

STATE OF NORTH CAROLINA  
COUNTY OF NEW HANOVER

AQUARIUM PIER AND OCEAN ACCESS  
AGREEMENT

This AQUARIUM PIER AND OCEAN ACCESS AGREEMENT (“AGREEMENT”) is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2010, by, between and among THE TOWN OF CAROLINA BEACH (herein “TOWN”) a North Carolina Municipal Corporation and CBP3, Inc. a non-profit corporation formed under the laws of the State of North Carolina (herein “CBP3”) both of 1121 N. Lake Park Blvd., Carolina Beach, NC 28428, on the one hand and THE NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES through the NORTH CAROLINA AQUARIUMS DIVISION, 3125 Poplarwood Court, Suite 160, Raleigh, NC 27604 (herein "AQUARIUM"), an agency of the STATE OF NORTH CAROLINA (herein the “STATE”), on the other hand. When referred to herein, unless the context clearly indicates otherwise, the “AQUARIUM” shall include the STATE. The TOWN, CBP3 and the AQUARIUM are herein sometimes collectively referred to as the “PARTIES”;

WITNESSETH:

WHEREAS, CBP3, Inc., has acquired several parcels of land along Carolina Beach Avenue North in the vicinity of the Atlantic Ocean, the ocean beach, the Town’s historic Boardwalk area, and located near the Town’s historic Municipal Marina and associated Yacht Basin; and

WHEREAS, CBP3 purchased the parcels through a loan from a lending institution (herein “LENDER”), which loan is secured by the parcels;

WHEREAS, CBP3 is holding title to said parcels for public purposes as determined by the TOWN; and

WHEREAS, the TOWN has an option to purchase the CBP3 parcels and the TOWN also owns other parcels of land in the same general vicinity; and

WHEREAS, the TOWN has arranged for CBP3 and the TOWN to obtain the parcels for public purposes such as (1) better enabling the AQUARIUM to develop and complete a public ocean fishing pier facility, pier house, ocean water access, vehicular access and adjacent parking and (2) the TOWN developing its proposed Ocean-to-Sound Access Park (herein “PARK”) with ancillary parking, both purposes collectively described herein as the “PROJECT”; and

WHEREAS, the PARTIES now desire to provide for and stipulate the respective rights and responsibilities of each of the PARTIES with regard to the development and completion of the PROJECT; and

WHEREAS, it is within the contemplation of the PARTIES that the STATE will immediately purchase and acquire from CBP3, Inc. by instrument in fee simple the oceanfront lot at #234 Carolina Beach Avenue North in order to secure the location for the pier and landward access area, and the STATE at a later date will accept the donation of or purchase and acquire (if the Aquarium is successful in obtaining grant funds for this purpose) from CBP3 by separate instrument in fee simple the oceanfront lot at #236 Carolina Beach Avenue North for use by the AQUARIUM as adjacent pier parking and to provide public ocean water access; and

WHEREAS, the STATE will acquire and purchase 234 and potentially 236 Carolina Beach Avenue North, each at the price CBP3 paid to acquire them; and

WHEREAS, the TOWN has agreed to release 234 and 236 Carolina Beach Avenue North from the TOWN's option to purchase the same, subject to LENDER and all other required approvals; and

WHEREAS, it is within the contemplation of the PARTIES that the TOWN, or CBP3 or both as needed will enter into a non-exclusive arrangement with the AQUARIUM for the location of parking facilities, utilities, and other improvements on the parcels and on those lots located at 235, 237, 239, 302 and 309 Carolina Beach Avenue North or in the right of way of Carolina Beach Ave. (all parcels and lots referred to above being the "PROPERTY") prior to the start of construction on the pier; and

WHEREAS, in consideration for the TOWN/CBP3 non-exclusive agreement to provide parking facilities, waiving utility connection fees (water and sewer) and impact fees, and making miscellaneous interim improvements on or to serve the pier site, the AQUARIUM shall use funds secured for the purposes set forth herein, for the development, construction, maintenance and operation of the AQUARIUM PIER, which operation shall include the educational exhibits and informational programs developed and conducted by the AQUARIUM; and

WHEREAS, it is the expectation of the PARTIES that the AQUARIUM, with the TOWN's assistance, will seek funding to carry out and complete the design, permitting, engineering, construction, and development of the AQUARIUM PIER on the PROPERTY, and the AQUARIUM will thereafter, subject to necessary approvals and the appropriation and allocation of adequate funds, provide funding necessary to support the operation, management and administration of the AQUARIUM PIER and related programs; and

WHEREAS, the TOWN, with the AQUARIUM's assistance, will seek funding to carry out and complete the PARK.

NOW, THEREFORE, in consideration of the terms and conditions set forth herein, the PARTIES have mutually agreed as follows:

1. Creation and Purpose of the AQUARIUM PIER. The PARTIES do hereby approve the cooperative development, construction, and completion of the AQUARIUM PIER for the purpose of providing public beach access and for the purpose of operating and maintaining access facilities, an ocean fishing pier, a pier house, a snack bar, educational and program facilities, meeting/rental facilities, parking facilities and other improvements, which are shown and described on the preliminary conceptual site plan. Said plan will be subject to revisions and modifications and to state construction policies and procedures as the plans are further developed. The AQUARIUM PIER shall be operated for the benefit of the citizens of the State, under the administration and control of the AQUARIUM. The AQUARIUM is authorized to submit applications for both AQUARIUM PIER construction and program funding from public and private sources on behalf of the PARTIES. The TOWN will assist the AQUARIUM in securing such funding for the AQUARIUM PIER, and the AQUARIUM will assist the TOWN

and CBP3 in securing grants and other funds to reduce CBP3's debt incurred in financing the purchase of 234, 236, 235, 237, 239, 302, and 309 Carolina Beach Avenue North.

2. Sale of Property to the STATE. The AQUARIUM will: 1) apply for a Public Beach and Coastal Waterfront Access Program grant; and 2) seek additional funds to purchase lot #234 Carolina Beach Avenue North for the current appraised value of one million one hundred seventy-two thousand three hundred thirty-five dollars (\$1,172,335) and CBP3, Inc. agrees, subject to LENDER and all required approvals, to sell the property at the appraised value. The PARTIES contemplate a sale commencing as soon as the AQUARIUM has funds in hand.

3. Condition of Property, Future Utility Improvements, Parking. Within 180 days of the conveyance of Lot #234 to the STATE, the TOWN will demolish the current improvements and will create, lease, maintain and operate a temporary oceanfront parking lot at the site until the AQUARIUM Pier at Carolina Beach is constructed. By a separate lease agreement, the STATE will lease the property to the TOWN for one dollar (\$1.00) annually until the AQUARIUM is ready to begin construction on the pier and pierhouse. The TOWN will ensure utility junctions are installed at the Property adequate for both municipal water and sewer service to the pier, pier house and any associated bath house facility, and agrees to waive impact fees and utility connection fees for municipal water and sewer. The PARTIES shall reach a written agreement before completion of construction on a system for parking fee validation or reimbursement to pier event rental clients and employees. The TOWN agrees that lots under its control, specifically the gravel marina lot, #235, #236, #237, #239, #302, and #309, will be available for non-exclusive use by pier event rental clients, customers, pier vendors, and employees in perpetuity. This will provide a minimum of 100 new parking spaces. The PARTIES contemplate that the PROJECT's construction will create paved parking spaces on lot 234 and adjacent lot 236.

4. Time Schedule for PROJECT. It is within the contemplation of the PARTIES that the sale of lot #234 to the STATE will occur in the fourth quarter of 2010 or the first quarter of 2011, conditioned upon approval of the Public Beach Access Grant and approval of the conveyance of 234 Carolina Beach Avenue North to STATE by all appropriate STATE and TOWN officials and the LENDER. Upon the conveyance of lot #234 to the STATE, the AQUARIUM, without unreasonable delay, will begin work on securing financing for the design and construction of the AQUARIUM PIER.

The PARTIES anticipate that construction of the AQUARIUM PIER will be substantially complete and will accommodate general public use on or before December 31, 2015. In the event the AQUARIUM PIER is not substantially complete by December 31, 2015, and provided the AQUARIUM continues to seek necessary funding and work toward the completion of the AQUARIUM PIER, the deadline for completion of the AQUARIUM PIER shall be extended to December 31, 2018 or such later date as the PARTIES may mutually agree to in writing. If the AQUARIUM PIER is not funded by December 31, 2015, the STATE shall convey to the TOWN or CBP3, Inc. an option to purchase 234 Carolina Beach Avenue North, and lot #236 if in State ownership at that time, at the same price the STATE paid for it.

5. Funding, Construction, and Operations. The AQUARIUM shall seek funding for the construction, operation, maintenance and repair of the AQUARIUM PIER. The TOWN shall

assist the AQUARIUM in identifying, applying for, and securing additional funding to enable construction of the AQUARIUM PIER in a timely manner. The construction and operation of the AQUARIUM PIER is subject to the availability of adequate funds to the AQUARIUM. The AQUARIUM and the State Construction Office, a Division of the North Carolina Department of Administration, shall have the authority over and responsibility for the design, planning, engineering and construction of the AQUARIUM PIER. The AQUARIUM PIER may also be subject to inspection and safety requirements of the North Carolina Department of Insurance. The AQUARIUM, in its sole discretion may close 234 and 236 Carolina Beach Avenue North to public use during construction of the AQUARIUM PIER, but shall use reasonable efforts to keep as much of that property as possible open to public access and use. Subject to the approval and appropriation of resources by the STATE for such purposes, the AQUARIUM PIER shall be operated and maintained in a manner consistent with the current operation and maintenance of the North Carolina Aquariums.

6. Interim Operations and Maintenance. The PARTIES desire to continue to operate the 234 and 236 Carolina Beach Avenue North as an unofficial public beach access parking facility in the period between conveyance of the same to the STATE and completion of construction (hereinafter the “Interim Period”). During the Interim Period, subject to the conditions contained in Paragraph 5 herein, the TOWN agrees to operate and maintain the same in a manner consistent with an unofficial public beach access parking facility. The TOWN shall be responsible during the Interim Period for all routine maintenance and upkeep of that portion of the same that remains open for parking and/or public beach access. The TOWN may install parking meters and retain their proceeds to help cover maintenance and upkeep of the parking facility.

7. Liability and Insurance During Interim Period. During the Interim Period, the TOWN shall maintain its present liability policy, shall be liable for torts arising from the negligent or intentional acts or omissions of its agents, contractors or employees with regard to its maintenance and operation of the Property and any Improvements it makes, to the extent allowed by law and subject to any and all defenses. As between the STATE and the TOWN, during the Interim Period the STATE, subject to the terms of this AGREEMENT, shall be primarily liable for the negligent or intentional acts or omissions of its agents, contractors or employees. As to third parties, the State is an immune sovereign and is not ordinarily subject to suit. However, the State has enacted Chapter 143, Article 31, of the North Carolina General Statutes (the “Tort Claims Act”), pursuant to which the State may be liable for the torts of its officers and employees, within the terms of the Tort Claims Act and, accordingly, the State will be primarily liable for any claims within the coverage of the Tort Claims Act. The State shall require its contractors and agents (not including employees of the State) entering onto the Property to procure and maintain: (i) statutory worker’s compensation and employer’s liability insurance; and (ii) commercial general liability coverage with available limits in accordance with current State policy.

8. Consultation and Cooperation. The PARTIES recognize and understand that the AQUARIUM, in its sole and absolute discretion, subject to the terms of this AGREEMENT, has full authority and control over the design, planning, engineering, construction, funding, operation and maintenance of the AQUARIUM PIER. However, the AQUARIUM also recognizes that the

TOWN will play a vital role in the construction and operation of the AQUARIUM PIER. The TOWN may participate in the development of the AQUARIUM PIER by appointing the Mayor and Manager of the TOWN to serve in an advisory capacity to any group formulated by the STATE to help steer the development of the AQUARIUM PIER. Such development group may include among other employees of the State, the Director of the North Carolina Aquariums and the Director of the North Carolina Aquarium at Fort Fisher.

The TOWN and the AQUARIUM will jointly appoint a pier steering committee of officials or citizens of both organizations or agencies to consult and confer from time to time on the progress of the AQUARIUM PIER and problems or joint concerns which develop concerning funding, construction, or completion. This group is strictly advisory and has no policy or rule-making authority. Final decision-making authority on all pier matters remains with officials of the TOWN and AQUARIUM.

The PARTIES hereby establish the pier steering committee to consist of eight (8) members, with four (4) members appointed by the AQUARIUM and four (4) members appointed by the TOWN. The four (4) members appointed by the AQUARIUM shall represent the following interests:

- One (1) member of the NC Aquarium at Fort Fisher Advisory Committee.
- One (1) member of the New Hanover County surfing community.
- One (1) member of the New Hanover County university research community.
- One (1) at-large member.

The four (4) members appointed by the TOWN shall represent the following interests:

- One (1) member of the Town Council.
- One (1) member who is a property owner in the general vicinity of the PROJECT.
- One (1) member who is an avid pier fisherman.
- One (1) at-large member.

The TOWN's Mayor, the Town Manager, the Director of the North Carolina Aquariums, the Director of the North Carolina Aquarium at Fort Fisher, and the Director of the North Carolina Aquarium Society shall all serve as non-voting members of the pier steering committee, and shall provide a support role to the steering committee.

All members of the steering committee shall serve for the duration of the development and construction of the AQUARIUM PIER. The advisory committee shall be disbanded no later than one (1) year following the date construction of the AQUARIUM PIER is completed, at which time the North Carolina Aquarium at Fort Fisher Advisory Committee shall incorporate the AQUARIUM PIER into its scope and mission.

The steering committee appointed by the TOWN and the AQUARIUM shall establish bylaws or procedures, select officers, and determine its meeting schedule upon formation.

9. Commencement of AQUARIUM PIER CONSTRUCTION. With the execution of this AGREEMENT, the PARTIES shall have the following responsibilities:

(a) The STATE is authorized to go upon the Property to perform tests and surveys, to seek permits and approvals, to have architectural and engineering designs and schematics completed, to apply and secure funding for the AQUARIUM PIER, and to generally prepare to improve and to thereafter construct and complete improvements and to provide for the operational programs of the AQUARIUM PIER.

(b) Upon authorization to arrange for and obtain financing, for the AQUARIUM PIER, the STATE will proceed with the design, planning and engineering of same, procure all necessary permits, including, but not limited to, CAMA, zoning, building, stormwater and other applicable permits, and will thereafter construct the AQUARIUM PIER consistent with the schedule set forth in Paragraph 4.

10. Modifications or Changes. This AGREEMENT contains the understanding between the PARTIES, however, the PARTIES recognize that there are many factors unknown at this point. The PARTIES contemplate that changes or modifications may become necessary and the PARTIES agree to negotiate in good faith and to produce such changes or modifications in writing.

11. Governing Law. This AGREEMENT shall be governed by the laws of the State of North Carolina.

12. Binding Effect. This AGREEMENT is binding between the PARTIES and their successors, heirs, and assigns.

13. Construction. Whenever necessary in this AGREEMENT and where the context requires, the singular shall include the plural and the neuter gender shall include the masculine and feminine genders.

14. Interpretation. The use of headings, captions and numbers in this AGREEMENT is solely for the convenience of identifying and indexing the various provisions in this AGREEMENT and shall in no event be considered otherwise in construing or interpreting any provision in this AGREEMENT.

15. Terms. Capitalized terms used in this AGREEMENT shall have the meanings ascribed to them at the point where first defined, irrespective of where their use occurs, with the same effect as if the definitions of such terms were set forth in full and at length every time such terms are used.

16. Validity. In the event that any provisions of this AGREEMENT shall be held to be invalid, the same shall not affect in any respect whatsoever the validity of the remainder of this AGREEMENT.

17. Modification. Modification of this AGREEMENT may be made only in writing and with the signatures of the same positions as the original AGREEMENT.

IN WITNESS WHEREOF, the PARTIES hereto have caused these presents to be duly signed and sealed the day and year first above written.

**TOWN of Carolina Beach**

By: \_\_\_\_\_  
Joel A. Macon, Mayor

Attest:

\_\_\_\_\_  
Lynn N. Prusa, TOWN Clerk

STATE OF NORTH CAROLINA

COUNTY OF NEW HANOVER

I, a Notary Public for the County and State aforesaid, certify that Joel A. Macon, Mayor of the Town of Carolina Beach, and Lynn N. Prusa, Town Clerk, personally came before me this day and acknowledged the execution of the foregoing instrument in such capacity, and said Clerk did place the official seal of the Town thereof, pursuant to authority duly given.

Witness my hand and official stamp or seal, this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public  
Print Name: \_\_\_\_\_

My Commission expires: \_\_\_\_\_

**CBP3, Inc**

By: \_\_\_\_\_  
President of CBP3, Inc

Attest:

By: \_\_\_\_\_  
Secretary of CBP3, Inc

STATE OF NORTH CAROLINA

COUNTY OF NEW HANOVER

I, a Notary Public for the County and State aforesaid, certify that \_\_\_\_\_, President of CBP3, Inc. and \_\_\_\_\_, Secretary of CBP3, Inc., personally came before me this day and acknowledged the execution of the foregoing instrument in such capacity, and said Clerk did place the official seal of the Town thereof, pursuant to authority duly given.

Witness my hand and official stamp or seal, this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public

Print Name: \_\_\_\_\_

My Commission expires: \_\_\_\_\_

**North Carolina Department of Environment and Natural Resources**

By: \_\_\_\_\_  
Dee Freeman, Secretary

STATE OF NORTH CAROLINA

COUNTY OF WAKE

I, a Notary Public for the County and State aforesaid, certify that Dee Freeman, in the capacity of Secretary of the North Carolina Department of Environment and Natural Resources, personally appeared before me this day and acknowledged the due execution of the foregoing instrument for and on behalf of such agency in the capacity indicated.

Witness my hand and official stamp or seal, this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public

Print Name: \_\_\_\_\_

My Commission expires: \_\_\_\_\_