

**FIRST AMENDED CONCESSIONAIRE AND PROPERTY USE
AGREEMENT**

THIS FIRST AMENDED CONCESSIONAIRE AND PROPERTY USE AGREEMENT ("Agreement") is hereby made and entered into by and between the City of Monroe, Washington, a municipal corporation and noncharter code city organized under Title 35A RCW ("the City") and H30, LLC a Washington limited liability company ("Concessionaire"). This First Amended Concessionaire and Property Use Agreement amends in its entirety the original Concessionaire and Property Use Agreement signed by the parties.

RECITALS

WHEREAS, the City is the owner of that certain parcel of land described in Exhibit "A" and commonly known as Lake Tye Park (the "Land") located in the City of Monroe, Snohomish County, Washington; and

WHEREAS, the City and Concessionaire desire to undertake, as a public-private partnership, the installation and operation of a cable wakeboard park facility upon a portion of the Land for the purpose of offering certain recreational opportunities to the public as set forth herein;

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby mutually acknowledged, the City and the Concessionaire (collectively, "the parties") hereby agree as follows:

Article I.

Definitions

For purposes of this Agreement, the following words and phrases shall have the meanings indicated unless the context clearly indicates otherwise:

"Commencement of Construction" means that (i) the plans have been prepared and all approvals thereof required by applicable governmental authorities have been obtained for construction of the Facilities; (ii) all necessary permits for the construction of the Facilities on the Land pursuant to the respective plans therefore having been issued by all applicable governmental authorities; and (iii) grading of the Land or the construction of the vertical elements of the Facilities, has commenced.

"Completion of Construction" means that (i) the construction of the Facilities on the Land has been substantially completed, (ii) all final, permanent certificates of occupancy for the occupancy of the Facilities has been issued by the City, and (iii) there are no physical impediments preventing the operation of the Facilities for the Permitted Use.

"Phase 1 Concept Plan" means the preliminary conceptual plan for the development of the Facilities on the Land as depicted on Exhibit "B-1".

"Phase 2 Concept Plan" means the preliminary conceptual plan for the development of the Facilities on the Land as depicted on Exhibit "B-2".

"Days" means calendar days. In computing any period of time described in this Agreement, the provisions of RCW 1.12.040 shall govern.

"Effective Date" means the last date of execution hereof.

"Expiration Date" shall be as defined in Section 2.02.

"Phase 1" Facilities means a functional, top-quality cable park/wakeboard park venue consisting of (i) the portion of Lake Tye comprised of approximately 42 acre in surface area sloped at the banks with overhead towers and cable systems for boat-free wakeboarding to be located on the Land as shown on the Phase 1 Concept Plan; (ii) not to exceed an eight (8) tower wakeboard system; (iii) purchase and installation of lake obstacles, including ramps, jumps and rails; (iv) a starting dock or main cable and beginning cable systems; (v) cut and fill site to form viewing areas and ADA-compliant walkway and access to dock; (vi) temporary office building approximately 15' by 36'; (vii) temporary storage container; (viii) temporary restroom facilities; (ix) landscaping improvements to viewing area, office area, and crawl-out points; and other improvements to be constructed on the Land more fully described in a submittal (the "Phase 1 Facilities Plan") filed and approved by the City.

"Phase 2 Facilities" means all of Phase 1 Facilities, plus (i) the construction of a building ("the Building") containing approximately 2,500 square feet of space under roof to be constructed on the Land generally south of Lake Tye as shown on the Phase 2 Concept Plan and containing a retail and pro shop area, ticket sales booth, rental area, private office space, restrooms and reception area to replace the temporary building, temporary storage container and temporary restroom facilities in Phase 1; (ii) eight (8) cable wakeboard tower systems; (iv) purchase and installation of lake obstacles, including ramps, jumps and rails; (v) a full starting dock, including seating areas, covered viewing areas, walkways and landscaping; (vi) pedestrian bridge; (vii) expansion and construction of additional parking to enhance the existing parking capacity on the Land to at least 20 new parking spaces; and (viii) landscaping, irrigation, and other improvements to be constructed on the Land more fully described in a submittal (the "Phase 2 Facilities Plan") filed and approved by the City ~~(the "Facilities Plan")~~.

"Phase 1 Facilities Plan" and "Phase 2 Facilities Plan" means the submittal plan for the proposed Facilities filed by the Concessionaire to be approved by the City.

"Gross Revenue" means all money received by Concessionaire subsequent to the Rent Commencement Date (or in connection with services to be performed or goods to be provided on or after the Rent Commencement Date) as a result of any rental or sublease of the Designated Premises, the rental or sale of goods, services, food and beverages, merchandise or the provision of services, party rentals (including fees charged for lessons and instruction except as defined herein), on or from the Designated Premises, but shall not include:

- (1) Cash refunds or credits allowed on returns by customers;
- (2) Sales taxes, admission taxes, use taxes and other similar taxes now or later imposed upon the sale of food, beverages, merchandise or services that are (a) collected from purchasers or customers of Concessionaire's services, and (b) paid by Concessionaire to the appropriate taxing authority, whether added to or included in the rental or selling price or the cost of the service provide
- (3) The actual uncollectible amount of any check or bank draft received by

Concessionaire as payment for goods or services and returned to Concessionaire from a customer's bank as being uncollectible (commonly "non-sufficient funds" or "stop-payment" checks);

(4) The actual uncollectible amount of any charge or credit account (commonly "bad debts ") incurred by Concessionaire for the sale of merchandise or services;

(5) Sales or trade-ins of machinery, vehicles, trade fixtures or personal property used in connection with Concessionaire's operation of the Designated Premises;

(6) The value of any merchandise, supplies or equipment exchanged or transferred from or to other locations of Concessionaire's business where such exchange or transfer is not made for the purpose of avoiding a sale which would otherwise be made from or at the Designated Premises;

(7) Receipts in the form of refunds from or the value of merchandise, supplies or equipment returned to shippers, suppliers or manufacturers;

(8) The amount of any cash or quantity discounts received from sellers, suppliers or manufacturers;

(9) The amount of any gratuities paid or given by customers to or for employees or independent contractors of Concessionaire;

(10) Amounts attributed to meals served or provided to employees or independent contractors of Concessionaire;

(11) The amount of discount taken on sales of merchandise discounted to employees or independent contractors;

(12) Receipts from the sale of waste or scrap materials resulting from Concessionaire's operations;

(13) The proceeds of any casualty insurance paid for damages to or destruction of the Designated Premises or any improvements or equipment thereon, actually used for Restoration (as defined in Section 8.02); and

(14) The proceeds of any business interruption insurance.

"Impositions" means all taxes, assessments, use and occupancy taxes, charges, excises, license and permit fees, and other charges by public or governmental authority, general and special, ordinary and extraordinary, foreseen and unforeseen, which are or may be assessed, charged, levied, or imposed by any public or governmental authority on the Designated Premises or any portion thereof or with respect to any property located thereon or any business conducted thereon.

"Land" means the real property described in Exhibit "A".

"Agreement Term" or "Term" shall be as defined in Section 2.02, and shall include the Renewal Terms.

"Agreement Year" means each calendar year occurring during the Agreement Term, ~~the first~~
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| ~~such calendar year commencing on _____.~~

"**Concessionaire**" means H30, LLC, a Washington limited liability company.

"**The City**" means the City of Monroe, Washington.

"**Maximum Rate**," when used in reference to an interest rate, means the greatest of the rates of interest from time to time permitted under applicable federal and state law. Wherever it is provided herein that a monetary sum shall be due to the City together with interest at the Maximum Rate and at such time there is no Maximum Rate, interest shall be due at the rate of twelve percent (12%) per annum.

"**Permitted Use**" means use of the Land for construction, reconstruction, repair, and maintenance of the Facilities, and use and operation of the Facilities as a top quality cable park/wakeboard park venue and other related recreational, and associated retail, office, parking and food service facilities, all of which are open to the public; provided, however, the requirement that the Facilities be "open to the public" does not preclude Concessionaire from charging an admission for entry to and use of the Facilities, the use of the entire Facilities for hosting tournaments, private parties, and similar events where all or a part of the Facilities are from time to time reserved for private events with or without payment of a rental fee.

"**Premises**" or "**Designated Premises**" means the portion of the Land identified in Exhibit C as the area of operation for the Permitted Use.

| "**Renewal Term**" means the extension of the ~~initial~~ 10-year Term for up to three (3) periods of five (5) years as provided in Section 2.03.

"**Rent**" means Minimum Rent and Percentage Rent as defined in Article III.

| "**Rent Commencement Date**" means the date on which Concessionaire opens the Facilities for general admission and use by the public, ~~or June 1, 2013, whichever shall first occur.~~

"**Site Plan**" means a site plan for the development of the Designated Premises for the Facilities as approved by the City as provided in Article VI. The Site Plan is independent of and separate from any development plan, license, permit or other regulatory approval that must be granted by the City pursuant to the Monroe Municipal Code. The Site Plan is rather a separate final plan substantially similar to the Concept Plan for the development of the Designated Premises for the Facilities.

Each of the foregoing definitions and basic provisions shall be construed in conjunction with the references thereto contained in the other provisions of this Agreement and shall be limited by such other provisions. Each reference in this Agreement to any of the foregoing definitions and basic provisions shall be construed to incorporate each defined term set forth above under such definition or provision.

Article II.

Demise of Designated Premises; Option to Purchase Facilities

2.01 Agreement for Concession. The City, in consideration of the covenants, agreements and undertakings of Concessionaire as herein set forth, does hereby grant unto
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Concessionaire, and Concessionaire does hereby accept from the City, the right and privilege to occupy and use the Designated Premises for the Permitted Use throughout the duration of the Agreement Term and all upon and subject to the terms and conditions set forth in this Agreement. The parties further hereby acknowledge their mutual intent to execute one or more easements, licenses or similar grants by separate instrument(s) covering the area of the Land upon which the tower pad component of the Facilities will be installed.

2.02 **Agreement Term.** The Agreement Term shall be the period of time beginning on the ~~Rent Commencement Effective~~ Date and ending on the last day of the month in which falls the tenth (10th) anniversary of the Rent Commencement Date ("the Expiration Date") unless terminated earlier as provided in this Agreement.

- (a) If Rent Commencement Date has not started by December 31, 2017, either party may terminate this Agreement. This non-event shall not constitute an Event of Default, and termination of the Agreement shall be the City's sole and exclusive remedy.
- (b) If Concessionaire fails to complete construction of Phase 1 Facilities and Phase 2 Facilities within five (5) years after the Rent Commencement Date, the City shall have the option to terminate this Agreement upon 90-days notice. Termination of this Agreement shall be the City's sole and exclusive remedy.

This Agreement will terminate without further notice when the Agreement Term expires and any holding over by Concessionaire after the Agreement Term expires will not constitute a renewal of this Agreement or give Concessionaire any rights under this Agreement or to the Land.

2.03 **Renewal Term.** Concessionaire may extend the Agreement Term for up to three (3) additional periods of five (5) years each (each additional period being called a "Renewal Term") by delivering written notice to the City not later than ninety (90) days, but not earlier than one hundred eighty (180) days, prior to the then current Expiration Date, any such extension to be subject to the same terms and conditions set forth herein. Provided, that the City may reject any Renewal Term upon one or more of the following grounds:

- (i) Concessionaire's failure to meet the financial performance levels stated in the projections attached hereto on Exhibit D;
- (ii) Failure to correct identified public safety concerns; or
- (iii) The City's need to utilize the Designated Premises for a substantial public purpose, and for which no alternative location is available to the City to satisfy the identified public purpose.

Prior to any decision by the City to reject a Renewal Term, the Monroe City Council shall hold a public hearing, with advance notice to Concessionaire, and shall enter written findings and conclusions in support of its decision. Concessionaire shall be afforded an opportunity to testify and provide opposing evidence at the hearing. The City Council's decision shall be appealable by Concessionaire to the Snohomish County Superior Court within 14 days.

2.04 **"AS IS" Condition.** Concessionaire accepts the Designated Premises "AS IS" and "WITH ALL FAULTS," and the City makes no warranty of any kind, express or implied, with respect thereto. Without limiting the generality of the preceding sentence, it is expressly agreed that the City makes no warranty as to the marketability, habitability or fitness for any particular purpose of the Designated Premises. The City further makes no warranty of any kind regarding the level, quality, temperature, chemical composition or other condition regarding the water in Lake Tye, and the City does not make, and expressly disclaims, any maintenance obligation regarding the same.

2.05 **Memorandum of Agreement.** The parties agree to execute, acknowledge and deliver a mutually acceptable form of Memorandum of Agreement (which shall, among other things, memorialize the Effective Date), contemporaneously with the execution and delivery of this Agreement, and such Memorandum of Agreement shall be recorded in the real property records of Snohomish County, Washington.

2.06 **Frustration of Purpose.** Concessionaire and City agree that if Concessionaire is legally or physically unable to occupy the Designated Premises or engage in the Permitted Use as a direct result of any reasonably unanticipated act, event or occurrence beyond the reasonable control of either party, including but not limited to third-party lawsuits, natural disasters, material changes in the physical or chemical composition of Lake Tye, and/or regulatory actions by State or Federal agencies, Concessionaire may terminate this Agreement upon 60 days written notice to the City without recourse or further liability except as expressly provided herein. Provided, that any such termination shall not in any manner relieve Concessionaire's obligation regarding removal of the Facilities as set forth in this Agreement, or relieve Concessionaire's obligations pursuant to Article IX. Provided further, that the provisions of this section shall not apply with respect to any act, event or occurrence governed by Section 8.01.

Article III

Rent

3.01 **Rent.** During the Agreement Term, Concessionaire shall pay rent to the City, without offset or deduction as follows:

(a) **Minimum Rent.** Concessionaire agrees to pay to the City as fixed Minimum Rent (herein so called), the following sums:

- Partial Agreement Year: \$12,000
- (1) Agreement Year 1: \$12,000
- (2) Agreement Year 2: \$18,000
- (3) Agreement Year 3 to end of term: \$24,000

The Minimum Rent shall be per Agreement Concession Year for each Agreement Concession Year commencing with the Rent Commencement Date and continuing thereafter through the Expiration Date or early termination of this Agreement, which amount shall be payable in equal quarterly payments, payable on or before the first day of each calendar quarter (January 1, April 1, July 1, October 1) of each Agreement Concession Year, but in any event, shall be considered late after the fifteenth (15th) day of any due date. Concessionaire shall pay to the City as rent for the period of time beginning on the Rent Commencement Date through the end of the Agreement Year June 30, _____ a pro-ratable portion of \$12,000 calculated pursuant to the following formula:

- (i) \$33.33; multiplied by
- (ii) the number of days beginning on the Rent Commencement date and

ending on ~~December 31st~~~~June 30, 2012~~; and

- (iii) rounded up to nearest \$0.01.

For example, if the Rent Commencement Date is May 1, 2012, then the number of days from May 1, 201~~2~~, through ~~December 31~~~~June 30~~, 201~~2~~ is ~~24461~~. To determine the Minimum Rent due for ~~24461~~ days, multiply \$33.33 by ~~24461~~, which equals ~~\$8,132,522,033.13~~ (rounded up).

The Minimum Rent for shall be due and payable in equal installments equal to the number of calendar quarters or partial calendar quarters remaining in the year. As such, the first installment is due on or before the Rent Commencement Date, and the remaining installments are due on or before the first day of each calendar quarter remaining in the year (April 1, July 1, October 1), but in any event, shall be considered late after the fifteenth (15th) day of any due date. In the case of the foregoing example, Concessionaire shall pay Rent in the amount of ~~\$2,132,522,011.13~~ on May 1, 2012, \$3,000 on July 1, 2012 and \$3,000 on October 1, 2012. Likewise, the Minimum Rent due for the final Agreement Year shall be prorated to the date of the Expiration Date if the Expiration Date does not coincide with the end of the Agreement Year.

(b) Minimum Rent During Renewal Terms. If Concessionaire extends this Agreement for one or more of the Renewal Terms, Concessionaire agrees to pay to the City as fixed Minimum Rent the following sums during the Renewal Terms: First Renewal Term shall be \$25,000 per year; Second Renewal Term shall be \$26,000 per year, and Third Renewal Term shall be \$27,000 per year.

(c) Percentage Rent. From the Rent Commencement, and for each Agreement Year thereafter through the Expiration Date (whether through the expiration or early termination of this Agreement), Concessionaire shall pay to the City rent in an amount equal to two percent (2%) of Gross Revenue ("Percentage Rent") This rent shall be in addition to the Minimum Rent.

(d) Credit for Concessionaire's assumption of City expenses. In consideration for Concessionaire's assumption of costs and fees for the project that are typically borne by the land owner, the City shall grant Concessionaire a credit of 1% of the Gross Revenue not to exceed a total credit over the term of this Agreement of \$45,000. This amount shall be deducted from the payment owed pursuant to the terms of this Agreement, and shall not be credited except through a reduction in payments owed to City pursuant to (c) above. The provisions in this section of the Agreement shall not survive termination of the Agreement, and the City shall at no time owe any amount of this credit to Concessionaire if the amount has not been credited to Concessionaire by the time of the Agreement's termination. This credit shall be calculated, deducted, reported and paid pursuant to the terms of the Percentage Rent in this Agreement.

(e) Rent in Final Agreement Year. With respect to payment of Rent for the final Agreement Year, the determination of Gross Revenue and the report regarding same as required by Section 3.06(b) shall be delivered to the City not later than thirty (30) days following the termination of this Agreement. If the termination of the Agreement is on a date prior to the end of the then current Agreement Year, the calculation of Percentage Rent shall be based on the Gross Revenue for the portion of the final Agreement Year during which the

Agreement was in effect, and the calculation of the amount of Rent due for the final Agreement Year shall be based on a comparison of the Minimum Rent for the final Agreement Year prorated as provided in Section 3.01(a) and the Gross Revenue for the final Agreement Year as determined above.

(f) **Survival of Percentage Rent Obligation.** Notwithstanding the termination of this Agreement on the Expiration Date or such earlier time as may be provided in this Agreement, the obligation to determine the Percentage Rent and the payment of same shall survive the termination of this Agreement.

(g) **Hold Over Rent.** If Concessionaire remains in possession of the Designated Premises after expiration or termination of the Agreement Term, such possession by Concessionaire shall be deemed a month-to-month tenancy terminable by either party upon thirty (30) days' written notice to the other party. During any such month-to-month tenancy, Rent shall accrue at the monthly rate of 125 percent of the prior year's Rent for the same month (i.e., 125 percent of December 2020's Rent payment used to calculate the holdover month of December 2021, etc.), payable in advance by the tenth day of each month. All other provisions of this Agreement shall apply with respect to any month-to-month tenancy created under this section.

3.02 **Late Charge.** If Concessionaire fails to pay any installment of Rent on or before the same becomes due, Concessionaire shall pay to the City on demand a late charge (the "Late Charge") equal to five percent (5%) of such installment. It is understood and agreed that the Late Charge is for the purpose of reimbursing the City for the extra costs and expenses incurred in connection with the handling and processing of late installments of Rent. In addition to the Late Charge, all amounts of Rent or other payment to be made by Concessionaire to the City hereunder shall bear interest at the Maximum Rate beginning on the thirtieth (30th) day of the date the payment was due if remaining unpaid. In no event, however, shall the charges permitted under this Section or elsewhere in this Agreement, to the extent the same are considered to be interest under applicable law, exceed the maximum rate of interest permitted by applicable law.

3.03 **Place of Payment.** All installments of rent hereunder, when and as the same becomes due and payable, shall be paid in lawful money of the United States at the time to the City at Monroe City Hall or at such other place as may be directed in writing by the City from time to time.

3.04 **All Charges Deemed Rent.** Rent and all other amounts becoming payable by Concessionaire under this Agreement shall constitute rent payable hereunder, and in the event Concessionaire fails to pay any such amount when due according to the provisions of this Agreement, the City shall have all remedies available hereunder or at law or in equity for failure to pay rent. No happening, event, occurrence or situation during the Agreement Term, whether foreseen or unforeseen, and however extraordinary, shall relieve Concessionaire from its liability to pay Rent and other charges payable by Concessionaire under this Agreement or relieve Concessionaire from any of its other obligations under this Agreement.

3.05 **Lien for Rent.** In consideration of the mutual benefits arising under this Agreement, Concessionaire hereby grants to the City a lien and security interest in all property of Concessionaire (including all fixtures, machinery, equipment, furnishings, and other articles of personal property now or hereafter placed in or on the Designated Premises by Concessionaire and owned by Concessionaire, together with the proceeds from the disposition of those items) (the "Collateral"), now or hereafter placed in or upon the Designated Premises or subject to easements, licenses or similar interests granted by the City, as security for payment of all Rent and other sums agreed to be paid by Concessionaire

herein, not to exceed two months minimum Rent for the year of the arrearage as specified in Section 3.01. The provisions of this Section 3.05 constitute a lien consistent with RCW 60.72.010 in addition to and cumulative of the City's rights provided by law or by the other terms and provisions of this Agreement.

3.06 **Books and Records.**

(a) Concessionaire agrees to maintain a complete set of books and records in connection with all aspects of and specific to this Agreement relating to Gross Revenue, which books and records shall be kept and maintained in accordance with generally accepted accounting practices and procedures. Said books and records shall at all reasonable times be available for inspection, copying, audit and examination by the City or by properly designated employees or agents of the City. The City may require the keeping of additional records or accounts relating to Gross Revenue which are customary for the businesses conducted on the Designated Premises and which are reasonably necessary for purposes of identifying, accounting for, and reporting Gross Revenue.

(b) In order to determine the Gross Revenue received by Concessionaire, Concessionaire agrees that, within thirty (30) days following the end of the Agreement Year in which the Rent Commencement Date began, and each Agreement Year thereafter, it will deliver to the Monroe City Clerk a report certified by Concessionaire's managing member as being true and correct and in a form to be prescribed by and acceptable to the City with sufficient detail to itemize all Gross Revenue received from the Designated Premises including revenue from each of the categories identified in the definition of Gross Revenue, the form of which shall be attached to this Agreement as an exhibit.

(c) The City shall have the right, after the ~~s~~Second Agreement Year, such right not to be exercised more frequently than once every other Agreement Year thereafter, to audit the books and records of Concessionaire for the previous two-year period so as to confirm the accuracy of the annual report of Gross Revenue described herein. Such audit, if any, shall be undertaken by a nationally recognized firm or independent certified public accountants engaged by the City and Concessionaire, the expense of which is to be paid one-half by the City and one-half by Concessionaire. Concessionaire shall cooperate by all reasonable means in order to facilitate a timely and accurate completion of such audit. A copy of the report of such audit shall be addressed to each of the City and Concessionaire and shall be delivered to each of the City and Concessionaire at substantially the same time. If such audit reveals that Concessionaire has understated Gross Revenues, as defined herein, by five percent (5%) or more, then, within thirty (30) days following receipt of such audit report, Concessionaire shall pay to the City the amount of any Percentage Rent deficiency based on such understated Gross Revenue together with all of the City's fees, costs and expenses, including without limitation attorneys' fees, and such penalties for late payment as may be applicable pursuant to other provisions of this Agreement. If such audit shall indicate an understatement of Gross Revenue of less than five percent (5%), Concessionaire, in the manner provided herein, shall pay any Percentage Rent deficiency. If such audit indicates an overstatement of Gross Revenue and, if on account of such overstatement, Percentage Rent in excess of amounts due have been paid by Concessionaire to the City, then such overpayment (less any amounts other than Minimum Rent which shall then be due and owing to the City) shall be credited against the next due installment of Minimum Rent. Nothing herein is intended to require Concessionaire to provide to the City, or to allow the City to obtain from Concessionaire, confidential financial and tax return information concerning Concessionaire and its investors. The City may, at any time, make inquiries pertaining to the operation of the Designated Premises and the improvements thereon, and

Concessionaire shall respond to such inquiries on a timely basis.

Article IV.

Utilities and Impositions

4.01 **Separate Utility Meters.** All utilities to the Facilities shall be separately metered.

4.02 **Payment of Utilities.** In addition to the payment of Rent, Concessionaire shall pay or cause to be paid all charges for water, heat, gas, electricity, stormwater, sewer and any and all other utilities used on the Designated Premises throughout the Agreement Term, including without limitation any connection fee or impact fee. Concessionaire has the option to charge any user or sublessor of the Designated Premises for the pro-rata costs associated with the user's use of the Designated Premises.

4.03 **Impositions.** Concessionaire shall pay and discharge all Impositions, taxes, general and special assessments and other similar charges which, during the Agreement Term, may be levied on or assessed against the Designated Premises (specifically including without limitation all applicable leasehold excise taxes) and all interests therein and all improvements and other property, including personal property thereon, owned by Concessionaire. Concessionaire shall pay all such taxes, charges and assessments to the public officer charged with the collection thereof not less than fifteen (15) days before the same shall become delinquent, and Concessionaire agrees to indemnify and save harmless the City from all such taxes, charges and assessments. Concessionaire shall have the right in good faith and at its sole cost and expense to contest any such taxes, charges and assessments and shall be obligated to pay the contested amount only if and when such amount is finally determined to be due. Concessionaire shall give notice to the City of its intent to contest any such taxes, charges or assessments, the amount thereof and the entity to which such taxes, charges or assessments are purportedly owed.

4.04 **Payment by the City.** Subject to the right of Concessionaire to contest taxes, assessments and governmental charges as hereinabove provided, the City may, at any time that the payment of any item of taxes, special assessments or governmental charges which Concessionaire is obligated to pay under the provisions of Section 4.02 remains unpaid, give written notice to Concessionaire of its default and if Concessionaire continues to fail to pay such item of taxes, special assessments or governmental charges or to contest the same in good faith, then at any time after fifteen (15) days from the date of such written notice the City may pay the items specified in the notice and Concessionaire covenants thereupon on demand to reimburse the City any amount so paid or expended in the payment of the items specified in the notice, with interest thereon at the Floating Rate (as hereinafter defined) from the date of such payment by the City until repaid by Concessionaire; provided however, if the City, without giving the fifteen (15) days—notice provided for above, pays any such item which has not been paid by Concessionaire within the time required in Section 4.02, or which has not then or thereafter been successfully contested by Concessionaire, Concessionaire shall nevertheless reimburse the City for such item, but without interest. The term "Floating Rate" shall mean the annual rate of interest from time to time published or announced by The Wall Street Journal. as the prime rate or base commercial lending rate, or if The Wall Street Journal (or any other money center bank selected pursuant to this sentence) shall ever cease to exist or cease to announce a prime rate or base commercial lending rate, then the annual rate of interest from time to time announced by Citibank, N.A. (or by any other New York money center bank selected by the City) as its prime rate or base commercial lending rate.

4.05 **Change in Taxation Method.** If at any time during the Agreement Term there shall be levied or assessed in substitution of property taxes, in whole or in part, a tax, assessment or

governmental imposition on the rents received from the Designated Premises or the rents reserved herein, and said tax, assessment or governmental imposition shall be imposed upon the City, Concessionaire shall pay same as hereinabove provided.

4.06 **Ownership by the City.** The parties understand, acknowledge and agree that title to the Land shall at all times during the Agreement Term be vested in the City, and should be exempt from ad valorem taxation. The City and Concessionaire further understand, acknowledge, and agree that the Facilities and any tangible personal property located on the Designated Premises shall at all times during the Agreement Term be owned by Concessionaire. Concessionaire agrees that Concessionaire shall at all times during the Agreement Term be solely responsible for payment of ad valorem taxes assessed against the Designated Premises, the Facilities, Concessionaire's tangible personal property and Concessionaire's interest in the Designated Premises. If for any reason during the Agreement Term all or any part of the Designated Premises, the Facilities, Concessionaire's tangible personal property, and/or Concessionaire's interest in the Designated Premises become subject to ad valorem taxes or any other Impositions, payment of same shall in all events be the exclusive liability of Concessionaire.

4.07 **Failure to Pay Impositions.** If Concessionaire shall fail to pay any Impositions for which Concessionaire is liable before the same becomes delinquent, or fails to notify the City of its intention to contest the same prior to such delinquency, or fails to pay any contested Impositions before the property is threatened with foreclosure or similar proceedings, the City, at the City's election, may (but shall not be obligated to) pay such Impositions with any interest and penalties due thereon, and the amount paid by the City shall be repayable by Concessionaire on demand, together with interest thereon at the Maximum Rate from the date of such payment until repaid. Thereafter, in addition to all other remedies of the City, the City may require that Concessionaire pay to the City, on an annual basis the Impositions, as estimated by the City, becoming due during each calendar year. Any such additional payment shall be due monthly and in advance on the same day that Annual Rent is due and shall be held in escrow by the City.

Article V.

Use of Designated Premises

5.01 **General.** Concessionaire shall use the Designated Premises solely for the Permitted Use for the purpose of constructing, maintaining, and operating the Facilities. The Facilities shall be open to the public during the times set forth in Section 5.07(b). Nothing in this Agreement shall prevent Concessionaire from charging fees for use of the Facilities. In the use of the Facilities and the Designated Premises and in addition to all of the terms, conditions and obligations of this Agreement, Concessionaire shall comply with and be subject to all applicable federal, state and local laws, regulations and ordinances, specifically including without limitation all regulations of the City of Monroe.

5.02 **Compliance with Restrictions and Laws.** Concessionaire shall, at Concessionaire's sole expense, (a) comply with all applicable laws, orders, ordinances, and regulations of federal, state, county, and municipal authorities having jurisdiction over the Designated Premises and the Facilities, (b) comply with any directive, order or citation made pursuant to law by any public officer requiring abatement of any nuisance or which imposes upon the City or Concessionaire any duty or obligation arising from Concessionaire's occupancy or use of the Designated Premises and the Facilities, or required by reason of a breach of any of Concessionaire's obligations hereunder or by or through other fault of Concessionaire, (c) comply with all insurance requirements applicable to the Designated Premises, and (d) indemnify and hold the City harmless from any loss, cost, claim or expense which the City incurs or suffers by reason of Concessionaire's failure

to comply with its obligations under clauses (a), (b), (c) or (d) above. If Concessionaire receives notice of any such directive, order citation or of any violation of any law, order, ordinance, regulation or any insurance requirements, Concessionaire shall promptly notify the City in writing of such alleged violation and furnish the City with a copy of such notice. Without limitation of the forgoing, Concessionaire specifically acknowledges and shall comply fully with all applicable requirements of Chapter 67.42 RCW and any administrative regulations promulgated thereunder.

5.03 Specific Covenants Regarding Environmental Matters.

(a) Concessionaire covenants that as a result of Concessionaire's activities or the activities of the guests, invitees, users, or sublessees (a) no toxic or hazardous substances, including, without limitation, asbestos and the group of organic compounds known as polychlorinated biphenyls (except such substances as are used in accordance with law), shall be generated, treated, stored or disposed of, or otherwise deposited in or located on, or release on or to the Designated Premises, including, without limitation, the surface and the subsurface waters of the Designated Premises, (b) Concessionaire will not engage in and will not permit any other party under its control to engage in any activity on the Designated Premises which would cause (i) the Designated Premises to become a hazardous waste treatment storage or disposal facility within the meaning of, or otherwise bring the Designated Premises within the ambit of, the Resource Conservation and Recovery Act of 1975 ("RCRA"), 42 U.S.C. § 6901, et seq., as amended, or any similar state law or local ordinance or other environmental law, (ii) a release or threatened release of a hazardous substance from or to the Designated Premises within the ambit of, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601 9657, as amended, or any similar state law or local ordinance or any other environmental law, or (iii) the discharge (except in accordance with applicable law) of pollutants or effluents into any water source or system, or the discharge (except in accordance with applicable law) into the air of any emissions, which would require a permit under the Federal Water Pollution control Act, 33 U.S.C. § 1251, et seq., or the Clean Air Act, 42 U.S.C. §§ 7401, et seq., or any similar state law or local ordinance or any other environmental law,

(b) Concessionaire will not permit any substance or conditions in or on the Designated Premises which might support a claim or causes of action under RCRA, CERCLA, or any other federal, state or local environmental statutes, regulations, ordinances or other environmental regulatory requirements, and (d) no other ground storage tank will be located on or under the Designated Premises, except as presently exists or is approved per this Agreement. As used herein, the terms "hazardous substance" and "release" shall have the meanings specified in CERCLA, and the terms "solid waste" and "disposal" (or "disposed") shall have the meanings specified in RCRA; provided, in the event either CERCLA or RCRA is amended so as to broaden the meaning of any term defined thereby, such broader meaning shall apply subsequent to the effective date of such amendment, provided, further, to the extent that the laws of the State of Washington establish a meaning for such terms which is broader than that specified in either CERCLA or RCRA, such broader meaning shall apply.

(c) In the event Concessionaire or the City is obligated by any applicable federal, state or local law, ordinance or regulation or otherwise directed by any governmental agency or authority, to clean up, remove or encapsulate or cause the clean-up, removal, or encapsulation of any Hazardous Wastes and/or Hazardous Materials or asbestos or material containing asbestos from the Designated Premises, the Concessionaire hereby guarantees to the City that the Concessionaire (i) shall promptly undertake to arrange for such clean-up, removal and disposal in accordance with all governmental regulations, (ii) shall exercise its best efforts to ensure that

such clean up and removal shall be conducted in a timely and diligent manner, and (iii) hereby assumes the costs and expense, including any fines, of such clean up and removal unless such condition is determined to have existed on the Designated Premises prior to Concessionaire's execution and acceptance of this Agreement in which case, the City shall be responsible for, and shall assume the cost and expense of, such cleanup.

(d) In the event that any lien is recorded or filed against the Designated Premises pursuant to any governmental regulations regarding Hazardous Materials, Hazardous Wastes, or Asbestos, Concessionaire hereby guarantees to the City that Concessionaire shall, not later than thirty (30) days following the filing of such lien, and the determination that Concessionaire (or Concessionaire's guests, invitees, users or sublessees) caused and is responsible for payment of said lien, satisfy the claim and caused the lien thereunder to be discharged of record, unless such condition is determined to have existed on the Designated Premises prior to Concessionaire's execution and acceptance of this Agreement in which case, the City shall be responsible for, and shall assume the cost and expense of, satisfying the claim or causing the lien to be discharged. Provided, that nothing herein shall be construed as consenting or otherwise acknowledging that the Designated Premises, as public property, is subject to any such lien under Washington law.

(e) IN ADDITION TO THE FOREGOING, CONCESSIONAIRE SHALL PROTECT, DEFEND, INDEMNIFY AND SAVE HARMLESS THE CITY, AND THE CITY'S OFFICERS, ELECTED AND APPOINTED OFFICIALS, AGENTS, EMPLOYEES AND REPRESENTATIVES FROM AND AGAINST ALL LOSS (INCLUDING DIMINUTION IN THE VALUE OF THE DESIGNATED PREMISES), COST, DAMAGE, LIABILITY, OBLIGATION, CAUSES OF ACTION, FINE, PENALTY OR EXPENSE (INCLUDING ATTORNEY'S FEES AND EXPENSES FOR INVESTIGATION, INSPECTION, REMOVAL, CLEAN UP, AND REMEDIAL COSTS INCURRED TO PERMIT CONTINUED OR RESUME NORMAL OPERATION OF THE DESIGNATED PREMISES), IMPOSED UPON OR INCURRED BY OR ASSERTED AGAINST THE CITY, ITS OFFICERS, OFFICIALS, EMPLOYEES OR AGENTS BY REASON OF: (I) THE PRESENCE, DISPOSAL, ESCAPE, SEEPAGE, LEAKAGE, SPILLAGE, DISCHARGE, EMISSION, RELEASE, OR THREATENED RELEASE OF ANY HAZARDOUS MATERIALS AND/OR HAZARDOUS WASTES ON, FROM, OR AFFECTING THE DESIGNATED PREMISES OR ANY OTHER PROPERTY OR THE PRESENCE OF ASBESTOS ON THE DESIGNATED PREMISES; (II) ANY PERSONAL INJURY (INCLUDING WRONGFUL DEATH) OR PROPERTY DAMAGE OR DESTRUCTION (REAL OR PERSONAL) ARISING OUT OF OR RELATED TO SUCH HAZARDOUS WASTES, HAZARDOUS MATERIALS OR ASBESTOS; (III) ANY LAWSUIT BROUGHT OR THREATENED, SETTLEMENT REACHED, OR GOVERNMENT ORDER RELATING TO SUCH HAZARDOUS WASTES, HAZARDOUS MATERIALS OR ASBESTOS; OR (IV) ANY VIOLATION OF LAWS, ORDERS, REGULATIONS, REQUIREMENTS, OR DEMANDS OF GOVERNMENTAL AUTHORITIES, WHICH ARE BASED UPON OR IN ANY WAY RELATED TO SUCH HAZARDOUS WASTES, HAZARDOUS MATERIALS OR ASBESTOS INCLUDING, WITHOUT LIMITATION, THE COSTS AND EXPENSES OF ANY REMEDIAL ACTION, ATTORNEY AND CONSULTANT FEES, INVESTIGATION AND LABORATORY FEES, COURT COSTS, AND LITIGATION EXPENSES. THE ABOVE AND FOREGOING OBLIGATION CONTAINED IN THIS SECTION 5.03 SHALL ONLY APPLY TO ANY ACT OR OMISSION OF CONCESSIONAIRE OR OF CONCESSIONAIRE'S OFFICERS, PRINCIPALS, EMPLOYEES, AGENTS, CONTRACTORS, OR SUBCONTRACTORS IN CONNECTION WITH ANY LOSS (INCLUDING DIMINUTION IN THE VALUE OF THE DESIGNATED PREMISES), COST, DAMAGE,

LIABILITY, OBLIGATION, CAUSES OF ACTION, FINE, PENALTY OR EXPENSE (INCLUDING ATTORNEY'S FEES AND EXPENSES FOR INVESTIGATION, INSPECTION, REMOVAL, CLEAN UP, AND REMEDIAL COSTS INCURRED TO PERMIT CONTINUED OR RESUME NORMAL OPERATION OF THE DESIGNATED PREMISES), IMPOSED UPON OR INCURRED BY OR ASSERTED AGAINST THE CITY, ITS OFFICERS, OFFICIALS, AGENTS OR EMPLOYEES BY REASON OF SUBPARTS (I) THROUGH (IV) OF THIS SECTION 5.03(d) AND FOR WHICH SUCH CONDITION WAS NOT A PRE-EXISTING CONDITION OF THE DESIGNATED PREMISES PRIOR TO CONCESSIONAIRE'S EXECUTION AND ACCEPTANCE OF THE AGREEMENT.

(f) The City hereby warrants that the City has no knowledge of the existence of Hazardous Wastes and/or Hazardous Materials or asbestos or material containing asbestos on the property, nor any other condition, the discovery of which would likely subject Concessionaire to civil, criminal or administrative liability. The City further covenants, warrants and promises that, to the greatest extent allowed under law, Concessionaire shall not be held liable by the City, for any condition existing prior to Concessionaire's execution and acceptance of this Agreement.

5.04 **Natural Resources.** Concessionaire shall cut no timber, conduct no mining operations, remove no sand, gravel, or kindred substances from the ground, commit no waste of any kind, nor in any manner substantially change the contour or condition of the Designated Premises, except as may be authorized by the City or as may be required by the construction and subsequent improvements of the Facilities in accordance with plans and specifications approved by the City.

5.05 **Access to Property.** Concessionaire agrees that access to the Designated Premises and the Facilities shall be designated and shown on the Concept Plan, as amended. The City shall be entitled to public access from the Facilities parking lot on the Designated Premises and by way of Lake Tye Park. Concessionaire, through its employees, shall have sole responsibility for allowing access to the Designated Premises by unlocking access gates each morning (if applicable) and shall further have sole responsibility for securing the Designated Premises by locking any access gate each evening (if applicable) during any period of time when Designated Premises and the Facilities are not open and available to the public or when the Designated Premises and the Facilities are not regularly patrolled by local police or private security guards. Concessionaire further agrees that the Monroe Police Department and the local fire department shall be provided with duplicate keys to the access gates for use in obtaining access to the Facilities for security patrols and in emergency situations. The City and its designated representatives shall have the right to enter upon the Designated Premises for the purpose of inspection of the Facilities.

5.06 **Historic Preservation.** Concessionaire shall not remove or disturb, or cause or permit to be removed or disturbed, any historical, archaeological, architectural or other cultural artifacts, relics, remains, or objects of antiquity on or from the Designated Premises. In the event such items are discovered on the Designated Premises, Concessionaire shall immediately notify the City and protect the site and the material from further disturbance until the City gives clearance to proceed, which clearance shall not be unreasonably withheld or delayed. If such discovery materially impairs Concessionaire's intended use of the Facilities, Rent payments shall be suspended until the City gives clearance to proceed under this Section 5.06.

5.07 Operation and Use Restrictions for the Facilities.

(a) Concessionaire shall, during the Agreement Term, manage and operate the Facilities in a first class manner consistent with industry standards for the operation of similar types of first class facilities.

(b) Concessionaire shall operate the Facilities to be open to the public as determined by Concessionaire and posted/advertised on-site based upon the season and time of year. Provided, that said hours of operation shall be consistent with and subordinate to any hours of operation for Lake Tye Park that are established by applicable City regulations. Lighting of the Facilities (indoor and exterior landscaping and security only) is permissible after dark to the extent allowed under applicable regulations. Lighting of the towers, cables and lake obstacles is prohibited unless required by applicable City regulations.

(1) Notwithstanding the provisions of this subsection, Concessionaire may from time to time utilize the Building and any terraces and deck areas immediately surrounding the Building after dusk for the purpose of hosting events. Provided, that nothing herein shall be construed as authorizing the operation of the cable park/wakeboard facilities, including without limitation the associated towers, cables and lake obstacles, after dusk.

(c) Concessionaire shall have the right to make rules and regulations controlling the use of the Designated Premises, not inconsistent with this Agreement and applicable City, State and federal rules and regulations. Such rules and regulations shall include, but are not limited to, excluding those deemed at risk of injury, trespassers, admission policies and others.

(d) No alcoholic beverages shall be sold, served, or stored (and no alcoholic beverages may be given away) on the Designated Premises at any time without a Special Use Permit or other applicable approval from the City.

(e) Concessionaire shall maintain the Facilities, the Building, structures, outdoor areas and the grounds surrounding the Buildings and structures on the Designated Premises to the same level and standard of maintenance and landscape as the City requires for Lake Tye Park and the City's other park facilities and grounds.

(f) At no time shall any outdoor storage be permitted on the Designated Premises except for the customary items that are normally stored outside.

5.08 Interruption in Utilities. The City is not during the Agreement Term liable for any interruption whatsoever (unless directly caused by the negligent or wrongful actions of the City) in utility services to the Facilities, and in no event shall any payments required under this Agreement be modified, adjusted, reduced or abated as a result of the interruption of utility services.

5.09 Subletting. Concessionaire may sublet space within the Building comprising the Facilities to sub-tenants to use for the sale of food and beverages, and/or for a retail and/or pro shop with the prior written approval of the City; provided such sublease contains provisions making the sublease expressly subordinate and subject to the provisions of this Agreement. Notwithstanding the foregoing, Concessionaire may let or rent party rooms within the Building on the Premises for birthday parties and similar events. In no case shall the term of any sublease authorized herein extend beyond the Expiration Date, regardless of the method of termination of this Agreement.

Article VI.

Construction and Alterations

6.01. Construction of Facilities.

(a) Concessionaire shall submit the Phase 1 Facilities Plan and a Site Plan for the development of the Designated Premises for the Phase 1 Facilities for review and approval by the City, ~~within fifteen (15) days after the Effective Date.~~ The Site Plan shall be substantially similar to the Concept Plan. The City shall approve or deny the Phase 1 Facilities Plan and the Site Plan within thirty (30) business days following the City's receipt of the respective plan (the "Plan Review Period"). If the City has objections to the Phase 1 Facilities Plan and/or the Site Plan as submitted, the City shall note the such objections in writing and Concessionaire shall cause the Phase 1 Facilities Plan and/or the Site Plan, as the case may be, to be revised to address such objections and re-submit the revised Phase 1 Facilities Plan and/or the Site Plan, as the case may be, to the City for approval subject to the same Plan Review Period. This process shall continue until the City has approved the Phase 1 Facilities Plan and the Site Plan or has determined that the City's objections cannot be addressed, in which case this Agreement shall terminate without further notice. Concessionaire shall obtain approval of the Phase 1 Facilities Plan and the Site Plan by the City prior to the submission of any construction plans for the Facilities. The Phase 1 Facilities Plan and the Site Plan as approved by the City shall be deemed a part of this Agreement without the necessity of further amendment. In no case shall the approval of the Phase 1 Facilities Plan and/or the Site Plan be deemed a modification or amendment of this Agreement. The Facilities Plan and the Site Plan shall be in conformance with this Agreement.

As in the previous paragraph, a similar process shall occur if and when Concessionaire submits its Phase 2 Facilities Plan to the City. The Phase 2 Facilities Plan as approved by the City shall be deemed a part of this Agreement without the necessity of further amendment. In no case shall the approval of the Phase 2 Facilities Plan be deemed a modification or amendment of this Agreement. The Phase 2 Facilities Plan shall be in conformance with this Agreement.

(b) The exterior construction materials for the Facilities shall be subject to approval by the City, which shall not be unreasonably withheld.

6.02 Alterations.

(a) Except as expressly provided in Section 6.02(b) below, Concessionaire shall not make any alterations to the Designated Premises without the prior written consent of the City. If Concessionaire desires to make any alteration to the Designated Premises, Concessionaire shall, prior to commencing same, submit plans and specifications therefore to the City. The City will, within thirty (30) days after receipt of such plans and specifications, promptly review and approve the plans and specifications or note in writing any required changes or corrections that must be made to the plans and specifications. If the City timely objects to the plans and specifications, Concessionaire shall make the required changes or corrections and resubmit the plans and specifications to the City within thirty (30) days after receiving notice of the required corrections or changes. Minor changes in work or materials not affecting the general character of the building project may be made at any time without the City's approval, but a copy of the altered plans and specifications must be furnished to the City. The City's approval of any plans and specifications applies only to the conformity of the plans and specifications to the general architectural plan for the Designated Premises, and the City may not unreasonably withhold approval of plans and specifications. The City's approval does not constitute approval of the architectural or engineering design, and the City, by approving the plans and

specifications, assumes no liability or responsibility for the architectural or engineering design or for any defect in any building or improvement constructed from the plans or specifications, and Concessionaire, to the extent allowed by law, shall indemnify and hold the City harmless from all such liability and responsibility.

(b) Notwithstanding the provisions of Section 6.02(a) above, Concessionaire need not obtain the City's consent to perform (i) repairs necessary to maintain existing structures and improvements in a useful state of repair and operation, provided such repairs do not affect the general quality or character of the Facilities, and (ii) changes and alterations required by an authorized public official with authority or jurisdiction over the buildings or improvements, to comply with legal requirements.

(c) Any buildings, improvements, additions, alterations, and fixtures (except furniture and trade fixtures) constructed, placed, or maintained on any part of the Designated Premises during the Agreement Term shall be considered part of the real property of the Designated Premises and may, at the City's option, become the property of the City and remain on the Designated Premises if the Agreement is terminated for an uncured event of default under this Agreement, except as otherwise provided herein. All equipment associated with the wakeboard cable system and its controls, as well as ramps, jumps and lake features, shall at all times be considered a trade fixture and shall be the property of Concessionaire except as expressly provided in this Agreement. Except as provided in this Section 6.02(c), so long as no Event of Default exists, Concessionaire may, at any time while it occupies the Designated Premises, remove any furniture, machinery, equipment, or other trade fixtures owned or placed by Concessionaire in, under, or on the Designated Premises or acquired by Concessionaire, whether before or during the Agreement Term. Concessionaire shall be responsible for repairing any damage to the Facilities and any buildings or improvements on the Designated Premises resulting from such removal. Any such items not removed upon the termination of this Agreement will become the City's property on that date. The provisions of this subsection (c) shall not apply to the Building, which is governed by subsection (d) below.

(d) Notwithstanding any other provision of this Agreement, the parties expressly agree that ownership of the Building shall be vested exclusively in the City upon construction. The parties further agree that upon the expiration or termination of this Agreement, regardless of the reason and/or means of such termination, Concessionaire shall promptly vacate the Building and transfer the same to the City in good condition, repair and working order, and that Concessionaire shall be entitled to no compensation from the City therefor.

6.03 **Contracting.** In undertaking any construction, alteration or repair under this Agreement, Concessionaire shall comply fully with all applicable laws and regulations, specifically included without limitation any applicable requirements concerning public works bidding and the payment of prevailing wages. Separate from and in addition to any other provision of this Agreement, Concessionaire shall fully indemnify, protect, defend and hold harmless the City from and against any breach or violation of this Section 6.03.

Article VII.

Repairs

7.01 **Triple Net Agreement.** This Agreement shall be deemed and construed to be a "triple net Agreement," and Concessionaire shall pay to the City, net throughout the Agreement Term, the Rent and other payments hereunder free of any costs or expenses associated with the Designated Premises and without abatement, deduction or set off. Under no circumstances or conditions, whether now existing or hereafter arising, or whether or not beyond the contemplation of the

parties, shall the City be expected or required to make any payment of any kind whatsoever or be under any other obligation or liability hereunder in respect of the Designated Premises, except as herein otherwise expressly set forth.

7.02 **Concessionaire to Make Repairs.** Concessionaire, at Concessionaire's own cost and expense, at all times during the Term, agrees to keep and maintain, or cause to be kept and maintained, the Facilities, all buildings and improvements included on the Designated Premises in a good state of cleanliness, appearance and repair, reasonable wear and tear excepted. Concessionaire shall perform such maintenance and repair as necessary to operate the Designated Premises as a first-class facility. Without limiting the generality of the foregoing provisions of this Section 7.02, it is understood that Concessionaire's obligations with respect to the maintenance and repair of the Facilities and the Designated Premises includes all of the components comprising the Facilities, the lake, the repair and replacement of all structural items, including the walls, roof and foundation, lighting, heating, air conditioning, plumbing and other electrical and mechanical equipment, fixtures and systems, and also include all utility repairs in ducts, conduits, pipes and wiring located in, under and above the Designated Premises, and all paving, driveways, sidewalks and parking areas. The City shall have no duty, obligation or liability to make any repairs, replacements, or alterations to the Designated Premises, or any portion thereof, at any time during the term of this Agreement. Without limiting the generality of the foregoing provisions of this Section 7.02, Concessionaire shall: (a) conduct regular inspections of the Facilities for compliance with health and safety standards and building codes and for cleanliness, good order, condition, and repair; (b) buy, clean, and repair all furnishings and equipment in and for the Facilities; (c) periodically paint, redecorate, and refurbish the Facilities and related equipment; (d) hire and maintain a staff to clean and maintain the Facilities; (e) cause all equipment and fixtures in and about the Facilities to be repaired and maintained in good condition, including, but not limited to, furnaces, air conditioners, lights, wiring, plumbing, and other equipment; and (f) contract for required services such as, but not limited to, cleaning and laundry service.

7.03 **Mechanic's Liens.** Concessionaire shall not suffer or permit any mechanics' liens or other liens to be filed against the Designated Premises or against Concessionaire's interest in the Designated Premises. If any such liens shall be recorded against the Designated Premises, Concessionaire shall cause the same to be removed within thirty (30) days after obtaining knowledge thereof; or, in the alternative, if Concessionaire desires in good faith to contest the same, Concessionaire shall be privileged to do so, but in such case Concessionaire shall indemnify and save the City harmless from all liability for damages occasioned thereby and shall, in the event of a judgment of foreclosure on said mechanics' lien, cause the same to be discharged and removed prior to the execution of such judgment. Provided, that nothing herein shall be construed as consenting or otherwise acknowledging that the Designated Premises, as public property, is subject to any such lien under Washington law.

Article VIII.

Casualty

8.01 **Damage to Premises.** If, during the Agreement Term, the Facilities, any other buildings or other improvements located on the Designated Premises are wholly or partially destroyed or damaged by fire, or any other casualty whatsoever (collectively called a "Casualty"), this Agreement shall be subject to cancellation at the option of Concessionaire by written notice of such election to cancel within sixty (60) days after the date of such substantial damage or destruction. Concessionaire shall also have the right to cancel this Agreement if substantially all of the damage was not covered by Concessionaire's insurance policies. Concessionaire shall also have this right to cancel if the Land or Facilities or surrounding property is damaged by casualty and such damage materially interferes with Concessionaire's use of the Land or Facilities unless such damage is capable of being

repaired within ninety (90) days after issuance of a building permit so as to minimize such interference.

If this Agreement is so cancelled, all Rent and other payments paid in advance by Concessionaire, if any, that are not actually earned as of the date of such damage shall be refunded forthwith to Concessionaire.

If this Agreement is not so cancelled, Concessionaire shall proceed, at its sole cost and expense and with due diligence to restore the damaged property to substantially the same condition existing immediately prior to such damage and from and after the date of such damage to the date of completion of the repairs the Rent shall abate. For the purposes of this Article, the Designated Premises shall be deemed substantially damaged if more than twenty-five percent (25%) thereof is rendered unavailable for Concessionaire's intended use and such damage is not reasonably capable of being repaired within ninety (90) days following the date of the casualty.

If Concessionaire does not elect to cancel this Agreement or if at any time prior to or during the Agreement Term not more than twenty-five percent (25%) of the Designated Premises is damaged by fire or other casualty, or if more than twenty-five percent (25%) is so damaged but the same may be fully restored and ready for Concessionaire's occupancy within ninety (90) days following the date of the casualty, or if the Building or other part of the Facilities or Designated Premises is damaged but the same does not materially interfere with Concessionaire's use of the Designated Premises, and if such damage is covered by Concessionaire's insurance policies, then this Agreement shall remain in full force and effect, Concessionaire shall proceed with due diligence to repair and restore the damaged property to substantially the same condition existing immediately prior to such damage, and from and after the date of such damage to the date of completion of said repairs a just proportion of the Rent, according to the extent of the untenability of the Designated Premises, shall abate. Untenability shall be determined by reference to the reasonable usability of the Premises by Concessionaire and not to the extent of actual physical damage

8.02 Payment of Insurance Proceeds. In the event that proceeds of insurance are to be used to repair, replace, restore or reconstruct improvements destroyed by Casualty ("Restoration"), the following provisions shall pertain:

(a) Prior to the commencement of such Restoration, the plans and specifications for the Restoration must be approved by the City (such approval not to be unreasonably withheld or delayed).

(b) If Concessionaire elects not to rebuild and elects instead to cancel this Agreement, Concessionaire shall promptly restore the Designated Premises to a condition substantially similar to the condition existing immediately prior to making this Agreement and surrender the same to the City.

Article IX.

Insurance, Indemnification, Risk of Loss, Waiver and Security

9.01 Required Insurance. Concessionaire shall, at its expense, procure and maintain for the entire Agreement Term insurance against claims for injuries to persons and damage to property which may arise from or in connection with Concessionaire's occupation and use of the Designated Premises.

(a) **Minimum Scope of Insurance.** Concessionaire shall obtain insurance of the types described below:

A. Commercial General Liability insurance shall be written on Insurance

Services Office (ISO) occurrence form CG 00 01 and shall cover liability arising from premises, operations, independent contractors, products-completed operations, stop gap liability, personal injury and advertising injury, and liability assumed under an insured contract. The City shall be named as an insured under such policy using ISO Additional Insured Additional Insured – Designated Person or Organization, or substitute endorsement providing equivalent coverage. The Commercial General Liability Insurance shall be written with no exclusion or policy sub-limit for participant liability. The Commercial General liability insurance shall provide coverage for any watercraft used by the Concessionaire.

B. Property Insurance shall be written on an all risk basis and shall insure against the perils of fire and extended coverage and physical loss or damage including earthquake, theft, vandalism, malicious mischief, collapse, temporary buildings and debris removal.

(b) Minimum Amounts of Insurance. Concessionaire shall maintain the following insurance limits:

A. Commercial General Liability insurance shall be written with limits no less than \$1,000,000 each occurrence, \$2,000,000 general aggregate and \$2,000,000 products-completed operations aggregate limit.

B. Property insurance shall be written covering the full value of Concessionaire's property and improvements with no coinsurance provisions.

(c) Other Insurance Provisions. The insurance policies shall contain, or be endorsed to contain, the following provisions for Commercial General Liability insurance:

A. Concessionaire's insurance coverage shall be primary insurance as respect the City. Any insurance, self-insurance or insurance pool coverage maintained by the City shall be excess of Concessionaire's coverage and shall not contribute with it.

B. The Concessionaire shall purchase and maintain Excess or Umbrella Liability insurance with limits not less than \$10,000,000 per occurrence and annual aggregate. This Excess or Umbrella liability insurance shall apply above, and be at least as broad in coverage scope, as the Concessionaire's Commercial General Liability insurance.

This requirement may be satisfied instead through Concessionaire's Commercial General Liability and Automobile Liability insurance, or any combination thereof.

(d) Acceptability of Insurers. Insurance shall be placed with insurers with a current A.M. Best rating of not less than A:VII.

(e) Verification of Coverage. Prior to commencement of the Agreement Term, Concessionaire shall furnish the City with copies of the policies of insurance or certificates thereof, including without limitation any amendatory endorsements.

(f) Failure to Maintain Coverage. If Concessionaire fails to maintain such insurance, the City may, without prejudice to any other remedy, procure and maintain the same on behalf of Concessionaire. Any such premiums paid by the City shall be deemed additional rent and shall be due on the payment date of the next installment of rent hereunder.

(g) Waiver of Subrogation. The City and Concessionaire hereby mutually release each other from all claims, losses, and liabilities arising from or caused by any hazard covered by property insurance or in connection with the Designated Premises. This release shall apply only to the extent that

such claim, loss or liability is covered by insurance.

(h) No Limitation. Concessionaire's maintenance of insurance as required by this Agreement shall not be construed to limit the liability of Concessionaire as to the coverage provided by such insurance, or otherwise limit the City's recourse to any remedy available at law or in equity.

(i) Notice of Cancellation. The Concessionaire shall provide the City and all Additional Insureds for this work with written notice of any policy cancellation, within two business days of their receipt of such notice.

9.02 **Contractor's Insurance**. Without limiting any of the other obligations or liabilities of Concessionaire, Concessionaire shall require its contractors and subtenants, at the contractors' or subtenants' expense, to maintain during the portion of the Agreement Term during which they occupy or otherwise are conducting activities on the Designated Premises, the required insurance including the certificate and policy conditions as stated herein. For the construction of buildings, docks and all structures on or above the water the contractors or sub-contractors of the Concessionaire shall purchase builders risk insurance in lieu of property insurance. The Builders Risk insurance shall cover the interests of the Concessionaire, its Contractor, Subcontractors, and Sub-subcontractors in the work. Builders Risk insurance shall be on a all-risk policy form and shall insure against the perils of fire and extended coverage and physical loss or damage including earthquake, theft, vandalism, malicious mischief, collapse, temporary buildings and debris removal. The Builders Risk insurance shall be maintained until final acceptance of the work by the Concessionaire.

9.03 **Indemnification**.

(a) Generally. Concessionaire shall protect, defend, indemnify and hold the City, its officers, officials and employees harmless from and against any and all claims, losses, suits or damages arising out of (i) Concessionaire's breach of any of the provisions of this Agreement, (ii) Concessionaire's use or occupation of the Designated Premises and the Land, (iii) the conduct of Concessionaire's business, or (iv) any activity, work or thing done, permitted, or suffered by Concessionaire in or about the Designated Premises and the Land. The City shall hold Concessionaire harmless from and against any and all damages arising out of any damage to any persons or property occurring in, on or about the Designated Premises or the Land resulting from the negligent acts or omissions of City or its authorized representatives.

(b) Concurrent Negligence of City and Concessionaire. Notwithstanding subsection (a) above, in the event of concurrent negligence of Concessionaire, or its authorized representatives, on the one hand, and that of City, or its authorized representatives, on the other hand, which concurrent negligence results in damage to any persons or property occurring in, on or about the Designated Premises or the Land, either party's obligation to indemnify the other party as set forth in subsection (a) shall be limited to the extent of the negligence of the indemnifying party, or its authorized representatives, including the indemnifying party's proportional share of costs and attorneys' fees incurred in connection with any claims, actions or proceedings brought with respect to such damage.

(c) Waiver of Worker's Compensation Immunity. The indemnification obligations contained in this Section shall not be limited by any worker's compensation, benefit or disability laws, and each indemnifying party hereby waives any immunity that said indemnifying party may have under the Industrial Insurance Act, Title 51 RCW and similar worker's compensation, benefit or disability laws.

(d) Provisions Specifically Negotiated. THE CITY AND CONCESSIONAIRE ACKNOWLEDGE BY THEIR EXECUTION OF THIS AGREEMENT THAT EACH OF THE INDEMNIFICATION PROVISIONS OF THIS AGREEMENT (SPECIFICALLY INCLUDING BUT NOT LIMITED THOSE RELATING TO WORKER'S COMPENSATION BENEFITS AND LAWS)

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WERE SPECIFICALLY NEGOTIATED AND AGREED TO BY THE CITY AND CONCESSIONAIRE.

(e) Exemption of City from Liability. The City shall not be liable for injury to Concessionaire's business or loss of income there from or for damage which may be sustained by the person, goods, wares, merchandise or property of Concessionaire, its authorized representatives, or any other person in or about the Designated Premises, caused by or resulting from fire, steam, electricity, gas, water or rain, which may leak or flow from or into any part of the Designated Premises, or from the breakage, leakage, obstruction or other defects of the pipes, sprinklers, wires, appliances, plumbing, air conditioning or lighting fixtures of the same, whether the said damage or injury resulting from conditions arising upon the Designated Premises or upon other portions of the Building or the Land unless such injury or damage is caused by the gross negligence or intentional acts of the City or its authorized representatives.

(f) Survivability. The provisions of this section shall survive the expiration or termination of this Agreement with respect to damages arising from acts, omissions or events occurring during the Agreement Term.

9.04 Limitation of Individual Liability. Concessionaire agrees that no officer, official or employee of the City will be personally liable for any obligation of the City hereunder, and that Concessionaire must look solely to the interest of the City in its corporate capacity for the enforcement of any claims arising hereunder.

9.05 Risk of Loss. Concessionaire exclusively assumes all risk of loss in storing, using or operating any personal property upon the Designated Premises or the Land, and the City shall have no responsibility whatsoever for the safety, protection, integrity or preservation thereof.

9.06 Security. Within ten (10) days of the Effective Day, Concessionaire shall post and maintain for the duration of the Agreement Term a bond, cash deposit or other form of security acceptable to the City in the amount of not less than \$100,000. The security is to guarantee the removal of equipment and all improvements installed or constructed upon the Designated Premises by Concessionaire in the event that Concessionaire fails to remove the same within the deadlines established by this Agreement. If a bond is used to satisfy this requirement, the Surety shall be licensed to conduct business in the State of Washington, are "A" rated or better by AM Best, and are named in the current list of "Surety Companies Acceptable in Federal Bonds" as published in the Federal Register by the Audit Staff Bureau of Accounts, U.S. Treasury Department. Bonds may be written on an annual basis, but if not renewed then another form of security must be posted or the Concessionaire will be considered in default of this Agreement.

9.07 Waiver. Concessionaire shall require each customer, invitee, user or other person authorized to use the Facilities to execute a written liability waiver in a form approved by the City. Said waiver shall, to the fullest extent allowed by law, include the signatory's waiver of liability as against the City, its officials and employees, for any injury, damage, loss, or harm resulting from or otherwise arising in any manner from the signatory's use of the Facilities and entry upon the Designated Premises for such purpose.

Article X.

Assignment and Subletting

10.01 Consent of the City Required. Except as provided in Section 5.09, above, neither Concessionaire nor its legal representatives or successors in interest shall, by operation of law or otherwise, assign or otherwise transfer this Agreement or any part hereof, or the interest of Concessionaire under this Agreement, or in any sublease or the rent there under without obtaining

the prior written consent of the City, which may be given or withheld in the sole discretion of the City. An assignment of this Agreement shall be deemed to have occurred if in a single transaction or in a series of related transactions more than fifty percent (50%) of the ownership interests in Concessionaire (whether stock, partnership interest or otherwise) is transferred, diluted, reduced, or otherwise affected with the result that the present holder or owners of Concessionaire have less than a fifty percent (50%) interest in Concessionaire.

10.02 **Assignments Void.** Any attempted assignment or subletting by Concessionaire in violation of the provisions of Section 5.09 or this Article X shall be void and shall constitute a material breach of this Agreement. In no event shall any assignment, subletting or transfer, whether or not with the City's consent, relieve Concessionaire of its primary liability under this Agreement for the entire term hereof, and Concessionaire shall in no way be released from the full and complete performance of all the terms hereof.

10.03 **Obligations to Remain in Effect.** If the City expressly consents to an assignment or subletting, Concessionaire and any guarantor of Concessionaire's obligations under this Agreement shall at all times remain fully responsible and liable for the payment of the rentals herein specified and for compliance with all of the other obligations under this Agreement (even if future assignments and sublettings occur subsequent to the assignment or subletting by Concessionaire).

10.04 **Mortgage of Interest.** Concessionaire may not mortgage the interest granted by this Agreement without the prior written consent of the City, but no such encumbrance shall constitute a lien on the fee title to the Designated Premises, and the indebtedness secured thereby shall at all times be and remain inferior and subordinate to all the conditions, covenants and obligations of this Agreement and to all of the rights of the City hereunder.

10.05 **Asset-Based Lending.** Concessionaire shall have the right, at any time, to encumber all or any part of its interest in the inventory or trade fixtures on the Designated Premises with a lien to secure financing, and the City agrees to execute, subject to other provisions of this Agreement, such waiver, subordination, or other agreements as any such asset-based lender may reasonably request in connection with such financing. Concessionaire agrees that any such City waiver shall include a provision reasonably acceptable to the City to the effect that (i) such asset based lender shall have the right to remove such financed items from the Designated Premises only during the Agreement Term and for a period of sixty (60) days after the City has given written notice to such lender that the Agreement has been terminated, for any reason; (ii) if such lender undertakes such removal, such lender shall be obligated to repair, at such lender's expense, any damage to the Designated Premises or the improvements thereon caused by the removal of any such financed items; and (iii) if such lender fails to remove such financed items during the Agreement Term, or within sixty (60) days after receiving written notice from the City of the termination of this Agreement, such financed items shall be deemed to have been abandoned by such lender to the City. Nothing herein shall be construed as authorizing any such lender to operate the Facilities without the City's advance written consent, which may be withheld for any reason at the City's sole discretion.

10.06 **Right of the City.** All mortgages, deeds of trust or other instruments (the "Mortgages") whereby Concessionaire mortgages the interest of Concessionaire created hereby or any improvements on the Designated Premises, or encumbers inventory or trade fixtures, shall contain provisions, (i) requiring the lienholder to give the City not less than fifteen (15) days written notice prior to accelerating the debt of Concessionaire to such Mortgages and/or initiating foreclosure proceedings under said Mortgages, and (ii) allowing the City during such fifteen (15) day notice period to cure. Concessionaire's default and prevent said acceleration and/or foreclosure proceedings, and thereafter at the City's option to assume Concessionaire's position under said mortgages.

10.07 **Assignment by the City.** Notwithstanding anything contained in this Agreement to the contrary, the City shall have an absolute, unequivocal right to assign or transfer its interest in this Agreement, whether as collateral or absolutely, to any party whatsoever whether or not such party is related to the City, and Concessionaire covenants and agrees that this Agreement shall remain in full force and unaffected by such transfer or assignment. In the event of the transfer or assignment by the City of its interest in this Agreement to any party expressly assuming the City's obligations under this Agreement, the City shall thereby be released from any further obligations hereunder, and Concessionaire agrees to look solely to such successor in interest of the City for the performance of such obligations. Any security given by Concessionaire to secure performance of Concessionaire's obligations hereunder may be assigned and transferred by the City to such successor in interest and the City shall thereby be discharged of any further obligations relating thereto.

Article XI.

Default and Remedies

11.01 **Default by Concessionaire.** The occurrence of any one or more of the following events shall constitute an Event of Default (herein so called) of Concessionaire under this Agreement:

(a) if Concessionaire fails to pay Rent or any other amount payable by Concessionaire hereunder as and when same becomes due and such failure shall continue for more than ten (10) days after the City gives Concessionaire notice of past due rent;

(b) if Concessionaire attempts to make an unpermitted assignment or subletting of this Agreement;

(c) if Concessionaire fails to maintain in force all policies of insurance required by this Agreement and such failure shall continue for more than twenty (20) days after the City gives Concessionaire notice of such failure;

(d) if any petition is filed by or against Concessionaire or any guarantor of this Agreement under any present or future section or chapter of the Bankruptcy Code, or under any similar law or statute of the United States or any state thereof (which, in the case of an involuntary proceeding, is not permanently discharged, dismissed, stayed, or vacated, as the case may be, within ninety (90) days of commencement), or if any order for relief shall be entered against Concessionaire or any guarantor of this Agreement in any such proceedings;

(e) if Concessionaire becomes insolvent or makes a transfer in fraud of creditors or makes an assignment for the benefit of creditors;

(f) if a receiver, custodian, or trustee is appointed for the Facilities or for all or substantially all of the assets of Concessionaire or of any guarantor of this Agreement, which appointment is not vacated within ninety (90) days following the date of such appointment;

(g) if Concessionaire fails to perform or observe any provision of this Agreement and such failure shall continue for more than thirty (30) days after the City gives Concessionaire notice of such failure, or, if such failure cannot be corrected within such thirty (30) day period, if Concessionaire does not commence to correct such default within said thirty (30) day period and thereafter diligently prosecute the correction of same to completion within ninety (90) days after notice is sent by the City;

(h) if Concessionaire fails to pay any Impositions;

(i) if a final judgment for the payment of money in any material amount in excess of One Million Dollars (\$1,000,000.00) and which is not covered by any insurance insuring the interest of Concessionaire shall be rendered against Concessionaire, and within sixty (60) days after the entry thereof such judgment shall not have been discharged or execution thereof stayed pending appeal or if within sixty (60) days after the expiration of such stay, such judgment shall not have been discharged; or

(j) following commencement of use and operation of the Designated Premises, abandon the Designated Premises (failure to occupy and operate the Designated Premises for sixty (60) consecutive days during the period described in Section 5.07(b), for reasons other than because of adverse weather conditions, natural disaster, acts of war or terrorism or other force majeure reasons, shall be deemed an abandonment).

- 11.02 **Default by City.** An Event of Default by City shall occur under this Agreement when, following commencement of use and operation of the Designated Premises, Concessionaire desires but is unable to occupy and operate the Designated Premises for fifteen (15) consecutive days from written notice to City, where the cause of the default is the wrongful act of City.

11.03 **Dispute Resolution.** If a dispute arises with respect to this Agreement, the parties to the dispute shall first attempt to resolve it through direct discussions in the spirit of mutual cooperation. If the parties' attempts to resolve their disagreements through negotiation fail, the parties may, in their mutual discretion, submit the dispute for mediation by a mutually acceptable third-party. If neither a negotiated settlement nor mediated resolution is obtained, the parties may pursue any available legal or equitable remedy; provided, however, that this Article shall not preclude either party from exercising any remedy available to them under this Agreement.

11.04 **Additional Remedies.**

(a) Upon the occurrence of any Event of Default by Concessionaire, the City shall have the right, at the City's option, to elect to do any one or more of the following without further notice or demand to Concessionaire:

(i) Bring an action for breach of the Agreement in the court having jurisdiction over such matters. The City cannot claim lost rent, future rent, leasing commissions or tenant improvements as compensable damages.

(ii) Seek termination of this Agreement, in which event City shall provide ninety (90) days notice to Concessionaire to shall immediately surrender the Designated Premises to the City, and if Concessionaire fails to so surrender in ninety-days (90) or less, the City shall have the right, without notice and without resorting to additional legal process, enter upon and take possession of the Designated Premises, and to expel or remove Concessionaire and its property without being liable for prosecution or any claim for damages.

(b) Upon the occurrence of any Event of Default by the City, Concessionaire shall have the right, at Concessionaire's option, after fifteen (15) days' notice and an opportunity to cure, to elect to

do any one or more of the following:

- (i) bring an action for breach of the Agreement in the court having jurisdiction over such matters. Concessionaire may seek to specifically enforce this Agreement, or to seek from the City recovery of all actual damages caused by the default.
- (ii) terminate this Agreement, in which event Concessionaire shall immediately surrender the Designated Premises to City; or
- (iii) all other rights and remedies provided at law or in equity.

11.05 Nondefaulting Party's Right to Cure.

(a) City's Right to Cure. If Concessionaire defaults in the observances or performance of any of Concessionaire's covenants, agreements or obligations hereunder, then the City may (but need not) and without limiting any other remedies which it may have by reason of such default, upon fifteen (15) days' notice to Concessionaire, cure such default, charge the costs thereof to Concessionaire, and Concessionaire shall pay the same as additional Rent forthwith upon demand.

(b) Concessionaire's Right to Cure. If the City defaults in the observances and performances of any of the City's covenants, agreements or obligations hereunder, then Concessionaire may (but need not) and without limiting any other remedies which it may have by reason of such default, upon ten (10) days' notice to the City, cure such default, and bring an action against the City for recovery of such amounts. In the case of an emergency requiring immediate action to protect persons or property from significant injury, or if Concessionaire is denied access or utilities for more than 24 consecutive hours, then Concessionaire shall have the right to cure such default on telephone notice to the City.

11.06 No Acceptance of Surrender. No agreement to accept a surrender of the Designated Premises and no act or omission by the City or the City's agents during the Agreement Term shall constitute an acceptance or surrender of the Designated Premises unless made in writing and signed by the City. No reentry or taking possession of the Designated Premises by the City shall constitute an election by the City to terminate this Agreement unless a written notice of such intention is given to Concessionaire.

11.07 No Waiver. No provision of this Agreement shall be deemed to have been waived by the City unless such waiver is in writing and signed by the City. The City's acceptance of Rent following an Event of Default hereunder shall not be construed as a waiver of such Event of Default. No custom or practice which may occur or develop between the parties in connection with this Agreement shall be construed to waive or lessen the City's right to insist upon strict performance of the provisions of this Agreement, without a written notice thereof to Concessionaire from the City.

11.08 Rights Cumulative. The rights granted to the parties in this Article shall be cumulative of every other right or remedy provided in this Agreement or which a party may otherwise have at law or in equity or by statute, and the exercise of one or more rights or remedies shall not prejudice or impair the concurrent or subsequent exercise of other rights or remedies or constitute a forfeiture or waiver of Rent or damages accruing to a party by reason of any Event of Default under this Agreement. The non-prevailing party agrees to pay to the prevailing party all costs and expenses incurred in the enforcement of this Agreement, including all attorneys' fees incurred in connection with the collection of any sums due hereunder or the enforcement of any right or remedy.

Article XII.

Warranties

12.01 **The City's Title.** The City hereby represents and warrants that it owns the Land, subject to all covenants, conditions, dedications, restrictions, Agreements, easements, and other matters of record.

12.02 **Quiet Enjoyment.** The City covenants and agrees that Concessionaire, on paying the Rent and other charges herein provided for and observing and keeping the covenants, conditions, and terms of this Agreement on Concessionaire's part to be kept or performed, shall lawfully and quietly hold, occupy, and enjoy the Designated Premises during the term of this Agreement without hindrance of the City.

12.03 **Concessionaire Financing.** Concessionaire warrants and represents that prior to the Effective Date it secured sufficient financial resources to pay for the construction and completion of the Facilities. Concessionaire has provided to the City a letter from its primary lender regarding the financing of the cost of construction of the Facilities, a copy of which is attached hereto as Exhibit "E." Concessionaire understands and acknowledges that the City's agreement to execute this Agreement has been in reliance on the representation made in this Section 12.03 and the representation in Exhibit "E" hereto.

Article XIII.

Eminent Domain

13.01 **Total Taking.** If all or substantially all of the Designated Premises is taken under power of eminent domain (which term as used in this Agreement shall include any conveyance in avoidance or settlement of condemnation or eminent domain proceedings) or other similar proceeding, then this Agreement shall terminate as of the date of taking of possession by the condemning authority.

13.02 **Partial Taking.** The City and Concessionaire agree that if less than all or substantially all of the Designated Premises is taken under power of eminent domain or other similar proceeding, then this Agreement shall nevertheless continue in effect as to the remainder of the Designated Premises; provided, however, that if in the reasonable opinion of Concessionaire that any of the Designated Premises taken under the power of eminent domain makes it economically unsound to attempt to use the remainder thereof for the conduct of Concessionaire's business thereon, then this Agreement shall terminate upon possession of such portion of the Designated Premises by the condemning authority.

13.03 **Award.** All sums awarded or agreed upon between the City and the condemning authority for the taking of the interest of the City or Concessionaire in the Designated Premises, whether as damages or as compensation, will be the property of the City. All sums awarded or agreed upon between Concessionaire and the condemning authority for the taking of the interest of Concessionaire will be the property of the Concessionaire. Concessionaire shall be entitled to all condemnation award which are attributable to or made on account of any interest, loss or expense of Concessionaire, including the value of this Agreement, Concessionaire's moving expenses, and the unamortized value of the Designated Premises and the improvements made by Concessionaire upon the Designated Premises, which are not capable of being moved by Concessionaire.

Article XIV.

The City's Right of Access

The City (and its agents, employees and contractors) shall have the right to enter the Designated Premise at any time in order (a) to inspect the Designated Premises and the Facilities, and (b) to confirm that Concessionaire is complying with all of Concessionaire's covenants and obligations under this Agreement. Provided, that the City shall provide 24 hours' notice to Concessionaire before entering the Building without Concessionaire's verbal permission. The City shall not be liable to Concessionaire for the exercise of the City's rights under this Article, and Concessionaire hereby waives any claims for damages for any injury or inconvenience to or interference with Concessionaire's business, any loss of occupancy or quiet enjoyment of the Designated Premises, and any other loss occasioned thereby. The 24 hours' notice requirement set forth above shall not apply in the event of an emergency or with respect to the City's lawful exercise of its police powers.

Article XV.

Advertising

In connection with any advertising or promotional material relative to the Facilities, Concessionaire shall use reasonable good faith efforts to include therein the use of the words "Monroe, Washington". In connection therewith, the City does hereby grant to Concessionaire the personal and nontransferable right and license to use the service mark of the City of Monroe in the development and promotion of the Facilities. The right granted to Concessionaire herein shall not be assigned, transferred or otherwise conveyed without the City's prior written consent. Concessionaire acknowledges the City's exclusive right, title, and interest in and to the service mark and will not at any time do or cause to be done any act or thing contesting or in any way impairing or tending to impair any part of such right, title, and interest. In connection with the use of the service mark, Concessionaire shall not in any manner represent that it has any ownership in the service mark or registration thereof, and Concessionaire acknowledges that use of the service mark shall not create in Concessionaire's favor any right, title, or interest in or to the service mark, but all uses of the service mark by Concessionaire shall inure to the benefit of the City. Upon termination of this Agreement in any manner provided herein, Concessionaire will cease and desist from all use of the service mark in any way (and will at the City's request deliver up to the City, or its duly authorized representatives, all material and papers upon which the service mark appears), and Concessionaire shall at no time adopt or use, without the City's prior written consent, any word or mark which is likely to be similar to or confusing with the service mark.

Article XVI.

Miscellaneous

16.01 **Estoppel Certificate.** Upon the written request of either party to this Agreement, the other shall execute, acknowledge and deliver to the requesting party, a written statement certifying: (i) that none of the terms or provisions of this Agreement have been changed (or if they have been changed, stating how they have been changed); (ii) that this Agreement has not been canceled or terminated; (iii) the last date of payment of Minimum Rent, Percentage Rent and other charges, and the time period covered by such payment; and (iv) that the other party is not in default under this Agreement (or, if the other party is claimed to be in default, stating why). Such party shall deliver such statement to the party requesting the same within ten (10) days after the requesting party's request.

16.02 **Independent Covenant.** Concessionaire shall not for any reason withhold or

reduce Concessionaire's required payments of Rent and other charges provided in this Agreement, it being agreed that the obligations of the City under this Agreement are independent of Concessionaire's obligations except as may be otherwise expressly provided. The immediately preceding sentence shall not be deemed to deny Concessionaire the ability of pursuing all rights granted it under this Agreement or at law; however, at the direction of the City, Concessionaire's claims in this regard shall be litigated in proceedings separate from any litigation involving claims for Rent or other claims by the City against Concessionaire (i.e., each party may proceed to a separate judgment without consolidation, counterclaim or offset as to the claims asserted by the other party).

16.03 **The City's Liability.** Anything contained in this Agreement to the contrary notwithstanding, Concessionaire agrees that Concessionaire shall look solely to the estate and property of the City for the collection of any judgment or other judicial process requiring the payment of money by the City for any default or breach by the City under this Agreement. No officers, agents and employees shall be subject to levy, execution or other judicial process for the satisfaction of Concessionaire's claim. Notwithstanding the foregoing, nothing in this Agreement shall be construed as waiving the City's immunity from suit or liability pursuant to the doctrine of sovereign immunity.

16.04 **No Joint Venture.** The relationship between the City and Concessionaire at all times shall remain solely that of a landowner and concessionaire and shall not be deemed or construed as a partnership or joint venture.

16.05 **Force Majeure.** Whenever a period of time is herein prescribed for action to be taken by the City or Concessionaire (other than payment by Concessionaire of amounts due under this Agreement), the City or Concessionaire shall not be liable or responsible for, and there shall be excluded from the computation for any such period of time, any delays due to force majeure, which term shall include strikes, riots, acts of God, shortages of labor or materials, war, third-party lawsuits, governmental approvals, laws, regulations, or restrictions, or any other cause of any kind whatsoever which is beyond the reasonable control of the City or Concessionaire.

16.06 **Notice.** All rents or other sums, notices, demands, or requests from one party to another shall be personally delivered or sent by United States mail certified, or registered, return receipt requested, postage prepaid, to the addresses stated in this Section.

If to the City:

City of Monroe, Washington
Attn: Mayor
Monroe City Hall
806 W. Main Street
Monroe, Washington 98272
Telephone: (360) 794-7400
Facsimile: (360) 794-4007

With a copy to:
(which will not constitute notice)

Ogden Murphy Wallace, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101

Telephone: (206) 447-7000
Facsimile: (206) 447-0215

If to Concessionaire:

H30, LLC
Attn: Brad Smith, Member
25877 SE 22nd Place
Sammamish, WA 98075
Telephone: (206) 227-5178

With copy to:

Michael S. Essig
O'Brien Barton Joe & Hopkins, PLLP
175 NE Gilman Blvd, Suite 100
Issaquah, WA 98027
Telephone: (425) 391.7427
Facsimile: (425) 391-7489

Notice shall be deemed to have been given (i) if by hand delivery, at the time of delivery, or (ii) if mailed, seventy-two (72) hours after the deposit of same in any United States mail post office box in the state to which the notice is addressed or ninety-six (96) hours after the deposit in any post office in the state other than the state to which the notice is addressed, postage paid, addressed as set forth above. The addresses and addressees for the purpose of this section may be changed by giving notice of such change in the manner herein provided for giving notice. Unless and until such written notice is received the last addresses and addressee stated by written notice, or provided herein if no written notice of change has been sent or received, shall be deemed to continue in effect for all purposes hereunder.

16.07 **Successors and Assigns.** This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns where permitted by this Agreement. The undersigned officers and/or agents of the parties hereto are the properly authorized officials and have the necessary authority to execute this Agreement on behalf of the parties hereto, and each party hereby certifies to the other that any necessary resolutions or other act extending such authority have been duly passed and are now in full force and effect.

16.08 **Brokerage Fee.** Concessionaire and the City each represent and warrant to the other that it has not entered into any agreement with, or otherwise had any dealings with, any broker or agent in connection with the negotiation or execution of this Agreement which could form the basis of any claim by any such broker or agent for a brokerage fee or commission, finder's fee, or any other compensation of any kind or nature in connection herewith, and each party shall, and hereby agrees, to the extent allowed by law, to indemnify and hold the other harmless from all costs (including, but not limited to, court costs, investigation costs, and attorneys' fees), expenses or liability for commissions or other compensation claimed by any broker or agent with respect to this Agreement which arise out of any agreement or dealings, or alleged agreement or dealings, between the indemnify party and any such agent or broker. This provision shall survive the expiration or earlier termination of this Agreement.

16.09 **Time of Essence.** Time is of the essence of this Agreement.

16.10 **Governing Law; Venue.** This Agreement shall be construed under and in accordance with the laws of the State of Washington. The exclusive venue for any action arising hereunder shall be in the courts of Snohomish County, Washington. The parties hereby submit to the personal and subject matter jurisdiction of said courts.

16.11 **Severability.** In case of any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision hereof and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.

16.12 **Amendment.** No amendment, modification or alteration of the terms hereof shall be binding unless the same be in writing, dated subsequent to the date hereof and duly executed by the parties hereto.

16.13 **Integration.** This Agreement constitutes the sole and only agreement of the parties hereto and supersedes any prior understandings or written or oral agreements between the parties respecting the within subject matter.

16.14 **No Waiver.** No waiver by the City of any default or breach of any covenant, condition, or stipulation herein contained shall be treated as a waiver of any subsequent default or breach of the same or any other covenant, conditions, or stipulation hereof.

16.15 **Use Clause.** Concessionaire agrees not to use the Designated Premises or any building or improvement situated upon said Designated Premises, or any part thereof for any use or purpose in violation of any applicable law, regulation, or ordinance of the United States, the State of Washington or the City of Monroe, Washington, or other lawful authority having jurisdiction over the Designated Premises.

16.16 **Rights and Remedies Cumulative.** The rights and remedies provided by this Agreement are cumulative and the use of any one right or remedy by either party shall not preclude or waive its right to use any other remedies. Said rights and remedies are given in addition to any other rights the parties may have by law statute, ordinance, or otherwise.

16.17 **Attorney's Fees.** In the event the City or Concessionaire breaches any of the terms of this Agreement whereby the party not in default employs attorneys to protect or enforce its rights hereunder and prevails, then the defaulting party agrees to pay the other party reasonable attorney fees so incurred by such other party. Concessionaire shall reimburse the City on demand for all reasonable fees and expenses (including attorneys' fees) which it incurs in connection with the seeking and obtaining of permits and approvals required of the City hereunder. The City or its attorney shall advise Concessionaire in advance of incurring such fees or expenses, of the approximate amount of said fees or expenses and shall obtain Concessionaire's approval for said expenditures before incurring same.

16.18 **Further Documents.** The City agrees that it will from time to time and at any reasonable time execute and deliver to Concessionaire such other and further instruments and assurances as Concessionaire may reasonably request approving, ratifying, and confirming this Agreement and the interest created hereby and certifying that the same is in full force and effect and that no default on the part of Concessionaire exists, or if any such default does exist, the City shall specify in said certificate each such default. Without limiting the generality of the foregoing, The City acknowledges that Concessionaire intends to obtain third party financing with

respect to the construction, operation and maintenance of improvements on the Designated Premises and, in connection therewith, the City agrees with Concessionaire to consider in good faith amendments to, or modifications of, this Agreement as may reasonably be required in order to facilitate all such third party financing.

16.19 **Exhibits and Recitals.** The exhibits and recitals to this Agreement are incorporated herein. Specifically, the following Exhibits are or will be attached hereto:

- Exhibit A (legal description of Land)
- Exhibit B (Concept Plan)
- Exhibit C (depiction of Designated Premises)
- Exhibit D (financial performance projections)
- Exhibit E (lender financing letter)

16.20 **Concessionaire Representations.** Concessionaire represents and covenants that: (i) Concessionaire is a duly organized and validly existing limited liability company under the laws of the State of Washington and has the power and authority to transact the business in which it is now engaged or proposed to engage; (ii) Concessionaire has the power and authority to execute, deliver and carry out the terms and provisions of this Agreement and all other instruments to be executed and delivered by the Concessionaire in connection with its obligations hereunder; (iii) the execution, delivery, and performance by the Concessionaire of this Agreement have been duly authorized by all requisite action by the Concessionaire, and this Agreement is a valid and binding obligation of the Concessionaire enforceable in accordance with its respective terms, except as may be affected by applicable bankruptcy or insolvency laws affecting creditors' rights generally; (iv) the Concessionaire is not in default in the performance, observance or fulfillment of any of the obligations, covenants or conditions contained in any evidence of indebtedness of the Concessionaire or contained in any instrument under or pursuant to which any such evidence of indebtedness has been issued or made and delivered; (v) neither the execution and delivery of this Agreement, nor the consummation of the transactions herein contemplated, will conflict with or result in a breach of or default under (1) any terms, conditions or provisions of any agreement or instrument (A) to which the Concessionaire is now a party or is otherwise bound, or (B) to which any of its properties or other assets is subject; (2) any order or decree of any court or governmental instrumentality; or (3) any arbitration award, franchise, or permit; and (vi) the Concessionaire is not a party to any litigation or threatened litigation or otherwise bound by any agreement or instrument or subject to any other restriction or any judgment, order, writ, injunction, decree, award, rule or regulation which could reasonably be expected to materially and adversely affect the Concessionaire's ability to perform its obligations under this Agreement.

16.21 **City Use of Designated Premises.** For the purpose of hosting, sponsoring and/or conducting festivals, races, motorized wakeboard competitions and similar events, the City shall have the right to exclusively occupy and use the Designated Premises without charge or cost at least twelve (12) days each ~~Agreement calendar~~ ~~Year~~ upon prior reasonable written notice to Concessionaire. However, in the first Agreement Year, the twelve days shall be pro-rated for the number of months remaining in the Agreement Year. Concessionaire shall cease operation of the Facilities during any such period of exclusive use and occupation by the City. ~~For each City request to use the Designated Premises beyond the 12 minimum calendar days allowed pursuant to this section, the City shall provide Concessionaire with at least 90 days advance written notice. As one of the twelve days, the City, at its option, may use the Concessionaire's Facilities~~

including its towers and cable system at no charge, provided said day is between Monday and Thursday. Said use is exclusively for the purpose of allowing only residents of the City of Monroe and the City of Snohomish free access to the Facilities. Facilities shall be staffed by Concessionaire at Concessionaire's sole expense. Accessories, rentals and other equipment of Concessionaire are unavailable for use except by agreement between Concessionaire and intended user of the equipment at Concessionaire's applicable rental rates and terms.—

16.22 **Traffic and Parking Impact Analysis.** Concessionaire, without cost to the City, shall cause a professional traffic engineer to prepare a sealed traffic impact analysis which analyzes the traffic impact of the Facilities on local streets and rights of way, and without cost to the City, to cause a professional traffic engineer to prepare a sealed parking analysis which analyzes the parking demands of the Facilities in Lake Tye Park.

16.23 **Naming Rights.** The name or branding name of the Facilities shall be subject to the prior written approval of the City.

16.24 **Signs.** All signs for the Facilities shall be subject to the prior written approval of the City and shall be in full compliance with all applicable Monroe Municipal Code provisions.

16.25 **No Third-Party Beneficiary.** This Agreement is executed for the exclusive benefit of the signatory parties and their respective successors and assigns. Nothing herein shall be construed as creating any enforceable right, claim or cause of action in or for any third-party.

16.26 **Regulatory Authority Preserved.** Concessionaire acknowledges that the City has executed this Agreement in the City's proprietary capacity as owner of the Land. Nothing herein shall be construed as a waiver, abridgement or limitation of the City of Monroe's regulatory authority, which the City hereby reserves in full. Without limitation of the forgoing, Concessionaire shall be responsible for obtaining any and all applicable permits, licenses and other regulatory approvals necessary to conduct its operations upon the Land and/or to construct, repair or otherwise alter any improvements.

16.27 **No Employment Relationship.** Nothing herein shall be construed as establishing an employment relationship between the City and any employee, agent or contractor of Concessionaire, or between Concessionaire and any employee, agent or contractor of the City.

16.28 **Public Records Disclosure.** Concessionaire expressly acknowledges that the City is an "agency" as defined by Chapter 42.17 RCW, and is fully subject to the provisions governing the disclosure of public records codified at Chapter 42.56 RCW. To the extent required or otherwise authorized by said statutes or other applicable law:

A. Any public records submitted to or generated by the City in connection with this Agreement are potentially subject public to inspection and copying upon request. Concessionaire expressly waives any claim or cause of action against the City arising out of such disclosure.

B. Concessionaire shall fully cooperate with and assist the City with respect to any request for public records received by the City and related to any public records generated, produced, created and/or possessed by Concessionaire and related to this Agreement. Upon written demand by the City, the Concessionaire shall furnish the City with full and complete copies of any such records within five business days. Concessionaire's failure to timely provide such records upon demand shall be deemed a breach of this Agreement. To the extent that the City incurs any monetary penalties, attorneys' fees, and/or any other expenses as a result of such breach, Concessionaire shall fully indemnify and hold

harmless the City.

For purposes of this section, the term “public records” shall have the same meaning as defined by Chapter 42.17 RCW and Chapter 42.56 RCW, as said chapters have been construed by Washington courts.

The provisions of this section shall survive the expiration or termination of this Agreement.

EXECUTED this _____ day of _____, 2012

THE CITY:

CITY OF MONROE

By:
Its_____

STATE OF WASHINGTON)
) ss.
COUNTY OF _____)

On this _____ day of _____, 2012, before me personally appeared _____ to me known to be the _____ of the City of Monroe, Washington, the corporation that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal the day and year first above written.

(Signature)

(Seal or stamp)

(Name legibly printed or stamped)
Notary Public in and for the State of Washington,
residing at _____.
My appointment expires _____

CONCESSIONAIRE:

H30, LLC

STATE OF WASHINGTON)
) ss.
COUNTY OF _____)

On this _____ day of _____ 2012, before me personally appeared _____ to me known to be the _____ of H30, LLC, and executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said _____ for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal the day and year first above written.

(Signature)

(Seal or stamp)

(Name legibly printed or stamped)
Notary Public in and for the State of Washington,
residing at _____.
My appointment expires _____