



Mayor Gavin Newsom  
Philip A. Ginsburg, General Manager

REVOCABLE PERMIT TO ENTER AND USE PROPERTY

by and between the

CITY AND COUNTY OF SAN FRANCISCO

and

Twirl and Dip Soft Serve,  
Permittee

To operate a Mobile Food Truck in Golden Gate Park and at the Marina Green  
San Francisco, California

December 3, 2010

**CITY AND COUNTY OF SAN FRANCISCO**

**Gavin Newsom, Mayor**

**SAN FRANCISCO RECREATION and PARK COMMISSION**

**Tom Harrison, Vice President**

**Gloria Bonilla, Commissioner**

**David E. Lee, Commissioner**

**Meagan Levitan, Commissioner**

**Lawrence Martin, Commissioner**

**Philip A. Ginsburg, General Manager**



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**CITY AND COUNTY OF SAN FRANCISCO  
 REVOCABLE PERMIT  
 TO OPERATE A MOBILE FOOD TRUCK  
 (Marina Green and Golden Gate Park)**

THIS REVOCABLE PERMIT TO ENTER AND USE PROPERTY (this "Permit"), dated for reference purposes only as of December 3, 2010, is made by and between the CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation ("City") and Twirl and Dip Soft Serve ("Permittee").

City and Permittee agree as follows:

**1. LICENSE**

City confers to Permittee a revocable, personal, unassignable, non-exclusive and non-possessory privilege to enter upon and use that certain real property owned by City located within Golden Gate Park and the Marina Green in the City and County of San Francisco, more particularly described in **Exhibit A** attached hereto (the "Permit Area"), for the limited purpose and subject to the terms, conditions and restrictions set forth below. This Permit gives Permittee a license only, revocable at any time at the will of City on delivery of thirty (30) days written notice of revocation, and notwithstanding anything to the contrary herein, this Permit does not constitute a grant by City of any ownership, leasehold, easement or other property interest or estate whatsoever in the Permit Area, or any portion thereof. The privilege given to Permittee under this Permit is effective only insofar as the rights of City in the Permit Area are concerned, and Permittee shall obtain any further permission necessary because of any other existing rights affecting the Permit Area.

**2. USE OF PERMIT AREA**

**2.1 Scope of Permitted Use**

**(A) Permitted Acts. Permittee may enter and use the Permit Area for the sole purpose of operating a food and/or non alcoholic beverages ("beverages") mobile food truck on the Permit Area (the "Permitted Activity"), in strict accordance with Section 4 hereof and for no other purpose whatsoever.**

**(B) Operating Schedule. Permittee shall actively operate the pushcarts in the designated locations on a minimum schedule based upon location and activity:**

Location	Hours of Operation*	Closures
Marina Green, Scott Street Entrance	Tuesday through Sunday, 3PM to 7PM	As Required for Special Events
Golden Gate Park, Big Rec	Tuesday through Sunday, 11AM to 3PM	As Required for Special Events

\* Failure to comply with minimum schedule without Department approval may result in the loss of the location.

\*Hours may be adjusted with a two week advance written request from the Permittee. All requests are subject to Department approval.

During periods of inclement weather, Permittee may choose to not operate pushcarts in any or all of the locations. Rent, however, will not be adjusted because of closures due to weather.

### **3. RESTRICTIONS ON USE**

Permittee agrees that, by way of example only and without limitation, the following uses of the Permit Area by Permittee, or any other person claiming to act on behalf of, Permittee are inconsistent with the limited purpose of this Permit and are strictly prohibited as provided below:

#### **3.1 Special Events**

At times, the City may permit a special event in the park location permitted herein. In such instances the City retains the authority, in its sole discretion, to prohibit the permittee from operating during the length of the special event. In those instances, the minimum monthly guarantee will be prorated to reflect the permittee's inability to operate during the special event.

#### **3.2 Improvements**

Permittee shall not construct or place any temporary or permanent structures or improvements on the Permit Area, nor shall Permittee alter any existing structures or improvements on the Permit Area. Permittee shall not place any tables or chairs on the premises without express written approval of the Department.

#### **3.3 Dumping**

Permittee shall not dump or dispose of refuse or other unsightly materials on, in, under or about the Permit Area.

#### **3.4 Hazardous Material**

Permittee shall not cause, nor shall Permittee allow any of its Agents or Invitees (as defined in Section 19 below) to cause, any Hazardous Material (as defined below) to be brought upon, kept, used, stored, generated or disposed of in, on or about the Permit Area, or transported to or from the Permit Area. Permittee shall immediately notify City when Permittee learns of, or has reason to believe that, a release of Hazardous Material has occurred in, on or about the Permit Area. Permittee shall further comply with all laws requiring notice of such releases or threatened releases to governmental agencies, and shall take all action necessary to mitigate the release or minimize the spread of contamination. In the event that Permittee or its Agents or Invitees cause a release of Hazardous Material, Permittee shall, without cost to City and in accordance with all laws and regulations, return the Permit Area to the condition immediately prior to the release. In connection therewith, Permittee shall afford City a full opportunity to participate in any discussion with governmental agencies regarding any settlement agreement, cleanup or abatement agreement, consent decree or other compromise proceeding involving Hazardous Material. For purposes hereof, "Hazardous Material" means material that, because of its quantity, concentration or physical or chemical characteristics, is at any time now or hereafter

deemed by any federal, state or local governmental authority to pose a present or potential hazard to public health, welfare or the environment. Hazardous Material includes, without limitation, any material or substance defined as a "hazardous substance, pollutant or contaminant" pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. Sections 9601 et seq., or pursuant to Section 25316 of the California Health & Safety Code; a "hazardous waste" listed pursuant to Section 25140 of the California Health & Safety Code; any asbestos and asbestos containing materials whether or not such materials are part of the Permit Area or are naturally occurring substances in the Permit Area, and any petroleum, including, without limitation, crude oil or any fraction thereof, natural gas or natural gas liquids. The term "release" or "threatened release" when used with respect to Hazardous Material shall include any actual or imminent spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing in, on, under or about the Permit Area.

### **3.5 Nuisances**

Permittee shall not conduct any activities on or about the Permit Area that constitute waste, nuisance or unreasonable annoyance (including, without limitation, emission of objectionable odors, noises or lights) to City, to the owners or occupants of neighboring property or to the public.

### **3.6 Damage**

Permittee shall not do anything about the Permit Area that will cause damage to any of City's property.

**4. EXECUTION OF PERMITTED ACTIVITY** Permittee may perform the Permitted Activity on the Permit Area on the following conditions, which are for the sole benefit of City:

**(A) Modification of the Permitted Activity.** The nature and scope of the Permitted Activity, including but not limited to location of Permitted Area, may not be revised or amended except upon the prior written approval of the General Manager of the Recreation and Park Department, or his/her designee. The Permitted area may be expanded to additional sites within the control of the Recreation and Park Department based on need and location, upon written approval of the Department.

**(B) Permits and Approvals.** Before beginning any Activity in the Permit Area, Permittee shall obtain any and all permits, licenses and approvals (collectively, "approvals") of all regulatory agencies and other third parties that are required to commence and complete the Permitted Activity. Promptly upon receipt of such approvals, Permittee shall deliver copies of them to Department. Permittee recognizes and agrees that no approval by Department for purposes of Permittee's Activity hereunder shall be deemed to constitute the approval of any federal, state or local regulatory authority with jurisdiction, and nothing herein shall limit Permittee's obligation to obtain all such regulatory approvals, at Permittee's sole cost.

Permittee possesses the following Department of Public Health – Environmental Health Section Permits and approvals\*

\* Please include a copy of all Permits and a written approval showing that pushcarts to be used in the execution of this Permit have complied with the current California Uniform Retail Food Facilities Laws to operate a pushcart outdoors and the San Francisco Department of Public Health Food Vending Pushcart Permit conditions.

## **5. PERMIT FEE**

### **For the privileges granted herein, Permittee shall pay fees as follows:**

Permittee shall pay the greater of a Minimum Annual Guarantee of \$12,000 or 16% of gross revenue minus sales tax. The Minimum Annual Guarantee shall be divided into twelve equal payments to be paid monthly.

Said fee shall be due and payable on the 15<sup>th</sup> day of each month for the activities conducted in the previous month. If any fee amount or report from Permittee is not received by Department when due, Permittee shall pay to Department an additional sum of \$75.00 as a late charge. Failure to pay any amounts due the Department within 10 days from a written request by the Department may result in automatic termination of this agreement and may result in the forfeiture of any deposits. Acceptance of any late charge shall not constitute a waiver of Permittee's default with respect to the overdue amount, or prevent Department from exercising any of the other rights and remedies available to Department. Fees not paid when due shall bear interest from the date due until date paid at 1% per month.

If any activity by the City, except those activities by the City that the parties have agreed to under the Permit, or inclement weather for 10 consecutive days, prevents Permittee from using the Permitted Areas as authorized under Section 2, this Permit shall remain in full force and effect except that the Permittee shall be entitled to a prorata abatement of Permit Fees during such period of non-use for activities by the City, or to a prorata abatement of Permit Fees for each day of non-use after the tenth (10<sup>th</sup>) consecutive day of non-use due to inclement weather.

The monthly fee shall be paid to City in advance, without prior demand and without any deduction, setoff or counterclaim whatsoever, on or before the first day of the term of this Permit and on or before the first day of each month thereafter. All sums payable by Permittee to City hereunder shall be paid in cash or by good [cashier's or certified] check to the City and County of San Francisco and delivered to City's Director of Property at the primary address for notices to City specified below, or such other place as City may designate in writing. Such use fee shall be prorated for any fractional month.

**6. RATES AND CHARGES**

Permittee agrees to charge not more than the attached rates and charges (tax included), as specified in **Exhibit B**. Permittee shall submit to the Property Management office a written request for any changes in rates charged for approval by the General Manager, or his or her designee, at least 30 days prior to such changes.

**7. QUALITY OF PRODUCTS AND SERVICES PROVIDED**

Permittee hereby agrees that any food and refreshments offered for sale hereunder shall be of good quality and that the service shall be prompt, clean, courteous, and efficient. Department shall have the right to raise reasonable objections to the quality of the food, beverages, and service(s) provided and Permittee shall have the obligation to address those objections by modifying the causes of those objections until corrected to the satisfaction of the Department.

**8. CONCESSION RIGHTS**

The Permittee shall have the non-exclusive right, during the term of the Permit, to operate the food and beverage pushcarts, as described herein, at the location indicated herein, and to sell food and non-alcoholic beverages, candy and confections. On the limited occasions that part or all of a site location in the Permit Area is permitted out for a special event, Permittee may be prohibited to operate the food and beverage pushcarts, as described herein. In such instances the Department shall provide two weeks notice that the Permittee shall be prohibited from operating. The schedule of items to be sold and the prices to be charged shall be subject to written approval by the General Manager prior to being effective, and the General Manager shall reserve the right to review and adjust the items and prices on that schedule.

**9. TERM OF PERMIT**

The privilege given to Permittee pursuant to this Permit is temporary only and shall commence on December 3, 2010 and shall expire no later than 5:00 p.m. on December 2, 2011; provided, in addition to City's revocation rights set forth in Section 1 above, the City shall have the right to terminate this Permit (1) if Permittee fails to comply with any of the terms or conditions of this Permit and cure such non-compliance within three (3) days after written notice by City (or in the case of Permittee's failure to comply with any non-monetary obligation that cannot be cured within such period, in the event Permittee does not commence cure within such period and does not diligently pursue such cure to completion, but in no event later than 30 days following notice), or (2) if City determines that there is an emergency requiring termination, then City may terminate this Permit effective immediately upon delivery of written notice to Permittee. Upon any expiration or early terminate of this Permit, Permittee shall immediately surrender the Permit Area in the condition required under Section 13. The Term of Permit may be extended for up to one year upon the mutual consent of the parties, subject to approval by the General Mana

**10. INSURANCE**

(A) Permittee shall procure and keep in effect at all times during the term of this Permit, at Permittee's expense, insurance as follows:

**(i)** General Liability Insurance with limits not less than One Million Dollars (\$1,000,000) each occurrence Combined Single Limit for Bodily Injury and Property Damage, including coverages for Contractual Liability, Personal Injury, Independent Permittees, Explosion, Collapse and Underground (XCU), Broadform Property Damage, Sudden and Accidental Pollution, Products Liability and Completed Operations;

**(ii)** Automobile Liability Insurance with limits not less than One Million Dollars (\$1,000,000) each occurrence Combined Single Limit for Bodily Injury and Property Damage, including coverages for owned, non-owned and hired automobiles, as applicable, and sudden and accidental pollution; and

**(iii)** Workers' Compensation Insurance with Employer's Liability Coverage with limits of not less than One Million Dollars (\$1,000,000) each accident.

**(iv)** Food Products Liability Insurance with limits of not less than One Million Dollars (\$1,000,000) each incident.

**(B)** All liability policies required hereunder shall provide for the following:  
**(i)** name as additional insureds the City and County of San Francisco, its officers, agents and employees; and **(ii)** specify that such policies are primary insurance to any other insurance available to the additional insureds, with respect to any claims arising out of this Permit and that insurance applies separately to each insured against whom claim is made or suit is brought. Such policies shall also provide for severability of interests and that an act or omission of one of the named insureds which would void or otherwise reduce coverage shall not reduce or void the coverage as to any insured, and shall afford coverage for all claims based on acts, omissions, injury or damage which occurred or arose (or the onset of which occurred or arose) in whole or in part during the policy period. Sudden and accidental pollution coverage in the liability policies required hereunder shall be limited to losses resulting from Permittee's activities (and Permittee's Agents and Invitees) under this Permit (excluding non-negligent aggravation of existing conditions with respect to Hazardous Materials).

**(C)** All policies shall be endorsed to provide thirty (30) days' prior written notice of cancellation, non-renewal or reduction in coverage to City.

**(D)** Prior to the commencement date of this Permit, Permittee shall deliver to City certificates of insurance and additional insured policy endorsements from insurers in a form satisfactory to City, evidencing the coverages required hereunder, together with complete copies of the policies at City's request. In the event Permittee shall fail to procure such insurance, or to deliver such policies or certificates, City may procure, at its option, the same for the account of Permittee, and the cost thereof shall be paid to City within five (5) days after delivery to Permittee of bills therefore.

**(E)** Should any of the required insurance be provided under a form of coverage that includes a general annual aggregate limit or provides that claims investigation or legal defense costs be included in such general annual aggregate limit, such general aggregate limit shall double the occurrence or claims limits specified above.

**(F)** Should any of the required insurance be provided under a claims made form, Permittee shall maintain such coverage continuously throughout the term of this Permit and, without lapse, for a period of three (3) years beyond the Permit expiration, to the effect that, should any occurrences during the Permit term give rise to claims made after expiration of the Permit, such claims shall be covered by such claims-made policies.

(G) Upon City's request, Permittee and City shall periodically review the limits and types of insurance carried pursuant to this Section. If the general commercial practice in the City and County of San Francisco is to carry liability insurance in an amount or coverage materially greater than the amount or coverage then being carried by Permittee for risks comparable to those associated with the Permit Area, then City in its sole discretion may require Permittee to increase the amounts or coverage carried by Permittee hereunder to conform to such general commercial practice.

(H) Permittee's compliance with the provisions of this Section shall in no way relieve or decrease Permittee's indemnification obligations under this Permit or any of Permittee's other obligations hereunder. Notwithstanding anything to the contrary in this Permit, this Permit shall terminate immediately, without notice to Permittee, upon the lapse of any required insurance coverage. Permittee shall be responsible, at its expense, for separately insuring Permittee's personal property.

## **11. SECURITY FOR PERFORMANCE**

At or before the date for commencement of this Permit, Permittee shall deposit with City the sum of \$5,000 (the "Security Deposit") to secure Permittee's faithful performance of all terms and conditions of this Permit, including, without limitation, its obligation to surrender the Permit Area in the condition required by this Permit. Such Security Deposit shall be in the form of cash. The amount of the security deposit shall not limit Permittee's obligations under this Permit. Permittee agrees that City may (but shall not be required to) apply the Security Deposit in whole or in part to remedy any damage to the Permit Area caused by Permittee, its Agents or Invitees, or any failure of Permittee to perform any other terms, covenants or conditions contained herein (including, but not limited to, the payment of permit fees or other sum due hereunder either before or after a default), without waiving any of City's other rights and remedies hereunder or at law or in equity and without any obligation. Permittee waives the provisions of Section 1950.7 of the California Civil Code or any similar law, statute or ordinance now or hereafter in effect and agrees that City may retain any portion of Security Deposit reasonably necessary to compensate City for any other foreseeable or unforeseeable loss or damage caused by the acts or omissions of Permittee, its Agents or Invitees. Without limiting the foregoing, Permittee understands and agrees that City may apply some or all of the Security Deposit to the payment of future permits fees following a Permittee default.

Should City use any portion of the Security Deposit to cure any default by Permittee hereunder, Permittee shall immediately replenish the Security Deposit to the original amount. If the permit fee Rent is increased pursuant to any of the provisions of this Permit, Permittee shall increase the amount of the Security Deposit accordingly. City's obligations with respect to the Security Deposit are solely that of debtor and not trustee. City shall not be required to keep the Security Deposit separate from its general funds, and Tenant shall not be entitled to interest on the Security Deposit. The amount of the Security Deposit shall in no way limit the liabilities of Permittee under any provision of this Permit.

In lieu of such Security Deposit, Permittee may deliver to City a valid surety bond in the sum equal to amount specified, issued by a surety company acceptable to City's Controller in such form as approved by the City Attorney or a clean irrevocable letter of credit issued by a financial institution acceptable to the Director of Property and in form approved by the City Attorney. Permittee shall keep such surety bond or letter of credit, at its expense, in full force and effect until the thirtieth (30th) day after the expiration or sooner termination of this Permit, to insure the faithful performance by Permittee of all of the covenants, terms and conditions of this Permit. Such bond or letter of credit shall

provide thirty (30) days' prior written notice to City of cancellation or material change thereof.

## **12. COMPLIANCE WITH LAWS**

Permittee shall, at its expense, conduct and cause to be conducted all activities on the Permit Area allowed hereunder in a safe and prudent manner and in compliance with all laws, regulations, codes, ordinances and orders of any governmental or other regulatory entity (including, without limitation, the Americans with Disabilities Act), whether presently in effect or subsequently adopted and whether or not in the contemplation of the parties. Permittee shall, at its sole expense, procure and maintain in force at all times during its use of the Permit Area any and all business and other licenses or approvals necessary to conduct the activities allowed hereunder. Permittee understands and agrees that City is entering into this Permit in its capacity as a property owner with a proprietary interest in the Permit Area and not as a regulatory agency with police powers. Nothing herein shall limit in any way Permittee's obligation to obtain any required regulatory approvals from City departments, boards or commissions or other governmental regulatory authorities or limit in any way City's exercise of its police powers.

## **13. COVENANT TO MAINTAIN PERMIT AREA**

- (A)** In connection with its use hereunder, Permittee shall at all times, at its sole cost, maintain the Permit Area in a good, clean, safe, secure, sanitary and sightly condition, so far as the Permit Area may be affected by Permittee's activities hereunder. Permittee agrees to remove all waste, trash, rubbish, papers, cartons and refuse from said Permit Area and within a radius of 100 feet of the areas that the pushcarts are being operated.
- (B)** If Permittee fails after notice from the Department to maintain and keep the Permit Area clean and orderly, the Department may at the expense of the Permittee cure the deficiency at any time. If such problem occurs a second time, the Department reserves the right to revoke Permittee's permit, and retain all deposits and permit fees already paid in advance.

## **14. SURRENDER**

Upon the expiration of this Permit or within ten (10) days after any sooner revocation or other termination of this Permit, Permittee shall surrender the Permit Area in the same condition as received, and broom clean, free from hazards, and clear of all debris. At such time, Permittee shall remove all of its property from the Permit Area and any signs permitted hereunder, and shall repair, at its cost, any damage to the Permit Area caused by such removal. Permittee's obligations under this Section shall survive any termination of this Permit.

## **15. WAIVER OF CLAIMS; WAIVER OF CONSEQUENTIAL AND INCIDENTAL DAMAGES**

**(A)** Neither City nor any of its commissions, departments, boards, officers, agents or employees shall be liable for any damage to the property of Permittee, its officers, agents, employees, contractors or subcontractors, or their employees, or for any bodily injury or death to such persons, resulting or arising from the condition of the Permit Area or its use by Permittee.

**(B)** Permittee acknowledges that this Permit is freely revocable by City and in view of such fact, Permittee expressly assumes the risk of making any expenditures in

connection with this Permit, even if such expenditures are substantial. Without limiting any indemnification obligations of Permittee or other waivers contained in this Permit and as a material part of the consideration for this Permit, Permittee fully RELEASES, WAIVES AND DISCHARGES forever any and all claims, demands, rights, and causes of action against, and covenants not to sue, City, its departments, commissions, officers, directors and employees, and all persons acting by, through or under each of them, under any present or future laws, statutes, or regulations, including, but not limited to, any claim for inverse condemnation or the payment of just compensation under the law of eminent domain, or otherwise at equity, in the event that City exercises its right to revoke or terminate this Permit.

(C) Permittee acknowledges that it will not be a displaced person at the time this Permit is terminated or revoked or expires by its own terms, and Permittee fully RELEASES, WAIVES AND DISCHARGES forever any and all claims, demands, rights, and causes of action against, and covenants not to sue, City, its departments, commissions, officers, directors and employees, and all persons acting by, through or under each of them, under any present or future laws, statutes, or regulations, including, without limitation, any and all claims for relocation benefits or assistance from City under federal and state relocation assistance laws.

Permittee expressly acknowledges and agrees that the fees payable hereunder do not take into account any potential liability of City for any consequential or incidental damages including, but not limited to, lost profits arising out of disruption to the facilities or Permittee's uses hereunder. City would not be willing to give this Permit in the absence of a complete waiver of liability for consequential or incidental damages due to the acts or omissions of City or its Agents, and Permittee expressly assumes the risk with respect thereto. Accordingly, without limiting any indemnification obligations of Permittee or other waivers contained in this Permit and as a material part of the consideration for this Permit, Permittee fully RELEASES, WAIVES AND DISCHARGES forever any and all claims, demands, rights, and causes of action against for consequential and incidental damages (including lost profits ), and covenants not to sue for such damages, City, its departments, commissions, officers, directors and employees, and all persons acting by, through or under each of them, arising out of this Permit or the uses authorized hereunder, including, without limitation, any interference with uses conducted by Permittee pursuant to this Permit, regardless of the cause, and whether or not due to the negligence of City or its Agents, except for the gross negligence or willful misconduct of City or its Agents.

(D) In connection with the foregoing releases, Permittee acknowledges that it is familiar with Section 1542 of the California Civil Code, which reads:

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

Permittee acknowledges that the releases contained herein includes all known and unknown, disclosed and undisclosed, and anticipated and unanticipated claims. Permittee realizes and acknowledges that it has agreed upon this Permit in light of this realization and, being fully aware of this situation, it nevertheless intends to waive the benefit of Civil Code Section 1542, or any statute or other similar law now or later in effect. The releases contained herein shall survive any termination of this Permit.

## **16. REPAIR OF DAMAGE**

If any portion of the Permit Area or any property of City located on or about the Permit Area is damaged by any of the activities conducted by Permittee hereunder, Permittee shall immediately, at its sole cost, repair any and all such damage and restore the Permit Area or property to its previous condition.

## **17. SIGNS**

Permittee shall not place, erect or maintain any sign, advertisement, banner or similar object on or about the Permit Area, except for any temporary sign that is necessary for Permittee's use so long as Permittee first obtains City's written consent, which City may give or withhold in its sole discretion.

## **18. LOCATION OF UTILITIES**

City has no responsibility or liability of any kind with respect to any utilities that may be on, in or under the Permit Area. Permittee has the sole responsibility to locate such utilities and protect them from damage. Permittee shall arrange and pay for any necessary temporary relocation of City and public utility company facilities, subject to the prior written approval by City and any such utility companies of any such relocation. Permittee shall be solely responsible for arranging and paying directly for any utilities or services necessary for its activities hereunder.

## **19. CITY'S RIGHT TO CURE DEFAULTS BY PERMITTEE**

If Permittee fails to perform any of its obligations under this Permit, to restore the Permit Area or repair damage, or if Permittee defaults in the performance of any of its other obligations under this Permit, then City may, at its sole option, remedy such failure for Permittee's account and at Permittee's expense by providing Permittee with three (3) days' prior written or oral notice of City's intention to cure such default (except that no such prior notice shall be required in the event of an emergency as determined by City). Such action by City shall not be construed as a waiver of any rights or remedies of City under this Permit, and nothing herein shall imply any duty of City to do any act that Permittee is obligated to perform. Permittee shall pay to City upon demand, all costs, damages, expenses or liabilities incurred by City, including, without limitation, reasonable attorneys' fees, in remedying or attempting to remedy such default. Permittee's obligations under this Section shall survive the termination of this Permit.

## **20. NO COSTS TO CITY**

Permittee shall bear all costs or expenses of any kind or nature in connection with its use of the Permit Area, and shall keep the Permit Area free and clear of any liens or claims of lien arising out of or in any way connected with its use of the Permit Area.

## **21. INDEMNITY**

Permittee shall indemnify, defend and hold harmless City, its officers, agents, employees and contractors, and each of them, from and against any and all demands, claims, legal or administrative proceedings, losses, costs, penalties, fines, liens, judgments, damages and liabilities of any kind (collectively, "Losses"), arising in any manner out of **(a)** any injury to or death of any person or damage to or destruction of any property occurring in, on or about the Permit Area, or any part thereof, whether the person or property of Permittee, its officers, agents, employees, contractors or subcontractors (collectively, "Agents"), its

invitees, guests or business visitors (collectively, "Invitees"), or third persons, relating in any manner to any use or activity under this Permit, **(b)** any failure by Permittee to faithfully observe or perform any of the terms, covenants or conditions of this Permit, **(c)** the use of the Permit Area or any activities conducted thereon by Permittee, its Agents or Invitees, or **(d)** any release or discharge, or threatened release or discharge, of any Hazardous Material caused or allowed by Permittee, its Agents or Invitees, on, in, under or about the Permit Area, any improvements permitted thereon, or into the environment; except solely to the extent of Losses resulting directly from the gross negligence or willful misconduct of City or City's authorized representatives. The foregoing indemnity shall include, without limitation, reasonable attorneys' and consultants' fees, investigation and remediation costs and all other reasonable costs and expenses incurred by the indemnified parties, including, without limitation, damages for decrease in the value of the Permit Area and claims for damages or decreases in the value of adjoining property. Permittee specifically acknowledges and agrees that it has an immediate and independent obligation to defend City from any claim which actually or potentially falls within this indemnity provision even if such allegation is or may be groundless, fraudulent or false, which obligation arises at the time such claim is tendered to Permittee by City and continues at all times thereafter. Permittee's obligations under this Section shall survive the expiration or other termination of this Permit.

## **22. "AS IS" CONDITION OF PERMIT AREA; DISCLAIMER OF REPRESENTATIONS**

Permittee accepts the Permit Area in its "AS IS" condition, without representation or warranty of any kind by City, its officers, agents or employees, including, without limitation, the suitability, safety, or duration of availability of the Permit Area or any facilities on the Permit Area for Permittee's use. Without limiting the foregoing, this Permit is made subject to all applicable laws, rules and ordinances governing the use of the Permit Area, and to any and all covenants, conditions, restrictions, easements, encumbrances, claims of title and other title matters affecting the Permit Area, whether foreseen or unforeseen, and whether such matters are of record or would be disclosed by an accurate inspection or survey. It is Permittee's sole obligation to conduct an independent investigation of the Permit Area and all matters relating to its use of the Permit Area hereunder, including, without limitation, the suitability of the Permit Area for such uses. Permittee, at its own expense, shall obtain such permission or other approvals from any third parties with existing rights as may be necessary for Permittee to make use of the Permit Area in the manner contemplated hereby.

## **23. NO ASSIGNMENT**

This Permit is personal to Permittee and shall not be assigned, conveyed or otherwise transferred by Permittee under any circumstances. Any attempt to assign, convey or otherwise transfer this Permit shall be null and void and cause the immediate termination and revocation of this Permit.

## **24. CESSATION OF USE**

Permittee shall not terminate its activities on the Permit Area, as authorized herein, without prior written notice to City.

## **25. NO JOINT VENTURES OR PARTNERSHIP; NO AUTHORIZATION**

This Permit does not create a partnership or joint venture between City and Permittee as to any activity conducted by Permittee on, in or relating to the Permit Area. Permittee is not a State actor with respect to any activity conducted by Permittee on, in, or under the Permit Area. The giving of this Permit by City does not constitute authorization

or approval by City of any activity conducted by Permittee on, in or relating to the Permit Area.

## **26. MACBRIDE PRINCIPLES - NORTHERN IRELAND**

The City and County of San Francisco urges companies doing business in Northern Ireland to move toward resolving employment inequities and encourages them to abide by the MacBride Principles as expressed in San Francisco Administrative Code Section 12F.1 et seq. The City and County of San Francisco also urges San Francisco companies to do business with corporations that abide by the MacBride Principles. Permittee acknowledges that it has read and understands the above statement of the City and County of San Francisco concerning doing business in Northern Ireland.

## **27. NON-DISCRIMINATION**

### **27.1 Covenant Not to Discriminate**

In the performance of this Permit, Permittee agrees not to discriminate against any employee of, any City employee working with Permittee, or applicant for employment with Permittee, or against any person seeking accommodations, advantages, facilities, privileges, services, or membership in all business, social, or other establishments or organizations, on the basis of the fact or perception of a person's race, color, creed, religion, national origin, ancestry, age, height, weight, sex, sexual orientation, gender identity, domestic partner status, marital status, disability or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status), or association with members of such protected classes, or in retaliation for opposition to discrimination against such classes.

### **27.2 Subcontracts**

Permittee shall include in all subcontracts relating to the Permit Area a non-discrimination clause applicable to such subcontractor in substantially the form of Subsection 25.1 above. In addition, Permittee shall incorporate by reference in all subcontracts the provisions of Sections 12B.2(a), 12B.2(c)-(k), and 12C.3 of the San Francisco Administrative Code and shall require all subcontractors to comply with such provisions. Permittee's failure to comply with the obligations in this Subsection shall constitute a material breach of this Permit.

### **27.3 Non-Discrimination in Benefits**

Permittee does not as of the date of this Permit and will not during the term of this Permit, in any of its operations in San Francisco, on real property owned by City, or where the work is being performed for the City or elsewhere within the United States, discriminate in the provision of bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits, as well as any benefits other than the benefits specified above, between employees with domestic partners and employees with spouses, and/or between the domestic partners and spouses of such employees, where the domestic partnership has been registered with a governmental entity pursuant to state or local law authorizing such registration, subject to the conditions set forth in Section 12B.2(b) of the San Francisco Administrative Code.

#### **27.4 Condition to Permit**

As a condition to this Permit, Permittee shall execute the "Chapter 12B Declaration: Nondiscrimination in Contracts and Benefits" form (Form HRC-12B-101) with supporting documentation and secure the approval of the form by the San Francisco Human Rights Commission (the "HRC"). Permittee hereby represents that prior to execution of this Permit, **(i)** Permittee executed and submitted to the HRC Form HRC-12B-101 with supporting documentation, and **(ii)** the HRC approved such form.

#### **27.5 Incorporation of Administrative Code Provisions by Reference**

The provisions of Chapters 12B and 12C of the San Francisco Administrative Code relating to non-discrimination by parties contracting for the use of City property are incorporated in this Section by reference and made a part of this Agreement as though fully set forth herein. Permittee shall comply fully with and be bound by all of the provisions that apply to this Permit under such Chapters of the Administrative Code, including but not limited to the remedies provided in such Chapters. Without limiting the foregoing, Permittee understands that pursuant to Section 12B.2(h) of the San Francisco Administrative Code, a penalty of Fifty Dollars (\$50) for each person for each calendar day during which such person was discriminated against in violation of the provisions of this Permit may be assessed against Permittee and/or deducted from any payments due Permittee.

#### **28. TROPICAL HARDWOODS AND VIRGIN REDWOOD BAN**

The City and County of San Francisco urges companies not to import, purchase, obtain or use for any purpose, any tropical hardwood, tropical hardwood wood product, virgin redwood or virgin redwood wood product, except as expressly permitted by the application of Sections 802(b) and 803(b) of the San Francisco Environment Code. Permittee agrees that, except as permitted by the application of Sections 802(b) and 803(b), Permittee shall not use or incorporate any tropical hardwood, tropical hardwood wood product, virgin redwood or virgin redwood wood product in the performance of this Permit.

#### **29. NOTIFICATION OF LIMITATIONS ON CONTRIBUTIONS**

Through its execution of this Permit, Permittee acknowledges that it is familiar with Section 1.126 of the San Francisco Campaign and Governmental Conduct Code, which prohibits any person who contracts with the City for the selling or leasing of any land or building to or from the City whenever such transaction would require approval by a City elective officer or the board on which that City elective officer serves, from making any campaign contribution to (1) an individual holding a City elective office if the contract must be approved by the individual, a board on which that individual serves, or a board on which an appointee of that individual serves, (2) a candidate for the office held by such individual, or (3) a committee controlled by such individual, at any time from the commencement of negotiations for the contract until the later of either the termination of negotiations for such contract or six months after the date the contract is approved. Permittee acknowledges that the foregoing restriction applies only if the contract or a combination or series of contracts approved by the same individual or board in a fiscal year have a total anticipated or actual value of \$50,000 or more. Permittee further acknowledges that the prohibition on contributions applies to each prospective party to the contract; each member of Permittee's board of directors, chairperson, chief executive officer, chief financial officer and chief operating officer; any person with an ownership interest of more than 20 percent in Permittee; any subcontractor listed in the contract; and any committee that is sponsored or controlled by Permittee. Additionally, Permittee acknowledges that Permittee must inform

each of the persons described in the preceding sentence of the prohibitions contained in Section 1.126. Permittee further agrees to provide to City the names of each person, entity or committee described above.

### **30. POSSESSORY INTEREST TAXES**

Permittee recognizes and understands that this Permit may create a possessory interest subject to property taxation and that Permittee may be subject to the payment of property taxes levied on such interest under applicable law. Permittee agrees to pay taxes of any kind, including possessory interest taxes, if any, that may be lawfully assessed on Permittee's interest under this Permit or use of the Permit Area pursuant hereto and to pay any other taxes, excises, licenses, permit charges or assessments based on Permittee's usage of the Permit Area that may be imposed upon Permittee by applicable law. Permittee shall pay all of such charges when they become due and payable and before delinquency.

### **31. PESTICIDE PROHIBITION**

Permittee shall comply with the provisions of Section 308 of Chapter 3 of the San Francisco Environment Code (the "Pesticide Ordinance") which **(i)** prohibit the use of certain pesticides on City property, **(ii)** require the posting of certain notices and the maintenance of certain records regarding pesticide usage and **(iii)** require Permittee to submit to the Recreation and Park Department an integrated pest management ("IPM") plan that **(a)** lists, to the extent reasonably possible, the types and estimated quantities of pesticides that Permittee may need to apply to the Permit Area during the term of this Permit, **(b)** describes the steps Permittee will take to meet the City's IPM Policy described in Section 300 of the Pesticide Ordinance and **(c)** identifies, by name, title, address and telephone number, an individual to act as the Permittee's primary IPM contact person with the City. In addition, Permittee shall comply with the requirements of Sections 303(a) and 303(b) of the Pesticide Ordinance.

### **32. PROHIBITION OF TOBACCO SALES AND ADVERTISING**

Permittee acknowledges and agrees that no advertising of cigarettes or tobacco products is allowed on the Permit Area. This advertising prohibition includes the placement of the name of a company producing, selling or distributing cigarettes or tobacco products or the name of any cigarette or tobacco product in any promotion of any event or product. This advertising prohibition does not apply to any advertisement sponsored by a state, local, nonprofit or other entity designed to (i) communicate the health hazards of cigarettes and tobacco products, or (ii) encourage people not to smoke or to stop smoking.

### **33. PROHIBITION OF ALCOHOLIC BEVERAGE ADVERTISING**

Permittee acknowledges and agrees that no advertising of alcoholic beverages is allowed on the Permit Area. For purposes of this section, "alcoholic beverage" shall be defined as set forth in California Business and Professions Code Section 23004, and shall not include cleaning solutions, medical supplies and other products and substances not intended for drinking. This advertising prohibition includes the placement of the name of a company producing, selling or distributing alcoholic beverages or the name of any alcoholic beverage in any promotion of any event or product. This advertising prohibition does not apply to any advertisement sponsored by a state, local, nonprofit or other entity designed to (i) communicate the health hazards of alcoholic beverages, (ii) encourage people not to drink alcohol or to stop drinking alcohol, or (iii) provide or publicize drug or alcohol treatment or rehabilitation services.

### **34. CONFLICTS OF INTEREST**

Through its execution of this Permit, Permittee acknowledges that it is familiar with the provisions of Section 15.103 of the San Francisco Charter, Article III, Chapter 2 of City's Campaign and Governmental Conduct Code, and Sections 87100 et seq. and Sections 1090 et seq. of the Government Code of the State of California, and certifies that it does not know of any facts which would constitute a violation of said provision, and agrees that if Permittee becomes aware of any such fact during the term of this Permit, Permittee shall immediately notify the City.

### **35. FOOD SERVICE WASTE REDUCTION**

Permittee agrees to comply fully with and be bound by all of the provisions of the Food Service Waste Reduction Ordinance, as set forth in the San Francisco Environment Code, Chapter 16, including the remedies provided therein, and implementing guidelines and rules. The provisions of Chapter 16 are incorporated herein by reference and made a part of this Permit as though fully set forth herein. This provision is a material term of this Permit. By entering into this Permit, Permittee agrees that if it breaches this provision, City will suffer actual damages that will be impractical or extremely difficult to determine. Without limiting City's other rights and remedies, Permittee agrees that the sum of One Hundred Dollars (\$100.00) liquidated damages for the first breach, Two Hundred Dollars (\$200.00) liquidated damages for the second breach in the same year, and Five Hundred Dollars (\$500.00) liquidated damages for subsequent breaches in the same year is a reasonable estimate of the damage that City will incur based on the violation, established in light of the circumstances existing at the time this Permit was made. Such amounts shall not be considered a penalty, but rather agreed monetary damages sustained by City because of Permittee's failure to comply with this provision.

### **36. NOTICES**

Except as otherwise expressly provided herein, any notices given under this Permit shall be effective only if in writing and given by delivering the notice in person, by sending it first class mail or certified mail, with a return receipt requested, or overnight courier, return receipt requested, with postage prepaid, addressed as follows:

City: Partnerships and Strategic Resources Division  
Recreation and Park Department  
501 Stanyan Street  
San Francisco, CA 94117

Permittee: Twirl and Dip Soft Serve  
887 Rhode Island Street  
San Francisco, CA 94107

Notices herein shall be deemed given two (2) days after the date when it shall have been mailed if sent by first class, certified or overnight courier, or upon the date personal delivery is made.

**37. COUNTERPARTS**

This Permit may be executed in two or more counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument.

**38. COOPERATIVE DRAFTING**

This Permit has been drafted through a cooperative effort of both parties, and both parties have had an opportunity to have the Permit reviewed and revised by legal counsel. No party shall be considered the drafter of this Permit, and no presumption or rule that an ambiguity shall be construed against the party drafting the clause shall apply to the interpretation or enforcement of this Permit.

### **39. GENERAL PROVISIONS**

(A) This Permit may be amended or modified only by a writing signed by City and Permittee.

(B) No waiver by any party of any of the provisions of this Permit shall be effective unless in writing and signed by an officer or other authorized representative, and only to the extent expressly provided in such written waiver.

(C) All approvals and determinations of City requested, required or permitted hereunder may be made in the sole and absolute discretion of the General Manager of the Recreation and Park Department or other authorized City official.

(D) This instrument (including the exhibit(s) hereto) contains the entire agreement between the parties and all prior written or oral negotiations, discussions, understandings and agreements are merged herein.

(E) The section and other headings of this Permit are for convenience of reference only and shall be disregarded in the interpretation of this Permit.

(F) Time is of the essence.

(G) This Permit shall be governed by California law and the City's Charter.

(H) If either party commences an action against the other or a dispute arises under this Permit, the prevailing party shall be entitled to recover from the other reasonable attorneys' fees and costs. For purposes hereof, reasonable attorneys' fees of City shall be based on the fees regularly charged by private attorneys in San Francisco with comparable experience.

(I) If Permittee consists of more than one person then the obligations of each person shall be joint and several.

(J) Permittee may not record this Permit or any memorandum hereof.

(K) Subject to the prohibition against assignments or other transfers by Permittee hereunder, this Permit shall be binding upon and inure to the benefit of the parties and their respective heirs, representatives, successors and assigns.

(L) In the event City sells or otherwise conveys the property burdened by this Permit this Permit shall automatically be revoked.

### **40. SPECIFIC PROVISIONS**

(A) **Maximum Number of Pushcarts.** The maximum number of individual pushcart units allowed at one time at each of the locations is two. One will be the food and beverage service pushcart and the other may be an ice cream pushcart. The Department will consider requests in writing to operate more than two carts in a specific location.

(B) **Appearance and Design of Pushcarts.** The Department requires that all of the pushcarts be attractive and uniform in appearance. They shall be kept clean and free from

clutter at all times. The design of the food and beverage pushcart and the ice cream cart shall receive approval from the Department prior to the execution of this Permit and ordering of the pushcarts.

**(C) Prohibition of Advertising.** Permittee's pushcarts and equipment are not to be used for advertising of any kind, except for the name and logo of the Permittee's company and small generic illustrations of some of the products that are sold. The design and placement of all signs must be approved in writing in advance by the Department.

**(E) Standards of Conduct, Customer Service and Customer Contact Number.** Permittee and its employees shall conduct themselves in a professional, courteous and respectful manner at all times. The Permittee, not the City, shall be responsible for handling, addressing and responding to any customer concerns regarding any service matters pertaining to the concession including refund requests, product complaints or other service matters. Permittee shall have visible signage on the cart, identifying the Permittee's company name and the phone number for comments or complaints.

**(F) Prohibition of Alcohol.** Sales, distribution, promotion, advertising and use of any type of alcohol is strictly prohibited.

**41. NO SMOKING IN CITY PARKS**

Smoking is prohibited on any unenclosed area of property in the City and County of San Francisco that is open to the public and under the jurisdiction of the Recreation and Park Commission or any other City department if the property is a park, square, garden, sport or playing field, pier, or other property used for recreational purposes. SF Health Code Section 1009.81.

Permittee represents and warrants to City that it has read and understands the contents of this Permit and agrees to comply with and be bound by all of its provisions.

PERMITTEE:

\_\_\_\_\_

a \_\_\_\_\_

By: \_\_\_\_\_

Its: \_\_\_\_\_

CITY:

CITY AND COUNTY OF SAN FRANCISCO,  
a municipal corporation

By: \_\_\_\_\_

Philip A. Ginsburg  
General Manager  
Recreation and Park Department

**APPROVED BY**  
**RECREATION AND PARK COMMISSION**  
**PURSUANT TO RESOLUTION NO. \_\_\_\_\_ DATED: \_\_\_\_\_**

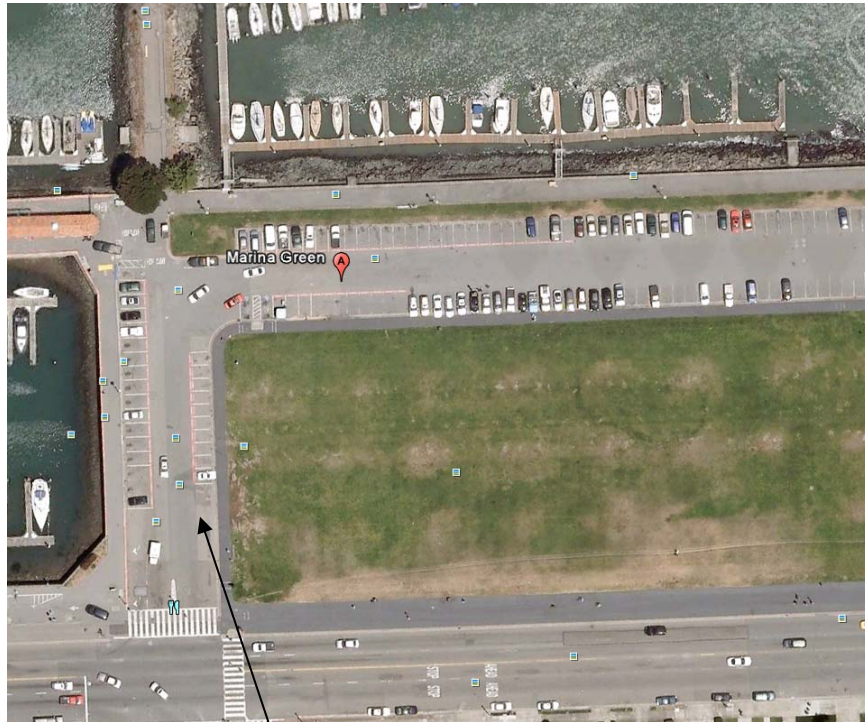
\_\_\_\_\_  
Margaret McArthur, Commission Liaison

APPROVED AS TO FORM:

DENNIS J. HERRERA, City Attorney

By: \_\_\_\_\_  
Virginia Dario Elizondo  
Deputy City Attorney

Exhibit-A  
Site Premises



Twirl and Dip's Marina Green location, directly off of Marina Boulevard on Scott Street



Twirl and Dip's Golden Gate Park location on Martin Luther King Drive

Exhibit B  
Twirl and Dip's Menu

Twirl and Dip will offer three flavors of soft serve ice cream daily served in cones or cups as a single flavor or a two flavor swirl. The flavors will change frequently as Twirl and Dip will be using seasonal products. Twirl and Dip also proposes to serve popsicles and ice cream sandwiches as well as milkshakes, hot chocolate shots, ice cream sodas and floats.

Soft serve will be served in a handmade plain or chocolate dipped cone or recyclable cup. Below is a list of flavors of soft serve ice cream, toppings, popsicles, and ice cream sandwiches. The flavors may expand as new recipes are perfected and seasons change.

Soft serve flavors: vanilla, chocolate, coffee, butterscotch, basil, nutmeg, mojito, meyer lemon, peach with orange blossom, honey blueberry, strawberry, apple pie, brown sugar ginger, eggnog, mocha, maple, butter rum, molasses spice, lemon thyme, mint, tangerine.

Handmade toppings: shaved milk chocolate, white chocolate, and dark chocolate, peach with mint, balsamic syrup, butterscotch sauce, chocolate sauce, pecan brittle, praline, toasted coconut, toasted almond, blueberry sauce, strawberry rhubarb compote, raspberry sauce.

Popsicle flavors: grapefruit riesling, meyer lemon, cucumber lime, strawberry lemonade, grapefruit pineapple with vanilla, pineapple orange with ginger, kiwi, green grape.

Ice Cream Sandwich flavors (cookie flavor plus ice cream flavor): chocolate coffee, chocolate vanilla, lemon strawberry, lemon tangerine, molasses vanilla, chocolate chip mint.

***Proposed Menu Prices***

Soft serve ice cream, cake cone or cup	\$3.50
House made cone	\$1.00
Fruitsicles	\$3.00
Soft serve ice cream sandwiches	\$4.50
Ice cream floats	\$4.50
Milkshakes	\$5.00
Old fashioned ice cream sodas	\$5.00
Sundaes – sauce, topping, whipped cream	\$4.50
Toppings	\$.50 for one, .25 additional
Soft serve cocoa shot	\$2.50
Cocoa	\$3.00

