

CITY OF NEWPORT BEACH

REQUEST FOR PROPOSALS
Concession Operations
at Corona del Mar State Beach

Deadline for Submission of Proposals
April 8, 2011, at 12:00 noon

**REQUEST FOR PROPOSALS ("RFP")
Concession Operations
at Corona del Mar State Beach**

The City of Newport Beach ("City") is soliciting proposals to identify individuals and/or businesses qualified to operate and manage the concession located at Corona del Mar State Beach ("CDM State Beach") (See **Exhibit "A"**). CDM State Beach is part of the California State Parks system, but is managed and operated by the City. This RFP is designed for those interested in entering into a contractual relationship with the City ("Concession Agreement") in substantially the form attached as **Exhibit "B"** to operate the City-managed concession facility.

I. RFP TERMS AND CONDITIONS

- A. This RFP does not commit the City to award a contract. No other party, including any proposer, is intended to be granted any rights hereunder. Proposals which, in the sole discretion of the City, do not meet the minimum requirements, including without limitation the minimum proposal submission requirements, will not be reviewed. This RFP and the process it describes are proprietary to the City and are for the sole and exclusive benefit of the City. Any response, including written documents and verbal communication by any proposer to this RFP, will become the property of the City, and if required by law may be subject to public disclosure by the City or any authorized agent of the City. The City is not liable for any costs associated with the development, preparation, transmittal or presentation of any proposal or materials submitted in response to this RFP.
- B. It shall be the proposer's responsibility to review and verify the completeness of its proposal. The City may request additional or clarifying information or more detailed information from any proposer at any time, including information inadvertently omitted by an proposer. The City may request to inspect properties or contact clients referenced in the proposal. The City also reserves the right to conduct investigations with respect to the qualifications of an proposer.
- C. Verbal communication made by any City employee or agent of the City with respect to this RFP is not binding and shall not in any way be considered as a commitment by the City. Only written responses to questions submitted in writing to the City or

written addenda to this RFP issued by the City may be relied upon.

- D. City employees and officials are prohibited from responding to this RFP or being a party, direct or indirect, to any contract resulting from the RFP, and no proposal shall be accepted from, or contract awarded to, any City employee or official who submits a proposal or solicits any contract in which he or she may have any direct or indirect interest. No proposer may submit more than one proposal pursuant to this RFP. Entities that are legally related to each other or to a common entity may not submit separate proposals. Any proposal may be rejected because it, in the City's sole judgment, violates these conditions or the spirit of these conditions.
- E. The City reserves and may exercise the following rights and options with respect to evaluation of proposals and selection for negotiation:
 - i. To reject any and all proposals and re-issue the RFP at any time prior to execution of a final contract if, in the City's sole discretion, it is in the City's best interest to do so;
 - ii. To supplement, amend, substitute or otherwise modify this RFP at any time prior to selection of one or more proposers for negotiation and to cancel this RFP with or without issuing another RFP;
 - iii. To accept or reject any or all of the items in any proposal and award the contract in whole or in part if it is deemed in the City's best interest to do so;
 - iv. To reject any proposer that, in the City's sole judgment, has been delinquent or unfaithful in the performance of any contract with the City or other government entity, is financially or technically incapable or is otherwise not a responsible proposer;
 - v. To reject as informal or non-responsive any proposal which, in the City's sole judgment, is incomplete, is not in conformity with applicable law, is conditioned in any way, deviates from this RFP or contains erasures, ambiguities, alterations, or items of work not called for by this RFP;

- vi. To waive any informality, defect, non-responsiveness and/or deviation from this RFP that is not, in the City's sole judgment, material to the proposal;
 - vii. To permit or reject, at the City's sole discretion, amendments (including information inadvertently omitted), modifications, alterations and/or corrections of proposals by some or all of the proposers following proposal submission; or
 - viii. To request that some or all of the proposers modify proposals based upon the evaluation of the City.
- F. The City may enter into negotiations for a contract, on terms and conditions satisfactory to the City with one or more selected proposers. However, the City reserves the right to terminate any negotiations at any time or conduct simultaneous, competitive negotiations with multiple proposers. The City reserves the right to negotiate acceptable terms in an otherwise unacceptable proposal. Such negotiations may result in changes in terms material to this RFP; in such an event, the City shall not be obligated to inform other proposers of the changes, or permit them to revise their proposals accordingly, unless the City, in its sole discretion, determines that doing so and permitting such is in the City's best interest. Should negotiations not prove satisfactory with the selected proposer(s), the City reserves the right to discontinue negotiations. Additional firms may be asked to enter into negotiations, and/or the City may solicit new proposals.

Time is of the essence. The City reserves the right to immediately and permanently terminate negotiations with any proposer who is delaying or slowing down the negotiation process.

II. BACKGROUND

The public amenities at CDM State Beach are improved with infrastructure and visitor-serving amenities, including public restrooms, showers, a lifeguard facility, and landscaping. The facility includes a self-contained concession area intended to provide food/drink service and beach rentals to beach visitors. CDM State Beach includes open shoreline, day use parking, and nearby City parks. CDM State Beach also hosts major special events, including an annual sandcastle building competition and an antique car

show. CDM State Beach is one of the community's most family-friendly beaches with ocean-level parking and gentle surf conditions.

The City is pleased to present this opportunity for interested individuals and/or businesses to submit proposals and qualifications for the operation of the beach concession facility.

III. PROJECT DESCRIPTION

The concession facility is intended for food and drinks as well as beach rentals, such as umbrellas and body boards. The concession area is approximately one thousand forty-three (1,043) square feet in size and centrally located within the Lifeguard Observation building. A floor plan is attached as **Exhibit "A"**.

IV. PROPOSED AGREEMENT

Concession operations are a key component to the overall character of CDM State Beach. Proposers shall review the proposed Concession Agreement attached hereto as **Exhibit "B"** and:

- 1) Agree, in writing, to the agreement as-is, with a proposal for Percentage Rent (see Section 4.2 of the Concession Agreement) and proposed menu and prices; **OR**
- 2) Provide, in writing, counter-proposals to any provision in the proposed agreement at the time the proposer submits a response to this RFP.

V. QUALIFICATIONS

To ensure a high-quality level of operation for the facility, proposers must demonstrate experience and qualifications. Proposers must complete the City's Vendor Application Form (**Exhibit "C"**). Qualifying proposers will demonstrate evidence of the following:

- Experience in successfully operating and managing a similar type of business for a minimum of three (3) years;
- Fiscal solvency and capacity to complete necessary concessionaire improvements;
- Demonstrated track record of being an equal opportunity employer; and

- Must not be currently indebted to the federal government, State of California, or the City of Newport Beach for non-payment of taxes, fines, judgments, liens, or fees.

Note: At City's discretion, City may require the principals of an LLC, corporation, or other entity, to execute a personal guarantee for the prompt, full and complete performance of any and all covenants and provisions of the agreement.

The proposer or its employees may be subject to the provisions of the California Political Reform Act of 1974 (the "Act"), which (1) requires such persons to disclose any financial interest that may foreseeably be materially affected by the work to be performed pursuant to this RFP, and (2) prohibits such persons from making, or participating in making, decisions that will foreseeably financially affect such interest.

If subject to the Act, the proposer shall conform to all requirements of the Act. Failure to do so constitutes a material breach and is grounds for immediate rejection of the proposer's proposal, or, if the Concession Agreement is already entered into with the proposer, immediate termination of that Agreement by City. The proposer shall be required to indemnify, defend and hold harmless City for any and all claims for damages resulting from the proposer's violation of this provision.

Additional copies of this RFP, as well as copies of documents referenced in this RFP, may be obtained online at www.city.newport-beach.ca.us. Copies may also be obtained at the Revenue Division, City of Newport Beach, 3300 Newport Blvd., Newport Beach, CA 92658-8915.

VI. PROPOSAL INSTRUCTIONS

Submission Date and Requirements

Proposals must be submitted to:

**Evelyn Tseng
Revenue Manager
City of Newport Beach
3300 Newport Blvd.
P.O. Box 1768
Newport Beach, CA 92658-8915**

The following conditions apply to this submission:

- Proposals must be submitted by 12:00 noon, on **April 8, 2011**.
- Proposals must be signed, in ink, by an individual duly authorized to bind the proposer.
- Please provide one (1) original and five (5) copies of completed proposals. Do not bind the proposals – a simple buck clip is appropriate.
- Proposals or proposal components **will not** be accepted via facsimile (fax) transmission.
- Proposals shall remain binding for one hundred twenty (120) days from the date of proposal submission.
- The City reserves the right, at its sole discretion, to reject and return, without evaluation, any acceptance or counter-proposal received after the proposal submission time and date, whether it is delivered by mail or otherwise.

VII. REQUIRED ELEMENTS OF PROPOSALS

Proposers may submit any information they deem necessary and appropriate for the City to fully and completely evaluate their qualifications. The proposal must, at a minimum, include the following general information:

1. Pursuant to Section IV of this RFP, an agreement, in writing, to the attached Concession Agreement as-is, with a proposal for Percentage Rent (see Section 4.2 of the Concession Agreement) and proposed menu and prices; **OR** counter-proposals, in writing, to any provision in the proposed agreement.
2. Vendor Application (use form attached as **Exhibit "C"**);
3. Checklist for a Complete Submission (use form attached as **Exhibit "D"**);
4. Description of the proposer's business structure, key staff and their qualifications;
5. Description of the proposer's experience in operating a concession or other similar business enterprise, including the size of business operated, type of retail sales, etc.;

6. An audited financial statement (or a financial statement prepared by a certified public accountant) from the last full year of operation of a similar business enterprise. If you wish for this financial information to be kept out of the public record, please submit ONE COPY in a separate envelope, with the words 'FINANCIAL INFORMATION' along with your name on the envelope. This information will be held apart from the proposal and will be returned upon completion of the selection process.
7. A proposed annual budget for the operation of the beach concession for the first two to five years. Include a brief narrative that generally describes the anticipated expenses, revenues, and net income for each year.
8. At least three persons or businesses that have first-hand knowledge of the proposer's ability to successfully operate and maintain a business enterprise as described in Section 4, above.

VIII. ADDITIONAL REQUIREMENTS

Insurance

The concessionaire must meet all the insurance requirements required by the Concession Agreement attached as **Exhibit "B"**. These requirements are not open to counter-proposals.

All proposers are encouraged to contact their insurance carriers during the review of qualifications stage to ensure that the insurance requirements can be met if the proposer is selected for negotiation of a contract.

IX. REVIEW OF PROPOSAL RESPONSES

Review process

All proposals received by the deadline will be evaluated by a committee ("Review Committee") established by the City Manager or his designated representative. Upon the review and discussion of the quality and responsiveness of the proposals received, the Review Committee will make recommendations to the Newport Beach City Council.

The City discourages any proposer's advocacy before Members of the City Council until such time as the Review Committee has brought forth its recommendation to the City Council.

Notification of Awards

The successful proposer will be required to execute the Concession Agreement with the City, which is subject to formal approval by the Newport Beach City Council.

EXHIBITS

- A. Concession Floor Plan
- B. Proposed Concession Agreement
- C. Vendor Application Form
- D. RFP Submission Checklist

EXHIBIT "A"
CONCESSION FLOOR PLAN
(ATTACHED)

EXHIBIT "B"

**PROPOSED CONCESSION AGREEMENT
(ATTACHED)**

Corona del Mar Concession State Beach Concession Agreement (draft)

This Concession Agreement (“Agreement”) is made and entered into as of the ___ day of _____, ____ (“Effective Date”), by and between the City of Newport Beach, a municipal corporation (“City”) and _____ (“Concessionaire”).

RECITALS

A. Corona del Mar State Beach is part of the California State Parks system, but is operated by the City pursuant to the Operating Agreement by and between the City and the State of California, dated August 1, 1999 (the “Operating Agreement”). Pursuant to the Operating Agreement, City agreed “to develop, operate, control and maintain the premises as public recreational beach and park with related concession...”

B. In September 2005, the concession located at Corona del Mar State Beach was closed to commence construction of the Corona del Mar Beachgoer Amenities Improvement Project (the “Project”). The Project included the improvement of a one thousand forty-three (1,043) square foot concession facility which is depicted on Exhibit “A” and incorporated herein by this reference (the “Premises”).

C. The City issued a Request for Proposals for Concession Operations at Corona del Mar State Beach on _____, 2011, and after a careful evaluation process, the City selected Concessionaire.

D. Concessionaire and City desire to enter into this Agreement relating to the purpose of allowing Concessionaire to operate a concession area intended to provide food/drink service and beach rentals to beach visitors (“Concession”).

A G R E E M E N T

NOW, THEREFORE, in consideration of the mutual covenants herein contained, City and Concessionaire hereby agree as follows:

1. DEFINITIONS

1.1 General Definitions. As used in this Agreement, the following words and phrases shall have the following meanings:

(a) Alteration – any improvements, additions, alterations, changes, or modifications of the Premises made by Concessionaire including, but not limited to fixtures and signage.

(b) Authorized City Representative – the City Manager or his designee.

(c) Expiration - the lapse of the time specified as the Term of this Agreement, including any extension of the Term resulting from the exercise of an option to extend.

(d) Good Condition - neat and broom-clean, and is equivalent to similar phrases referring to physical adequacy in appearance and for use.

(e) Law - any judicial decision, statute, constitution, ordinance, resolution, regulation, rule, administrative order, or other requirement of any municipal, county, state, federal, or other government agency or authority having jurisdiction over the parties hereto or the Premises.

(f) Maintenance or Maintain - repairs, replacement, maintenance, repainting, and cleaning.

(g) Person - one or more natural persons, or legal entities, including, without limitation, partnerships, corporations, trusts, estates, associations, or a combination of natural persons and legal entities.

(h) Provision - any term, covenant, condition, or clause in this Agreement that defines, establishes, or limits the performance required or permitted by either party.

(i) Rent – includes Base Rent, Percentage Rent, taxes, and other similar charges payable by Concessionaire under the provisions of this Agreement.

(j) Rent Commencement Date - the Rent Commencement Date shall be the Effective Date set for this Agreement.

(k) Successor - assignee, transferee, personal representative, heir, or other Person succeeding lawfully, and pursuant to the provisions of this Agreement, to the rights or obligations of either Party.

(l) Termination - the termination of this Agreement, for any reason, prior to Expiration.

1.2 Other Definitions. - The following additional terms are defined in the following sections of this Agreement:

(a)	Base Rent	§4.2
(b)	Claim or Claims	§10.1
(c)	Concession	Recitals, §D
(d)	Gross Sales	§4.6
(e)	Hazardous Materials	§17
(f)	Indemnified Parties	§6.3
(g)	Option Term(s)	§3.2
(h)	Percentage Rent	§4.3(a)
(i)	Project	Recitals, §B
(j)	Premises	Recitals, §B

2. PREMISES

City finds it to be in the public interest and consistent with park uses to grant an exclusive right to operate a Concession at the Corona del Mar State Beach. Therefore, pursuant to the terms and conditions set forth herein, City hereby grants to Concessionaire the exclusive right, privilege and concession to conduct a business at the Premises engaged in selling such items as those described in Section 5.1, Business Purposes. Concessionaire agrees to accept the Premises in an "as is" condition as tendered by City. Concessionaire agrees that no representations with respect to the condition or improvements of the Premises have been made by City except as specifically set forth in this Agreement.

3. TERM

3.1 Term of Agreement. The Term of this Agreement shall be five (5) years from the Rent Commencement Date unless terminated sooner as provided in Section 14, or extended as provided in Section 3.2.

3.2 Option to Extend. Provided Concessionaire is not then in default, Concessionaire may extend the term of this Agreement for two additional successive terms of five (5) years (the "Option Term" or "Option Terms") the first commencing on Expiration of the initial Term and the second commencing on Expiration of the first Option Term, on the same terms and conditions as contained in this Agreement. Concessionaire must exercise the option by giving City written notice of its intention to do so at least three (3) months prior to Expiration of the initial Term or the first Option Term.

3.3 Hold Over. Should Concessionaire, with City's consent, hold over and continue in possession of the Premises after Expiration of the Term or any Option Term,

Concessionaire's continued occupancy of the Premises shall be considered a month-to-month tenancy subject to all the terms and conditions of this Agreement, except the provisions of Sections 3.1 and 3.2.

4. RENT

4.1 Concessionaire shall pay the greater of Base Rent or Percentage Rent.

4.2 Base Rent. The Base Rent shall be established at _____ per year. Base Rent shall be paid, in advance, in equal monthly installments of _____ on the first day of each month. Base Rent for any partial month shall be prorated in accordance with the actual number of days in that month and shall be due on the first day of that month that falls within the Term.

Annually, upon the anniversary date of the Rent Commencement Date, the Base Rent shall be adjusted in proportion to changes in the Consumer Price Index. Such adjustment shall be made by multiplying the original Base Rent by a fraction, the numerator of which is the value of the Consumer Price Index for the calendar month three (3) months preceding the calendar month for which such adjustment is to be made and the denominator of which is the value of the Consumer Price Index for the same calendar month immediately prior to the Rent Commencement Date. For example, if the adjustment is to occur effective June 1, 2012, the index to be used for the numerator is the index for the month of March 2012 and the index to be used for the denominator is the index for the month of March preceding the Rent Commencement Date. In no event shall the adjusted rent be reduced below the Base Rent immediately preceding any adjustment. The "Consumer Price Index" to be used in such calculation is the Consumer Price Index, All Urban Consumers (All Items), for the Los Angeles, Anaheim Riverside, Metropolitan Area, published by the United States Department of Labor, Bureau of Labor Statistics (1982-84 = 100). If both an official index and one or more unofficial indices are published, the official index shall be used. If said Consumer Price

Index is no longer published at the adjustment date, it shall be constructed by conversion tables included in such new index.

4.3 Percentage Rent.

(a) Payment. "Percentage Rent" shall be determined each calendar month and shall be calculated by multiplying _____ percent (___%) by the total Gross Sales (as defined in Section 4.6) made in, upon, or from the Premises and/or otherwise attributable to the Premises for the calendar month. For each month that Percentage Rent exceeds Base Rent, Concessionaire shall pay to City the Percentage Rent less the Base Rent paid to the City for that month.

(b) Accounting and Payment. Within twenty-five (25) days after the end of each calendar month for the term hereof, as may be extended as provided herein, commencing with the twenty-fifth (25th) day of the month following the Rent Commencement Date, and ending with the twenty-fifth (25th) day of the month next succeeding the last month of the term, as may be extended as provided herein, Concessionaire shall furnish to City a statement in writing, certified by Concessionaire and a Certified Public Accountant to be correct, showing the total Gross Sales made in, upon, or from and/or otherwise attributable to the Premises during the preceding calendar month (or fractional month at the beginning of the term if the Rent Commencement Date is other than the first day of a month), and shall accompany each such statement with a payment to City equal to _____percent (___%) of the total monthly Gross Sales made in, upon, or from or otherwise attributable to the Premises for the calendar month, less the Base Rent already paid to the City for that month.

4.4 Revenue from Premises Use in Film, Television, and/or Advertising.

Concessionaire may allow the Premises to be used for film, television production, advertising production, or other media vehicle only upon written approval from the City. One-half (1/2) of all monetary revenue received by Concessionaire as compensation or other payment for the use of the Premises in a film, television production, advertising

production, or other media vehicle shall be paid to City. The payment of revenue pursuant to this Section shall occur not less than thirty (30) days after Concessionaire receives this compensation or other payment.

4.5 Payment Location. Rent shall be payable at the office of the City's Cashiering Division at 3300 Newport Boulevard, Newport Beach, California, or at such other place or places as City may from time to time designate by written notice delivered to Concessionaire.

4.6 Gross Sales.

(a) The term "Gross Sales" means:

(1) all money, cash receipts, assets, property or other things of value, including but not limited to gross charges, sales, rentals, fees and commissions made or earned by Concessionaire and/or any assignees, licensees, permittees or concessionaires thereof, whether collected or accrued from any business, use or occupation, or any combination thereof, originating, transacted or performed in whole or in part, on the Premises, including but not limited to rentals, the rendering or supplying of services and the sale of goods, wares or merchandise, whether wholesale or retail, whether for cash or credit, or otherwise, and including the value of all consideration other than money received for any of the foregoing, without, except as expressly provided in Section 4.6(b), deduction from gross receipts for any overhead or cost or expense of operations, such as, but without limitation to salaries, wages, costs of goods, interest, debt amortization, credit, collection costs, discount from credit card operations, insurance and taxes. Each installment or credit sale shall be treated as a sale for the full price in the month during which such sale is made, irrespective of whether or when Concessionaire receives payment therefore. Gross Sales shall include any amount allowed upon any "trade in," the full retail price of any merchandise delivered or redeemed for trading stamps or coupons and all deposits not refunded to purchasers;

(2) Orders taken in or from the Premises, even if the orders are filled elsewhere, and sales by any subconcessionaire in or from the Premises;

(3) Gross receipts of all coin-operated devices that are placed on the Premises by Concessionaire or pursuant to any rent concession, percentage or other arrangement (but excluding revenue from telephones that are collected by a public and/or private utility); and

(4) Rentals of any beach equipment, beach furniture, goods, wares or merchandise.

(b) Exclusions from Gross Sales. Gross Sales shall not include, or if included there shall be deducted (but only to the extent they have been included), the following:

(1) Sales and use taxes, so-called luxury taxes, consumers' excise taxes, gross receipts taxes, and other similar taxes now or in the future imposed on the sale of merchandise or services, but only if such taxes are added to the selling price and collected from customers;

(2) The amount of returns to shippers or manufacturers;

(3) The amount of any cash or credit refund made upon any sale where the merchandise sold or some portion is returned by the purchaser. Each sale upon installment or credit shall be treated as a sale for the full price in the month during which such sale shall be made, irrespective of the time when Concessionaire shall receive payment (whether in full or partial) from its customers;

(4) Sales of trade fixtures or personal property to be replaced by Concessionaire that are not considered stock in trade;

(5) Sums and credits received in the settlement of claims for loss of or damage to merchandise;

(6) Meals provided for officers or employees without charge;

(7) Meals, goods or products provided for promotional or publicity purposes without charge;

(8) Cash refunds made to customers in the ordinary course of business;

(9) Value added taxes ("VAT") or other taxes added to the selling price of products and other similar taxes now or hereafter imposed upon the sale of merchandise or services, whether such taxes are added to, or included in the selling price;

(10) Discounted sales to employees of Concessionaire, not to exceed two percent (2%) of the monthly Gross Sales;

(11) Uncollectible credit accounts and other bad debts, not to exceed two percent (2%) of the monthly Gross Sales; and

(12) Amounts paid to charge card or credit card issuers.

(c) Annual Statements of Gross Sales. Within thirty (30) days after the end of each calendar year during the Term hereof, as may be extended as provided herein, Concessionaire shall furnish to City a statement in writing, certified by Concessionaire and a Certified Public Accountant to be correct, showing the total Gross Sales made in, upon, or from and/or otherwise attributable to the Premises during the preceding calendar year (or fractional year at the beginning of the term if the Rent Commencement Date is other than the first day of the year).

(d) Sales and Charges. All sales and charges shall be recorded by means of cash registers that display the amount of the transaction certifying the amount recorded. The register shall be equipped with devices that log in daily sales totals, and record on tapes the transaction numbers and sales details. At the end of each day the tape will record the total sales for that day.

(e) Production of Statement, Records and Audit. Concessionaire shall keep at the Premises (and shall require any permitted subconcessionaire to keep at the

Premises) full, complete and proper books, records and accounts of its daily Gross Sales, both for cash and on credit, at any time operated in the Premises. Concessionaire agrees to make available for inspection by City at the Premises, a complete and accurate set of books and records of all sales of goods, wares, and merchandise and revenue derived from the conduct of business or activity in, at or from the Premises from which Gross Sales can be determined. Concessionaire shall also make available, upon City request, all supporting records. Concessionaire shall also furnish City copies of its quarterly California sales and use tax returns at the time each is filed with the State of California. Concessionaire shall retain and preserve for at least three (3) years all records, books, bankbooks or duplicate deposit books and other evidence of Gross Sales. City shall have the right, upon reasonable notice, during the Term and within one hundred eighty (180) days after Expiration or Termination of this Agreement to inspect and audit Concessionaire's books and records and to make transcripts to verify the Rent due to the City. The audit may be conducted at any reasonable time during normal business hours. Concessionaire shall cooperate with City in making the inspection and conducting the audit. The audit shall be limited to the determination of Gross Sales and shall be conducted during usual business hours in a manner that minimizes any interference with the conduct of Concessionaire's regular business operations. If the audit concludes that there is a deficiency in the payment of any Rent, the deficiency shall become due and payable within twenty (20) days and if there is an overpayment, City shall refund the amount of the overpayment within twenty (20) days. City shall bear its costs of the audit unless the audit shows that Concessionaire understated Gross Sales by more than two percent (2%), in which case Concessionaire shall pay all City's reasonable costs of the audit. City shall keep any information gained from such statements, inspections or audits confidential to the maximum extent permitted by law. City shall not disclose financial information received in confidence and pursuant to this Agreement except to carry out the purposes of this

Agreement unless disclosure is required (rather than permitted) by law. However, City may disclose the results of any audit in connection with any financing arrangements, the sale or transfer of City's interest in the Premises, pursuant to order of a court or administrative tribunal, or to collect any outstanding Rent.

(f) Concessionaire's Gross Sales Audit. In the event of any audit by City in accordance with this Agreement, Concessionaire may contest the results of City's audit by performing a confirming audit, at Concessionaire's expense, within sixty (60) days of receipt of City's audit results and supporting evidence, using an independent Certified Public Accountant reasonably acceptable to City. If Concessionaire's audit discloses that City's audit was incorrect by more than twenty-five percent (25%), then City shall pay the cost of Concessionaire's contesting audit.

(g) Acceptance. The acceptance by City of any money paid to City by Concessionaire as Percentage Rent for the Premises, as shown by any statement furnished by Concessionaire, shall not be construed as an admission of the accuracy of said statement, or of the sufficiency of the amount of the Percentage Rent payment.

4.7 Late Payment. Concessionaire hereby acknowledges that the late payment of Rent or other sums due hereunder will cause City to incur costs not contemplated by this Agreement, the exact amount of which is extremely difficult to ascertain. Such costs include, but are not limited to, processing and accounting charges. Accordingly, any payment of any sum to be paid by Concessionaire not paid within five (5) days of its due date shall be subject to a ten percent (10%) late charge. City and Concessionaire agree that this late charge represents a reasonable estimate of such costs and expenses and is fair compensation to City for its loss suffered by such late payment by Concessionaire.

4.8 Interest on Unpaid Sums. Unpaid sums due to either City or Concessionaire under this Agreement shall bear interest at the rate of ten percent

(10%) per annum on the unpaid balance, including but not limited to late payment penalties, from the date due until paid.

5. BUSINESS PURPOSES AND USE OF PREMISES

5.1 Business Purposes. The Premises are to be used by Concessionaire for the operation of a concession selling food, non-alcoholic beverages, and miscellaneous beach-related merchandise, as well as for the rental of beach-related products such as umbrellas, beach chairs, and boogie boards. Concessionaire's proposed menu, proposed rental items and proposed sales merchandise is hereby attached as Exhibit "B". Pricing for these products will be comparable to prices at nearby beach concession facilities. Alcoholic beverage sales or giveaways are prohibited.

5.2 Operation of Premises. Concessionaire shall operate and manage the Premises in a manner comparable to other high quality businesses providing similar food and services. Deliveries shall be made and completed only between 7a.m. and 6 p.m. on non-holiday weekdays.

5.3 Prohibited Uses. Concessionaire shall not sell or permit to be kept, used, displayed or sold in or about the Premises (a) pornographic or sexually explicit books, magazines, literature, films or other printed material, sexual paraphernalia, or other material which would be considered lewd, obscene or licentious, (b) any article which may be prohibited by standard forms of fire insurance policies, or (c) any alcoholic beverages. Vending machines, gaming machines or video or arcade games shall not be used or installed on the Premises unless expressly permitted by this Agreement. Concessionaire shall not use or permit the use of the Premises in any manner that (a) creates a nuisance or (b) violates any Law. Concessionaire shall not offer entertainment or broadcast music or entertainment through exterior speakers or other form of transmission.

5.4 Food Packaging and Debris. Concessionaire shall use food packaging consistent with good environmental practices, including prohibiting polystyrene (also known as Styrofoam) from the Premises, minimizing the use of PVC plastics (especially plastic bags for carrying food), and providing both trash receptacles and places for customers to dispose of recyclable products.

5.5 Outdoor Dining. Concessionaire shall be permitted to use up to ____ tables on a portion of the paved area outside of the Premises, subject to prior written approval of the City Manager and in accordance with City zoning codes and State requirements. Concessionaire may not expand onto the beach area, or place any temporary furniture or objects onto the beach area.

5.6 Operation. Weather permitting, Concessionaire shall keep the Premises in operation and open to the public for business each calendar day of the year in accordance with the schedule in this Section. Concessionaire may close the Concession on Thanksgiving Day, Christmas Day, during periods of remodeling, reconstruction, inventory and emergencies (including substantially inclement weather) or to comply with Laws. Notwithstanding the foregoing, if Concessionaire can show, on the second (2nd) anniversary of the Rent Commencement Date, consistently low gross sales on certain days of the year, then Concessionaire may close the Concession on those days upon written approval of City Manager. Unless otherwise approved in writing by the City Manager, which approval shall not be unreasonably withheld, the Concession shall follow this schedule of operations:

- (a) Daily from Memorial Day through Labor Day:
7:00 a.m. through 8:30 p.m., all sales and rentals to cease at 7:30 p.m.
- (b) From the day after Labor Day to the day before Memorial Day:
Weekend days (Saturday and Sunday) -
7:00 a.m. through dusk.

Weekdays (Monday through Friday) –

Hours at Concessionaire's discretion, but in no event, no earlier than 7:00 a.m. or later than dusk.

5.7 Food Preparation. Concessionaire shall install, at Concessionaire's own expense, fire protective systems in grill, deep fry, and cooking areas which are required by City, County, and state fire ordinances, and such system when installed shall qualify for full fire protective credits allowed by the fire insurance rating and regulatory body in whose jurisdiction the Premises is located. Concessionaire shall also install adequate ventilation systems to operate the cooking area.

5.8 Advertising Display. Concessionaire may, at its own expense, place unlit signs in or upon the Premises subject to the prior written consent of the City Manager as to the size, type, number, design and method of installation. All signage placed by Concessionaire on, in or about the Premises shall remain the property of Concessionaire and shall be removed by Concessionaire upon Termination or Expiration of this Agreement at Concessionaire's expense; and any damage caused by removal shall be repaired at Concessionaire's expense.

5.9 Personnel. Concessionaire shall be responsible for hiring the necessary personnel to conduct the daily operation of Concession. Concessionaire shall comply with all federal, state, and local Laws related to minimum wage, social security, nondiscrimination, ADA, unemployment compensation, and workers' compensation. If required by the City, employees shall wear a uniform and/or identification badge.

5.10 Independent Contractor. It is understood that Concessionaire is an independent contractor and not an agent or employee of City. Nothing in this Agreement shall be deemed to constitute approval for Concessionaire or any of Concessionaire's employees or agents, to be the agents or employees of City. City shall have no interest in the business of Concessionaire.

5.11 No Distress Sales. No auction, fire, bankruptcy, "going out of business" or other distress sales of any nature may be conducted on the Premises without the prior written consent of the City Manager, which approval will not be unreasonably withheld but may be conditioned.

5.12 Parking for Employees. City shall designate four (4) parking spaces for Concessionaire and its employees. Concessionaire shall be responsible for the payment of any applicable parking entrance fees and cause its employees to comply with the procedures and regulations established by City from time-to-time to control parking.

6. TAXES, LICENSES AND OTHER OBLIGATIONS

6.1 Payment of Taxes. Concessionaire shall pay directly to the appropriate taxing authorities all taxes applicable to this Agreement, fixtures and Concessionaire's personal property on the Premises, that are levied or assessed against Concessionaire during the Term. Taxes shall be paid at least ten (10) days before delinquency and before any fine, interest or penalty is due or imposed by operation of law. Concessionaire shall, upon request, promptly furnish to the City satisfactory evidence of payment. Concessionaire acknowledges that this Agreement may create a possessory interest subject to property taxation and that Concessionaire may be subject to the payment of property taxes levied on such interest. Concessionaire shall pay, before delinquency all taxes, assessments, license fees and other charges ("Taxes") that are levied or assessed against Concessionaire's interest in the Premises or any personal property installed on the Premises.

6.2 Payment of Obligations. Concessionaire shall promptly pay, when due, any and all bills, debts, liabilities and obligations incurred by Concessionaire in connection with Concessionaire's occupation and use of the Premises.

6.3 Challenge to Taxes. Concessionaire shall have the right in good faith, at its sole cost and expense, to contest the amount or legality of any Taxes on or attributable to this Agreement, the Premises, Concessionaire's personal property, or Concessionaire's occupation and use of the Premises, including the right to apply for reduction. If Concessionaire seeks a reduction or contests such taxes, Concessionaire's failure to pay the taxes shall not constitute a default as long as Concessionaire complies with the provisions of this Section. City shall not be required to join in any proceeding or contest brought by Concessionaire unless the provisions of any Law require that the proceeding or contest be brought by or in the name of City or any owner of the Premises. In that case, City shall join in the proceeding or contest or permit it to be brought in City's name as long as City is not required to bear any cost. If requested by Concessionaire, City shall execute any instrument or document necessary or advisable in connection with the proceeding or contest. Concessionaire, on final determination of the proceeding or contest, shall immediately pay or discharge any decision or judgment rendered, together with all related costs, charges, interest and penalties. Concessionaire shall indemnify, defend and hold harmless the City, its council members, boards, commissions, officers, employees, Authorized City Representatives, agents and volunteers ("Indemnified Parties") from and against any liability, claim, demand, penalty, cost or expense arising out of or in connection with any contest by Concessionaire pursuant to this Section.

7. UTILITIES.

Concessionaire shall make all arrangements for utilities installation and pay for all utilities furnished to or used on the Premises, including, without limitation, gas, electricity, water, telephone service, and cable TV. Concessionaire may use City's trash enclosures or public trash cans, provided however, that City may, at City's discretion, require Concessionaire to arrange for its own refuse collection. Any repair to

utility lines within the Premises is the sole responsibility of Concessionaire. Concessionaire shall service and maintain the Concession's 1500-gallon grease interceptor. Refuse collection and grease interceptor maintenance shall occur between 7 a.m. and 6 p.m. on non-holiday weekdays.

8. ALTERATIONS TO THE PREMISES.

8.1 Concessionaire Improvements. Concessionaire acknowledges that City has delivered the Premises without any improvements, and it shall be Concessionaire's responsibility to install service runs, including gas, water and electricity, in addition to completing interior finishes, installing equipment and providing other improvements (including a restroom) as necessary for the Concession to operate. All Concessionaire improvement plans and construction shall be subject to the prior written approval of the City Manager. Concessionaire improvements shall be performed between 7 a.m. and 6 p.m. on non-holiday weekdays. Any contractors hired by Concessionaire shall be fully licensed and bonded. Concessionaire's contractors and any subcontractors shall obtain insurance in an amount and form to be approved by City's Risk Manager, including workers compensation insurance as required by law, general liability, automobile liability and builder's risk insurance covering improvements to be constructed, all pursuant to standard industry custom and practice. City shall be named as an additional insured on the contractors and any subcontractors policies.

8.2 Permits. Concessionaire shall obtain, and be responsible for the costs for, all building permits, health department permits and other required permits prior to commencement of Concessionaire improvements and operations.

8.3 Quality of Work Performed. All alterations, maintenance and other work shall be performed in a good and workmanlike manner, shall comply with the plans and specifications submitted to City, and shall comply with all applicable governmental permit requirements and Laws in force at the time permits are issued.

8.4 Payment of Costs. Concessionaire shall pay all costs related to the construction of the improvements and any Alterations by Concessionaire or its agents.

8.5 Liens. Concessionaire shall keep the Premises free from any liens arising out of any work performed, material furnished, or obligation incurred by Concessionaire or alleged to have been incurred by Concessionaire.

8.6 Disposition of Alterations at Expiration or Agreement Termination. Any Alterations made to the Premises shall remain on, and be surrendered with, the Premises on Expiration or Termination of this Agreement (excluding Concessionaire's fixtures, equipment, furniture, and moveable decorations). However, City may elect not less than thirty (30) days prior to Expiration or Termination of this Agreement, to require Concessionaire to remove any Alterations that Concessionaire has made to the Premises. If City requires removal of Alterations, Concessionaire shall, at its cost, remove the Alterations and restore the Premises to a broom-clean condition before the last day of the Term, or within thirty (30) days after notice is given, whichever is later. Prior to Expiration or within fifteen (15) days after Termination of this Agreement, Concessionaire may remove any moveable partitions, machinery, equipment, furniture, and trade fixtures previously installed by Concessionaire, provided that Concessionaire repairs any damage to the Premises caused by removal.

9. MAINTENANCE OF PREMISES

9.1 Maintenance and Repair by Concessionaire and City. Concessionaire agrees that it will keep the Premises in Good Condition. Graffiti shall be called in to the City's Graffiti Hotline for removal. City may perform Maintenance or repairs in the event Concessionaire fails to commence required Maintenance or repairs within three (3) business days after receipt of notice to do so. The cost of any Maintenance or repairs by the City pursuant to this Section shall be payable as additional Rent. All furnishings, equipment, facilities, improvements, alterations, attachments and appurtenances not

provided by City, but required for concession operations, including all kitchen equipment and interior furnishings, shall be maintained in Good Condition and repair by Concessionaire at its cost. City may perform required cleaning and charge the costs to Concessionaire if the Concessionaire fails to perform within five (5) days after notice to do so and continue to Maintain the area as required by this Agreement.

9.2 Entry by City. Upon twenty-four (24) hour notice to Concessionaire, City and its Authorized City Representatives may enter upon and inspect the Premises at any reasonable time for any lawful purpose. In case of emergency, City or its Authorized City Representative may enter the Premises by whatever force necessary if Concessionaire is not present to open and permit an entry. Any entry to the Premises by City shall not be construed as a forcible or unlawful entry into, or a detainer of, the Premises, or an eviction of Concessionaire from the Premises or any portion thereof.

10. INDEMNITY AND EXCULPATION; INSURANCE

10.1 Hold-Harmless Clause. Concessionaire agrees to indemnify, defend and hold harmless the City, its City Council, Boards, Commissions, officers, agents, volunteers, employees, and the State of California (collectively, the “Indemnified Parties”) from and against any and all claims (including, without limitation, claims for bodily injury, death or damage to property), demands, obligations, damages, actions, causes of action, suits, losses, judgments, fines, penalties, liabilities, costs and expenses (including, without limitation, attorney’s fees, disbursements and court costs) of every kind and nature whatsoever (individually, a “Claim”; collectively, “Claims”), which may arise from or in any manner relate (directly or indirectly) to Concessionaire’s possession or occupation and use of the Premises, specifically including, without limitation, any claim, liability, loss, or Damage arising by reason of:

(a) The death or injury of any Person or damage to personal property caused or allegedly caused by the condition of the Premises or an act or omission of Concessionaire or an agent, contractor, subcontractor, supplier, employee, servant, sublessee or concessionaire of Concessionaire;

(b) Any work performed on the Premises or materials furnished to the Premises at the request of Concessionaire or any agent or employee of Concessionaire, with the exception of Maintenance performed by City; and/or

(c) Concessionaire's failure to perform any provision of this Agreement or to comply with any requirement of Law or any requirement imposed on the Premises by any duly authorized governmental agency or political subdivision.

Concessionaire's obligations pursuant to this Subsection shall not extend to any Claim proximately caused by the sole negligence, willful misconduct, or unlawful or fraudulent conduct on the part of the Indemnified Parties. This indemnity shall apply to all claims and liability regardless of whether any insurance policies are applicable.

10.2 Exculpation of City. Except as otherwise expressly provided in this Agreement, City shall not be liable to Concessionaire for any damage to Concessionaire or Concessionaire's property from any cause other than the sole negligence, intentional or willful acts of the Indemnified Parties. Except as otherwise expressly provided in this Agreement, Concessionaire waives all claims against the Indemnified Parties arising for any reason other than the sole negligence, intentional or willful acts of the Indemnified Parties. City shall not be liable to Concessionaire for any damage to the Premises, Concessionaire's property, Concessionaire's goodwill, or Concessionaire's business income, caused in whole or in part by acts of nature including, without limitation, waves, wind and ocean currents.

10.3 Insurance. In addition to insurance required of Concessionaire to be obtained, provided, and maintained during the construction of the improvements, and without limiting Concessionaire's indemnification of City, Concessionaire shall obtain,

provide and maintain at its own expense during the term of this Agreement, a policy or policies of liability insurance of the type and amounts described below and in a form satisfactory to City.

(a) Certificates of Insurance. Concessionaire shall provide certificates of insurance with original endorsements to City as evidence of the insurance coverage required herein. Insurance certificates must be approved by City's Risk Manager prior to execution of this Agreement by the City. Current certification of insurance shall be kept on file with City at all times during the term of this Agreement.

(b) Signature. A person authorized by the insurer to bind coverage on its behalf shall sign certification of all required policies.

(c) Acceptable Insurers. All insurance policies shall be issued by an insurance company currently authorized by the Insurance Commissioner to transact business of insurance in the State of California, with an assigned policyholders' Rating of A- (or higher) and Financial Size Category Class VII (or larger) in accordance with the latest edition of Best's Key Rating Guide, unless otherwise approved by the City's Risk Manager.

(d) Coverage Requirements.

i. Workers' Compensation Coverage. Concessionaire shall maintain Workers' Compensation Insurance at statutory limits and Employer's Liability Insurance at One Million and 00/100 Dollars (\$1,000,000.00) for his or her employees in accordance with the laws of the State of California. Any notice of cancellation or non-renewal of all Workers' Compensation policies must be received by City at least thirty (30) calendar days (ten (10) calendar days written notice of non-payment of premium) prior to such change. The insurer shall agree to waive all rights of subrogation against City, its officers, agents, employees and volunteers for all losses that relate in any way to this Agreement.

ii. General Liability Coverage. Concessionaire shall maintain commercial general liability insurance in an amount not less than Two Million and 00/100 Dollars (\$2,000,000.00) per occurrence for bodily injury, personal injury, and property damage, including without limitation, contractual liability. If commercial general liability insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to the work to be performed under this Agreement, or the general aggregate limit shall be at least twice the required occurrence limit.

iii. Automobile Liability Coverage. Concessionaire shall maintain automobile insurance covering bodily injury and property damage for all activities of the Concessionaire arising out of or in connection with the services to be performed under this Agreement, including coverage for any owned, hired, non-owned or rented vehicles, in an amount not less than Two Million Dollars and 00/100 Dollars (\$2,000,000.00) combined single limit for each occurrence.

iv. Fire and Extended Coverage. Concessionaire shall maintain fire and extended coverage insurance, together with insurance against vandalism, theft and malicious mischief, on the improvements and fixtures, alterations, trade fixtures, signs, equipment, personal property and inventory on or upon the Premises from loss or damage to the extent of their full replacement value.

v. Concessionaire shall maintain loss of rent insurance insuring that the Rent will be paid to City for a period up to six (6) months if the Premises are destroyed or rendered unusable or inaccessible for commercial purposes by a risk insured under a special form property coverage policy including vandalism and malicious mischief endorsements.

(e) Endorsements. Each insurance policy shall be endorsed with the following specific language:

i. The City, its elected or appointed officers, officials, employees, agents and volunteers, and the State of California, its elected or appointed officers, officials, employees, agents and volunteers, are to be covered as additional insureds, with respect to liability arising out of work performed by or on behalf of the Concessionaire.

ii. This policy shall be considered primary insurance as respects to City, its elected or appointed officers, officials, employees, agents and volunteers as respects to all claims, losses, or liability arising directly or indirectly from the Concessionaire's operations or services provided to City. Any insurance maintained by City, including any self-insured retention City may have, shall be considered excess insurance only and not contributory with the insurance provided hereunder.

iii. This insurance shall act for each insured and additional insured as though a separate policy had been written for each, except with respect to the limits of liability of the insuring company.

iv. The insurer waives all rights of subrogation against City, its elected or appointed officers, officials, employees, agents and volunteers.

v. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to City, its elected or appointed officers, officials, employees, agents or volunteers.

vi. The insurance provided by this policy shall not be suspended, voided, canceled, or reduced in coverage or in limits, by either party except after thirty (30) calendar days (ten (10) calendar days written notice of non-payment of premium) written notice has been received by City.

(f) Timely Notice of Claims. Concessionaire shall give City prompt and timely notice of claim made or suit instituted arising out of or resulting from Concessionaire's performance under this Agreement.

(g) Additional Insurance. Concessionaire shall also procure and maintain, at its own cost and expense, any additional kinds of insurance, which in its own judgment may be necessary for its proper protection and prosecution of the work.

11. DAMAGE OR DESTRUCTION OF PROJECT/PREMISES

11.1 Destruction of Premises. If the Premises are totally or partially destroyed, rendering the Premises or any portion thereof totally or partially inaccessible or unusable, Concessionaire shall restore the Premises to substantially the same condition as immediately prior to such destruction (including all trade fixtures, personal property, improvements and Alterations as are installed by Concessionaire, which shall be replaced by Concessionaire at its expense). Concessionaire may elect to terminate this Agreement by giving notice of such election to City within sixty (60) days after the date of the occurrence of any casualty if the cost of the restoration exceeds the amount of any available insurance proceeds, if the damage has been caused by an uninsured casualty or event, or if Concessionaire reasonably estimates that repairs of the Premises will take more than six (6) months. Upon such termination, insurance proceeds applicable to reconstruction of the Project (excluding Concessionaire's personal property therein) shall be paid to City and Concessionaire shall have no further liability or obligations under this Agreement.

11.2 Replacement of Concessionaire's Property. In the event of damage or destruction of improvements located on the Premises not giving rise to Concessionaire's option to terminate this Agreement, Concessionaire shall, at its own expense, replace and repair all Concessionaire's trade fixtures, equipment, machinery, furnishings, furniture and inventory as soon as reasonably possible to permit the prompt continuation of Concessionaire's business at the Premises.

11.3 Destruction of Project. In the event that all or a portion of the Project is damaged, and the Premises or a material portion becomes inaccessible or

commercially unusable, and the damage or destruction cannot reasonably be repaired within twelve (12) months after the date of the casualty, City shall have the right to either:

(a) Terminate this Agreement by giving to Concessionaire written notice (which notice shall be given, if at all, within thirty (30) days following the date of the casualty), in which case this Agreement shall be terminated thirty (30) days following the date of the casualty; or

(b) Give Concessionaire written notice of City's intention to repair such damage as soon as reasonably possible at City's expense, in which event this Agreement shall continue in full force and effect; however, Rent shall be abated in accordance with the procedures set forth in Section 12. Concessionaire may terminate this Agreement by giving City written notice at any time prior to the commencement of repairs if City agrees to repair the Project pursuant to this Section and fails to commence repairs within one hundred twenty (120) days after giving Concessionaire written notice of its intention to repair. In such event, this Agreement shall terminate as of the date of notice from Concessionaire to City, and City shall have no liability under this Agreement.

12. ABATEMENT OF RENT

12.1 General Rule. In the event of damage or destruction of the Premises or Damage to the Project that impacts the Premises and this Agreement is not terminated, Concessionaire shall continue to utilize the Premises for the operation of its business to the extent it may be practicable and commercially reasonable. Rent shall abate only in proportion to the area of the Premises that is rendered unusable. The abatement of Rent shall commence on the date that use of the Premises is impacted and continue until the completion of those repairs necessary to restore full use of the Premises and Concessionaire's re-opening of the Premises. Concessionaire's obligation to pay Taxes

pursuant to this Agreement shall not be abated or reduced. Rent shall not abate if the damage or destruction to the Premises is the result of the negligence or willful conduct of Concessionaire or its employees, officers or agents. Concessionaire's right to abatement of Rent is contingent on payment of insurance proceeds, if any, equal to the amount of Rent pursuant to coverage required by Section 10.3.

12.2 Abatement/Maintenance. Concessionaire shall not be entitled to any abatement of Rent for Maintenance that occurs during the Maintenance period.

13. PROHIBITION AGAINST VOLUNTARY ASSIGNMENT, SUBLETTING AND ENCUMBERING

13.1 Prohibition of Assignment. City and Concessionaire acknowledge that City is entering into this Agreement in reliance upon the experience and abilities of Concessionaire. Consequently, Concessionaire shall not voluntarily assign or encumber its interest in this Agreement or in the Premises, or assign substantially all or any part of the Premises, or allow any other person or entity (except Concessionaire's authorized representatives) to occupy or use all or any part of the Premises without the prior written consent of City, which shall not be unreasonably withheld. City's consent to any assignment or other transfer is subject to Concessionaire providing City with evidence reasonably satisfactory to City that the proposed transferee has financial strength and restaurant or food service experience comparable to Concessionaire and the use of the Premises by the proposed transferee is consistent with the terms of this Agreement. Except as otherwise expressly provided herein, any dissolution, merger, consolidation, reorganization of Concessionaire, or the sale or other transfer resulting in a transfer of a controlling percentage of the capital stock of Concessionaire, shall be deemed a voluntary assignment; provided, however, that the sale or transfer of a controlling percentage of the capital stock of Concessionaire pursuant to a public offering(s) of equity or debt instruments issued by Concessionaire, or other transfers of publicly

traded capital stock or debt instruments shall not constitute a voluntary assignment and shall not require City's consent or approval. The phrase "controlling percentage" means the ownership of, or the right to vote, stock possession of at least fifty percent (50%) of the total combined voting power of all classes of Concessionaire's capital stock issued, outstanding, and entitled to vote for the election of directors, except for ownership of publicly traded shares, warrants or similar equity interests in Concessionaire traded on a national exchange or over-the-counter markets.

13.2 Exceptions. Notwithstanding the foregoing paragraphs or anything to the contrary contained herein, City's consent shall not be required for an assignment or subletting to an Affiliate, Subsidiary, or Successor of Concessionaire. For purposes hereof, an "Affiliate", a "Subsidiary", and a "Successor" of Concessionaire are defined as follows:

(a) an "Affiliate" is any corporation or other entity which directly or indirectly controls or is controlled or is under common control with Concessionaire (for purposes of this Section, "control" shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such corporation or other entity, whether through the ownership of voting securities or by contract or otherwise);

(b) a "Subsidiary" shall mean any corporation or other entity not less than twenty-five percent (25%) of whose outstanding stock shall, at the time, be owned directly or indirectly by Concessionaire and which is at least as creditworthy as Concessionaire; and

(c) a "Successor" shall mean a corporation or other entity in which or with which Concessionaire is merged or consolidated, in accordance with applicable statutory provisions for merger or consolidation of corporations or a corporation or other entity acquiring a substantial portion of the property and assets of Concessionaire.

13.3 Continuing Effect. City's consent to any assignment or encumbrance shall not relieve Concessionaire from its obligations or liabilities under this Agreement nor act as a waiver of the requirement that such consent be obtained to any subsequent assignment or encumbrance.

14. DEFAULT

14.1 Default by Concessionaire. The occurrence of any one or more of the following events shall constitute a default and material breach of this Agreement by Concessionaire:

- (a) The vacating or abandonment of the Premises by Concessionaire;
- (b) The failure by Concessionaire to make any payment of Rent or any other payment required by this Agreement, as and when due, when such failure shall continue for a period of ten (10) days after written notice of default from City to Concessionaire;
- (c) Except as specified in Subsection 14.1(b), the failure of Concessionaire to observe or perform any of the material covenants, conditions or provisions of this Agreement to be observed or performed by Concessionaire where such failure shall continue for a period of thirty (30) days after written notice thereof from City to Concessionaire; provided, however, that if the nature of Concessionaire's default is such that more than thirty (30) days are reasonably required for its cure, then Concessionaire shall not be deemed to be in default if Concessionaire commences such cure within said thirty (30) day period and thereafter diligently prosecutes such cure to completion;
- (d) The making by Concessionaire of any general arrangement or assignment for the benefit of creditors;

(e) Concessionaire becomes a "debtor" as defined in 11 U.S.C. Section 101 or any successor statute thereto (unless, in the case of a petition filed against Concessionaire, the same is dismissed within sixty (60) days);

(f) The appointment of a trustee or receiver to take possession of substantially all of Concessionaire's assets located at the Premises or of Concessionaire's interest in this Agreement, where such appointment is not discharged within sixty (60) days; and

(g) The attachment, execution or the judicial seizure of substantially all of Concessionaire's assets located at the Premises or of Concessionaire's interest in this Agreement, where such seizure is not discharged within sixty (60) days.

14.2 Remedies.

(a) Cumulative Nature of Remedies. If any default by Concessionaire shall continue without cure as required by this Agreement, City shall have the remedies described in this Section in addition to all other rights and remedies provided by law or equity, to which City may resort cumulatively or in the alternative.

(1) Reentry without Termination. City may reenter the Premises, and, without terminating this Agreement, re-let all or a portion of the Premises. City may execute any agreements made under this provision in City's name and shall be entitled to all rents from the use, operation, or occupancy of the Premises. Concessionaire shall nevertheless pay to City on the dates specified in this Agreement the equivalent of all sums required of Concessionaire under this Agreement, plus City's expenses in conjunction with re-letting, less the proceeds of any re-letting or atonement. No act by or on behalf of City under this provision shall constitute a Termination of this Agreement unless City gives Concessionaire specific written notice of Termination.

(2) City may terminate this Agreement by giving Concessionaire notice of Termination. In the event City terminates this Agreement, City may recover possession of the Premises (which Concessionaire shall surrender and vacate upon

demand) and remove all Persons and property. City shall be entitled to recover the following as damages;

(A) The value of any unpaid Rent or other charges that are unpaid at the time of Termination;

(B) The value of the Rent and other charges that would have accrued after Termination less the amount of Rent and charges the City received or could have received through the exercise of reasonable diligence as of the date of the award;

(C) Any other amount necessary to reasonably compensate City for the detriment proximately caused by Concessionaire's failure to perform its obligations under this Agreement; and

(D) At City's election, such other amounts in addition to or in lieu of the foregoing as may be permitted from time-to-time by applicable California law. City shall be entitled to interest at the rate of ten percent (10%) per annum on all Rent and other charges from the date due or the date they would have accrued. City shall also be entitled to an award of the costs and expenses incurred by City in maintaining or preserving the Premises after default, preparing the Premises for re-letting, or repairing any damage caused by the act or omission of Concessionaire.

(3) Use of Concessionaire's Personal Property. City may use Concessionaire's personal property and trade fixtures located on the Premises or any of such property and fixtures without compensation or liability to Concessionaire for use or damage. In the alternative City may store the property and fixtures at the cost of Concessionaire. City shall not operate the Concession in any manner tending to indicate that the Concession is affiliated with, part of or operated in conjunction with Concessionaire's business.

(b) City's Right to Cure Concessionaire's Default. Upon continuance of any material default beyond applicable notice and cure periods, City may, but is not

obligated to, cure the default at Concessionaire's cost. If City pays any money or performs any act required of, but not paid or performed by, Concessionaire after notice, the payment and/or the reasonable cost of performance shall be due as additional Rent not later than five (5) days after service of a written demand accompanied by supporting documentation. No such payment or act shall constitute a waiver of default or of any remedy for default or render City liable for any loss or damage resulting from performance.

15. SUBJECT TO STATE OPERATING AGREEMENT

The Premises are located on property that is the subject of an Operating Agreement between the State of California to the City. Concessionaire shall not take any action that would cause the City to be in violation of any provisions of that Operating Agreement. If the State of California terminates the Operating Agreement, this Agreement shall terminate as a result and the parties shall be released from all liabilities and obligations under this Agreement.

16. WASTE OR NUISANCE

Concessionaire shall not commit or permit the commission of any waste on the Premises. Concessionaire shall not maintain, commit, or permit any nuisance as defined in Section 3479 of the California Civil Code on the Premises. Concessionaire shall not use or permit the use of the Premises for any unlawful purpose.

17. NO CONFLICTS OF USE, HAZARDOUS MATERIALS.

City represents and warrants that, to the best of City's knowledge, (i) Concessionaire's use of the Premises does not conflict with applicable Laws, and City knows of no reason why Concessionaire would be unable to obtain all required permits, licenses and approvals from the appropriate governmental authorities; (ii) the Project is

not in violation of any environmental laws, rules or regulations and Concessionaire's contemplated uses will not cause any such violation; and (iii) the Project is free of any and all Hazardous Materials as of the date of this Agreement. In the event that the presence of any Hazardous Materials not caused by Concessionaire is detected at the Project at any time during the Term of this Agreement and any Option Term all remedial work shall be performed by City at City's expense. Concessionaire's obligation to open shall be delayed until the remedial work is completed if the remedial work is performed prior to Concessionaire opening for business. Concessionaire's obligation to pay Rent shall be abated in direct proportion to the extent Concessionaire is unable to conduct its business upon the Premises as a result of any remedial work that is performed subsequent to Concessionaire opening for business. Concessionaire shall have the right (but not the obligation) to terminate this Agreement, upon thirty (30) days advance written notice to City in the event that Hazardous Materials are detected at the Project and the presence or the remediation materially affects Concessionaire's ability to conduct its business in the Premises. "Hazardous Materials" shall mean any oil, flammable explosives, asbestos, urea formaldehyde, radioactive materials or waste, or other hazardous, toxic, contaminated or polluting materials, substances or wastes, including, without limitation, any "hazardous substances", "hazardous wastes", "hazardous materials" or "toxic substances" under applicable federal, state and local laws, ordinances and regulations.

18. CITY'S DEFAULTS/CONCESSIONAIRE'S REMEDIES.

City shall be in default if it fails to perform, or commence performance if the obligation requires more than ten (10) days to complete, any material obligation within ten (10) days after receipt of written notice by Concessionaire to City specifying the nature of such default. City shall also be in default if it commences performance within

ten (10) days but fails to diligently complete performance. In the event of City's default, Concessionaire may:

(a) Upon five (5) days notice to City, cure any such default, and City shall reimburse Concessionaire the amount of all costs and expenses incurred by Concessionaire in curing the default, together with interest and expenses at the maximum rate then allowed by law; or

(b) Terminate this Agreement if City's default materially interferes with Concessionaire's use of the Premises for its intended purpose and City fails to cure such default within ten (10) days after a second demand by Concessionaire in which case Concessionaire shall have no further or continuing obligations.

19. NOTICES.

Any notice, demand, request, consent, approval or communication that either party desires or is required to give shall be in writing and shall be deemed given three (3) days after deposit into the United States registered mail, postage prepaid, by registered or certified mail, return receipt requested. Unless notice of a different address has been given in accordance with this Section, all notices shall be addressed as follows:

If to City, to:

CITY OF NEWPORT BEACH
Attention: Revenue Manager
3300 Newport Boulevard
Newport Beach, CA 92658
(949) 644-3141

If to Concessionaire, to:

20. SURRENDER OF PREMISES

At the Expiration or earlier Termination of this Agreement, Concessionaire shall surrender to City the possession of the Premises. Concessionaire shall leave the

surrendered Premises, required personal property and fixtures, in good and broom-clean condition, reasonable wear and tear excepted. All property that Concessionaire is not required to surrender, but that Concessionaire does abandon shall, at City's election, become City's property at Expiration or Termination.

21. COMPLIANCE WITH ALL LAWS

Concessionaire shall at its own cost and expense comply with all statutes, ordinances, regulations and requirements of all governmental entities, including federal, state, county or municipal, whether now in force or hereinafter enacted. In addition, all work prepared by Concessionaire shall conform to applicable City, county, state and federal laws, rules, regulations and permit requirements and be subject to approval of the City Manager and the City.

22. WAIVERS

The waiver by either party of any breach or violation of any term, covenant or condition of this Agreement, or of any ordinance, law or regulation, shall not be deemed to be a waiver of any other term, covenant, condition, ordinance, law or regulation, or of any subsequent breach or violation of the same or other term, covenant, condition, ordinance, law or regulation. The subsequent acceptance by either party of any fee, performance, or other consideration which may become due or owing under this Agreement, shall not be deemed to be a waiver of any preceding breach or violation by the other party of any term, condition, covenant of this Agreement or any applicable law, ordinance or regulation.

23. SEVERABILITY

If any term or portion of this Agreement is held to be invalid, illegal, or otherwise unenforceable by a court of competent jurisdiction, the remaining provisions of this

Agreement shall continue in full force and effect.

24. APPLICABLE LAW

This Agreement shall be construed in accordance with the laws of the State of California in effect at the time of the execution of this Agreement. Any action brought relating to this Agreement shall be adjudicated in a court of competent jurisdiction in the County of Orange.

25. ENTIRE AGREEMENT; AMENDMENTS

25.1 The terms and conditions of this Agreement, all exhibits attached, and all documents expressly incorporated by reference, represent the entire agreement of the parties with respect to the subject matter of this Agreement.

25.2 This Agreement shall supersede any and all prior agreements, oral or written, regarding the subject matter between Concessionaire and City.

25.3 No other agreement, promise or statement, written or oral, relating to the subject matter of this Agreement, shall be valid or binding, except by way of a written amendment to this Agreement.

25.4 The terms and conditions of this Agreement shall not be altered or modified except by a written amendment to this Agreement signed by Concessionaire and City.

25.5 If any conflicts arise between the terms and conditions of this Agreement, and the terms and conditions of the attached exhibits or the documents expressly incorporated by reference, the terms and conditions of this Agreement shall control.

25.6 Any obligation of the parties relating to monies owed, as well as those provisions relating to limitations on liability and actions, shall survive termination or expiration of this Agreement.

25.7 Each party has relied on its own inspection of the Premises and examination of this Agreement, the counsel of its own advisors, and the warranties, representations, and covenants in this Agreement. The failure or refusal of either party to inspect the Premises, to read this Agreement or other documents, or to obtain legal or other advice relevant to this transaction constitutes a waiver of any objection, contention, or claim that might have been based on such reading, inspection, or advice.

26. TIME IS OF THE ESSENCE

Time is of the essence for this Agreement.

27. SUCCESSORS

Subject to the provisions of this Agreement on assignment and subletting, each and all of the covenants and conditions of this Agreement shall be binding on and shall inure to the benefit of the heirs, successors, executors, administrators, assigns, and personal representatives of the respective parties.

28. INTERPRETATION

The terms of this Agreement shall be construed in accordance with the meaning of the language used and shall not be construed for or against either party by reason of the authorship of this Agreement or any other rule of construction which might otherwise apply.

29. TABLE OF CONTENTS; HEADINGS

The table of contents of this Agreement and the captions of the various sections of this Agreement are for convenience and ease of reference only and do not define, limit, augment, or describe the scope, content, or intent of this Agreement.

30. GENDER; NUMBER

The neuter gender includes the feminine and masculine, the masculine includes the feminine and neuter, and the feminine includes the neuter, and each includes corporation, partnership, or other legal entity whenever the context requires. The singular number includes the plural whenever the context so requires.

31. EXHIBITS

All exhibits to which reference is made in this Agreement are incorporated by reference. Any reference to "this Agreement" includes matters incorporated by reference.

32. CITY BUSINESS LICENSE

Concessionaire shall obtain and maintain during the duration of this Agreement, a City business license as required by the Newport Beach Municipal Code.

33. COSTS AND ATTORNEYS FEES

The prevailing party in any action brought to enforce the terms and conditions of this Agreement, or arising out of the performance of this Agreement, shall not be entitled to recover its attorneys' fees.

35. NONDISCRIMINATION

Concessionaire, for itself and its successors, agrees that in the performance under this Agreement, Concessionaire shall not discriminate against any person because of the marital status or ancestry of that person or any characteristic listed or defined in Section 11135 of the Government Code.

[Signature page follows]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first written above.

CITY OF NEWPORT BEACH ("City"),
a Municipal Corporation

By: _____
Michael Henn, Mayor of Newport Beach

ATTEST:

Leilani Brown
City Clerk

_____ ("Concessionaire")

By: _____

Its: _____

By: _____

Its: _____

APPROVED AS TO FORM:

Leonie Mulvihill
Assistant City Attorney

EXHIBIT "C"

**CITY OF NEWPORT BEACH
CONCESSIONAIRE APPLICATION FORM**

TYPE OF CONCESSIONAIRE: NEW CURRENT OPERATOR

Legal Contractual Name of Business: _____

Owner's Name: _____

Business Mailing Address: _____

City, State and Zip Code: _____

E-Mail Address _____

Phone: _____ Fax: _____

General Business

Contact Person for Business Operations: _____

Title: _____ E-Mail Address for Business Operations _____

Business Telephone: _____ Business Fax: _____

Fiscal

Contact Person for Fiscal Operations: _____

Title: _____ E-Mail Address for Fiscal Operations _____

Business Telephone: _____ Business Fax: _____

Is your business: (check one)

NON PROFIT CORPORATION

FOR PROFIT CORPORATION

Is your business: (check one)

CORPORATION

LIMITED LIABILITY PARTNERSHIP

INDIVIDUAL

SOLE PROPRIETORSHIP

PARTNERSHIP

UNINCORPORATED ASSOCIATION

Names & Titles of Co-Owners, Partners, or Board Members

(Also list Names & Titles of persons with written authorization/resolution to sign contracts)

Names	Title	Phone

Names and Titles of Business Officers

Names	Title	Phone

Does business have any liens or claims?

(If so, please indicate by whom and specify lien or claim, including any tax delinquencies)

Name of Company	Claim	Lien	Amount

Please provide the following:

Federal Tax Identification Number: _____

City of Newport Beach Business License Number: _____
(If none, selected vendor must obtain a Newport Beach Business License
prior to execution of contract.)

EXHIBIT "D"

CORONA DEL MAR STATE BEACH CONCESSION RFP SUBMISSION CHECKLIST

Name of Proposer _____

- Agreement, in writing, to the attached Concession Agreement as-is, with a proposal for Percentage Rent (see Section 4.2 of the Concession Agreement) and proposed menu and prices; **OR** counter-proposals, in writing, to any provision in the proposed Concession Agreement.
- Vendor Application
- RFP Submission Checklist
- Business Structure, Key Staff and their Qualifications
- Description of Experience
- Financial Information
- Budget Information
- References