

1 **FIRST AMENDMENT TO PERMIT NO. 27276 BETWEEN CITY OF**
2 **LONG BEACH AND HARBOR BREEZE, INC.**
3 **27276**

4 THIS FIRST AMENDMENT TO PERMIT NO. 27276 is made and entered,
5 in duplicate, as of August 1, 2006, for reference purposes only, by and between the CITY
6 OF LONG BEACH, a municipal corporation ("City") and the HARBOR BREEZE, INC., a
7 California corporation ("Permittee").

8 WHEREAS, City and Permittee entered into Permit No. 27276, (the
9 "Permit"), pursuant to a minute order approved by the City Council of the City of Long
10 Beach on April 24, 2001 to use and occupy portions of the docks, the slips and end ties in
11 Rainbow Harbor for embarking and disembarking passengers in connection with charters,
12 harbor cruises and whale watching tours; and

13 WHEREAS, Section Three (3) of the Permit provided that the term of the
14 Initial Permit shall be for five years and that the term of the Permit may be extended for
15 four additional periods of five (5) years upon the mutual agreement in writing by the City
16 Manager and Permittee provided that Permittee shall submit a written request to extend
17 and provided that Permittee is not in default; and

18 WHEREAS, the parties now desire to extend the term of the Permit as
19 provided in Section Three (3) of the Permit;

20 NOW, THEREFORE, in consideration of the mutual terms, covenants and
21 conditions contained in the Permit and herein, the parties agree as follows:

22 1. Section 2.1 of Permit No. 27276 is hereby amended in its entirety to read as
23 follows:

24 "2.1. Delivery and Loading.

25 Permittee, its subpermittees, concessionaires or other person or entity
26 person or entity operating under a contract with Permittee or on behalf of Permittee
27 delivering, loading or unloading goods, services or merchandise to the Permit Area
28 shall use the area(s) marked for loading located at Pine Avenue Circle, Shoreline

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1 Park parking lot and Aquarium Way for access. Permittee shall instruct all parties
2 delivering, loading or unloading goods, services or merchandise to use hand trucks
3 orushman type carts with inflatable tires. No trucks or vans shall be allowed within
4 the Permit Area or the Esplanade and grounds surrounding Rainbow Harbor.”

5 2. Section 3 of Permit No. 27276 is hereby amended in its entirety to read as
6 follows:

7 “3. TERM:

8 The term of this Permit shall commence at 12:01 a.m. on May 1, 2006
9 and shall terminate at midnight on April 30, 2011. Upon termination of this
10 Permit (whether by lapse of time or otherwise), Permittee shall quit and
11 surrender possession of the Permit Area and remove its personal property
12 therefrom. The term of this permit may be extended beyond April 30, 2011
13 for three (3) additional periods of five (5) years upon the mutual agreement
14 in writing by the City Manager of the City of Long Beach or his designee and
15 Permittee.”

16 3. Section 4 of Permit No. 27276 is hereby amended in its entirety to read as
17 follows:

18 “4. COMPENSATION:

19 4.1. Dock Fee. Permittee shall pay to the City for the use of the Permit Area
20 an amount equal to \$13.35 per lineal foot, per month, or other fee subsequently
21 adopted by the City Council of the City of Long Beach, occupied and/or reserved by
22 Permittee for any time such slip or end tie is so used. The Dock Fee shall be paid
23 on or before the first day of each month during the term of this Permit. The Dock
24 Fee shall be paid in advance and Permittee shall not have any right of abatement,
25 deduction, set off, prior notice or demand.

26 4.2. Permit Fee.

27 Permittee shall pay to the City percentage fees in the amount of
28 five percent (5%) of Permittee's "gross receipts" (as that term is defined in

1 subparagraph 4.5 below) per month on the twentieth (20th) day of each month
2 following each and every month in which gross receipts are received whether
3 received by Permittee, its subpermittees, concessionaires or other person or entity
4 operating under a contract with Permittee from all permitted concessions,
5 operations and activities. Permittee shall not have any right of abatement,
6 deduction, set off, prior notice or demand.

7 4.3. Charges for Late Payments.

8 A. If Dock Fee payment is not received within ten days after the
9 same has become due, a late fee shall be assessed. The late fee shall be, in
10 addition to the amount of the Dock Fee, a sum equal to ten percent (10%) thereof.

11 B. If Permit Fee payment is not received on the twentieth(20th)
12 day following the preceding month, a late fee shall be assessed. The late fee shall
13 be 5% or \$50, whichever is greater.

14 C. In addition to the late fees above, interest shall accrue on all
15 amounts owed from the due date, at a rate of ten (10) percent per annum until paid.

16 D. The late fees above are intended to compensate City for its
17 additional administrative costs resulting from Permittee's failure, and has been
18 agreed upon by City and Permittee, after negotiation, as a reasonable estimate of
19 the additional administrative costs that will be incurred by City as a result of
20 Permittee's failure. The actual cost in each instance is extremely difficult, if not
21 impossible, to determine. These late fees will constitute liquidated damages and
22 shall be paid to City together with such unpaid amounts. The payment of these late
23 fees shall not constitute a waiver by city of any default by Permittee under this
24 Permit.

25 4.4. Gross Receipts. "Gross receipts" as used herein shall include the
26 following:

27 A. The gross selling price of all boat tickets or other charges for the
28 use of or passage aboard any Permittee authorized vessel that docks or ties up at

1 the Permit Area.

2 B. The gross selling price for all food, beverages, and other
3 merchandise or services sold or delivered by Permittee, its permitted licensees,
4 concessionaires, and persons, firms, or corporations aboard said vessels.

5 C. Gross receipts shall include sales for cash, credit, or services
6 whether collected or not. Gross receipts shall not include, or if included shall be
7 deducted (but only to the extent they have been included), any sales and use taxes,
8 transportation taxes, excise taxes, franchise taxes, and other similar taxes now or in
9 the future imposed on the sale of tickets, food, beverages, merchandise, or services,
10 but only if such taxes are added to the selling price, separately stated, collected
11 separately from the selling price and collected from customers. Gross receipts shall
12 not include any value imputed to charitable charters (i.e., any charter in which
13 Permittee does not collect a fee or reimbursement for expenses).

14 4.5. Statement of Gross Receipts.

15 A. Permittee shall prepare and deliver or cause to be prepared and
16 delivered to the City at:

17 Department of Parks, Recreation and Marine

18 2760 Studebaker Road

19 Long Beach, CA 90815-1697

20 Attention: Accounting Section

21 within twenty (20) days after the end of each month during the term of this permit or
22 extension thereof, a financial statement showing in reasonable detail Permittee's
23 gross receipts for the preceding calendar month or partial calendar month and a
24 computation of the percentage fee provided for herein.

25 B. Permittee shall within thirty (30) days of each calendar year deliver
26 to the City, at the address set forth in subparagraph 4.5.A. above, a statement
27 showing gross receipts of the preceding calendar year or partial calendar year. Such
28 statement shall be prepared and delivered to City in accordance with generally

1 accepted accounting practices containing a statement of gross receipts and a
2 computation of percentage of gross receipts.

3 C. Each statement shall be signed and certified to be correct by an
4 officer of Permittee.”

5 4. Section 11 of Permit No. 27276 is hereby amended in its entirety to read as
6 follows:

7 “11. TRASH REMOVAL AND DISPOSAL:

8 The City shall provide, for Permittee, at each dock for trash disposal except
9 the floating docks located at Pierpoint Landing. Trash from Permittee’s operation shall be
10 disposed of in the trash bins for collection by the Maintenance Operations Bureau of the
11 Department of Parks, Recreation and Marine. The Maintenance Operations Bureau shall
12 perform collection services from the water and the collection schedule shall be according to
13 demand. The City shall have the right to modify or change the trash removal operation and
14 Permittee agrees to accept and comply with such modifications or changes.”

15 5. Section 12 of Permit No. 27276 is hereby amended in its entirety to read as
16 follows:

17 “12. MAINTENANCE AND REPAIR:

18 The City shall maintain the Permit Area and the improvements thereon in good
19 condition and repair, reasonable wear and tear excepted. Permittee understands that the
20 water area within the Rainbow Harbor area is subject to collection of debris from the Los
21 Angeles River runoff. Further, Permittee acknowledges that water conditions including
22 debris and sediment may occur at times in the adjacent area of the Los Angeles River which
23 could affect access to the Rainbow Harbor. City shall not be required to dredge the Permit
24 Area or adjacent area of the Los Angeles river. Neither the City nor its officers or employees
25 shall be liable and Permittee waives all claims for damage to its vessels or its business as
26 a result of any such condition. Permittee's vessels and their gear and Permittee's property
27 thereon shall be at the Permit Area at Permittee's risk and the City shall not be liable for
28 damage thereto or theft or appropriation thereof.”

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6. Section 24 of Permit No. 27276 is hereby amended in its entirety to read as follows:

24. GENERAL PROVISIONS:

24.1. Notices, Demands and Communication Between the Parties. Written notices, demands, and communication between City and Permittee shall be in writing and shall be sufficiently given if personally served or if mailed by registered or certified mail, postage prepaid, return receipt requested addressed as follows:

TO CITY: City Manager
13th Floor, City Hall
333 West Ocean Boulevard
Long Beach, California 90802

WITH A COPY TO: Director of Parks, Recreation & Marine
2760 Studebaker Road
Long Beach, California 90815-1697

TO PERMITTEE: Harbor Breeze, Inc.
83 Narcissa Drive
Rancho Palos Verdes, California 90275

Either party may change its address by notifying the other party of the change of address. Notice shall be deemed communicated within forty-eight (48) hours from the time of mailing if mailed as provided in this paragraph.

24.2. Conflict of Interest. No member, official or employee of City shall have any personal interest, direct or indirect, in this Permit, nor shall any such member, official or employees participate in any decision relating to this Permit which affects his personal interest or the interests of any corporation, partnership or association in which he is, directly or indirectly, interested. No member, official or employee of City shall be personally liable to Permittee, or any successor in interest, in the event of any default or breach by City or for any amount which may become due to Permittee or successor or on any obligations under the terms of this Permit.

24.3. Defaults and Remedies.

24.3.1. Defaults - General. Failure by either party to perform any term

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or provision of this Permit constitutes default under this Permit, if not cured within thirty (30) days from the date of receipt of a written notice from the other party specifying the claimed default provided that is such default cannot reasonably be cured within such thirty (30) day period, the party receiving such notice of default shall not be in default under this Permit if such party commences the cure of such default within such thirty (30) day period and thereafter diligently prosecutes the steps to cure such default to completion.

24.3.2. Institution of Legal Actions. In addition to any other rights or remedies, either party may institute legal action to cure, correct, or remedy any default, to recover damages for any default, or to obtain any other remedy consistent with the purpose of this Permit. Such legal actions must be instituted in the South Branch of the Superior Court of the County of Los Angeles, State of California, in an appropriate municipal court in that county, or in the Federal District court in the Central District of California. The prevailing party in any action commenced pursuant to this Permit shall be entitled to recover reasonable costs, expenses and attorneys' fees.

24.3.3. Applicable Law. The laws of the State of California shall govern the interpretation and enforcement of this Permit. Permittee during its use and occupancy of the Permit Area shall at all times comply with all laws, ordinances, rules, and regulations of and obtain permits from all federal, state, and local governmental authorities having jurisdiction over the Permit Area, Permittee's vessels and Permittee's activities thereon.

24.3.4. Service of Process. In the event any legal action is commenced by Permittee against City, service of process on City shall be made by personal service upon the City Clerk of the City, or in such other manner as may be provided by law.

In the event that any legal action is commenced by City against Permittee, service of process on Permittee shall be made as provided by law and shall be

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valid whether made within or without the State of California.

24.3.5. Rights and Remedies Are Cumulative. Except as otherwise expressly stated in this Permit, the rights and remedies of the parties are cumulative, and the exercise by either party of one or more such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default by the other party.

24.3.6. Inaction Not a Waiver of Default. Any failures or delays by either party in asserting any of its rights and remedies as to any default shall not operate as a waiver of any default or of any such rights or remedies or deprive either such party of its right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert or enforce any such rights or remedies.

24.3.7. Remedies. In the event of a default by Permittee, which is not cured by Permittee within the times specified in this Permit, City without further notice to Permittee, may declare this Permit and/or Permittee's right of possession at an end and may reenter the Permit Area by process of law, in which event, City shall have the right to recover from Permittee:

24.3.7.1. The worth at the time of award of the unpaid fees which has been earned at the time of termination, plus interest;

24.3.7.2. The worth at the time of award of the amount by which the unpaid fees which would have been earned after termination until the time of award exceeds the amount of such fee loss that Permittee proves could have been reasonably avoided, plus interest;

24.3.7.3. The worth at the time of award of the amount by which the unpaid fees for the balance of the term after the time of award exceeds the amount of such fee loss for the same period the Permittee proves could be reasonably avoided, plus interest thereon; and

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24.3.7.4. The remedies of City as hereinabove provided are cumulative to the other provisions of this Permit.

24.5. Partial Invalidity. If any term or provision of this Permit or the application thereof to any party or circumstances shall, to any extent, be held invalid or unenforceable, the remainder of this Permit, or the application of such term or provisions, to persons or circumstances other than those as to whom or which it is held invalid or unenforceable, shall not be affected thereby, and each term and provision of this Permit shall be valid and enforceable to the fullest extent permitted by law.

24.6. Entire Agreement, Waivers and Amendments. This Permit constitutes the entire understanding and agreement of the parties. This Permit integrates all the terms and conditions mentioned herein or incidental hereto, and supersedes all negotiations between the parties with respect to all or any part of the subject matter hereof.

24.7. Waivers. All waivers of the provisions of this Permit must be in writing by the appropriate authorities of City or Permittee and all amendments hereto must be in writing by the appropriate authorities of City and Permittee.

24.8. Successors in Interest. The provisions of this Permit shall be binding upon and shall inure to the benefit of the heirs, executors, assigns and successors in interest of the parties hereto.

24.9. Nondiscrimination. In connection with performance of this Agreement and subject to applicable laws, rules and regulations, Consultant shall not discriminate in rendering services hereunder on the basis of race, color, religion, national origin, sex, sexual orientation, AIDS, HIV status, age, disability, handicap or veteran status.

24.10. No Joint Venture or Partnership. Nothing in this agreement shall be construed as creating either a partnership or joint venture between the parties hereto.

24.11. Jointly Drafted. This agreement is jointly drafted by the parties hereto

1 and it is not to be construed against either party as the drafter.

2 24.12. Municipal Powers. Nothing contained herein shall be construed as a
3 limitation upon powers of City as a chartered city of the State of California. This
4 Permit is entered into by City in its proprietary capacity and nothing contained herein
5 shall relieve Permittee from complying with all requirements, rules, regulations or
6 ordinances of the City of Long Beach.

7 24.13. No Mineral Rights. This Permit creates no rights in Permittee to
8 minerals, or proceeds from mineral production, which may lie below the Permit Area
9 including but not limited to any unitized oil.

10 24.14. No Relocation Benefits. Permittee shall have no rights to relocation
11 benefits mandated by the laws of the State of California as to this Permit Area.

12 24.15 Americans with Disabilities Act. Permittee shall have and be allocated
13 the sole responsibility to comply with the Americans with Disabilities Act ("ADA") as
14 may be applicable with respect to Permittee's operation and the Permittee shall
15 indemnify and hold City harmless from and against any claims of a violation of the
16 ADA."

17 7. Section 28 of Permit No. 27276 is hereby amended in its entirety to read as
18 follows:

19 "28. SPECIAL EVENTS:

20 Permittee recognizes that the area of the City in which Permittee will operate
21 further to this Permit is annually impacted by Special Events, including but not limited to the
22 running of the Long Beach Grand Prix. Permittee waives any and all claim that it might ever
23 have against City or the operators of said Special Events, including but not limited to the
24 Grand Prix as a result of any adverse impact on its operations or business as a result of said
25 Special Events."

26 8. Except as expressly amended herein, all terms, covenants and conditions in
27 the Lease are ratified and confirmed and shall remain in full force and effect. Capitalized
28 terms used herein without definition shall have the meanings ascribed to them in the Lease.

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IN WITNESS WHEREOF, the parties have caused this First Amendment to be
duly executed with all formalities required by law as of the date first stated above.

HARBOR BREEZE, INC.

March 16, 2006

By Rahel D Salas
Title CEO

March 16, 2006

By Kim Salas
Title Vice President

"Permittee"

CITY OF LONG BEACH, a municipal
corporation

April 15, 2006

By [Signature] **ASSISTANT**
City Manager

"City" **EXECUTED PURSUANT
TO SECTION 301 OF
THE CITY CHARTER.**

This First Amendment to Lease No. 27276 is approved as to form on

April 1, 2006

ROBERT E. SHANNON, City Attorney

By [Signature]
Deputy

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