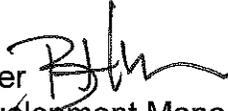




Agenda Date: 01/27/2015
Agenda Item: 3.9

STAFF REPORT

Date: January 27, 2015
To: City Council
From: Bryan Montgomery, City Manager 
Dwayne Dalman, Economic Development Manager

SUBJECT: Resolution approving the Lease Agreement between the City and Byrnes Enterprise, LLC, doing business as Mr. Pickles Sandwich Shop, at the property located at 3080 Main St. in Oakley.

Background and Analysis

In February of 2013, the City entered into a lease agreement with Republic of Cake, LLC (ROC) for the retail building located at 3080 Main Street. Sales activity started strong and continued for several months; however, more recently some reduction in sales has taken place. This, combined with health concerns of one of the principals, has led ROC to the decision to sell the business..

At the January 13, 2015 Meeting, the City Council approved an Assignment Agreement that would pass the existing lease agreement on from ROC to Byrnes Enterprise, LLC for the purposes of establishing a Mr. Pickles sandwich shop at that location. Also discussed at that Council Meeting were some proposed lease terms for a new lease for Byrnes Enterprise, LLC. Attached is the proposed lease agreement.

Fiscal Impact

Continued lease revenue - commencing April 1st at \$1,550 per month, increasing each year by 3%. Common Area Maintenance charges are also to be collected as part of the lease agreement.

Recommendation

Adopt a resolution approving the Lease Agreement between the City and Byrnes Enterprise, LLC, doing business as Mr. Pickles Sandwich Shop.

Attachment

1. Resolution
2. Proposed Lease Agreement

RESOLUTION NO. _____

**A RESOLUTION OF THE OAKLEY CITY COUNCIL APPROVING
THE LEASE AGREEMENT BETWEEN THE CITY OF OAKLEY AND T
BYRNES ENTERPRISE, LLC, FOR THE PROPERTY LOCATED AT
3080 MAIN STREET, OAKLEY, CALIFORNIA**

BE IT RESOLVED by the City Council hereby approves the Lease Agreement between the City and Byrnes Enterprise, LLC, doing business as Mr. Pickles Sandwich Shop, a true and accurate copy of which is attached hereto, and authorizes the City Manager to sign Agreement on behalf of the City.

The foregoing resolution was adopted at a regular meeting of the City Council a held on the 27th day of January, 2015, by Councilmember _____, who moved its adoption, which motion being duly seconded by Councilmember _____, was upon voice vote carried and the resolution adopted by the following vote:

AYES:

NOES:

ABSTENTION:

ABSENT:

APPROVED:

Doug Hardcastle, Mayor

ATTEST:

Libby Vreonis, City Clerk

Date

LEASE AGREEMENT
3080 Main Street, Oakley, California 94561

This Lease Agreement ("Lease"), by and between the Successor Agency to the Oakley Redevelopment Agency and the City of Oakley, a municipal corporation ("Lessor"), and Byrnes Enterprise, LLC, dba Mr. Pickles Sandwich Shop, hereinafter collectively designated as ("Lessee"), is made on the following terms and conditions:

Recitals

- A. The City of Oakley, hereinafter "CITY," is the owner of that real property located at 3080 Main Street, Oakley, California. This property is further identified as APN 037-200-011, hereinafter "the Property."
- B. The previous lessee of the Property, Republic of Cake, LLC, has assigned the lease agreement to Lessee and on January 13, 2015 the City formally consented to the assignment.

Agreement

Now, therefore, the parties agree as follows:

1. **DESCRIPTION.** Lessor hereby leases unto Lessee, and Lessee hereby leases from Lessor, on the terms and conditions hereinafter set forth, those certain premises hereinafter referred to as the "leased premises" and described as follows:

**Those certain premises located at 3080 Main Street, Oakley, California,
 (Assessor's Parcel Number 037-200-011)**

2. **TERM.** The term of this Lease shall be five (5) years, commencing on the 11th day of February 2015; however, the first lease payment shall not be due until April 1, 2015, allowing time for the conversion of the lease space. This Agreement may be extended, modified or otherwise amended only by mutual agreement of the parties in writing.
3. **RENT.** The rent for the leased premises shall commence at be the sum of ONE THOUSAND FIVE HUNDRED-FIFTY DOLLARS (\$1,550) and will increase by three percent (3%) on the 1st day of April each year. The rent is due commencing on April 1, 2015 and on the 1st day of every month thereafter. Rent and CAM charges payments shall be mailed or hand-delivered to:

City of Oakley
 Attn: Finance Director
 3231 Main Street
 Oakley, CA 94561

4. **COMMON AREA MAINTENANCE CHARGES.** The common area maintenance ("CAM") charges, that include operating costs and other charges related to the Oakley Plaza parking and open spaces, further defined in Paragraphs 7, 8 and 14 of this Lease, shall also be payable on the 1st day of every month. Lessee shall pay Lessor as a monthly ONE HUNDRED SEVENTY-TWO DOLLARS AND 37/100 (\$172.37) for the CAM charges through July 1, 2015. Prior to July 1, 2015 and every year thereafter by July 1st a new CAM charge will be presented which are the costs allocable to the lease premises, which are shared costs by all tenants and owners within the Oakley Plaza. It is not expected that these charges will be much greater than \$200 per month during the lease period; however, these costs will be determined on an annual basis in consultation with Lessee and all other operators within the Oakley Plaza.

5. **SECURITY DEPOSIT:** Lessor holds a deposit in the amount of THREE THOUSAND TWO HUNDRED DOLLARS AND NO/100 (\$3,200), as security for the full and faithful performance by Lessee of all terms, conditions, and covenants of this Lease.

Upon termination of this Lease, the Lessor may use any portion of the security deposit as may be reasonably necessary to remedy Lessee's defaults of the provisions of this Lease Agreement, including, but not limited to, payment of unpaid rent due under paragraph 2 of this Lease, cleaning of the Property, repair of damage, or for storage of personal property which has been abandoned by Lessee. Any remaining portion of the security deposit after such deduction shall be mailed to Lessee at Lessee's last known address.

6. **TENANT IMPROVEMENT PARTICIPATION.** Lessor owns and retains ownership of all fixed in place equipment such as plumbing, restrooms, hood with make-up and exhaust systems, grease trap/collector, electrical, HVAC, sewer system, built-in customer counter and all other fixed equipment. Lessee shall provide all removable equipment (ovens, refrigerators, furniture, point of sale system, etc.) at Lessee's own expense and shall provide a list of said equipment to Lessor prior to commencement of operations.

7. **DELINQUENT RENT AND LATE CHARGES:** If any rent and accompanying CAM charges are not paid to the Lessor within ten (10) days after due date of the 1st of the month, a late charge of TWO-HUNDRED FIFTY DOLLARS AND NO/100 (\$250) shall be added to the payment and the total sum shall become immediately due and payable to Lessor. Failure to pay within twenty (20) days after the due date will incur an additional late charge of THREE-HUNDRED FIFTY DOLLARS AND NO/100 (\$350) which shall be added to the payment and the total sum shall become immediately due. Failure to pay rent and accompanying CAM charges, and any late charges mentioned herein within thirty (30) days after the due date will immediately terminate this Lease.

In the event that Lessee shall become delinquent in paying Lessor any payment due pursuant to this Lease, Lessee shall pay to Lessor interest on said unpaid balance at a rate of one and one-half percent (1½%) per month, from the date said rent, accompanying CAM charges and late charges were due and payable until paid.

8. **USE:** The premises are leased to Lessee for the purpose of establishing a Mr. Pickles sandwich shop and for no other purpose without the written consent of the Lessor. Lessee shall not leave the premises unoccupied or vacant, but shall conduct and carry on only the type of business specifically set forth herein, keep in stock a line of merchandise of such size, character and quality as is reasonably designed to produce the maximum amount of gross sales and revenues, maintain an adequate sales force to serve all customers properly, and operate such business in an efficient and diligent manner at all times during the term of this Lease. Said business shall be kept open continuously each day of the week during the hours customary for business of like character, generally recognized holidays excepted. Lessee agrees to expand business hours to meet customer demand.

Lessee further agrees, if allowed by the rules and regulations of the Mr. Pickles franchise, to work with Lessor on the possibility of the Property being used for evening wine tastings after 8:30pm – most likely on the weekends. Any such use must be on terms that are mutually agreed to by the parties in writing.

9. **COMMON AREAS:** The Lessor reserves the right to regulate the use of areas and facilities which are available for use by the general public or Lessor's other lessees and designees, for ingress and egress, for service and loading areas and for parking, whether within or without the area of the leased premises described above. Lessee agrees that the maintenance and use of such areas by the Lessee, its employees, agents, customers and invitees, shall be in common with others, as Lessor may from time to time permit. The manner in which the said common areas and facilities shall be maintained, and the expenditures for maintenance shall be at the sole discretion of Lessor and the use of such areas and facilities shall be subject to such reasonable regulations and changes as Lessor shall make from time to time.

No part of any parking area adjoining the premises is leased hereunder, but Lessor agrees that the parking area shall be available to be used by customers of Lessee along with customers of other tenants of the shopping center. Lessee, its employees and agents shall park their automobiles in such a place or places as shall be designated by Lessor. Lessee agrees that upon written notice from Lessor, it will, within five days, furnish the automobile license numbers of its cars and the cars of all its employees and agents. These employees are encouraged to park in the parking areas at City Hall, not in the Oakley Plaza parking lot.

10. UTILITIES, SERVICES AND OPERATING COST. Any utilities and services individually metered to Lessee or supplied individually to Lessee shall be paid directly by Lessee at Lessee's sole cost and expense. In addition, as stated herein, Lessee agrees to pay to Lessor, Lessee's proportional share of the cost of such items and services as Lessor may deem appropriate to good order, protection, condition and repair of the shipping center and which may be provided in common with other tenants of the building of which the leased premises are a part and may include, but shall not be limited to: (a) parking lot paving, sweeping, lighting, striping, drainage and maintenance and the cost to have abandoned vehicles removed from the shipping center; (b) maintenance, repair and replacement of and utilities to operate heating and air conditioning systems if the same are provided centrally, (c) maintenance and lighting of the shipping center signs; (d) water and sewage; (e) garbage and trash removal; (f) business permit fees, parking or occupancy taxes and charges assessed against the shipping center by governmental agencies; (g) fire, casualty, public liability, rental and other insurance in amounts and covering hazards deemed appropriate by Lessor; (h) cleaning and painting of exterior walls and removal of graffiti; (i) cleaning and lighting of walkways and common areas; (j) gardening and maintenance of planted areas and weed abatement; (k) security guards, inspectors and parking lot attendants; and (l) seasonal decorations. Lessee's share of costs for these services shall be paid to Lessor as set forth in Paragraph 3.

If individual heating or air conditioning units or any other equipment and fixtures are provided to Lessee, Lessee shall pay the full cost of operating, maintaining, replacing and repairing same during the term hereof.

11. ALTERATIONS AND REPAIRS. Lessee shall make no alterations of or additions to either the interior or exterior of the said premises without the written consent of Lessor. Any such additions to or alterations of the premises shall be made at the expense of the Lessee, and any such alterations of or additions to the premises, including any locks, bolts or security grating and hardware, shall become at once a part of the realty and belong to Lessor. Lessee, at Lessee's sole cost, is responsible for all repairs and maintenance of the lease premises and shall keep and maintain said premises and appurtenances and every part thereof, including but not limited to the store front, exterior walls, doors, roof, plumbing, sewers, plate glass and other glazing, duct work, electrical wiring and lights, sign fixtures, canopies and sidewalks adjacent to the premises, floors, ceilings, fire sprinkler systems and the entire interior of the premises in good and sanitary order, condition and repair, making replacements as necessary. Lessee hereby waives all right to make repairs at the expense of Lessor as provided in Section 1942 of the Civil Code of the State of California, and all rights provided for by Section 1941 of said Civil Code. If, during the term of this Lease, in the judgment of Lessor, the Lessee shall fail to keep and maintain the premises in any respect required by this Paragraph, Lessor may do anything necessary to correct the problem by restoring the good and sanitary order and condition, or make the repair, provided that the Lessee shall have failed to correct such problem or make such

repair within fifteen (15) days after receipt of notice from Lessor. Any amounts expended by Lessor to correct such problem or make such repair shall be deemed to be additional rental and is payable as such on the next day upon which rent becomes due.

By entry hereunder, Lessee accepts the premises in their present order, condition and repair and agrees on the last day of said term or sooner termination of this Lease, to surrender unto Lessor said premises with the said appurtenances in the same condition as when received, reasonable use and wear thereof excepted. Lessee understands that Lessor makes no representations or warranties as to the physical or mechanical qualities of the premises. Any costs at the outset necessary to make the leased premises tenantable shall be borne by the Lessee.

12. **TRADE FIXTURES.** Subject to the provisions of this Agreement, Lessee at Lessee's expense may install in or on the leased premises such fixtures, equipment, furniture and property as it may consider advisable for the conduct of its business, provided that any such installation shall not cause any material damage to the improvements on the leased premises. Lessee shall remove all unattached, movable furniture, trade fixtures and store equipment installed on the leased premises by Lessee and the same shall be removed by Lessee at or before the expiration or termination of this Lease, or any renewal term hereof, and if damage is caused by such removal, Lessee agrees to repair such damage at its own cost forthwith.

13. **FREE FROM LIENS.** Lessee shall keep the leased premises and the property in which the leased premises are situated free from any liens arising out of any work performed, materials furnished, or obligations incurred by or for Lessee.

14. **COMPLIANCE WITH GOVERNMENTAL REGULATIONS.** Lessee shall, at its sole cost and expense, comply with all of the requirements of all County, Municipal, State and Federal authorities now in force, or which may hereafter be in force, pertaining to the leased premises, and shall faithfully observe in the use of the premises all County, Municipal, State and Federal laws now in force or which may hereafter be in force. The judgment of any court of competent jurisdiction, or the admission of Lessee in any action or proceeding against Lessee, whether Lessor be party thereto or not, that Lessee has violated any such laws in the use of the premises, shall be conclusive of that fact as between Lessor and Lessee.

15. **ASSIGNMENT OR SUBLETTING.** Lessee shall not assign this Lease, nor any right hereunder, nor sublet the premises, nor any part thereof, without the Lessor's prior written consent of the assignment or subletting after reviewing the proposed tenant's business background, creditworthiness and financial conditions which written consent shall not be unreasonably withheld by Lessor. Lessor's consent to any assignment shall be withheld in the event there shall be any change or modification of the use of the premises

from that stipulated in Paragraph 4 above. Upon any assignment or subletting, the parties agree that the base rent stipulated in Paragraph 3 above shall be increased to the market rent determined by survey of the rent then being asked for similar vacant premises in the area, but in no event shall the new base rent be less than the base rent payable for the last full month immediately preceding the assignment or subletting. Lessor's consent to any one assignment or subletting, shall not constitute a waiver of any subsequent assignment or subletting requirements as set forth in this Agreement. Any assignment or subletting without the Lessor's consent shall, at the option of the Lessor, be voidable and be deemed a breach of this Lease. In the event of any assignment or subletting, it is understood that Lessee shall not be relieved of any liability or performance of any term of this Lease.

16. TAXES AND ASSESSMENTS.

16.1 PERSONAL PROPERTY AND TRADE FIXTURES. Lessee shall be liable for all taxes and assessments levied against personal property and trade fixtures or improvements placed by or for Lessee in, on or about the leased premises. If any such taxes or assessments on Lessee's personal property or trade fixtures or improvements are levied against the Lessor or Lessor's property, and if Lessor pays the same, which Lessor shall have the right to do regardless of the validity of such levy, or if the assessed value of Lessor's property is increased by the inclusion therein of the value placed upon such personal property or improvements of Lessee, and if Lessor pays the taxes and assessments based on such increased assessment, which Lessor shall have the right to do, regardless of the validity thereof, Lessee, upon demand, shall, as the case may be, repay to Lessor the taxes and assessments so levied against Lessor, or the proportion of such taxes and assessments resulting from such increases in the assessment.

16.2 PROPERTY TAXES AND ASSESSMENTS. Lessee agrees to pay Lessor Lessee's proportional share as defined in paragraph 7 of the total taxes and special assessments upon the whole of the land and building and parking lot, upon and within which, the leased premises are situated. A statement of the taxes and special assessments for each year shall be prepared by Lessor and a copy thereof furnished to Lessee, and Lessor's good faith computation of Lessee's *pro rata* share of said taxes and assessments for the year shall be final and binding on all parties. The taxes and assessments due from Lessee for the first and last years of the lease term shall be prorated so as to include only those portions of the taxable years which are part of the lease period. If property taxes are cancelled following Lessor's acquisition of the property, Lessee shall pay any possessory interest tax levied by Contra Costa County.

17. ADVERTISEMENTS AND SIGNS. Lessee shall not place or permit to be placed any sign, marquee, lettering, decoration, advertising, light or awning on the outside of the leased premises or on the inside of the said premises if the same be visible from the

outside of the leased premises, without the written consent of Lessor. Lessee agrees that all signs shall be conformity with dimensions and color schemes designated by Lessor. Lessee, upon request of Lessor, shall immediately remove any sign or decoration which Lessee has placed or permitted to be placed in, on or about the premises and which, in the opinion of Lessor, is objectionable or offensive, and if Lessee fails so to do, Lessor may enter upon the leased premises and remove the same. Lessee agrees not to use a phonograph, loud speaker or other sound equipment audible from the outside of the premises without the prior written consent of Lessor. Lessee shall comply with all sign requirements as set forth in the Oakley Municipal Code.

18. LESSEE'S INSURANCE. During the term of this Lease, Lessee at its own cost and expense, shall procure from reliable insurance satisfactory to Lessor, and keep in full force and effect at all times during this Lease term, a public liability and property damage insurance policy in amounts of not less than the following: Bodily injury liability - \$1,000,000 each person, \$1,000,000 each occurrence; property damage liability - \$500,000 each occurrence. Said policy shall cover injuries to and/or death of all persons and loss of or damage to property (including loss of use) occasioned by or arising from or out of the acts or omissions of Lessee, its agents and/or employees and/or the condition of the premises. Such insurance shall expressly inure to the benefit of Lessor, its agent or employees, for liability arising or alleged to have arisen from such acts or omission on the leased premises or the operations of Lessee or anyone directly or indirectly employed by Lessee. Said insurance policy shall name both Lessor and Lessee as insureds, with a copy of said policy being furnished directly to Lessor.

Lessee is to obtain a written obligation on the part of the insurance carriers to notify Lessor in writing at least ten (10) days prior to any cancellation or expiration without renewal thereof, and Lessee agrees if it does not keep said insurance in full force and effect the Lessor may take out the necessary insurance and pay the premium, and the repayment thereof shall be deemed to be a part of the rental and is payable as such on the next day upon which rent becomes due.

The Lessee shall, at its sole cost and expense, comply with any and all recommendations and requirements pertaining to the leased premises of any insurance organization or company in connection with the maintenance of fire and public liability insurance covering the leased premises and the shopping center.

19. WASTE. The Lessee shall not commit, or suffer to be committed, any waste upon the leased premises or any public or private nuisance. Lessee shall contract for the general and routine waste removal pursuant to City ordinance.

20. PROHIBITED USES. Lessee shall not use the leased premises for, or carry on or permit upon said leased premises, any offensive, unlawful, noisy or dangerous trade,

business, manufacture or occupation, or any nuisance or anything against the public policy. Lessee shall not conduct or permit any auction sale, sidewalk sale or parking lot sale to be held in or about the leased premises, although outdoor seating for Lessee's customers is allowed with a seating plan approved by Lessor. Lessee shall not solicit business, distribute handbills, store its equipment or merchandise or erect any signs, planters or other barriers on any sidewalk, in the parking lot, or in any common area, without the written permission of the City Manager.

21. **ENTRY BY LESSOR.** Lessee shall permit the Lessor and its designees to enter into and upon the leased premises after reasonable notice is given to Lessee, who shall not unreasonably withhold such permission, (a) to inspect the premises; (b) to make repairs, alterations or additions (with such materials as Lessor may deem necessary therefore) to the leased premises, the building of which the leased premises form a part, or any property owned or controlled by Lessor; (c) to post notices of non-liability for alterations, additions or repairs; (d) to place upon the property in which the said leased premises are located any usual or ordinary "For Sale" signs, and to show any prospective purchasers the leased premises; (e) to place upon said leased premises any usual or ordinary "To Let" or "To Lease" signs, at any time within ninety (90) days prior to the expiration of this Lease, in which case Lessee shall allow prospective lessees or applicants to enter and examine said leased premises during the said last ninety (90) days; and (f) for any other lawful purposes. In all instances of emergency, entry by Lessor, its designees or its invitees, Lessee waives any claim to damages or any rebate of rent for any loss of occupation or quiet enjoyment of the leased premises, including loss of business, occasioned by such entry.

22. **INDEMNIFICATION OF LESSOR.** Lessee, as a material part of the consideration to be rendered to Lessor, hereby waives all claims against Lessor for damages to goods, merchandise or property of Lessee in, upon or about said premises and for injuries to persons in or about said premises, from any cause arising at any time, and Lessee will hold Lessor exempt and harmless from any damage or injury to any person, or to the goods, merchandise or property of any person, occurring in, upon or about the leased premises, sidewalks or parking areas adjacent thereto, from any cause arising at any time during the term of this Lease or any extension hereof. Lessee agrees that if Lessor is involuntarily made a party defendant to any litigation concerning this Lease or the demised leased premises, for any reason other than because of any act or omission of Lessor, then Lessee shall hold Lessor harmless from all liability by reason thereof, including reasonable attorney's fees incurred by Lessor in such litigation and all taxable court costs.

23. **INSOLVENCY.** The following shall constitute a breach of this Lease by Lessee: (a) the insolvency of the Lessee; (b) the commencement of any bankruptcy proceedings whether begun by or against the Lessee; (c) the appointment of a receiver to take

possession of all or substantially all of the assets of Lessee; (d) an assignment by Lessee for the benefit of creditors.

24. **NOTICES.** Any notice, demand or communication under or in connection with this Lease may be served by either party upon the other by personal service, or by mailing the same by registered mail in the United States Post Office, postage thereon fully prepaid, and directed to Lessor at 3231 Main Street, Oakley, California 94561 and may, likewise, be served on Lessee by personal service, or by mailing the same, addressed to lessee at 3080 Main Street, Oakley, California 94561 whether or not Lessee has departed from, abandoned or vacated said leased premises. Either Lessor or Lessee may change its address by notifying the other party in writing as to such new address as may be desired used and which same shall continue as the address until further written notice.

25. **TIME IS OF THE ESSENCE.** Time is hereby expressly declared to be of the essence of this Lease and of all the covenants, agreements, conditions and obligations herein contained.

26. **NON-WAIVER OF BREACH.** The waiver by Lessor of any breach of any term, covenant or condition herein contained shall not be deemed to be a waiver of such terms, covenants or conditions or any subsequent breach of the same or any other term, covenant or condition herein contained. The subsequent acceptance of rent hereunder by Lessor shall not be deemed to be a waiver of any receding breach by Lessee of any term, covenant or condition of this Lease, regardless of Lessor's knowledge of such preceding breach at the time of acceptance of such rent.

27. **EFFECT OF EXERCISE OF PRIVILEGE BY LESSOR.** The exercise of any right or option or privilege hereunder by Lessor shall not exclude Lessor from exercising any and all other rights, privileges, and options hereunder and Lessor's failure to exercise any right, option or privilege nor shall it relieve Lessee from Lessee's part to be performed hereunder nor from damage or other remedy for failure to perform or meet the obligations of this Lease.

28. **VACATING OR ABANDONMENT OF PREMISES.** Lessee shall not vacate or abandon the leased premises any time during the lease term; and if Lessee shall abandon, vacate or surrender said leased premises, or be dispossessed by process of law, or otherwise, any personal property belonging to the Lessee and left on the leased premises shall be deemed to be abandoned, at the option of the Lessor, except such property as may be mortgaged to the Lessor, if any.

29. **SURRENDER OF LEASE NOT MERGER.** The voluntary or other surrender of this Lease by the Lessee, or a mutual cancellation thereof, shall not work a merger, and shall, at the option of the Lessor, terminate all of the existing subleases or subtenancies.

30. **DESTRUCTION OF PREMISES.** In the event of total destruction of the building in which the said leased premises are situated during the said term, from fire or other catastrophe, this Lease shall terminate. In the event of a partial destruction from any such causes, the Lessor shall forthwith restore the premises provided such restoration can be made within thirty (30) days under the laws and regulations of federal, state, county and municipal authorities, and materials and labor are available for such repairs, but such partial destruction shall in no way annul or void this Lease, except that Lessee shall be entitled to a proportionate deduction of rent while such restoration is being made, such proportionate deduction to be based upon the extent to which the making of such restoration shall interfere with the business carried on by Lessee in said leased premises. If such restoration cannot be made in thirty (30) days, Lessor may, at its option, make same within a reasonable time, this Lease continuing in full force and effect and the rent to be proportionately abated as in this paragraph provided. In the event that the Lessor does not so elect to make such restoration which cannot be made in thirty (30) days or a reasonable time, or such restoration cannot be made under such laws and regulations, or materials and labor are not available for such restoration within such time, this Lease may be terminated at the option of either party. In respect to any partial destruction which Lessor is obligated to restore or may elect to restore under the terms of this paragraph, the provisions of Section 1932, Subdivision 2, and of Section 1933, Subdivision 4, of the Civil Code of the State of California, are waived by the Lessee. In the event that the leased premises may be destroyed to the extent of more than 33-1/3% (thirty three and one-third percent) of the replacement cost thereof, the Lessor may elect to terminate this Lease. In any case that Lessor should elect or be obligated to restore or rebuild because of destruction as provided herein, Lessor's obligation shall be limited to the basic building, store front and interior work originally provided by Lessor at the inception of this Lease; Lessee shall fully repair or replace its own alterations and improvements, exterior signs, trade fixtures, equipment, display cases and other installations originally installed by Lessee at its expense.

31. **REMEDIES OF LESSOR OR DEFAULT.** This Lease is made upon the express condition that if default be made in the payment of the rent above reserved, or any part thereof, or if Lessee falls or neglects to perform, meet or observe any of Lessee's obligations hereunder, or if Lessee shall abandon or vacate said leased premises, Lessor or the legal representative of Lessor, at any time thereafter, without notice or demand, may lawfully declare said term ended, and re-enter the said demised premises, or any part thereof, either with or without process of law, and expel, remove and put out Lessee or any person or persons occupying said leased premises and may remove all personal property therefrom, and store the same in a public warehouse at the cost of and on account of Lessee, using such force as may be necessary to again repossess and enjoy said leased premises as before this demise, without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant or condition, and without

liability to any person for damages sustained by reason of such removal. Lessor may likewise, at Lessor's option, but at the cost of Lessee, and in addition to any other remedies which Lessor may have upon such default or failure or neglect and without notice to Lessee, petition the Superior Court of the State of California for and be entitled as a matter of right to the appointment of a receiver and said court may appoint such receiver and vest in him such powers and authority as may be necessary or proper to fully protect all the rights herein granted or reserved to Lessor. Any such receiver may take possession of any personal property belonging to the Lessee and used in the conduct of the business then being carried on by the Lessee in the said leased premises, and may use the same in conducting such business on the leased premises, without compensation to the Lessee.

Should Lessor elect to re-enter, as herein provided, or should it take possession pursuant to legal proceedings or pursuant to any notice provided for by law, it may, in addition to any other remedies Lessor may have upon such default, failure or neglect, either terminate this Lease or it may from time to time, without terminating this Lease, relet the said leased premises, or any part thereof, for such term or terms and at such rental or rentals and upon such other terms and conditions as Lessor, in its sole discretion, may deem advisable, with the right to make alterations and repairs to said leased premises. Rentals received by Lessor from such reletting shall be applied: First, to the payment of any indebtedness, other than rent, due hereunder from Lessee to Lessor; second, to the payment of rent due and unpaid hereunder; third, to the payment of any cost of such reletting, including commissions; fourth, to the payment of the cost of any alterations and repairs to the leased premises; and the residue, if any shall be held by Lessor and applied in payment of future rent as the same may become due and payable hereunder. Should such rentals received from such reletting during any month be less than that agreed to be paid during the month by Lessee hereunder, then Lessee shall pay such deficiency to Lessor. Such deficiency shall be calculated and paid monthly.

No such re-entry or taking possession of said leased premises by Lessor shall be construed as an election on its part to terminate this Lease unless a written notice of such intention be given to Lessee or unless the termination thereof be decreed by a court of competent jurisdiction. Notwithstanding any such reletting without termination, Lessor may at any time thereafter elect to terminate this Lease for such previous breach. Should Lessor at any time terminate this Lease for any breach, in addition to any other remedy it may have, it may recover from Lessee all damages it may incur by reason of such breach, including the worth at the time of any award of damages of the excess, if any, of the amount of rent reserved in this Lease for the balance of the term and charges equivalent to rent for the remainder of the stated term, and including the cost of recovering the leased premises over that which Lessee proves could reasonably have been avoided, pursuant to Section 1951.2 of the Civil Code of California. No notice of the exercise of any election given Lessor herein need be sent to Lessee.

32. **SUBORDINATION.** Lessee covenants that this Lease is and shall be at all times subject and subordinate to the liens of any mortgage or mortgages, deed of trust or deeds of trust now existing or which Lessor, or any subsequent owner of the demised premises shall make hereafter covering said premises, and to any and all advances made or to be made thereunder, and to the interest thereon and to any and all renewals thereof. Lessee covenants to execute, acknowledge, and deliver upon request, all documents demanded by Lessor to subordinate this Lease to any such indebtedness as herein provided.

33. **WAIVER OF RELOCATION BENEFITS:** Lessee warrants and represents to Lessor that Lessee does not have nor shall Lessee claim any right to relocation benefits under any provision of any State of California or federal law and Lessee knowingly waives the right to make any claim against the Lessor for relocation benefits in the event Lessor elects to terminate this Agreement for any reason or at the expiration of the Lease term. Lessee further warrants and represents that he has no other right or claim to compensation arising out of or connected with the acquisition of the leased premises by the Lessor and agrees never to assert such a claim. Lessee does not waive relocation benefits only in the event the leased premises is voluntarily rehabilitated or demolished by Lessor or subject to enforcement of building or health codes by a public entity, as set forth in California Government Code section 7265.3.

34. **BINDING ON SUCCESSORS.** The covenants and conditions herein contained shall, subject to the provisions as to assignment and subletting, apply to and bind the heirs, successors, executors, administrators and assigns of all the parties hereto.

35. **DEFINED TERMS.** The words "Lessor" and "Lessee" as used herein shall include the plural as well as the singular. Words used in masculine gender include the feminine and neuter. If there be more than one Lessor or Lessee the obligations hereunder imposed upon Lessor or Lessee shall be joint and several. The marginal heading or titles to the paragraphs of this Lease are not a part of this Lease and shall have no effect upon the construction or interpretation of any part hereof.

36. **COSTS OF SUIT.** In the event that it becomes necessary or advisable for either party hereto to file suit against the other party to enforce any rights hereunder, the successful party in such lawsuit shall be entitled to a reasonable attorney's fee, to be taxed as costs in such suit or to be fixed by the Court in any such suit.

37. **WAIVER OF SUBROGATION.** As long as their respective insurers so permit, Lessor and Lessee mutually waive for themselves and their respective insurers, their respective rights of recovery against each other for any loss insured by fire, extended coverage and other property insurance policies, existing for the benefit of the respective parties, but solely to the extent of the amount of insurance proceeds received by the

insured party. Each party shall obtain any available endorsements to evidence compliance with the above waiver.

IN WITNESS WHEREOF, the parties hereunto set their hands in duplicate, the day and year first hereinabove written.

LESSOR

City of Oakley, a municipal corporation

LESSEE

*Byrnes Enterprise, LLC, dba Mr. Pickles
Sandwich Shop*

By: _____

Bryan H. Montgomery
City Manager

By: _____

William Byrnes
Owner

ATTEST:

By: _____

Libby Vreonis
City Clerk

APPROVED AS TO FORM

By: _____

William R. Galstan
Special Counsel