


(8/8)

B. HALL, EDD
P. EMERY, CS
L. GOMEL, EDD
MICHAEL, CS
M. GOMEL, CS

Council/Agency Meeting Held: <u>8/6/2012</u>	 City Clerk's Signature
Deferred/Continued to: _____	
<input checked="" type="checkbox"/> Approved <input type="checkbox"/> Conditionally Approved <input type="checkbox"/> Denied <u>6-0-1 (BOARDMAN ABSENT)</u>	
Council Meeting Date: August 6, 2012	Department ID Number: ED 12-26

**CITY OF HUNTINGTON BEACH
REQUEST FOR CITY COUNCIL ACTION**

SUBMITTED TO: Honorable Mayor and City Council Members

SUBMITTED BY: Fred A. Wilson, City Manager

PREPARED BY: Bob Hall, Deputy City Manager/Economic Development Director

Paul Emery, Deputy City Manager/Community Services Director

SUBJECT: Approve and authorize execution of a Lease Agreement between the City and Michael and Christine Bartusick, dba Park Bench Café, for the operation of a restaurant/food concession in Central Park

Statement of Issue: The City Council is asked to approve a ten-year Lease Agreement between the City of Huntington Beach and Michael and Christine Bartusick, dba Park Bench Cafe for the operation of a restaurant/food concession in Huntington Central Park located at 17732 Goldenwest Street, Huntington Beach, California.

Financial Impact: City will receive a percentage of gross revenues generated at the facility estimated at \$35,000 per year.

Recommended Action: Motion to:

Approve and authorize the Mayor and City Clerk to execute the "Lease Agreement Between the City of Huntington Beach and Michael and Christine Bartusick, dba Park Bench Café" for a restaurant/food concession in Huntington Central Park.

Alternative Action(s):

Do not approve the lease agreement and direct staff accordingly.

LEASE AGREEMENT BETWEEN
THE CITY OF HUNTINGTON BEACH
AND MICHAEL AND CHRISTIE BARTUSICK, dba
PARK BENCH CAFÉ

THIS LEASE (the "Lease") is made and entered into effective August 06, 2012 by and between the CITY OF HUNTINGTON BEACH, a municipal corporation of the State of California ("City") and MICHAEL and CHRISTIE BARTUSICK, dba PARK BENCH CAFÉ, a California corporation, hereinafter "Lessee."

WHEREAS, City wishes to lease certain real property (the "Property"), described as a café style restaurant with both indoor and outdoor dining, known as the Park Bench Café, whose address is 17732 Goldenwest Street, Huntington Beach, CA, together with a building and other related improvements (collectively referred to as the "Improvements"). The term "Premises" as used in this Lease shall mean both the Property and the Improvements. Lessee desires to lease the Premises in the manner set forth below.

NOW, THEREFORE, the parties covenant and agree as follows:

SECTION 1. SUPERSEDING OF PRIOR LEASE

This Lease shall supersede and replace any existing lease agreement(s) for the Premises currently entered into by and between the parties and all supplemental agreement(s) entered into by and between the parties regarding the existing lease agreement(s).

SECTION 2. GRANT OF CONCESSION ON THE PREMISES

City, pursuant to the terms of this Lease, grants to Lessee for the purposes stated herein, the right, privilege and duty to equip, operate and maintain a concession open to the public located on the Premises (hereinafter sometimes referred to as the "Concession"). Lessee shall not use the Premises for any other purpose or business. The legal description of the Premises is set forth in Exhibit "A", which is attached and incorporated herein by this reference. A map depicting the Premises is set

forth in **Exhibit "B"**, which is attached hereto and incorporated herein by this reference. This Lease is not intended to confer third-party beneficiary status to anyone.

SECTION 3. RESERVATIONS, ENCUMBRANCES AND RIGHTS-OF-WAY

- (a) City expressly reserves all natural resources in, on, or two hundred fifty (250) feet under the Premises, including, without limitation, oil, coal, natural gas and other hydrocarbons, minerals, aggregates, timber and other geothermal resources, as well as the right to grant leases or other contractual arrangements in and over the Premises for the extraction of such natural resources. However, such leasing or other arrangement shall be neither inconsistent nor incompatible with the rights or privileges of Lessee under this Lease.
- (b) City expressly reserves a right to enter upon the Premises with as much advance written, verbal or electronic notice as possible to Lessee for any reason associated with public health, safety or welfare, or for the protection of life, limb or property. In all other cases unless otherwise specifically set forth herein, City reserves the right for such entry but City shall give Lessee at least twenty-four (24) hours advance written, verbal or electronic notice. City shall have a right of reasonable access to the Premises across Lessee owned, controlled or occupied lands adjacent to the Premises, if any, for any purpose associated with this Lease.
- (c) City expressly reserves the right to lease, convey, or encumber the Premises, in whole or in part, for any purpose not inconsistent or incompatible with the rights or privileges of Lessee under this Lease. In addition, Lessee agrees to subordinate the Lease to any existing or future City financing regarding the Premises or any portion thereof. Lessee also agrees to cooperate and provide any documentation necessary for City to obtain any such financing.

- (d) This Lease is subject to pre-existing contracts, leases, licenses, easements, encumbrances and claims affecting the Premises and it is made without warranty by City of title, condition or fitness of the land for the stated or intended use.

SECTION 4. TIME OF ESSENCE

Time shall be of the essence of this Lease and each and all of its terms, covenants or conditions in which performance is a factor.

SECTION 5. TERM

This Lease shall commence at 12:01 a.m. on AUGUST 6, 2012 for a ten (10) year term, which shall end at 11:59 p.m. on AUGUST 5, 2022, unless extended, or sooner terminated, as provided for herein. Lessee agrees that the café/restaurant shall be operational a minimum of 250 days per year. An operational day is defined as being open for business a minimum of four (4) hours per day.

SECTION 6. CONDITIONS OF PREMISES AS IS

The taking of possession of the Premises by Lessee shall, in itself, constitute acknowledgment that the Premises are in good and tenantable condition. Upon taking possession of the Premises, Lessee agrees to accept the Premises in their presently existing condition, "as is", and agrees that City shall not be obligated to make any alterations, additions or betterments thereto.

SECTION 7. DURATION OF PUBLIC FACILITIES

By entering into this Lease, City makes no stipulation as to the type, size, location or duration of public facilities (excluding the Premises), including, without limitation, any City parking lots to be maintained on property owned, controlled or occupied by City.

SECTION 8. ADDITIONS, ALTERATIONS AND REMOVAL

- (a) No modifications, alterations or additions to the Premises, including, without limitation, construction of Improvements or changes to structural design, landscape

design, or interior or exterior furnishings, shall be constructed or made by Lessee without Lessee first obtaining the prior written approval of City, which will not be unreasonably withheld.

- (b) Except as provided under this Lease, no alteration or removal of existing Improvements on or natural features of the Premises shall be undertaken without Lessee first obtaining the prior written approval of City.
- (c) Lessee's obligation to obtain City's prior written approval is separate and independent of Lessee's obligation to obtain any permits from City, such as, without limitation, a building permit.

SECTION 9. CITY'S CONTRACT ADMINISTRATOR

City's Director of Community Services, or his or her designee, shall be City's Contract Administrator for this Lease with the authority to act on behalf of City for the purposes of this Lease, and all City approvals and notices required to be given herein to City shall be so directed and addressed.

SECTION 10. RENT

Lessee agrees to pay to City as rent (the "Rent") for the use and occupancy of the Premises a sum equal to the following percentages of the amount of "Gross Sales," as defined in Section 12 below:

Years 1 through 5

\$0 \$100,000.00 of Gross Sales	=7.0%;
\$100,000.01 - \$150,000.00 of Gross Sales	=8.0%;
Over \$150,000.00 of Gross Sales	=9.0%
Minimum Base Rent*	=\$1,000 per month plus annual CPI increases

Years 6 through 10

\$0 \$100,000.00 of Gross Sales	=7.5%;
\$100,000.01 - \$150,000.00 of Gross Sales	=8.5%;
Over \$150,000.00 of Gross Sales	=9.5%
Minimum Base Rent*	=\$1,250 per month plus annual CPI increases

*Monthly rent will equal minimum base rent or percentage of gross sales for the month-whichever is greater.

Lessee shall pay the Rent monthly to City at the City Treasurer's Office, P.O. Box 711, Huntington Beach, California, 92648, or at such other place or places as City may from time-to-time designate by written notice delivered to Lessee. Lessee shall pay the Rent, which must be received by the City Treasurer within fifteen (15) calendar days after the end of the month for which the Rent is being paid, or on the next business day if the fifteenth day falls on a weekend or holiday.

SECTION 11. LATE CHARGE AND PENALTY

If the Rent is not received by the City Treasurer within ten (10) calendar days after the end of the month for which the Rent is being paid, or the next business day if the twentieth day falls on a weekend or holiday, Lessee shall pay the following late charge and penalty: (1) a late charge of ten percent (10%) shall be applied to any outstanding balance after any payment hereunder is due but unpaid; and (2) one and a half percent (1 ½%) penalty per month shall be added for each month the Rent is due but unpaid. With respect to any other payments required by Lessee, a one and a half percent (1 ½%) penalty per month shall be added for each month such payment hereunder is due but unpaid.

SECTION 12. GROSS SALES DEFINED

For the purpose of this Lease, the term "Gross Sales" shall mean the total price of all merchandise, food and beverages, or services sold or rendered, or equipment rented, in, on, or from the Premises by Lessee, or anyone contracting with Lessee, including, without limitation, its agents or sublessees (collectively or individually, "Lessee Party(ies)"), whether wholesale or retail, whether for cash or on credit, and if on credit whether or not paid, and whether in exchange for any other product, commodity, service, commercial paper or forbearance, and shall include, without limitation, the following:

- (a) All revenues, receipts, commissions or proceeds from on-line sales by Lessee Party(ies), and/or from all public telephones, vending, weighing and all other

machines owned, operated, or leased to or by Lessee Party(ies) in, on, or from the Premises;

- (b) All revenues, receipts, commissions or proceeds from sales based on orders solicited or taken, in, on, or from the Premises for merchandise, food and beverages, or services to be delivered or rendered off, or from sources outside, the Premises, including, without limitation, all orders taken in, on, or from the Premises although the orders may be filled elsewhere;
- (c) All revenues, receipts, commissions or proceeds from the renting of equipment of any kind in, on, or from the Premises; and
- (d) All revenues, receipts, commissions or proceeds generated from offsite but delivered through the Concession.
- (e) All revenues, receipts, commissions or proceeds made by Lessee Party(ies) or their employees or others acting on their behalf for the rendition of services of any kind whatsoever, made in, on, or from the Premises.
- (f) All other revenues, receipts, commissions or proceeds generated by, arising or derived whatsoever from the use of the Premises or derived whatsoever from any business conducted in, on, or from the Premises.

For purposes of computing the Gross Sales figure on which to calculate the Rent, the amount of Gross Sales shall start over at zero dollars on January 1 of each year. If the Lease commences on any date other than January 1, the Gross Sales calculation begins from such commencement date and runs through December 31 of such Lease commencement year.

SECTION 13. GROSS SALES EXCLUSIONS

Gross Sales shall not include the following items, and Lessee may deduct such items from Gross Sales to the extent they have been included therein or have been included in a prior computation of Gross Sales on which the Rent has been paid under this Lease to City:

- (a) Any sales, excise or other taxes otherwise includable in Gross Sales and which become part of the total price of merchandise, food and beverages, or services sold or rendered, or equipment rented, in, on, or from the Premises where Lessee must account for and remit the taxes to the government entity or entities which impose them, but only if such taxes are added to the total price and collected from customers;
- (b) Any transfer of trade inventory from the Premises to the manufacturer or supplier from whom it was obtained by Lessee;
- (c) Sales of Trade Fixtures (as defined in Section 51 below);
- (d) Sums and credits received in the settlement of claims for loss of or damage to trade inventory or Trade Fixtures; and
- (e) Any sales resulting in a cash or credit refund to a customer in the ordinary course of business.

SECTION 14. BOOKS AND RECORDS

Lessee shall keep true and accurate books and records showing all of its business transactions in separate records of account for the Concession in a manner acceptable to City, and City and/or its designated representatives shall have the right, at all reasonable times, to inspect such books and records including, without limitation, State of California sales or use tax returns or other State return records, and Lessee hereby agrees that all such records and instruments shall promptly be delivered and made available to City and/or its designated representatives within thirty (30) days of receiving

written request therefor. Lessee shall furnish to City and/or its designated representatives copies of its quarterly California sales and use tax returns at the time each is filed with the State of California.

The books and records shall show the total amount of Gross Sales made each calendar month in, on, or from the Premises and any exclusions listed in Section 13 above. All sales and charges shall be recorded by means of cash registers which display the amount of the transaction certifying the amount recorded. The register shall be equipped with devices which log in daily sales totals and which shall record on tapes the transaction numbers and sales details. At the end of each day the tape shall record the total sales for that day. Lessee agrees to maintain on the Premises, or another location subject to the prior written approval of City, all records, books of account and cash register tapes, showing, or in any way pertaining to the Gross Sales made in, on, or from the Premises during such calendar month, including, without limitation, State of California sales or use tax returns or other State tax returns, for a period of five (5) years following the close of each calendar month.

SECTION 15. STATEMENT OF GROSS SALES/AUDIT

At the time specified in Section 10 of this Lease for the payment of the Rent, Lessee shall deliver to City a true and accurate statement signed by Lessee or by an authorized employee of Lessee showing the total Gross Sales and any exclusions listed in Section 13 above made during the preceding calendar month and the amount of the Rent then being paid calculated on such Gross Sales pursuant to this Lease. The acceptance by City of any monies paid to City by Lessee as the Rent, as shown by any statement furnished by Lessee, shall not be construed as an admission of the accuracy of the statement, or of the sufficiency of the amount of the Rent payment, and City shall be entitled to review the adequacy of such payment as set forth herein. By the end of each January, Lessee shall deliver to City a year-end statement showing the total amount of Gross Sales made in, on, or from the Premises in each month of the preceding year, the total of any exclusions, the total Rent paid to City for each of those months, all with year-end totals. City may at any time within three (3) years after

receiving the year-end statement, at its sole cost and expense, cause all records, books of account and cash register tapes for the year purportedly covered by the statement, to be audited by City or an accountant selected by City. Lessee shall, within thirty (30) days of receiving written notice of City's desire for such an audit, deliver and make available all such records, books of account and cash register tapes to City or its designated representative for City's use in the audit and/or for copying. If the audit discloses that Gross Sales were understated and/or exclusions overstated, Lessee shall immediately pay the additional Rent, together with a penalty thereon from the date it was due at the penalty rate set forth in Section 11 above. Furthermore, Lessee shall promptly on demand reimburse City for the full cost and expense of the audit should the audit disclose that the questioned year-end statement understated Gross Sales (including an overstatement of exclusions) or the Rent by any amount greater than Two Hundred Fifty Dollars (\$250.00). City further reserves the right to examine and audit all such records, books of account and cash register tapes at any time during the three (3) year period following the expiration or termination of this Lease. In addition, City shall have the right to enter upon the Premises during business hours and with two (2) hours advance written, verbal or electronic notice to Lessee to perform any audit or inspection function with respect to this Lease.

Lessee, its bookkeeper and/or accountant shall respond to all questions and inquiries of City with respect to the books, records, statements and other documentation being examined, and shall promptly provide other further documentation as may be required by City. City is entitled to take statements by deposition under oath of Lessee, its officers, bookkeepers and/or accountants or any person who prepared the books, records, statements and other documentation required to be provided by Lessee under this Lease.

SECTION 16. SECURITY DEPOSIT

Lessee's existing security deposit of Two Thousand Five Hundred Dollars (\$2,500.00) to guarantee all of Lessee's obligations, liabilities, duties and responsibilities under the Lease,

including, without limitation, the repair and maintenance of the Premises as provided herein, shall remain in effect during the rental term. No interest shall accrue on cash deposits to the benefit of Lessee, but interest shall accrue on a CD or savings account and shall be paid to Lessee under the terms of the CD or savings account. Lessee shall send a copy of each renewal of the CD to the City Treasurer to ensure that City has the records of each active deposit account.

SECTION 17. USE OF DRINK SPONSOR

Lessee shall comply with any exclusivity agreement which the City may have with a drink sponsor. This exclusivity shall not apply to third-party rentals that bring their own drink products.

SECTION 18. QUALITY OF SALES, RENTALS AND SERVICES

Lessee, at its sole cost and expense, shall equip, operate, manage and maintain the Premises and Concession and shall keep the same equipped and maintained in a manner acceptable to City during the entire term of this Lease or any renewals or extensions thereof or during any holdover period. It is the intent of City that the Concession's services be provided in a manner to meet the needs of the visiting public, and should City deem the Concession's hours of operation and/or food, merchandise, services or rentals inadequate to meet such needs, City may require Lessee to make such changes requested by City. Lessee shall not use or permit the Premises to be used, in whole or in part, during the entire term of this Lease or any renewals or extensions thereof or during any holdover period for any purpose other than as herein set forth, without the prior written consent of City.

Except as permitted in advance in writing by City, all foods and beverages shall be sold in disposable paper or plastic containers. No pull-top cans or styrofoam containers are to be vended or dispensed from the Premises unless pre-approved in writing by City. Lessee, wherever feasible, shall eliminate the use of non-recyclable containers and plastics. City may from time to time review the

items sold and containers or utensils used or dispensed by Lessee. City reserves the right to prohibit the sale or use of non-recyclable containers or plastics.

City in its sole discretion reserves the right to prohibit Lessee's sale, provision or rental of any item or service rendered or performed, which it deems objectionable or offensive, beyond the scope deemed necessary for proper service to the public, inappropriate for sale, provision or rental by the Concession, or of inferior quality.

The restaurant must be in operation for a minimum of 250 days during the calendar year. An operational day is defined as being open for business a minimum of four consecutive hours.

SECTION 19. INDEMNIFICATION, DEFENSE AND HOLD HARMLESS

Lessee hereby agrees to protect, defend, indemnify and hold harmless City, its officers, elected or appointed officials, employees, agents and volunteers from and against any and all claims, damages, losses, expenses, judgments, demands and defense costs (including, without limitation, costs and fees of litigation (including arbitration) of every nature or liability of any kind or nature) arising out of or in connection with (1) the use or occupancy of the Premises by Lessee, its officers, employees or agents, or (2) the death or injury of any person or the damage to property caused by a condition of the Premises, or (3) the death or injury of any person or the damage to property caused by any act or omission of Lessee, its officers, employees or agents, or (4) any failure by Lessee to keep the Premises in a safe condition, or (5) Lessee's (or Lessee's agents and/or sublessees, if any) performance of this Lease or its failure to comply with any of its obligations contained in this Lease by Lessee, its officers, agents or employees except such loss or damage which was caused by the sole negligence or willful misconduct of City. Lessee shall hold all Trade Fixtures, personal property and trade inventory on the Premises at the sole risk of Lessee and save City harmless from any loss or damage thereto by any cause whatsoever, except such loss or damage which was caused by the sole negligence or willful misconduct of City. Lessee will conduct all defense at its sole cost and expense

and City shall approve selection of Lessee's counsel. This indemnity shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as limitation upon the amount of indemnification to be provided by Lessee.

SECTION 20. WORKERS' COMPENSATION AND EMPLOYERS' LIABILITY
INSURANCE

Lessee acknowledges awareness of Section 3700 *et seq.* of the *California Labor Code*, which requires every employer to be insured against liability for workers' compensation. Lessee covenants that it shall comply with such provisions prior to the commencement of this Lease. Lessee shall obtain and furnish to City workers' compensation and employers' liability insurance in amounts not less than the State statutory limits. Lessee shall require all sublessees and contractors to provide such workers' compensation and employers' liability insurance for all of the sublessees' and contractors' employees. Lessee shall furnish to City a certificate of waiver of subrogation under the terms of the workers' compensation and employers' liability insurance and Lessee shall similarly require all sublessees and contractors to waive subrogation.

SECTION 21. GENERAL PUBLIC LIABILITY INSURANCE

In addition to the workers' compensation and employers' liability insurance and Lessee's covenant to defend, hold harmless and indemnify City, Lessee shall obtain and furnish to City, a policy of general public liability insurance, including motor vehicle coverage against any and all claims arising out of or in connection with the Premises. This policy shall indemnify Lessee, its officers, employees and agents, while acting within the scope of their duties, against any and all claims arising out of or in connection with the Premises, and shall provide coverage in not less than the following amount: combined single limit bodily injury and property damage, including products/completed operations liability and blanket contractual liability, of One Million Dollars (\$1,000,000.00) per occurrence. If coverage is provided under a form which includes a designated

general aggregate limit, the aggregate limit must be no less than One Million Dollars (\$1,000,000.00) for the Premises. This policy shall name City, its officers, elected or appointed officials, employees, agents, and volunteers as Additional Insureds, and shall specifically provide that any other insurance coverage which may be applicable to the Lease shall be deemed excess coverage and that Lessee's insurance shall be primary.

Under no circumstances shall said above-mentioned insurance contain a self-insured retention, or a "deductible" or any other similar form of limitation on the required coverage.

SECTION 22. PROPERTY INSURANCE

Lessee shall provide before commencement of this Lease and shall obtain and furnish to City, at Lessee's sole cost and expense, property and fire insurance with extended coverage endorsements thereon, by a company acceptable to City authorized to conduct insurance business in California, in an amount insuring for the full insurable value of all Improvements, Trade Fixtures, personal property whether or not owned or leased by Lessee, and all trade inventory in or on the Premises against damage or destruction by fire, theft or the elements. This policy shall contain a full replacement cost endorsement naming Lessee as the insured and shall not contain a coinsurance penalty provision. The policy shall also contain an endorsement naming City as an Additional Insured. The policy shall contain a special endorsement that such proceeds shall be used to repair, rebuild or replace any such Improvements, Trade Fixtures, personal property whether or not owned or leased by Lessee, and all trade inventory so damaged or destroyed; and if not so used, such proceeds (excluding any insurance proceeds for Trade Fixtures, personal property whether or not owned or leased by Lessee, and trade inventory, but only to the extent the insurance proceeds specifically cover those items) shall be paid to City. The policy shall also contain a special endorsement that if the Premises are so destroyed triggering the parties' ability to terminate as set forth in Section 52 (Destruction) below, and either party elects to terminate the Lease, the entire

amount of any insurance proceeds (excluding such proceeds for Trade Fixtures, personal property whether or not owned or leased by Lessee and trade inventory, but only to the extent the insurance proceeds specifically cover those items) shall be paid to City. The proceeds of any such insurance payable to City may be used, in the sole discretion of City, for rebuilding or repair as necessary to restore the Premises or for any such other purpose(s) as City sees fit.

This policy shall also contain the following endorsements:

- (a) The insurer shall not cancel or reduce the insured's coverage without (30) days prior written notice to City;
- (b) City shall not be responsible for premiums or assessments on the policy.

A complete and signed certificate of insurance with all endorsements required by this Section shall be filed with City prior to the execution of this Lease. At least thirty (30) days prior to the expiration or termination of any such policy, a signed and complete certificate of insurance showing that coverage has been renewed shall be filed with City.

SECTION 23. INCREASE IN AMOUNT OF GENERAL PUBLIC LIABILITY
AND PROPERTY INSURANCE

Not more frequently than once every two (2) years, if, in the sole opinion of City, the amount and/or scope of general public liability insurance in Section 21 above and/or property insurance coverage in Section 22 above at that time is not adequate, Lessee shall increase the insurance coverage as reasonably required by City.

SECTION 24. CERTIFICATES OF INSURANCE; ADDITIONAL INSURED
ENDORSEMENTS

Prior to commencement of this Lease, Lessee shall furnish to City certificates of insurance subject to approval of the City Attorney evidencing the foregoing insurance coverages as required by this Lease; these certificates shall:

- (a) provide the name and policy number of each carrier and policy;
- (b) shall state that the policy is currently in force; and
- (c) shall promise to provide that such policies shall not be canceled or modified without thirty (30) days' prior written notice of City; however ten (10) days' prior written notice in the event of cancellation for nonpayment of premium, which 10-day notice provision shall not apply to property insurance in Section 22 above.

Lessee shall maintain the foregoing insurance coverages in force during the entire term of the Lease or any renewals or extensions thereof or during any holdover period.

The requirement for carrying the foregoing insurance coverages shall not derogate from Lessee's defense, hold harmless and indemnification obligations as set forth in this Lease. City or its representatives shall at all times have the right to demand the original or a copy of any or all the policies of insurance. Lessee shall pay, in a prompt and timely manner, the premiums on all insurance hereinabove required.

SECTION 25. INSURANCE HAZARDS

Lessee shall not commit or permit the commission of any acts on the Premises nor use or permit the use of the Premises in any manner that will increase the existing rates for, or cause the cancellation of any liability, property, or other insurance policy for the Premises or required by this Lease. Lessee shall, at its sole cost and expense, comply with all requirements of any insurance carrier providing any insurance policy for the Premises or required by this Lease necessary for the continued maintenance of these policies at reasonable rates.

SECTION 26. MAINTENANCE OF PREMISES

City's maintenance responsibilities of the Premises shall be limited to maintaining all sewers and drain lines, roofs and attached public restrooms (if they exist). Except as set forth in the

preceding sentence, Lessee agrees to maintain the Premises in good order and repair, at Lessee's sole cost and expense, during the entire term of this Lease or any renewals or extensions thereof or during any holdover period, pursuant to the City's maintenance standards. A copy of the quarterly evaluation summary sheet setting forth the City's maintenance checklist is attached as Exhibit "C", and incorporated herein by this reference. Except as provided above, Lessee, at its sole cost and expense, shall perform any maintenance and repairs including, without limitation, facility maintenance and landscape maintenance on the Premises.

Lessee's obligation includes, without limitation, maintaining and operating the Premises and adjacent areas to a distance of not more than fifty (50) feet, in a clean, safe, wholesome and sanitary condition free of trash, garbage or obstructions of any kind and in compliance with any and all present and future laws, general rules or regulations of any governmental authority now, or at any time during the entire term of this Lease or any renewals or extensions thereof or during any holdover period, in force, relating to sanitation or public health, safety or welfare, or for the protection of life, limb or property; and Lessee shall at all times faithfully obey and comply with all laws, rules and regulations applicable thereto. Lessee, at its sole cost and expense, shall remedy without delay any defective, dangerous or unsanitary condition(s) caused by Lessee or anyone related thereto. Provided, however, that Lessee shall have no obligation to repair or maintain sewer lines or respond to sewer leaks.

Lessee shall paint, stain or seal the Premises' exterior surfaces a minimum of every three (3) years, unless City determines in its sole discretion that such work shall be done on a more frequent basis. All exterior metal surfaces, except the roof, shall be painted with rust resistant paint no less than once every other year. Any and all graffiti on the Premises shall be removed by Lessee, at its sole cost and expense, within forty-eight (48) hours of Lessee receiving notice thereof or of Lessee becoming aware of such graffiti. In addition, with or without notice from City, Lessee shall, at its

sole cost and expense, repair and/or replace any broken glass within forty-eight (48) hours of its becoming broken, regardless of cause, except by fault of City. Except as provided above for graffiti and broken glass, Lessee, at its sole cost and expense and with or without notice from City, shall repair and/or replace all damage or destruction to the Premises caused by act(s) of vandalism as soon as possible but in no event later than fourteen (14) days after the date such damage or destruction occurred. Lessee, at its sole cost and expense, shall repair and/or replace all other damage or destruction to the Premises, regardless of cause, except by fault of City.

Lessee shall comply with all written notices served by City with regard to the care and maintenance of the Premises. Any written notice hereunder shall specify the work to be done and the period of time deemed to be reasonably necessary for completion of such work. Should Lessee fail to commence making the necessary repairs within seven (7) days after receiving such notice, or within twenty-four (24) hours of the glass becoming broken in the case of broken glass, or fail to diligently proceed to complete the necessary repairs within the period of time reasonably specified in the City's notice, or within forty-eight (48) hours of the glass becoming broken in the case of broken glass, or within the forty-eight (48) hour time period for removing graffiti, or within fourteen (14) days of the date that the vandalism damage or destruction occurred, City shall proceed to cause the required work to be performed, and Lessee shall promptly reimburse City for the cost of labor and materials thereof and pay City a penalty on such costs at the penalty rate set forth in Section 11 above from the date the costs were incurred by City to the date they are reimbursed to City by Lessee.

Lessee hereby expressly waives the right to make repairs at the expense of City and the benefit, if any, of the provisions of Sections 1941 and 1942 of the California Civil Code relating thereto.

SECTION 27. RENT CREDIT

City in its sole discretion may decide to give Lessee rent credit if Lessee undertakes (1) any repair or maintenance obligation of City under this Lease, (2) any work City in its sole discretion deems necessary and appropriate or (3) any Lessee improvements. Prior to Lessee undertaking any such work, City must agree in writing to the amount of and procedures for the rent credit, the work to be done by Lessee and the cost of such work. The maximum rent credit shall be no more than \$50,000 through the full term of the Lease.

SECTION 28. DAMAGE, DESTRUCTION OR NUISANCE

Lessee shall not commit or permit the commission by others of any damage or destruction of, on, or to the Premises and/or Concession. Lessee shall not maintain, commit or permit the maintenance or commission of any nuisance as defined in Section 3479 and/or Section 3480 of the California Civil Code on the Premises; and Lessee shall not use or permit the use of the Premises for any unlawful purpose.

SECTION 29. TAXES

This Lease may create a possessory interest in property, which is subject to taxation. In the event that such possessory interest is created, Lessee agrees to be subject to the payment of and to pay taxes levied on such interest, at its sole cost and expense. Lessee also agrees to pay, at its sole cost and expense, before they become delinquent all other lawful taxes, assessments or charges, which at any time may be levied by any governmental agency including, without limitation, the State, County, City or any tax or assessment levying body upon any interest in this Lease, or any possessory right which Lessee may have in or to the Premises, by reason of Lessee's use or occupancy thereof or otherwise, as well as all taxes, assessments, and charges on Trade Fixtures, personal property and trade inventory in, on, or about the Premises. Upon request, Lessee shall promptly furnish to City

satisfactory evidence establishing such payment. Lessee shall comply with all laws, regulations and ordinances regarding the collection of taxes due a government agency.

SECTION 30. PAYMENT OF OBLIGATIONS

Lessee shall promptly pay, at its sole cost and expense, before they become delinquent, any and all bills, debts, liabilities and obligations incurred by Lessee in connection with Lessee's occupation and use of the Premises and/or operation of the Concession. Upon request, Lessee shall promptly furnish to City satisfactory evidence establishing such payment.

SECTION 31. UTILITIES AND SERVICES

Excluding any attached public restrooms, if they exist, Lessee shall be responsible for the payment of all utility charges, including, without limitation, gas, electricity, water, telephone service, cable TV service, and the furnishing of all necessary refuse and garbage containers and the removal and disposal of all rubbish, refuse and garbage resulting from the operation of the Premises and/or the Concession. All such rubbish, refuse and garbage removed shall be disposed of in accordance with applicable laws and local ordinances. All trash containers and/or trash bins shall be adequately screened and located to the satisfaction of City. For the purposes of this Section, sewage disposal shall be construed as a utility. All such charges shall be paid by Lessee directly to the provider of the service and shall be paid as they become due and payable. Upon request, Lessee shall promptly furnish to City satisfactory evidence establishing such payment.

SECTION 32. BUSINESS LICENSE

Lessee shall maintain a business license from City during the entire term of this Lease or any renewals or extensions thereof or during any holdover period.

SECTION 33. SIGNS, ADVERTISING AND APPROVAL OF NAME

City shall have the right to approve in its sole discretion and at any time require Lessee to change or remove signs, names, placards, decorations or advertising placed on, or inscribed, painted

or affixed upon the Premises. Should City approve of any sign, name, placard, decoration or advertising, Lessee shall maintain the same at all times during the entire term of this Lease or any renewals or extensions thereof or during any holdover period in good appearance and repair. All signs, names, placards, decorations or advertising must comply with all requirements of any governmental authority with jurisdiction.

SECTION 34. NO ASSIGNING, SUBLEASING OR ENCUMBERING

- (a) Prohibition of Assignment. The parties acknowledge that City is entering into the Lease in reliance upon the experience and abilities of Lessee and its principals. Consequently, Lessee shall not voluntarily assign, encumber or otherwise transfer its interest in the Lease or in the Premises, or sublease all or any part of the Premises, or allow any other person or entity (except Lessee's authorized representatives) to occupy or use all or any part of the Premises without the prior written consent of City, which consent shall not be unreasonably withheld. Provided, however, that City's consent shall not relieve Lessee from any and all of its obligations, liabilities, duties or responsibilities under this Lease. Any assignment, encumbrance, occupation or use, sublease or other transfer without such consent shall be voidable and, at City's sole discretion, shall constitute a Default of this Lease.
- (b) Consent to Transfer. City's consent to any assignment, encumbrance, occupation or use, sublease or other transfer is subject to Lessee providing City with evidence satisfactory to City that the proposed, assignee, encumbrancer, occupier or user, sublessee or other transferee has suitable financial strength, experience and character for operation and control of the Premises and the Concession and that the use of the Premises by the proposed assignee, encumbrancer, occupier or user, sublessee or other transferee is consistent with that specified herein, and is commercially reasonable.

Any proposed assignee, encumbrancer, occupier or user, sublessee or other transferee shall agree to abide by the terms and conditions of the Lease including, without limitation, all the obligations, liabilities, duties and responsibilities of Lessee, and other conditions imposed upon it pursuant to law. An approval by City to one assignment, encumbrance, occupation or use, sublease or other transfer shall not be deemed to be an approval to any other assignment, encumbrance, occupation or use, sublease or other transfer.

- (c) Voluntary assignment defined. Except as otherwise expressly provided herein, any dissolution, merger, consolidation or reorganization of Lessee, or the sale or other transfer resulting in a transfer of a controlling percentage of the capital stock of Lessee (other than a transfer by will, devise, bequest, intestate succession, a transfer to or between the family members of Lessee, or a transfer to or between one or more trusts for the benefit of Lessee and/or Lessee's family members, where applicable) shall be deemed a voluntary assignment.
- (d) Exceptions. Notwithstanding the foregoing paragraphs or anything to the contrary contained herein, City's consent shall not be required for an assignment or subleasing to an Affiliate, Subsidiary or Successor of Lessee (for purposes hereof, an "Affiliate," a "Subsidiary" and a "Successor" of Lessee are defined as follows: (a) an "Affiliate" is any corporation which directly or indirectly controls or is controlled or is under common control with Lessee (for this purpose, "control" shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such corporation, whether through the ownership of voting securities or by contract or otherwise), (b) a "Subsidiary" shall mean any corporation or partnership not less than twenty-five percent (25%) of whose outstanding stock shall, at the time,

be owned directly or indirectly by Lessee and which is at least as creditworthy as Lessee, and (c) a "Successor" shall mean a corporation or partnership in which or with which Lessee is merged or consolidated, in accordance with applicable statutory provisions for merger or consolidation of corporations, or a corporation or partnership acquiring a substantial portion of the property and assets of Lessee.

SECTION 35. TERMS BINDING ON SUCCESSORS

All the terms, covenants and conditions of this Lease shall inure to the benefit of and be binding upon the parties and their successors, including, without limitation, their assignees, encumbrancers, occupiers or users, sublessees or other transferees. The provisions of this Section shall not be deemed as a (1) waiver of any of the prohibitions and conditions against assignments, encumbrances, occupations or uses, subleases or other transfers hereinbefore set forth, or (2) City's consent thereto. If more than one lessee is a party to this Lease, the obligations of the lessees shall be joint and several. Even if City's consent is not required, Lessee shall immediately provide City with written notice of any, assignment, encumbrance, occupation or use, sublease or other transfer.

SECTION 36. DEFAULT

The occurrence of any one or more of the following events shall constitute a material default and breach ("Default") of this Lease by Lessee:

- (a) Lessee's failure to make any payment of the Rent or other payment required to be made by Lessee at the time required for payment under this Lease.
- (b) Lessee's failure to obtain or maintain the insurances and/or the security deposit as required under this Lease.
- (c) Lessee's vacating or abandonment of the Premises during the entire term of this Lease or any renewals or extensions thereof or during any holdover period. Closure of the Concession for more than a combined total of one hundred eighty (180) days in a

calendar year, minus any days of closure of the Concession caused by City, shall be deemed an abandonment of the Premises.

- (d) Lessee's violation of Section 19 (Indemnification, Defense and Hold Harmless), Section 34 (No Assigning, Subleasing or Encumbering), Section 47 (Hazardous Substances), Section 48 (Nondiscrimination), Section 49 (Sale of Alcoholic Beverages and Entertainment Prohibited), Section 62 (Conflict of Interest) or Section 64 (Compliance with Laws).
- (e) The insolvency of Lessee as evidenced by a receiver being appointed to take possession of all or substantially all of Lessee's assets located at or on the Premises or of Lessee's interest in this Lease, or the making by Lessee of a general arrangement or assignment for the benefit of creditors, or Lessee's filing a petition in bankruptcy, whether voluntary or involuntary, or the attachment, execution or the judicial seizure of substantially all of Lessee's assets located at or on the Premises or of Lessee's interest in the Lease.
- (f) Lessee's failure to observe or perform any other term, covenant, obligation, duty, responsibility or condition of this Lease to be observed or performed by Lessee when such failure shall continue for a period of thirty (30) days after City's giving written notice to Lessee, or such earlier period if specifically set forth in this Lease; however, if the nature of such failure is such that more than thirty (30) days are reasonably required for its cure, then Lessee shall not be deemed to be in Default if Lessee notifies City of the length of the additional time required to cure and receives City's written approval of the additional time required, which approval will not be unreasonably withheld, and commences such cure within such thirty (30) day period

and diligently proceeds with such cure to completion during such additional time period approved by City.

SECTION 37. REMEDIES

- (a) Cumulative Nature of Remedies. In the event of any Default by Lessee, City shall have the remedies described in this Section in addition to all other rights and remedies provided by law or equity, to which City may resort cumulatively or in the alternative:
- (1) Reentry without Termination. City may at City's sole discretion reenter the Premises, and, without terminating the Lease, at any time and from time to time relet the Premises or any part or parts of them for the account and in the name of Lessee or otherwise. Any reletting may be for the remainder of the term or for a longer or shorter period. City may in City's sole discretion eject all persons or eject some and not others or eject none. In addition, City may in its sole discretion remove some or all of the Trade Fixtures, personal property and trade inventory from the Premises. City may store such removed Trade Fixtures, personal property and trade inventory in a public warehouse or other location at the sole cost, expense and risk of Lessee, and for the account of and in the name of Lessee. City shall apply all rents from reletting as follows: first, to the payment of reasonable expenses (including brokers' commissions) paid or incurred by or on behalf of City in recovering possession, placing the Premises in good condition, and preparing or altering the Premises for reletting; second, to the reasonable expense of securing new subtenants; third, to the fulfillment of Lessee's covenants to the end of the term. City may execute any leases or subleases made under this provision either in City's name or in Lessee's name and City shall be entitled to all rents from the use,

operation or occupancy of the Premises. Lessee shall nevertheless pay to City on the dates specified in this Lease the equivalent of all sums required of Lessee under this Lease, plus City's expenses, less the proceeds of any reletting or attornment.

- (2) Termination. In the event of a Default by Lessee, City may at City's sole discretion terminate this Lease by giving Lessee written notice of termination. In the event City terminates this Lease, City may recover possession of the Premises (which Lessee shall immediately surrender and vacate upon demand) and remove all persons therefrom, and Lessee shall comply with, without limitation, Sections 56 and 57 below. City also shall be entitled to recover as damages all of the following:

- (A) The worth at the time of the award of any unpaid Rent or other charges which have been earned at the time of termination;
- (B) The worth at the time of the award of the amount by which the unpaid Rent (each month's Rent would be calculated as the average Rent for that same month in the preceding years, or if Lessee did own/operate the Concession in the preceding years, then each month's Rent would be calculated as the average of all months Lessee owned/operated the Concession) and other charges which would have been earned after termination until the time of the award exceeds the amount of the loss of such rental and other charges that Lessee proves could have been reasonably avoided;
- (C) The worth at the time of the award of the amount by which the unpaid Rent (each month's Rent would be calculated as the average Rent for

that same month in the preceding years, or if Lessee did not own/operate the Concession in the preceding years, then each month's Rent would be calculated as the average of all months Lessee owned/operated the Concession) and other charges for the balance of the term after the time of the award exceeds the amount of the loss of such rental and other charges that Lessee proves could have been reasonably avoided;

- (D) Any other amount necessary to compensate City for the detriment proximately caused by Lessee's failure to perform its obligations, liabilities, duties or responsibilities under this Lease; and
- (E) At City's sole discretion, such other amounts in addition to or in lieu of the foregoing as may be permitted from time to time by applicable California law.

As used in Sections 37(a)(2)(A) and (B) above, the "worth at the time of the award" shall be computed by allowing interest at the rate of twelve percent (12%) per annum. As used in Section 37(a)(2)(C) above, the "worth at the time of the award" shall be computed by discounting such amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of the award, plus one percent (1%). The amount recoverable by City pursuant to Section 37(a)(2)(D) above shall include, without limitation, any costs or expenses incurred by City in maintaining or preserving the Premises after such Default.

- (3) Use of Personal Property. City may at City's sole discretion use the Trade Fixtures, personnel property and/or trade inventory located on, about or appurtenant to the Premises without compensation and without liability for use or damage, or store them in a public warehouse or other location at the sole

cost, expense and risk of Lessee, and for the account of and in the name of Lessee.

- (b) Election of Remedy. The election of one remedy for any one item shall not foreclose an election of any other remedy for another item or for the same item at a later time.
- (c) City's Right to Cure Lessee's Default. Upon continuance of any Default, City may in its sole discretion, but is not obligated to, cure such Default at Lessee's sole cost and expense. If City at any time, by reason of such Default by Lessee, pays any sum or does any act, the sum paid by City plus the reasonable cost of performing such act, together with a penalty thereon at the penalty rate set forth in Section 11 above from the date the costs were incurred or the act performed by City to the date they are reimbursed to City by Lessee, shall be due as additional rent not later than five (5) days after service of a written demand therefor on Lessee, including reasonably detailed documentation of the amount owed. No such payment or act shall constitute a waiver of Default or of any remedy for Default or render City liable for any loss or damage resulting from any such act.
- (d) Waiver of Rights. Lessee hereby waives any right of redemption or relief from forfeiture under California Code of Civil Procedure Sections 1174 or 1179, or under any other present or future law, in the event Lessee is evicted or City takes possession of the Premises by reason of any Default by Lessee hereunder.
- (e) Other Rights of City. No act of City, including, without limitation, City's entry on the Premises, efforts to relet the Premises, or maintenance of the Premises, shall be construed as an election to terminate this Lease unless a written notice of such intention is given to Lessee by City or unless the termination thereof is decreed by a court of competent jurisdiction. Notwithstanding if City elects to continue the Lease

in full force and effect after a Default by Lessee and to relet the Premises, City may at any time after such reletting elect to terminate this Lease for any such Default.

SECTION 38. CUMULATIVE REMEDIES

The remedies given to City in this Lease shall not be exclusive but shall be cumulative and in addition to all remedies now or hereafter allowed by law or elsewhere provided in this Lease. City shall have the right to exercise any other right or remedy which City may have at law or in equity including, without limitation, City's rights under the unlawful detainer laws.

SECTION 39. WAIVER OF DEFAULT

The waiver by City of any Default by Lessee of any of the provisions of this Lease shall not constitute a continuing waiver or a waiver of any subsequent Default by Lessee either of the same or another provision of this Lease.

SECTION 40. CITY'S DEFAULTS/LESSEE'S REMEDY

In the event City fails to perform any material obligation of City under the Lease within ninety (90) days after receiving written notice from Lessee specifying the nature of such default, or, if the nature of City's obligation is such that more than ninety (90) days are required for its performance, if City fails to commence such performance within such ninety (90) day period and thereafter diligently prosecute the same to completion, then City shall be in default of this obligation. If City's default materially interferes with Lessee's use of the Premises for its intended purpose, Lessee shall have the option to terminate the Lease by giving City at least sixty (60) days' written notice of its intent to terminate. In such a situation, Lessee must still comply with all of its obligations, liabilities, duties and responsibilities under the Lease, including, without limitation, paying any Rent due up to the time of termination and surrendering the Premises pursuant to Sections 56 and 57 below. This remedy of termination is Lessee's sole and exclusive remedy for a default by City.

SECTION 41. CONSENT

When City's consent/approval is required under this Lease, its consent/approval for one transaction or event shall not be deemed to be a consent/approval to any subsequent occurrence of the same or any other transaction or event.

SECTION 42. HOLDOVER

Should Lessee hold over and continue in possession of the Premises after expiration or termination of this Lease, with or without the express prior written consent of City, Lessee's continued occupancy of the Premises shall constitute a month-to-month tenancy, subject to all the terms and conditions of this Lease, at a monthly rent of one hundred ten percent (110%) of the previous calendar year's annual Rent divided by twelve (12) (or the average monthly Rent for all months Lessee owned/operated the Concession if Lessee has owned/operated the Concession for less than one (1) year) or that month's actual Rent, whichever is greater, and shall not constitute a renewal or extension of the Lease term.

SECTION 43. WAIVER OF CLAIMS

Lessee hereby waives any claim against City, its officers, elected or appointed officials, employees, agents or volunteers for damage or loss caused by any suit or proceeding directly or indirectly attacking the validity of this Lease, or any part thereof, or caused by any judgment or award in any suit or proceeding declaring this Lease null, void or voidable, or delaying the Lease or any part thereof from being carried out.

SECTION 44. INSPECTION OF PREMISES

City shall make quarterly physical inspections of the leased premises upon at least twenty-four (24) hours advance written, verbal or electronic notice given by City to Lessee. Lessee shall permit City or City's agents, representatives or employees to enter the Premises at all reasonable times for the purpose of inspecting, investigating and surveying the Premises to determine whether

Lessee is complying with the terms of this Lease and for the purpose of doing other lawful acts that may be necessary to protect City's interest in the Premises or to perform City's duties under this Lease. City also shall have the right in its sole discretion to do any and all work of any nature necessary for the preservation, maintenance and operation of property owned, controlled or occupied by City. Lessee shall be given reasonable notice when such work becomes necessary, and Lessee shall adjust the operation of the Concession in such a manner that City may proceed expeditiously.

SECTION 45. CITY'S RIGHT TO LEASE BUYOUT

City shall have the right at any time during the entire term of this Lease or any renewals or extensions thereof to buyout the remaining years of the Lease and Lessee's interest in this Lease based upon the following buyout formula:

Average of the most recent two (2) years (preceding the date of the notice of buyout) annual Gross Sales under this Lease or a prior lease multiplied by a twelve and one-half percent (12.5%) profit margin multiplied by the number of years remaining on the Lease discounted by twelve and one-half percent (12.5%) to present value.

For example:

The annual Gross Sales for the most recent two (2) years of the Concession are \$335,000.00 and \$350,000.00. If City gives Lessee notice of its buyout intention in September, the preceding two (2) years would be the preceding twenty-four (24) months ending in August. There are three (3) years remaining in the Lease.

The average of the Gross Sales of the most recent two (2) years is \$342,500.00 (\$335,000.00 + \$350,000.00/2).

The profit margin is 12.5% of the most recent two (2) year average which is \$42,812.50 (\$342,500.00 x 0.125).

The profit margin is then discounted at the rate of 12.5% to present value over the remaining years of the Lease:

$$\text{Year 1: } \$42,812.50 / 1.125 = \$38,055.56$$

$$\text{Year 2: } \$42,812.50 / 1.125 / 1.125 = \$33,827.16$$

$$\text{Year 3: } \$42,812.50 / 1.125 / 1.125 / 1.125 = \$30,068.59$$

All of the discounted cash flows for the remaining years of the Lease are totaled and the result is the buyout price of the Lease. In this case, the City's buyout price is \$101,951.31.

If Lessee has owned/operated the Concession for less than two (2) years, the City's buyout price will be the greater of (1) the amount calculated under the Gross Sales formula above or (2) all reasonable and provable start-up costs, which start-up costs will be determined by City in its sole discretion. The annual Gross Sales figure on which to calculate the buyout amount shall be calculated as follows:

The average monthly Gross Sales for all months up to twenty-three (23) months converted into an annual Gross Sales figure.

For example, if City decides to buyout the Lease of a new Lessee who has owned/operated the Concession for fifteen (15) months, with an average monthly Gross Sales figure of Five Thousand Dollars (\$5,000.00), the annual Gross Sales figure for the option to buyout would be Sixty Thousand Dollars (\$60,000.00).

For purposes of this calculation, a Lessee shall not be considered a new lessee if the Concession was previously owned/operated by a lessee, whose assignment, encumbrance, occupation or use, sublease or other transfer to Lessee did not require City approval in Section 34 above.

At City's sole option, City shall have the right, but not the obligation, to purchase any or all of Lessee's Trade Fixtures (defined in Section 51 below), based on the appraised fair value market of the Trade Fixtures.

If City desires to purchase any or all of Lessee's Trade Fixtures, City shall select an appraiser to provide an appraisal of such Trade Fixtures. If Lessee disagrees with City's appraisal, Lessee, at its sole cost and expense, shall select another appraiser to provide an appraisal. If City disagrees with Lessee's appraisal, City shall select another appraiser to perform an appraisal. In such case, the parties agree that the price for the Trade Fixtures will be the average of these three (3) appraisals. All appraisers must be members in good standing in the American Society of Appraisers. Notwithstanding the foregoing, at any time, City may elect not to purchase any or all of Lessee's Trade Fixtures.

Upon City's request, Lessee shall provide City with proof of lien free, good and merchantable title to any such Trade Fixtures City desires to purchase. Lessee shall protect, defend, indemnify, and hold harmless City, its officers, elected and appointed officials, employees, agents and volunteers from and against any and all liens, claims, damages, losses, expenses, judgments, demands and defense costs (including, without limitation, costs and fees of litigation (including arbitration) of every nature or liability of any kind or nature) arising out of or in connection with Lessee's fraud, omission or negligence regarding any purchase of Lessee's Trade Fixtures by City. Lessee will conduct all defense at its sole cost and expense and City shall approve selection of Lessee's counsel. This indemnity shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as limitation upon the amount of indemnification to be provided by Lessee.

Lessee acknowledges and agrees that this Lease buyout option of City has been negotiated at arms-length and does not constitute nor does Lessee construe this to be an act of eminent domain or inverse condemnation. In the event City exercises this buyout option, Lessee waives any and all claims of loss of business goodwill and relocation rights or benefits. Lessee also shall immediately

surrender the Premises as set forth herein and comply with, without limitation, Sections 56 and 57 below.

SECTION 46. PHOTOGRAPHY

Lessee acknowledges and agrees that City may grant permits to third parties engaged in the production of still and motion pictures and related activities to take photographs or videos of or on the Premises when such permission shall not interfere with the primary business of Lessee, all without providing Lessee with notice or requiring consent by Lessee.

SECTION 47. HAZARDOUS SUBSTANCES

Lessee represents and warrants that its use or occupation of the Premises shall not generate any Hazardous Substance (as defined below in this Section), and it shall not store or dispose on the Premises nor transport to or over the Premises any Hazardous Substance during the entire term of this Lease or any renewals or extensions thereof or during any holdover period. The foregoing restrictions shall not be deemed to restrict or prohibit the use by Lessee of ordinary cleaning products as customarily used in Lessee's ordinary course of business at the Concession, provided that Lessee complies with all provisions of law as to the use, storage and disposal of such products. Lessee further agrees to clean up and remediate any such Hazardous Substance on the Premises, and agrees to protect, defend, indemnify and hold harmless City, its officers, elected or appointed officials, employees, agents and volunteers from and against any and all claims, damages, losses, expenses, judgments, demands and defense costs (including, without limitation, costs and fees of litigation (including arbitration) of every nature or liability of any kind or nature) arising out of or in connection with any such Hazardous Substance and any damage, loss, or expense or liability resulting from any such Hazardous Substance including, without limitation, all attorney's fees, costs and penalties incurred as a result thereof except any release caused by the sole negligence or willful misconduct of City. Lessee will conduct all defense at its sole cost and expense and City shall

approve selection of Lessee's counsel. This indemnity shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as limitation upon the amount of indemnification to be provided by Lessee. "Hazardous substance" shall be interpreted broadly to mean any substance or material defined or designated as a hazardous or toxic waste, hazardous or toxic material, hazardous or toxic or radioactive substance, or other similar term, by any Federal, State or local environmental law, regulation or rule presently in effect or promulgated in the future, as such law, regulation or rule may be amended from time to time; and it shall be interpreted to include, without limitation, any substance which after release into the environment will or may reasonably be anticipated to cause sickness, death or disease.

SECTION 48. NONDISCRIMINATION

Lessee and its employees shall not discriminate because of race, religion, color, ancestry, sex, age, national origin or physical handicap against any person by refusing to furnish such person any accommodation, facility, rental, service or privilege offered to or enjoyed by the general public. Nor shall Lessee or its employees publicize the accommodation, facilities, rentals, services or privileges in any manner that would directly or inferentially reflect upon or question the acceptability of the patronage of any person because of race, religion, color, ancestry, sex, age, national origin or physical handicap.

In the performance of this Lease, Lessee shall not discriminate against any employee or applicant for employment, because of race, religion, color, ancestry, sex, age, national origin or physical handicap. Lessee shall take affirmative action to ensure that applicants are employed and that employees are treated during employment, without regard to their race, religion, color, ancestry, sex, age, national origin or physical handicap. Such action shall include, without limitation, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training,

including, without limitation, apprenticeship. Lessee shall post in conspicuous places, available to all employees and applicants for employment, notices setting forth the provisions of this Section.

Lessee shall permit access to its records of employment, employment advertisements, application forms, and other pertinent data and records by City, the State Fair Employment Practices Commission or any other agency with jurisdiction over these matters, for the purpose of investigation to ascertain compliance with this Section.

City may determine a violation of this Section to have occurred upon receipt of a final judgment having that effect from a court in an action to which Lessee was a party, or upon receipt of a written notice from the State Fair Employment Practices Commission or other government agency with jurisdiction over these matters that it has investigated and determined that Lessee has violated the Fair Employment Practices Act or other applicable discrimination law and has issued an order which has become final, or obtained an injunction. In the event of violation of this Section, City shall have the right to terminate this Lease, and any loss of revenue sustained by City by reason thereof shall be borne and paid for by Lessee, at its sole cost and expense.

SECTION 49. SALE OF ALCOHOLIC BEVERAGES AND ENTERTAINMENT

PROHIBITED

Notwithstanding anything to the contrary, the sale or provision of alcoholic beverages and/or live entertainment in, on, or from the Premises is expressly forbidden, unless expressly permitted in writing by City in advance. For any proposed sale or provision of alcoholic beverages, Lessee must first obtain written City approval prior to submitting any request for approval to the Alcohol Beverage Commission.

SECTION 50. LIENS

Lessee shall keep the Premises free and clear from any and all liens, including, without limitation, mechanics' or materialmen's liens, claims and demands for work performed, materials furnished, or operations conducted on or about the Premises or by reason of any use or occupancy by Lessee, or any person claiming under Lessee. When applicable, Lessee shall cause a notice of nonresponsibility to be posted and recorded pursuant to *California Civil Code* Section 3094.

SECTION 51. INSTALLATION AND REMOVAL OF TRADE FIXTURES

Lessee shall have the right during the entire term of this Lease or any renewals or extensions thereof, at Lessee's sole cost and expense, to install or affix in, to, or on the Premises any machinery, equipment and other objects (the "Trade Fixtures"), for use in Lessee's trade or business as Lessee may deem advisable. Any and all such Trade Fixtures that can be removed without structural damage to the Premises shall, subject to Section 57 below, remain the property of Lessee and may be removed by Lessee at any time prior to the expiration or termination of this Lease, provided Lessee repairs any damage caused by the removal. Upon execution of this Lease and every anniversary, Lessee shall provide City with a list of all Trade Fixtures on the Premises.

SECTION 52. DESTRUCTION

Should the Premises be partially destroyed, this Lease shall continue in full force and effect, and Lessee, at Lessee's sole cost and expense, shall complete the work of repairing and restoring the Premises to their prior condition providing such work can be accomplished under all applicable governmental laws and regulations within one hundred eighty (180) days. Should the Premises be so far destroyed that in City's reasonable judgment they cannot be repaired or restored to their former condition within one hundred eighty (180) days, City shall give Lessee notice of such determination in writing and each party may, in that party's sole discretion:

- (a) Continue this Lease in full force and effect in which case Lessee shall repair and restore, at Lessee's sole cost and expense, the Premises to their former condition; or
- (b) Terminate this Lease by giving the other party thirty (30) days' written notice of such termination within sixty (60) days after the date that City gives Lessee notice that the Premises cannot be repaired or restored to their former condition within one hundred eighty (180) days. In the event that either party elects to terminate this Lease, the entire amount of any insurance proceeds (excluding such proceeds for Trade Fixtures, personal property whether or not owned or leased by Lessee and trade inventory, but only to the extent that the insurance proceeds specifically cover those items) shall be paid to City. The proceeds of any such insurance payable to City may be used, in the sole discretion of City, for rebuilding or repair as necessary to restore the Premises or for any other such purpose(s) as City sees fit. In addition, if Lessee elects to terminate the Lease, Lessee must still comply with all of its obligations, liabilities, duties and responsibilities under the Lease, including, without limitation, paying any Rent due up to the time of termination and surrendering the Premises, pursuant to Sections 56 and 57 below.

In the event of the damage or destruction of Improvements, Trade Fixtures and/or personal property located on the Premises not giving rise to a termination of this Lease, Lessee shall, at its sole cost and expense, replace and repair the same as soon as reasonably possible to permit the prompt continuation of Lessee's business at the Premises.

SECTION 53. NO ABATEMENT OF RENT DURING REPAIR WORK

The Rent shall not be abated for the time Lessee is prevented from using the whole or a portion of the Premises. In addition, Lessee shall not be excused from the payment of taxes,

insurance or any other obligations for the time Lessee is prevented from using the whole or a portion of the Premises.

SECTION 54. EMINENT DOMAIN

If, during the term of this Lease or any renewals or extensions thereof or during any holdover period, City's real property (whether held by City in fee simple, an easement interest or otherwise) and/or the Premises is taken in eminent domain, the entire award (that is, all forms) of compensation, other than as provided herein, shall belong to and be paid to City. In the event of condemnation, Lessee shall be entitled to an award of only the following forms of compensation, if any, from the condemning authority: compensation for loss of business goodwill; compensation for the value of any of Lessee's Trade Fixtures; compensation for the value of any of Lessee's personal property; compensation for the value of any of Lessee's trade inventory; and compensation for relocation benefits as authorized by law. All other forms of compensation, such as, for example, but not by way of limitation, any bonus value of Lessee's interest in this Lease, shall belong to and be paid to City. In the event of condemnation, unless Lessee is allowed by the condemning authority to continue its operations on the Premises, the Lease shall terminate on the earliest of the following dates: the date the condemning authority obtains a prejudgment order for possession; the date title to the Premises vests in the condemning authority; or the date when Lessee is required by the condemning authority to cease its operations.

SECTION 55. RELOCATION AND ASSISTANCE, BUSINESS GOODWILL AND LEASEHOLD BONUS VALUE

Upon expiration or termination of this Lease for any reason, including, without limitation, if City exercises its Lease buyout option, but excluding eminent domain, Lessee shall not be entitled to any relocation rights or benefits, business goodwill or bonus value attributable to this Lease, and Lessee expressly waives any claim to the same.

SECTION 56. QUITCLAIM DEED

Upon expiration or termination of this Lease as provided for herein, including, without limitation, in the event City exercises its Lease buyout option, Lessee shall execute and deliver to City within thirty (30) days thereof, a good and sufficient quitclaim deed to the rights and interests of Lessee in the Premises and the Lease. Should Lessee fail or refuse to deliver to City this quitclaim deed, City may record in the Orange County Recorder's Office a written notice reciting the failure of Lessee to execute and deliver this quitclaim deed. The date of recordation of this notice by City shall be conclusive evidence against Lessee and all persons claiming under Lessee of the expiration or termination of this Lease and any rights or interests of Lessee in the Premises and/or the Lease. Lessee also agrees to execute, acknowledge, and deliver to City any other instrument requested by City as necessary to perfect City's right, title and interest to the Premises.

SECTION 57. RESTORATION AND SURRENDER OF PREMISES/TITLE TO IMPROVEMENTS

On expiration or termination of this Lease, including, without limitation, in the event City exercises its Lease buyout option, Lessee shall, without compensation to Lessee, promptly surrender and deliver the Premises to City in as good condition as such were at the commencement date of this Lease, reasonable wear and tear excepted. Lessee also shall, without compensation to Lessee, surrender all Improvements to City in good condition and repair, ordinary wear and tear excepted, free and clear of all liens and encumbrances. Lessee also shall remove all Trade Fixtures, personal property and trade inventory. City may in its sole discretion accept all or any portion of the Premises, as then improved with Improvements and no sum whatsoever shall be paid to Lessee or any other person; or City may require Lessee to remove all or any portion of such Improvements, at Lessee's own risk and cost and expense; or City may itself remove or have removed all or any portion of such Improvements, at Lessee's own risk and cost and expense. If required by City to do so, in removing

any such Improvements, Lessee shall restore the Premises as nearly as possible to the conditions existing prior to their installation or construction. All such removal and restoration shall be to the satisfaction of City and shall be completed within thirty (30) days of the expiration or termination of this Lease; provided, however, that Lessee shall be considered a holdover tenant (pursuant to Section 42 above) after expiration or termination of the Lease until the time Lessee completes this removal and restoration work, including, without limitation, the removal of any Trade Fixtures, personal property and trade inventory left on the Premises. In addition, any Trade Fixtures, personal property or trade inventory left on the Premises after the expiration of this 30-day period, regardless of cause, shall be deemed abandoned by Lessee. In City's sole discretion, it may choose to do one or more of the following: (1) take any or all of such Trade Fixtures, personal property and trade inventory as City property; (2) store any or all of such Trade Fixtures, personal property and trade inventory in a public warehouse or other location at the sole cost, expense and risk of Lessee, and for the account and in the name of Lessee; or (3) dispose of any or all of such Trade Fixtures, personal property and trade inventory without any liability to Lessee. In addition, Lessee's indemnification, hold harmless and defense obligations set forth in this Lease shall apply to such Trade Fixtures, personal property and/or trade inventory, and to City's actions with respect thereto.

SECTION 58. FORCE MAJEURE - UNAVOIDABLE DELAYS

Should the performance of any act required by this Lease to be performed by either City or Lessee be prevented or delayed by reason of an act of God, strike, lockout, labor troubles, inability to secure materials, restrictive governmental laws or regulations, or any other cause except financial inability not the fault of the party required to perform the act, the time for performance of the act shall be extended for a period equivalent to the period of delay and performance of the act during the period of delay shall be excused. Provided, however, that nothing contained in this Section shall excuse the prompt payment of the Rent or other consideration by Lessee as required by this Lease or

the performance of any act rendered difficult solely because of the financial condition of the party, City or Lessee, required to perform the act.

SECTION 59. CITY'S OPTION TO CLOSE THE PREMISES

City may close the Premises without liability and without advance notice to Lessee therefor at any time as City in its sole discretion deems necessary for the protection of life, limb or property, or for public health, safety or welfare purposes, or upon reasonable notice to effect any repair, remodeling or rebuilding deemed necessary by City in its sole discretion. The length of time of any closing of the Premises by City longer than two (2) weeks during a period when the Concession would otherwise be open shall extend the term of the Lease by the same amount of time. If this occurs, Lessee and City shall memorialize this extension in writing.

SECTION 60. DELIVERIES OF SUPPLIES

City may establish the days and times deliveries of supplies may be made and advise Lessee in writing thereof.

SECTION 61. EMPLOYEE PARKING

City shall establish the days, times and locations where Lessee and Lessee's employees may park, and the number of automobiles, trucks, and other motorized and non-motorized vehicles that Lessee and Lessee's employees may park, and advise Lessee in writing thereof.

SECTION 62. CONFLICT OF INTEREST

Lessee warrants and covenants that no official or employee of City, nor any business entity in which an official or employee of City is interested, (1) has been employed or retained by Lessee to solicit or aid in the procuring of this Lease; or (2) shall be employed by Lessee in the performance of this Lease without the immediate written divulgence of such fact to City. In the event City determines that the employment of any such official, employee or business entity is not compatible with such official's or employee's duties as an official or employee of City, Lessee, upon request of

City, shall terminate such employment immediately. For breaches or violation of this Section, City shall have the right both to terminate this Lease without liability and, in its discretion, recover the full amount of any such compensation paid to such official, employee or business entity. No official or employee of City shall have any financial interest in this Lease in violation of the applicable provisions of the *California Government Code*.

SECTION 63. NOTICE

Unless specifically providing for verbal or electronic notice, all notices, certificates, or other communications required to be given hereunder shall be in writing and made in the following manner, and shall be sufficiently given and deemed received when (a) personally delivered; or (b) three (3) business days after being sent via United States certified mail – return receipt requested; or (c) one (1) business day after being sent by reputable overnight courier, in each case to the addresses specified below; provided that City and Lessee, by notice given hereunder, may designate different addresses to which subsequent notices, certificates or other communications will be sent:

CITY:

City of Huntington Beach
ATTN: Director of Community Services
2000 Main Street, P.O. Box 190
Huntington Beach, CA 92648

LESSEE:

Park Bench Café
ATTN: Michael and/or Christie Bartusic
20431 Graystone Lane
Huntington Beach, CA 92646

SECTION 64. COMPLIANCE WITH LAWS

Lessee, at its sole cost and expense, shall comply with all statutes, ordinances, regulations and requirements of all governmental entities, including, without limitation, Fire Department regulations; Health Department Regulations, American Disabilities Act (ADA), Federal, State, county or municipal, relating to Lessee's use and occupancy of the Premises and/or operation of the Concession whether such statutes, ordinances, regulations and requirements be now in force or hereinafter enacted. This Lease is expressly subject to the laws, regulations and policies of City. Lessee shall deliver to City a copy of any notice from any governmental entity received by Lessee regarding any

alleged violation of law regarding the Lease, Premises or the Concession or from any person allegedly entitled to give notice under any conditions, covenants, or restrictions binding or affecting the Premises. The judgment of any court of competent jurisdiction, or the admission by Lessee in a proceeding brought against Lessee by any government entity, that Lessee has violated any such statute, ordinance, regulation or requirement shall be conclusive as between City and Lessee and shall be grounds for termination of this Lease by City.

SECTION 65. INTERPRETATION OF THIS LEASE

The language of all parts of this Lease shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties. If any provision of this Lease is held by an arbitrator or court of competent jurisdiction to be unenforceable, void, illegal or invalid, such holding shall not invalidate or affect the remaining covenants and provisions of this Lease. No covenant or provision shall be deemed dependent upon any other unless so expressly provided here. As used in this Lease, the masculine or neuter gender and singular or plural number shall be deemed to include the other whenever the context so indicates or requires. Nothing contained herein shall be construed so as to require the commission of any act contrary to law, and wherever there is any conflict between any provision contained herein and any present or future statute, law, ordinance or regulation contrary to which the parties have no right to contract, then the latter shall prevail, and the provision of this Lease which is hereby affected shall be curtailed and limited only to the extent necessary to bring it within the requirements of the law.

SECTION 66. SURVIVAL

Terms and conditions of this Lease, which by their sense and context survive the expiration or termination of this Lease, shall so survive.

SECTION 67. MODIFICATION

No waiver or modification of any language in this Lease shall be valid unless in writing and duly executed by both parties.

SECTION 68. SECTION HEADINGS

The titles, captions, section, paragraph and subject headings, and descriptive phrases at the beginning of the various sections in this Lease are merely descriptive and are included solely for convenience of reference only and are not representative of matters included or excluded from such provisions, and do not interpret, define, limit or describe, or construe the intent of the parties or affect the construction or interpretation of any provision of this Lease.

SECTION 69. BROKERS

Each party warrants to and for the benefit of the other that it has had no dealings with any real estate broker or other agent (attorneys excepted) in connection with the negotiation or making of this Lease.

SECTION 70. INDEPENDENT CONTRACTOR

Lessee is, and shall be, acting at all times in the performance of this Agreement as an independent contractor herein and not as an employee of City. Lessee shall secure at its own cost and expense, and be responsible for any and all payment of all taxes, social security, state disability insurance compensation, unemployment compensation and other payroll deductions for Lessee and its officers, agents and employees and all business licenses, if any, in connection with the Lease and/or any services to be performed hereunder.

SECTION 71. ATTORNEY'S FEES

In the event suit is brought by either party to construe, interpret and/or enforce the terms and/or provisions of this Lease or to secure the performance hereof, each party shall bear its own

attorney's fees, such that the prevailing party shall not be entitled to recover its attorney's fees from the non-prevailing party.

SECTION 72. LEGAL SERVICES SUBCONTRACTING PROHIBITED

Lessee and City agree that City is not liable for payment of any subcontractor work involving legal services, and that such legal services are expressly outside the scope of services contemplated hereunder. Lessee understands that pursuant to Huntington Beach City Charter Section 309, the City Attorney is the exclusive legal counsel for City; and City shall not be liable for payment of any legal services expenses incurred by Lessee.

SECTION 73. GOVERNING LAW

This Lease shall be governed and construed in accordance with the laws of the State of California.

SECTION 74. DUPLICATE ORIGINAL

The original of this Lease and one or more copies hereto have been prepared and signed in counterparts as duplicate originals, each of which so executed shall, irrespective of the date of its execution and delivery, be deemed an original. Each duplicate original shall be deemed an original instrument as against any party who signed it.

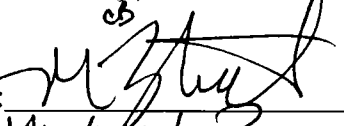
SECTION 75. ENTIRETY

The parties acknowledge and agree that they are entering into this Lease freely and voluntarily following extensive arm's length negotiations, and that each has had the opportunity to consult with legal counsel prior to executing this Lease. The parties also acknowledge and agree that no representations, inducements, promises, agreements or warranties, oral or otherwise, have been made by that party, or anyone acting on that party's behalf, which are not embodied in this Lease, and that that party has not executed this Lease in reliance on any representation, inducement, promise, agreement, warranty, fact or circumstance not expressly set forth in this Lease. The Lease, and the attached

exhibits, contain the entire agreement between the parties respecting the subject matter of this Lease, the Premises, the leasing of the Premises to Lessee, or the lease term created under this Lease and supercede all prior understandings and agreements, whether oral or in writing between the parties respecting the subject matter hereof.

IN WITNESS WHEREOF, the parties hereto have caused this Lease to be executed by and through their authorized officers the day, month and year first above written.

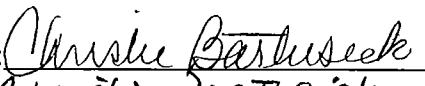

MICHAEL BARTUSICK/CHRISTIE
BARTUSICK dba PARK BENCH CAFE

By: 

Michael Bartusick
print name

ITS: (circle one) Chairman/President/Vice President

AND

By: 

Christie Bartusick
print name

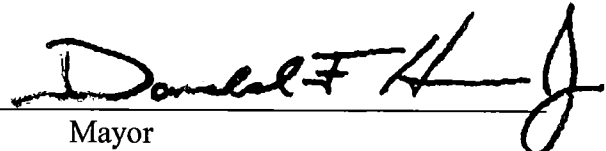
ITS: (circle one) Secretary/Chief Financial
Officer/Asst. Secretary - Treasurer

REVIEWED AND APPROVED:

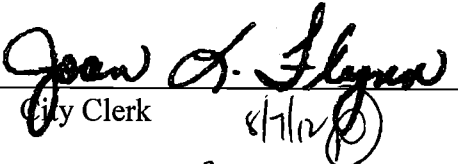


City Manager

CITY OF HUNTINGTON BEACH, a
municipal corporation of the State of
California



Mayor



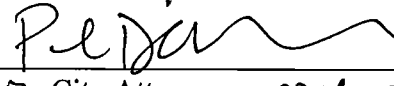
Joan D. Flynn
City Clerk

INITIATED AND APPROVED:



Director of Community Services

APPROVED AS TO FORM:



City Attorney 7/19/2012
mv 7-5-12

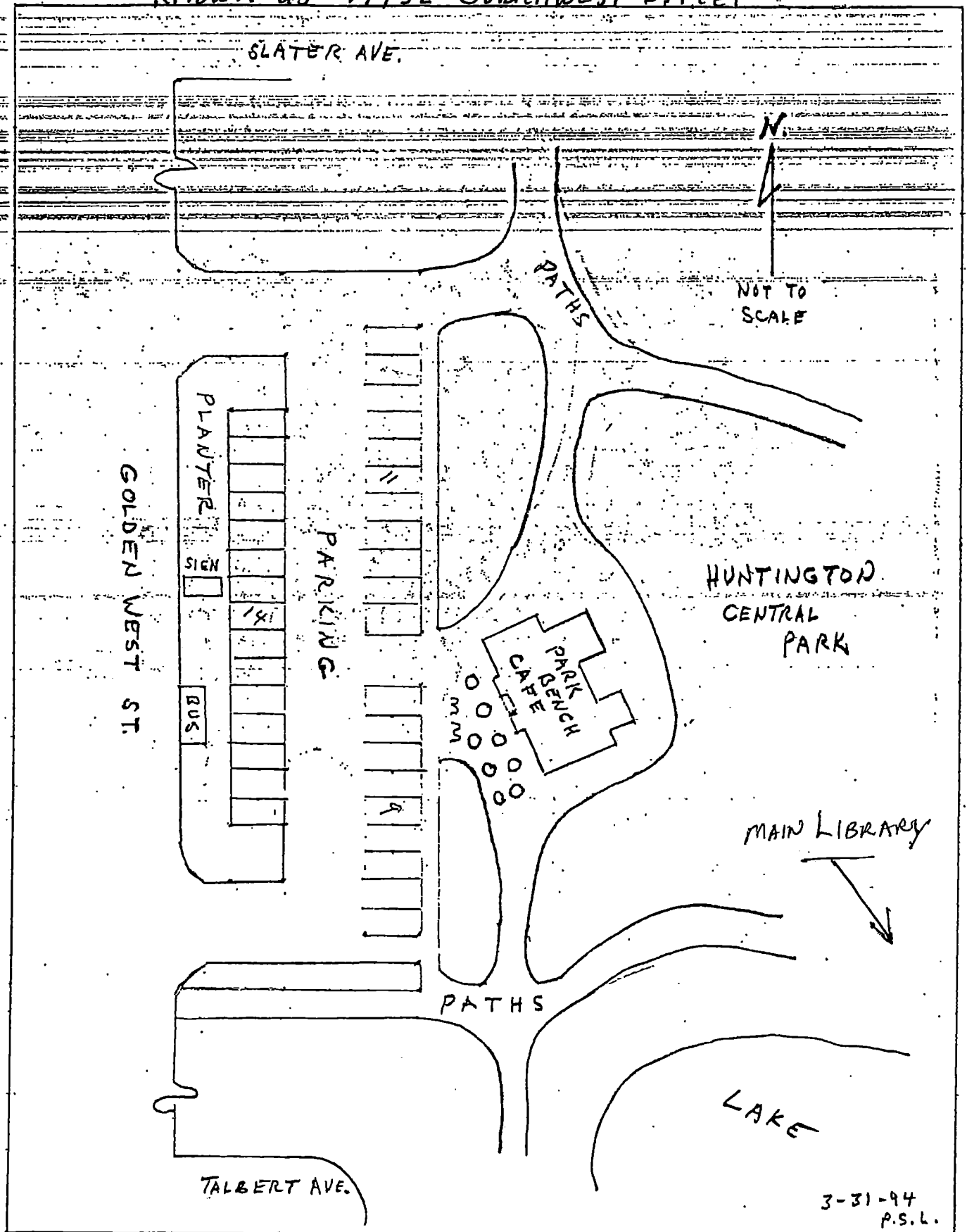


SUBJECT

EXHIBIT "A"

Portion of APN 111-010-69

Known as 17732 Goldenwest Street



CITY OF HUNTINGTON BEACH

Quarterly Evaluation

Month _____ Year _____ Today's Date _____

Inspected By: _____

<u>Area</u>	<u>O.K.</u>	<u>Needs Attention:</u>
Doors & Locks	_____	_____
Exterior Walls	_____	_____
Exterior Area	_____	_____
Graffiti Removal	_____	_____
Grease Trap	_____	_____
Hood Grease Filters	_____	_____
Interior Walls	_____	_____
Removal of Bird Droppings	_____	_____
Rest Room	_____	_____
Roof	_____	_____
Rust	_____	_____
Signage	_____	_____
Trash	_____	_____
Trim	_____	_____
Windows	_____	_____

COMMENTS: _____

ACTION REQUIRED: _____

AGREED TO: _____