PROCEDURE FOR THE ALLOCATION OF A BERTH PLACE USING A GUARANTEE OF USE AGREEMENT

(Version dated 16/06/17)
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I. Public information - intentions

I.1. The Request

The request by the vessel owner in a port, whether it is a boat or a yacht, relates to:

- Access to port services for themselves, their guests, crew and their vessels;
- A contractual commitment that allows them (permanent clients and not vessel owners who are considered ‘temporary’ and merely passing through the port) to permanently park their vessel (for those vessel owners who are not merely passing through the port).

To date, the number of berth places lags behind demand although this gap trend to reduce or even reverse in some extreme cases. Locating a berth can be a complex process, especially for very large vessels such as superyachts over 65 meters.

Port services and parking in a port come under the management of public service. The obligation of equal treatment of customers and demands for berth places are a crucial element of the port management requiring transparency of decisions taken by the port authority (the commune or municipality) and by its delegate (SAS VAUBAN 21).

This requirement is the purpose of this procedure, which is of a regulatory nature.

I.2. Expectations

The public management of the port is represented on two levels:

- The municipality that owns the port (the municipality of Antibes), which assumes responsibility for the port authority, that is to say, the power of police and regulation, but also of ‘delegating power.’ It delegates the operation of the port to a delegate whose management it controls.
- The port management group or Delegate (SAS VAUBAN 21), which has been chosen by the municipality to manage the day-to-day management of the port in compliance with laws and regulations, and with the aim of providing a satisfactory service to the port’s users and clients.

The delegate is aware that it was chosen by the municipality, among other criteria, for the quality of its managerial expertise and its ultimate respect for regulations regarding public and financial management. Therefore, the delegate is explicitly committed to ensure that its management of the port is exemplary, transparent and fully compliant with European and national regulations. It reports directly to the municipality and, on the occasion of the port council meetings, to the representation of the port actors.
I.3. Services - applicable requirements

In terms of port management, there is a formal distinction between port services which constitute a service provision and on the other hand berthing rights, which fall within the delegated management of the public port domain.

Port services are services performed by the port and/or its operators based on public tariffs payable for services rendered and corresponding terms and quality commitments. These elements are approved by the municipality following proposals made by the delegate.

Handling, water and electrical supply, access by car are, for example, considered to be port services.

In the case of client or user dissatisfaction with port services, the client or user can file a complaint as with any other public service. Should access to a service be temporarily restricted (for example, a full car park or shipyard), a waiting rule will be implemented to ensure all clients and users waiting receive equal treatment.

The right to park on public domain (land or water) is handled by authorisations, in return for which the client or user is subject to fees / royalties.

The options that are offered are:

- A short-term permit (AOT), which applies to stays of just a few days or nights and can be managed without an explicit contract;

- A more permanent style of permits, such as a parking permit for a boat owner, a crew member, craftsperson, restaurateur or any other professional operator, they are subject to a contract. These public permits remain precarious and may be withdrawn. They may be accompanied by a sub-delegation of public service by the concessionary (in the case of the shipyard and maintenance area, a construction site or dockside fuelling station);

- A Guarantee of Use contract for berths places for the owners of the vessels, who contribute financially towards the new investments in the port (article R.5314-31 Transport Code).

The law (Transport Code, General Code on Public Property) strictly limits the durations of these permits and the corresponding fees.

Thus, for a land based occupation, domanial law forbids any automatic renewal without limit of duration. In the case of necessary limitation on the number of operators requiring a permit for the same activity, there will be a call for competitive bidding.

Regarding the occupation of the water space:

- The owners of a yacht are not authorised to have a berth exclusively at their disposal for longer than one year; the renewal of this permit at the end of the one-year period is subject to several obligatory requirements. This renewal is in no case automatic and the occupation remains precarious and revocable;

- In the case of a privatised berth for professional, sporting or association-based activities, this period may be extended to five years;
I.4.2. The Guarantee of Use contract corresponds to a contract that may not exceed 35 years but that, in return for the financing of the new port facilities, eliminates the precariousness as applied for the annual contract. It is emphasized that the purpose of the guarantee of use is to enable its Beneficiary to moor a vessel of which he is either the owner or the constant user and proof is required.

The sub-delegation of public service and the granting of a Guarantee of Use Contract require the formal and explicit approval of the port authority (in other words, by the municipality). Only it can grant permits beyond the duration granted to the concessionaire.

I.4. Intentions of the delegate

The intentions of the delegate, as validated by the municipality, are:

I.4.1. On land

For the time being, all permits remain valid until the end of their specified duration if they are in conformity with regulations and have been correctly set out in the form of a contract. If this is not the case, a meeting will be organised between the beneficiary and the port manager to decide whether the permits can be brought into conformity. Situations such as these will be decided on a case-by-case basis, considering economic activity and port services rendered.

Future permits will be considered in light of the renovation and new construction programs planned for the port (capitaineries, premises for associations, shipyard and construction zones, new infrastructure).

I.4.2. On water

The different zones of the port will be preserved in principle; however, modifications will be necessary following the implementation of certain works.

Overall, owners of small boats will be kept on their berth places as much as possible, depending on the optimization requirements of the anchorage plan. They will have annual rental contracts which include an obligatory exit from the port and annual renewal if the owner complies with all regulations.

Finally, owners whose lease or Guarantee of Use contract expires can submit an application following the procedure set out in the following section. The management of the port will contact them immediately to determine the new contractual terms and conditions for a mooring with a guarantee of use.

Furthermore, at the request of the port authority, should a current ‘real beneficiary’ of a berth, whether through a lease (amodation) or a Guarantee of Use contract, wish to join the waiting list, they will be given priority (in chronological order) to any new member on the list. The term ‘real
beneficiary’ should be understood as the owner of a vessel/s or someone who has used the vessel in port either personally or through a lease over several years.

II. Guaranteed Use - formal requirements and variations

The term ‘guarantee of use’ is used in all the following in equivalence of the expression ‘authorisation of mooring in the port with guaranteed use of a berth’.

II.1. The contract – enforcement - language

The establishment of a guarantee of use results in a contract between the Delegate on one hand and the owner of the vessel (or "yacht owner"). This concept and its variants are detailed in II.3 below.

In the contract, the "Delegate" is hereinafter referred to as the "Port Manager" or "the Manager". It is exactly the same entity.

Where the owner of the ship is a natural person, it is the signatory; In the case of a legal person, the contract is signed by its legal representative.

The contract becomes effective and the applicant becomes a beneficiary of the contract only when:

- It has been signed by both Parties
- The first five-year payment was received by the Manager
- The security deposit and administration fees have been received by the manager
- It has been approved by the Port Authority.

Contrary to previous situations under the ‘amodiations’ regime, the contract does not involve participation in the concession company of the port or in the management of the port, whether in the form of company shares, dividends or governance.

The contract is in French and French law. The translation of the contract into English, intended to inform foreign owners, has no legal value in case of disagreement on interpretation.

II.2. Financial contributions to the new port works

In accordance with article R.5314-31 of the Transport Code and the article 11.2 of the Public Service Delegation Agreement of 29 December 2016, Vauban 21 was expressly authorized by the Municipality of Antibes Juan -Les-Pins to offer guarantees of the use of parking places to natural or legal persons. This guarantee obliges the beneficiary to participate in the financing of new port works; This financial contribution entitles the holder, in return, to benefit from a guarantee for the use of a parking space in the port, without any privative assignment of a particular post.
II.3. The beneficiary: owner or long term beneficiary of the vessel

Long-term parking in marinas is governed by a contract between the port manager and the owner, natural or legal person, of the vessel. It is possible to take into account the specific situations in which the beneficiary of the guarantee of use is not the owner of the vessel but is the long-term beneficiary: such is the case of a long-term charter or lease Duration of the vessel.

Where the beneficiary is not the owner of the vessel, he must prove that he has a direct contractual relationship relating to the use of the vessel ("beneficial owner"), whether as a natural or legal person, through a leasing, charter, rental or equivalent contract. The supporting evidence for this link may be included, where necessary, in an addendum to the contract. The beneficiary may delegate the negotiation of the contract to a person or company managing the vessel on his behalf. Such delegation does not authorize the person or company so delegated to be the beneficiary of the guarantee of use.

II.4. Nature of the guarantee of use

The guarantee of use consists in the multi-annual commitment by the manager to place at the disposal of the vessel subject to the Use Guarantee a berth place corresponding to the dimensions of this vessel, without right to the fixed and permanent assignment of it. Even if the port makes every effort to ensure a stable definition of the position provided.

The principle of public ‘domaniality’ of precarious and revocable occupation does not apply, only in exceptional circumstances described below (revocation). The contract does not in any way constitute a transfer of ownership. There are no real rights to the water area.

II.5. Duration

The maximum limit on the duration of a Guarantee of Use has been fixed for the end of the delegation of public service, which is 31/12/2032. Exceptions may be possible, but must been approved by the municipality. In any case, the contract may not exceed 35 years. It is possible to envisage a contract with a duration that precedes the end of the port management concession.

II.6. Obligation to exit the port

The contract requires necessarily to exit the port at least once per year under the vessel’s own power. Other obligations may be negotiated where necessary, such as the liberation of a berth for certain nautical events of general interest, works or for security reasons.
II.7. Essential modifications of the contract

It is not possible to assign a Guarantee of Use contract directly to a third party. The contract is solely granted to the person signing the contract for the vessel he/she owns or uses as a long-term beneficiary because of the intuitu personae of the authorizations of occupation on the public domain.

However, certain situations must allow the de facto assignment of the contract, with the requirement of prior agreement of the concessionaire.

1. Change of ownership of a beneficiary - legal person
Where the guarantee of use is granted to a legal person, the change of its shareholder (s) does not modify the benefit of the contract for the said legal person, the new shareholder (s) then becoming the beneficiary of the guarantee of use. However, the change of ownership or the representative of the legal person must be the subject of a prior request addressed to the management of the port. An addendum to the contract is signed.

2. Change of Beneficiary's vessel
The beneficiary may replace the vessel covered by the guarantee of use with another, in particular in accordance with the ownership requirements of Article II.3 above, provided that the replacement vessel is of the same dimensions or dimensions inferior to those of the vessel mentioned above. An addendum to the contract is signed.
A new substation may be designated according to these new dimensions.

3. Change of Ownership of Vessel
In the event of a change of ownership (owner or long-term beneficiary) of a vessel covered by a guarantee of use, without the intention of the recipient of the guarantee to replace it under one year by another vessel, the Buyer may benefit from a guarantee of use for that vessel, then a prior request must be made jointly by the seller and the buyer of the vessel with the port manager. The manager, after validation of the conditions of this change of ownership, issues a new contract on behalf of the new owner and beneficiary of the guarantee of use. An administrative fee is charged to the new beneficiary.

4. Change of Beneficiary by Presentation of the replacing Beneficiary
Where the beneficiary wishes to terminate the contract prematurely and the beneficiary presents to the port manager a replacement agreeing to assume all of the obligations and obligations of the beneficiary, then the manager may accept the termination of the contract without the initial beneficiary paying a penalty. Otherwise, a negotiation can determine the amount of the penalty owed by the beneficiary. The manager, after validation of this replacement, issues a new contract on behalf of the new owner and beneficiary of the guarantee of use. Administrative costs are billed to the new beneficiary.

II.8. Termination – Revocation of contract

Clauses of unilateral termination by the port manager and revocation are provided for in the contract. They concern in particular:
• Termination at the request of the Port Authority for reasons of public interest,
• Revocation for non-compliance with the terms of the contract or port regulations,
• Revocation for loss of the vessel owner's or long-term beneficiary's requirement for more than one year.
II.9. **Amount of the Contract cost and payment terms**

In addition to the contribution to the financing of new port facilities, with the guarantee of use as a counterpart, the amount of the contract includes the national royalties and the annual charges, excluding port services on request (services rendered, fluids, etc.) which are invoiced in addition. Unless otherwise provided, payment of the guarantee of use is made as follows:

- Payment, at the signature of the contract, of a security deposit corresponding to 10% of the total guarantee of use

- Advance payment every 5 years of the share corresponding to 5 years of the contract amount; The last period, if it does not cover 5 full years, is evaluated pro rata temporis.

The contract shall take effect only after payment of the fee and the deposit of the amount of the guarantee.

The user charge is subject every five years to a revision calculated on the basis of annual indexation specified in the contract.

The services rendered and the fluids (water, electricity, telecommunications or other variable consumption) are not included in the five-year fee and are invoiced annually, either on a flat-rate basis or on the basis of metering equipment, at the public rate.

This fee is subject to VAT in accordance with the applicable tax regulations.

II.10. **Rental of the berth**

**Principles**

The guarantee of the use of a berth place may be sublet under the conditions set out in article R5314-31 of the Transport Code: "The contract granting the guarantee of use mentioned above shall provide that the right attached to this guarantee may only be rented through the port manager or with his consent."

This rental is made on the basis of an annual public rate approved by the Port Authority. The manager is free to organize the commercialization of the guarantee of use berth places by using commercial intermediaries and / or by management of a waiting lists.

**Modalities**

The beneficiary shall report to the manager the forecasted movements of his vessel and the vacancies of the berth place he occupies.

In the event that the position is vacant for more than 48 hours, the manager may make this position available to other users.

If the beneficiary has notified the manager in advance of this availability, the recipient shall remit
the amount of the royalty for the subleased item received by the manager, less a percentage of management fees.

Management fee rate
The rate of management fees for the rental is set at 25%
When the beneficiary has given notice of absence of his / her vessel of at least 15 days and has allowed a sublease of more than 40 days accumulated in the year, the rate of management fees collected by the manager will be reduced to 20%.

Limitation
The total amount of sub-rental payments received by the beneficiary may not exceed the amount of the annual public berthing tariff for a berth of the same size, less a management fee of 20%.

The rental of the berth place can generate assets, credit of the beneficiary of the contract, on the amounts to be paid. This income must be subject to a tax declaration

II.11. Port Authority approval
The contractual framework of the guarantee of use is the object of a formal and explicit approval by the Port Authority, in other words the municipality of Antibes. This framework constitutes the standard contract of guarantee of use

II.12. Routine obligations
The beneficiary of the contract must undertake to respect all other users of the public domain and other users of the port as well as the applicable maritime, port, fiscal and social regulations. The beneficiary must also be covered by an insurance policy that complies with the requirements in force.

III. Procedure for obtaining a contract of Guaranteed Use
The procedure for Port-Vauban uses waiting list registration and consists of 4 distinct steps, detailed below:
• Monitoring of availabilities by the port
• The filing of an application for allocation by an owner
• Follow-up on applications on the waiting list or competitive tenders
• The actual allocation of a contract of guarantee of use
III.1. Monitoring of availabilities by the port

A list of berths/moorings available offered for the allocation of a guarantee of use is established by the port and posted in the capitaincies and on a website (under construction). In addendum is an example of this list.

In particular, please note:

- Berths will be categorised according to size, length, and width over all (including fenders). The vessel must be able to safely manoeuvre and dock in the berth without exceeding.
- The total amount of the guarantee of use excluding indexation is indicated.
- For each berth there are the corresponding maximal dimensions for the vessel moored on this berth. The total amount of the guarantee of use (excluding impact of indexation) will be indicated.

The maximum draft for each berth as well as any other specific requirements of the berth will also be noted.

III.1. Application for a Guarantee of Use contract

Any owner or operator of a vessel may apply for such a contract, specifying the characteristics of the vessel concerned. He indicates on this declaration the elements of the civil and domiciliation documents, and encloses a copy of the following documents:

- identity for a private person,
- K-bis or equivalent for a legal person,
- Statutes of the company showing the majority shareholder, official decision of the advisory body specifying the beneficiary of the guarantee of use
- registration and / or francization of the vessel,
- insurance certificate with indication of damage covered, in conformity with the regulations of the port
- mandate for the prospective representation (broker, captain ...).

An example of a mandate form is attached.

All this information is entered in a data file declared and complying with the requirements of the CNIL. Information concerning an application can be consulted and rectified by the applicant.

III.1. Follow up of applications – Managing the waiting list

The management of the port ensures a follow-up between the availability of berths under the Guarantee of Use system and the berths thus assigned.

A unique waiting list is established based on application, as and when they are submitted in chronological order whether the application is submitted by post, in person at the capitainerie or online. Each application is designated a unique reference number.
This reference number will be sent to the applicant and constitutes the acknowledgement and receipt of the application.

The waiting list will be digitally managed by tamper-proof software. The format of the list is available in the appendix. It will be available in the capitainerie and online. However, as the personal details of the applicant (their name and the name of the vessel) are deemed confidential, these will not appear on the publicly-displayed lists.

This waiting list is different from the list of berths/moorings available for annual contracts. It will be reviewed each month by the port’s Chief Operations Manager.

### III.2. Assignment of a contract

As soon as the joint analysis of the offer of post as guarantee of use and the waiting list of the applicants allows an allocation, it is proceeded as follows:

- If there is only one application suitable for a berth, the applicant and/or his representative shall be informed and discussions shall be held to conclude the signing of the contract.

- If there are several applications suitable for a berth, the various candidates shall be informed one after another, considering in the first place the priority accorded to former beneficiaries of amended berth places, secondly the seniority in the waiting list.

- Each candidate, in turn, has 30 days to sign the proposed Guarantee of Use contract. If this period has elapsed, taking into consideration a certain flexibility in the duration, which in any case may not exceed 2 months in total, without being able to conclude the contract, the possibility to make a proposition is officially ended and the next candidate will be contacted.

- During this period of negotiation and finalization of the contract, the applicant and the port manager will exchange the required documents, organise and control payments and when appropriate adapt the secondary terms of the contract (e.g. the rental of the berth to a third party, mandatory exits of the port, mandatory liberation of the berth during peak season).

Once jointly established, the contract will be signed by both parties, beneficiary and delegate.

The beneficiary of the guarantee of use must carry out all the formalities, formalities or administrative regularizations, also he shall also bear all costs, taxes or other fees related to this assignment and he must produce the proofs of these regularisations to the delegate.
IV. Intervention by industry professionals

During the period of negotiation, the owner of the vessel, whether a natural or legal person or the usual beneficiary of the vessel (if not the owner) may be assisted by a person of his choice, be it a legal advisor, captain or an expert in the maritime, port or other field.

This person must be formally mandated by the application of the Guarantee of Use. This mandate must include the following ethics clauses.

“This mandate prohibits the representative appointed by the vessel’s owner from taking any steps to: distort the probity and integrity of the transaction; and/or influence the signatories of the Guarantee of Use contract using financial incentive proposals, bribery, corrupt actions or any other related offence.”

Once the contract has been signed, the same requirements then apply to any intermediary, central agent, broker or captain mandated by the owner for all and any actions related to the contract. These include: absences from the vessel, annual fees of the contract of Guaranteed Use parking and charges, and returns on rental of the berth to a third party by the port if the contract provides for this action.

These professionals undertake not to re-let the berth under a Guarantee of Use contract to another vessel nor the attempt to transfer the contract to another party. The actions, when authorised, are reserved exclusively for the delegate (SAS VAUBAN 21).

V. Input from port employees and personnel

All employees and personnel of the port, whether they are directly or indirectly involved in the provision of services to vessel owners and their representatives, port clients, fleet owners and their representatives, crew members or captains, must sign a declaration on their honour.

Addendum :