in a creditable manner. CONCESSIONAIRE shall thoroughly train its employees in their duties and shall regularly monitor them to ensure that they behave in a courteous manner, do not disturb the quiet enjoyment of other beach users, and otherwise comply with all of the Kayak Requirements in Exhibit B of this Permit.
- c. Exclusiveness of Permit and Unauthorized Vending CITY, by granting this Permit to CONCESSIONAIRE, makes no warranty that the Site shall be free of unauthorized vending or that any specific level of police or lifeguard enforcement against such activities shall be maintained.
- d. Concession Site. CONCESSIONAIRE shall erect no improvements. The Site must be maintained so as to present a neat and attractive appearance to the satisfaction of the CITY. Any items or improvements brought on the Site by the CONCESSIONAIRE must be approved by CITY and shall not remain on location after permitted hours of operation, unless prior approval of CITY is obtained.
- e. Improvements. Upon expiration or termination of this Permit, any and all improvements, trade fixtures, structures, and installations or additions to the Site now existing or constructed on the Site by CONCESSIONAIRE shall be deemed to be part of the Sites and shall become CITY'S property free of all liens and claims. All personal property remaining on the Sites after expiration or termination shall also become the property of CITY.
- f. Maintenance of Site. CONCESSIONAIRE agrees not to commit or allow to be committed any waste or injury or any public or private nuisance, to keep the Site clean and clear of refuse and obstructions, and to dispose of all garbage, trash, and rubbish in or about said spaces to the satisfaction of CITY and at CONCESSIONAIRE'S sole cost. Site must be cleaned up nightly by CONCESSIONAIRE or more often, as required.

11. Fees.

- a. Percentage Fees. Percentage fees will be calculated on a calendar month basis and will consist of eight percent (8.00%) of the gross income resulting from Kayak tours permitted under this Permit. The City Manager, in his sole discretion, may approve another percentage rate or minimum rate for each other incidental service or operation supplementary to the permitted uses stated in Section 3, Use of Site, as may be approved in writing by the City Manager prior to the commencement of any additional service or operation. Provided however, any activity conducted on the Site without the prior written approval of the City Manager shall be subject to the requirements of Section 10.E., Unauthorized Use Charge.

- b. Minimum Fees. The annual Minimum Fee established for the first year following the effective date of this Permit is Six Thousand Dollars (\$6,000.00), which is Five Hundred Dollars (\$500.00) on a monthly installment basis.

If the Minimum Fee is greater than the percentage fee on a calendar month basis, one-twelfth (1/12) of the Minimum Fee is required to be paid for that month. Minimum Fees are to be paid in monthly installments on or before the day of the calendar month when percentage fees are due pursuant to Section 10.I., Time and Place of Payment. In the event that the combined total percentage fee payments and monthly installments of the Minimum Fee during any Permit year equal or exceed the required Minimum Fee for that year, for the balance of that year, CONCESSIONAIRE shall discontinue paying monthly installments of the Minimum Fee until the beginning of the next Permit Year. If in any Permit Year, Minimum Fees paid plus Percentage Fees paid exceed the annual Minimum Fee and also exceed the fee which would have been paid if the Percentage Fee had been paid on total gross income, the excess over the total fee owed shall be credited against the next payable fee as it becomes due. It is the intent of this provision that CONCESSIONAIRE shall pay monthly installments of the annual Minimum Fee as a guarantee against the Percentage Fee requirement and that the greater of the two requirements, minimum or percentage, whichever occurs throughout the term, shall prevail on an annual basis.

- c. Minimum Fee Adjustment. Effective at the beginning of the first day of the 13th and 25th month of this Permit, the annual Minimum Fee shall be eighty percent (80.00%) of the annual average of actual rents paid in the Initial Term plus any option terms exercised under this Permit. The annual average shall then be divided by twelve (12) to establish the new monthly Minimum Fee. It is recognized that the adjustments shall be

calculated by the CITY upon completion of payments due for the preceding year in order to determine the amount of the Minimum Fee for the option period. Until such calculations are completed, CONCESSIONAIRE shall continue paying monthly Minimum Fees at the prior rate. Any additional fees determined by the adjustment to be due for the months previously paid at the prior rate shall be paid to the CITY within thirty (30) days following written notice. In no event shall the Minimum Fee Adjustment result in a decrease in the Minimum Fee requirement in effect immediately prior to the adjustment date.

- d. Annual Percentage Adjustment to Minimum Fee. In the event that only the minimum fee is paid, every 12 months, the Minimum Fee shall increase to one-hundred five (105.00%) of the previous year's Minimum Fee.
- e. Delinquent Concession Fee. If CONCESSIONAIRE fails to pay any concession fees when due, CONCESSIONAIRE will pay, in addition to the unpaid concession fees, a fee of \$25.00. If the fees are still unpaid at the end of the fifteen (15) days, CONCESSIONAIRE shall pay a fee of \$50.00, which is mutually agreed by the parties to this Permit to be appropriate to compensate the CITY for loss resulting from concession fee delinquency, including lost interest opportunities, legal costs, and the cost of servicing the delinquent account.
- f. Unauthorized Use Charge. CONCESSIONAIRE shall pay CITY fifty percent (50.00%) of the gross receipts for any service or use that is not permitted by this Permit. This payment is subject to the due date provided in this Permit for minimum guaranteed fees payments and the provision for delinquent concession fees payments and the provision for delinquent concession fees. The existence of the fifty percent (50.00%) charge in this clause and the payment of this charge or any part of it, do not constitute an authorization for a particular service or use, and does not waive any CITY rights to terminate a service or use or to default CONCESSIONAIRE for participating in or allowing any unauthorized use.
- g. Gross Income. "Gross income" or "gross receipts", as used in this Permit shall include all income resulting from the Concession from whatever source derived whether received or to become due. Provided; however, gross income shall not include federal, state, or municipal taxes collected from the consumer (regardless of whether the amount is stated to the consumer as a separate charge) and paid over periodically by CONCESSIONAIRE to a governmental agency accompanied by a tax return or statement as required by law. Possessory interest taxes or other property taxes shall not be deducted by CONCESSIONAIRE in computing gross income. Gross income shall not include refund of

deposits. The amount of taxes and refunds shall be clearly shown on the books and records of CONCESSIONAIRE. The percentage concession fees shall be calculated and paid by CONCESSIONAIRE on the basis of gross income whether the income is received by CONCESSIONAIRE or by any permittee or licensee, or their agents, and all gross income received by any permittee, licensee, or other party as a result of occupancy or operation of the Site(s) shall be regarded as gross income of CONCESSIONAIRE for the purpose of calculating the percentage concession fees required to be paid by CONCESSIONAIRE to CITY, except as may be otherwise specified by or pursuant to this Permit.

h. Inspection of Records.

- i. Records. CONCESSIONAIRE shall, at all times during the Permit term, keep or cause to be kept true and complete books, records, and accounts of all financial transactions in the operation of all business activities conducted upon and financial transactions resulting from the use of the Site(s). The records shall be supported by source documents such as sales slips, daily cash register tapes, purchase invoices, tour lists, or other documents as necessary to allow CITY to easily determine the gross income. Any retail sales or charges will be recorded by means of cash registers or other comparable devices which display to the customer the amount of the transaction and automatically issue a receipt. The registers will be equipped with devices that lock in sales totals and other transaction numbers and sales details that are not resettable. Totals registered shall be read and recorded at the beginning and end of each business day. In the event of admission charges or concession rents, CONCESSIONAIRE shall issue serially numbered tickets for such admission or concession fees and shall keep an adequate record of such tickets, as well as a record of unissued tickets. All retail sales and charges may be recorded by a system other than cash registers or other comparable devices provided such a system is approved by the CITY.
- ii. Financial Statements. Within sixty (60) days after the end of the Initial 12 months, CONCESSIONAIRE will, at its expense, submit to CITY a statement in which the total gross receipts and the corresponding amounts of concession percentage fees paid CITY for the year are classified according to the categories of business established for any percentage concession fees and for any other business conducted on or from the Site. The statement shall be

signed by CONCESSIONAIRE and Financial Representative of CONCESSIONAIRE attesting to the accuracy thereof, which shall be legally binding upon CONCESSIONAIRE.

iii. Right to Inspect. All CONCESSIONAIRE'S books of account, records, and supporting documentation, as described under Section 10.G.(i), will be kept for at least five (5) years and made available to CITY in one location within the City of San Diego. These books and records must be maintained separately from all other accounts not relating to the Site(s). The CITY, at its discretion, shall have the right to inspect and audit the business of CONCESSIONAIRE, its agents, permittees, and licensees operating on, and in connection with, the Site(s) as necessary and appropriate for CITY to determine the amounts of concession fees due CITY in compliance with the requirements of this Permit. At CITY'S request, CONCESSIONAIRE shall promptly provide, at CONCESSIONAIRE'S expense, any necessary data to enable CITY to fully comply with all requirements of the state and federal government for Permit information or reports concerning the Concessions. Such data will include, if required, a detailed breakdown of CONCESSIONAIRE'S receipts and expenses.

iv. Audit Cost. The full cost of the CITY'S audit(s) will be borne by CITY unless one or both of the following conditions exist, in which case CONCESSIONAIRE agrees to pay CITY'S cost of audit(s):

The audit(s) reveal an underpayment of more than five percent (5.00%) or more than \$10,000.00, whichever is less, between the concession fees due as reported and paid by CONCESSIONAIRE, pursuant to this Permit and concession fees determined by the audit(s).

CONCESSIONAIRE has failed to maintain complete and true books, records, accounts, and supporting documents in strict accordance with this section.

Any underpayment of concession fees less than five percent (5.00%) revealed by the audit may be paid within thirty (30) days written notice from the CITY without penalty, otherwise, CONCESSIONAIRE shall incur interest charges on the delinquent amount as defined in Section 10.D.,

DELINQUENT CONCESSION FEES. CITY will credit any overpayment against incoming concession fees. Any overpayment determined after the end of this Permit will be refunded by CITY within thirty (30) days of confirmation by the City Manager of the audit(s) findings.

- i. Default. CONCESSIONAIRE'S failure to keep complete and accurate records by means of double-entry bookkeeping and make them available for CITY inspection is, like all other failures to comply with covenants of this Permit, a breach of this Permit and cause for termination.
- j. Time and Place of Payment. Payments are due on or before the last day of the calendar month following the calendar month in which the Gross Income subject to percentage fees was earned. Checks shall be made payable to the City Treasurer and mailed to the Office of the City Treasurer, City of San Diego, P.O. Box 122289, San Diego, California 92112-4165, or delivered to the Office of the City Treasurer, Civic Center Plaza, 1200 Third Avenue, First Floor, San Diego, California. The place and time of payment may be changed by CITY upon thirty (30) days prior written notice to CONCESSIONAIRE. Mailed payments shall be deemed paid upon the date such payment is postmarked by the postal authorities. If postmarks are illegible, the payment shall be deemed paid upon actual receipt by the City Treasurer. CONCESSIONAIRE assumes all risk of loss and responsibility for late payment charges if payments are made by mail.
- k. Security Deposit. The CONCESSIONAIRE shall deliver to CITY with the executed copies of this Permit, a good faith deposit in the amount of two thousand five hundred dollars (\$2,500.00). All or any portion of the principal sum shall be available unconditionally to CITY for payment of delinquent concession fees, for correcting any default or breach of this Permit by CONCESSIONAIRE, CONCESSIONAIRE'S successors or assignees, or for payment of expenses incurred by CITY as a result of CONCESSIONAIRE'S failure to faithfully perform all terms, covenants, and conditions of this Permit. If at the end of the term of this Permit, CONCESSIONAIRE has performed all of the provisions of the Permit, the deposit or any remaining balance shall be returned to the CONCESSIONAIRE without interest. The security deposit may be increased by CITY proportionate to any increase in Minimum Fees. CONCESSIONAIRE shall maintain the security deposit throughout the Term. **Notwithstanding any other provision of this Permit, if CONCESSIONAIRE fails or refuses to deposit or maintain a security deposit as required by this Permit, CITY may terminate this Permit immediately upon such breach. Upon such termination, CONCESSIONAIRE shall immediately cease its use of the Sites and**

commence and diligently pursue the removal of its property from the Sites.

- i. Utilization. If CITY utilizes all or any portion of the security deposit, upon 10 days prior written notice, CONCESSIONAIRE shall reimburse the security deposit to the full required amount.
 - ii. Increase. Upon thirty (30) days prior written notice by CITY, CONCESSIONAIRE shall deliver to CITY additional funds as CITY may, in its sole determination, require to adequately secure CONCESSIONAIRE'S obligations under this Permit.
 - iii. Return. Provided CONCESSIONAIRE is not in breach or default of this Permit, CITY shall return the security deposit, or any balance thereof, to CONCESSIONAIRE within sixty (60) days after the expiration or termination of this Permit.
12. CITY'S Consent, Discretion. Whenever required under this Permit, CITY'S consent or approval shall mean the written consent or approval of the City Manager, unless otherwise expressly provided. CITY'S discretionary acts hereunder shall be made in the City Manager's sole and absolute discretion, unless otherwise expressly provided.
13. Acceptance of Site. CONCESSIONAIRE represents and warrants that it has independently inspected the Site and made all tests, investigations, and observations necessary to satisfy itself of the condition of the Site. CONCESSIONAIRE agrees it is relying solely on its independent inspection, tests, investigations, and observations in entering into this Permit. CONCESSIONAIRE further acknowledges that the Site is in the condition called for by this Permit, that CITY has performed all work, if any, related to the Sites and required by this Permit, and that CONCESSIONAIRE shall hold CITY harmless for any defects, whether apparent or latent, in the Site, including without limitation the presence of any hazardous substances.
14. Maintenance of the Site. CONCESSIONAIRE shall, at CONCESSIONAIRE'S sole cost and expense and to CITY'S satisfaction, maintain the Sites in a decent, safe, healthy and sanitary condition at all times during the Term.
15. Standard of Conduct. CONCESSIONAIRE and its employees shall at all times conduct themselves and the operations on the Sites in a creditable manner.
16. Inspection. CITY may, at all times upon prior notice, enter and inspect the Site.

17. Insurance. On or before the Effective Date, CONCESSIONAIRE shall deliver to CITY a current certificate of insurance for:
- a. Commercial General Liability insurance providing coverage for bodily injury, including death, personal injury, and property damage with limits of at least One Million Dollars (\$1,000,000) per occurrence, subject to an annual aggregate of Two Million Dollars (\$2,000,000).
 - b. Licensee must maintain current workers compensation coverage which meets statutory requirements for all employees. One million (1,000,000) dollars of employers liability coverage is also required.
 - c. Licensee must maintain a (marine) protection and indemnity policy, with limits of not less than one million (1,000,000) dollars UNLESS proof is submitted that Licensee's kayak operations are under the commercial general liability policy. A certified copy of the CGL policy will be sufficient to meet this requirement.
 - i. Additional Insureds. Pursuant to a separate endorsement [CG2010 (11/85) or equivalent form], "The City of San Diego, its elected officials, officers, employees, representatives, and agents" shall be named as additional insureds in all policies.
 - ii. Primary & Non-Contributory. Insurance policies shall be endorsed such that the coverage is primary and non-contributory to any coverage carried or maintained by CITY. The policies shall be kept in force for the duration of the Term and any extended use. The certificate(s) of insurance shall be filed with CITY'S Real Estate Assets Department upon execution of this Permit.
 - iii. Qualified Insurer(s). All insurance required by the terms of this Permit must be provided by insurers licensed to do business in the State of California which are rated at least "A-, VI" by the current AM Best Ratings Guide and which are acceptable to CITY. Non-admitted surplus lines insurers may be accepted provided they are included on the most recent list of California eligible surplus lines insurers (LESLI list) and otherwise meet CITY requirements.
 - iv. Deductibles/Retentions. All deductibles and self-insured retentions on any insurance policy are the sole responsibility of CONCESSIONAIRE and must be

disclosed and acceptable to CITY at the time evidence of insurance is provided.

- v. Continuity of Coverage. All policies shall be in effect on or before the first day of the Term of this Permit, except "course of construction fire insurance" shall be in force on commencement of all authorized construction on the Sites, and full applicable fire insurance coverage shall be effective upon completion of each insurable improvement. At least thirty (30) days prior to the expiration of each insurance policy, CONCESSIONAIRE shall furnish a certificate(s) showing that a new or extended policy has been obtained which meets the requirements of this Permit.

- vi. Modification. To assure protection from and against the kind and extent of risk existing on the Sites, CITY, at its discretion, may require the revision of amounts and coverages at any time during the Term by giving CONCESSIONAIRE thirty (30) days prior written notice. CONCESSIONAIRE shall also obtain any additional insurance required by CITY for new improvements, in order to meet the requirements of this Permit.

- vii. Accident Reports. CONCESSIONAIRE shall report to CITY any accident causing more than Five Thousand Dollars (\$5,000) worth of property damage or any serious injury to persons on the Sites. Such report shall be delivered to CITY within five (5) days of such accident and shall contain the names and addresses of the involved parties, a statement of the circumstances, the date and hour of the accident, the names and addresses of any witnesses, and other pertinent information.

- viii. Failure to Comply. If CONCESSIONAIRE fails or refuses to obtain and maintain the required insurance, or fails to provide proof of coverage, CITY may obtain the insurance. CONCESSIONAIRE shall reimburse CITY for the premiums paid, with interest at the maximum allowable legal rate then in effect in California. CITY shall notify CONCESSIONAIRE of such payment of premiums within thirty (30) days of payment stating the amount paid, the name(s) of the insurer(s), and rate of interest. CONCESSIONAIRE shall pay such reimbursement and interest on the first (1st) day of the month following CITY'S notice. **Notwithstanding any other provision of this Permit, if CONCESSIONAIRE fails or refuses to**

obtain or maintain insurance as required by this Permit, or fails to provide proof of insurance, CITY may terminate this Permit immediately upon such breach. Upon such termination, CONCESSIONAIRE shall immediately cease its use of the Sites and commence and diligently pursue the removal of its property from the Sites.

- ix. All insurers must be licensed to conduct business in the State of California and with exception of workers compensation, be rated "A-, VI" or better by AM Best. If coverage is provided by a surplus lines carrier, it must be listed on the current LESLI list. Any and all deductibles and/or self-insured retentions must be disclosed to the City at the time proof of insurance is provided. All insurers must be acceptable to the City.
18. Indemnification. CONCESSIONAIRE shall protect, defend, indemnify, and hold CITY, its elected officials, officers, representatives, agents and employees, harmless from and against any and all claims asserted or liability established for damages or injuries to any person or property, including injury to CONCESSIONAIRE'S officers, employees, invitees, guests, agents, or contractors, which arise out of or are in any manner directly or indirectly connected with this Permit or CONCESSIONAIRE'S occupancy, use, development, or maintenance of the Sites, and all expenses of investigating and defending against same, including without limitation attorney fees and costs; provided, however, that CONCESSIONAIRE'S duty to indemnify and hold harmless shall not include any claims or liability arising from the established active negligence, sole negligence, or sole willful misconduct of CITY, its elected officials, officers, representatives, agents and employees. CITY may, at its election, conduct the defense or participate in the defense of any claim related in any way to this indemnification. If CITY chooses at its own election to conduct its own defense, participate in its own defense, or obtain independent legal counsel in defense of any claim related to this indemnification, CONCESSIONAIRE shall pay all of the costs related thereto, including without limitation reasonable attorney fees and costs.
19. No Discrimination. CONCESSIONAIRE shall not discriminate in any manner against any person or persons on account of race, color, religion, gender, sexual orientation, medical status, national origin, age, marital status, or physical disability in CONCESSIONAIRE'S use of the Sites, including but not limited to the providing of goods, services, facilities, privileges, advantages, and accommodations, and the obtaining and holding of employment.
20. Local Business and Employment. CONCESSIONAIRE acknowledges that CITY seeks to promote employment and business opportunities for local residents and firms in all CITY contracts. CONCESSIONAIRE will, to the extent legally

possible, solicit applications for employment, and bids and proposals for subcontracts, for work associated with this Permit from local residents and firms as opportunities occur. CONCESSIONAIRE agrees to hire qualified local residents and firms whenever feasible.

21. Drug-free Workplace. CONCESSIONAIRE shall be required to abide by the omnibus drug legislation passed by Congress on November 18, 1988, by adopting and enforcing a policy to maintain a drug-free workplace by doing all of the following:
 - a. Publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession or use of controlled substances are prohibited on the Sites and specifying the actions that will be taken against employees for violations of the prohibition; and
 - b. Establish a drug-free awareness program to inform employees about all of the following:
 - i. The dangers of drug abuse in the workplace;
 - ii. CONCESSIONAIRE'S policy of maintaining a drug-free workplace;
 - iii. Any available drug counseling, rehabilitation, and employees assistance programs; and
 - iv. Penalties that may be imposed upon employees for drug abuse violations.
22. Disabled Access Compliance. CONCESSIONAIRE shall comply with the California Government Code, Sections 11135-11139.5; the Federal Rehabilitation Act of 1973, Section 504, Title V; the Americans with Disabilities Act of 1990 (ADA); and any other applicable state and federal laws and regulations hereafter enacted protecting the rights of people with disabilities.
23. CONCESSIONAIRE'S Risk. CONCESSIONAIRE shall bear all risks and liability arising out of or in any manner directly or indirectly connected with CONCESSIONAIRE'S occupancy, use, development and maintenance of the Sites and any damages to the improvements on, under, or in the vicinity of the Sites resulting directly or indirectly thereby.
24. No Nuisance. CONCESSIONAIRE shall not use the Sites in any manner which, in CITY'S opinion, creates a nuisance or disturbs the quiet enjoyment of persons in and to the surrounding area.

25. No Assignment. CONCESSIONAIRE shall not assign any rights granted by this Permit or any interest herein without CITY'S prior written consent. Approval of any such proposed assignment may be withheld in CITY'S sole and absolute discretion. Any assignment by operation of law shall automatically terminate this Permit.
26. Signs. CONCESSIONAIRE shall not erect or display any banners, pennants, flags, posters, signs, decorations, marquees, awnings or similar devices or advertising without CITY'S prior written consent. If any such unauthorized item is found on the Sites, CONCESSIONAIRE shall remove the item at its expense within 24 hours notice by CITY, or CITY may thereafter remove the item at CONCESSIONAIRE'S cost.
27. Advertisement and Marketing. Any advertising or marketing which reference the City of San Diego may not be distributed by the CONCESSIONAIRE without the advanced written approval of the CITY. If CONCESSIONAIRE uses the City of San Diego in any context to promote its business operations without prior written approval by CITY, CONCESSIONAIRE will be considered to be in default. No advertising or marketing materials of any kind may be posted or distributed on any City beach without the advanced written approval of the CITY.
28. Encumbrances. CONCESSIONAIRE shall keep the Sites free from all encumbrances and liens of any nature which arise out of or are in any manner directly or indirectly connected with this Permit or CONCESSIONAIRE'S occupancy, use, development, or maintenance of the Sites. CONCESSIONAIRE shall protect, defend, indemnify, and hold CITY harmless from and against any and all such encumbrances and/or liens, and from and against any claim, liability, cost or expense, including without limitation all attorney fees and costs, relating to or charged against the Sites, including without limitation CONCESSIONAIRE'S failure or the failure of any contractor or subcontractor hired by CONCESSIONAIRE to pay any person or persons referred to in Section 3181 of the California Civil Code or other applicable sections thereof.
29. Defaults and Remedies.
 - a. Default by CONCESSIONAIRE. In the event that:
 - i. CONCESSIONAIRE shall default in the performance or fulfillment of any covenant or condition required by this Permit to be performed or fulfilled by CONCESSIONAIRE and shall fail to cure the default within thirty (30) days following written notice from CITY; or if any default is not curable within thirty (30) days, and CONCESSIONAIRE shall fail to commence to cure the default(s) within said thirty (30) day period and diligently pursue cure to completion;

- ii. CONCESSIONAIRE shall voluntarily file or have involuntarily filed against it any petition under bankruptcy or insolvency act or law; or
- iii. CONCESSIONAIRE shall make a general assignment for the benefit of creditors;

then CITY may, at its option, without further notice or demand upon CONCESSIONAIRE or upon any person claiming rights through CONCESSIONAIRE, immediately terminate this Permit and all rights of CONCESSIONAIRE and of all persons claiming rights through CONCESSIONAIRE to the Concession Sites or to possession thereof, and CITY may then enter and take possession of the Sites and expel CONCESSIONAIRE and all persons so claiming rights thereto. Provided; however, in the event that any default described in Part (1)a. of this section is not curable within thirty (30) days after written notice to CONCESSIONAIRE, CITY shall not terminate this Permit pursuant to the default if CONCESSIONAIRE immediately commences to cure the default and diligently pursues cure to completion. In any event, either party may terminate this Permit without cause by giving ninety (90) days written notice of intent to terminate to the other party.

- b. Abandonment by CONCESSIONAIRE. Even though CONCESSIONAIRE has breached the Permit and abandoned the Concession Site(s), this Permit shall continue in full force and effect for so long as CITY does not terminate this Permit, and CITY may enforce all its rights and remedies under this Permit, including, but not limited to, the right to recover the concession fee as it becomes due, plus damages. For purposes of this section, the following do not constitute a termination of CONCESSIONAIRE'S right to possession or operation:

- i. Acts by CITY of maintenance, preservation, or efforts to negotiate a new Permit.
- ii. The appointment of a receiver upon initiative of CITY to protect CITY'S interest under this Permit.

- 30. Damages. Damages which CITY may recover in the event of default under this Permit include the worth, at the time of the award, of the amount by which the unpaid concession fee for the balance of the term after the date of award or for any shorter period of time specified in this Permit exceeds the amount of concession fee loss for the same period that the CONCESSIONAIRE proved could be reasonably

avoided. The remedies provided by this section are not exclusive and shall be cumulative to all other rights and remedies possessed by CITY, and nothing contained herein shall be construed so as to defeat any other rights or remedies possessed by CITY, and nothing contained herein shall be construed so as to defeat any other rights or remedies to which CITY may be entitled.

31. Compliance with Laws. CONCESSIONAIRE shall, at its sole cost and expense, comply with all the requirements of all rules, regulations, ordinances, laws and direction of governing authorities now in effect or which may hereafter be in effect, which pertain to CONCESSIONAIRE'S occupancy, use, development, and maintenance of the Site.
32. Taxes. CONCESSIONAIRE shall pay, before delinquency, all taxes, assessments, and fees assessed or levied upon CONCESSIONAIRE by reason of the business or other CONCESSIONAIRE activities related to the Sites, including any licenses or permits. CONCESSIONAIRE acknowledges that this Permit may create a possessory interest subject to property taxation, and that CONCESSIONAIRE may be subject to the payment of taxes levied on that interest. CONCESSIONAIRE shall pay all such possessory interest taxes. CONCESSIONAIRE'S payment for taxes, fees, and assessments shall not reduce any payment due CITY under this Permit.
33. Hazardous Substances. CONCESSIONAIRE shall not allow the installation or release of hazardous substances in, on, under, or from the Sites. CONCESSIONAIRE and CONCESSIONAIRE'S agents and contractors shall not store, utilize, or sell any hazardous substance on the Sites without CITY'S prior written consent. For the purposes of this provision, a release shall include but not be limited to any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leeching, dumping, or otherwise disposing of hazardous substances. "Hazardous substances" shall mean those hazardous substances listed by the Environmental Protection Agency in regularly released reports and any other substances incorporated into the State of California's list of hazardous substances. A copy of the presently effective EPA and the State lists is on file in the Office of the City Clerk as Document 769704 and by this reference is incorporated into this Permit.
 - a. Remediation. If any release of a hazardous substance occurs, CONCESSIONAIRE shall pay all costs of remediation and removal of the hazardous substance in accordance with all applicable laws and rules and regulations of governmental authorities.
 - b. Indemnity. CONCESSIONAIRE shall protect, defend, indemnify, and hold CITY harmless from any and all claims, costs, and expenses related to environmental liabilities resulting from CONCESSIONAIRE'S occupancy, use, development, or maintenance of the Sites, including but not limited to costs of environmental assessments, costs of remediation

and removal, any necessary response costs, damages for injury to natural resources or the public, and costs of any health assessment or health effect studies.

- c. Notice of Release. If CONCESSIONAIRE knows or has reasonable cause to believe that any hazardous substance has been released on or beneath the Sites, CONCESSIONAIRE shall give written notice to CITY within three (3) days of receipt of the knowledge or cause for belief. If CONCESSIONAIRE knows or has reasonable cause to believe that such substance is an imminent and substantial danger to public health and safety, CONCESSIONAIRE shall notify CITY immediately upon receipt of such knowledge or belief and shall take all actions necessary to alleviate the danger. CONCESSIONAIRE shall notify CITY immediately of any notice of violation received or initiation of environmental actions or private suits related to the Sites.
 - d. Environmental Assessment. At CITY'S option upon expiration or termination of this Permit, an environmental assessment of the Sites shall be performed by a professional environmental consultant registered with the State of California as a Professional Engineer, Certified Engineering Geologist, or Registered Civil Engineer. The environmental assessment shall be obtained at CONCESSIONAIRE'S sole cost and expense, and shall establish what, if any, hazardous substances exist on, in, or under the Sites, and in what quantities. If any hazardous substances exist in quantities greater than that allowed by CITY, county, state, or federal laws, statutes, ordinances, or regulations, then the environmental assessment shall include a discussion of these substances with recommendations for remediation and removal necessary to effect compliance with those laws or statutes, and estimates of the cost of such remediation or removal. CONCESSIONAIRE shall cause the remediation and/or removal recommended in the environmental assessment such that compliance with environmental law is achieved, and CONCESSIONAIRE shall pay all costs and expenses therefor.
34. Waiver. CITY'S failure to insist upon the strict performance of any of CONCESSIONAIRE'S obligations under this Permit, in one or more instance, shall not be construed as a waiver of any such obligation, and the same shall remain in full force and effect. CITY'S failure to discover a breach of any obligation of this Permit or take prompt action to require the cure of any such breach shall not result in an equitable estoppel, but CITY may at any and all times require the cure of any such breach.
35. Survival. Any obligation which accrues under this Permit prior to its expiration or termination shall survive such expiration or termination.

36. Partial Invalidity. If any term, covenant, condition, or provision of this Permit is found invalid, void, or unenforceable by a court of competent jurisdiction, the remaining provisions will remain in full force and effect.
37. Number and Gender. Words of any gender used in this Permit shall include any other gender, and words in the singular number shall include the plural, when the tense requires.
38. Captions. Section headings and captions shall not be held to define, limit, augment, or describe the scope, content, or intent of any or all parts of this Permit. The numbers of the paragraphs and pages of this Permit may not be consecutive. Such lack of consecutive numbers shall have no effect on the enforceability of this Permit.
39. Entire Permit. This Permit constitutes the entire Permit between the parties and supersedes any and all prior understandings, representations, warranties and Permits between them and pertaining to this Permit and CONCESSIONAIRE'S occupancy, use, development, and maintenance of the Sites. Any modification, alteration, or amendment of this Permit shall be in writing and signed by all the parties hereto.
40. Legal Proceedings. If either party commences legal proceedings to enforce or interpret any right or obligation under this Permit, the prevailing party shall be entitled to an award of costs related thereto, including without limitation reasonable attorney fees and court costs.
41. Notices. Any notice required or permitted to be given under this Permit shall be in writing and may be served personally or delivered by United States mail, postage prepaid, and addressed to CITY or CONCESSIONAIRE, respectively, as follows:

THE CITY OF SAN DIEGO
Real Estate Assets Department
Attention: Director, Real Estate Assets Department
1200 Third Avenue, Ste. 1700 MS 51A
San Diego, CA 92101

42. Governmental Approvals. By entering into this Permit, neither CITY nor CITY'S City Council is obligating itself to any governmental agent, board, commission, or agency with regard to any other discretionary action relating to CONCESSIONAIRE'S occupancy, use, development, or maintenance of the Sites. Discretionary action includes but is not limited to re-zonings, variances, environmental clearances, or any other governmental approvals which may be required for CONCESSIONAIRE'S occupancy, use, development, or maintenance of the Sites.

43. San Diego's Strong Mayor Form of Governance. All references to "City Manager" in this Permit shall be deemed to refer to "the Mayor or his/her designee." This section shall remain in effect for the duration CITY operates under the mayor-council (commonly referred to as "strong mayor") form of governance pursuant to Article XV of the San Diego City Charter.

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44. Authority to Contract. Each individual executing this Permit on behalf of another person or legal entity represents and warrants that he/she is authorized to execute and deliver this Permit on behalf of such person or entity in accordance with duly adopted resolutions or other authorizing actions which are necessary and proper and under such legal entity's articles, charter, bylaws, or other written rules of conduct or governing Permit, and that this Permit is binding upon such person or entity in accordance with its terms. Each person executing this Permit on behalf of another person or legal entity shall provide CITY with evidence, satisfactory to CITY, that such authority is valid.

IN WITNESS WHEREOF, this Permit is executed to be effective as of the Effective Date.

Date: _____

THE CITY OF SAN DIEGO, a California
municipal corporation

BY: _____

James Barwick, Director
Real Estate Assets Department

Date: _____

BY: _____

Name: _____

Title: _____

APPROVED AS TO FORM AND LEGALITY:

Effective Date: _____

MICHAEL J. AGUIRRE, City Attorney

BY: _____

Deputy City Attorney

EXHIBIT A
Operating Plan

EXHIBIT
Kayak Concession Requirements