



AGENDA ITEM MEMORADUM

Item No. 11e

Development Services

Department

Bud Bentley

Department Director

COMMISSION MEETING DATE (*) - 7:00 PM	Deadline to Town Clerk
<input checked="" type="checkbox"/> , 2012	

***Subject to Change**

- | | | | |
|---------------------------------------|---|---|---------------------------------------|
| <input type="checkbox"/> Presentation | <input type="checkbox"/> Reports | <input checked="" type="checkbox"/> Consent | <input type="checkbox"/> Ordinance |
| <input type="checkbox"/> Resolution | <input type="checkbox"/> Quasi-Judicial | <input type="checkbox"/> Old Business | <input type="checkbox"/> New Business |

FY2012 DESIGNATED HIGH PRIORITY ITEM - PRIORITY TOPIC

SUBJECT TITLE: Benihana License Agreement for Property on W. Trade Winds

EXPLANATION: The attached License Agreement (**Exhibit 1**) with Benihana has been prepared for another five year term.

History

On March 28, 2006 the Town Commission approved a site plan for the remodeling of the Benihana Restaurant located at 276 Commercial Boulevard. The site plan included the condition that the applicant enters into a license agreement with the Town for the utilization of the Town property on each side of W. Trade Winds Avenue. The License Agreement was approved by the Town Commission on September 14, 2006. The License was for five years, Benihana paid \$20,987.50 per year and the Town could terminate the license with forty-eight (48) hours written notice. The license also provided that Benihana would return the property in substantially the same condition as it was at the beginning of the term. The license fee was based on a formula of what the Town could have received from 23 meters being use 11 hours per day at the rate of \$0.25 per hour.

On the February 8, 2011 Round table meeting, the Commission discussed the license and provided policy direction as reflected in the attached minutes (**Exhibit 2**). The initial License Agreement terminated on September 13, 2011. The execution of a new License Agreement was delayed because we initially thought the Commercial West Streetscape Plan might impact this license. It was ultimately determined that Benihana's parking demand in season was such that they could not operationally allow vehicular access across their property to the shopping plaza where Interior Digs and Corelli's are located. Benihana did pay \$20,987.50 to the Town for their continuing use of the Town property, which was the previous year's license fee, until the License Agreement could be finalized.

Proposed License Agreement

The new License Agreement has been prepared and the most pertinent changes are:

- Section 2. Compensation.** The license fee has doubled to \$41,975 because it is based on potential parking revenue to the Town and the meter rate in the Commercial Business District doubled in 2011. The agreement provides that we will give 90-days' written notice of an increase in the meter rate in the future and their license fee will increase as a result. (In the prior agreement, there was not an automatic increase in their license fees when meter rates increased.)

Benihana will pay \$20,987.50 to the Town within ten days of the execution of the License Agreement, which will bring their total payment for this fiscal year to \$41,975.



2. **Section 4. Termination.** The notice period for termination has been increased from 48 hours to six months and there is a provision for extending the surrendering time for the west parcel. The 48 hour notice simply is not practical as it would take time for Benihana to make other parking and restaurant access arrangements were we to terminate the license.

The possible extended period of time for the west parcel is recommended because the restaurant becomes essentially landlocked if the Town terminates the License Agreement. Even if the Town terminates the lease of the west parcel, Benihana as a landlocked property owner could petition the Court for a "Way of Necessity" over the Town parcel. While the restaurant does have Commercial Boulevard frontage, it is not anticipated that FDOT would ever give Benihana access to Commercial because of the limited site distance coming off of the bridge.

There are special design issues because of the change in grade between the restaurant and the right of way, as well as working out an access point to the restaurant; these will all take time to work out, get the agreement of the parties, design and then construct.

The text of Section 4 is being revised to describe the extended circumstances for the west parcel and will be provided to the Commission in advance of Tuesday's meeting.

3. **Section 9. Indemnification.** The indemnification clause was updated to provide more protection to the Town.
4. **Section 11. Maintenance of Licensed Premises and Utilities.** New language has been added making Benihana responsible for any taxes that may be levied on the property.
5. **Section 13, Surrender Upon Termination.** Upon surrendering of the property, Benihana would be required to restore the property, 1) to the physical grade of the adjacent public right of way or, 2) to other conditions agreed to by the parties.

RECOMMENDATION: We recommend approval of the proposed License Agreement (**Exhibit 1**) with the changes to the Section 4 text that will provided to the Commission before Tuesday evening.

- EXHIBITS:**
- 1. License Agreement
 - 2. February 8, 2011 Round table meeting minutes

FISCAL IMPACT: An increase of \$20,987 in revenues per year to the General Fund.

License Approve as to Form by Town Attorney

Yes No

Town Manager Initials

CA

EXHIBIT 1

License Agreement between Town of Lauderdale-By-The-Sea
and Benihana National of Florida Corp.

THIS IS A LICENSE AGREEMENT ("License"), made this _____ day of July, 2012
by and between:

THE TOWN OF LAUDERDALE-BY-THE-SEA, FLORIDA, a municipal corporation organized and existing under the laws of the State of Florida, hereinafter referred to as "TOWN"

And

BENIHANA NATIONAL of FLORIDA CORP. a Florida Corporation, hereinafter referred to as "LICENSEE". TOWN and LICENSEE may hereinafter collectively be referred to as the "Parties."

1. DESCRIPTION OF THE PREMISES

TOWN hereby grants to LICENSEE the non-exclusive right, license, and privilege of reserving certain TOWN-owned property, as more particularly described in **Exhibit "A"** attached hereto and by this reference made a part hereof (hereinafter referred to as the "Premises" or "Property") subject to the terms and conditions set forth in this License. LICENSEE shall not have any property interest in the Premises arising out of this License. Nothing herein shall create a landlord-tenant relationship between the Parties nor shall any rights, obligations, duties or interests associated with a landlord-tenant relationship accrue in law or in equity pursuant to the terms of this License.

2. COMPENSATION

In exchange for the license granted herein, LICENSEE shall pay to TOWN the amount of Forty one Thousand Nine Hundred and Seventy-Five Dollars and no cents (\$41,975.00) per annum for the right to reserve the parking area identified in **Exhibit "A"**, for the use of the Property for ingress/egress.

On or about November 29, 2011, LICENSEE paid \$20,897.50 to TOWN. Within ten days after full execution of this License, LICENSEE shall pay to TOWN \$20,987.50, representing payment due for the balance of the initial year of the Term hereof. Thereafter, payment in the amount of \$41,975.00 shall be made annually in advance on October 1 of each year of the Term, commencing October 1, 2012.

Compensation is based upon the following formula:

$$3,650 \text{ hours per year} \times \$0.50 \text{ meter rate} \times 23 \text{ meters} = \$41,975$$

- A. Hours: 11:00 am to 2:00 pm and 4:00pm to 11:00 pm, which equal 10 hours per day times 365 days per year = 3,650 hours
- B. Meter Rate: The current meter rate of \$0.50 per hour
- C. Number of meters: 23 meters

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In the event the meter rates are increased for the majority of the meters within the Commercial Business District of TOWN, the compensation due TOWN shall be increased effective the first of the month following receipt by LICENSEE of ninety (90) days prior written notice. LICENSEE shall pay the additional amount due for the then current year within thirty (30) days of the effective date and thereafter for each year of the Term.

Example: The TOWN adopts a rate change that is effective on January 1. The TOWN provides notice to License on December 15th, which means the effective date of the increase for the LICENSEE is April 1st (first of the month following the 90-day notice) and the LICENSEE's payment to TOWN is due by April 30th.

3. TERM

The term of the prior Agreement between the Parties was from September 14, 2006 to September 13, 2011. The term of this Agreement shall be from October 1, 2011 to September 30, 2016 (the "Term").

4. TERMINATION

The TOWN may terminate this Agreement by providing (6) months advance written notice to LICENSEE. The TOWN shall reimburse LICENSEE a pro rata share of the License fee paid hereunder from the termination date to September 30 of any Term year. Notice shall be given pursuant to Section 16.

SECTION 4 IS BEING REVISED and will be provided to the Commission in advance of the July 24, 2012 meeting.

5. USE OF PREMISES

5.1 LICENSEE shall use and occupy the Premises as ingress/egress in conjunction with the operation of the official business of the LICENSEE conducted at 276 Commercial Boulevard, Lauderdale-By-The-Sea, Florida, in a manner as approved by the TOWN site plan approval of March 28, 2006 and shall not be used for any other purpose whatsoever without the written consent of the TOWN. LICENSEE covenants that it will not, without written consent of the TOWN, permit the Premises to be used or occupied in any manner by any other person, firm, entity or corporation other than LICENSEE or its agents, except customers of LICENSEE's business.

5.2 LICENSEE further covenants that no nuisance or hazardous trade or occupation shall be permitted and nothing shall be kept in or about said Premises that will increase the risk of any hazard, fire or catastrophe, and no waste shall be permitted or committed upon or any damage done to said Premises. LICENSEE shall not permit the licensed Premises to be used or occupied in any manner that will violate any laws or regulations of any governmental authority

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5.3 LICENSEE further acknowledges that TOWN shall not provide any parking enforcement of the Premises where vehicles are legally parked within the confines of a visually-delineated parking space. LICENSEE acknowledges that any vehicle parked legally at the Premises shall not be disturbed by LICENSEE. Nothing contained herein shall prohibit LICENSEE from removal of vehicles parked on LICENSEE's property.

5.4 LICENSEE acknowledges TOWN makes no representations as to the permissibility of LICENSEE'S use of the Premises which may be limited within the conveyance of the Premises to TOWN.

6. ASSIGNMENT

LICENSEE shall have no authority to assign any portion of the Premises during the Term of this Agreement. Should LICENSEE attempt to assign this license, the license shall be terminated automatically without prior notice to LICENSEE.

7. DAMAGE TO PREMISES

LICENSEE agrees that LICENSEE is responsible for all personal property, inventory, or stock placed on the Premises and such is placed on the Premises at the risk of LICENSEE. LICENSEE hereby releases TOWN from any liability for any such property. LICENSEE shall give the TOWN prompt written notice of any occurrence, loss, incident or accident occurring on the Premises.

8. INSPECTIONS

TOWN, its agents, or authorized employees may enter upon the Premises at all reasonable times and hours, to examine same to determine if LICENSEE is properly maintaining the Premises according to this Agreement.

9. INDEMNIFICATION

LICENSEE shall indemnify and save harmless and defend the TOWN, its trustees, elected and appointed officials, agents, servants and employees from and against any claim, demand, liability, or cause of action of whatsoever kind or nature arising out of LICENSEE'S use of the Premises or arising from this Agreement or LICENSEE'S acts or failure to act hereunder, including for, but not limited to, damages or injury (including death) to persons or property, judgments and attorneys' fees.

The Parties understand and agree that the covenants and representations relating to this indemnification provision shall survive the Term of this Agreement and continue in full force and effect as to LICENSEE's responsibility to indemnify.

10. INSURANCE

The Parties hereby acknowledge that LICENSEE shall pay for and obtain all insurance required under this paragraph and such insurance has been approved by the Risk Manager of the TOWN.

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10.1 Certificates of Insurance reflecting evidence of the required insurance shall be filed with the TOWN prior to the commencement of this Agreement. These Certificates shall contain a provision that coverage's afforded under these policies will not be cancelled without at least forty-five days (45) prior written notice being given to the TOWN. Policies shall be issued by companies authorized to do business under the laws of the State of Florida. Financial Ratings must be not less than "A-VI" in the latest edition of "Best Key Rating Guide", published by A.M. Best Guide.

10.2 Insurance shall be in force until the termination of this License. In the event the insurance certificate provided indicated that the insurance shall terminate and lapse during the period of this Agreement, then in that event, the LICENSEE shall furnish, at least forty-five (45) days prior to the expiration of the date of such insurance, a renewed certificate of insurance as proof that equal and like coverage for the balance of the period of the contract and extension thereunder is in effect. The LICENSEE shall not utilize the Premises pursuant to this License unless and until all required insurance remains in full force and effect.

10.3 Commercial General Liability insurance to cover liability bodily injury and property damage. Exposures to be covered are: premises, operations and certain contracts. Coverage must be written on an occurrence basis, with the following limits of liability:

\$1,000,000	Combined Single Limit – each occurrence
\$1,000,000	Combined Single Limit – general aggregate
\$1,000,000	Personal Injury
\$1,000,000	Products/Completed Operations Aggregate

LICENSEE shall have its insurer name the TOWN as an additional insured on its General Liability policy.

11. MAINTENANCE OF LICENSED PREMISES AND UTILITIES

The LICENSEE agrees to maintain the Premises and all personal property placed thereon in accordance with the terms and conditions of this Agreement and consistent with prudent and well-reasoned maintenance procedures and techniques. The LICENSEE agrees to pay as and when due all taxes of any nature that may become due by virtue of this Agreement or related to the Premises or LICENSEE'S use of the Premises.

12. AMENDMENTS

It is agreed that no modifications, amendment or alteration in the terms or conditions contained herein shall be effective unless contained in a written document executed with the same formality and of equal dignity herewith.

13. SURRENDER UPON TERMINATION

Upon the conclusion of the Term, or upon termination of this License, LICENSEE agrees to peaceably surrender and deliver the Premises to the TOWN. LICENSEE agrees to return the Premises to either: (A) a physical grade with asphalt surface compatible with the adjacent public

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right of way, or (B) whatever other condition agreed to by the Parties. TOWN approval, which shall not be unreasonably withheld, is required of the restoration plan, which shall comply with Town design standards and all applicable building requirements and other laws and regulations.

14. WAIVER

Failure of the TOWN to insist upon strict performance of any covenant or condition of this Agreement, or to execute any right herein contained, shall not be construed as a waiver or relinquishment for the future of any such covenant, condition or right, but the same shall remain in full force and effect.

15. INDEPENDENT CONTRACTOR

This Agreement does not create an employee/employer relationship between the Parties. It is the intent of the Parties that the LICENSEE is an independent contractor under this Agreement and not the TOWN'S employee for all purposes, including but not limited to, the application of the Fair Labor Standards Act minimum wage and overtime payments, Federal Insurance Contribution Act, the Social Security Act, the Federal Unemployment Tax Act, the provisions of the Internal Revenue Code, the State Workers Compensation Act, and the State unemployment insurance law. The LICENSEE shall retain sole and absolute discretion in the judgment of the manner and means of carrying out LICENSEE'S activities and responsibilities hereunder. The LICENSEE agrees that it is a separate and independent enterprise from the TOWN, that it has full opportunity to find other business, that it make its own investment in its business, and that it will utilize a high level of skill necessary to utilize the rights granted hereunder. This Agreement shall not be construed as creating any joint employment relationship between the LICENSEE and the TOWN and the TOWN will not be liable for any obligation incurred by LICENSEE, including but not limited to unpaid minimum wages and/or overtime premiums.

16. NOTICES

Whenever any party desires to give notice unto any other party, it must be given by 'written notice, sent by registered United States mail, with return receipt requested, hand delivery or facsimile transmission with receipt of delivery, addressed to the party for whom it is intended, at the places last specified, and the places for giving of notice shall remain such until they shall have been changed by written notice in compliance with the provisions of this section. Notice shall be deemed to have been given upon receipt. For the present, the LICENSEE and the TOWN designate the following as the respective places for giving of notice:

TOWN: Town Manager
 4501 Ocean Drive
 Lauderdale-By-The-Sea, FL 33308
 Telephone No.: (954) 640-4203
 Facsimile No.: (954) 776-1857

COPY TO: Town Attorney

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4501 Ocean Drive
Lauderdale-By-The-Sea, FL 33308
Telephone No.: (954) 640-4203
Facsimile No.: (954) 776-1857

LICENSEE: CEO
Benihana National of Florida Corp.
8685 NW 53 Terrace
Miami, FL 33166
Telephone No.: (305) 593-0770
Facsimile No.: (305) 592-6371

17. BINDING AUTHORITY

Each person signing this Agreement on behalf of either party individually warrants that he or she has full legal power to execute this Agreement on behalf of the party for whom he or she is signing, and to bind and obligate such party with respect to all provisions contained in this Agreement.

18. LAWS AND ORDINANCES

The LICENSEE agrees to observe all laws and ordinances of the TOWN, state, federal, local or other public agencies directly relating to the operations being conducted on the Premises. No officer or employee of the TOWN, during his or her term of employment or for one year thereafter, shall have any interest, direct or indirect, in this Agreement or the proceeds thereof. No vendor shall give, solicit for, deliver or provide a campaign contribution directly or indirectly to a candidate, or to the campaign committee of a candidate, for the offices of Mayor or Commissioner.

19. SEVERABILITY

If any provision of this Agreement or application thereof to any person or situation shall to any extent, be held invalid or unenforceable, the remainder of this Agreement, and the application of such provisions to persons or situations other than those as to which it shall have been held invalid or unenforceable shall not be affected thereby, and shall continue in full force and effect, and be enforced to the fullest extent permitted by law.

20. INTERPRETATION

It is agreed between the Parties that neither Party shall be deemed as the drafter of this Agreement, both Parties having the benefit of advice by their respective counsel.

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21. GOVERNING LAW

This Agreement shall be governed by the laws of the State of Florida with venue lying in Broward County, Florida.

22. ENTIRE AGREEMENT

This Agreement represents the entire and integrated agreement between the TOWN and the LICENSEE and supersedes all prior negotiations, representations or agreements, either written or oral.

IN WITNESS OF THE FOREGOING, the Parties have set their bands and seals the day and year first written above.

TOWN OF LAUDERDALE-BY-THE-SEA

ATTEST:

Town Clerk

Mayor

APPROVED AS TO FORM:

Town Attorney

WITNESSES:

**BENIHANA NATIONAL OF FLORIDA
CORP.**

Signature

By: _____

Print Name

Print Name: _____

Signature

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Print Name

STATE OF FLORIDA)

: ss:

COUNTY OF BROWARD)

BEFORE ME an officer duly authorized by law to administer oaths and take acknowledgments, personally appeared _____ of BENIHANA National of Florida Corp., a Florida corporation, and acknowledged executed the foregoing License as the proper official of BENIHANA for the use and purposes mentioned in it and that the instrument is the act and deed of that corporation

- He is personally know to me; or
 has produced _____ as identification.

IN WITNESS OF THE FOREGOING, I have set my hand and official seal in the State and County aforesaid on this _____ day of _____, 2012.

My commission expires:

NOTARY PUBLIC

Town Commission Roundtable Meeting Minutes
February 8, 2011

k. Benihana License Renewal (Assistant Town Manager Bud Bentley)

Assistant Town Manager Bentley explained that Benihana entered into a license agreement with the Town approximately 4 1/2 years ago. He added that Benihana wanted to enter into a new agreement. Assistant Town Manager Bentley inquired as to whether the Commission had an interest in doing that. He advised that the Town had no public use for that property in the near future, other than converting it to additional parking. Assistant Town Manager Bentley said that the fee paid by Benihana was equivalent to 100% of the Town parking revenue and therefore, beneficial to the Town.

Commissioner Vincent asked whether there was a land lock issue. Assistant Town Manager Bentley explained that in reviewing the plat, the property had access to the north side of Commercial Boulevard. He said that FDOT would not allow Benihana to have access to Commercial Boulevard. Assistant Town Manager Bentley stated that the lease was more than just a driveway. He said a land lock issue or a way of necessity would focus on approximately 20 feet. Assistant Town Manager Bentley stated that Benihana provided a circular drive and landscaping.

Commissioner Sasser inquired as to whether Benihana wanted to renew their agreement for another five (5) years. Assistant Town Manager Bentley said that the time frame was not specified. Commissioner Sasser recommended extending out 180 days to allow them time for permitting. Mayor Minnet was in agreement. She was concerned with compensation and cost of living increases and asked whether the Commission wanted to add a cost of living increase to the compensation. Assistant

Town Commission Roundtable Meeting Minutes
February 8, 2011

Town Manager Bentley said the initial calculation was based upon revenue from loss of meters. He added that it was not a lease of property; it was a license, without property rights. Assistant Town Manager Bentley added that it could be tied to future parking rates. Mayor Minnet said she did not want to complicate matters and suggested moving it along.

There was Commission consensus to move forward.

Commissioner Clotey questioned clause 14 as to whether the contract required ten (10) hours' notice or 10 day notice. Assistant Town Manager Bentley said the initial contract had a 48 hour notice requirement and the one before the Commission had a 10 day notification period. Town Manager Hoffmann suggested they work out the notification time period.

It was the consensus of the Commission to agree to what was fair.