



Agenda Item # \_\_\_\_\_

# Staff Report

## City of Manhattan Beach

**TO:** Honorable Mayor Fahey and Members of the City Council

**THROUGH:** Geoff Dolan, City Manager

**FROM:** Sherilyn Lombos, Deputy City Manager

**DATE:** September 6, 2005

**SUBJECT:** Consideration of an Occupancy Agreement between Oceanographic Teaching Stations, Inc. (OTS) and the City for Use of a Portion of the Roundhouse Facility on the Manhattan Beach Pier

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### **RECOMMENDATION:**

Staff recommends that the City Council approve the occupancy agreement with OTS for use of a portion of the Roundhouse facility of the pier.

### **FISCAL IMPLICATION:**

There is no budget implication associated with this item. The agreement allows OTS to occupy the facility rent-free. OTS is responsible for electrical service and for maintenance of the interior of their facility. The City provides maintenance of the exterior of the facility as well as maintenance of the restroom facilities.

### **BACKGROUND:**

The Roundhouse building at the end of the pier is currently occupied by two separate tenants. Approximately 190 square feet of the eastern space of the building is occupied by a food concession which was entered into in February 2004 after an extensive request for proposal process for a five-year period (through 2009). OTS occupies approximately 1,550 square feet of the western space in the Roundhouse. The organization provides marine life educational programs to children and adults, and provides a marine life exhibit that is open to the public various hours during the week-days and on the week-ends.

In 1988, the City entered into an agreement with the State Department of Parks and Recreation to provide for the operation and control of the pier. As the operator of the pier, the City has the authority to enter into agreements with parties for occupancy of the Roundhouse, subject to the provisions of the State Public Resources Code. OTS has occupied the Roundhouse since 1980; prior to 1992, they operated under an agreement with the County of Los Angeles. In 1992, the City entered into a three-year agreement with OTS which was renewed for an additional three years in 1995. In 1998 the agreement was renewed for a five-year period. Since November 2003 the City and OTS have been without a formal agreement, operating under the provisions of the previous agreement.

**DISCUSSION:**

The attached agreement provides for a term which continues until terminated by either party. The City retains its rights to alter the terms should the City's lease agreement with the State for the pier change. With the exception of length of the term of the agreement, there have been no significant changes from the previous contract.

The City Attorney has reviewed the agreement and approved as to form. Also, the Board of Directors for OTS have reviewed and approved the agreement. Representatives from the Board of Directors will make a presentation about OTS and the Roundhouse Aquarium at tonight's meeting.

Attachment: A. Contract between the City and OTS

## **CONTRACT AGREEMENT**

THIS CONTRACT is made and entered into on this 6<sup>th</sup> day of September 2005, by and between the CITY OF MANHATTAN BEACH, ("CITY") and Oceanographic Teaching Stations, Inc., a nonprofit corporation incorporated under the laws of the State of California, ("OTS") with respect to the following facts:

- A. There is, within the State Park System, a structure located at the western end of the Manhattan State Beach Pier in the County of Los Angeles, ("Roundhouse"); and
- B. The State of California ("State") is the owner of the Manhattan State Beach Pier ("Pier") and all structures and improvements located thereon; and
- C. Pursuant to the provisions of Section 5080.30 et seq. of the Public Resources Code of the State of California, the CITY and State have entered into an Operating Agreement dated August 1, 1988 for the Beach Pier; and
- D. The Operating Agreement provides that the CITY shall provide for the operation, care, custodial maintenance, and control of the Pier; and
- E. OTS desires to occupy the nine hundred-ninety (990) square foot exhibit space, one hundred-sixty (160) square foot office space and four hundred (400) square foot mezzanine space portions of the Roundhouse building (shown in Exhibit A), ("Roundhouse Space,") to provide marine life educational programs to the public.

In consideration of the mutual promises set forth below, the City and OTS agree as follows:

### 1. TERM

The term of this contract shall continue until terminated by either party. The City retains the right to alter these terms should the City's lease agreement for the Pier change.

### 2. ROLE OF OTS

- A. OTS may sponsor, publish, purchase, and distribute or sell appropriate maps and literature, illustrative materials, and other items which increase visitor understanding and appreciation of marine life and the State Park System values and purposes.
- B. OTS may acquire and display materials, equipment, and other items and funds for use in it educational programs.

- C. OTS may sponsor and support docent programs, environmental education activities, seminars, lectures, and other activities that contribute to its educational programs.
- D. OTS may plan, organize, and implement fund-raising programs to acquire contributions to support the educational activities of the organization.
- E. OTS shall use its best efforts to maximize the public use of the facilities it occupies under this contract.

3. CHARGES

OTS may levy charges for its programs and for literature in accordance with the fee schedule approved by the CITY, and in areas as designated by the CITY.

4. SALE ITEMS

- A. OTS may sell only items that have been approved by the CITY. Prior to publication, the CITY shall approve any OTS publication to be sold and/or distributed to the public.
- B. OTS shall display the sales items in keeping with the general design and decor of the Roundhouse space.
- C. OTS is not by this agreement granted the right to sell items, the sale of which would infringe on applicable rights of a concession agreement with another party.
- D. OTS may be permitted to offer convenience and related merchandise to enhance the comfort and enjoyment of visitors, as long as these items are approved by the CITY.
- E. The CITY reserves the right to determine and control the nature and type of merchandise, service, and activities which may be sold or furnished by the OTS. The OTS shall assist the CITY in removal of any sales items, artwork, displays, or other objects and/or in the cancellation of any activities judged by the CITY to be inappropriate for presentation in the Roundhouse space.

5. REVENUE

- A. OTS shall maintain financial records for the operation which shall be kept in accordance with state and federal law, and in keeping with good business practices.
- B. OTS shall make financial records for the operation available for the inspection by the CITY at any reasonable time. The CITY may, on reasonable notice, audit the records and review the internal controls of OTS business operations.
- C. OTS shall separately account for all revenue derived from OTS Roundhouse space activities pursuant to this contract. OTS may expend the excess revenue over costs

derived from OTS Roundhouse space activities, only for the purpose of accomplishing educational work and for the purpose of carrying out the terms of this contract.

6. ANNUAL REPORT

OTS shall annually, on September 1, furnish the CITY with a financial statement and a report of activities, with information as required by the CITY.

7. FACILITIES

- A. The CITY shall provide OTS with facilities to be used or occupied by OTS for the purpose of carrying out the terms of this contract.
- B. OTS shall provide all maintenance and repair services inside the space to be occupied by OTS including replacement and/or repair of damaged or missing window screens, window hand cranks and other similar items, unless otherwise authorized by the CITY. The interior area of the Roundhouse space shall be kept in a condition as could reasonably be expected for a public facility. Should OTS fail, neglect or refuse to do so, the CITY shall have the right to perform such maintenance or repairs for OTS. In this event, OTS shall promptly reimburse the CITY for the cost thereof, provided however, that the CITY shall first give OTS ten (10) days written notice of its intention to perform such maintenance or repairs for OTS for the purpose of enabling OTS to proceed with such maintenance or repairs at OTS own expense.
- C. The CITY shall provide exterior maintenance of the Roundhouse including doors and windows plus the internal maintenance of the restroom facilities. It may be necessary to have access to the interior of the Roundhouse space to periodically replace door and window shutter mechanisms. To the extent practicable, the CITY shall give OTS 72 hours prior notice before undertaking any internal or external maintenance on the Roundhouse.
- D. OTS shall be responsible for payment of all incidental utility services.
- E. The CITY shall have emergency access to all facilities to make such inspections as the CITY deems necessary. CITY personnel shall have access to conduct inspection of the Roundhouse space (including storage areas).
- F. No construction, structural alteration, repair, reconstruction, restoration, tank or equipment installation, or structural improvement may be made to the Roundhouse by OTS without first obtaining approval for any plans, specifications, and contracts from the Director of Public Works of the CITY. This includes painting, tinting windows, or any other similar alterations. No additional tanks or equipment will be approved by the CITY that would subject the first floor to mezzanine level to a live load in excess of one hundred (100) pounds per square foot.

- G. Only vehicles with a gross vehicle weight of less than 10,000 pounds may be driven on the pier to provide service or deliver goods to OTS. Only one such vehicle at a time shall be permitted to be driven on the pier by or for OTS and it shall not park on the pier for greater than twenty (20) minutes per visit. All vehicles authorized by OTS or its independent contractors to drive on the pier must submit evidence of automobile insurance to the City of Manhattan Beach for a minimum \$1,000,000 coverage. Deliveries shall be limited to times when pedestrian traffic is slow and any vehicle shall leave the pier immediately when requested by the Police Department. For purposes of clarification, this paragraph shall also pertain to any outside company or independent contractors hired by OTS to perform repair work and or maintenance of the facility.
- H. CITY shall have the right to use the Roundhouse up to ten (10) times per year for special functions. The CITY shall provide a minimum of thirty (30) days of advance notice to OTS prior to such special functions.
- I. The Cylindrical Tanks and Shark Tank are to be located only as originally proposed respectively on the proposed pile above the beams reinforced for the tank.
- J. OTS shall be responsible for opening and closing thirteen (13) protective window shutters surrounding their portion of the Roundhouse space each day of OTS operation. OTS shall be liable for any damage resulting from their negligence to close the protective window shutters as required or from any damage to the protective window shutters resulting from improper operation of the shutters.
- K. No signs, names, placards or advertising matter shall be inscribed, painted or affixed upon the Roundhouse or the pier without the prior written consent of the Director of Public Works for the CITY.
- L. The CITY may negotiate a separate contract for the operation of the first floor two hundred (200) square foot snack shop portion of the Roundhouse. OTS and the snack shop concessions shall cooperate and coordinate their operations and will minimize any possible interference between the operations and associated activities.
- M. Utility closets in the mezzanine area that contain heating, ventilation, telephone or radio equipment shall not be used by OTS as a storage area.

## 8. USE RESTRICTIONS

- A. No event, class, ceremony, or program may block public access to any part of the Pier without CITY approval.
- B. No alcohol is allowed on the Pier or inside the Roundhouse.
- C. OTS may apply to the CITY on an event by event basis for a waiver of the restrictions set forth in Sections 8A and 8B above. Any waiver shall be granted in

the sole discretion of the CITY, and nothing herein shall be deemed to constitute an implied agreement to grant any waivers to OTS.

9. TITLE

All improvements, alterations, and resorted facilities constructed under this contract shall become the property of the State of California, and neither the CITY nor state shall be responsible for the cost of such improvements, alterations, and restorations. Title to all improvements and fixtures shall vest in the state immediately on their becoming affixed to the state real property.

10. EQUIPMENT

OTS, at OTS's own expense, shall completely equip the facility and shall keep the same equipment in a safe and first-class manner throughout the term of this contract (Exhibit B).

11. PERSONAL PROPERTY

Title to all personal property provided by OTS shall remain with OTS.

12. POSSESSORY INTEREST

It is not the intention of the parties to this agreement to create any possessory interest or tenure by OTS in any property of the State Park System; however, this agreement may create or cause to be created a possessory interest in public land within the meaning of Revenue and Taxation Code Section 107. In the event such possessory interest is created, OTS may be subject to the payment of property taxes levied on such possessory interest. The OTS hereby agrees to pay any such property taxes levied. OTS agrees to pay all lawful taxes, assessments, or charges which may at any time be levied by the state, county, city, or any tax or assessment levying body on any interest in this contract which the association may have in or to the premises covered by the contract, as well as taxes and assessments on goods, merchandise, fixtures, appliances, equipment, and property owned by it in or around said premises.

13. OTS PERSONNEL

A. OTS understands and specifically agrees to inform its employees that OTS is an independent contractor to the State and the CITY.

B. OTS understands and specifically agrees to inform its employees that they are not agents or employees of the State or the CITY.

C. Volunteers or independent contractors, action on behalf of OTS shall be informed by OTS and must understand that they are not agents or employees of the State or the CITY.

- D. All OTS agents and employees involved in visitor contract shall be trained before assuming such responsibilities.
- E. OTS agents and employees who come in direct contact with the public shall wear identification by which they may be known and distinguished as agents or employees of OTS.
- F. OTS shall review the conduct of any of its agents and employees whose action or activities are considered by OTS or the CITY to be inconsistent with proper administration of the Roundhouse and enjoyment and protection of visitors and shall take actions as are necessary in a timely manner to fully correct the situation.

14. NONDISCRIMINATION CLAUSE

OTS and its agents and employees shall not discriminate because of race, religion, color, ancestry, sex, sexual orientation, age, national origin, or physical disability against any person by refusing to furnish such person any accommodation, facility, service, or privilege offered to, or enjoyed by, the general public. Nor shall OTS or its agents or employees publicize the accommodations, facilities, services, or privileges in any manner that would directly or inferentially reflect upon or question the acceptability of the patronage of any person because of race, religion, color, ancestry, sex, sexual orientation, age, national origin, or physical disability.

The following is the state's Nondiscrimination Clause (OCP-1), Standard Form 17A (new 5/83) and it is incorporated herein, per State Administrative Manual Section 1225(c). For the purposes of this contract, the term "contractor" in said Standard Form 17A (new 5/83) shall mean "OTS".

NONDISCRIMINATION CLAUSE (OCP-1)

1. During the performance of this contract, contractor and its subcontractors shall not unlawfully discriminate against any employee or applicant for employment because of race, religion, color, national origin, ancestry, physical handicap, medical condition, marital status, age, or sex. Contractors and subcontractors shall insure that the evaluation and treatment of their employees and applicants for employment are free of such discrimination. Contractors and subcontractors shall comply with the provisions of the Fair Employment and Housing Act Government Code, Section 12900 et seq.) and the applicable regulations promulgated hereunder (California Administrative Code, Title 2, Section 7285.0 et seq). The applicable regulations of the Fair Employment and Housing Commission implementing Government Code, Section 12990, set forth in Chapter 5 of Division 4 of Title 2 of the California Administrative Code, are incorporated into this contract by reference and made a part hereof as if set forth in full. Contractor and its subcontractors shall give written notice of their obligations



under this clause to labor organizations with which they have a collective bargaining or other agreement.

2. This contractor shall include the nondiscrimination and compliance provisions of this clause in all subcontracts to perform work under the contract.

## 15. TERMINATION OF CONTRACT

- A. The CITY reserves the unqualified right to terminate this agreement by giving OTS twelve (12) months' prior written notice of the effective date of such termination. CITY further may terminate this agreement for material breach by OTS of any of the provisions hereof, however, OTS shall be given not less than thirty (30) day period the breach is not cured, the contract shall terminate upon written notice from the CITY. Provided however that where OTS has initiated in good faith action to cure the breach during the thirty (30) day period and the breach can not reasonably be cured within thirty (30) days this period shall be extended for an additional thirty (30) days.
- B. OTS reserves the unqualified right to terminate this agreement by giving CITY twelve (12) months' prior written notice of the effective date of such termination. OTS further may terminate this agreement for breach by CITY of any of the provisions hereof upon giving CITY ninety (90) days written notice of intent to terminate if any and all breaches are not cured. Termination shall be effective at the end of said period if breached are not cured.
- C. Upon termination of this contract by OTS, or expiration of this contract by both parties, OTS shall designate the transfer of all remaining assets raised under the specific provisions or this contract to a nonprofit fund, foundation, or corporation which is organized and operated exclusively for charitable purposes, and which has established its tax exempt status under Section 501 (c) (3) of the Internal Revenue Code.

## 16. WAIVER

Waiver of a breach of this contract by either party shall not be construed as a waiver of any subsequent breach of the same or any other provision.

17. BREACH

- A. This contract is breached if OTS fails to meet the criteria outlines in State Public Resources Code Section 513 or this contract.
- B. This contract is breached if the CITY fails to meet the criteria outlined in State Public Resources Code Section 513 or this contract.

18. CONTRACTUAL OBLIGATIONS

- A. This contract constitutes the entire agreement between the parties, and supersedes any and all prior oral or written agreements or understandings between them. No representations, warranties, or inducements expressed or implied have been made by either party to the other, except as set forth herein.
- B. Commercial General Liability Insurance

OTS, at its sole cost, shall procure and maintain, at all times during the term of this Agreement, a policy with a current A.M. Best's rating of not less than A-: VIII providing Commercial General Liability Insurance (or, at its discretion, Comprehensive General Liability protecting the state, CITY and OTS against all claims, defense costs and loss costs arising from personal injury, including death, or property damage occurring directly or indirectly from the operation and/or maintenance of the Roundhouse. The state and CITY shall be named as an Additional Insured on this policy (see specific wording on the required CITY of Manhattan Beach Insurance Endorsement Form #1 (General). Acceptable-minimum limits for this coverage are:

Per Occurrence:	\$1,000,000
General Aggregate: Products/Completed Operations	\$2,000,000
Aggregate: Personal and Advertising Injury	\$2,000,000
Aggregate:	\$1,000,000
Fire Damage:	\$ 50,000
Medical Payments:	\$ 5,000

In addition, Excess or Umbrella coverage should increase this policy's aggregate limits to a total of \$3,000,000. The policy shall not contain a provision that would make this policy excess over, contributory with, or invalidated by the existence of any insurance, self-insurance or other risk-financing program maintained by the City.

The CITY of Manhattan Beach Insurance Endorsement Form #1 (General) shall be executed by the insurance underwriters for OTS.

- C. Additional Requirements.

The procuring of such required policies of insurance shall not be construed to limit OTS' liability hereunder, nor to fulfill the indemnification provisions and requirements of this Agreement. There shall be no recourse against CITY for payment of premiums or other amounts with respect thereto. CITY shall notify OTS in writing of changes in the insurance requirements. If OTS does not deposit copies of acceptable insurance policies with CITY incorporating such changes within sixty (60) days of receipt of such notice, OTS shall be deemed in default hereunder.

Any deductibles or self-insured retentions must be declared to and approved by CITY. Any deductible exceeding an amount acceptable to CITY shall be subject to the following changes:

- (1) Either the insurer shall eliminate or reduce such deductibles or self-insured retentions with respect to CITY and its officials, employees and agents (with additional premium, if any, to be paid by OTS) ; or
- (2) OTS shall provide satisfactory financial guarantee for payment of losses and related investigations, claim administration, and defense expenses.

D. Verification of Compliance.

OTS shall furnish CITY with original endorsements effecting coverage required by this Agreement. The endorsements are to be signed by a person authorized by the insurer to bind coverage on its behalf. All endorsements are to be received and approved by CITY before work commences. Not less than fifteen (15) days prior to the expiration date of any policy of insurance required by this Agreement, OTS shall deliver to CITY a binder or certificate of insurance with respect to each renewal policy, bearing a notation evidencing payment of the premium therefore, or accompanied by other proof of payment satisfactory to CITY.

E. Indemnity

1. OTS agrees to indemnify, defend, and hold harmless CITY and its elective or appointive boards, officers, agents, attorneys and employees from any and all claims, liabilities, expenses, or damages of any nature, including attorneys' fees arising out of, or in any way connected with performance of, the Agreement by OTS, OTS'S agents, officers, employees, subcontractors, or independent contractor(s) hired by OTS, involving Roundhouse activities. This indemnity shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation upon the amount of indemnification to be provided by OTS.
2. OTS shall indemnify, save, and hold harmless and defend the State against all fines, claims, damages, losses, judgments, and expenses arising out of, or from, any omission or activity of OTS with activities, not co-sponsored by the State.

OTS shall furnish the State a certificate of insurance stating that there is insurance currently in effect. The State shall be named as an additional insured, but only insofar as the operations under this contract are concerned.

19. AMENDMENTS

No amendment or modification of the contract shall have an effect whatsoever, unless the same is in writing and signed by each of the parties hereto.

20. CONTRACT ASSIGNMENT

OTS shall not assign its contract or any interest herein, or any part thereof, to any party.

21. NOTICES

Any notices herein provided to be given or which may be given by either party to the other shall be deemed to have been fully given when made in writing and deposited in the United States mail, postage prepaid, and addressed as follows:

OTS

BY: \_\_\_\_\_  
TITLE: \_\_\_\_\_  
DATE: \_\_\_\_\_  
ADDRESS: \_\_\_\_\_

CITY

BY: \_\_\_\_\_  
TITLE: \_\_\_\_\_  
DATE: \_\_\_\_\_

City Manager  
City of Manhattan Beach  
1400 Highland Avenue  
Manhattan Beach, CA 90266

APPROVED TO FORM:

\_\_\_\_\_  
City Attorney

ATTEST:

\_\_\_\_\_  
City Clerk