



Memorandum No: 21-034

City Attorney's Office

To: Honorable Mayor and Commissioners

From: Alain E. Boileau, City Attorney

A handwritten signature in blue ink, appearing to be "AB", written over the name Alain E. Boileau.

Date: March 10, 2021

RE: Proposed Amended and Restated Master Lease and Phased Lease Submitted for Review by Bahia Mar and Summary of Current Lease

I have been requested to provide available detail and analysis pertaining to the Amended and Restated Master Lease and Phased Lease Agreement regarding the Bahia Mar property, submitted and proposed by Rahn Bahia Mar LLC ("Rahn Bahia" or Lessee) to the City Manager and City Attorney for review, as well as regarding the existing Amended and Restated Lease. At the outset, it must be reiterated and noted that, except for the existing Lease: (1) the documents are draft documents submitted by Rahn Bahia, whose review by the City Attorney's Office is not complete;¹ (2) the documents are thus far only being reviewed for purposes of determining what is being proposed, and for legal sufficiency and commercial reasonableness, and the City Attorney's Office has not approved and has, and is not herein, rendering any opinion or recommendations regarding their legal sufficiency; (3) any financial and business terms contained therein have not been reviewed or analyzed, and remain to be considered and negotiated, if desired, by City Management and the City Commission. The following represents the City Attorney's Office understanding and analysis of the key terms of the aforementioned documents:

Proposed Amended and Restated Master Lease

As is the case currently with the existing Lease with Rahn Bahia, the proposed Amended and Restated Master Lease would cover the entirety of the Bahia Mar property, specifically, all

¹ In addition to the continuing review, the documents submitted reference the existence or need for a Master Declaration, which has not been submitted to our office for review. Typically, a Master Declaration is created to establish a governing structure that manages the relationships, rights, and remedies between all of the various property rights existing between the parties on a particular property and within the entire Bahia Mar complex, to provide for maintenance of the common areas, to restrict and/or permit certain uses, to create certain rights, such as easements for support, access and utilities, lien rights, and other legal rights.

of the Bahia Mar Plat, lying west of the west right-of-way line of Seabreeze Boulevard, less Parcel 1 and less the North 80 feet of Parcel 34. Additionally, Rahn Bahia would have the right to use the Pedestrian Bridge according to the existing Pedestrian Bridge agreement.² The proposed Amended and Restated Master Lease also proposes the following key terms:

- An Initial Term of fifty (50) years, with an additional term of fifty (50) years,³ provided no Event of Default has occurred and the Lessee has applied for a building permit to construct the Promenade (as defined in Article 2 and further described in Article 38, Section 38.2) prior to the end of the seventh lease year of the Initial Term and completes the Promenade within the Initial Term. (Article 4).
- With regards to Rent, the Lessee proposes paying: (1) Base Rent (in quarterly installments) and (2) Percentage Sum of Gross Revenue (Hotel, Marina, and Retail/Office Gross Revenue) annually less Base Rent previously paid. From the date of the proposed Lease until September 30, 2065, the Base Rent would be \$600,000. Thereafter, the Base Rent would increase to \$750,000. The Applicable Percentage of Gross Revenue ranges from 4.25% down to 3.75% during the construction period commencing on the Start Date (date of commencement of the first to occur- construction of residential building or new hotel), and up to 4.25% upon the Completion Date (12 years from the Start Date) (as to Hotel Gross Revenue), a maximum of 5.75% (as to Marina Gross Revenue) and a maximum of 5% (as to Retail/Office Gross Revenue). The Lessee will be required to provide a detailed statement of Gross Revenue and will maintain the records for 5 years. Additional Rent would be in the form of recoupment of costs related to self-help actions engaged in by the City, if warranted. The Lessee is also responsible for all real property taxes, sales taxes, assessments and utility charges. (Article 27).
- The Lessee is responsible for all operating expenses. (Article 13). (*same as current lease*).
- Lessee would be required to set aside funds in a Capital Improvement Reserve Account (CIRA) to fund future Capital Improvements as necessary. However, Lessee has Reserve Credits in the amount of \$38,090,007 and so no funds are currently paid into CIRA. (Article 37). (*same as current lease*).

² As will be discussed further herein, as Phased Lease Agreements are created, the Master Lease will be adjusted to remove the respective phased parcels from the legal description therein.

³ See attached City Attorney Memorandum No. 10-0269 regarding the Bahia Mar Complex and Charter Section 8.06, with which I concur.

- The Bahia Mar property would be permitted to be used for hotel, and marina and resort complex, retail, office, multifamily residential dwelling units, restaurants, cocktail lounges, liquor package store, food store, yacht brokerage offices, convention hall, retail stores, marine stores, marine services station, charter boat and sightseeing facilities, the boat show and other kindred and similar businesses and other uses permitted under the zoning code. Illegal activity, gambling or live adult entertainment shall not be permitted. (Article 21).
- Includes detailed and extensive maintenance requirements including hotel and marina standards. (Article 18).
- The Lessee would have permission to “make improvements and rehabilitate the Premises” with no City consent required. (Article 5.1).
- The Lessee would have the right to construct the “Proposed Improvements” according to the Site Plan and Approved Plan, with no requirement to complete the Proposed Improvements within a certain period of time (Article 11, Section 11.1.6). Any amendments to the Site Plan or Permitted Changes would require the consent of the City Manager who has a certain period of time to grant or deny consent. Failure to approve or deny during the time period allowed would be deemed consent if the proper notice is given by the Lessee. The City Manager also has the authority to approve the Promenade. The Lessee would have to meet certain construction standards and provide evidence of funding for projects in excess of \$10,000,000. (Article 11).
- Allows for renovation or new construction for office/retail, commercial, residential buildings, garages and other improvements, including demolition of existing improvements, with the City Manager having discretion to approve Plans and Permitted Changes.
- Assignment of the leasehold interest would be prohibited without City Commission or City Manager consent except that a restructuring of the Lessee would be permitted and Phased Lease Agreements would be permitted. Failure to respond to a request for approval of assignment of leasehold interest within the required period of time shall be deemed consent. The assigning party (i.e. Rahn Bahia) of a leasehold interest shall be released from matters which arise after the effective date of the assignment but is still liable for matters which arose prior to the effective date. In addition, subleases shall not relieve Rahn Bahia of its obligations under the Master Lease. Consent would not be required for subleases or for grants of licenses or concessions or for subleases to affiliates of the Lessee (except the City has the right to require Fair Market Rent) or leasehold or for sub-leasehold or for sub-sub-leasehold mortgages (*unless the City is being asked to sign an SNDA in which case the City must approve the sublease or sub-sublease according to the standards in Article 22, Sections 22.3 and 22.4 as well*). In

the event the Master Lease is terminated, the recognized lease would remain in effect. (Article 22)

- The City would be required to subject its fee simple interest to a Master Declaration, with the City being required to join and consent to any required easements.⁴ The City Manager would have the right to approve the Master Declaration. (Article 11 Section 11.1.5 and Article 38, Section 38.2).
- The Lessee would have the option to enter into Phased Leases to “facilitate the development and operation of the various components of the Bahia Mar Complex in phases . . .” When requested by the Lessee, the City, the Lessee, and the Phased Lessee would have sixty (60) days (or longer) to sign a Phased Lease Agreement. As a result of such a lease, an allocation of the Base Rent and Additional Rent must be made to the Phased Lease based upon “relative values or in any other fair and equitable manner.” As a further result, the Lessee under the Master Lease would be released from any obligations to pay the Base Rent or Additional Rent or to maintain insurance related to the Phased Parcel. In essence, separate independent leases are being created. (Article 22, Section 22.6).
- The Lessee seeks the delegation of authority to the City Manager to make certain binding decisions and determinations under the Lease, including but not limited to, decisions regarding right to determine rent and Fair Market Value, right or obligation to approve subleases and sub-subleases, right or obligation to execute, amend, and release easements, restrictive covenants, and Master Declaration, and the approval of any assignment of the Master Lease Agreement. (Article 38, Section 38.12).
- City would be required to consent to Subordination Non-Disturbance and Attornment Agreements (SNDA) with lenders on the Lessee’s leasehold interest and the leasehold interest of sub-lessees and sub-sublessees. Further the leasehold interest of the parties would not be cross collateralized with non-Bahia Mar real estate. The SNDA holder would have certain rights under the proposed lease (e.g. it would have the right to extend the term of the Lease in the event the Lessee, sub-lessee or sub-sublessee fail to do so). (Article 16).⁵
- The City would be entitled to use two (2) boat slips, from time to time, for patrol and fire boats, without charge, except during the Boat Show. (Article 33).

⁴ It must be ensured that the fee simple interest of the City is not conveyed and can never be subject to foreclosure or any lien rights.

⁵ Again, it must be ensured that the fee simple interest of the City is not conveyed and can never be subject to foreclosure or any lien rights.

- The name “Bahia Mar” would belong to the Lessee but the City would have the right to use it in its advertising as a publicly owned facility. (Article 23) (*same as current lease*).
- The City would be responsible for maintaining the pump station and force mains. (Article 32) (*same as current lease*).
- If more than six (6) special events are held each month in the Promenade, the City Manager would be required to consent.

Proposed Phased Lease Agreements

Due to the anticipated creation and development of condominiums on the property, to be built in phases, the Lessee has proposed the creation of Phased Lease Agreements, which would be required for each condominium building and condominium association created on the property. In other words, as condominium buildings are proposed to be built on the property, the land (and portions of the building consisting of the air right parcels above)⁶ would be “carved-out” and removed from the Master Lease, and thereafter governed by a separate Phased Lease Agreement. As a result, if for example 5 buildings are built, the City would be a party to five separate Phased Lease Agreements, in addition to the Amended and Restated Master Lease. The proposed Phased Lease Agreement also proposes the following key terms:

- The Landlord or Lessor would be the City, while initially the Lessee/Tenant would be the Developer (To Be Determined) and subsequently, after creation of the condominium, the condominium association (TBD Lessee).
- An Initial Term of fifty (50) years, with an additional term of fifty (50) years, provided no Event of Default has occurred and a shell Certificate of Occupancy has been obtained for the Phased Building (as defined therein).
- The premises encompassed by the Phased Lease would be the underlying land of the building pad, plus five (5) feet extending from and surrounding the building pad, plus air rights (an elevation specified above the ground surface as to portions of the Phased Building that overhangs beyond the Base Portion.).
- The Phased Lease would commence and occur on the date the Master Lessee and TBD Lessee notify the City of the commencement date or some other date to be determined.

⁶ Although the City Attorney’s Office remains uncertain, it appears the Phased Lease contemplates a “Commercial Space” which would occupy the space between the ground and a certain elevation above the ground. The condominium and the Residential Units would presumably be located in the air parcel above the Commercial Units.

- Provides the TBD Lessee the right to construct the Proposed Improvements, with no requirement to complete the Proposed Improvements within a certain period of time. (Article 11).
- Allows for the renovation or new construction of office/retail, commercial, residential buildings, garages, and other improvements, including demolition of existing improvements. The City Manager would have the discretion to approve Plans and Permitted Changes.
- The Phased Lease property would be permitted to be used for retail, office, residential dwelling units, cocktail lounge, liquor package store, food store, yacht brokerage offices, convention hall, retail stores, marine stores, marine services station, offices, the boat show and other kindred and similar businesses and other uses permitted under the zoning code. No illegal activity, gambling or live adult entertainment would be permitted.
- The TBD Lessee would have the right to construct the "Proposed Improvements" according to the Site Plan, however, no material changes can be made without the City Manager's consent. Unit owners would be permitted to make changes to their respective condominium units without the City's consent.
- The TBD Lessee would be responsible for all Operating Expenses until the condominium association is created. (Article 13).
- The TBD Lessee would be required to pay a Sales Consideration Fee, which consists of 1.25% of the net sales proceeds from the sale of each Residential Unit, and would be due five (5) days after closing. The TBD Lessee (e.g. the condominium association), acting as the collection agent for the Lessor, would be required to pay a Residential Annual Rent, consisting of \$1.00 per square footage of the Residential Unit and Commercial Annual Rent (Applicable Percentage of the Gross Revenue) to the City on the Annual Payment Date for the preceding calendar year. The Commercial Annual Rent is a percentage of the gross revenue derived from the commercial space or commercial use. The applicable percentage would range from 4.25% down to 3.75% during the construction period and up to 5.00% upon completion of the Phased Building. The Commercial Unit Owner or the TBD Lessee would be required to provide a detailed statement of Gross Revenue. The cost incurred by the City for any curative or remedial actions would be considered Additional Rent, and the City would be permitted to collect interest on late payments. It is proposed that the City would pay sales tax on the Annual Rent. The City may assess interest at the Default Rate on any amount that is not paid within the grace period. (Article 26).
- In exchange for the receipt of the Sales Consideration Fee, the City will be required to execute a Partial Release in favor of the Residential Unit Owner. Such a release is an

acknowledgement of termination of the City's right to file a lien on the Residential Unit and a termination of the right of the condominium association to specially assess the Residential Unit for non-payment of the Sales Consideration Fee. (Article 26, Section 26.11).

- The condominium association would be the collection agent for the City and would be charged with assessing the condominium units for the Residential Annual Rent, the Commercial Annual Rent, and special assessments for the Sales Consideration Fee. If the Sales Consideration Fee is not paid, the condominium association will be required to specially assess the condominium unit for which payment was not made, plus interest and assign the lien rights to the City. The City would be permitted to elect to cure non-monetary defaults, including maintaining the premises according to certain standards, and the cost to cure would become Additional Rent. (Article 17.5).
- With regards to monetary defaults, failure to make payment within 30 days after notice from the City shall constitute a default. With regards to a non-monetary default, failure to cure within 60 days after notice is given would constitute a default. However, notice would also have to be given to parties holding SNDA's. Additionally, the cure period for non-monetary defaults would be extended for a reasonable period of time to cure, provided the party in default or SNDA holder commences to cure within the 60-day period. After the creation of the Condominium, the Association has additional cure periods (time to include Additional Rent in next year annual budget and obligation to pay Additional Rent within 30 days after effective date of annual budget). Additional Rent is all other monetary obligations other than Sales Consideration Fee or Annual Rent. With regards to defaults prior to creation of condominium form of ownership, the City cannot cancel the Lease prior to recording the condominium documents so long as the Annual Rent, taxes and insurance are paid. **However, with regards to defaults after creation of condominium form of ownership and recording of the condominium documents, the City irrevocably waives and relinquishes its right to terminate or cancel the Phased Lease until the expiration of the Term notwithstanding any default under the Phased Lease.** Therefore, since the City would be unable to terminate the Phased Lease, the City's remedies would include suing the Association for damages, seeking specific performance against the Association, filing a collection action against the Residential Unit Owner for the special assessment (Sales Consideration Fee), and foreclosing against the Residential Unit and Residential Unit Owner for the special assessment (i.e. Sales Consideration Fee) and annual assessment (i.e. Annual Rent). (Article 17).
- The City would be required to subject its fee simple interest to a Master Declaration, with the City being required to join and consent to any required easements.⁷

⁷ It must be ensured that the fee simple interest of the City is not conveyed and can never be subject to foreclosure or lien.

- Assignment of the leasehold interest would be prohibited without City Commission or City Manager consent except that a restructuring of the TBD Lessee would be permitted.⁸ Consent would not be required for transfer of title to (or leases of) residential or commercial units, an assignment to the condominium association, for subleases, for grants of licenses, concessions, for subleases to affiliates of TBD Lessee (except the City would have the right to require Fair Market Rent), or for leasehold, sub-leaseholds or sub-sub-leasehold mortgages (*unless the City is being asked to sign an SNDA*). (Article 22).
- City would be required to consent to SNDA's with lenders on the TBD Lessee's leasehold interest and the leasehold interest of sub-lessees and sub-sublessees. No SNDA would be required for Residential or Commercial Units because such units are proposed to have the right to encumber their interest without City approval. The SNDA holder would have certain rights under the proposed lease (*e.g. it would have the right to extend the term of the Lease in the event the Lessee fails to do so*). (Article 16).
- TBD Lessee seeks the delegation of authority to the City Manager to make certain binding decisions and determinations under the Lease, including but not limited to, decisions regarding right to determine rent and Fair Market Value, right or obligation to approve subleases and sub-subleases, right or obligation to execute, amend, and release easements, restrictive covenants, and Master Declaration, the approval of Condominium Documents, and the approval of any assignment of the Master Lease Agreement. (Article 33, Section 33.12).
- The condominium documents would disclose the annual boat show and its impact on the quiet enjoyment of the Residential Unit Owners.

Current Amended and Restated Lease Agreement

The current Amended and Restated Lease Agreement dated January 4, 1995 covers the entirety of the Bahia Mar property, specifically, all of the Bahia Mar Plat, lying west of the west right-of-way line of Seabreeze Boulevard, less Parcel 1 and less the North 80 feet of Parcel 34. The following are key terms of the current lease:

- The Initial Term was from September 1, 1962 to August 31, 2012, with a first extended term from September 1, 2012 to September 30, 2037 (25 years plus 30 days). The second extended term commences on October 1, 2037 and ends on September 30, 2062 (25 years).

⁸ However, the sale or transfer of a member interest in the TBD Lessee should require the consent of the City Commission.

- The Leased property is permitted to be used for first-class hotel – marina and resort complex, retail, office, apartments, restaurants, cocktail lounge, liquor package store, food store, yacht club, motel, hotel, convention hall, retail stores, marine stores, marine services station, charter boat and sightseeing boat facility, and other kindred and similar businesses and other uses permitted under the zoning code. The Lessee shall not be unreasonably restricted in the use of the leased premises, and the Lessee shall maintain the character of Bahia Mar as a marina. No illegal activity, gambling or live adult entertainment shall be permitted.
- Commencing October 1, 1995, the Lessee was required to pay a Base Rent of \$300,000 in quarterly installments. Commencing on October 1, 2037, the Lessee is required to pay the greater of \$300,000 or “80% of the average annual rent payable during the three lease years immediately preceding the lease year for which the minimum annual rental herein is being calculated.” The Lessee is also required to pay the annual percentage Gross Operating Revenue (which is defined therein). From October 1, 2012 through September 30, 2037, the annual percentage rental is 4.25%. The minimum rent is credited against the annual percentage rental. Late payments (received 15 days after being due) shall accrue interest at the rate of 12%. (Article 26).
- The Lease permits the full or partial acceleration of rent if rent remains unpaid for 60 days or more. (Article 8).
- The Lessee is required to submit annual audited financial reports. (Article 28).
- The Lessee has a right to place a leasehold mortgage on the leasehold interest without the City’s consent. The City is required to send a leasehold lender notice of default of the Lessee if the Lessee sends the name and address of the leasehold lender and the lender has certain cure rights. If the Leasehold lender acquires title to the leasehold interest, the lender can make a one-time assignment to a nonaffiliated person without the City’s consent the City must recognize the lender’s successor if it has certain attributes (i.e., hotel and marina experience or financial assets). So long as the leasehold interest is encumbered by a mortgage, the City cannot sell its interest to the Lessee, cannot accept a surrender of the Lease or prepayment of rent without the leasehold lender’s consent. (Article 13).
- The City is permitted to forfeit the Lease upon default and after the cure period has expired, but the Lease cannot be terminated so long as the rent and taxes are paid. (Article 14).
- The assignment of the leasehold interest is prohibited without City Commission approval; however, the Lessee can sublet portions of the Marina without City Commission approval.

- The Lessee is responsible for all Operating expenses and real property taxes, sales taxes, special assessments and utility charges. (Article 10).
- The Lessee is required to maintain the premises. (Article 14).
- Lessee is required to set aside funds in a Capital Improvement Reserve Account (CIRA). Expenditures from this account shall be made for Capital Improvements. However, the Lessee has a capital reserve credit and so no funds are being contributed to this account. (Article 15).
- The name "Bahia Mar" belongs to the Lessee but the City has the right to use it in its advertising as a publicly owned facility. (Article 23).
- The City is responsible for maintaining the pump station and force mains. (Article 32).

Memorandum
No. 10-0269

City Attorney's Office

To: Mayor John P. "Jack" Seiler
Vice-Mayor Romney Rogers
Commissioner Bruce G. Roberts
Commissioner Charlotte E. Rodstrom
Commissioner Bobby B. DuBose

From: Harry A. Stewart, City Attorney

Date: May 21, 2010

Re: Bahia Mar Complex

In connection with the presentation of our recommended term sheet for the lease of the Bahia Mar Complex, we have been asked to provide an explanation of the City's charter restrictions on the lease of the Bahia Mar property and the suggested lease structure provided in the term sheet.

The Bahia Mar lease restrictions are found in Section 8.06 of the City of Fort Lauderdale Charter and reads as follows:

Leases for the city property known as Bahia-Mar may be negotiated by the city commission without the necessity of public bid; provided, however, that no such lease shall be for an initial term longer than fifty (50) years. Extensions of or amendments to such leases may likewise be negotiated without necessity of public bid; provided, however, that no such extension or amendment shall be for an additional term longer than fifty (50) years beyond the original termination date of the lease which is to be extended or amended. The provisions of this section are notwithstanding the limitations provided in sections 8.05 and 8.09.

This charter provision provides a means by which the City may negotiate a lease for the Bahia Mar property without going through a public bid process. The condition for using this method is a 100 years limitation on the potential term of the lease, fifty (50) years for the initial term and fifty (50) years for any term extensions. Please note that the actual number of amendments and extensions are not limited, as long as their cumulative effect does not result in the extension of the term of the lease beyond fifty (50) years from the "original termination date of the lease."

The original lease was entered into on September 1, 1962, with Ft. Lauderdale Candlelight Corporation¹ for a term of fifty (50) years. The original termination date of

¹ Lessee changed its name to Bahia Mar Yachting Center, Inc. on November 11, 1970.

EXHIBIT 3

the lease was August 31, 2012, therefore the lease cannot be extended or amended beyond August 31, 2062. On April 22, 1980 the terms of the lease were amended to provide, among other things, an additional twenty-five (25) years and thirty (30) days to the original lease term making the termination date September 30, 2037, leaving fifty-seven years as the remaining term of the lease. On January 4, 1995, the City executed an Amended and Restated Lease Agreement with Rahn Bahia Mar, LTD., assignee of the rights under the original lease as amended, which provided an additional extension terminating on August 31, 2062, leaving sixty-seven (67) years as the remaining term of the lease. No further extensions are permitted.

Currently, there remains fifty-two (52) years under the terms of the current lease. The current leaseholder and successor-in-interest to Rahn Bahia Mar, Ltd., Rahn Bahia Mar, L.L.C. (hereinafter "Developer"), desires to extend the duration of the lease to facilitate the redevelopment of the property. Since the Developer believes that redevelopment is not feasible under the terms of a single fifty (50) year lease, they propose the termination of the existing lease via a Termination and Cancellation Agreement and the concurrent negotiation and execution of the two new lease agreements with durations of fifty (50) years each to run consecutively. The new leases will contain cross default clauses that will terminate both leases in the event of a default in one of the lease agreements.

The Charter specifically allows the Bahia Mar property to be leased without public bid for an initial term of fifty (50) years, and allows for that initial term to be extended for an additional term of fifty (50) years totaling one hundred (100) years. After entering into a lease for an initial term of fifty (50) years, there are no restrictions as to when approval of an extended term may be granted. Historically, with forty-two (42) years remaining on the term of the lease, the City extended the term 25 years leaving a leasehold interest of 67 years. Additionally, there are no restrictions on when a new lease may be negotiated. Since both leases being proposed are for a term of fifty (50) years, both meet the requirements of the Charter, notwithstanding the fact that they cover two consecutive fifty (50) year time periods.

It is the opinion of this office the negotiated terms comply with the requirements of the City's charter and the new leases will provide sufficient protection for the City in the event of default.

HAS:mr
cc: George Gretsas, City Manager
John Herbst, City Auditor
Jonda K. Joseph, City Clerk
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