

29264

AGREEMENT

THIS AGREEMENT is made and entered into as of May 1, 2002, pursuant to a minute order adopted by the City Council of the City of Long Beach at its May 16, 2000, and June 27, 2000 meetings by and between the **CITY OF LONG BEACH**, a municipal corporation and trust grantee of the State of California of certain tide and submerged lands within said City (the "**City**"), and **JOHN HANCOCK LIFE INSURANCE COMPANY**, a Massachusetts corporation ("**Owner**").

RECITALS

A. Pursuant to a Ground Lease between Owner and City ("**Ground Lease**"), Owner is the ground leasehold owner of that certain project located at 310 through 340 Golden Shore, Long Beach, California ("**Project**"), and commonly known as Catalina Landing. Owner acknowledges that City currently has no obligation to maintain the depth of the docking basin located at the Project ("**Basin**") by dredging or other means. Owner desires that City agree to maintain the depth of the Basin as described below during the entire Term (defined below).

B. As inducement and in consideration of City's agreement to maintain the depth of the Basin as described below and for other good and valuable consideration, Owner and City agree as set forth below.

1. **DEFINITIONS:** As used in this Agreement, the following terms will have the following meanings:

1.1 "**Calendar Year**" means any calendar year during the term of this Agreement.

1.2 "**Net Parking Revenue**" means all parking revenue received by Owner resulting directly from the operation of a waterborne passenger service to or from the Project including, without limitation, passenger service between the Project and Catalina Island, harbor cruises, whale watching cruises, water taxi service, and other waterborne passenger services (collectively, "**Waterborne Passenger Services**"). "**Net Parking Revenue**" shall include revenue from the sale of monthly parking passes, validations and prepaid parking, daily and hourly parking fees, and parking fees collected by a Provider (defined below) to the extent that Provider actually pays the proceeds of such sales and fees to Owner or Owner's designee or assignee, or any party that holds a lien on Owner's right, title or interest in Net Parking Revenue. Net Parking Revenue shall not include (or, if included, there shall be deducted to the extent of such inclusion) the following:

(a) any parking revenue not directly related to Waterborne Passenger Services ("**Non-Passenger Parking**"); and

(b) sales and use taxes, transportation taxes, excise taxes, franchise taxes and other similar taxes now or in the future imposed upon Net Parking Revenue, but only if such taxes and charges are added to the selling price, separately stated and collected from customers.

In lieu of implementing a program at the Project to establish with certainty the amount of parking revenue attributable to Non-Passenger Parking relating to transient parkers ("**Transient Parkers**") visiting Project tenants, Owner may elect, in its sole discretion, for purposes of calculating Net Parking Revenue, to assume that the parking revenue paid by Transient Parkers during any calendar year is Twenty-five Thousand and 00/100 Dollars (\$25,000) ("**Assumed Amount**"). In no event will the Assumed Amount be deemed to include any revenue from the following types of Non-Passenger Parking: Prepaid monthly tenant parking (including prepaid parking for the personnel of any Provider but not including monthly parkers using Waterborne Passenger Services), parking provided for the Long Beach Grand Prix, or parking for any other event, use or purpose that Owner and City mutually agree shall not be included in the Assumed Amount. The Assumed Amount shall be (i) prorated for any partial calendar year during which this Agreement is in effect based on the number of months during that year that this Agreement is in effect and (ii) increased, but never decreased, on January 1 of each calendar year based on increases during the immediately preceding calendar year in the Consumer Price Index (All Urban Consumers) for the Los Angeles-Anaheim-Riverside Metropolitan Area ("**CPI**") published by the Bureau of Labor Statistics of the U.S. Department of Labor. The increase shall be determined by multiplying the percentage increase in the CPI by the Assumed Amount in effect as of December 31 of the immediately preceding calendar year. The increase that will take effect on January 1, 2003 shall be based on the increase in the CPI for the entire 2002 calendar year.

1.3 "**Hazardous Materials**" means any toxic, hazardous, corrosive, reactive, ignitable, carcinogenic, mutagenic or reproductive toxic chemical, compound, material, mixture, waste or substance, whether now or hereafter defined, listed in or otherwise classified pursuant to any state or federal law, now or hereafter applicable to the Project; petroleum, including crude oil or any fraction thereof; and asbestos containing materials.

1.4 "**Term**" means the period beginning on the date of this Agreement and ending on the date of expiration or earlier termination of the term of any existing or future agreement between Owner, or its successors and assigns, and City pursuant to which the Project is ground leased from the City.

1.5 "**Provider**" means any person or entity that provides Waterborne Passenger Services to or from the Project.

2. **FEE:** Owner shall pay to City an annual fee (the "Fee") equal to thirty percent (30%) of all Net Parking Revenue collected during each Calendar Year during the Term, prorated for the initial and last years of the Term based on the Net Parking Revenue collected on the days during those years that this Agreement is in effect.

3. **PAYMENT SCHEDULE:** Owner shall pay City the Fee, if any, required under Paragraph 2, above, on a yearly basis by February 28 of each year for the immediately preceding Calendar Year. Owner shall by each such February 28 furnish City a statement of Net Parking Revenue ("**Statement**") received by Owner during the immediately preceding Calendar Year and will on said date pay City the amount of any Fee City is entitled to receive. Such Statement shall show Net Parking Revenue received by Owner and the amount of the Fee City is entitled to receive.

4. RECORDS:

4.1 Owner shall keep or cause to be kept at the Premises accurate and complete records, books of account, records showing transactions relating to parking for Waterborne Passenger Services and Non-Passenger Parking, general ledgers, journals including supporting documents and any other accounting records maintained by Owner that City's auditor reasonably deems necessary for proper reporting of Fees and Net Parking Revenue (collectively, "**Records**"). Owner shall install and maintain an accurate transaction processing system providing a cumulative total of total parking revenue at the Project and of Net Parking Revenue and shall keep records of those totals reflecting every such transaction; provided, however, that if Owner elects to fix Non-Passenger Parking Revenue at the Assumed Amount as permitted above, then Owner shall only be required to accurately record the cumulative total of total parking revenue at the Project.

4.2 Owner shall hold the Records for a period of two (2) years after the end of the applicable calendar year and shall, upon City's prior written request, make the Records available to City at the Project, during normal weekday business hours. City shall have the right at any reasonable time during the Term, and for two (2) years after expiration or termination of the Term, to examine and audit the Records for the purpose of determining the accuracy thereof, at City's sole cost and expense. In addition, City's auditor may from time to time conduct an audit of the Records and observe the operation of the relevant portions of Owner's business (at no cost to Owner and without interfering with the operation of any business operating at the Project) to confirm the accuracy of the Records. If the audit accurately reflects a deficiency in the payment of any Fee, the deficiency shall become immediately due and payable. In the event that the audit accurately reflects that Owner understated Net Parking Revenue by more than five percent (5%), then Owner shall pay the reasonable cost of City's audit.

4.3 All accounting records audited by City or received by City shall be treated as confidential and exempt from public disclosure thereof to the extent permitted by law.

5. **OBLIGATION TO DREDGE BASIN:** City shall at all times keep and maintain the Basin properly dredged. The Basin shall be deemed properly dredged if the water depth at low tide is sufficient to permit each Provider's vessels to navigate the Basin, provided that in all events a minimum water depth of fifteen (15) feet at low tide shall be deemed sufficient.

5.1 As part of City's obligation to keep and maintain the Basin properly dredged, City shall use every reasonable opportunity to dredge the Basin and dispose of the resultant spoils in advance of silting in the Basin actually impinging on the fifteen (15) foot standard mentioned above. Factors that will be taken into account to determine when dredging should be undertaken shall include but not be limited to the following ("**Dredging Factors**"): (i) the then current depth of the Basin at low tide (i.e., whether the depth of the Basin is substantially greater than fifteen (15) feet at low tide), (ii) whether or not a suitable site for depositing dredging spoils is available, (iii) how deep the Basin can be dredged without risking damage to the seawalls of the Basin (i.e., City will dredge the Basin deeper than the fifteen (15) foot standard whenever possible to minimize the likelihood that the fifteen (15) foot standard will not be met, and (iv) whether or not impending or continuing rains might result in the depth of the Basin being less than fifteen (15) feet at low tide in the foreseeable future.

5.2 City will implement the following procedures to ensure that dredging of the Basin will occur when warranted by the Dredging Factors: (a) City personnel will review reports of the depth of the Basin provided by Catalina Channel Express, Inc. ("CCE") or any other Provider obligated to provide such reports to Owner, (b) City shall operate and properly maintain a dredge capable of dredging the Basin or contract with the operator of a dredge so that the dredge will be reasonably available to dredge the Basin when warranted by the Dredging Factors, (c) All appropriate agencies of City shall coordinate their dredging efforts throughout the Port of Long Beach so that City may take advantage of opportunities to deposit dredge spoils from the Basin at sites identified and used by City in connection with dredging operations at other sites, (d) City shall, to the extent feasible, at all times maintain all permits required to dredge the Basin and deposit dredge spoils, (e) City shall implement an ongoing program to identify sites at which City may acquire the right to deposit dredge spoils at nominal cost, and (f) City shall at all times take all other action reasonably required to be able to perform its dredging obligations under this Paragraph 5 consistent with the provisions of Paragraph 5.1 and this Paragraph 5.2.

5.3 If City faithfully and fully implements the procedures described in Paragraph 5.2, above, then Owner's sole remedy against City if City fails to keep the Basin properly dredged as required under this Paragraph 5 shall be to elect one or more of the following remedies, which shall be cumulative and not exclusive of each other: (a) Owner shall be entitled to the prompt return of Fees paid by Owner to City under this Agreement ("**Past Fees**") to the extent that Owner must abate or pay any amount to CCE under that certain Lease Agreement, dated January 29, 2002, between Owner and CCE, or under any other substantially similar agreement with any other Provider because City fails to keep the Basin properly dredged (collectively, "**Abatement Costs**"); (b) Owner shall be entitled to offset against Fees then payable to City, or payable to City at any time in the future (collectively, "**Future Fees**"), the amount of any Abatement Costs for which Owner is not reimbursed under Clause (a), above, and (c) issuance by a court with jurisdiction over the matter of an injunction ordering City to properly dredge the Basin as soon as reasonably possible and deposit the dredge spoils within Los Angeles County, or ordering City to take or cease such other action that will, as soon as reasonably possible, effectuate the proper dredging of the Basin and the deposit of the dredge spoils within Los Angeles County. If City fails to faithfully and fully implement the procedures described in Paragraph 5.2, above, then Owner's monetary remedies shall not be limited by the amount of Past Fees or Future Fees but shall instead be limited to the greater of (i) the amount Owner would be entitled to under the immediately preceding sentence and (ii) all Abatement Costs relating to the office/terminal space (as compared to any loss of parking related revenue) that CCE or any other Providers is obligated to lease (or otherwise pay a fee to occupy) at the Property, now or in the future, and incurred by Owner because City has failed to keep the Basin properly dredged.

5.4 Notwithstanding the other provisions of this Paragraph 5, City shall have no liability to Owner under this Paragraph 5 if City's failure to dredge the Basin is caused by war, fire, civil commotion, earthquake, other acts of God (other than rain, flood, mudslide, alluvium deposits, or silting), or any state or federal regulation enacted in the future and publicly opposed by City that materially impairs City's ability to dredge the Basin and not due to the City's fault or neglect or financial inability to perform, provided that in all events City shall use reasonable

diligence to overcome any such event. City agrees that its obligations under this Paragraph 5 are in addition to and not limited by the provisions of the Ground Lease.

6. NO COMPETING FACILITIES: Other than CCE's use of the existing facilities at the Queen Mary site or any sail boat service provided on a chartered basis, City shall not actively encourage or promote the use of, construct any facilities on, lease, or license, or permit the use, construction of any facilities on, leasing, subleasing, licensing, or sublicensing of any property owned by, or under the direct or indirect control of City for the purpose of providing ferry service from City to Catalina Island or for the parking of vehicles in connection with any such ferry service. Notwithstanding the foregoing, City shall not be in breach of this Paragraph 6 to the extent that (a) a third party provides ferry service from City to Catalina Island from property that is not owned by, or under the direct or indirect control of City, (b) a third party acting pursuant to rights granted by City before the date of this Agreement, uses, constructs facilities on, leases, or licenses, any property owned by, or under the direct or indirect control of City for the purpose of providing ferry service from City to Catalina Island or for the parking of vehicles in connection with any such ferry service, or (c) City's compliance with its obligations under this Paragraph 6 will violate applicable law. If City breaches its obligations under this paragraph, as Owner's sole remedies: (x) Owner's obligation to pay City the Fee shall be permanently abated for the entire period that City is in breach and for twelve (12) months after the breach is cured and (y) issuance by a court with jurisdiction over the matter of an injunction against City entering into any agreement or enacting any law or ordinance, or taking any similar action, that will breach City's obligations under this Paragraph 6.

7. NO ADDITIONAL FEES: As additional consideration for the Fee, City agrees that it shall not impose or charge any other fee of any nature, whether in the form of rent, a use or operations fee, an assessment, tax, or otherwise, against Owner or any Provider, including, without limitation, CCE in connection with either (a) any Provider's lease or use of a portion of the Project or (b) any Provider's, including, without limitation, CCE's operation of a ferry service from the Project to Catalina Island (collectively, the "**Fee Waiver**"); provided, however, that the Fee Waiver shall not apply to any generally applicable tax, fee, assessment, or charge payable by businesses or property owners operating in City. The Fee Waiver will remain in effect until the expiration of the later of (x) the Term or (y) the term of the lease for a portion of the Project between CCE and Hancock, and shall also apply to any assignee of CCE under the Lease.

City agrees that (a) CCE is relying on the Fee Waiver in entering into its lease with Owner, (b) the rent that CCE has agreed to pay under the Lease is based on CCE's understanding that City will agree to the Fee Waiver and (c) CCE would not have entered into the Lease absent the Fee Waiver. The Fee Waiver shall apply to City and all of its agencies. Each Provider, including, without limitation, CCE is a third party beneficiary to this Paragraph 7, and each Provider, including, without limitation, CCE (and each of their successors) may enforce this Paragraph 7 against City directly. In any action or proceeding between City and any Provider, including, without limitation, CCE in connection with the interpretation or enforcement of this Paragraph 7, the prevailing party shall be entitled to reimbursement of its reasonable attorney's fees and costs from the other party. Notwithstanding anything contained in this Paragraph 7, neither City's breach of its obligations under this Paragraph 7 nor the inability to enforce the provisions of this Paragraph 7 shall limit or modify CCE's or Owner's obligations under the Lease.

8. **HAZARDOUS MATERIALS:** As additional consideration for the annual Fee payable under this Agreement, City agrees that, except for any Release (defined below) of Hazardous Materials within the Basin by Owner, a Provider, or any other tenant or licensee of Owner (collectively, an "**Owner Release**"), Owner will have no liability for the presence of any Hazardous Materials in the Basin, including, without limitation, in, on, or under the Basin or the waters located therein (collectively, a "**Release**") and, except for any claim arising out of an Owner Release, City hereby waives and releases Owner from any claim City may now or hereafter have against Owner arising out of or in connection with any Release. City understands, has been advised by its legal counsel, and with respect to the matters covered by this paragraph, hereby waives the provisions of Section 1542 of the California Civil Code, which provides as follows:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

9. **WAIVER:** Any waiver by either party of any breach of any one or more of the terms, covenants, or conditions of this Agreement shall be in writing and shall not be construed to be a waiver of any subsequent or other breach of the same or of any other term, covenant, or condition of this Agreement, nor shall failure on the part of either party to require exact, full and complete compliance with any of the terms, covenants, or conditions of this Agreement be construed as in any manner changing the terms, covenants, or conditions hereof or preventing the enforcement of the provisions hereof, nor shall the conduct of the parties be deemed to change or modify the terms, covenants, or conditions of this Agreement. No delay, failure or omission of either party to insist on strict enforcement of any term, covenant, or condition or to exercise any right, power, privilege or option arising from any default shall impair any such right, power, privilege or option or be construed as a waiver of or acquiescence in such default or as a relinquishment of any right. The receipt and acceptance by City of a delinquent fee payment shall not constitute a waiver of any other default but shall only constitute waiver of timely payment for the particular fee payment involved. No notice to either party shall be required to restore "time is of the essence" after the waiver of any default. No option, right, power, remedy or privilege of either party shall be construed as being exhausted by the exercise thereof in one or more instances.

10. **SUCCESSORS AND ASSIGNS:** This agreement is binding on the successors and assigns of Owner. It is agreed between Owner and City that in no event shall it be unreasonable for City to refuse to consent to an assignment of this Agreement without the written promise of any such assignee to both adhere to the terms of this Agreement and to require such assignees, successors and assigns to adhere to the terms of this Agreement. Otherwise, City shall not unreasonably withhold its consent to an assignment of this Agreement.

11. **MISCELLANEOUS PROVISIONS:**

11.1 Notice. Any notice, demand, request, consent, approval or communication that either party desires or is required to give to the other party shall be in writing addressed to the other party at the addresses set forth below or such other address as may have been specified by notifying the other party of the change of address.

To City: City of Long Beach
Attention: City Manager
333 West Ocean Boulevard, 13th Floor
Long Beach, CA 90802

With copy to: The City Attorney
City of Long Beach
333 West Ocean Boulevard, 11th Floor
Long Beach, CA 90802

To Owner: John Hancock Life Insurance Company
Property Management Office
300 Golden Shore
Long Beach, CA 90802
FAX: (562) 495-2270

Notice shall be deemed served on the second business day following the day of mailing if properly mailed with the United States Postal Service, by certified mail, return receipt requested.

11.2 Time of Essence. Time is of the essence as to each provision of this Agreement.

11.3 Covenants and Conditions. All provisions hereof expressed as either covenants or conditions on the part of Owner or City to be performed or observed shall be deemed to be both covenants and conditions.

11.4 California Law. This Agreement shall be construed and interpreted in accordance with the laws of the State of California. Owner covenants and agrees to submit to the personal jurisdiction of any state court located in Los Angeles County, California, for any dispute, claim or matter arising out of or related to this Agreement.

11.5 Integrated Agreement. This Agreement constitutes the entire agreement between Owner and City regarding the subject matter of this Agreement and cannot be amended or modified except by written agreement.

11.6 Interpretation. The captions of this Agreement shall have no effect on its interpretation. When required by the context of this Agreement, the singular shall include the plural.

11.7 Severability. The unenforceability, invalidity or illegality of any provision shall not render the other provisions unenforceable, invalid or illegal.

11.8 Attorney Fees. If either party becomes a party to any litigation concerning this Agreement, by reason of any act or omission of the other party or its authorized representatives, and not by an act or omission of the party that becomes a party to that litigation or any act or omission of its authorized representatives, the party that causes the other party to become involved in the litigation shall be liable to that party for reasonable attorneys' fees and court costs incurred by it in the litigation. If either party commences an action against the other

party arising out of or in connection with this Agreement, the prevailing party shall be entitled to request the court for an award of reasonable attorneys' fees and costs of suit from the losing party. Such reasonable attorney's fees, costs, and expenses shall also be applicable to representation of all leasehold interests in any bankruptcy proceedings.

11.9 Municipal Authority. The execution and delivery of this Agreement by City and the consummation of the transactions contemplated herein have been duly authorized and approved by all requisite action of the City of Long Beach, acting by and through its City Council, and constitutes a valid and binding obligation on City.

11.10 Owner's Authority. The execution and delivery of this Agreement by Owner and the consummation of the transactions contemplated herein have been duly authorized and approved by all required action of Owner. Owner represents and warrants to City that it is duly incorporated under the laws of the State of Massachusetts and in good standing with the Secretary of State. Owner represents and warrants that this Agreement has been duly executed and delivered by Owner and constitutes a valid and binding obligation on Owner.

WITNESS the execution hereof under seal the day and year first above written.

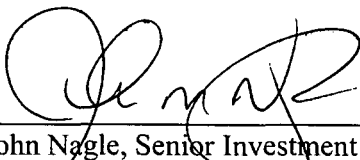
"CITY"

CITY OF LONG BEACH, a municipal corporation

By: 
City Manager

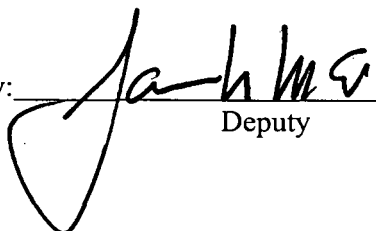
"OWNER"

JOHN HANCOCK LIFE INSURANCE COMPANY, a Massachusetts corporation

By: 
John Nagle, Senior Investment Officer

Approved as to form this 1st day of May, 2002.

ROBERT H. SHANNON, City Attorney

By: 
Deputy