

2008-12-11-1152

AN ORDINANCE

**APPROVING A PATIO LICENSE AGREEMENT WITH BARKER'S COLLECTIBLES FOR 270 SQUARE FEET OF PATIO SPACE LOCATED ADJACENT TO 102 PRODUCE ROW IN MARKET SQUARE, FOR A TERM ENDING ON MARCH 31, 2010, AT AN INITIAL RATE OF \$1.19 PER SQUARE FOOT PER MONTH.**

\* \* \* \* \*

**WHEREAS**, Barker's Collectibles has operated a retail establishment for over 15 years at 102 Produce Row, utilizing the adjacent patio space for outside retail display via a license agreement with the City of San Antonio; and

**WHEREAS**, the proposed rental rate for the patio space is \$1.19 per square foot per month, which shall be adjusted each April 1st per the Consumer Price Index (CPI) throughout the lease term; and

**WHEREAS**, the patio space is currently in use by Barker's Collectibles under a temporary permit that expires December 31, 2008; **NOW THEREFORE**:

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:**

**SECTION 1.** A Patio License Agreement with Barker's Collectibles for 270 square feet of patio space located adjacent to 102 Produce Row in Market Square for a term ending on March 31, 2010 at an initial rate of \$1.19 per square foot per month is hereby approved. The City Manager or her designee, or the Director of the Downtown Operations Department or her designee, is authorized to execute a Patio Display License Agreement with Barker's Collectibles. A copy of the Patio Display License Agreement is attached hereto and incorporated herein for all purposes as **Attachment I**.

**SECTION 2.** Funds generated by this ordinance will be deposited in Fund 11001000 General Fund, Internal Order 219000000013 Market Square, General Ledger 4407711 Patio Space.

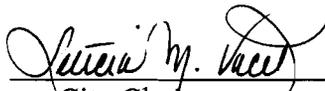
**SECTION 3.** The financial allocations in this Ordinance are subject to approval by the Director of Finance, City of San Antonio. The Director of Finance may, subject to concurrence by the City Manager or the City Manager's designee, correct allocations to specific SAP Fund Numbers, SAP Project Definitions, SAP WBS Elements, SAP Internal Orders, SAP Fund Centers, SAP Cost Centers, SAP Functional Areas, SAP Funds Reservation Document Numbers, and SAP GL Accounts as necessary to carry out the purpose of this Ordinance.

SW/mgc  
12/11/08  
Item # 24

**SECTION 4.** This ordinance shall be effective on and after December 21, 2008.

PASSED AND APPROVED this 11<sup>th</sup> day of December, 2008.

  
M A Y O R

ATTEST:   
City Clerk

APPROVED AS TO FORM:   
for City Attorney



Request for  
**COUNCIL  
ACTION**



## Agenda Voting Results - 24


<b>Name:</b>	8, 9, 11, 12, 13, 15, 18, 19, 21, 22, 23, 24, 25, 27, 28, 29, 30, 34, 35A, 35B, 35C, 35D, 35E, 36, 37, 38, 39, 41, 42, 46, 47
<b>Date:</b>	12/11/2008
<b>Time:</b>	05:03:36 PM
<b>Vote Type:</b>	Motion to Approve
<b>Description:</b>	An Ordinance approving a Patio License Agreement with Barker's Collectibles for 270 square feet of patio space located adjacent to 102 Produce Row in Market Square, for a term ending on March 31, 2010, at an initial rate of \$1.19 per square foot per month. [Pat DiGiovanni, Deputy City Manager; Paula X. Stallcup, Director, Downtown Operations]
<b>Result:</b>	Passed

Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Phil Hardberger	Mayor		x				
Mary Alice P. Cisneros	District 1		x				
Sheila D. McNeil	District 2		x				
Jennifer V. Ramos	District 3		x				
Philip A. Cortez	District 4		x				
Lourdes Galvan	District 5		x				
Delicia Herrera	District 6		x				x
Justin Rodriguez	District 7		x				
Diane G. Cibrian	District 8		x				
Louis E. Rowe	District 9		x				
John G. Clamp	District 10		x			x	

**PATIO DISPLAY LICENSE AGREEMENT**

**Market Square Plaza**

This License Agreement is made and entered into by and between the **CITY OF SAN ANTONIO**, a Texas Municipal Corporation, acting herein through its City Manager pursuant to Ordinance No. \_\_\_\_\_ passed and approved on the \_\_\_\_ day of \_\_\_\_\_, (hereinafter referred to as "**CITY**"), and **Maria Barker, Mark A Barker and Lydia Barker Smith, d/b/a BARKER'S COLLECTIBLES** (hereinafter referred to as "**LICENSEE**"), acting by and through its duly authorized officers, WITNESSETH:

**1. DEMISE OF PREMISES**

- 1.1 **CITY**, for and in consideration of the rents, covenants and promises herein contained to be kept, performed and observed by **LICENSEE**, does hereby License and demise to **LICENSEE**, and **LICENSEE** does hereby rent and accept from **CITY** for the term hereinafter set out, the real property owned by the **CITY** at **102 Produce Row**, San Antonio, Bexar County, Texas, 78207 within the area commonly known as Market Square as outlined on the drawing which is attached hereto as **Exhibit A** and incorporated by reference herein for the purposes of this License Agreement, the same as if fully copied and set forth at length. Said real property and improvements (hereinafter referred to as the Licensed Premises) are further described as follows: Patio Display License area which is adjacent to the front of the building at **102 Produce Row** in Market Square, San Antonio, Texas 78207 identified in **Exhibit A** and is **24** by **11.25** feet, which totals **270** square feet.

**2. USE OF PREMISES**

- 2.1 **CITY** hereby agrees to permit **LICENSEE** use of above described **CITY**-owned property located at **102 Produce Row, at Market Square Plaza In San Antonio, Bexar County, Texas 78207.**
- 2.2 **Permitted Uses:**
- 2.2.1 May be used for the sole purpose of outdoor display of goods sold in the store by **Maria Barker, Mark A Barker and Lydia Barker Smith d/b/a BARKER'S COLLECTIBLES**, in accordance with applicable statutes, laws, ordinances, rules and regulations of the United States, the State of Texas and the City of San Antonio, Texas.
- 2.3 **Prohibited Uses:**
- 2.3.1 The use of this area for any **SALES.**
- 2.3.2 The use of the area for the display of any Alcoholic Goods and/or merchandise that has any reference or depicts any type of Illegal Drug or obscenity.
- 2.3.3 The service of food and/or alcoholic beverages in the Patio License Area.
- 2.3.4 Any use prohibited by law including any Ordinances of the City of San Antonio.

- 2.4 **CITY'S** Reservation of Rights - In addition to the **CITY'S** Reservations set out in **Article 16** and other sections of the License Agreement, **CITY** reserves the right to a public right-of-way along the common sidewalk area to follow a path designated by the **CITY** for safe passage by pedestrians and further described by the diagram attached hereto and incorporated herein as **Exhibit A**. **LICENSEE** shall keep said right of way free of obstructions in the form of either fixed or movable objects and shall not allow patrons to queue, or wait for entrance into **LICENSEE'S** business establishment, in said public right of way.

### 3. TERM AND EXPIRATION DATE

- 3.1 The term of this License is for **Upon Approval and ending on March 31, 2010**.
- 3.2 **LICENSEE** may cancel this License by giving thirty (30) days written notice to **CITY**.

### 4. RENTAL

- 4.1 **LICENSEE** shall pay rental in either one lump sum in advance for Annual Payment or in monthly installments **in advance, on, or before the first day of each month** in accordance with the following payment schedule. **Any payment of rent or other charges and fees received after the first (1<sup>st</sup>) day of the month will be considered late.**
- 4.2 The monthly rental from the Commencement Date until March 31, 2009 shall be \$1.19 per square foot per month (base rental). On April 1, 2009 the base rental shall be adjusted per Consumer Price Index (CPI) of the US Department of Labor Bureau of Labor Statistics All Urban Consumers (CPI-U) as described in section 4.3.
- 4.3 Beginning April 1, 2009, the adjusted monthly rental shall be calculated by means of the Consumer Price Index formula (CPI) as follows: **ADJUSTED MONTHLY RENTAL = BASE RENTAL X (CPI-2/CPI-1)**.
- 4.4 In applying the above formula for rental adjustment, the following definitions shall prevail:
- (a) "Base rental", means \$1.19 per square foot per month. Thereafter, the adjusted monthly rental will become the base rental.
  - (b) "Bureau" means the U. S. Department of Labor, Bureau of Labor Statistics or any successor agency that shall issue the indexes or data referred to in Section 4.2 above.
  - (c) "CPI-1" means the CPI for the Calendar Month two (2) months prior to the Commencement date of the current License year.
  - (d) "CPI-2", means the CPI for the Calendar Month two (2) months prior the new term for which the adjusted monthly rental is to be calculated.
- 4.5 If at the time of any such computation the U.S. Department of Labor should no longer compile and publish such price indexes, the index for "all items" compiled and published by any other branch or department of the Federal Government shall be used for the purpose of this Section; and if no such index is compiled and published by any branch or department of the Federal Government, the statistics reflected in the cost of living increases as compiled by any institutional organization or individual recognized as an authority by financial and insurance institutions shall be used as a basis for such adjustments.

*ms*

4.6 Payment shall be submitted by LICENSEE to:

**City of San Antonio  
Revenue Division  
P.O. Box 839975  
San Antonio, Texas 78283-3975**

## 5. ACCEPTANCE AND CONDITION OF PREMISES

- 5.1 **LICENSEE** has had full opportunity to examine the Licensed Premises and acknowledges that there is in and about them nothing dangerous to life, limb or health and hereby waives any claim for damages that may arise from defects of that character after occupancy. **LICENSEE'S** taking possession of the Licensed Premises shall be conclusive evidence of **LICENSEE'S** acceptance thereof in good order and satisfactory condition, and **LICENSEE** hereby accepts the Licensed Premises in its present **AS IS, WHERE IS, WITH ALL FAULTS CONDITION** as suitable for the purpose for which licensed, **LICENSEE** accepts the Licensed Premises with the full knowledge, understanding and agreement that **CITY** disclaims any warranty of suitability for **LICENSEE'S** intended commercial purposes.
- 5.2 **LICENSEE** agrees that no representations respecting the condition of the Licensed Premises, and no promises to decorate, alter, repair or improve the Licensed Premises, either before or after the execution hereof, have been made by **CITY** or its agents to **LICENSEE** unless the same are contained herein or made a part hereof by specific reference herein.

## 6. UTILITIES

- 6.1 **LICENSEE** shall furnish and pay for all utilities, if any, that may be necessary for its operations as authorized herein on the Patio Display Licensed Premises. **LICENSEE** further agrees to pay all monthly charges associated with effective maintenance of said operation. Should connection or reconnection of any utility become necessary, **LICENSEE** agrees to pay any expenses.

## 7. IMPROVEMENTS

- 7.1 **LICENSEE** shall not construct, or allow to be constructed, any improvements or structures on the Licensed Premises nor shall **LICENSEE** make, or allow to be made, any alterations to the Licensed Premises without the prior written approval of the **CITY** through the **DIRECTOR** and any and all other necessary departments, boards or commissions of the **CITY OF SAN ANTONIO**, including, but not limited to, the Historic and Design Review Commission (**HDRC**).
- 7.2 **LICENSEE** covenants that it shall not bind, or attempt to bind, **CITY** for the payment of any money in connection with the construction, repair, alteration, addition or reconstruction in, on or about the Licensed Premises. Further, **LICENSEE** agrees to remove, within thirty (30) days after filing, by payment or provisions for bonding, any mechanic's or materialman's liens filed against the Licensed Premises and to indemnify **CITY** in connection with such liens to the extent of any damages, expenses, attorney's fees, or court costs incurred by **CITY**.

## 8. MAINTENANCE OF PROPERTY

- 8.1 **LICENSEE** shall, at all times, maintain the sidewalks adjacent to the Licensed Premises free from obstructions other than Displays for Merchandise sold by the business inside. **LICENSEE** shall keep the front of the business property neat and orderly, and if any tables or other fixed or movable property is placed in this area by **LICENSEE** it shall be organized so as not to create any tripping hazard or block the exit to the business in case of emergencies. **LICENSEE** shall not use any of said sidewalk area outside of the licensed patio display area in the exercise of privileges granted herein, except to pass to and from the Licensed Premises. **LICENSEE'S** use may at no time obstruct public access to the public right-of-way.
- 8.2 **LICENSEE** shall, at all times, keep or cause to be kept the Licensed Patio Display area free of litter, trash, paper, and other waste and shall place same in standard trash containers in the appropriate locations and shall conform with all applicable garbage, sanitary and health regulations of the **CITY**.
- 8.3 Other than as provided herein, **LICENSEE** shall be responsible for the condition of the Licensed Patio Display area. **LICENSEE** shall repair any damage to the Licensed Premises caused by **LICENSEE**, and shall maintain, or cause to be maintained, the Licensed Premises in a clean, neat, attractive and sanitary condition.
- 8.4 **CITY** shall be responsible for sidewalk repairs other than those necessitated by the actions of **LICENSEE**, as required to conform to safety and aesthetic standards.
- 8.5 **LICENSEE** will, at the termination of this License Agreement, return the Licensed Premises to **CITY** in as good condition as at the commencement of the term hereof, usual wear and tear, acts of God, or unavoidable accident only excepted.
- 8.6 **LICENSEE** agrees to hold **CITY** harmless for any theft, damages or destruction of signs, goods and/or other property of **LICENSEE** both during the term of this License Agreement and as so left on the Licensed Premises after **LICENSEE** vacates the Patio Display Licensed Premises. If said signs, goods and any other property placed by **LICENSEE** upon the Licensed Premises are not removed by it after the close of business and the Licensed Patio Display area is vacated, then the **CITY** may remove same without further notice or liability therefore.

## 9. TAXES AND LICENSES

- 9.1 **LICENSEE** shall pay, on or before their respective due dates, to the appropriate collecting authority, all Federal, State and local taxes and fees which are now or may hereafter be levied upon the Licensed Premises, or upon **LICENSEE**, or upon the business conducted on the Licensed Premises, or upon any of **LICENSEE'S** property used in connection therewith; and shall maintain in current status all Federal, State and local licenses and permits required for the operation of the business conducted by **LICENSEE**.

## 10. ASSIGNMENT AND SUBLETTING

- 10.1 Except as to the parent, subsidiary or affiliated company, **LICENSEE** shall not assign this Patio Display License area, or allow same to be assigned by operation of law or otherwise, any part thereof without the prior written consent of **CITY**, which may be given only by or pursuant to an

Ordinance enacted by the City Council of San Antonio, Texas. Any assignment by **LICENSEE** without such permission shall constitute an Event of Default. Subletting of any part of the Patio Display area is not authorized as part of this Patio Display License Agreement.

- 10.2 Without the prior written consent of **LICENSEE**, **CITY** shall have the right to transfer and assign, in whole or in part, any of its rights and obligations under this Patio Display License Agreement; and, to the extent that such assignee assumes **CITY'S** obligations hereunder, **CITY** shall, by virtue of such assignment, be released from such obligation.
- 10.3 The receipt by the **CITY** of rent from an assignee, or occupant of the Patio Display Licensed Premises shall not be deemed a waiver of the covenant in this License Agreement against assignment and/or an acceptance of the assignee, or occupant as a **LICENSEE**, or a release of the **LICENSEE** from further observance or performance by the **LICENSEE** of the covenants contained in this Patio Display License Agreement. No provision of this License Agreement shall be deemed to have been waived by the **CITY** unless such waiver be in writing and signed by the **CITY**.

## 11. DISPLAY AREA

- 11.1 **LICENSEE'S** Patio Display Licensed Premises is an area adjacent to business but does not include any area outside of the licensed area as shown in **Exhibit A** attached hereto. **LICENSEE** may only use area adjacent to the store to display merchandise using acceptable display fixtures in this space. **LICENSEE** may not obstruct any entrance to the store with any type of display, counters, etc. **CITY** has the right to request the removal of display merchandise and fixtures, if **LICENSEE'S** display is not presentable, as determined by the Market Square Facilities Coordinator. **LICENSEE** must bring into his store any merchandise and display fixtures in said display space outside of store doors after closing each day. **LICENSEE** is not authorized to leave any merchandise or display fixtures in front of the **LICENSEE'S** store after closing.
- 11.2 The Display area will not be used for **SALES**. All sales will be processed inside of **LICENSEE'S** store.
- 11.3 Encroachment on the Common Area beyond the authorized Licensed Display area is not permitted.

## 12. TERMINATIONS, DEFAULTS AND REMEDIES

- 12.1 The right is expressly reserved to the **CITY**, to terminate this Agreement in the event this agreement is deemed to be inconsistent with the public use of the property.
- 12.2 The right is expressly reserved to the **CITY**, to terminate this Agreement in the event the use of the premises shall have been deemed a nuisance by a court of competent jurisdiction.
- 12.3 In the event of termination in relation to 12.1 or 12.2 above, the **CITY** shall give **LICENSEE** notice in writing at least thirty (30) days prior to the termination date.

- 12.4 **RENT** - Any Payment of rent received after the first (1<sup>st</sup>) day of the month will be considered late and will be considered an Event of Default by the following criteria:
- 12.4.1 Any payment not received after the eleventh (11<sup>th</sup>) day of the month on the first occurrence will be an Event of Default.
  - 12.4.2 For the term of the agreement, **LICENSEE** may pay no more than two (2) payments of any type after the first (1<sup>st</sup>) day but no later than the tenth (10<sup>th</sup>) day of the month, with the addition of the late fee. The third (3<sup>rd</sup>) occurrence of any late payment will constitute an Event of Default.
  - 12.4.3 Any payment after the first (1<sup>st</sup>) day is late; therefore, any payment received will be charged a late fee in the amount of \$50.00 per occurrence.
- 12.5 **DEFAULT WITHOUT AN OPPORTUNITY TO CURE.** The following events shall constitute Events of Default:
- 12.5.1 The third (3<sup>rd</sup>) occurrence of any late payment;
  - 12.5.2 Failure to comply with any and all Taxes and Licenses requirements as outlined **Article 9 TAXES AND LICENSES;**
  - 12.5.3 Any assignment as specified in **Article 10 ASSIGNMENT AND SUBLETTING** not approved in writing by Ordinance by the City of San Antonio;
  - 12.5.4 The subletting of any part of the Patio Display License area;
  - 12.5.5 Encroachment unto the Common area beyond the authorized Licensed Patio Display area;
  - 12.5.6 If **LICENSEE** fails to abide by the requirements of **Article 14 INSURANCE REQUIREMENTS** or allows the Insurance Certification to be cancelled without other approved Insurance replacement coverage. New or revised policy must overlap or immediately continue term of old policy. Expired policy must be replaced before expiration date of current policy. Use of the Licensed Premises before **Approval and Acknowledgement** by the **City** of any new, revised, renewed or reinstated Certification;
  - 12.5.7 The service of any food or beverages, in the Patio Display License area;
  - 12.5.8 The third (3<sup>rd</sup>) occurrence of any merchandise or display fixtures left in front **LICENSEE'S** store after closing;
  - 12.5.9 The third (3<sup>rd</sup>) occurrence of the use of premises for any display of Alcoholic Beverages, any goods and/or merchandise related to Alcoholic Beverages and any goods or merchandise with any reference or which depict any type of Illegal Drug or Obscenity;
  - 12.5.10 The third (3<sup>rd</sup>) occurrence of the use of the premises for any type of **SALES;**

12.5.11 The third (3<sup>rd</sup>) occurrence of any particular failure as outlined in section 12.6.1 below:

**12.6 DEFAULTS WITH AN OPPORTUNITY TO CURE:**

12.6.1 **LICENSEE** shall fail to comply with any term, provision or covenant of this License Agreement and shall fail cure any such failure within ten (10) days of **CITY** providing notice of such failure, provided, however, in the event **LICENSEE** repeats any such particular failure twice more during the term of the contract then any such third failure shall constitute an Event of Default and there shall be no opportunity to cure.

- 12.7 Upon the occurrence of an Event of Default as heretofore provided, **CITY** may, at its option, declare this License Agreement, and all rights and interests created by it, terminated. Upon **CITY** electing to terminate, this License Agreement shall cease and come to an end as if that were the day originally fixed herein for the expiration of the term hereof; or **CITY**, its agents or attorney may, at its option, resume possession of the Licensed Premises and re-let the same for the remainder of the original term for the best rent **CITY**, its agents or attorney may obtain for the account of **LICENSEE** without relieving **LICENSEE** of any liability hereunder as to rent or any other charges still due and owing in this License Agreement, or any extension thereof, as applicable. **LICENSEE** shall make good any deficiency.
- 12.8 Any termination of this License Agreement as herein provided shall not relieve **LICENSEE** from the payment of any sum or sums that shall then be due and payable or become due and payable to **CITY** hereunder, or any claim for damages then or theretofore accruing against **LICENSEE** hereunder, and any such sum or sums or claim for damages by any remedy provided for by law, or from recovering damages from **LICENSEE** for any default hereunder. All rights, options and remedies of **CITY** contained in this License Agreement shall be cumulative of the other, and **CITY** shall have the right to pursue any one or all of such remedies or any other remedy or relief available at law or in equity, whether or not stated in this License Agreement. No waiver by **CITY** of a breach of any of the covenants, conditions or restrictions of this License Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same or any other covenant, condition or restriction herein contained.
- 12.9 The taking by a court of competent jurisdiction of **LICENSEE** and its assets pursuant to proceedings under the provisions of any Federal or State reorganization code or act, insofar as the following enumerated remedies for default are provided for or permitted in such code or act.
- 12.10 Upon any such expiration or termination of this License Agreement, **LICENSEE** shall quit and peacefully surrender the Licensed Premises to **CITY**, and **CITY**, upon or at any time after such expiration or termination, may, without further notice, enter upon and re-enter the Licensed Premises and possess and repossess itself thereof, by force, summary proceedings, ejectment or otherwise, and may dispossess **LICENSEE** and remove **LICENSEE** and all other persons and property, including all signs, furniture, trade fixtures, and other personal property which may be disputed as to its status as fixtures, from the Licensed Premises, and such action by **CITY** shall not constitute **CITY'S** acceptance of abandonment and surrender of the Licensed Premises by **LICENSEE** nor prevent **CITY** from pursuing all legal remedies available to it.

### 13. INDEMNIFICATION

- 13.1 LICENSEE covenants and agrees to FULLY INDEMNIFY and HOLD HARMLESS, the CITY and the elected officials, employees, officers, directors, volunteers and representatives of the CITY, individually or collectively, from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, penalties, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal or bodily injury, death and property damage, made upon the CITY directly or indirectly arising out of, resulting from or related to LICENSEE'S activities under this AGREEMENT, including any acts or omissions of LICENSEE, any agent, officer, director, representative, employee, consultant or subcontractor of LICENSEE, and their respective officers, agents, employees, directors and representatives while in the exercise of performance of the rights or duties under this AGREEMENT, all without however, waiving any governmental immunity available to the CITY under Texas Law and without waiving any defenses of the parties under Texas Law. IT IS FURTHER COVENANTED AND AGREED THAT SUCH INDEMNITY SHALL APPLY EVEN WHERE SUCH COSTS, CLAIMS, LIENS, DAMAGES, LOSSES, EXPENSES, FEES, FINES, PENALTIES, ACTIONS, DEMANDS, CAUSES OF ACTION, LIABILITY AND/OR SUITS ARISE IN ANY PART FROM THE NEGLIGENCE OF CITY, THE ELECTED OFFICIALS, EMPLOYEES, OFFICERS, DIRECTORS AND REPRESENTATIVES OF CITY, UNDER THIS AGREEMENT. The provisions of this INDEMNITY are solely for the benefit of the parties hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity. LICENSEE shall advise the CITY in writing within 24 hours of any claim or demand against the CITY or LICENSEE known to LICENSEE related to or arising out of LICENSEE'S activities under this AGREEMENT and shall see to the investigation and defense of such claim or demand at LICENSEE'S cost. The CITY shall have the right, at its option and at its own expense, to participate in such defense without relieving LICENSEE of any of its obligations under this paragraph.
- 13.2 It is the EXPRESS INTENT of the parties to this AGREEMENT, that the INDEMNITY provided for in this section, is an INDEMNITY extended by LICENSEE to INDEMNIFY, PROTECT and HOLD HARMLESS, the CITY from the consequences of the CITY'S OWN NEGLIGENCE, provided however, that the INDEMNITY provided for in this section SHALL APPLY only when the NEGLIGENT ACT of the City is a CONTRIBUTORY CAUSE of the resultant injury, death, or damage, and shall have no application when the negligent act of the City is the sole cause of the resultant injury, death, or damage. LICENSEE further AGREES TO DEFEND, AT ITS OWN EXPENSE and ON BEHALF OF THE CITY AND IN THE NAME OF THE CITY, any claim or litigation brought against the CITY and its elected officials, employees, officers, directors, volunteers and representatives, in connection with any such injury, death, or damage for which this INDEMNITY shall apply, as set forth above.

### 14. INSURANCE REQUIREMENTS

- 14.1 Any and all employees, representatives, agents, or volunteers of LICENSEE while engaged in the performance of any work required by the CITY or any work related to a license of space or Concession Agreement with the CITY shall be considered employees, representatives, agents or volunteers of LICENSEE only and not of the CITY. Any and all claims that may result from any obligation for which LICENSEE may be held liable under any Workers' Compensation,

Unemployment Compensation or Disability Benefits law, or under any similar law on behalf of said employees, representatives, agents, or volunteers shall be the sole obligation and responsibility of **LICENSEE**.

- 14.2 Prior to the commencement of any work under this License Agreement, **LICENSEE** shall furnish an original completed Certificate(s) of Insurance (In **ACCORD** format attached as **Exhibit B**) to the **CITY'S** Director, Parks and Recreation Department, which shall be completed **only by an AGENT authorized** to bind the named underwriter(s) and their company to the coverage, limits, and termination provisions shown thereon, and which shall furnish and contain all required information referenced or indicated thereon. **The Original Certificate(s) must have the agent's original signature, including the signer's company affiliation, title and phone number, and be mailed directly from the agent to the CITY.** The **CITY** shall have no duty to pay or perform under this License Agreement until such certificate shall have been delivered to the **CITY'S** Director, Parks and Recreation Department, and no officer or employee shall have authority to waive this requirement.
- 14.3 When the Certification expires, changes or is cancelled for any reason and other approved Insurance Certification has not already been approved by the City, the **LICENSEE** will not be authorized to have any activity in the Licensed Premises; **LICENSEE** will not enter or utilize the Licensed Premises and all authorized uses of the Licensed Premises will cease until the City Acknowledges that an **Approved Insurance Certification** has been received directly from the Authorized Agent.
- 14.4 The **CITY** reserves the right to review the insurance requirements of this section during the effective period of the License Agreement and any extension or renewal hereof and to modify insurance coverage and their limits when deemed necessary and prudent by the **CITY'S** Risk Manager based upon changes in statutory law, court decisions, or circumstances surrounding the License Agreement, but in no instance will the **CITY** allow modification whereupon the **CITY** may incur increased risk.
- 14.5 **LICENSEE'S** financial integrity is of interest to **CITY**, therefore, subject to **LICENSEE'S** right to maintain reasonable deductibles in such amounts as are approved by **CITY**, **LICENSEE** shall obtain and maintain in full force and effect for the duration of this License Agreement, and any extension hereof, at **LICENSEE'S** sole expense, insurance coverage written, on an occurrence basis, by companies authorized and admitted to do business in the State of Texas and with an A.M Best's rating of no less than A-(VII), in the following types and for an amount not less than the amount listed below:

	TYPE	AMOUNT
1	Workers' Compensation and Employers Liability	Statutory \$1,000,000/\$1,000,000/\$1,000,000
2	Broad Form Commercial General Liability Insurance to include coverage for the following: a. Premises/Operations b. Independent Contractors c. Products/completed operations d. Personal Injury e. Contractual Liability f. Environmental Impairment/Impact-sufficiently broad to cover disposal liability.	For Bodily Injury and Property Damage of \$1,000,000 per occurrence; \$2,000,000 General Aggregate, or its equivalent in Umbrella or Excess Liability Coverage.
3	Comprehensive Automobile Liability* a. Owned/Leased Vehicles b. Non-owned Vehicles c. Hired Vehicles	Combined Single Limit for Bodily Injury and Property Damage of \$1,000,000 per occurrence or its equivalent
4	Property Insurance: For physical damage to the property of <b>LESSEE</b> , including improvements and betterment to the Leased Premises	Coverage for a minimum of eighty percent (80%) of the replacement cost of <b>LESSEE'S</b> property

\*If Applicable

14.6 The **CITY** shall be entitled, upon request and without expense, to receive copies of the policies and all endorsements thereto as they apply to the limits required by the **CITY**, and may make a reasonable request for deletion, revision, or modification of particular policy terms, conditions, limitations or exclusions (except where policy provisions are established by law or regulation binding upon either of the parties hereto or the underwriter of any such policies). Upon such request by the **CITY**, the **LICENSEE** shall exercise reasonable efforts to accomplish such changes in policy coverage and shall pay the cost thereof.

14.7 **LICENSEE** further agrees that with respect to the above-required insurance; all insurance contracts and Certificate(s) of Insurance will contain the following required provisions:

14.7.1 Name the **CITY** and its officers, employees, volunteers, and elected representatives as Additional Insured as respects operations and activities of, or on behalf of the named insured performed under contract with the **CITY**, with the exception of workers' compensation and professional liability policies;

14.7.2 Provide for an endorsement that the "other insurance" clause shall not apply to the City of San Antonio where the **CITY** is an additional insured shown on the policy;

14.7.3 Workers' compensation and employers' liability policy will provide a waiver of subrogation in favor of the **CITY**

- 14.8 **LICENSEE** through his Agent shall notify the **CITY** in the event of any notice of cancellation, non-renewal or material change in coverage and shall give such notices not less than thirty (30) days prior to the change, or ten (10) days notice for cancellation due to non-payment of premiums, which notice must be accompanied by a replacement Certificate of Insurance. All notices shall be given to the **CITY** at the following address:

City of San Antonio  
Downtown Operations Department  
Contract Services Division  
P.O. Box 839966  
San Antonio, Texas 78283-3966

- 14.9 If **LICENSEE** fails to maintain the aforementioned insurance, or fails to secure and maintain the aforementioned endorsements, the **CITY** may obtain such insurance, and deduct and retain the amount of the premiums for such insurance from any sums due under this License Agreement. Procuring of such insurance by the **CITY** however, is not the exclusive remedy for failure of **LICENSEE** to maintain said insurance or secure said endorsements. In addition to any other remedies, the **CITY** may upon **LICENSEE'S** failure to provide and maintain any insurance or policy endorsements to the extent and within the time herein required, have the right to order **LICENSEE** to stop work hereunder, until **LICENSEE** demonstrates compliance with the requirements hereof.
- 14.10 Nothing herein contained shall be construed as limiting in any way the extent to which **LICENSEE** may be held responsible for payments of damages to persons or property resulting from **LICENSEE'S** or its subcontractors' performance of the work covered under this License Agreement.
- 14.11 All personal property placed in the Licensed Premises shall be at the sole risk of **LICENSEE**. **CITY** shall not be liable, and **LICENSEE** waives all claims for any damage either to the person or property of **LICENSEE** or to other persons due to the Licensed Premises or any part of appurtenances thereof becoming out of repair or arising from bursting or leaking of water, gas, waste pipes, or defective wiring or excessive or deficient electrical current; or from any act or omission of employees, or other occupants of the Licensed Premises, or any other persons; due to the happening of any accident in or about said Licensed Premises, unless caused by **CITY'S** sole active negligence. **LICENSEE** shall save and hold harmless **CITY** from any claims arising out of damage to **LICENSEE'S** property or damage to **LICENSEE'S** business, including subrogation claims by **LICENSEE'S** insurers.

## 15. RULES AND REGULATIONS

- 15.1 **LICENSEE** shall observe and comply with all laws and ordinances of the **CITY** affecting **LICENSEE'S** business.
- 15.1.1 This includes and is not limited to, the **CITY'S** noise ordinance and the provisions concerning operation of businesses in the Market Square Plaza of the City of San Antonio. **LICENSEE** shall not place speakers or amplified music on or near the Patio Display Licensed Premises or in any other location outside the adjacent enclosed building on any side of the licensed premises. **LICENSEE** shall comply with **CITY'S** laws pertaining to noise. **LICENSEE** agrees to comply with any requests by the **CITY'S** Park

Police, Parks Department Staff, City Police Officers or noise abatement officers. Failure to comply with this section may constitute an Event of default.

- 15.1.2 No advertisements, signs, decorations and/or displays shall be placed in, on, or about the Licensed Patio Display Premises without the prior written approval of the CITY through the Director of Parks and Recreation or his authorized representative and any and all other necessary departments, boards or commissions of the CITY OF SAN ANTONIO, including, but not limited to, the Historic and Design Review Commission. LICENSEE agrees to remove all signs from the Licensed Display Premises when LICENSEE vacates the Licensed Premises.
- 15.2 LICENSEE will be allowed to place only tables, racks and fixtures as approved by City on the demised premises. All furnishing will be removed from the Patio Display area during non-business hours.
- 15.3 No activity or method of operation shall be allowed in, on, or about the Licensed Premises, which exposes patrons thereof to nudity or to partial nudity. For the purposes of this provision, the following definitions apply:
- 15.3.1 Nudity means total absence of clothing or covering for the human body.
- 15.3.2 Partial nudity means exposure of the female breast or the exposure of the male or female pubic area or buttocks.
- 15.4 Any nudity as specified above will constitute a violation of this Article and result in an Event of Default.
- 15.5 The operation of a massage business, tanning salon, or gambling of any nature shall not be allowed in, on, or about the Patio Display Licensed Premises.
- 15.6 Discrimination on account of race, color, sex, age, handicap, or national origin, directly or indirectly, in employment, or in the use of or admission to the Licensed Patio Display Premises is prohibited.
- 15.7 LICENSEE shall not, except as may otherwise be permitted by applicable laws and regulations, pay less than the minimum wage required by Federal and State statutes and CITY ordinances to persons employed in its operations hereunder.
- 15.8 No provision of this License Agreement shall operate in any manner to prevent CITY from permitting displays, tournaments, amusements, or parades for the benefit of the public.
- 15.9 CITY park police, police officers and other safety personnel shall have the right of entry on and into the Licensed Premises as needed to investigate any circumstances, conditions, or person(s) that may appear to be suspicious. LICENSEE shall cooperate with all reasonable requests by such personnel to facilitate public safety and orderly conduct by persons at Market Square in San Antonio. LICENSEE expressly understands and agrees that CITY has not agreed to act and does not act as an insurer of LICENSEE'S property and does not guarantee security against theft, vandalism, or injury of whatever nature and kind to persons or property.

15.10 Other specific uses of Licensed Patio Display area are outlined in **Article 2**.

#### **16. RESERVATIONS: CITY**

16.1 **CITY** reserves the right to enter the Patio Display Licensed Premises at all reasonable times for the purpose of examining, inspecting or making repairs as herein provided. **LICENSEE** shall not be entitled to an abatement or reduction of rent by reason of such entry, nor shall said entry be deemed to be an actual or constructive eviction of **LICENSEE** from the Licensed Premises. Should construction or other activity by **CITY** prevent **LICENSEE'S** use of the Patio Display Licensed Premises for the purposes outlined herein for longer than ten (10) days, then this License Agreement shall be automatically extended for the same number of days **LICENSEE'S** use of Licensed Premises was denied or an abatement for the period **LICENSEE** was not able to use the premises may be considered but not both. The City will determine which resolution will be executed.

#### **17. HOLDING OVER**

17.1 Should **LICENSEE** hold over the Licensed Premises, or any part thereof, after the expiration or termination of the term of this License Agreement, unless otherwise agreed in writing, such holding over shall constitute and be construed as a tenancy from month to month only, at a rental equal to **One Hundred Twenty-Five percent (125%)** the amount of the rent paid for the last month of the term of this Patio Display License Agreement. The inclusion of the preceding sentence shall not be construed as **CITY'S** consent for the **LICENSEE** to hold over.

#### **18. CONFLICT OF INTEREST**

18.1 **LICENSEE** acknowledges that it is informed that the Charter of the City of San Antonio and its Ethics Code prohibit a City officer or employee, as those terms are defined therein, from having financial interest in any contract with the City or any City Agency, such as City-owned utilities. An officer or employee has a "prohibited financial interest" in a contract with the City or in the sale to the City of land, materials, supplies, or service, if any of the following individual(s) or entities is a party to the contract or sale: A City officer or employee, or his parent, child, or spouse; a business entity in which the officer or employee, or his parent, child, or spouse owns ten (10%) percent or more of the voting stock or shares of the business entity, or ten (10%) percent or more of the fair market value of the business entity; a business entity in which any individual or entity above listed is a subcontractor on a City contract, a partner or a parent or subsidiary business entity.

18.2 **LICENSEE** warrants and certifies, and this license is made in reliance thereon, that it, its officers, employees and agents are neither officers nor employees of the City or any of its agencies such as city owned utilities

#### **19. SEPARABILITY**

19.1 If any clause or provision of this License Agreement is illegal, invalid or unenforceable under present or future laws effective during the term of this License Agreement, then and in that event it is the intention of the parties hereto that the remainder of this License Agreement shall not be affected thereby, and it is also the intention of the parties to this License Agreement that in lieu of each clause or provision of this License Agreement that is illegal, invalid or

unenforceable, there be added as a part of this License Agreement a clause or provision as similar in terms to such illegal, invalid or unenforceable clause or provision as may be possible and be legal, valid and enforceable.

## 20. NOTICES

- 20.1 Notices to **CITY** required or appropriate under this License Agreement shall be deemed sufficient if in writing and mailed, Certified mail, Postage Prepaid, and addressed to:

City of San Antonio  
Downtown Operations Department  
Contract Services Division  
202 E. Nueva  
P.O. Box 839966  
San Antonio, Texas 78283-3966

or to such other address as may have been designated in writing by the City Manager of the CITY OF SAN ANTONIO from time to time.

Notices to **LICENSEE** shall be deemed sufficient if in writing and mailed, Certified mail, Postage Prepaid, addressed to **LICENSEE** at:

**Maria Barker, Mark A Barker and Lydia Barker Smith  
d/b/a Barkers Collectibles  
801 Dewhurst  
San Antonio, Texas 78213**

or to such other address on file with the City Clerk as **LICENSEE** may provide in writing to **CITY**.

## 21. PARTIES BOUND

- 21.1 If there shall be more than one party designated as **LICENSEE** in this License Agreement, they shall each be bound jointly and severally hereunder.
- 21.2 The covenants and agreements herein contained shall inure to the benefit of and be binding upon the parties hereto; their respective heirs, legal representatives, successors, and such assigns as have been approved by **CITY**.

## 22. TEXAS LAW TO APPLY

- 22.1 **THIS LICENSE AGREEMENT SHALL BE CONSTRUED UNDER AND IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, AND ALL OBLIGATIONS OF THE PARTIES CREATED HEREUNDER ARE PERFORMABLE IN BEXAR COUNTY, TEXAS.**

## 23. RELATIONSHIP OF PARTIES

- 23.1 Nothing contained herein shall be deemed or construed by the parties hereto or by any third party as creating the relationship of principal and agent, partners, joint venturers, or any other

similar such relationships between the parties hereto other than that of **LICENSOR** and **LICENSEE**.

#### **24. GENDER**

- 24.1 Words of any gender used in this License Agreement shall be held and construed to include any other gender, and words in the singular number shall be held to include the plural, unless the context otherwise requires.

#### **25. CAPTIONS**

- 25.1 The captions contained in this License Agreement are for convenience of reference only and in no way limit or enlarge the terms and conditions of this License Agreement.

#### **26. ENTIRE AGREEMENT/AMENDMENT**

- 26.1 This License Agreement, together with its attached exhibits and the authorizing ordinance, in writing, constitutes the entire agreement between the parties, any other written or parole agreement with **CITY** being expressly waived by **LICENSEE**.
- 26.2 No amendment, modification, or alteration of the terms of this License Agreement shall be binding unless the same be in writing, dated subsequent to the date hereof and duly executed by the parties hereto.
- 26.3 It is understood that the Charter of the **CITY** requires that all contracts with the **CITY** be in writing and adopted by ordinance. All amendments also need approval evidenced by an ordinance.

#### **27. ACKNOWLEDGEMENT OF READING**

- 27.1 The parties hereto acknowledge that they have thoroughly read this Agreement, including any exhibits or attachments hereto, and have sought and received whatsoever competent advice and counsel which was necessary for them to form a full and complete understanding of their rights and obligations herein, and having done so, do hereby execute this Agreement.

**28. AUTHORITY**

28.1 If the signer of this License Agreement is an entity or other than an individual who is the **LICENSEE**, then the signer hereof for **LICENSEE** hereby represents and warrants that he or she has full authority to execute this License Agreement on behalf of **LICENSEE**.

**WITNESS**, the signature of the parties hereto in multiple originals, this, the \_\_\_\_\_ day of \_\_\_\_\_, 2008.

**CITY OF SAN ANTONIO,  
A Texas Municipal Corporation**

**LICENSEE:  
Maria Barker, Mark A Barker and  
Lydia Barker Smith  
d/b/a Barker's Collectibles**

By: \_\_\_\_\_  
Sheryl L. Sculley, City Manager

*Maria L. Barker*  
\_\_\_\_\_  
Signature  
*Mark A. Barker*  
*Lydia Barker Smith*

**ATTEST:**

\_\_\_\_\_  
City Clerk

*Owner*  
\_\_\_\_\_  
Title

**APPROVED AS TO FORM:**

\_\_\_\_\_  
City Attorney

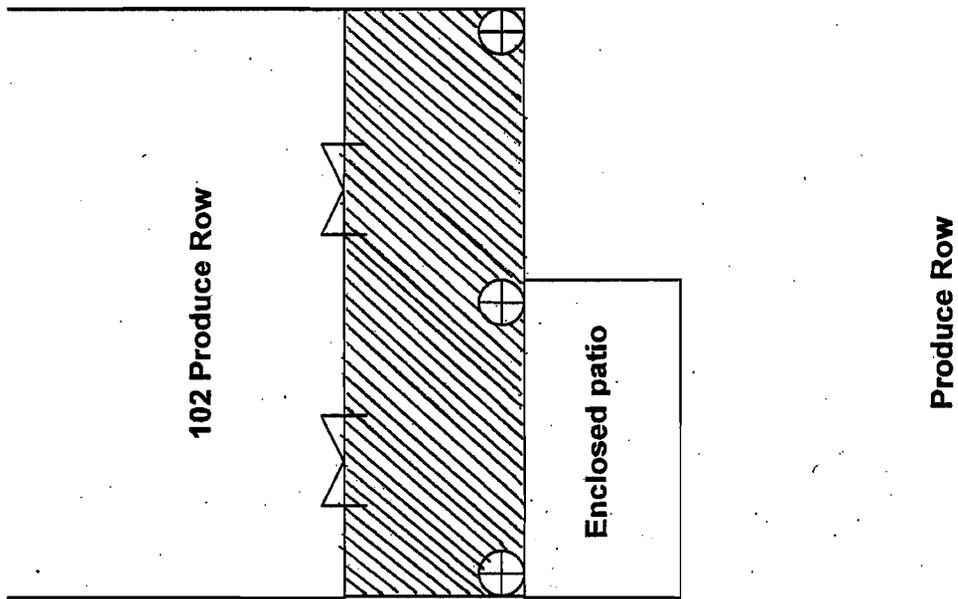
*801 Dan Street*  
\_\_\_\_\_  
Residence Address

*San Antonio, Texas 78213*  
\_\_\_\_\_  
City, State, and Zip Code

*210-732-5937*  
\_\_\_\_\_  
Area Code/Telephone Number Residence

\_\_\_\_\_  
Area Code/Telephone Number Business

**Exhibit A  
Barker's Collectibles**



Drawing showing an approximate area of:  
 $11.25' \times 24.0' = 270 \text{ SQ. FT.}$