

RESOLUTION NO. 18-31

Resolution Of The City Council Of The City Of Emeryville Approving The Second Amendment To The Second Amended And Restated Agreement Of Ground Lease By And Between The City Of Emeryville And Safe Harbor Marinas Emeryville, LLC And Authorizing The City Manager To Execute The Agreement

WHEREAS, the City of Emeryville owns a marina, which consists of certain real property and improvements, commonly referred to as the "Marina"; and

WHEREAS, in 2008, the City entered into a Second Amended and Restated Agreement of Ground Lease with Emeryville Marina, LLC, which has been subsequently amended, and assigned to Safe Harbor Marinas Emeryville, LLC; and

WHEREAS, since 1988, the City has had a third party operate a sport fishing concession at the Marina in which a third party scheduled fishing trips for the sport fishing operators at the Marina and remitted business tax from the sport fishing boat operators to the City along with other services; and

WHEREAS, the Parties desire to amend their rights and obligations as set forth in the Lease and the First Amendment to accommodate a sport fishing concession at the Marina consistent with the Parties' practice; and therefore be it

RESOLVED, the City Council of the City of Emeryville approves the Second Amendment to the Second Amended and Restated Agreement of Ground Lease by and Between the City of Emeryville and Safe Harbor Marinas Emeryville, LLC and authorizes the City Manager to execute the agreement, attached hereto as Attachment A, on behalf of the City.

ADOPTED, by the City Council of the City of Emeryville at a regular meeting held Tuesday, March 20, 2018, by the following vote:

AYES:	5	Mayor Bauters, Vice Mayor Medina and Council Members Donahue, Martinez and Patz
NOES:	0	
ABSTAIN:	0	
ABSENT:	0	

MAYOR

ATTEST:

APPROVED AS TO FORM:

CITY CLERK

CITY ATTORNEY

**SECOND AMENDMENT TO THE SECOND AMENDED AND RESTATED
AGREEMENT OF GROUND LEASE BY AND BETWEEN THE CITY OF
EMERYVILLE AND SAFE HARBOR MARINAS EMERYVILLE, LLC**

This Second Amendment to Second Amended and Restated Agreement of Ground Lease, dated _____, 2017 ("**Second Amendment**"), is entered into by and between the City of Emeryville, a municipal corporation ("**Landlord**") and SHM Emeryville, LLC, a Delaware, limited liability company, and successor-in-interest to Emeryville Marina, LLC, a Delaware limited liability company, and to Westrec Marina Management, Inc. a California corporation ("**Tenant**").

RECITALS

- A. Landlord and Tenant previously entered into that certain Second Amended and Restated Agreement of Ground Lease ("**Lease**") dated November 14, 2008, which describes the parties' rights and obligations regarding the use and operations of and improvements to the Marina;
- B. Landlord and Tenant previously entered into that certain First Amendment to the Second Amended and Restated Agreement of Ground Lease ("**First Amendment**") dated December 21, 2009, in which the parties amend certain terms and obligations of the Lease;
- C. Since the date of the Lease, through the present, the Tenant has allowed a sport fishing concession at the Marina; and
- D. The Parties desire to amend their rights and obligations as set forth in the Lease and the First Amendment to accommodate a sport fishing concession at the Marina consistent with the Parties' practice.

NOW, THEREFORE, Tenant and Landlord hereby agree as follows:

1. Section 33.05 Sport Fishing Concession Agreement. Section 33.05 of the Lease is hereby amended and restated in its entirety as follows:

Tenant hereby covenants that Tenant shall make good faith efforts to cooperate with Landlord to allow for the continuation of the sport fishing concession operation at the Marina. Such good faith efforts include, and is not limited to: 1) executing a commercial lease or other substantially similar document that is mutually agreed upon by Tenant and the sport fishing concessionaire selected by Landlord, which allows the sport fishing concessionaire to operate at the Marina, but subject to Tenant's approval, which may only be reasonably withheld based on substantial evidence;; 2) unless prohibited by applicable law or regulation, prohibiting any other sport fishing concessionaire to operate at the Marina unless Tenant has obtained Landlord's written permission prior to allowing the other sport fishing concessionaire, and 3) unless prohibited by applicable law or regulation, requiring all sport fishing operators to book passengers through the sport fishing concessionaire(s) selected or approved by the Landlord, but subject to Tenant's approval, which may only be reasonably withheld based on substantial evidence.


2. No Other Changes. Except as amended by this Second Amendment, all other provisions of the Lease and the First Amendment shall continue in full force and effect and in accordance with their respective terms. Subject to the foregoing, if any provision of any of the Lease or First Amendment conflicts with the terms of this Second Amendment, then the provisions of this Second Amendment shall control.

IN WITNESS WHEREOF, Landlord and Tenant have executed this Second Amendment on the date the City executes this Second Amendment.

LANDLORD
CITY OF EMERYVILLE

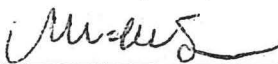
By: CAROLYN LEHR
Its: City Manager

Approved as to Form:



Michael Guina, City Attorney

TENANT
SHM Emeryville, LLC



By: Michelle Shadrows
Its: General Manager