



**CITY AND COUNTY OF SAN FRANCISCO
LONDON N. BREED, MAYOR**

MEMORANDUM OF UNDERSTANDING

MOU M-16811

BY AND BETWEEN

**THE CITY AND COUNTY OF SAN FRANCISCO
OPERATING BY AND THROUGH THE
SAN FRANCISCO PORT COMMISSION**

AND

THE SAN FRANCISCO RECREATION AND PARK COMMISSION

**ELAINE FORBES
EXECUTIVE DIRECTOR**

SAN FRANCISCO PORT COMMISSION

**KIMBERLY BRANDON, PRESIDENT
WILLIE ADAMS, VICE PRESIDENT
JOHN BURTON, COMMISSIONER
GAIL GILMAN, COMMISSIONER
DOREEN WOO HO, COMMISSIONER**

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MEMORANDUM OF UNDERSTANDING

THIS MEMORANDUM OF UNDERSTANDING ("MOU") is dated _____, 2021, for reference purposes only, by and between the Recreation and Park Department ("RPD"), a department of the City and County of San Francisco ("City"), and the San Francisco Port Commission ("Port"), an agency of the City.

RECITALS

A. Under the Burton Act (Chapter 1333 of Statutes 1968, as amended) and San Francisco Charter Section 4.114, the administration and control of real property transferred to the City of San Francisco by the State of California pursuant to the legislative trust grant, including the area encompassing the real property which is the subject of this MOU, is vested in the Port.

B. RPD, which has the jurisdiction over certain real property in Aquatic Park commonly known as 502 and 504 Jefferson Street, leases the building (the "Clubhouse") and the associated launching dock within its jurisdiction at such property to the Dolphin Swimming and Boating Club ("Dolphin Club") to provide access to the waters of San Francisco Bay to their club members and to the public, as a public benefit, during certain hours.

C. The Clubhouse launching dock extends into Port's jurisdictional area.

D. The Dolphin Club keeps the Clubhouse and associated dock open to and visited by the general public for access to the bay for a reasonable daily use fee and the Dolphin Club also hosts internationally known swimming and rowing events both of which provide a valuable public benefit.

E. Port is willing to allow RPD to sublease that portion of the launching dock and the underlying land and water that is within Port jurisdiction to the Dolphin Club for similar uses, and to give RPD a license, and allow RPD to grant an access license to each Clubhouse tenant and licensee, on the terms and conditions described in this MOU.

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

AGREEMENT

1. RECITALS

The foregoing recitals are true and correct and are incorporated herein by this reference.

2. PREMISES.

The "Premises" consists approximately of 1,459 square feet of submerged lands within Port's jurisdiction near the intersection of Tonquin Street and Jefferson Street as more particularly described on Exhibit A attached hereto.

RPD acknowledges and agrees that it is familiar with the Premises, accepts the Premises in its "as is" condition, without any improvements or alterations by Port, without representation or warranty of any kind, and subject to all applicable laws governing its use, occupancy and possession. RPD acknowledges that it has received and reviewed the FEMA disclosure notice attached as *Schedule 1*. RPD acknowledges and agrees that it has investigated and inspected the condition of the Premises and the suitability of the Premises for RPD's intended use. RPD acknowledges and agrees that Port has not made, and Port hereby disclaims, any representations

or warranties, express or implied, concerning the rentable area of the Premises, the physical or environmental condition of the Premises, the present or future suitability of the Premises for RPD's intended use, accessibility of the Premises or any other matter whatsoever relating to the Premises, including, without limitation, any implied warranties of merchantability or fitness for a particular purpose. RPD must disclose the information contained in this Section to any proposed subtenant.

3. EFFECTIVE DATE

The "Effective Date" of this MOU shall be the later date to occur of the full execution of (i) this MOU and (ii) a lease between RPD and Dolphin Club that grants Dolphin Club a sublease for the Premises.

4. TERM

The "Term" of this MOU shall begin on the Effective Date and continue for twenty-five (25) years unless terminated as provided herein; provided, however, that if Dolphin Club exercises its extension option under its sublease for the Premises with RPD, the Term shall be extended through the forty-ninth (49th) anniversary of the Effective Date, provided that RPD submits a written notice to Port of Dolphin Club's execution of the extension option. Following the expiration of the Term, this MOU shall continue on a month-to-month basis at which point either party may terminate the MOU with 30-days' prior written notice. If the Dolphin Club sublease for the Premises is terminated, RPD shall have the right to terminate this MOU with respect to the Premises by delivering written notice of such termination to Port.

5. NO USE FEE

Use of the Premises by RPD will enliven the waterfront by attracting people to the waterfront and raising awareness of the waterfront and its benefits and amenities at no cost to Port. Given the existing RPD lease with Dolphin Club, there is no other practical user of the Premises. In lieu of paying a use fee and as a material consideration for the Port entering into this MOU, RPD shall ensure that the Premises are available for public use on the days the Clubhouse is open to the public under the terms of the RPD lease with Dolphin Club.

6. PERMITTED USE

RPD shall have the right to sublease the Premises to Dolphin Club for the provision of public access to the waters of San Francisco Bay and for incidental directly related uses and for no other purpose (collectively, the "Permitted Use").

7. RESTRICTIONS ON USE; COMPLIANCE WITH LAW

RPD shall not use or permit the Premises, or any part thereof, to be used for any purposes other than the purposes set forth in Paragraph 6 of this MOU. RPD agrees not to make any material improvements or alterations to the Premises without the prior written consent of Port (which consent shall not be unreasonably withheld) as well as obtaining any necessary Port regulatory permits. Repairs, replacement of existing portions of the Premises with similar materials or improvements that do not change the functionality or dimensions of the Premises will not require Port consent.

RPD shall not perform any act which will cause a cancellation of any insurance policy covering the Premises or any part thereof. RPD, at RPD's expense, shall comply with all laws, regulations and requirements of any federal, state, and local government authority (including Port and RPD), now in force or which may hereafter be in force, which shall impose any duty

upon Port or RPD necessitated solely by use, occupation or alteration of the Premises under this MOU, except for any such laws that impose a duty upon Port arising from the condition of the Premises prior to RPD's use of the Premises.

8. MAINTENANCE; SURRENDER OF PREMISES

The parties acknowledge that the Port does not and is not required to provide maintenance, repairs or security for the Premises. RPD will be strictly responsible for the security, maintenance and repair of the Premises, including without limitation any improvements that RPD might choose to make to the Premises and for any repairs to the Premises that might be necessitated by RPD's or Dolphin Club's use of the Premises, other than normal wear and tear or conditions not caused by RPD or Dolphin Club. At the expiration or any termination of this MOU, RPD shall surrender the Premises in at least as good condition as when received (subject to any change in conditions not caused by RPD or Dolphin Club), clean and free of any items stored on the Premises by RPD and shall repair any damage to the Premises occasioned by RPD's use.

Nothing contained herein shall require either RPD or the Port to repair or replace the Premises as a result of damage caused by acts of war, earthquake, tidal wave or other acts of God, except that if the Premises are damaged by fire or other casualty, then RPD shall require its tenant at the Premises to repair the same provided that (i) funds for such repairs are available for such purpose and (ii) such repairs can be made within 210 days after the date of such damage.

9. INSURANCE

(a) RPD shall require each Clubhouse tenant and licensee and any agent, contractor or subcontractor they hire in connection with their respective use of the Premises (each, an "Operator") to secure, the insurance coverage specified below as applicable.

(i) General Liability Insurance. Comprehensive or commercial general liability insurance, with limits not less than One Million Dollars (\$1,000,000.00) each occurrence combined single limit for bodily injury and property damage, including coverages for contractual liability, independent contractors, broad form property damage, personal injury, products and completed operations, fire damage and legal liability with limits not less than Two Hundred Fifty Thousand Dollars (\$250,000.00) and explosion, collapse and underground (XCU) coverage during any activity on or alteration or improvement to the Premises with risk of explosion, collapse, or underground hazards.

(ii) Automobile Liability Insurance. Comprehensive or business automobile liability insurance with limits not less than One Million Dollars (\$1,000,000.00) each occurrence combined single limit for bodily injury and property damage, including coverages for owned and hired vehicles and for employer's non-ownership liability, which insurance shall be required if any automobiles or any other motor vehicles are operated in connection the Permitted Use or with activities on the Premises. This provision shall not apply to an Operator so long as it does not own any automobiles and has no employee using an automobile for such Operator's business.

(iii) Worker's Compensation; Employer's Liability; Jones Act; U.S. Longshore and Harborworker's Act Insurance. Worker's Compensation Insurance, U.S. Longshore and Harborworker's Act Insurance and Jones Act Insurance with Employer's Liability limit not less than One Million Dollars (\$1,000,000.00) for each accident, injury or illness, on employees eligible for each. In the event an Operator is self-insured for the insurance required pursuant to this Section 10(a)(iii), it shall furnish to Port a current Certificate of Permission to

Self-Insure signed by the Department of Industrial Relations, Administration of Self-Insurance, Sacramento, California.

(iv) Personal Property Insurance. An Operator, at its sole cost and expense, shall procure and maintain on all of its personal property and improvements and alterations, in, on, or about the Premises, property insurance on an all risk form, excluding earthquake and flood, in an amount not less than full replacement value or a stated value, at Operator's sole discretion, for the replacement of Operator's personal property and improvements and alterations. The proceeds from any such policy shall be used by the Operator for the replacement of its personal property. Port shall have no responsibility or obligation to maintain insurance or replace such property or any improvements regardless of cause of loss.

(v) Watercraft Liability Insurance. If an Operator owns or operates watercraft in connection with the Premises, it shall, at its sole cost and expense, procure and maintain protection and indemnity insurance or other form of watercraft liability insurance acceptable to Port, with limits not less than Five Million Dollars (\$5,000,000) per each occurrence, including coverages for owned and non-owned watercraft; but this insurance shall be required only if the Operator owns or operates any watercraft under the provisions of the relevant RPD contract or sublease; provided, however, that, in the event the Operator receives any goods at the Premises from any watercraft, then the Operator shall require that the user of such watercraft maintain the insurance set forth in this Subsection. Notwithstanding anything in this provision to the contrary, watercraft liability insurance limits shall be not less than \$1,000,000 for owned watercraft so long as such owned watercraft are wooden row boats, kayaks, sculls and rubber-inflatable boats (e.g., zodiacs and avons).

(vi) Vessel Pollution Liability Insurance. Any Operator that owns or operates watercraft in connection with the Premises must, at its sole cost and expense, procure and maintain Vessel Pollution Liability Insurance with combined single limit of Two Million Dollars (\$2,000,000.00) each claim, Five Million Dollars (\$5,000,000.00) aggregate, and with coverage to include legal liability arising from the sudden and accidental release of pollutants, and no less than a one-year extended reporting period. Notwithstanding anything in this provision to the contrary, watercraft liability insurance limits shall be not less than \$1,000,000 for owned watercraft so long as such owned watercraft are wooden row boats, kayaks, sculls and rubber-inflatable boats (e.g., zodiacs and avons).

(vii) Hull and Machinery Protection and Indemnity Insurance. Any Operator that owns or operates watercraft in connection with the Premises must, at its sole cost and expense, procure and maintain Hull and Machinery Protection and Indemnity Insurance in a form and with limited acceptable to Port.

(viii) Special Events/Participants. If an Operator holds special events at the Premises, such Operator, at its sole cost and expense, shall procure and maintain Special Events/Participants Liability (GL) coverage insurance acceptable to Port, with limits not less than One Million Dollars (\$1,000,000.00).

(ix) Other Coverage. Such other insurance or different coverage amounts as is required by applicable law or as is generally required by commercial owners of facilities similar in size, character, age and location as the Premises, as may change from time to time, or as may be required by the City's Risk Manager.

(b) Claims-Made Policies. If any of the insurance required in this Section is provided under a claims-made form of policy, the insured entity shall maintain such coverage continuously throughout the Term and without lapse for a period of three (3) years beyond the termination of the relevant RPD contract or sublease, to the effect that should occurrences during the Term give rise to claims made after termination of the relevant RPD contract or sublease, such claims shall be covered by such claims-made policies.

(c) **Annual Aggregate Limits.** If any of the insurance required in this Section is provided under a form of coverage which includes an annual aggregate limit or provides that claims investigation or legal defense costs be included in such annual aggregate limit, such annual aggregate limit shall be double the occurrence limits specified herein.

(d) **Payment of Premiums.** The insured entity shall pay the premiums for maintaining all required insurance.

(e) **Waiver of Subrogation Rights.** RPD is responsible for performing its obligations under this MOU, but is not required to carry any third party insurance for the Premises. Before entering into any sublease of the Premises with any party, RPD shall require such party to (i) waive any right of recovery against City, including but not limited to the Port and RPD, for any loss or damage sustained by such party with respect to the Premises or any portion thereof or the contents of the same or any operation therein, whether or not such loss is caused by the fault or negligence of the City, to the extent such loss or damage is covered by insurance which such party is required to purchase under such sublease or license or is actually covered by insurance obtained by such party, and (ii) to agree to cause its insurers to issue appropriate waiver of subrogation rights endorsements to all policies relating to the Premises; provided, the failure to obtain any such endorsement shall not affect the above waiver.

(f) **General Insurance Matters.**

(i) All liability insurance policies required to be maintained by hereunder shall contain a cross-liability clause, shall name as additional insureds the "**CITY AND COUNTY OF SAN FRANCISCO AND THE SAN FRANCISCO PORT COMMISSION AND THEIR OFFICERS, DIRECTORS, EMPLOYEES AND AGENTS,**" shall be primary to any other insurance available to the additional insureds with respect to claims arising under this MOU, and shall provide that such insurance applies separately to each insured against whom complaint is made or suit is brought except with respect to the limits of the company's liability.

(ii) All insurance policies required to be maintained by any entity as required herein shall be issued by an insurance company or companies reasonably acceptable to Port with an AM Best rating of not less than A-VIII and authorized to do business in the State of California. RPD's compliance with this Section shall in no way relieve or decrease RPD's liability under this MOU.

(iii) All insurance policies required to be maintained by any entity hereunder shall provide for thirty (30) days prior written notice of cancellation for any reason, intended non-renewal, or reduction in coverage to RPD and Port. Such notice shall be given in accordance with the notice provisions of Section 15.

(iv) RPD shall deliver to Port certificates of insurance and additional insured policy endorsements in a form satisfactory to Port evidencing the coverages required herein, together with evidence of payment of premiums, on or before the commencement date of any contractor sublease, and upon renewal of each policy not less than thirty (30) days before expiration of the term of the policy. RPD shall, upon Port's request, promptly furnish Port with a complete copy of any insurance policy required hereunder.

10. CLAIMS AND DAMAGES

Because Port will not be receiving any fees for the use of the Premises and because of certain funding restrictions imposed on Port funds due to public trust restraints, it is the understanding of the parties that Port shall not expend any funds due to or on connection with

RPD's use of the Premises. Therefore, RPD agrees to be responsible or cause its tenants, subtenants, or licensees to be responsible for all costs associated with all claims, damages, liabilities or losses which arise (i) as a result of the handling of Hazardous Materials on or about the Premises by RPD, its agents, contractors, tenants, subtenants, licensees, or invitees and (ii) out of any injuries or death of any person or damage of any property occurring in, on or about the Premises from any cause, which arise as a result of RPD's acts or omissions or its tenants, subtenants, or licensees. The foregoing obligation of RPD shall survive the expiration or termination of this MOU.

11. PRESENCE OF HAZARDOUS MATERIALS

California law requires landlords to disclose to tenants the presence or potential presence of certain Hazardous Materials. Accordingly, RPD is hereby advised that Hazardous Materials (as herein defined) may be present on or near the Premises, including, but not limited to vehicle fluids, janitorial products, tobacco smoke, and building materials containing chemicals, such as lead and formaldehyde. Further, the Hazardous Materials listed in the reports listed in *Schedule 2* are present on the property, copies of which have been delivered to or made available to RPD. By execution of this MOU, RPD acknowledges that the notice set forth in this section satisfies the requirements of California Health and Safety Code Section 25359.7 and related Laws. RPD must disclose the information contained in this Section 12 to any subtenant, licensee, transferee, or assignee of RPD's interest in this MOU. RPD also acknowledges its own obligations pursuant to California Health and Safety Code Section 25359.7 as well as the penalties that apply for failure to meet such obligations.

12. DEFAULT BY RPD

The occurrence of any one or more of the following events shall constitute a default by RPD:

(a) Failure to use the Premises solely for the Permitted Use solely for the Access Use, as determined by Port in its sole and absolute discretion if such failure continues for a period of thirty (30) days following written notice from Port; or

(b) Failure to perform any other provision of this MOU if the failure to perform is not cured within ninety (90) days after Port has given written notice to RPD. If the default cannot reasonably be cured within 90 days, RPD shall not be in default of this MOU if RPD commences to cure the default within such ninety (90) day period and diligently and in good faith continues to cure the default.

13. PORT'S REMEDIES

Upon the occurrence of default by RPD with respect to the Premises, Port may at its option, without further notice or demand of any kind to RPD or to any other person, terminate RPD's right to possession of the Premises.

14. ENTRY BY PORT

The Port may enter the Premises at any reasonable time, for the purpose of inspection, inventory or repairs, and when otherwise reasonably necessary for the protection of the Port's interests. Port shall not be liable in any manner, and RPD hereby waives, and shall cause Dolphin Club to waive, any claim for damages, for any inconvenience, disturbance, loss of business, nuisance, or other damage, arising out of Port's entry onto the Premises or performance of any necessary or required work on the Premises, or on account of bringing necessary materials, supplies and equipment into or through the Premises during the course thereof, except damage resulting solely from the willful misconduct of Port or its authorized representatives.

15. NOTICE

Any notice given under this MOU shall be effective only if in writing and given by delivering the notice in person or by sending it first-class mail or certified mail with a return receipt requested or by overnight courier return receipt requested, with postage prepaid, at the following addresses, or at such other addresses as either the Port or RPD may designate by notice as its new address:

Address for Port: Deputy Director, Real Estate
Port of San Francisco
Pier One
San Francisco, CA 94111

Telephone No: (415) 274-0501
Fax No: (415) 274-0578

Address for RPD: Dana Ketcham
Director of Property
San Francisco Recreation and Park Department
McLaren Lodge
San Francisco, CA 94117

Telephone No: (415) 831-6868
Fax No: (415) 831-2099

Any notice hereunder shall be deemed to have been given two (2) days after the date when it is mailed if sent by first-class or certified mail, one day after the date it is mailed, if sent by overnight courier, or upon the date personal delivery is made. For convenience of the parties, copies of notices may also be given by email, facsimile or telephone to the address or numbers set forth above or such other address or number as may be provided from time to time; however, neither the Port nor RPD may give official or binding notice by email, telephone or facsimile.

16. MINERAL RESERVATION

The State of California, pursuant to Section 2 of Chapter 1333 of the Statutes of 1968, as amended, has reserved all subsurface mineral deposits, including oil and gas deposits, on or underlying the Premises. In accordance with the provisions of said Statutes, Port and RPD shall and hereby do grant to the State of California the right to explore, drill for and extract said subsurface minerals, including oil and gas deposits, from such areas.

In no event shall Port be liable to RPD for any claims arising from such exploration or drilling, nor shall such exploration or drilling constitute an actual or constructive eviction of RPD, or otherwise relieve RPD from any of its obligations under this MOU.

17. UTILITIES

RPD or its subtenants shall be responsible for the actual costs for electrical and water service to the Premises and waive any claims against the Port for such service.

18. ASSIGNMENT AND SUBLEASING

Port hereby consents to the anticipated sublease between RPD and Dolphin Club for the Premises subject to all of the terms and conditions of this MOU, including without limitation the

disclosures, insurance provisions and waiver of claims. If RPD wishes to sublease the Premises to any other party, it must first obtain Port's written consent, which shall not be unreasonably withheld.

19. ENTIRE AGREEMENT

This MOU (including attached exhibits, if any) contains the entire understanding between the parties with respect to the subject matter hereof.

[REMAINDER OF PAGE LEFT BLANK]

IN WITNESS WHEREOF, the parties have caused this MOU to be executed as of the date written below.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation operating by and through the SAN FRANCISCO PORT COMMISSION

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation operating by and through the SAN FRANCISCO RECREATION AND PARK DEPARTMENT

By: _____
ELAINE FORBES
Executive Director
Port of San Francisco

By: _____
PHIL GINSBURG
General Manager
San Francisco Recreation and Park Department

Date Signed: _____

Date Signed: _____

REVIEWED:
DENNIS J. HERRERA, City Attorney

By: _____
Rona H. Sandler
Deputy City Attorney

Recreation and Park Commission Resolution No.
Port Commission Resolution No.

MOU Prepared By: _____ Port Property Manager _____ (initial)

EXHIBIT A
Map of Premises

SCHEDULE 1
FEMA Notice

SCHEDULE 2
Hazardous Materials Disclosure