

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: March 16, 2009

PURPOSE:

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 Jose Miguel Martinez, d/b/a Anchor Boat Sales, at Brisbane Marina.

BACKGROUND:

This is the third time in six 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 this year due to questionable business practices, lack of proper timely sales reports and an inability to maintain a presence in the Marina.

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 Anchor Boat Sales 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 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 Anchor Boat Sales 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 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 City will charge a sales charge percentage of 5% on the commission paid to the broker. The broker would be required to submit a sales report and payment each quarter whether or not a sale occurred.

The Agreement would commence on April 1, 2009, 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. Anchor Boat Sales office rent would produce \$3,600.00 per year in revenue and an unknown amount on the commission sales percentage. There would also be an undetermined amount of new additional berth rent revenue brought in from the discount berth incentive clause.

MEASURE OF SUCCESS:

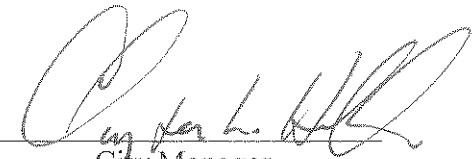
Numbers of new brokered boats brought in to the Marina. Number of sales of boats brokered by Anchor Boat Sales out of Brisbane Marina. Increase in berth and commission revenues.

ATTACHMENTS:

Background information on Mr. Martinez
Yacht Broker Agreement



Director of Marina and Aquatic Services



City Manager

Background information on Mr. Martinez

Mr. Martinez approached the Marina with the desire to establish an exclusive yacht brokerage business in Brisbane Marina.

Mr. Martinez maintains a yacht brokerage in Lowrie Yacht Harbor in San Rafael and would like a satellite office in Brisbane. Mr. Martinez has two licensed yacht sales people that would allow him to maintain both offices. Lowrie Yacht Harbor was contacted and gave a very positive recommendation on Mr. Martinez, indicating that he brings positive results and goodwill to their yacht harbor.

Staff checked with the State Department of Boating and Waterways, the agency responsible for yacht broker licenses, and Mr. Martinez' license is valid and in good standing with no complaints on file.

Although Mr. Martinez' license was just issued in 2008, he is an experienced yacht and boat salesman. Mr. Martinez previously worked at Suncoast Yachts in San Diego, Ballena Bay Yacht Brokers and Golden Gate Yacht Sales before launching Anchor Boat Sales. Mr. Martinez was previously a commercial airline pilot, and retired from United Airlines.

BOAT BROKERAGE CONCESSION AGREEMENT

THIS AGREEMENT, dated March 16, 2009, by the between THE CITY OF BRISBANE, a municipal corporation ("City"), and JOSE MIGUEL MARTINEZ, d/b/a ANCHOR BOAT 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 an exclusive 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 (the "Office Space"). Broker shall pay to the City \$300 per month as rent for use of the Office Space, payable in advance on the first day of each calendar month. Broker shall be solely responsible for all costs and expenses related to the furnishing and equipping of the Office Space, including installation of phone and fax lines, furniture and office equipment. No alternations or improvements shall be made by Broker to the Office Space without the prior written consent of City.

3. **Sales Inventory Showcase and Signage:** City hereby agrees to Broker's exclusive use of the showcase in front of the Harbormaster's building to advertise vessels for sale. The broker will be allowed to place business signage on Marina property, having a size and location as approved by the Director of Marina and Aquatic Services.

4. **Concession Charge:** In consideration for the granting of an exclusive concession to operate his boat brokerage business at the Marina,,

Broker agrees to pay City a concession charge (the "Concession Charge") in an amount equal to FIVE PERCENT (5%) of gross receipts earned by Broker from sale or rental of any goods, products, or services from the Marina, including, but not limited to, new or used boats, boat trailers, boat equipment or accessories, and commissions from the sale of insurance or extended warranties made in conjunction with boat sales or brokerage. As used herein, the term "gross receipts" shall have the same meaning as defined in Section 5.04.110 of the Brisbane Municipal Code, a copy of which is attached hereto as Exhibit "A" and incorporated herein by reference. A transaction shall be deemed to have been made from the Marina, and therefore subject to the Concession Charge, if the contract was negotiated or executed at the Marina, regardless of whether delivery to the customer is made at a different location.

5. **Payment of Concession Charge:** Not later than the fifth (5th) day of the month following the end of each calendar quarter, beginning with the calendar quarter in which this Agreement is executed, Broker shall furnish to City a statement showing Broker's gross receipts from the Marina during the preceding calendar quarter, if any, and a calculation of the Concession Charge owed to City based upon such gross receipts. The statement shall include a description of each good, product, or service and the amount paid by the customer. The statement shall be accompanied by a check payable to City for the total amount of the Concession Charge shown thereon. Any Concession Charge not paid to City when due shall be increased by a late charge equal to five percent (5%) of the delinquent payment, and if not paid within thirty (30) days after the same becomes due, such delinquent payment shall bear interest at the rate of one and one-half percent (1½%) per month until paid in full.

6. **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 is less. 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 and are continuing to do so, then the 50% discount may continue on a month by month basis until terminated by City giving 30 days prior written notice to Broker. The buyer of a vessel will also be allowed the 50% discount for 90 days from the date on which the sale is closed. Normal and customary berth rent will commence after the 90 day discount period.

7. **Audit of Broker's Records:** City shall have the right to audit the books and records of Broker at any time during regular business hours to determine whether Broker has complied with the terms and conditions of this Agreement. The right of inspection shall include the right to make extracts and copies. In the event such audit discloses that Broker owes an additional Concession Charge to City, such additional Charge shall be immediately due and payable and shall be considered delinquent if not paid within five (5) days after written demand by City. If the additional Concession Charge exceeds Two Hundred Dollars (\$200), Broker shall also be responsible for payment of the cost of the audit.

8. **Term:** The term of this Agreement shall be for a period of three (3) years, commencing on April 1 2009, and expiring on March 31, 2012.

9. **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.

10. **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.

11. **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 10 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.

12. **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.

13. **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.

14. **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.

15. **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 Services
Director	400 Sierra Point Parkway Brisbane, CA 94005
To Consultant	Jose Miguel Martinez DBA: Anchor Boat Sales (Need Address)

16. **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.

17. **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.

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

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

20. **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.

Balance of this page intentionally left blank.

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

THE CITY OF BRISBANE

By: _____
A. Sepi Richardson, Mayor

ATTEST:

Sheri Marie Spediacci, City Clerk

APPROVED AS TO FORM:

Harold S. Toppel, City Attorney

BROKER:

Jose Miguel Martinez

EXHIBIT "A"
Brisbane Municipal Code Section 5.04.110

"Gross receipts" includes the total of amounts actually received or receivable from sales and the total amounts actually received or receivable for the performance of any act of service, or whatever nature it may be, for which a charge is made or credit allowed, whether or not such act or service is done as a part of or in connection with the sale of materials, goods, wares or merchandise. Included in "gross receipts" shall be all receipts, cash, credits, and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service costs, interest paid or payable, or losses or other expenses whatsoever.

Excluded from "gross receipts" shall be the following:

- A. Cash discounts allowed and taken on sales;
- B. Credit allowed on property accepted as part of the purchase price and which property may later be sold;
- C. Any tax required by law to be included in or added to the purchase price and collected from the consumer or purchaser;
- D. Such part of the sale price of property returned by purchaser upon rescission of the contract of sale as is refunded either in cash or by credit;
- E. Amounts collected for others where the business is acting as an agent or trustee to the extent that such amounts are paid to those for whom collected, provided the agent or trustee has furnished the director of finance with the names and addresses of the others and the amounts paid to them;
- F. That portion of the receipts of a general contractor which represent payments to subcontractors, provided that such subcontractors are licensed under Chapters 5.04 through 5.24, and provided the general contractor furnishes the director of finance with the names and addresses of the subcontractors and the amounts paid each subcontractor;
- G. Receipts of refundable deposits, except that refundable deposits forfeited and taken into income of the business shall not be excluded;
- H. As to a real estate agent or broker, the sales price of real estate sold for the account of others, except that portion which represents commission or other income to the agent or broker;
- I. As to retail gasoline dealer, a portion of his receipts from the sale of motor vehicle fuels equal to the motor vehicle fuel license tax imposed by and previously paid under the provisions of Part 2 of Division 2 of the Revenue and Taxation Code of the state;

- J. As to retail gasoline dealer, the special motor fuel tax imposed by Section 4041 of Title 26 of the United States Code if paid by the dealer or collected by him from the consumer or purchaser.