

City of Brisbane

Agenda Report

TO: Honorable Mayor and City Council Members

FROM: Director of Marina and Aquatic Services, via City Manager

SUBJECT: Marina Yacht Broker Agreement

DATE: January 18, 2011

CITY COUNCIL GOALS:

To promote economic development that stabilizes and diversifies the tax base.

PURPOSE:

To make the purchase and sale of boats easier by having an on-site yacht broker at the Brisbane Marina.

RECOMMENDATION:

Approve exclusive yacht broker agreement for Ed McGrath, d/b/a McGrath Yachts, at Brisbane Marina.

BACKGROUND:

This is the fourth time over seven years that a yacht broker has wished to establish their business in Brisbane Marina. The first broker withdrew from talks and negotiations due to personnel changes. The second broker's agreement was terminated by the City due to questionable business practices, lack of proper timely sales reports and an inability to maintain a presence in the Marina. The last broker went out of business during this current recession and went back to flying commercial aircraft, his previous profession.

DISCUSSION:

Twice in the past, and this time, staff has researched and surveyed marina managers throughout California regarding the establishment and condition for yacht brokers. Due to the recession, we wish to craft an agreement that would have some enticements for the success of the Marina and the proposed on-site yacht broker.

The proposed agreement with McGrath Yachts, is conservative and cautious for both the City and the business. The proposed broker will rent 182 square feet of office space in the Harbormaster building, on the second floor.

Staff consulted in the past with two local commercial real estate experts, Carla Scimemi of GVA Kidder Mathews Commercial Real Estate and Matt Squire of NAIBT Commercial Real Estate to determine the fair market rate of the office space in this region.

Based on the shared use, small size and current office space market, we arrived at a fair market monthly rate of \$300.00.

The Marina has enjoyed a berth occupancy of 88% for nearly a year during the worst recession of most of our lives. Many marinas in our markets have not fared nearly so well and the Bay Area average occupancy is down to 76% from 81% the year before.

As an incentive to improve the Marina's occupancy, I am proposing that any of the proposed broker's vessels under a listing contract with McGrath Yachts, that is brought from another location into Brisbane Marina would enjoy a 50% berth rent discount per month as long as the boat is listed and until it sells. The 50% discount would not be allowed to continue beyond one year unless the City was satisfied that the broker is diligently marketing the boat and pricing it correctly and then the discount privilege would continue on a month-to-month basis at the discretion of the Director of Marina and Aquatic Services. This would be provided the Marina has a suitable berth for the brokered vessel(s). The new buyer would enjoy the 50% berth discount for 90 days following the day of the sales transaction.

The Agreement would commence on February 1, 2011, and would be re-evaluated and adjusted to suit the market after three years. The City Attorney has reviewed and approved the Agreement.

FISCAL IMPACT:


There would be no cost to the City. McGrath Yachts, office rent would produce \$3600.00 per year in revenue. There would also be an undetermined amount of new additional berth rent revenue brought in from the discounted berth incentive clause.

MEASURE OF SUCCESS:


Numbers of new brokered boats brought in to the Marina. Number of sales of boats brokered by McGrath Yachts, out of Brisbane Marina. Increase in berth revenues from boats brokered by McGrath Yachts, that become berth Licensees.

ATTACHMENTS:

Background information on Mr. McGrath
Yacht Broker Agreement



Director of Marina and Aquatic Services



City Manager

Ed McGrath Yachts
Fact Sheet

Department of Boating and Waterways

- Yacht broker in good standing
- Possesses yacht broker license since 2006

Experience/Background

Third Generation Californian

Former Sausalito Marina Manager

Employed in boat sales for the past 19 years

Sold 27 boats in 2010

Currently has 40 exclusive yacht listings

Established McGrath Yachts with his wife 8 years ago

Former Longshoreman

Worked as a dock hand on ferry boats

Graduated from Hayward State University with a degree in History

BOAT BROKERAGE CONCESSION AGREEMENT

THIS AGREEMENT, dated January 18, 2011, between THE CITY OF BRISBANE, a municipal corporation ("City"), and ED McGRATH, d/b/a McGRATH YACHT SALES, a sole proprietorship ("Broker"), is made with reference to the following facts:

A. City is the owner and operator of the Brisbane Marina ("the Marina") located within the area of City commonly known as Sierra Point.

B. Broker desires to establish a brokerage business at the Marina for the sale of boats and related items and City has agreed to provide space and other services needed for the conduct of such business, on the terms and conditions hereinafter set forth.

NOW, THEREFORE, the parties agree as follows:

1. **Grant of Concession; Conduct of Brokerage Business:** City hereby grants to Broker a nonexclusive concession to operate a boat brokerage business at the Marina. Except for the requirement to obtain a City business license, no other permit or approval by City for the conduct of such business shall be required. The brokerage business shall be conducted in full compliance with all applicable statutes, ordinances, rules and regulations. Broker shall obtain such permits and licenses from any other governmental agencies as may be required for the conduct of his business and shall keep the same in full force and effect at all times during the term of this Agreement. Broker shall not conduct any other business or activity at the Marina without the prior written consent of City, which City shall be entitled to grant or withhold in City's sole discretion.

2. **Use of City Building as Office Space:** Broker will be allowed to use 182 square feet inside the Harbor Master's office building as his office in the area designated on the 2nd floor. Broker shall pay to the City \$300 per month as rent for use of such space. Broker shall be solely responsible for all costs and expenses related to improvements, phone lines, fax lines and furniture that constitute as his office.

3. **Occupancy Incentive:** The City will discount 50% of the normal and usual berth rent for each month the Broker relocates a brokered vessel from another location into the Marina until the vessel is sold or for a period of one year, whichever comes first. At the end of one year, if that vessel has not sold, and if the City believes the owner and Broker have aggressively marketed and priced the vessel, then the 50% may continue on a month by month basis. The buyer of a vessel in this clause will be allowed the 50% discount for 90 days from the close of the sale date. Normal and customary berth rent will commence after the 90 day period.

4. **Term:** The term of this Agreement shall be for a period of three (3) years, commencing on February 1, 2011, and expiring on January 31, 2014.

5. **Termination of Agreement:** Broker may terminate this Agreement at any time upon giving thirty (30) days prior written notice to City. Either party may terminate this Agreement upon ten (10) days prior written notice to the other party if the other party has committed a default under this Agreement and has failed to cure such default within ten (10) days after written notice thereof from the non-defaulting party; provided, however, if the

nature of the default is such that it cannot reasonably be cured within ten (10) days, then no termination shall occur if the defaulting party commences a cure within such time and prosecutes the same diligently to completion.

6. **Indemnification:** Broker shall indemnify, defend, and hold City, and its officers, officials, boards, commissions, employees, agents, and volunteers harmless from and against any and all claims, demands, causes of action, liabilities, costs or expenses, including attorney's fees, occasioned by or in any way connected with the conduct of Broker's business under this Agreement or the use and occupancy of the Office or the berth by Broker, or occasioned by any negligent act or omission or willful misconduct by Broker or Broker's agents, servants, employees, or invitees, or resulting from any breach of this Agreement by Broker, and City shall not be liable for any acts or omissions of Broker. The indemnity obligations of Broker set forth herein shall survive and continue beyond the term of this Agreement.

7. **Insurance:** During the term of this Agreement, Broker shall procure and maintain in full force and effect at Broker's expense comprehensive general liability insurance with an aggregate limit of not less than One Million Dollars (\$1,000,000.00) per occurrence, insuring against all liability of Broker and City for bodily injury and property damage arising out of or in connection with Broker's use or occupancy of the Marina for the conduct of his business, and also insuring performance by Broker of the indemnity provisions set forth in Section 11 of this Agreement. Such general liability insurance shall not limit Broker's liability nor relieve Broker of any obligations under this Agreement. The liability insurance policy shall name City, and its officers, officials, boards, commissions, employees, agents, and volunteers as insured parties thereunder, and shall be endorsed to provide that: (i) the insurance coverage thereunder shall be primary with respect to City and its officers, officials, boards, commissions, employees, agents, and volunteers; and (ii) no cancellation or reduction in coverage will be made without twenty (20) days prior written notice to City by the carrier. Upon request, Broker shall provide City with a copy of the insurance policy required to be maintained hereunder, and such policy shall be subject to approval as to form, content and amount by City or its authorized representatives.

8. **Independent Contractor:** City and Broker acknowledge that that neither party is acting as the agent or representative of the other in any respect hereunder, and that each party is an independent contracting entity with respect to the terms, covenants and conditions contained in this Agreement. None of the provisions of this Agreement shall be deemed to create a partnership between or among the parties in the businesses of Broker, or the affairs of City, or otherwise, nor shall it cause them to be considered joint ventures or members of any joint enterprise. This Agreement is not intended nor shall it be construed to create any third party beneficiary rights in any person who is not expressly made a party and signatory to this Agreement.

9. **Assignment:** Broker shall not assign his interest in this Agreement to any other party without the prior written approval of City. An approval of such assignment shall not release or discharge Broker from any liability under this Agreement.

10. **Costs of Suit:** If either party to this Agreement commences any legal action against the other party to enforce or interpret this Agreement, the prevailing party shall be entitled to recover all costs and expenses that may be incurred in connection therewith, including court costs, expert witness fees, discovery expenses, and attorneys' fees.

11. **Notices:** Any notices required or permitted to be given under this Agreement shall be in writing and shall be either personally delivered or sent by certified mail, return receipt requested, addressed to the other party as follows:

To City City of Brisbane
 Attn.: Marina & Aquatic Services Director
 400 Sierra Point Parkway
 Brisbane, CA 94005

To Consultant Ed McGrath
 DBA: McGrath Yachts,
 1070 Marina Village Parkway #106
 Alameda, CA 94501

12. **Entire Agreement:** This Agreement constitutes the entire agreement between the parties and supersedes and cancels any prior agreements or understandings, whether written or oral. This Agreement can only be modified by a written amendment hereto executed by both parties.

13. **Severability:** If any term or provision of this Agreement shall, to any extent, be determined by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement shall not be affected thereby, and each term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

14. **Calendar Days:** All references herein to any acts or obligations to be performed within a certain number of days shall mean calendar days.

15. **Choice of Law:** This Agreement shall be governed by and interpreted in accordance with the laws of the State of California.

16. **Successors and Assigns:** Subject to the restrictions against assignment and subletting by Broker, this Agreement shall be binding upon and inure to the benefit of the respective heirs, executors, administrators, personal representatives, successors and assigns of the parties hereto.

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IN WITNESS WHEREOF, the parties have executed this Agreement the day and year first above written.

THE CITY OF BRISBANE

By: _____
Cyril "Cy" Bologoff, Mayor

ATTEST:

Sheri Marie Spediacci, City Clerk

APPROVED AS TO FORM:

Harold S. Toppel, City Attorney

BROKER:

Ed McGrath