

CITY OF BURNABY

BYLAW NO. 10484

A BYLAW to authorize the granting of a lease of certain
City owned property to BPYA 138 Holdings Ltd.

The Council of the City of Burnaby ENACTS as follows:

1. This Bylaw may be cited as **BURNABY LEASE AUTHORIZATION BYLAW NO. 2, 1996.**
2. The Council is hereby authorized and empowered to lease City owned property being legally described as Block 4, District Lot 138, Group 1, New Westminster District, Plan 50726 unto BPYA 138 HOLDINGS LTD. upon the terms and conditions in the form of lease attached hereto as Schedule "A" (hereinafter called the "said lease").
3. The City Clerk is hereby authorized and empowered to execute the said lease, signing the same and affixing the corporate seal thereto.

Read a first time this	28 th	day of	OCTOBER	1996
Read a second time this	28 th	day of	OCTOBER	1996
Read a third time this	28 th	day of	OCTOBER	1996
Reconsidered and adopted this	4 th	day of	NOVEMBER	1996


ACTING M A Y O R


C L E R K

Schedule "A"

L E A S E

THIS AGREEMENT made the _____ day of _____, 1996

PURSUANT TO PART 2 OF THE *LAND TRANSFER FORM ACT*

BETWEEN:

CITY OF BURNABY
4949 Canada Way
Burnaby, B.C., V5G 1M2

(hereinafter called "the City")

OF THE FIRST PART

AND:

BPYA 138 HOLDINGS LTD.
P.O. Box 550
4050 Whistler Way
Whistler, B.C. V0N 1B0

(hereinafter called "the Lessee")

OF THE SECOND PART

WHEREAS the City is the owner in fee simple of ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being the City of Burnaby in the Province of British Columbia, and more particularly known and described as Block 4, District Lot 138, Group 1, Plan 50726, New Westminster District (hereinafter called "the Burnaby Mountain Golf Course").

NOW THEREFORE THIS INDENTURE WITNESSETH THAT:

In consideration of the terms, covenants and conditions hereinafter contained on the part of the Lessee to be paid, observed and performed the City doth hereby lease unto the Lessee the building located on that portion of the Burnaby Mountain Golf Course

shown outlined in red on the attached sketch marked Schedule "A" (hereinafter called the "demised premises").

1.00 TERM:

To have and to hold the demised premises unto the Lessee for a period of five years commencing on the 1st day of November, 1996 and ending on the 31st day of October, 2001.

2.01 AMOUNT OF RENT PAYABLE:

The Lessee shall yield up and pay to the City for the term the greater of:

- (a) a minimum annual rental of FORTY-TWO THOUSAND (\$42,000.00) DOLLARS payable in equal monthly instalments of Three Thousand Five Hundred (\$3,500.00) Dollars in advance on the first day of each month commencing on the 1st day of December, 1996; or
- (b) a percentage rental for each calendar year equal to Five and One Half (5 1/2%) per centum of gross revenue (as hereinafter defined) for such calendar year.

The phrase "gross revenue" means the entire sales price, whether for cash or credit or otherwise, of all sales of food and beverages on or from the demised premises, including coin operated machines or vending machines, but shall not include any sums collected and paid out for any direct retail sales tax or goods and services tax imposed by any government or any revenue from the sale of food and beverages to the Lessee's employees or from promotional meals.

2.02 PAYMENT OF PERCENTAGE RENT:

- (a) Within thirty (30) days after the end of each year, the Lessee shall provide the City with an audited statement signed and verified by the Lessee and prepared by an accountant setting out the amount of the gross revenue for such year. If the amount resulting from the application of the percentage specified in section 2.01(b) to the gross revenue for such year exceeds the minimum annual rental payable under section 2.01(a), then the audited statement shall be accompanied by an additional payment to the City in the amount of such excess. Where this lease terminates on a day other than December 31, the audited statement shall be provided within thirty (30) days of such termination date and the payment of percentage rent shall be based on and prorated for that part of the calendar year ending on the termination date;

- (b) The Lessee hereby agrees that it will keep on the demised premises separate accounting records for the business carried on, upon or from the demised premises, such records consisting of an accurate record of all sales and all other revenue derived from the business and including such other supporting or ancillary records and vouchers so as to enable an audit of the statement of gross revenue to be conducted. Such records shall be available for the inspection and audit of the City and its agents at all reasonable times during ordinary business hours. The Lessee agrees to keep, retain, preserve, and make available to the City for at least twelve (12) months after the delivery of the annual audited statement all sales slips, inventory records and other pertinent records. The Lessee acknowledges that, notwithstanding the delivery to the City of the annual audited statement and the acceptance of such statement

and percentage rental, if any, shown to be payable thereby, the City may at its instance cause an independent audit to be undertaken. In the event that such audit discloses that the actual gross revenue is greater by two per cent or more than that disclosed by the annual audited statement furnished by the Lessee, the Lessee, in addition to paying the additional percentage rental based on the gross revenue disclosed by such independent audit, shall pay the cost of such audit with the next instalment of minimum rental.

2.03 NET LEASE:

Subject to section 7.01, all rent required to be paid by the Lessee hereunder shall be paid without any deduction, abatement or set-off whatsoever, it being the intention of this lease that all expenses, costs, payments and outgoing incurred in respect of the demised premises and other improvements on the demised premises or for any other matter or thing affecting the demised premises, shall (unless otherwise expressly stipulated herein to the contrary) be borne by the Lessee, that the rent herein provided shall be absolutely net to the City and free of all abatements, set-offs or deductions of real property taxes, charges, rates, assessments, expenses, costs, payments or outgoings of every nature arising from or related to the demised premises, or any other improvements on the demised premises, and that the Lessee shall pay or cause to be paid all such taxes, charges, rates, assessments, expenses, costs, payment and outgoings.

2.04 COLLECTION OF OTHER AMOUNTS DUE:

Any sums, costs, expenses or other monies from time to time due and payable by the Lessee to the City under the provisions of this lease, including sums payable by way of indemnity and whether expressed to be rent or not in this lease, shall be treated as and deemed to be additional rent, and the City shall have all the remedies for the

collection of such sums, costs, expenses or other amounts as are available to the City for the collection of rent in arrears.

2.05 INTEREST ON AMOUNT IN ARREARS:

When the basic rent, additional rent or any other amount payable hereunder by the Lessee to the City shall be in arrears, such amount shall bear interest at the rate of three (3%) per cent above the highest prime commercial lending rate of the City's bank per annum until paid, and the City shall have all the remedies for the collection of such interest, if unpaid after demand, as in the case of rent in arrears but this stipulation for interest shall not prejudice or affect any other remedy.

2.06 RENEWALS:

- (a) Provided the Lessee is not in default of any condition or provision of this lease and the Lessee serves written notice on the City on or before the 1st day of May, 2001 requesting the grant of a further five year lease of the demised premises the City will, subject to the approval of the Council of the City, grant to the Lessee a further lease of the demised premises for a five year term (the "First Renewal Term") commencing immediately upon the expiration of the term granted herein, such lease to contain the same covenants, premises and agreements as the present agreement except that such lease shall not contain any further right of renewal except in respect of the Second Renewal Term (as hereinafter defined). Provided that the City gives no warranty or undertaking express or implied as to its power to grant or confer this First Renewal Term. Provided further, that if the Lessee has operated its business on the demised premises in a satisfactory manner during the term, the City will give favourable consideration to a request for a renewal lease.

- (b) Provided the Lessee is not in default of any condition or provision of the Lease in respect of the First Renewal Term, and the Lessee serves written notice on the City no later than six (6) months before expiration of the First Renewal Term, requesting the grant of a further five year lease of the demised premises the City will, subject to the approval of Council of the City, grant to the Lessee a further lease of the demised premises for a further five (5) year term (the "Second Renewal Term") commencing immediately upon the expiration of the First Renewal Term granted herein, such lease to contain the same covenants, promises and agreements as the present agreement except that such lease shall not contain any further right of renewal. Provided that the City gives no warranty or undertaking express or implied as to its power to grant or confer this Second Renewal Term. Provided further, that if the Lessee has operated its business on the demised premise in a satisfactory manner during the First Renewal Term, the City will give favourable consideration to a request for a second renewal lease.

3. PAYMENT OF TAXES

3.01 LESSEE TO PAY TAXES:

In addition to the rent herein provided, the Lessee will in each and every year during the term not later than the day immediately preceding the date or dates on which real property taxes and other charges imposed upon real property within the City of Burnaby become due and payable whether monthly, quarterly, twice-yearly or otherwise, pay and discharge or cause to be paid and discharged all taxes, rates, duties, charges and assessments including school taxes, local improvement rates and other charges which now are or shall maybe levied, rated, charged or assessed against the demised premises, all other structures, all machinery, equipment, facilities and other property of any nature whatsoever thereon and therein, whether such taxes, rates, duties, charges and assessments

are charged by any municipality, parliamentary, legislative, regional, school or other authority during the term and, if the demised premises are not on the assessment roll an amount in lieu of taxes that would be payable if the demised premises were on the assessment roll (hereinafter called a "payment in lieu of taxes") and will indemnify and keep indemnified the City from and against payment of all losses, costs, charges and expenses occasioned by or arising from any and all such taxes, payments in lieu of taxes, rates, duties, charges and assessments; and any such losses, costs, charges and expenses suffered by the City may be collected by the City as additional rent with all rights of distress and otherwise as reserved to the City in respect of rent in arrears. The Lessee further covenants and agrees that during the term, it will deliver to the City for inspection receipts for payments of all taxes, payments in lieu of taxes, rates, duties, charges, assessments, including school taxes, local improvement rates and other structures, all machinery, equipment, facilities and other property of any nature whatsoever thereon and therein which were due and payable during the term within fourteen (14) days following receipt by the Lessee of each of such receipts for payments. The City shall, not later than ten (10) days following receipt of any notice including all assessment notices delivered to the City by any taxing authority, relating to the demised premises, all other structures, all machinery, equipment, facilities and other property of any nature whatsoever therein and therein, deliver a copy thereof to the Lessee. The Lessee shall have the right from time to time to appeal any assessment of the demised premises, or any other tax, rate, duty, charge or amount referred to in this section 3.01, provided that such appeal shall be at the sole cost and expense of the Lessee. If in the future, the Lessee is unable to appeal any assessment of the demised premises, or any other tax, rate, duty, charge or amount referred to in this section 3.01 except in the name of the City, then the Lessee shall have the right to appeal in the name of the City. Notwithstanding, anything herein contained, the Lessee shall be responsible only for the payments referred to in this section 3.01 for that portion of the year in which this lease is in effect, such adjustment to be made on a per diem basis.

3.02 DELINQUENT TAXES:

If the Lessee shall in any year during the term fail to pay the taxes under section 3.01 when due, the Lessee shall thereupon pay interest at the percentage rate or rates established by the City of Burnaby by bylaw, for unpaid real property taxes in the City of Burnaby.

3.03 PAYMENT FOR UTILITY SERVICES:

The Lessee covenants with the City to pay or cause to be paid when due all charges for gas, electricity, light, heat, power, telephone, water and other utilities and services used in or supplied to the demised premises throughout the term and to indemnify and keep indemnified the City from and against payment of all losses, costs, charges and expenses occasioned by or arising from any and all such charges, and any such loss, costs, charges and expenses which relate to such charges suffered by the City may be collected by the City as additional rent with all rights of distress and otherwise as reserved to the City in respect of rent in arrears.

3.04 BUSINESS TAX AND LICENSE FEES:

The Lessee covenants with the City to pay or cause to be paid when due every tax and permit and license fee in respect of any and every business carried on, upon or in the demised premises, in respect of the use or occupancy thereof by the Lessee (and any and every sublessee, permittee and licensee) other than such taxes as corporate income, profits and excess profit taxes assessed upon the income of the Lessee (or such sublessee, permittee and licensee) whether such taxes or permit and license fees are charged by any municipal, parliamentary, legislative, regional or other authority during the term and shall indemnify and keep indemnified the City from and against payment of all losses, costs, charges and expenses occasioned by or arising from any and all such taxes and permit and

license fees, and any such loss costs, charges and expenses which relate to such charges suffered by the City may be collected by the City as additional rent with all right of distress and otherwise as reserved to the City in respect of rent in arrears.

4. USE OF DEMISED PREMISES:

4.01 LESSEE'S PURPOSES:

It is a condition of this lease and the Lessee agrees that the Lessee shall occupy the demised premises throughout the term and any renewal thereof, solely for the purpose of conducting the business of a food, beverage and banquet facility serving the general public, and that the demised premises shall be continuously, actively and diligently operated, fully fixtured, stocked and staffed on such days and during such hours as will best serve the public and is in accordance with good business practise. The Lessee shall stay open for operation between the following opening and closing times:

<i>OUTLET</i>	<i>OPENING</i>	<i>CLOSING</i>
Coffee Shop	30 minutes prior to the 1st tee time for breakfast service	1.5 hours after the last tee time unless mutually agreed
Restaurant	11:00 a.m.	10:00 p.m. or later subject to business levels & liquor licence
Lounge	11:00 a.m.	11:00 p.m. or later subject to business levels & liquor licence

4.02 CONDITIONS OF OPERATION:

It is a condition of this lease and the Lessee agrees:

- (a) To operate the said restaurant as a public facility and in a good and businesslike manner and in accordance with best practices appropriate to this type of operation. Whenever in the opinion of the City the interest of the public is not being served in that the hours of operation, sanitation, quality of food or services are in the City's opinion unsatisfactory, the City may give notice in writing to the Lessee setting forth the said unsatisfactory practices, and the Lessee shall within thirty (30) days after receipt of the said notice remedy or cause to be remedied the said unsatisfactory practices to the satisfaction of the City or within a reasonable time in the case of an unsatisfactory practise which cannot with due diligence be remedied within the period of thirty (30) days aforesaid and on the proviso that the Lessee continues to prosecute same to completion with reasonable diligence.
- (b) That the Lessee shall at all times during the term hereby granted and any renewal thereof keep accounting records of the financial aspects of the operation of the said restaurant acceptable to the Director Finance of the City and the Lessee shall, throughout the term hereby granted and any renewal thereof and for a period of six months thereafter permit the Director Finance of the City or his nominee to inspect such records and all other books of account, receipts and invoices concerning the financial aspects of the operation of the said restaurant on the demised premises, and that it shall deliver to the Director Finance of the City an audited financial statement, prepared by an accountant who is a member in good standing for the time being of the institute or association of accountants incorporated by or under the Legislation of the Province, acceptable to the City in respect of the operation of the said restaurant for each year during the currency of the agreement, and shall submit same within two months after the final business day of each operating year. Each such statement shall give a concise.

complete and accurate account of the financial aspects of the operation of the said restaurant for the operating year immediately preceding the date upon which such statement is required hereby to be delivered.

- (c) To provide at its own expense a sufficient and competent staff of respectable persons as may reasonably be required for the operation of the demised premises and the said restaurant and who shall be cleanly and neatly dressed and polite in speech and conduct at all times in accordance with good business practise and taking into account the nature and scope of the business being carried on by the Lessee.
- (d) To forthwith furnish to the City satisfactory proof that the Lessee has been determined and is then admitted by the Workers' Compensation Board to be an employer within the scope of Part I of the *Workers' Compensation Act*, R.S.B.C. 1979 Chapter 437, as from time to time amended, and that in the event of the Lessee's failure to furnish such proof, the City shall have the right to terminate this agreement forthwith.

4.03 NO UNAUTHORIZED TRADE OR BUSINESS:

The Lessee agrees not to carry on, on the demised premises, any trade or business other than the trade or business authorized by this agreement.

5. INSURANCE:

The Lessee shall throughout the term and any period when it is in possession of all or any portion of the demised premises, at its sole cost and expense, take out and keep in full force and effect in the names of the Lessee and the City, as their respective interests may appear, the following insurance:

5.01 ***PROPERTY INSURANCE*** - upon all chattels and equipment contained in or on the demised premises and all other property of every description and kind owned by the Lessee or for which the Lessee is legally liable and which is located within the demised premises (including, without limitation, stock in trade and furniture) in each instance, in an amount of not less than one hundred percent of the full (new) replacement cost thereof, without deductions, and with coverage against all risks of loss or damage including, earthquake, flood, and collapse on a stated amount co-insurance basis.

5.02 ***COMPREHENSIVE GENERAL LIABILITY INSURANCE*** - including personal injury liability, contractual liability, motor vehicle liability, non-owned automobile liability and owners' and contractors' protective insurance coverage with respect to the demised premises, coverage to include the activities and operations conducted by the Lessee and any other parties on the demised premises. Such policies shall be written on a comprehensive basis with limits during the initial term of not less than Five Million Dollars (\$5,000,000.00) per occurrence and during any renewal term such greater amount as the City may require for bodily injury to any one or more persons or property damage, and such higher limits as the City requires from time to time, and shall not be invalidated as respects of any warranties, representations, declarations or conditions contained in the policies. All such policies must contain a severability of interests clause, a cross liability clause and shall be primary and shall not call into contribution any other insurance available to the City.

5.03 ***BOILER AND MACHINERY INSURANCE*** - covering the demised premises on a broad form in respect of all boilers and machinery and such other pressure vessels on a blanket repair and replacement basis with limits for each accident of not less than the full (new) replacement cost of all leasehold improvements in the demised premises and of all boilers, pressure vessels, air conditioning and miscellaneous electrical apparatus. Such insurance shall also cover loss or damage caused by rupture of steam pipes.

5.04 *TENANT'S LEGAL LIABILITY INSURANCE* in form and in amount as a prudent lessee of similar premises would carry.

5.05 *ANY OTHER* forms of insurance as the Lessee may deem appropriate or the City may reasonably require from time to time, in form, in amount and for insurance risks against which a prudent owner would insure.

5.06 *ALL POLICIES* required to be written on behalf of the Lessee (other than in respect of chattels, fixtures or equipment owned by the Lessee and the ownership of which does not by the terms of this lease, either during or at the end of the term, or any renewal thereof, revert to the City) shall contain a waiver of any subrogation rights which the Lessee's insurers have against the City and against those for whom the City is in law responsible, whether any such damage is caused by the act, omission or negligence of the City or those for whom the City is in law responsible. Further, all policies covering the buildings shall include a clause that loss, if any, is payable to the City and the Lessee as their respective interests may appear.

5.07 *ALL INSURANCE POLICIES* of the Lessee shall be taken out with insurers reasonably acceptable to the City from time to time and shall be in a form reasonably satisfactory from time to time to the City. The Lessee agrees that certificates of insurance signed by the insurers shall be delivered to the City as soon as practicable after placing of the required insurance. All such policies shall contain an undertaking by the insurers to notify the City in writing not less than thirty (30) days prior to any material change, cancellation, failure to renew, or termination thereof.

5.08 *THE LESSEE* agrees that if the Lessee fails to take out or to keep in force any such insurance referred to, or should any such insurance not be approved by the City, and should the Lessee not rectify the situation within forty-eight (48) hours after written notice by the City to the Lessee (stating the reasons therefor) the City may without assuming any obligation in connection to do so, effect such insurance at the sole cost and expense of the

Lessee and all outlays by the City shall be immediately paid by the Lessee to the City as additional rent on the first day of the next month following such payment by the City, without prejudice to any other rights and remedies of the City under this lease.

5.09 COPIES OF INSURANCE POLICIES - Certified copies of all policies of insurance referred to in this Article 5 shall be delivered to the City accompanied by evidence satisfactory to the City that the premiums thereon have been paid.

6. REPAIRS AND MAINTENANCE

6.01 REMOVAL OF ICE AND SNOW:

The Lessee shall keep all the sidewalks, patios, stairs and steps to the demised premises clear of ice, snow and debris, and failing that, the City although not obliged to do so, may through its agents, servants, contractors and subcontractors remove such ice and snow at the expense of the Lessee but without notice to the Lessee. The City shall keep all roads and parking lots surrounding the demised premises clear of ice, snow and debris.

6.02 REPAIR OF DEMISED PREMISES:

The Lessee shall clean, maintain and repair and keep in repair in a good and substantial manner the interior of the building on the demised premises, reasonable and normal wear and tear excepted, when, where and so often as need may be in the opinion of the City and the Lessee shall repair any and all damage caused by the failure of the Lessee or its heirs and assigns and its or their employees, servants, agents, licensees or contractors; and the Lessee shall use the said building and all additions and alterations thereto and all chattels and fixtures hereby demised or now or hereafter erected, placed or attached in, on or to the said building in a good, businesslike manner and in accordance with the covenants, terms and conditions of this agreement.

6.03 *CLEANING OF DEMISED PREMISES:*

The Lessee shall provide all cleaning and janitorial services for the demised premises and keep the demised premises in a clean and sanitary condition as would a reasonable and prudent owner of same. Without limiting the generality of the foregoing, the Lessee agrees to do all necessary cleaning of the grease trap in the demised premises and to be responsible for any necessary extension of the grease trap system to the specifications of the City.

6.04 *ENTRY BY CITY:*

The City, its servants, employees, agents, contractors, who are so authorized by the City, may at any reasonable times during normal business hours of the Lessee and during any emergency enter the demised premises and the City may view the state of cleanliness and repair and the Lessee agrees to clean and repair upon reasonable notice.

6.05 *STRUCTURAL IMPROVEMENTS:*

The Lessee shall not commence the construction of structural alterations or structural repairs to the demised premises until the Lessee has provided the City with the drawings and specifications of said structural alterations and obtained the written approval of same from the City and obtained all permits, including building permits, required by the City or any bylaw of the City.

6.06 *BUILDERS' LIENS:*

The Lessee shall promptly pay all amounts for work, service and materials when due, and shall forthwith remove any builders' liens that may be outstanding against the demised premises or the Burnaby Mountain Golf Course or any part thereof on

account of any construction or work undertaken by the Lessee to the demised premises and shall furnish to the City forthwith upon demand a statutory declaration stating that there are no such encumbrances, and that all accounts for work, service and materials have been paid in full with respect to the construction work in question. If the Lessee fails to promptly discharge or cause any such lien to be discharged then in addition to any other rights or remedies of the City, the City may, but it shall not be obligated to discharge same by paying the amount claimed to be due into Court or directly to any such lien claimant, and the amount so paid and all costs and expenses (including legal costs and expenses) shall be immediately due and payable by the Lessee to the City as additional rent on demand.

6.07 *LESSEE NOT TO COMMIT WASTE:*

The Lessee shall not suffer, cause or permit the commission of permissive, voluntary or equitable waste to the demised premises.

6.08 *RENOVATIONS:*

The Lessee shall immediately upon the commencement of the term undertake interior renovations and the installation and upgrading of the furniture and equipment in the demised premises to a value or cost of approximately Three Hundred Seventy Thousand (\$370,000.00) Dollars. The Lessee may implement additional improvements to the demised premises during the second year of the term. If the Lessee is granted one or more renewal terms pursuant to section 2.06 the Lessee shall expend not less than Fifty Thousand (\$50,000.00) Dollars on further improvements to the demised premises during each such renewal term.

7. DAMAGE OR DESTRUCTION:

7.01 ABATEMENT OF RENT:

In the event of damage to the demised premises of an extent that part or parts thereof are rendered untenable or access to the demised premises cannot be had which, in either case, is not caused by the default or negligence of the Lessee or its officers, servants and agents, the rent shall abate in the same proportion that the area of which the Lessee is deprived bears to the total area of the demised premises as determined in the bona fide opinion of the City and such abatement shall continue only so long as the City bona fide determines its continuance to be reasonable.

8. ASSIGNING AND SUBLETTING

8.01 SUBLETTING BY LESSEE:

The Lessee shall not, nor will during the term, sublease the demised premises or any part thereof to any person, persons or corporation whatsoever without the consent in writing of the City, which consent the City shall not unreasonably withhold.

8.02 ASSIGNMENT BY LESSEE:

The Lessee shall not, nor will during the term, either by act or by deed, assign, transfer, bargain or sell this lease to any person, persons or corporation whatsoever without the consent in writing of the City, which consent the City shall not unreasonably withhold provided however it shall be reasonable for the City to withhold its consent if in the City's bona fide opinion the prospective assignee does not have sufficient

experience in the restaurant business or does not have the financial strength to properly operate the demised premises in accordance with the terms of this lease.

8.03 MORTGAGING BY LESSEE:

Nothing herein contained shall be construed to prevent or prohibit the assignment or subletting by the Lessee of this lease or its leasehold interest in the demised premises by way of mortgage provided however that in the event of and notwithstanding any such assignment or subletting, the Lessee shall be and remain liable for the payment of all rent, additional rent and taxes and the performance of all the terms, covenants and conditions of this lease.

9. DEFAULT BY LESSEE:

9.01 RE-ENTRY ON CERTAIN DEFAULTS BY LESSEE:

The City and the Lessee agree that if:

- (a) the Lessee shall default in the payment of rent, additional rent or taxes or any other sums required to be paid to the City by any provision of this lease, and such default shall continue for five (5) days after notice thereof given by the City to the Lessee; or
- (b) the Lessee shall default in performing or observing any of its other covenants or obligations under this lease, or any contingency shall occur which by the terms of this lease constitutes a breach hereof or confers upon the City the right to re-enter or forfeit or terminate this lease, and the City shall have given to the Lessee notice of such default or the happening of such contingency, and at the expiration of thirty (30) days after the giving of such notice the default or contingency shall

continue to exist, or in the case of a default which cannot with due diligence be cured within the period of thirty (30) days aforesaid, the Lessee fails to proceed promptly after the giving of such notice to cure such default or contingency and to prosecute same to completion with reasonable diligence; or

- (c) this lease shall expire or be terminated by any other provision in it contained;

the City or the City's agents or employees authorized by the City may immediately or at any time thereafter re-enter the demised premises without being liable to any prosecution or damages therefor, and may repossess and enjoy the demised premises and all fixtures and improvements upon the demised premises without such re-entry and repossession working a forfeiture or waiver of the rents to be paid and the covenants to be performed by the Lessee up to the date of such re-entry and repossession.

9.02 *ASSIGNMENT OF RENT ON RE-LETTING*

If the City re-enters and repossesses the demised premises pursuant to section 9.01 and if the City re-lets the demised premises to a new tenant then the City shall enter into an assignment of rent with the Lessee, which assignment shall provide that any rent received by the City from any new tenant of the demised premises shall be assigned to the Lessee to a maximum amount of the rent that would have been payable by the Lessee to the City for the remainder of the term less all costs and expenses incurred by the City in the enforcement of its rights and remedies and in acquiring a new tenant. The maximum amount of monthly rent the City shall be liable to assign to the Lessee shall be the monthly rental rate set out in section 2.01 and the assignment shall only be in effect for a period equal to the term of the lease that would have remained had the City not re-entered and repossessed the demised premises.

Provided that nothing herein shall be deemed to have the effect of making the City responsible for obtaining a new tenant or obtaining rent equivalent to the rent paid by the Lessee or for obtaining a fair market value rent.

No assignment shall be entered into by the parties hereto unless the Lessee has first obtained and submitted to the City the written consent of any mortgagee of the leasehold interest and evidence in writing to the satisfaction of the City that the mortgage of the leasehold interest has been fully paid out and discharged.

9.03 ABANDONMENT OF DEMISED PREMISES:

If the demised premises shall be vacated or remain unoccupied for five (5) days or if, without the written consent of the City, the demised premises shall be used by any person other than the Lessee, the Lessee, permitted assigns or permitted sublessees, or for any purpose other than that for which the same were let or in case the term shall be taken in execution or attachment for any cause whatever, then and in every such case, it shall be lawful for the City at any time thereafter to enter into and upon the demised premises or any part thereof in the name of the whole and the same to have again, repossess and enjoy as of its former estate, anything in this lease contained to the contrary notwithstanding and in any such case this lease shall at the option of the City cease and determine and the term shall immediately become forfeited and void and the entire rent payable during the term hereof shall immediately become due and be paid and the City may immediately claim the same together with any arrears then unpaid and any other amounts owing to the City by the Lessee.

9.04 INSOLVENCY OF LESSEE:

If the term hereof or any of the goods and chattels of the Lessee shall be at any time seized in execution or attachment by any creditor of the Lessee or if a receiver or receiver-manager is appointed in respect of any property of the Lessee or the Lessee

shall make any assignment for the benefit of creditors or shall make any bulk sale or become bankrupt or insolvent or take the benefit of any act now or hereafter in force for bankrupt or insolvent debtors, or, if the Lessee is a corporation and any order shall be made for the winding-up of the Lessee, or other termination of the corporate existence of the Lessee, then in any such case this lease shall, at the option of the City cease and determine and the term shall immediately become forfeited and void and the entire rent payable during the term and renewal hereof shall immediately become due and be paid and the City may immediately claim the same together with any arrears then unpaid and any other amounts owing to the City by the Lessee and the City may without notice or any form of legal process forthwith re-enter upon and take possession of the demised premises and become the owner of and remove the Lessee's effects therefrom, any statute or law to the contrary notwithstanding, the whole without prejudice to and under reserve of, all other rights, remedies and recourses of the City.

9.05 CITY'S EXPENSES:

If at any time an action is brought for recovery of possession of the demised premises, or the recovery of rental or any part thereof, or because of a breach by act or omission of any other covenant herein contained on the part of the Lessee, and a breach is established, the Lessee shall pay to the City all expenses incurred by the City in the enforcement of its rights and remedies hereunder.

9.06 DESERTION OF DEMISED PREMISES:

In case the demised premises shall be deserted or vacated, the City shall have the right, if it thinks fit, to enter the same, as the agent of the Lessee either by force or otherwise without being liable to any prosecution therefor, and to re-let the demised premises as the agent and at the risk of the said Lessee and to receive the rental thereof.

9.07 PERFORMANCE BY CITY:

It is hereby expressly understood and agreed that if at any time and so often as the same shall happen, the Lessee shall make default in the observance or performance of any of the Lessee's covenants herein contained, then the City may, but shall not be obligated so to do, without waiving or releasing the Lessee from its obligations under the terms of this lease, itself observe and perform the covenant or covenants in respect of which the Lessee had made default, or make payment of any monies that the Lessee has failed to pay; and all costs and expenses incurred by the City in the observance or performance of such covenant or covenants including without limitation, legal costs as between solicitor and client and any so paid by the City, with interest thereon from the date upon which the City shall have paid out the same at a rate equal to three (3%) percent per annum above the prevailing prime rate being published by the City's bank at the time the City shall have paid out the same be a charge on the demised premises in favour of the City in priority to the interest of the Lessee hereunder and of any person claiming under or through the Lessee and all such costs, expenses, monies and interest thereon shall be payable by the Lessee, any such monies paid out by the City as aforesaid, together with interest thereon forthwith on demand as additional rental, and the City shall have the same rights and remedies and may take the same steps for the recovery thereof as for the recovery of rental in arrears.

9.08 NO WAIVER:

No condoning, excusing or overlooking by the City of any default, breach or non-observance by the Lessee at any time or times in respect of any covenant, proviso or condition herein contained shall operate as a waiver of the City's rights hereunder in respect of any continuing or subsequent default, breach or non-observance, or so as to defeat or affect in any way the rights of the City herein in respect of any such continuing

or subsequent default or breach, and no waiver shall be inferred from or implied by anything done or omitted by the City save only express waiver in writing.

9.09 REMEDIES OF CITY ARE CUMULATIVE:

The remedies of the City specified in this lease are cumulative and are in addition to any remedies of the City at law or equity. No remedy shall be deemed to be exclusive, and the City may from time to time have recourse to one or more of all of the available remedies specified herein or at law or equity. In addition to any other remedies provided in this lease, the City shall be entitled to restrain by injunction any violation or attempted or threatened violation by the Lessee of any of the covenants or agreements hereof.

10. INDEMNIFICATION:

10.1 INDEMNIFICATION OF CITY:

The Lessee covenants with the City that the Lessee shall indemnify and save harmless the City and its servants and agents from all costs, losses, damages, builders' liens, compensation and expenses of any nature whatever relating to or arising from the Lessee's occupation of or possession of the demised premises and from all actions, claims, demands, suits and judgments against the City or its servants and agents on account of injury, death or damage to or loss of property occurring in or about the demised premises or relating to or arising from the Lessee's occupation or possession of the demised premises.

10.2 COMPLIANCE WITH LAWS AND BYLAWS:

The Lessee will comply with all laws, ordinances, lawful ordinances, regulations and requirements of any and all Federal, Provincial, Municipal or other

authorities and will indemnify and save harmless the City from and against any and all manner of actions, causes of action, liens, damages, loss, costs or expenses which the City may sustain, incur or be put to by reason of any neglect of same or non-compliance therewith. In particular, but without restricting the generality of the foregoing, the Lessee shall comply strictly with all of the provisions of the *Liquor Control and Licensing Act* R.S.B.C. 1979, Chapter 237 and amendments thereto, so far as the same relate to the business of the Lessee.

11. LESSOR'S COVENANTS:

11.01 The City covenants:

- (a) That the Lessee shall have the exclusive right to sell foods and beverages on the Burnaby Mountain Golf Course for the term of this lease;
- (b) To do structural repairs to the building on the demised premises and normal repairs to exterior walls, furnace, roof, hot water tank and sanitary services which are deemed necessary by the City and other government agencies except those repairs caused by any improper, unreasonable or negligent use of the said building by the Lessee, its servants, employees, agents or licensees;
- (c) To maintain the landscaping and the parking lot and all access roads;
- (d) To expend a minimum of Seventy-five Thousand (\$75,000.00) Dollars in renovations to the exterior of the building on or before May 1, 1997. The design, colour and finishing will be subject to the approval of the Lessee, such approval not to be unreasonably withheld or delayed;

- (e) To shall give the Lessee notice of any golf tournament booking for the Burnaby Mountain Golf Course so that the Lessee may solicit catering sales.

12. SURRENDER OF LEASE:

12.01 SHOWING OF DEMISED PREMISES:

At any time during the last twelve (12) months of the term, or if the Lessee has exercised any right of renewal then at any time during the renewal term or if the Lessee is holding over, as the case may be, the City may exhibit "For Let" signs on the demised premises and may show the demised premises during normal business hours to agents of the City and to prospective purchasers or tenants and their agents and advisors.

12.02 SURRENDER OF LEASE:

At the end of the term, either by forfeiture, default or lapse of time, the Lessee shall surrender the demised premises to the City, and, except as provided in section 12.05, without compensation or further consideration from the City. Upon such surrender the Lessee shall assign to the City the benefit of all leases, licenses, agreements and other agreements and rights benefitting the demised premises or the Lessee's interest therein, if and to the extent that the City shall require such benefits to be so assigned, and if and to the extent the same are assignable.

12.03 VACANT POSSESSION:

Upon termination of the term hereby granted, whether by affluxion of time or otherwise, the Lessee shall deliver up vacant possession of the demised premises and shall leave the demised premises in a sanitary, neat, tidy, safe and empty condition free from all nuisance, debris, rubbish, stock in trade and in the state of repair required hereunder.

12.04 OVERHOLDING:

If the Lessee shall hold over after the expiration of the term, whether by forfeiture, affluxion of time or otherwise, the new tenancy thereby created shall be a tenancy from month to month and not from year to year, and shall be subject to the covenants and conditions herein contained so far as may be applicable to tenancy from month to month and the rent then payable shall be one twelfth of the then annual rental market value of the demised premises as determined from time to time in a bona fide opinion of the City.

12.05 AFFIXED IMPROVEMENTS:

It is understood, covenanted and agreed that any building, structure, fixtures or other improvements, including trade fixtures, now on said demised premises or hereafter constructed or placed thereon or attached thereto during the currency hereof are the property of the City and except as hereinafter specifically provided, no compensation shall be payable by the City to the Lessee for any buildings, structures, fixtures or other improvements constructed, placed or attached to the demised premises by the Lessee.

Notwithstanding the foregoing, if the Lessee is not then in default under this lease, and the Lessee serves written notice requesting a renewal of this lease under subsection 2.06 (a), and the City does not grant such renewal, the City shall pay to the Lessee 50% of the actual hard costs incurred by the Lessee in renovating and fixturing the demised premises during the term.

If the City grants the First Renewal Term pursuant to section 2.06 (6), but not the Second Renewal Term pursuant to section 2.06 (b), the City shall pay to the Lessee at the end of the First Renewal Term 50% of the appraised value of all fixtures installed by the Lessee on the demised premises pursuant to this lease during the First Renewal Term.

If the City grants the Second Renewal Term pursuant to section 2.06 (b), the City shall pay to the Lessee at the end of the Second Renewal Term 50% of the appraised value of all fixtures installed by the Lessee on the demised premises pursuant to this lease during the Second Renewal Term.

At the expiration or other determination of the term hereby granted the Lessee shall peaceably surrender and yield up unto the City the said demised premises and appurtenances, together with all buildings, structures and fixtures now or hereafter erected or placed thereon or attached thereto in good and substantial repair and condition in all respects.

13. *LESSEE'S COVENANTS SURVIVE TERMINATION*

13.01 The covenants, provisos and conditions herein on the part of the Lessee which, as of termination of this lease whether by effluxion of time or otherwise, remain unfulfilled, undischarged or otherwise outstanding shall notwithstanding termination of this lease continue in full force and effect and be binding upon the Lessee until such covenants, provisos and conditions are discharged or satisfied in full.

14. *QUIET ENJOYMENT*

14.01 If the Lessee pays the rent hereby reserved and the other charges payable hereunder, and performs the covenants herein on the Lessee's part contained, the Lessee shall and may peaceably enjoy and possess the demised premises for the term, without any interruption or disturbance whatsoever from the City or any third party lawfully claiming from or under the City, subject always to the terms and conditions hereof.

15. FORCE MAJEURE

15.01 The Lessee shall not be liable to perform any of its obligations hereunder during periods in which performance is prevented or the demised premises are rendered wholly untenable for any cause reasonably beyond the Lessee's control which causes are hereinafter called "force majeure". For the purposes of this agreement, the term force majeure shall include fires, floods and other damage from the elements, strikes, lockouts, and acts of God,. The term of the lease shall be suspended and shall not run for a period equal to the period for which performance is suspended or the demised premises are rendered untenable by reason of force majeure. The term shall recommence when in the reasonable opinion of the City the premises are tenantable and the Lessee is no longer prevented from performance of its obligations by reason of force majeure.

15.02 If the Burnaby Mountain Golf Course closes to the public due to a labour dispute the Lessee's obligation to pay taxes, utilities and rent shall be suspended for the period of such closure. The Lessee shall also be entitled to cease carrying on business from the demised premises during the period of such closure.

16. RIGHTS OF CITY AND LESSEE

16.01 All rights and benefits and all obligations of the City and the Lessee under this lease shall be rights, benefits and obligations of the City and the Lessee respectively in their capacities as Lessor and Lessee respectively under this lease.

17. NOTICE

17.01 All notices, demands and requests which may or are required to be given pursuant to this lease shall be in writing and shall be sufficiently given if served personally

upon the party or an executive officer of the party for whom it is intended or mailed prepaid and registered, in the case of the City addressed to:

City Clerk
City of Burnaby
4949 Canada Way
Burnaby, B.C. V5G 1M2

and in the case of the Lessee addressed to:

BPYA 138 Holdings Ltd.
P.O. Box 550
4050 Whistler Way
Whistler, B.C. V0N 1B0

or at such other addresses as the parties may from time to time advise by notice in writing as above provided. The date of receipt of any such notice, demand or request shall be deemed to be the date of delivery if such notice, demand or request shall be deemed to be the date of delivery if such notice, demand or request is served personally or if mailed as aforesaid on the second business day next following the date of such mailing, provided however, that if mailed, should there be between the time of mailing and the actual receipt of the notice a mail strike, slow down or postal service or other labour dispute which affects the delivery of such notice, then such notice shall be deemed to be received when actually delivered.

18. MISCELLANEOUS:

18.01 The City and the Lessee agree that at any time and from time to time upon not less than thirty (30) days' prior request by the other party, each will execute, acknowledge and deliver to the other a statement in writing certifying:

- (a) that this lease is unmodified and in full force and effect or if there have been modifications that the same are in full force and effect as modified and identifying the modifications;
- (b) the dates to which the rent and other charges have been paid and the request shall specify the charges in respect of which such information is required; and
- (c) that, so far as the maker of the statement knows, the party who requests the statement is not in default under any of the provisions of this lease, or, if in default, the particulars.

18.02 Time shall be of the essence of this lease, save as herein otherwise specified.

18.03 This lease may not be modified or amended except by an instrument in writing of equal formality herewith executed by the City and the Lessee or by the successors or assigns of the City and the successors or permitted assigns of the Lessee.

18.04 The captions and headings throughout this lease are for convenience and reference only and the words and phrases contained therein shall in no way be held or deemed to define, limit, describe, explain, modify, amplify or add to the interpretation, construction or meaning of any provision of or the scope or intent of this lease nor in any way affect this lease.

18.05 The Lessee is in no sense a servant, employee or agent or partner of the City and the City shall in no manner be responsible for the debts and liabilities of the Lessee.

18.06 This agreement is not to be construed as conferring on the Lessee or on any other person on behalf of the Lessee any legal or equitable estate or interest or tenancy in

lands, premises, furniture, equipment, articles, utensils, matter, or thing of the City and in particular in the building or any land of the City, except as herein provided.

18.07 Whenever in this agreement it is stipulated that anything shall be done or performed by either of the parties hereto it shall be assumed that such party has thereby entered, and such party does hereby enter into a covenant with the other party to do or perform the same.

18.08 The expressions the "City" and the "Lessee" herein contained shall be deemed to include the successors and permitted assigns of such parties wherever the context so admits

18.09 Words herein importing the singular number or the masculine gender only shall include more persons, parties or things of the same kind than one, and females as well as males, and the converse whenever the context requires; also these presents shall enure to the benefit of and be binding upon the heirs, executors, administrators, successors and assigns of the respective parties hereto.

IN WITNESS WHEREOF the parties hereto have executed these presents as of the day and year first above written.

**THE CORPORATE SEAL OF CITY OF
BURNABY WAS HEREUNTO AFFIXED
IN THE PRESENCE OF:**

City Clerk - Authorized Signatory

THE CORPORATE SEAL OF **BPYA138**
HOLDINGS LTD. WAS HEREUNTO
AFFIXED IN THE PRESENCE OF:

Authorized Signatory

Authorized Signatory