

THE REEF CAPE CORAL, LLC

Concessionaire Agreement for Management and Operation for Jaycee Park

Concession Area and Food Truck Court

**CONCESSIONAIRE AGREEMENT
BETWEEN CITY OF CAPE CORAL, FLORIDA
AND
THE REEF CAPE CORAL LLC FOR
MANAGEMENT AND OPERATION OF
JAYCEE PARK CONCESSION AREA AND FOOD TRUCK COURT**

THIS CONCESSIONAIRE AGREEMENT FOR MANAGEMENT AND OPERATION OF THE JAYCEE PARK CONCESSION AREA AND FOOD TRUCK COURT, as further known to be (the “Reef”) or referenced as (the “Agreement”) is made this _____ day of _____, 2024 (the “Effective Date”), between the **CITY OF CAPE CORAL, FLORIDA**, a municipal corporation of the State of Florida (“**City**”), having its principal address at 1015 Cultural Park Boulevard, Cape Coral, Florida 33990, and **THE REEF CAPE CORAL LLC, a Florida limited liability company**, with an address of 3508 SW 8th St., Cape Coral, FL 33991 (“**Concessionaire**”).

WHEREAS, pursuant to Section 255.065, Florida Statutes, the City received an unsolicited proposal from a developer for the financing, design and construction of improvements to Jaycee Park (the “Project”) to include, but not be limited to, an entertainment bandshell, a food truck court, covered pavilions, a boardwalk and other related amenities, on real property owned by the City (the “City Property”); and

WHEREAS, the City Commission has deemed developer’s unsolicited proposal a qualifying project under pursuant to those requirements set forth within Section 255.065, Florida Statutes, deserving of further consideration as a potential public-private partnership; and,

WHEREAS, on or about January 23, 2024, and January 10, 2024, the City published notice of its receipt of the proposal and solicited competing offers for the Project for the statutory required duration of time, and received no other proposals were received;

WHEREAS, the Mayor and City Council adopted Resolution No. _____ - 24 on this _____ day of _____, 2024 approving this Agreement.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the parties, the City and Concessionaire agree as follows:

SECTION 1. TERM AND CERTAIN DEFINITIONS.

- 1.1 This Agreement shall be effective as of the Effective Date, but the Term hereof shall not commence until the earlier of: (a) 120 days after Substantial Completion (as Defined in the Comprehensive Agreement) of the Project as defined in that certain Comprehensive Development Agreement for the Delivery of the Jaycee Park Improvements between the City and Fortress Secured, LLC (“Fortress”) dated _____, 2024 (the “Comprehensive Agreement”), subject to extension due to Unavoidable Delays (as hereafter defined) and (b) the date on which any of the Concession Operations (as hereinafter defined) have been issued a certificate of use or certificate of completion, as applicable, and are fully open to the public for business (the earlier of such dates, the “Commencement Date”). The term hereof (the “Term”) shall begin on the Commencement Date and shall expire at 11:59 p.m. on **the three hundred and sixty-fourth (364th) day of the tenth (10th) year** (the “Expiration Date”). Within five (5) days of the Commencement Date of the Term, City and Concessionaire shall complete and execute a Confirmation of Commencement Date Certificate in the form attached hereto as ***Exhibit 1.1*** to document the beginning and end of the Term. Provided Concessionaire is not in

default beyond any applicable cure period, Concessionaire may extend the Term eight (8) times for two (2) years each (a total of 26 years) by providing the City with written notice of the exercise of each such extension at least 180 days prior to the end of the then current Term, or extended Term as applicable. Notwithstanding any provision contained herein to the contrary, in the event Fortress Secured has not delivered the Project Substantially Complete to Concessionaire by **December 31, 2025**, Concessionaire shall have the right to terminate this Agreement and have any prepaid fees or rents returned.

- 1.2 The City shall have the right to terminate this agreement prior to the Expiration Date pursuant to Section 19 (Event of Default) and Section 25 (Early Termination Right in Event of Financial Emergency), when applicable.
- 1.3 Concessionaire shall be permitted to use and occupy the Concession Area for all purposes contemplated by this Agreement on or after the Occupancy Date subject to satisfaction of the following conditions precedent (the “Occupancy Conditions”):
 - (i) There exists no uncured Event of Default;
 - (ii) Concessionaire shall have provided to City, and City Manager or his or her designee shall have approved the Plans and Specifications to the extent applicable;
 - (iii) all final, non-appealable Project Approvals, if applicable, shall have been issued;
 - (iv) if applicable, Concessionaire shall have entered into, and delivered to the City a duly executed copy of, the General Construction Contract (and all then existing change orders thereto);
 - (v) Concessionaire shall have obtained, and shall have delivered to Owner a copy of, all Permits and Approvals necessary for the Work, including any Building Permits that have not been obtained by Fortress Secured; and the Concessionaire shall not be responsible for providing a parking plan and/or a transportation plan for off-site parking and transportation, unless the Owner determines that either would be required for the Concessionaire’s initiated permitted event(s);
 - (vi) Intentionally deleted;
 - (vii) Concessionaire shall not be obligated to deliver to the City the Payment and Performance Bond, unless one is not obtained by Fortress Secured for the Comprehensive Agreement;
 - (viii) Concessionaire shall have delivered to the City certificates of insurance evidencing that all insurance coverages required under this Agreement are in place;
 - (ix) If applicable, Concessionaire shall have delivered to the City, a duly executed assignment of Plans and Specifications, and a duly executed assignment of General Construction Contract and assignment of Construction Agreements, pursuant to which the City shall have the right, without assuming the Concessionaire’s obligations, to enforce the Architect’s and General

Contractor's, as applicable, full and prompt performance under their respective agreements, subject only to payment by the City, which assignment of Construction Agreements shall be substantially in the form attached hereto as ***Exhibit 1.3***,

- (x) The representations and warranties made by Concessionaire pursuant to Section 30 of this Agreement are true and correct on and as of the Occupancy Date;
- (xi) no lawsuit shall be pending, which prevents or restricts Concessionaire from using or occupying the Concession Area and/or commencing construction of the Work; and
- (xii) Concessionaire shall have delivered a duly executed written notice by Concessionaire to the City, which shall certify that all Occupancy Conditions for which Concessionaire is responsible, have been satisfied in form and substance acceptable to the City, which notice shall be acknowledged and countersigned by the City.

The City acknowledges that pursuant to Section 255.065 of the Florida Statutes, there exists a Comprehensive Agreement which establishes a contractual obligation by Fortress Secured to construct all of the buildings and infrastructure necessary for the operation of the Concession Area as contemplated herein, and that Concessionaire shall only be responsible for providing the furniture, fixtures and other equipment necessary for such operations once construction of the Project is complete. The City, in its reasonable determination, shall identify any other equipment that would be necessary for the operations of the Concession Area, which Concessionaire shall provide within 10 days.

1.4 For all purposes of this Agreement, the terms defined in this Section 1.4 shall have the meanings set forth below:

1.4.1 "Affiliate" or "Affiliates" means, with respect to any Person, any other Person that, directly or indirectly, through one or more intermediaries, Controls or is Controlled by, or is under common Control with, such Person.

1.4.2 "Agreement Year" means each one (1) year period during the Term commencing on the Commencement Date, provided, the final Agreement Year shall be the period of three hundred sixty-four (364) days commencing on the **ninth anniversary** of the Commencement Date and ending at 11:59 p.m. on the Expiration Date.

1.4.3 "Budget" means the budget for any applicable Work (in addition to the construction of the Project by Fortress Secured) submitted by Concessionaire to the City with its proposal, if applicable, a copy of which is attached hereto as **Exhibit 1.4.3**. The Budget does not include costs of so-called "OS&E" (e.g., chinaware, glassware, silverware, smallwares, cookware, linens, housekeeping equipment, uniforms, disposables, etc.).

1.4.4 "Building Permit" means a "Full Building Permit" as such term is defined in the City's Land Development Code, issued by the Development Services Department of the City, which allows building or structures to be erected, constructed, altered, moved, converted, extended, enlarged, or used, for any purpose, in conformity with applicable codes and ordinances.

- 1.4.5 “Business Day” or “business day” means a day other than Saturday, Sunday or a day on which banking institutions in the State of Florida are authorized or obligated by law or executive order to be closed.
- 1.4.6 “City Land Development Boards” means, the Planning & Zoning Commission or City Hearing Examiner.
- 1.4.7 “Concession Area” has the meaning set forth in the Recitals, provided, for the avoidance of doubt, where the context requires, Concession Area shall be deemed to include all Concession Area Structures.
- 1.4.8 “Contractor” means any contractor, subcontractor, supplier, vendor or materialman supplying services or goods in connection with construction of the Work or any other renovations or construction at the Concession Area.
- 1.4.9 “Control” “Controlling” and “Controlled” means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract, by Governmental Requirements or otherwise, or the power to elect in excess of fifty percent (50%) of the directors, managers, general partners or other Persons exercising similar authority with respect to such Person (it being acknowledged that a Person shall not be deemed to lack Control of another Person even though certain decisions may be subject to “major decision” consent or approval rights of limited partners, shareholders or members, as applicable).
- 1.4.10 “Development Order” means any order granting, denying or granting with conditions an application for a Development Permit.
- 1.4.11 “Development Permit” includes any building permit (including the Building Permit), zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land.
- 1.4.12 “Financial Emergency” shall have the meaning set forth in Section 25.
- 1.4.13 “Force Majeure Event” means the following: acts of God; strikes, lockouts or other industrial disturbances; acts of public enemies, whether actual or threatened; restrictions or restraints imposed by law, rules, regulations or orders of any civil or military authority (collectively, “Restraints”); civil disorder; insurrections; riots; acts of terrorism; war; sabotage; epidemics such as Ebola, Zika, SARD and swine flu; pandemics such as COVID-19 coronavirus; any public health emergency requiring quarantine, business closures mandated by Governmental Authorities or shelter in place orders; any governmental moratorium preventing the issuance of Permits and Approvals; landslides; earthquakes; lightning; fires; hurricanes; storms; floods; earthquake; windstorm; natural disaster; tropical depressions; red tides; algae blooms; seaweed inundations; significant beach erosion; oil spills; other environmental issues materially adversely impacting the Concession Area; street closures or adjusted traffic patterns which prevent access by the public to the Concession Area; sabotage; riots, civil disturbances; fires; explosions; floods; washouts and other natural disasters; verifiable and industry-wide inability to procure or a general shortage of labor, equipment, utilities, facilities, materials or supplies in the open market, or failure or unavailability of transportation generally; or other similar extraordinary causes beyond the commercially reasonable control of the party claiming such inability. In no event shall “Force Majeure Event” include economic hardship, financial inability to perform specific to the party or the failure to secure Permits and Approvals. When applicable based on the context, the period of a Force Majeure Event shall

extend from the occurrence of the Force Majeure Event until such time as the Force Majeure Event is over and any applicable Restraints are lifted.

- 1.4.14 “General Construction Contract” means the construction contract between Concessionaire, the General Contractor, or Fortress Secured for the construction of the Work in accordance with the approved Plans and Specifications for such Phase, within the contract time specified therein for completion of the Work for a guaranteed maximum price that as of the date of commencement of construction will, in the aggregate, equal or exceed the sum allocated for construction of the Work as reflected in the Budget (except to the extent that any reduction is reasonably attributable to a reduction in local area construction costs, as established by a published construction price index or otherwise approved by the City Manager) and that includes all other terms or conditions required under this Agreement.
- 1.4.15 “General Contractor” means the duly licensed general contractor engaged by Concessionaire for the construction of the Work and approved by the City in accordance with this Agreement.
- 1.4.16 “Governmental Authority or Authorities” means the United States of America, the State of Florida, the City (acting in its governmental, not proprietary, capacity), Lee County, and any agency, department, commission, board, bureau, instrumentality or political subdivision (including any county or district) of any of the foregoing, now existing or hereafter created, having jurisdiction over Concessionaire, or any subconcessionaire, subcontractor or other occupant of, or over or under the Concession Area or any portion thereof or any street, road, avenue or sidewalk comprising a part of, or in front of, the Concession Area, or any vault in or under the Concession Area, or airspace over the Concession Area.
- 1.4.17 “Improvements” shall have the meaning set forth in Section 11.1.
- 1.4.18 “Occupancy Date” means the date on which the Concessionaire satisfies all of the Occupancy Conditions and is permitted to use and occupy the Concession Area for the purposes contemplated in this Agreement.
- 1.4.19 “Permits and Approvals” means any and all permits and approvals required to be issued by Governmental Authorities in connection with the Work, including, without limitation, the City of Cape Coral building permits, the approvals of the City Land Development Boards, the Lee County Department of Natural Resources permits, any required State of Florida Department of Environmental Protection permits, and any utility access agreements with all applicable utility companies, Development Permits and Development Orders.
- 1.4.20 “Person” means an individual, corporation, partnership, joint venture, limited liability company, limited liability partnership, estate, trust, unincorporated association or other entity; any Federal, state, county or municipal government or any bureau, department, political subdivision or agency thereof; a foreign government or any bureau, department, political subdivision or agency thereof; and any fiduciary acting in such capacity on behalf of any of the foregoing.
- 1.4.21 “Plans and Specifications” means, the final plans and specifications for all Work, including, as applicable, foundation, structural, electrical, plumbing and HVAC plans.

- 1.4.22 “Preliminary Plans and Specifications” has the meaning set forth in Subsection 7.1.1.
- 1.4.23 “Project Approvals” means the approval of the applicable City Land Development Boards or City Hearing Examiner for the Work.
- 1.4.24 “Project Approvals Delays” means the number of days in excess of one hundred twenty (120) days (with such 120-day period being measured from the date of Concessionaire’s submission of its initial application to the City Land Development Boards) after which Concessionaire obtains approvals from the City Land Development Boards but only to the extent such additional days in excess of one hundred twenty (120) days are the result of the City Land Development Boards’ requirement of any revisions to the Preliminary Plans and Specifications that were approved by the City in accordance herewith.
- 1.4.25 “Requirements” means (a) any and all laws, constitutions, rules, regulations, orders, ordinances, charters, statutes, codes, executive orders and requirements of all Governmental Authorities having jurisdiction over a Person and/or the Concession Area or Concession Area Structures or buildings that have been identified in the Concession Area or any street, road, avenue or sidewalk comprising a part of, or lying in front of or adjacent to, the Concession Area or Concession Area Structures or buildings that have been identified in the Concession Area or any vault in, or under the Concession Area or Concession Area Structures or buildings that have been identified in the Concession Area (including, without limitation, any of the foregoing relating to handicapped access or parking, the Florida Building Code and the laws, rules, regulations, orders, ordinances, statutes, codes and requirements of any applicable Fire Rating Bureau or other body exercising similar functions, the Americans with Disabilities Act, Title VII of the Civil Rights Act, the EEOC Uniform Guidelines and all EEO regulations and guidelines); (b) conditions set forth in any Permits and Approvals; (c) the temporary and/or permanent certificate or certificates of occupancy issued for the Concession Area or Concession Area Structures as then in force; and (d) any and all provisions and requirements of any property, casualty or other insurance policy required to be carried by Concessionaire under this Agreement.
- 1.4.26 “Unanticipated Site Conditions” means (a) concealed or subsurface conditions within or proximate to the Concession Area that could not have been reasonably anticipated by Concessionaire or reasonably discoverable and/or is not actually discovered by Concessionaire through customary diligence, including, for example, Hazardous Materials (as defined in Section 10.7.1) or other environmental issues or conditions, unmapped utilities or any unknown environmental condition, geothermal system, geotechnical condition, or similar concealed condition not reasonably discoverable prior to the commencement of Construction Work; and (b) encumbrances on the Concession Area that are either unrecorded or revealed by any title update obtained by Concessionaire following the Effective Date (and were not disclosed in any prior title report or commitment or otherwise contemplated by this Agreement), which materially and adversely impact the prosecution of the Work.
- 1.4.27 “Unavoidable Delays” means a delay arising out of (a) a Force Majeure Event, (b) Unanticipated Site Conditions, (c) any lawsuit is filed and pending which prevents or restricts Concessionaire from using and occupying the Concession Area or commencing construction of the Work, and/or (d) a Project Approvals Delay, in each case, which actually prevents or

delays performance and that (i) is beyond the reasonable control of Concessionaire, (ii) is not due to the negligent or intentional act, error or omission of Concessionaire and (iii) if occurring after the commencement of any construction work, directly impacts the progress of such construction work. "Unavoidable Delay" shall not include technological interruption or malfunction, failure of equipment supplied by Concessionaire, shortage of funds, failure of suppliers to deliver equipment and materials except where such failure is itself the result of an Unavoidable Delay, or failure of Concessionaire or any Contractor to secure the required permits for prosecution of the Work (except to the extent caused or contributed to by a Project Approvals Delay); provided that Concessionaire delivers written notice to the City of such Unavoidable Delay within ten (10) business days after first becoming aware of the occurrence thereof, which notice shall describe in reasonable detail the events giving rise to the Unavoidable Delay, and Concessionaire shall diligently use commercially reasonable efforts to attempt to remove, resolve or otherwise seek to mitigate such delay and keep the City advised with respect thereto. Time is of the essence with respect to this provision, and any failure by Concessionaire to timely deliver notice of an Unavoidable Delay shall be deemed a waiver of Concessionaire's right to delay performance or to postpone any dates as a result of such Unavoidable Delay. Notwithstanding the provisions of Section 23, for purposes hereof, notice by Concessionaire shall be deemed sufficiently given to the City if transmitted via electronic transmission to the City Manager and City Attorney; provided that as soon as reasonably practicable thereafter a copy of such notice is delivered pursuant to the terms of Section 23 hereof. The times for performance set forth in this Agreement (other than for monetary obligations of Concessionaire) and the Commencement Date shall be extended to the extent performance is delayed by Unavoidable Delay, except as otherwise expressly set forth in this Agreement. If two or more separate events of Unavoidable Delay are concurrent with each other, Concessionaire shall only be entitled to an extension of time for each day of concurrent critical path delay, and Concessionaire shall not be entitled to double recovery thereon. For illustration purposes only, if two events of Unavoidable Delay are concurrent for two days, Concessionaire shall only receive an extension of time, if at all, of a total of two days, and not four days. In no event shall (i) Concessionaire's financial condition or inability to fund or obtain funding or financing constitute an Unavoidable Delay, or (ii) any delay arising from Concessionaire's default (whether or not the default is subsequently cured) under this Agreement constitute an Unavoidable Delay.

- 1.4.28 "Work" means the design, permitting, development and construction of improvements substantially in accordance with the Plans and Specifications approved by the City in accordance herewith, including all design, architectural, engineering and other professional services, demolition and construction services, supervision, administration and coordination services and the provision of all drawings, specifications, labor, materials, equipment, supplies, tools, machinery, utilities, fabrication, transportation, storage, insurance, bonds, permits and conditions thereof, zoning approvals, changes required to comply with building codes and Permits and Approvals, licenses, tests, inspections, surveys, studies, and other items, work and services that are necessary or appropriate for the demolition of existing structures and other preparatory or remediation work on the applicable portion of the Concession Area; utility relocations, installations, hook-ups or other infrastructure as may be required in connection with the improvements and the Concessionaire's proposed operations thereon and to obtain certificates of occupancy or certificates of completion for the Work; and total design, construction, installation, and functioning of all improvements to the extent

necessary to obtain certificates of occupancy for the Concession Operations, and together with all additional, collateral and incidental items, work and services required for completion of construction of the improvements. For purposes of this Agreement, the “Work” refers to any improvements or alterations made to the Project subsequent to the construction and delivery of the Project (a/k/a the Concession Area) by the City pursuant to the Comprehensive Agreement.

- 1.4.29 In the event of a dispute between the City and Concessionaire as to the meaning of “first-class” or “world-class” and words of similar import used in this Agreement, the City Manager’s (or his or her designee’s) decision, in that Person’s reasonable discretion, shall control.

SECTION 2. CONCESSION AREAS AND OPERATIONS; COMMITTED INVESTMENT IN IMPROVEMENTS BY CONCESSIONAIRE; SCHEDULE.

- 2.1 The City hereby grants to Concessionaire the exclusive right, during the Term, to establish, operate and manage all Concession Operations (as defined in Section 2.2 below) upon the Concession Area and to enter into subcontracts, and grant exclusive rights consistent with the terms of this Agreement, with approved Subconcessionaires. The Concession Area includes two **(2) main structures landward of the Caloosahatche River, including a main building with a storage area and the bandshell with a public restroom** (existing structures together with any new structures constructed by Concessionaire, the “Concession Area Structures”), which shall be constructed by Fortress Secured. The rights granted to Concessionaire herein include the exclusive right to occupy and use the Concession Area Structures.
- 2.2 The concessions to be operated by Concessionaire at the Property, directly or indirectly through a subcontract (as duly approved by the City as provided herein), shall include **(a) up to six (6) food trucks (the “Food Truck Operations”) as delineated on the site plan attached hereto as Exhibit 2.2 and incorporated herein by this reference (“Site Plan”); (b) operations for the preparation and sale of food and beverages (including alcohol) at the Reef, as delineated on the Site Plan (the “Restaurant Operations”); (c) operations associated with retail sales out of the Reef (the “Retail Operations”) and (d) any incidental revenue-generating operations and activities ancillary to the foregoing in the Concession Area (“Incidental Concessions”), and together with the Food Truck Operations, the Restaurant Operations and the Retail Operations, the “Concession Operations”).**
- 2.3 The Concession Operations are subject to the following specific limitations. The City and Concessionaire agree and acknowledge that the public’s use of the Riverfront Area is of prime consideration. Accordingly, the Concession Area shall be located south of the South Lawn as depicted on the Site Plan and the City shall maintain the facilities located on the North Lawn, as depicted on the Site Plan, including, but not limited to, the bandshell, restrooms, pavilions, parking areas and driveways. The City shall also operate and maintain the following facilities located south of the South Lawn, as depicted on the Site Plan: the restrooms, sand volleyball courts, playground, splash pad, pavilions, corn hole courts, lawns and landscaping, stormwater

detention areas, sidewalks, parking areas and driveways. All portions of the Concession Area are intended to be used in full for Concession Operations thereon to be run by Concessionaire and its approved Subconcessionaires to fulfill the purposes of this Agreement.

Concessionaire hereby acknowledges and agrees that the Riverfront Area, along with any and all other public riverfront areas not specifically identified herein, are public and, as such, must remain open, accessible and available for the use and enjoyment of the public, whether or not the public chooses to use any of Concessionaire's facilities and/or equipment, purchase its products, or engage in any of the services it provides. In the event that a member of the public is within the Riverfront Area, Concessionaire agrees to use good faith, diligent efforts to allow for his/her quiet and peaceful enjoyment of same.

- 2.4 Concessionaire shall initially invest (including amounts that are financed) not less than **\$1,370,488** (the "Committed Investment") on all costs associated with, and directly related to, the planning, design, and construction of the Improvements, including soft costs, hard costs, kitchen equipment and FF&E, but expressly excluding OS&E (collectively, "Project Costs"), substantially in accordance with the amounts allocated to Project Costs in the categories reflected in the Budget. Amounts allocated to specific line items in the Budget may be reallocated to other line items subject to any adjustments due to increased or decreased costs in particular categories provided such reallocations do not change the design quality or scope of the improvements, landscaping and FF&E described and reflected in the renderings included in the Comprehensive Agreement between the City and Fortress Secured. Notwithstanding the foregoing, if there is an overall savings on the Project Costs resulting from favorable market conditions, any savings will be placed into a separate, interest-bearing account and the use of such funds must be mutually agreed upon by the parties.

SECTION 3. USES.

Concessionaire is hereby authorized by the City, in its proprietary capacity, to conduct the following kinds of businesses and provide the following kinds of services upon the Property, all of which shall be provided at Concessionaire's sole cost and expense. As hereinafter set forth, Concessionaire is hereby authorized and permitted to enter into subcontracts with different Subconcessionaires to provide the services (each a "Subconcession Agreement" and collectively, "Subconcession Agreements"). The Subconcession Agreements, or any subsequent changes or amendments thereto, are subject to the prior approval of the City Manager or his or her designee. For the avoidance of doubt, the Concessionaire shall be solely responsible for obtaining any and all amendments to the City's Comprehensive Plan and Land Development Code that may be required for any of the proposed uses herein, provided the City shall reasonably cooperate with the Concessionaire.

3.1 Restaurant Operations and Food Truck Operations.

- 3.1.1** Concessionaire shall run the Restaurant Operations and Food Truck Operations at the Property. The Restaurant Operations and Food Truck Operations shall consist of the Reef and Food Truck sites as delineated on the Site Plan attached as *Exhibit ___* (collectively identified as the "Restaurants"), **with the initial concept for the Reef being a bar and concession stand serving casual meals, snacks, beverages**

(including alcohol), and ice cream and the Food Trucks shall offer a variety of foods. The proposed final dining concepts shall be submitted to the City by or before _____, 2025 for the prior written approval of the City Manager or his or her designee. Prior to the opening of the Restaurants to the public, Concessionaire shall provide to the City Manager alcoholic beverage licenses for the Reef. In the event that Concessionaire desires to subcontract with another entity (the “Replacement Restaurant Subconcessionaire”) to provide food and beverage services and delivery at and from the Restaurants, in the manner and to the extent contemplated under this **Subsection 3.2**, such new request shall be subject to the Concessionaire submitting information with respect to such Replacement Restaurant Subconcessionaire for the City Manager’s or his/her designee’s prior review and written approval, which shall not be unreasonably withheld. Notwithstanding the approval of a Replacement Restaurant Subconcessionaire, Concessionaire remains directly responsible to the City for payment of the MG and PG (as said term is hereinafter defined) even if the Subconcessionaire fails to make payment of any amount due to Concessionaire under its Subcontract. While the City Manager shall have approval over the Reef concept, Concessionaire shall choose the foods trucks/food truck concepts at its sole discretion and the City Manager’s approval shall not be need for the food trucks.

- 3.1.2 The terms of any contract entered into with any Replacement Restaurant Subconcessionaire shall include waivers of recovery against the City and indemnification in favor of the City substantially as set forth in paragraphs 2 and 3 of *Exhibit 7.6*.
- 3.1.3 Any amendments or modifications to those approvals required pursuant to 3.1.1, whether as to type of food and beverages to be sold must be provided to the City Manager or his or her designee prior to such changes being implemented within the Concession Area. The City reserves the sole and exclusive right to object to any such amendments or modifications, which objections must be reasonable, and shall serve to prohibit such changes from being implemented within the Concession Area.
- 3.1.4 Concessionaire shall be permitted to deliver food and beverages from the Concession Area to “offsite” customers and, in connection therewith, to utilize an internet based application or other form of electronic software program or any other platform or means of communication (e.g., website, third-party food delivery apps, telephone orders, etc.) (collectively, the “F&B Apps”) provided, that, (i) the only food and beverage menu items offered on the F&B Apps are those permitted to be provided by Concessionaire under this Agreement within the applicable Concession Areas; and (ii) no items whatsoever, other than those provided for under this Agreement, shall be offered on the F&B Apps within the Concession Areas.
- 3.1.5 **All food and beverages sold within the Property will be properly prepared and served in compliance with all applicable health and sanitary standards, laws and regulations and the Restaurants shall be operated in compliance with all Requirements. Concessionaire shall use products to serve food and beverage that are environmentally friendly. The use of expanded polystyrene containers or other food service articles and plastic (or other non-biodegradable) straws**

is strictly prohibited.

- 3.1.6 The quality of food and beverages contemplated in **Subsection 3.2.1**, and food and beverage service, will be first-rate and comparable to similar food and beverage operations.
- 3.1.7 All facilities within the Concession Area where the preparation, storage, cooking, heating and/or packaging of food occurs shall be properly cleaned and maintained in accordance with all applicable health and sanitary standards, laws and regulations and any other applicable Requirements. At least one supervisory employee at the Concession Area, (does this apply to the Food Trucks also?) during each shift, must possess a Food Service Management Certification issued by a County Public Health Department in Florida. In addition, each Restaurant or other food and beverage dispensing facility within the Concession Area, if any, must be licensed by the Florida Department of Business Regulation, Division of Hotels and Restaurants, and as may further be required by State law and/or by corresponding agencies.
- 3.1.8 The City acknowledges that the Restaurant Operations and Food Truck Operations will be delegated by Concessionaire to the Restaurant Subconcessionaires, provided that no such delegation will act to release Concessionaire from its obligations hereunder and Concessionaire shall remain responsible for compliance with all provisions of this Agreement.
- 3.1.9 Concessionaire shall maintain (or shall cause any approved Replacement Restaurant Subconcessionaire to maintain) the following minimum insurance coverage (i) Comprehensive General Liability in limits of not less than \$1,000,000.00 per occurrence and \$3,000,000 general aggregate; (ii) Workers' Compensation in statutory limits under Florida law and Employer Liability Insurance for bodily injury or disease with limits of not less than \$1,000,000/\$1,000,000/\$1,000,000; and (iii) Automobile Liability Insurance covering any automobile, if Concessionaire (or other approved Replacement Restaurant Subconcessionaire) has no owned automobiles, then coverage for hired and non-owned automobiles, with limits of not less than \$1,000,000 combined per accident for bodily injury and property damage; (iv) Liquor Liability Insurance, if applicable, on an occurrence basis, including property damage, bodily injury and personal & advertising injury with limits no less than \$1,000,000 per occurrence; (v) Crime/theft policy in limits of not less than \$300,000.00 per occurrence; (vi) Damage to Premises Rented to You insurance with limits of not less than \$1,000,000.00; (vii) Business Interruption Insurance effective no later than the date on which the Restaurant Operations commence to include so-called "Rent Insurance" on an "All Risk" basis in an amount not less than any minimum Subconcession fee payable to Concessionaire and otherwise consistent with the requirements set forth in *Exhibit 14.3*, and (viii) an umbrella policy of not less than \$5,000,000.00 per occurrence, with policies issued by a carrier with a current A.M. Best Company rating of at least A: VII, on an "occurrence" basis (other than Workers' Compensation) and maintained with insurers authorized to do business in the State of Florida and shall be endorsed to list the City as an additional insured. Copies of certificates of insurance and the Additional Insured Endorsement shall be provided to the City prior to commencing operations. Such policies shall comply with

the “General Provisions Applicable to All Policies” set forth in Exhibit 14. In addition, the City reserves the right to modify these requirements, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances. Concessionaire shall maintain all necessary licenses as may be required by Federal, state and/or local laws to legally perform the Restaurant Operations.

3.2 Retail Pavilion/Area

3.2.1 Concessionaire shall have the right to operate a Retail Operation out of the Bistro in a retail pavilion (the “Retail Pavilion”) to be located in the area of the Concession Area delineated on the Site Plan, which may include, but not be limited to, hats and apparel, art, artisanal food, fashion and design items and flowers, which Retail Pavilion will predominately (a minimum of fifty-one percent) have those items that positively promote the City of Cape Coral, Florida. Concessionaire shall not use or occupy any portion of the Retail Pavilion or any other area within the Concession Area, and neither permit nor suffer the Retail Pavilion or other area within the Concession Area to be used by any subconcessionaire for any Prohibited Uses as defined in Subsection 3.4 of this Agreement. Concessionaire in performing its duties hereunder shall comply with all applicable Requirements and maintain (or cause subconcessionaires to maintain) all necessary licenses. Concessionaire shall be responsible for hiring, terminating and making all other personnel decisions regarding the Retail Pavilion personnel except to the extent undertaken by the Retail Pavilion Subconcessionaire (as hereafter defined). In the event that Concessionaire desires to subcontract with another entity (a “Retail Pavilion Subconcessionaire”) to provide services or sell goods within any part of the Retail Pavilion, such request shall be subject to the Concessionaire submitting information with respect to such Subconcessionaire for the City Manager’s or his/her designee’s prior review and written approval of such Subconcessionaire by the City Manager or his/her designee. Notwithstanding the approval of any Retail Pavilion Subconcessionaire, Concessionaire remains directly responsible to the City for payment of the PG even if the Subconcessionaire fails to make payment of any amount due to Concessionaire under its Subcontract.

3.2.2 Concessionaire shall maintain (or shall cause any approved Subconcessionaire to maintain) the following minimum insurance coverage: (i) Comprehensive General Liability in limits of not less than \$1,000,000.00 per occurrence and \$5,000,000 general aggregate; (ii) Workers’ Compensation in statutory limits under Florida law and Employer Liability Insurance for bodily injury or disease with limits of not less than \$500,000/\$500,000/\$500,000; and (iii) Professional Liability coverage in limits of not less than \$1,000,000.00 per occurrence and \$2,000,000.00 in the aggregate; (iv) Crime/theft policy in limits of not less than \$300,000.00 per occurrence; (v) Business Interruption Insurance effective no later than the date on which the Retail Operations commence to include so-called “Rent Insurance” on an “All Risk” basis in an amount not less than any minimum Subconcession fee payable to Concessionaire and otherwise consistent with the requirements set forth in Exhibit 14.3; and (vi) an umbrella policy of not less than \$5,000,000.00 per occurrence, with policies issued by a carrier with a current A.M. Best Company rating of at least A: VII, on an “occurrence” basis (other than Workers’ Compensation) and maintained with insurers authorized to do business in the State of Florida and shall be

endorsed to list the City as an additional insured. Notwithstanding the foregoing, the insurance requirements and policy limits for the food truck operators shall not exceed the requirements customary in the food truck industry. Copies of certificates of insurance and the Additional Insured Endorsement shall be provided to the City prior to commencing services. Concessionaire shall maintain (and cause any Subconcessionaires to maintain) all necessary licenses as may be required by Federal, state and/or local laws to legally operate the Retail Pavilion as contemplated by this Agreement. Such policies shall comply with the “General Provisions Applicable to All Policies” set forth in Exhibit 14. In addition, the City reserves the right to modify these requirements, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances.

3.2.3 All use of space and goods to be sold at the Retail Pavilion are subject to the prior approval of the City Manager or his or her designee. On or before **April 1, 2026**, Concessionaire shall submit all proposed rates for subconcessions for use of space and cost of goods at the Retail Pavilion to the City Manager for approval by the City Manager or his or her designee and, as approved, shall be attached hereto as **Exhibit 3.6.2**. Any amendments to **Exhibit 3.6.2** must be approved, in writing, by the City Manager or his/her designee prior to such changes being implemented (and, if approved, an updated **Exhibit 3.6.2** will be incorporated into this Agreement).

3.3 Concession Facilities and Concession Storage Facilities

3.3.1 The design, materials, color, etc. of Concessionaire’s dispensing facilities and storage facilities within the Riverfront Area must be approved by the City’s Planning Department and receive design review approval from the appropriate City Land Use Board(s) or City Hearing Examiner prior to the Occupancy Date. The location of the dispensing facilities and storage facilities shall be included in **Exhibit 3.1.5**. Concessionaire shall not deviate from or change the type, design, and/or location of its proposed dispensing or storage facilities without the prior written consent of the City Manager or his/her designee.

3.3.2 On or before **April 1, 2025**, Concessionaire shall submit a written plan for storage and removal of Concessionaire’s dispensing facilities for the approval of the City Manager or his or her designee, and, as approved, shall be attached hereto as **Exhibit 3.7.2**, which plan shall include the use of any storage facilities contemplated in **Subsection 3.3.1** above. Any change thereto shall be subject to approval of the City Manager or his/her designee.

3.3.3 In the event that, at any time during the Term, the State of Florida determines that Concessionaire’s dispensing and storage facilities (for purposes of this subsection, the “facilities”) do not comply with State law, then Concessionaire shall, at its sole cost and responsibility, immediately take such actions, as reasonably necessary, to bring same into compliance, including, without limitation, revising its storage plan and/or either altering or removing the non-complying facilities from the Riverfront Area. Concessionaire herein further acknowledges that it shall indemnify and hold the City harmless for any expenses and/or other damages incurred as a result of Concessionaire’s non-compliance with State requirements pursuant to this subsection and Concessionaire shall be solely responsible for any cost or other liabilities incurred (a) by the City as a result of Concessionaire’s

noncompliance or (b) by Concessionaire as a result of removal of the facilities or, in the alternative, bringing such facilities into compliance with State law.

3.4 Prohibited Uses. Notwithstanding any other provision of this Agreement, Concessionaire shall not use the Concession Area nor permit any part thereof to be used for any of the following purposes (“Prohibited Uses”): (a) for the sale of second-hand goods, war surplus articles, insurance salvage stock, fire sale stock, merchandise damaged by or held out to be damaged by fire, except merchandise damaged by fire or smoke occurring in the Property, and then only for thirty (30) days after the date of any such damage; (b) as an auction or flea market; (c) any business in which Concessionaire is engaged in intentionally deceptive or fraudulent advertising or selling practices or any other act or business practice contrary to honest retail practices; (d) amusement centers, which is any indoor place or enclosure that contains three or more amusement devices of any description, including, but not limited to, pinball amusement games, computer amusement games and/or games of chance for the public amusement, patronage or recreation ; (e) coinbox entertainment (pinball, video games, moving pictures operated by coins); (f) casino gambling or games of chance or reward (including the sale of State of Florida lottery tickets); (g) any unlawful or illegal business, use or purpose, or for any business, use or purpose which is immoral or disreputable (including “adult entertainment establishments” and “adult” bookstores) or for any purpose or in any way in violation of Concessionaire’s Certificate(s) of Occupancy (or other similar approvals of applicable governmental authorities); (h) movie theatre; (i) medical facilities and offices; (j) check cashing facilities; (k) pawn shops; (l) the sale of firearms; (m) tattoo parlors, fortune tellers, psychics, palm readers, body piercing shops; (n) places of worship; (o) political offices; (p) military recruiting; (q) consular, legation or any other offices of foreign governments; (r) tire sales; (s) the sale of animals or birds of any kind and/or products of a nature typically sold in pet shops; (t) offices for the practice of veterinary medicine; (u) the sale of major appliances as a primary business; (v) housing or sleeping quarters; (w) grocery stores (other than specialty gourmet shops); (x) second hand stores; and/or (y) in any manner that will violate any Certificate of Occupancy or Certificate of Use for the Concession Area or any portion thereof, or which will violate any Requirements applicable to the Concession Area. Immediately upon its discovery of any Prohibited Use by, through or under Concessionaire, Concessionaire shall take all reasonably necessary steps, legal and equitable, to compel discontinuance of such business or use including, if necessary, the removal from the Concession Area of any subconcessionaires, licensees, or invitees, subject to applicable Requirements.

3.5 Emergency Liaison; Hurricane Evacuation Plan.

Concessionaire shall assign an employee and a backup employee to act as an emergency liaison (each, an “Emergency Liaison”) with the City. Upon City’s request, a Liaison will attend meetings held by the City in connection with emergency situations, such as extreme weather events, terrorist acts, etc. The Emergency Liaison will serve as the point of contact during any emergency crisis. Concessionaire agrees that fifty percent (50%) of all its storage and dispensing facilities, and any other equipment and facilities used in the Concession Operations will be removed from the riverfront immediately within sixteen (16) hours of the issuance of a Tropical Storm or Hurricane Watch by the Lee County Office of Emergency Management, and stored in accordance with **Subsection 3.3.2** above, and the remaining fifty

percent (50%) of the above-referenced facilities and equipment will be removed from the riverfront immediately within sixteen (16) hours of the issuance of a Tropical Storm or Hurricane Warning by the Lee County Office of Emergency Management, and stored in with **Subsection 3.3.2** above. On or before **April 1, 2025**, Concessionaire shall submit its hurricane preparedness/evacuation plan, which shall include the location, and proof of ownership and/or control by Concessionaire (either through a deed, lease or other form reasonably satisfactory to the City Manager or his designee), of its proposed hurricane storage facilities, for approval by the City Manager or his or her designee and, as approved, shall be attached hereto as **Exhibit 3.9** to this Agreement. Any amendments to Exhibit 3.9 must be approved, in writing, by the City Manager or his/her designee (and if approved, an updated Exhibit 3.9 will be incorporated into this Agreement). In the event that the City seeks reimbursement from the Federal Emergency Management Agency (“FEMA”) and/or any comparable federal or state agency for the costs and expenses involved in connection with hurricane preparedness and/or restoration of the Riverfront Area, the City shall provide written notice thereof to Concessionaire and agrees to the extent permitted by law to include those costs and expenses (“Concessionaire’s losses”) incurred by Concessionaire as well, if requested by Concessionaire. Concessionaire agrees to provide such documentation to the City as may be required by the City, FEMA and/or any comparable federal or state agency to document Concessionaire’s losses and to seek such reimbursement (the “Concessionaire Reimbursement”). In the event of any such reimbursement to the City with respect to the Concessionaire Reimbursement, the City shall grant to Concessionaire a credit against the next MG due and payable under **Section 4** in an amount equal to the amount of Concessionaire Reimbursement received by the City. The foregoing shall not create an agency relationship between the City and Concessionaire and shall not create an obligation by the City to pursue further any Concessionaire Reimbursement not approved or paid by FEMA.

3.6 City Business Tax Receipts.

Concessionaire and Subconcessionaires shall obtain, at their respective sole cost and expense, any Business Tax Receipts (BTR’s) required by City law, as amended from time to time, for all proposed uses, as contemplated in **Section 3** of this Agreement.

3.7 Affiliates.

Concessionaire shall have the right to subcontract the Concession Operations to be provided in the Concession Areas to any wholly-owned Affiliate without the approval of the City Manager or his/her designee, effective upon prior written notice to the City, provided, that, Concessionaire shall remain liable to pay the Concession Fees (as defined in Section 4 below) to the City.

3.8 Sponsorships. Concessionaire shall have the right to enter into sponsorship agreements relating to the various Concession Operations and sale of goods on the Property including, but not limited to, preferred providers, promotional opportunities, logo placement and marketing materials (“Sponsorships”). Any such Sponsorship request shall be subject to the Concessionaire submitting information with respect to such sponsor for the City Manager’s or his/her designee’s prior review and written approval and including any proposed contract or agreement which shall also be subject to the prior written approval of the City Manager

or his/her designee. In no event will any Sponsorship violate any intellectual property rights of the City nor will Concessionaire enter into any Sponsorships with competitors of any existing City sponsor or any future City sponsor of which Concessionaire is notified by the City. **Further, Concessionaire may not secure sponsorships involving the following categories: tobacco, vaping, firearms, intimate apparel, religious or political, gambling, prescription medication, intimate personal products (including male enhancement or feminine hygiene products) and any other category that is now or hereafter prohibited by federal law, state law, the Lee County Code or the City Code.**

SECTION 4. CONCESSION FEES.

In consideration of the grant of the concession to Concessionaire, Concessionaire agrees to pay to the City the following (collectively, the “Concession Fees”):

4.1 Upfront Payment.

Concessionaire shall pay to the City a total of One Million Three Hundred Seventy Thousand Four Hundred Eighty-Eight and No/100 (1,370,488.00) (the “Upfront Payment”), which shall be payable no later than 60 days following the complete execution of the Comprehensive Agreement and this Agreement, or upon the date in which the City commences to incur debt for construction activities or issues the first \$1.00 to Fortress Secured as payment pursuant to the Comprehensive Agreement The Upfront Payment shall not be deemed to serve satisfy any future credit or payment to the MG payments due upon the commencement of the Concession operations.

4.2 Minimum Guarantee (MG).

In consideration of the City’s execution of this Agreement and granting the rights provided herein, but subject to reduction as may (only) expressly be provided in this Agreement, commencing from and after the Commencement Date, Concessionaire shall pay to the City a Minimum Guaranteed Annual Concession Fee (“MG”) in the total amount of Seventy-Five Thousand and No/100 dollars (\$75,000.00) per Agreement Year. In addition, at the commencement of the second (2nd) Agreement year, the annual MG shall be opened for the sole and exclusive purpose of negotiating an increase in the MG for the remainder of the Initial Term. The Concessionaire acknowledges and agrees that the opening of negotiations for the yearly MG shall be exclusively limited to the City receiving an increase to the yearly MG, and the Concessionaire shall be prohibited from any reductions of the yearly MG. The Concessionaire shall be obligated to pay the MG to the City in twelve (12) equal installments commencing from and after the Commencement Date. By way of example, if the Commencement date is January 1, 2025, then with respect to the first Agreement year, \$6,250.00 of the \$75,000.00 will be payable by or before January 1, 2025, and shall be payable the first (1st) of each month thereafter.

4.3 Percent of Gross (PG).

For the Initial and First Agreement Year, during the initial Term, the Concessionaire shall pay to the City four percent (4%) of the Gross Receipts (as hereinafter defined) in excess of the amount of the then current MG (the “Percentage of Gross” or “PG”), for the first \$500,000.00 Percentage of Gross, and two and one-half percent (2.5%) for the Percentage of Gross above \$500,001.00, provided that the maximum PG shall not exceed \$240,000.00). The PG shall be

payable no later than the day that is one hundred twenty (120) days following the last day of such Initial and First Agreement year. **By way of example, if the Commencement Date is January 1, 2025, then the PG in respect of the initial Agreement Year shall be due and payable by or before April 30, 2026.** In addition, prior to the commencement of the second (2nd) Agreement year, the Percentage of Gross shall be opened for the sole and exclusive purpose of negotiating an increase to the PG for the remainder of the Initial Term. The Concessionaire acknowledges and agrees that the opening of negotiations for the PG shall be exclusively limited to the City receiving an increase to the PG, and the Concessionaire shall be prohibited from any reductions to the Percentage of Gross.

4.4 Charitable Net Receipts.

For each Agreement Year during the initial Term, Concessionaire shall remit two percent (2%) of the Net Receipts to the Guardian Angels Charitable Organization, or any other charitable organization or entity that is selected by the Concessionaire, provided that the City Manager approves, in writing, of the selected charitable organization. The Charitable PG shall be in excess of those amounts that are obligated to the City under the current MG and Percentage of Gross. The Concessionaire shall be obligated to remit the Charitable NG, no later than the day that is one hundred twenty (120) days following the last day of such Agreement Year, consistent with the example set forth in Section 4.3 herein.

4.5 Gross Receipts.

The term "Gross Receipts" as used herein shall mean any and all receipts, revenues and income of any nature derived directly or indirectly from all business conducted at, upon or from the Concession Area (including all Concession Operations) by Concessionaire, all Subconcessionaires, licensees, assignees and any and all others, whether evidenced by cash, check, credit, charge account, exchange or otherwise, including, without limitation, receipts from the sale of food, beverage, alcoholic beverages, services, merchandise, equipment rental and parking, so-called "location fees," sponsorship or advertising fees or other consideration, from vending or other machines, and from orders for any of the foregoing taken at the Concession Area or through any website, application or other interface (whether such orders are filled from or at the Concession Area or elsewhere). The term "Gross Receipts" shall also include any Displacement Fee or Alternative Consideration. The term "Gross Receipts" shall exclude: (a) amounts of any Federal, State, or City sales tax, use tax, excise tax, resort tax or other tax, governmental imposition, assessment, charge or expense of any kind, collected from customers, provided that the amount thereof is added to the selling price and remitted to the taxing or other governmental authority; (b) all credits and refunds given or made to customers for returns of merchandise; (c) all sums received in settlement for lost or damaged merchandise; (d) sales of machinery, equipment or trade fixtures after use thereof in the conduct of the Operations and not made to customers in the ordinary course of business; (e) the value of meal discounts to Concessionaire's employees, not to exceed two percent (2%) of Gross Receipts attributable to Concession Area Operations per year; and (f) service charges paid by customers to the extent paid to employees as tips and gratuities.

The Gross Receipts requirement set forth herein at 4.3, shall not be applicable to the two (2)

transitory food truck(s) that are to be engaged and/or secured by the Concessionaire on a limited duration, for the sole and exclusive purpose of occupying the remaining two (2) food truck sites. For purposes of this Section, “transitory” shall mean a food truck(s) that is secured and/or obtained by the Concessionaire for periods of time that shall not be greater than seven (7) days. The Concessionaire and the City agree that the monetary or non-monetary compensation that would be owned to the City for permitting the transitory food trucks to occupy the two (2) food truck sites shall be negotiated, in good faith, by the City Manager and City Attorney, or their designee and the Concessionaire, a minimum of 10 days prior to the transitory food truck(s) occupying the food truck sites in the Concession Area.

4.6 Interest for Late Payment.

Any payment which Concessionaire is required to make to City which is not paid within five (5) days of the date provided for in this Agreement shall be subject to a late charge of Fifty and 00/100 (\$50.00), plus interest at the rate of eighteen percent (18%) per annum (but not more than the highest rate allowable by law), from the due date of payment until such time as payment is actually received by the City.

4.7 Sales and Use Tax.

It is also understood that the required Florida State Sales and Use Tax shall be added to Concessionaire’s payments and forwarded to the City as part of said payments. It is the City's intent that it is to receive all payments due from Concessionaire as net of such Florida State Sales and Use Tax. Notwithstanding the foregoing, in the event the Concessionaire obtains an opinion from the Florida Department of Revenue that payments made to a municipality are not subject to sales tax, then Concessionaire shall not be required to pay sales tax.

SECTION 5. RECORDS, ACCOUNTS, STATEMENTS AND AUDITS.

5.1 Concessionaire shall keep at the Concession Area, or such other place approved by City, true, accurate, and complete records and accounts of all sales, gross sales, subcontract payments, and business being transacted upon or from the Concession Area maintained in accordance with generally accepted accounting principles and shall give City or City's representative access during reasonable business hours, with advance notice, to examine and audit such records and accounts. It is acknowledged that Concessionaire will implement an electronic and primarily cashless Point of Sale system (the “POS System”) to provide greater control and monitoring through the implementation of the SQUARE® POS software licensed by Concessionaire or such other similar POS system that the Concessionaire shall use from time to time. Subject to such reasonable system security rules that Concessionaire may implement from time to time, the Concessionaire shall provide access to limited number of City employees from the Office of Asset Management (the current administrator of this Agreement) (the “POS Employees”) and log-in credentials for the POS System so that they will have access for purposes of monitoring Concessionaire’s performance. Concessionaire shall maintain all records and accounts (and shall require each Subconcessionaire to so maintain all records and accounts) for a period of three (3) years following expiration (or other termination) of this Agreement (regardless of whether such termination results from the expiration of the Term or for any other reason). This provision shall apply to the four (4) Food Trucks, and the Concessionaire provides documented proof that the two (2) other

Food Truck sites are Subconcessionaires, which have no corporate affiliation or financial interest with the Concessionaire.

- 5.2 Within fifteen (15) days after each month of the Term hereof, Concessionaire shall deliver to City a written monthly statement of the Gross Receipts for such month certified by Concessionaire to be true, accurate, and complete. Any PG payable in respect of such month shall accompany such monthly statement.
- 5.3 Within ninety (90) days after each Agreement year, Concessionaire shall deliver to City a written annual statement of the Gross Receipts for such Agreement Year. Said statement shall be certified as true, accurate and complete by Concessionaire, by and through a duly authorized officer of Concessionaire. The City's auditor or his/her designee shall have the right, during regular business hours and upon the City's written request to Concessionaire to audit, inspect, examine and copy the Concessionaire 's fiscal and financial records, books, ledgers, statements, reports, tax returns and documents relating to this Agreement and the Concessionaire 's revenues thereunder through the Term of this Agreement and for three (3) years following its expiration or cancellation. The Concessionaire agrees to have such audit(s) conducted at the Concession Area or at such other locations within the City of Cape Coral, Florida as are mutually agreeable to the parties.

SECTION 6. TAXES, ASSESSMENTS, AND UTILITIES.

- 6.1 Concessionaire agrees to, and shall pay before delinquency, all taxes (including but not limited to resort taxes, ad valorem, sales and use taxes, as applicable) and assessments of any kind assessed or levied upon the Concession Area and any improvements thereon, including without limitation the Concession Area Structures, along with all taxes and assessments of any kind levied by reason of any business or activities conducted on the Concession Area by Concessionaire or any Subconcessionaire (collectively, "Impositions"). Concessionaire will have the right, at its own expense, to contest the amount or validity, in whole or in part, of any tax and/or assessment by appropriate proceedings diligently conducted in good faith. Concessionaire may refrain from paying a tax or assessment to the extent it is contesting the assessment or imposition of same in a manner that is in accordance with law; provided, however, if, as a result of such contest, additional delinquency charges become due, Concessionaire shall be responsible for such delinquency charges, in addition to payment of the contested tax and/or assessment if so ordered.
- 6.2. Concessionaire shall pay for any fees imposed by law for licenses or permits for any business(es) or activities of Concessionaire conducted in the Concession Areas.
- 6.3 Concessionaire shall pay before delinquency any and all charges for utilities used by, for, or on behalf of the Operations contemplated herein (including, but not limited to, water, electricity, gas, heating, cooling, sewer, telephone, ice machine, trash collection, etc.).

- 6.4 Notwithstanding **Subsection 6.1**, historically no ad valorem taxes have been assessed by the Lee County Tax Appraiser with regard to uses that are for public purposes and, accordingly, certain areas within the Concession Area may not be subject to ad valorem tax. If, however, such taxes are validly assessed at any time during the Term, the Concessionaire shall be solely liable for the payment of same.

SECTION 7. CONCESSIONAIRE IMPROVEMENTS.

7.1 Plans and Specifications.

7.1.1. Fortress Secured shall retain the services of such architecture, engineering and design firms for the Work as approved by the City Manager or his/her designee pursuant to the Comprehensive Agreement. **On or before April 1, 2025**, Fortress, after consulting with Concessionaire, shall submit to the City (acting in its proprietary capacity as owner of the Concession Area) all of the preliminary plans and specifications for the renovations and improvements to be made to the Property, which shall substantially conform to the conceptual designs presented by Fortress Secured with its RFP submission (the “RFP Conceptual Designs”) and shall include a site plan and all items constituting architectural plans and exhibits and landscape plans and exhibits that are required by the City Land Development Boards to be included in the application for Project Approvals (the “Preliminary Plans and Specifications”). The City Manager shall have twenty (20) Business Days to review the Preliminary Plans and Specifications solely for substantial conformity with the RFP Conceptual Designs. The City Manager shall not unreasonably withhold or delay his or her approval if the Preliminary Plans and Specifications for substantially conform to the Project Concept Plan for such Phase; it being agreed however, that the City’s failure to so notify Fortress Secured of its disapproval within ten (10) Business Days after a second written request bearing the legend specified in Subsection 26.13 of this Agreement shall be deemed to constitute the City’s conclusive approval of such Preliminary Plans and Specifications (subject to Concessionaire’s compliance with Subsection 26.13 of this Agreement). If the City Manager disapproves the Preliminary Plans and Specifications, then Fortress Secured shall within thirty (30) days after such disapproval, submit a revised modification to the Preliminary Plans and Specifications that substantially conform to the Project Concept Plan to the City Manager pursuant to the foregoing process until such Preliminary Plans and Specifications for such Phase have been approved by the City Manager.

7.1.2 Promptly following the City Manager’s approval of the Preliminary Plans and Specifications for construction of the Project in accordance with Subsection 7.1.1 above, Fortress Secured shall submit same to the applicable City Land Development Boards and deliver a copy of such submittal to the City. Thereafter, Fortress Secured shall use diligent, good faith efforts to obtain all Project Approvals on or before **July 1, 2025**. The City and Concessionaire acknowledge and agree that the City Land Development Boards and/or any other applicable Governmental Authority may require revisions to the Preliminary Plans and Specifications for the Work as a condition to the issuance of the Project Approvals; provided, however, that any revisions that will cause the Preliminary Plans and Specifications to substantially deviate from the RFP Concept Plans shall be subject to approval by the City Manager in his or her reasonable discretion. The Preliminary Plans and Specifications for each Phase of the Project, as revised to conform to conditions to the

issuance of the Project Approvals and, if applicable, any such revisions have been approved by the City Manager to the extent required herein, are referred to in this Agreement as the “Approved Preliminary Plans”.

7.1.3 Upon receipt of the Project Approvals for the Project, Fortress Secured shall prepare the Plans and Specifications for construction of the Project, substantially consistent with the Approved Preliminary Plans, for review by the City (acting in its proprietary capacity as owner of the Concession Area). The City Manager shall have twenty (20) Business Days to review the Plans and Specifications for substantial consistency with the Approved Preliminary Plans; it being agreed however, that the City’s failure to so notify Fortress Secured of its disapproval within ten (10) Business Days after a second written request bearing the legend specified in Subsection 26.13 of this Agreement shall be deemed to constitute the City’s conclusive approval of such Plans and Specifications (subject to Concessionaire’s compliance with Subsection 26.13 of this Agreement). If the City Manager disapproves the Plans and Specifications for either Phase of the Project, then Fortress Secured shall, within thirty (30) days after such disapproval, submit revised Plans and Specifications so that they substantially conform to the Approved Preliminary Plans and then re-submit them to the City Manager pursuant to the foregoing process until the Plans and Specifications have been approved by the City Manager. Fortress Secured shall pursue approval by the City of the Plans and Specifications diligently and in good faith and shall use diligent, good faith efforts to obtain the Full Building Permit on or before **December 31, 2025**.

7.2 The City hereby grants to Concessionaire, by and through Fortress Secured, the right, from and after the Occupancy Date, to undertake the Work, subject to compliance with the provisions of Section 7.1. **Subject to Unavoidable Delays, the Work shall be completed substantially in accordance with the projected timeline set forth in *Exhibit 7.2*.**

7.3 Concessionaire acknowledges and agrees that the Work to be performed pursuant to Section 7.1 is for the design and construction of public facilities and that the Concessionaire (through Fortress) shall ensure compliance by the primary general contractor retained by Concessionaire (the “Prime Contractor”) with the requirements of Section 255.05, Florida Statutes, including, but not limited to, the provision of bonds and payment of claims, provided, that, no bonds shall be required from the Concessionaire or third parties whose estimated scope of work is \$200,000.00 or less. Concessionaire hereby waives, releases and relinquishes any right to claim or file a construction lien against the Property including, but not limited to, any rights Concessionaire may have under Chapter 713, Florida Statutes. Concessionaire (through Fortress) shall include a provision substantially similar to this subsection in each of its contracts, subcontracts and purchase orders, requiring contractors, subcontractors and vendors to waive any claim or entitlement to a construction lien on the Property and to look solely to the credit of Fortress Secured or its surety for payment of any sums due on the Property.

7.4 Prior to commencing the Work or any other renovations or construction at the Concession Area, Fortress Secured shall provide the City's Risk Manager with evidence, consisting of certificates of insurance and bonds issued by Florida insurers and/or sureties rated A- or better per A.M. Best’s Key Rating Guide, latest edition, for the General Contractor. The General Contractor must carry and maintain throughout the term of such construction and

at least until final completion and acceptance of the Work, all lines of insurance coverage as depicted in *Exhibit 7.4* and the General Contractor shall provide the Payment and Performance Bonds to be provided by the general contractor in substantially the form prescribed for a public construction bond by Section 255.05, Fla. Stat. (2012), guaranteeing performance and payment of all subcontractors, material persons, and suppliers as set forth therein. As municipal property cannot be encumbered or liened under Florida Law, the Payment and Performance Bonds provided by the Prime Contractor must be equal to the construction bid amount. The City and Concessionaire shall be named as additional insureds and obligees on the Payment and Performance Bonds. The amount of insurance coverage required from the General Contractor will not be less than the amounts set forth in *Exhibit 7.4*. Subcontractors providing smaller levels of service than that provided by the General Contractor shall also be required to maintain the insurance coverage as depicted in *Exhibit 7.4*. Fortress Secured shall furnish to the City's Risk Manager certificates of insurance evidencing the coverage required hereunder and the required Payment and Performance Bond from the General Contractor for the City's Risk Manager to review, comment and approve at least thirty (30) days prior to commencement of construction on the Concession Area. All such policies shall provide that the City and the Concessionaire shall be given thirty (30) days prior written notice of any cancellation, lapse, or material modification of said insurance coverage and/or bonds or, if the insurer will not do so, the covenant of the General Contractor to provide such written notice.

7.5 Concessionaire's selection (through Fortress Secured) of the General Contractor shall be subject to the advance approval of the City Manager or his or her designee, which approval shall not be unreasonably withheld, conditioned or delayed provided the proposed General Contractor satisfies the qualifications listed below, after consultation with the City Attorney, as to the qualifications and responsibility of the proposed General Contractor to perform the General Construction Contract, based on the contractor's licensure, bonding capacity, financial capacity, history of compliance with laws, and satisfactory past performance on similar projects. Provided that the General Contractor proposed by Concessionaire for such Phase does not have a significant history of material non-compliance with the law, The City agrees to approve any General Contractor proposed by Concessionaire that satisfies each of the following:

- (i) Has a State of Florida Building and Business License;
- (ii) Has completed at least five projects of similar size and scope as the Project within the last ten (10) years; and
- (iii) Has total bonding capacity in excess of **\$10,000,000.00**.

7.6 All Construction Agreements shall include the provisions set forth on *Exhibit 7.6* (or language substantially similar thereto which is approved in advance by the City Manager). The City (solely in its capacity as the owner of the Concession Area and not in its governmental capacity) shall reasonably cooperate with Fortress Secured and Concessionaire in obtaining the Permits and Approvals, including but not limited to building permits (including phased permits) and any other building and development permits, curb cut permits, site plan approvals, and water and sanitary sewer tap permits and/or such other permits, licenses, or approvals as may be necessary for the development, construction and operation

of the Concession Area Structures and Concession Operations and any necessary utility access agreements, shall sign any applications, joinders, consents and/or other authorizations reasonably requested by Fortress Secured and Concessionaire which are required in order to obtain such Permits and Approvals and shall provide Fortress Secured and Concessionaire with any information and/or documentation not otherwise reasonably available to Fortress Secured and Concessionaire (if reasonably available to the City) which is necessary to procure such Permits and Approvals and utility access agreements. Fortress Secured shall reimburse the City, within thirty (30) days after the City's demand, for any reasonable out-of-pocket cost or expense payable to the City's technical consultants (other than City's employees), such as architects and engineers, so incurred by the City in connection with the City's reasonable cooperation in obtaining the Permits and Approvals as set forth in this Subsection 7.6. The City shall identify a City point person or persons (the make-up of which may change over time) to liaise with the various City departments in connection with the Project. Any such cooperation, accommodation or other action by the City pursuant to this Subsection shall be without prejudice to, and shall not constitute a waiver of, the City's rights to exercise its discretion in connection with its governmental or regulatory functions and any failure to do so shall not constitute or result in a breach or default by the City of any of the terms or conditions of this Agreement.

SECTION 8. EMPLOYEES AND INDEPENDENT CONTRACTORS.

- 8.1 In connection with the performance of its responsibilities hereunder, Concessionaire shall select, train, and employ (or otherwise retain) such number of employees and/or independent contractors, as is reasonably necessary or appropriate for Concessionaire to satisfy its responsibilities hereunder. Concessionaire shall have the sole responsibility to recruit, hire, terminate and discipline any and all personnel employed (or otherwise retained) by the Concessionaire to satisfy its responsibilities hereunder. Concessionaire shall select the number, function, qualifications, compensation, including benefits (if any), and may, at its discretion and at any time, adjust or revise the terms and conditions relating to such employees and/or independent contractors. None of the employees or contractors of Concessionaire shall be deemed to be employees or contractors of the City for any purpose whatsoever. Without limiting the generality of the foregoing, Concessionaire shall have the sole responsibility to recruit and employ a full-time general manager and any necessary administrative and accounting personnel that are responsible for the overall management and operation of the Concession Area and those structures located within the Concession Area. Concessionaire shall have the sole responsibility to recruit and employ sufficient personnel to maintain the following functions: general security; janitorial, housekeeping and cleaning; maintenance of electrical systems, plumbing; and air conditioner operation; painting and general overall maintenance of the Concession Area to ensure it is being maintained consistent with other similar first-class facilities. Concessionaire shall maintain personnel policies that assure employment practices do not discriminate on the basis of race, creed, sex, color, national origin, religion, sex, gender identity, sexual orientation, disability, marital or familial status or age.
- 8.2 Despite any subcontracts by Concessionaire approved by the City Manager or his/her designee and the delegation of certain responsibilities and obligations of Concessionaire as set forth in this Section 8 thereunder, Concessionaire shall remain responsible for ensuring

that any such subcontractors perform the services required to be provided under this Agreement are performed in accordance with the terms and conditions of this Agreement.

SECTION 9. HOURS OF OPERATION.

9.1 During the Term, all Concession Areas and Concession Operations thereon shall be open every day of the year, subject to weather (as to outdoor areas) and Force Majeure Events. The hours of operation for the Concession Operations shall be as follows:

- (i) **Bistro & Retail Operation – from 11:00 a.m. until at least 9:00 p.m. – 364 days a year (closed Christmas Day).**
- (ii) **Food Truck Operation – from 11:00 a.m. until 9:00 p.m. – 364 days a year (closed Christmas Day).**

Notwithstanding the foregoing, subject to approval of the City Manager or his/her designee, Concessionaire may make application for certain Concession Operations to be closed for specific national or religious holidays, including Christmas Eve. If Concessionaire can show that an increase or decrease in demand for certain services within the Concession Area exists, then Concessionaire may request an extension or decrease, as applicable, in the hours during which such services are offered. The City Manager or his or her designee will determine, in his or her sole discretion, whether allowing such an extension or decrease in the hours of service in question would be in the best interests of the City taking all relevant factors into account, including, without limitation, whether an extension in hours of service would not have an adverse effect on the quality of life of Persons residing in the vicinity of the Concession Area.

SECTION 10. MAINTENANCE AND REPAIR.

10.1 City Has No Obligation to Maintain or Repair.

The City shall have no responsibility to maintain or repair any part or portion of the Concession Area, including without limitation, any Concession Area Structure, lighting, electricity lines, water lines, sanitary sewer lines, gas lines, or telephone and cable lines serving the Concession Area. Notwithstanding the foregoing or any other provisions of this Agreement, but subject to Section 18, if any part of the Concession Area is damaged or destroyed or requires repair, replacement, or alteration and/or if Concessionaire fails to maintain the Concession Area in accordance with the Maintenance Standards, the City shall have the right to perform same and the cost of such repairs, replacement, alterations and/or maintenance shall be paid by Concessionaire to City within ten (10) days of written demand. In addition, if, in an emergency, it shall become necessary to make promptly any repairs or replacements required to be made by Concessionaire, City may proceed forthwith to have the repairs or replacements made and pay the costs thereof. Within ten (10) days after written demand, Concessionaire shall reimburse City for the cost of making the repairs. For the avoidance of doubt, the City shall remain responsible for maintaining and repairing water and sewer mains and stormwater infrastructure, if any, lying

within the Concession Area, but the City shall have no responsibility to maintain or repair any lines connecting the City’s water and sewer mains to any portion of the Concession Area or any drains and lines that allow for the drainage of stormwater from the Concession Area into the City’s stormwater infrastructure.

The City shall maintain the facilities located on the North Lawn, as depicted on the Site Plan, including, but not limited to, the bandshell, restrooms, pavilions, parking areas and driveways. The City shall also operate and maintain the following facilities located south of the South Lawn, as depicted on the Site Plan: the restrooms, sand volleyball courts, playground, splash pad, pavilions, corn hole courts, lawns and landscaping, stormwater detention areas, sidewalks, parking areas and driveways.

10.2 Maintenance and Repairs by Concessionaire.

10.2.1 Subject to completion of the Project, the Concessionaire accepts the use of the Concession Area in its “AS IS, WHERE IS” condition with all faults other than any Hazardous Materials or other environmental issues existing in the Concession Area prior to the Occupancy Date. Except as set forth in Section 10.1 above, Concessionaire shall maintain or cause to be maintained, at its own cost and expense, the Concession Area and all structures within the Concession Area in a first-class manner which is at least equal to the condition and quality of other comparable food truck courts and operations (the “Required Condition”), in compliance with all applicable Requirements, both inside and out, including, without limiting the generality of the foregoing, Concessionaire is specifically required to maintain and make repairs to: (i) all pipes, lines, ducts, wires, or conduits contained within the Concession Area; (ii) windows, plate glass, doors, and any fixtures or appurtenances composed of glass (including, without limitation, interior and exterior washing of windows and plate glass); (iii) Concessionaire’s signage; (iv) any heating or air conditioning equipment serving the Concession Area ("HVAC") (which shall include, without limitation, a preventive maintenance HVAC service contract that includes, without limitation, preventive HVAC maintenance no less than quarterly); (v) all or any portion of the Work including, without limitation, any materials, machinery, finishings, fixtures, and equipment related thereto; (vi) all building safety systems including, but not limited to, smoke, fire, and carbon monoxide detector systems, backup generator operation, emergency battery backup functions, emergency lighting, emergency egress, special needs and blackout preparedness equipment, emergency water and fire sprinkler system (all building safety systems shall be tested on at least an annual basis or as required by applicable Requirements and maintained in good operating condition at all times); (viii) ceilings, stairways, floor slabs and floor coverings, sidewalks, walkways, hallways, corridors, canopies (awnings and frames), loading dock/service areas, utility rooms, electric rooms, building structures including envelope, roof, siding, painting, structural integrity; (ix) regular inspections of elevator and escalator controls, motors, suspension systems, and related equipment, and shall maintain such systems substantially in accordance with manufacturer required standards (collectively, the “Maintenance Standards”). The Maintenance Standards shall also include Concessionaire’s obligation: (x) to furnish, maintain, and replace all electric light bulbs, tubes, and tube casings located within or serving the Concession Area and Concessionaire’s signage, all at Concessionaire’s sole cost and expense; (y) to maintain sufficient garbage collection areas so that garbage is not overflowing and enclosures remain closed at all times unless garbage is actively being disposed or collected (provided, however,

that the City shall maintain garbage collection areas at Jaycee Park located outside of the Concession Area). The Concession Area shall further be kept in good order, condition and repair by Concessionaire, and in a clean, sanitary and safe condition in accordance with all laws, including without limitation, the ADA, and directions, rules and regulations of the health officer, fire marshal, building inspector or other officers of any governmental agencies having jurisdiction, all at the sole cost and expense of Concessionaire. Concessionaire shall also be responsible for replacing all fixtures and equipment which are stolen damaged beyond repair or worn out. The interior wall finishes, interior flooring finishes fixtures, and furniture in the Concession Area shall be repaired, replaced, and/or maintained by Concessionaire, at Concessionaire's sole cost and expense, periodically as to keep the Concession Area in a condition that satisfies the Required Condition.

10.2.2 All repair and maintenance that cannot be performed by Concessionaire directly shall be performed by contractors or workmen approved by the City Manager or the City Manager's designee.

10.2.3 Concessionaire's compliance with the Maintenance Standards shall be subject to City's reasonable discretion. Concessionaire and City shall inspect the physical structure of the Concession Area not less frequently than every three (3) years, at the expense of the Concessionaire, and using a contractor mutually agreed upon by the parties, to identify deferred maintenance items and develop a schedule of renewal and replacement projects for the following three (3) years.

10.2.4 At the expiration or earlier termination of the Term, Concessionaire shall surrender the Concession Area to City in as good condition and repair as Concessionaire is required to maintain the Concession Area throughout the Term, reasonable wear and tear excepted.

10.2.5 Despite any subcontracts by Concessionaire approved by the City Manager or his/her designee and the delegation of certain responsibilities and obligations of Concessionaire as set forth in this Section 10, Concessionaire shall remain responsible for ensuring that any such subcontractors perform the services required to be provided under this Agreement are performed in accordance with the terms and conditions of this Agreement.

10.3 Ownership of Improvements and Fixtures; Removal.

All improvements, furnishings, and equipment constructed or installed on the Concession Area by Concessionaire and/or Fortress Secured shall be personal property and Concessionaire shall have legal title thereto during the term of this Agreement. Upon the expiration or termination of the Agreement, title to all permanent improvements constructed on the Concession Area shall vest in City. Title to all supplies, furnishings, inventories, and removable equipment and other personal property shall remain in Concessionaire, and Concessionaire shall have the right to remove such items from the Concession Area without damaging the Concession Area unless Concessionaire is in default under this Agreement. Concessionaire may, during the Term, in the usual course of its business, remove its trade fixtures, provided that Concessionaire is not in default under this Agreement; and Concessionaire shall, at the expiration or earlier termination of the Term, at its sole cost, remove such of the improvements and trade fixtures in the Concession Area as City shall

require to be removed and restore the Concession Area to the condition existing on the Commencement Date. Concessionaire shall at its own expense repair any damage caused to the Concession Area by such removal. If Concessionaire does not remove its trade fixtures at the expiration or earlier termination of the Term, the trade fixtures shall, at the option of City, become the property of City and may be removed from the Concession Area and sold or disposed of by City in such manner as it deems advisable without any accounting to Concessionaire.

10.4 Liens.

Concessionaire shall promptly pay for all materials supplied and work done in respect of the Concession Area by, through, or under Concessionaire so as to ensure that no lien is recorded against any portion of the Concession Area or against City's or Concessionaire's respective interests therein. If a lien is so recorded, Concessionaire shall discharge it promptly by payment or bonding. If any such lien against the Concession Area is recorded and not discharged by Concessionaire as above required within thirty (30) days following written notice to Concessionaire, City shall have the right to remove such lien by bonding or payment and the cost thereof shall be paid immediately by Concessionaire to City. City and Concessionaire expressly agree and acknowledge that no interest of City in the Concession Area shall be subject to any lien for improvements made by Concessionaire in or for the Concession Area, and City shall not be liable for any lien for any improvements made by Concessionaire, such liability being expressly prohibited by the terms of this Agreement. Concessionaire hereby agrees to inform all Contractors performing work in or for or supplying materials to the Concession Area of the requirements of this Section and to include provisions in all contracts with such Contractors confirming same.

10.4.1 Facilities/Equipment/Furnishings.

Concessionaire must provide and maintain, at its own cost and expense, all facilities, equipment, and furnishings required to operate the Concession Operations. In the event any of the aforesaid items are lost, stolen, or damaged during the Term, they shall be repaired or, if irreparable, replaced, at the sole cost and expense of the Concessionaire, within fifteen (15) days of written notice from the City Manager or his/her designee, provided, that, if any such item reasonably requires more than such 15-day period to repair or replace, Concessionaire shall not be in default of this **Subsection 10.4.1**, provided, that, it commences to repair and replace promptly after notice thereof from the City and pursues such repair or replacement with all due diligence.

10.5 Orderly Operation.

Concessionaire shall keep a neat and orderly operation at all times and shall be solely responsible for the necessary housekeeping services to properly maintain the Concession Area and all facilities, equipment and furnishings thereto. There shall be no living quarters, nor shall anyone be permitted to live, within the Concession Area, the Concession Area Structures and/or any other facilities thereon, provided, that, if Concessionaire becomes aware of any such living quarters or that someone is living in the Riverfront Area, its only obligation with regard thereto is to notify the City of Cape Coral Police Department promptly. Concessionaire shall make available all of its facilities, equipment and furnishings for

inspection during hours of operation by the City Manager or his/her authorized representative.

10.6 Environmental Matters.

10.6.1 Concessionaire shall not (and shall ensure any Subconcessionaires do not) knowingly incorporate into, use, or otherwise place or dispose of at the Concession Area (or allow others to incorporate into, use, or otherwise place or dispose of at the Concession Area) any Hazardous Materials, as hereinafter defined, unless (i) such Hazardous Materials are for use in the ordinary course of business (i.e., as with office or kitchen cleaning supplies or in the case of the Restaurant Operations, the use of cooking products, propane gas and similar products typical to the industry), (ii) notice of and a copy of the current material safety data sheet is provided to City for each such Hazardous Material (except for Hazardous Materials used by Concessionaire and Subconcessionaires in the ordinary course of business as set forth in (i), above), and (iii) such materials are handled and disposed of in accordance with all applicable governmental laws, rules, and regulations. If City or Concessionaire ever has actual knowledge of the presence at the Concession Area of Hazardous Materials which affect the Concession Area, such party shall notify the other thereof in writing promptly after obtaining such knowledge. For purposes of this Agreement, "Hazardous Materials" shall mean: (a) petroleum and its constituents; (b) radon gas, asbestos in any form which is or could become friable, urea formaldehyde foam insulation, transformers or other equipment which contain dielectric fluid containing levels of polychlorinated biphenyls in excess of federal, state or local safety guidelines, whichever are more stringent; (c) any substance, gas, material or chemical which is or may hereafter be defined as or included in the definition of "hazardous substances," "hazardous materials," "hazardous wastes," "pollutants or contaminants," "solid wastes," or words of similar import under any applicable governmental laws, rules, and regulations including, but not limited to, the Comprehensive Environmental Response, Compensation and Liability Act, as amended, 42 U.S.C. § 9061 et seq.; the Hazardous Materials Transportation Act, as amended, 49 U.S.C. § 1801, et seq.; the Resource Conservation and Recovery Act, as amended, 42 U.S.C. § 6901, et seq.; the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1251, et seq.; and Florida Statutes, Chapters 376 and 403; and (d) any other chemical, material, gas, or substance, the exposure to which is regulated by any governmental or quasi-governmental entity having jurisdiction over the Concession Area or the operations thereon.

10.6.2 If Concessionaire or its employees, agents, contractors, Subconcessionaires or assigns shall ever violate the provisions of **Subsection 10.6.1**, above, then Concessionaire shall clean-up, remove, and dispose of the Hazardous Material causing the violation, in compliance with all applicable governmental standards, laws, rules, and regulations and repair any damage to the Concession Area within such period of time as may be reasonable under the circumstances after written notice by City, provided that such work shall commence not later than thirty (30) days from such notice and be diligently and continuously carried to completion by Concessionaire or Concessionaire's designated contractors. Concessionaire shall notify City of its method, time, and procedure for any clean-up or removal of Hazardous Materials under this provision; and City shall have the right to require reasonable changes in such method, time, or procedure or to require the same to be done after normal business hours or when the Concession Area is otherwise closed (i.e., holidays) if reasonably required for the protection of Concessionaire's patrons.

10.6.3 Concessionaire agrees to defend, indemnify and hold harmless City against any and all claims, costs, expenses, damages, liability, and the like, which City may hereafter be liable for, suffer, incur, or pay arising under any applicable environmental laws, rules, and regulations and resulting from or arising out of any breach of the covenants contained in this **Section 10.7**, or out of any act, activity, or violation of any applicable environmental laws, rules, and regulations on the part of Concessionaire, its employees, agents, contractors, Subconcessionaires or assigns. Concessionaire's liability under this **Section 10.6.3** shall survive the expiration or any termination of this Agreement.

10.7.4 Concessionaire shall have no responsibility to pay for, assist with, contribute to, or remediate any environmental issues affecting the Concession Area (including, for the avoidance of doubt, the Public Parking Area) that existed prior to the Occupancy Date.

10.7 Security.

Concessionaire shall be solely responsible for providing such security measures as Concessionaire, in its professional experience and judgment, may deem necessary to protect any of its facilities, equipment, and furnishings within the Concession Area and patrons of the Concession Operations. Under no circumstances shall the City be responsible (i) for any stolen or damaged facilities, equipment, or furnishings; nor shall the City be responsible for (ii) any stolen or damaged personal property of Concessionaire's patrons, guests, invitees, employees, contractors, and/or any other third parties; provided that, as to clause (ii), the foregoing is not intended to impose any affirmative duty on Concessionaire for any such theft or damage.

10.8 Inspection.

The Concessionaire agrees that the Concession Area, and all facilities, equipment, furnishings, and operations thereon, may be inspected at any time during hours of operation by the City Manager or his/her authorized designee(s), or by any other municipal, County, State agency or official having responsibilities for inspections of such operations. The Concessionaire hereby waives all claims against the City for compensation for loss or damage sustained by reason of any interference (which interference, if by the City, must be reasonable) with the concession operation by the City, or any public agency or official, in enforcing their duties or any laws or ordinances. Any such interference shall not relieve the Concessionaire from any obligation to perform hereunder.

SECTION 11. DAMAGE AND DESTRUCTION.

11.1 Damage to Concession Area.

If the Concession Area Structures or other improvements on the Concession Area (collectively, "Improvements") are partially or totally destroyed due to fire or other casualty, the Concessionaire, except as hereafter provided in this **Subsection 11.1**, shall, at its sole cost and expense within the earlier of: (i) thirty (30) days after receiving insurance proceeds with respect to any such casualty or (ii) one hundred eighty (180) days from the date of such casualty, commence the work of repair, reconstruction, restoration, or replacement and shall prosecute the work with all reasonable dispatch,

so as to fully complete such work as expeditiously as reasonably possible consistent with the nature and extent of the casualty, with such Improvements to be repaired, reconstructed, or restored as nearly as practicable to the same condition as prior to such casualty. MG and PG shall abate proportionately to the portion of the Concession Area, if any, rendered unusable from the date of destruction or damage until the repairs have been substantially completed. Upon being notified that the repairs have been substantially completed, Concessionaire shall diligently perform all other work required to fully restore the Concession Area for use in Concessionaire's business, in every case at Concessionaire's cost and without any contribution to such cost by City. Concessionaire agrees that during any period of reconstruction or repair of the Concession Area, it will continue the operation of its business within the Concession Area to the extent practicable. If the damage or destruction is a result of the negligence or willful misconduct of Concessionaire or Concessionaire's employees, contractors or agents, the charges payable under this Agreement shall not abate.

11.2 Termination for Damage. Notwithstanding Section 11.1, if damage or destruction which has occurred to the Concession Area is of a material nature and such that, in the reasonable opinion of City or Concessionaire, such reconstruction or repair cannot be completed within three hundred and sixty five (365) days of the happening of the damage or destruction, City or Concessionaire may, at its sole option, terminate this Agreement on notice given within sixty (60) days after such damage or destruction.

SECTION 12. PARKING.

12.1 The City shall manage, operate and maintain the Public Parking Area at its sole cost and expense. Upon Substantial Completion of the Work, the Concession Area may be subdivided by Declaration or otherwise in a manner reasonably satisfactory to the City to specifically exclude the Public Parking Area. For the avoidance of doubt, the City shall be entitled to receive and retain all gross revenues from the operation of the Public Parking Area, if any.

SECTION 13. SIGNAGE AND NAMING RIGHTS.

13.1 Concessionaire, at Concessionaire's expense, and the Subconcessionaires, at their respective expense, shall have the right to erect and maintain signage upon the Concession Area, including, in Concessionaires discretion, signage which identifies the overall facility and individual Concession Areas. The design and specification of such signage shall be subject to City's sign criteria, as adopted from time to time, and such design and specification (including camera-ready artwork) shall be submitted for City's prior approval. City's current signage criteria is attached hereto and made a part hereof as *Exhibit 13.1*. All such signage shall be in accordance with all applicable Requirements. Any new or altered signage posted by Concessionaire (or any Subconcessionaire) on its facilities and equipment shall be subject to the prior approval of the City Manager or his or her designee as to size, shape and placement of same.

13.2 The name for the new establishment shall require the approval of the City Manager, which approval shall not be unreasonably withheld, conditioned or delayed, or if City Council approval is required, then in City Council's sole discretion. The foregoing is not intended to limit signage rights for Subconcessionaires, whose signage may be on the exterior of their spaces within the Concession Area, subject to compliance with applicable Requirements.

SECTION 14. INSURANCE.

14.1 Concessionaire shall maintain during the Term, at its sole cost and expense, insurance coverage meeting the criteria established by the City as set forth on *Exhibit 14* attached hereto and made a part hereof.

14.2 Should Concessionaire fail to obtain, maintain or renew the policies of insurance referred to above, in the required amounts, the City may, at its sole discretion, obtain such insurance, and any sums expended by City in obtaining said insurance, shall be repaid by Concessionaire to City, plus ten percent (10%) of the amount of premiums paid to compensate City for its administrative costs. If Concessionaire fails to repay City's expenditures within fifteen (15) days of demand, the total sum owed shall accrue interest at the rate of twelve percent (12%) per annum until paid, and such failure shall be deemed an Event of Default hereunder.

14.3 The terms of insurance policies referred to in this Section 14 shall preclude subrogation claims against Concessionaire, the City, and their respective officers, employees, contractors and agents.

SECTION 15 WAIVER OF SUBROGATION.

15.1 Without limiting Concessionaire's indemnity obligations, City and Concessionaire each hereby waives on behalf of itself and its insurers (none of which shall ever be assigned any such claim or be entitled thereto due to subrogation or otherwise) any and all rights of recovery, claim, action, or cause of action, against the other, its agents, officers, or employees, for any loss or damage that may occur to the Concession Area, the Concession Area Structures or any other Improvements, or any further improvements or renovation during the Term to any of the foregoing, or any personal property of such party therein, by reason of fire, the elements, or any other causes which are, or could or should be insured against under the terms of the standard fire and extended coverage insurance policies referred to in this Agreement, regardless of whether such insurance is actually maintained and regardless of the cause or origin of the damage involved, including negligence of the other party hereto, its agents, officers, or employees. Concessionaire shall obtain from its insurers, under all policies of fire, theft, public liability, worker's compensation, and other insurance maintained by it at any time during the Term hereof insuring or covering the Concession Area or any portion thereof or operations therein, a waiver of all rights of subrogation which the insurer of Concessionaire have against the City, and Concessionaire shall indemnify, defend, and hold harmless City against any loss or expense, including reasonable attorney's fees and costs at all tribunal levels.

SECTION 16. LOSS OR DAMAGE.

16.1 Except to the extent otherwise expressly set forth herein, Concessionaire acknowledges that the City will not be performing any maintenance and repairs to the Concession Area. City shall not be liable for any death or injury arising from or out of any occurrence in, upon, at, or relating to the Concession Area, or damage to property of Concessionaire or of others located in the Concession Area, nor shall it be responsible for any loss of or damage to any property of Concessionaire or others from any cause, unless such death, injury, loss, or damage results from the gross negligence or willful misconduct of City. Without limiting the generality of the foregoing, City shall not be liable for any injury or damage to persons or property resulting from fire, explosion, falling plaster, falling ceiling tile, falling fixtures,

steam, gas, electricity, water, rain, flood, or leaks from any part of the Concession Area or from the pipes, sprinklers, appliances, plumbing works, roof, windows, or subsurface of any floor or ceiling of any improvements on the Concession Area, or from the street or any other place or by dampness, or by any other cause whatsoever, unless resulting from the gross negligence or willful misconduct of City. Concessionaire agrees to indemnify City and hold it harmless from and against any and all loss, claims, actions, damages, liability, and expense of any kind whatsoever (including attorneys' fees and costs at all tribunal levels), unless caused by the gross negligence or willful misconduct of City, arising from any occurrence in, upon, or at the Concession Area, or the occupancy, use, or improvement by Concessionaire or its agents or invitees of the Concession Area, or occasioned wholly or in part by any act or omission of Concessionaire its agents, employees, and invitees or by anyone permitted to be in the Concession Area by Concessionaire.

SECTION 17. INDEMNITY.

- 17.1 In consideration of a separate and specific consideration of \$10.00 and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Concessionaire shall indemnify, hold harmless and defend the City, its officers, officials, employees, contractors, and agents, from and against any claim, demand or cause of action of whatsoever kind or nature arising out of (a) the negligent act or willful misconduct of Concessionaire, its officers, directors, members, managers, employees, contractors (including, without limitation, any Subconcessionaires), or agents, in the performance of services under this Agreement, excluding, however, any such liability that arises as a result of the willful misconduct or gross negligence of the City, its officers, officials, employees, contractors, or agents (b) Concessionaire's breach of the terms of this Agreement or its representations and warranties in Section 30; and/or (c) any lawsuit, action or proceeding challenging the validity, execution or effectiveness of the Concession Agreement, any tort or other claim related to any of the foregoing, or any such challenge relating to any approval required under the City Code and or City Charter. Concessionaire shall pay all such claims and losses and shall pay all such costs and judgments which may issue from any lawsuit arising from such claims and losses, and shall pay all costs and attorneys' fees expended by the City in the defense of such claims and losses, including appeals (the "Liabilities").
- 17.2 In addition, and in consideration of a separate and specific consideration of Ten (\$10.00) Dollars and other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, Concessionaire shall indemnify, hold harmless and defend the City, its officers, employees, contractors, agents or servants from and against any claim, demand or cause of action of whatever kind or nature arising out of any misconduct of Concessionaire, its officers, employees, contractors, Subconcessionaire(s), agents or servants not included in Subsection 17.1 herein and for which the City, its officers, employees, contractors, subconcessionaire(s), agents or servants are alleged to be liable excluding, however, any such liability that arises as a result of the willful misconduct or gross negligence of the City, its officers, officials, employees, contractors, or agents. Concessionaire shall pay all such claims and losses and shall pay all such costs and judgments which may issue from any lawsuit arising from such claims and losses, and shall pay all costs and attorneys' fees expended by the City in the defense of such claims and losses, including appeals (the "Misconduct Liabilities").

- 17.3 In the event any Person not a party to this Agreement shall make any demand or claim or file or threaten to file or continue any lawsuit, which demand, claim or lawsuit may result in Liabilities and/or Misconduct Liabilities to the City, the City shall give written notice to such effect to the Concessionaire promptly upon becoming aware thereof, including with such notice all correspondence and documents in the possession of the City relating thereto (collectively, the “Notice”). In such event, within ten (10) days after Notice of such demand, claim or lawsuit (provided, however, that the failure to give such Notice shall not relieve the Concessionaire of its obligations hereunder unless, and only to the extent that, such failure caused the damages for which the Concessionaire is liable to be greater than they would otherwise have been had the City given prompt notice hereunder), or if no such notice is given, within ten (10) days of becoming aware thereof, Concessionaire shall have the right, at its sole cost and expense, to retain counsel (which counsel shall be reasonably satisfactory to the City), to defend any such demand, claim or lawsuit. Thereafter, the City shall be permitted, but not required, to participate in such defense at its own expense. Notwithstanding the foregoing, if (a) the Concessionaire fails to retain counsel reasonably satisfactory to the City within such ten (10) day period or (b) if the named parties to any such proceeding (including any impleaded parties) include both the Concessionaire and the City or if the Concessionaire proposes that the same counsel represent both the Concessionaire and the City and representation of both parties by the same counsel would be inappropriate due to actual or potential differing interests between them, then the City shall have the right to retain its own counsel at the cost and expense of the Concessionaire.
- 17.4 Intentionally deleted.
- 17.5 Intentionally deleted.
- 17.6 The provisions of this Section 17 shall survive the expiration or termination of this Agreement.

SECTION 18. FORCE MAJEURE.

18.1. Force Majeure Generally.

The performance of any act by the City or Concessionaire hereunder may be delayed or suspended at any time while, but only so long as, such party is hindered in or prevented from performance of its obligations under this Agreement by a Force Majeure Event, provided, however, if such condition persists for more than one hundred eighty (180) consecutive days, the City and Concessionaire may in their sole discretion renegotiate the terms of this Agreement. If the performance of the contractual obligations is prevented or delayed by an event believed by a party to be a Force Majeure Event, such party shall immediately upon learning of the occurrence of the event or of the commencement of any such delay, but in no case later than thirty (30) days from the occurrence of the event, provide notice of (i) of the occurrence of the event believed to be a Force Majeure Event, (ii) of the nature of the event and the cause thereof, (iii) of the anticipated impact on the Agreement, (iv) of the anticipated period of the delay, and (v) of what course of action such party plans to take in order to mitigate the detrimental effects of the event. The timely delivery of the notice of the occurrence of a Force Majeure Event is a condition precedent to allowance of any relief pursuant to this section; however, receipt of such notice shall not constitute acceptance that the event claimed to be a Force Majeure Event is in fact a Force Majeure Event, and the burden of proof of the occurrence of a

Force Majeure Event shall be on the requesting party.

18.2 Labor Dispute.

In the event of a labor dispute which results in a strike, picket, or boycott affecting the Concession Areas described in this Agreement (a “Labor Dispute”), Concessionaire shall not thereby be deemed to be in default or to have breached any part of this Agreement, unless such dispute shall have been caused by illegal labor practices or violations by Concessionaire of applicable collective bargaining agreements and there has been a final determination of such fact which is not cured by Concessionaire within thirty (30) days following such determination or, if compliance with such final determination is not reasonably susceptible to being cured within such period, then Concessionaire shall not be considered in default if it shall, within such period, commence with due diligence and dispatch to cure such default and thereafter completes such cure.

18.3 Waiver of Loss from Hazards.

The Concessionaire hereby expressly waives all claims against the City or its officers, officials, employees, contractors or agents, for loss or damage sustained by the Concessionaire resulting from any Force Majeure Event or Labor Dispute, and the Concessionaire hereby expressly waives all rights, claims, and demands against the City or its officers, officials, employees, contractors, or agents, and forever releases and discharges the City and its officers, officials, employees, contractors, or agents, from all demands, claims, actions and causes of action arising from any of the aforesaid causes.

SECTION 19. DEFAULT, TERMINATION AND PENALTIES

Each of the events or occurrences described in Subsections 19.1 through 19.3 shall constitute an Event of Default under this Agreement. An Event of Default by Concessionaire shall entitle City to exercise any and all remedies available at law or in equity as well as those expressly provided for in this Section 19. An Event of Default by City shall entitle Concessionaire to exercise any and all remedies available at law or in equity as well as those expressly provided for in this Section 19.

19.1 Bankruptcy.

If either the City or Concessionaire shall be (a) adjudged bankrupt or insolvent, or (b) if any receiver or trustee of all or any part of the business property of either party shall be appointed, or if any receiver of all or any part of the business property shall be appointed and in any such case shall not be discharged within ninety (90) days after appointment, or (c) if either party shall make an assignment of its property for the benefit of creditors, or (d) shall file a voluntary petition in bankruptcy or insolvency, or shall apply for reorganization or arrangement with its creditors under the bankruptcy or insolvency laws now in force or hereinafter enacted, Federal, State, or otherwise, or (e) if such petitions shall be filed against either party and shall not be dismissed within ninety (90) days after such filing, then the other party may immediately, or at any time thereafter, and without further demand or notice, terminate this Agreement without being prejudiced as to any remedies which may be available to it for breach of contract.

19.2 Default in Payment.

In the event Concessionaire fails to submit any payment within five (5) days of its due date, there shall be a late charge of \$50.00 per day for such late payment, in addition to interest at the highest rate allowable by law (currently 18% per annum). If any payment and accumulated penalties are not received within fifteen (15) days after the payment due date, and such failure continues three (3) days after written notice thereof, then the City may, without further demand or notice, terminate this Agreement without being prejudiced as to any additional remedies which may be available to it for breach of contract.

19.3 Non-Monetary Default.

In the event that Concessionaire or the City fails to perform or observe any of the covenants, terms or provisions under this Agreement (other than default in payment under **Section 19.2** above), and such failure continues thirty (30) days after written notice thereof from the other party hereto, such non-defaulting party may immediately or at any time thereafter, and without further demand or notice, terminate this Agreement without being prejudiced as to any additional remedies which may be available to it for breach of contract. Notwithstanding the foregoing, in the event that a default is not reasonably susceptible to being cured within such period, the defaulting party shall not be considered in default if it shall, within such period, commence with due diligence and dispatch to cure such default and thereafter completes with dispatch and due diligence the curing of such default, but in no event shall such extended cure period exceed ninety (90) days from the date of written notice thereof except to the extent of a delay beyond such ninety (90) day period caused by a Force Majeure Event. In the event Concessionaire cures any default pursuant to this subsection, it shall promptly provide City with written notice of same.

19.4 City's Remedies for Concessionaire's Default.

If an Event of Default by Concessionaire as set forth in this Section shall occur, the City may, after notice (if required) and the expiration of applicable cure periods, as provided above, at its sole option and discretion, institute such proceedings as, in its opinion, are necessary to cure such defaults and to compensate City for damages resulting from such defaults, including, but not limited to, the right to give to Concessionaire a notice of termination of this Agreement. If such notice is given, the Term of this Agreement shall terminate upon the date specified in such notice from City to Concessionaire, but in no event shall the City specify a surrender date that is less than sixty (60) days from the date the notice is delivered to Concessionaire. On the date so specified, Concessionaire shall then quit and surrender the Concession Area to City pursuant to the provisions of **Subsection 19.6**. Upon the termination of this Agreement, all rights and interest of Concessionaire in and to the Concession Area and to this Agreement, and every part thereof, shall cease and terminate (other than those provisions which by their terms survive such termination) and City may, in addition to any other rights and remedies it may have, retain all sums paid to it by Concessionaire under this Agreement. In addition to the rights set forth above, City shall have the rights to pursue any and all of the following:

- a. the right to injunction or other similar relief available to it under Florida law against Concessionaire; and
- b. the right to maintain any and all actions at law or suits in equity or other proper proceedings to obtain damages for breach of contract resulting from Concessionaire's default.

19.5 Concessionaire's Remedies for City's Default.

If an Event of Default, as set forth in this Section, by the City shall occur, the Concessionaire may, after notice (if required) and the expiration of the applicable cure periods, as provided above, at its sole option and discretion, terminate this Agreement upon written notice to the City and/or sue for damages. Said termination shall become effective upon receipt of a written notice of termination by the City, but in no event shall Concessionaire specify a termination date that is less than sixty (60) days from the date of the written termination notice. On the date specified in the notice, Concessionaire shall quit and surrender the Concession Area to City pursuant to the provisions of **Subsection 19.6.**

19.6 Surrender of Concession Areas.

At the expiration of this Agreement, or earlier termination in accordance with the terms of this Agreement, Concessionaire shall surrender the Concession Area in as good condition and repair as Concessionaire is required to maintain the Concession Area throughout the Term, reasonable wear and tear excepted (including any erosion not directly caused by Concessionaire and/or its operation). Concessionaire shall remove all its facilities, equipment, fixtures, personal property, etc. upon seventy-two (72) hours of receipt of written notice from the City Manager or his designee unless a longer time period is agreed to by the City. Concessionaire's obligation to observe or perform this covenant shall survive the expiration or other termination of this Agreement. Continued occupancy of the Concession Area(s) after termination of this Agreement and expiration of such 48-hour period shall constitute trespass by the Concessionaire and may be prosecuted as such. In addition, the Concessionaire shall pay to the City one and a half times the daily rate calculated by dividing the MG in effect at the time into three hundred sixty-five (365) as liquidated damages for such trespass and holding over.

SECTION 20. ASSIGNMENT.

Except as otherwise provided in **Section 3** and in this **Section 20**, Concessionaire shall not assign, grant any concession or license, or otherwise transfer all or any portion of this Agreement and/or of the Concession Area(s) (all of the foregoing are herein after referred to collectively as "transfers"), without the prior written consent of the City Manager or his/her designee, which consent shall not be unreasonably withheld, conditioned or delayed.

If there is a change in control of Concessionaire, then any such change in control shall constitute a "transfer" for purposes of this Agreement and shall be approved by the Manager or his or her designee prior to consummation of such change in control. "Change in control", for purposes hereof, shall mean a change of the ownership, directly or indirectly, of greater than thirty-three and four tenths percent (33.4%) of the voting or ownership interest or right to profits in such Concessionaire

to any non-Affiliate, by means of one or more transfers, sales, mergers, consolidations, dissolutions or otherwise; provided, that, the foregoing shall not be deemed to include (i) a pledge or collateral assignment of the profits of Concessionaire in connection with any financing, provided such pledge or collateral assignment is subordinate to the rights of the City to the fees payable to the City pursuant to **Section 4** hereof; (ii) any transfer to other owners of Concessionaire or to trusts the beneficiaries of which are any owner(s) of Concessionaire or member(s) of their immediate family; (iii) a change in the ownership of Concessionaire through a registered public offering of shares in Concessionaire; or (iv) the merger or consolidation by Concessionaire or the sale of all or substantially all of the assets of Concessionaire with another party provided that the managers of Concessionaire remain in control of any such successor entity (clauses (i), (ii), (iii) and (iv) above collectively are referred to herein as the "Permitted Transfers"). Notwithstanding the City Manager's delegated authority to approve any matter as specified herein, the City Manager may elect to have the City Commission determine any matter or approval contemplated under this Agreement (within the timeframe therefor as if the approval was being determined by the City Manager).

Concessionaire shall notify the City of any proposed transfer that is not a Permitted Transfer prior to consummation of same for the approval of the City or the City Manager or his/her designee, as applicable, and the City or the City Manager or his/her designee, as applicable, shall respond within thirty (30) days. In the event that any such transfer is approved, the transferee shall agree to be bound by all the covenants of this Agreement required of the transferor hereunder. Any transfer made without complying with this Section shall be null, void, and of no effect and shall constitute an Event of Default under this Agreement. Notwithstanding any such consent, or any permitted transfer under any provision of this Section, each approved transferee shall automatically become liable for all obligations of the transferor hereunder with respect to that portion of the Agreement so transferred, and the City shall be permitted to enforce the provisions of this Agreement directly against any transferee of the Concessionaire without proceeding in any way against any other person. In addition, if Concessionaire makes a series of transfers which cumulatively equals thirty-three and four tenths percent (33.4%), then it shall be required to follow the procedures outlined in this paragraph as to the transfer which results in a cumulative transfer of thirty-three and four tenths percent (33.4%).

SECTION 21. SPECIAL EVENTS / SPONSORSHIPS.

- 21.1 Concessionaire's proposed uses of the Concession Area, as set forth in **Section 3** herein, do not contemplate the production, promotion or sponsorship by the Concessionaire of special events in any of the Concession Area(s). In the event Concessionaire does produce, promote, or sponsor a special event upon the Concession Area, it shall comply with by the City's Special Events Permit requirements, as same may be amended from time to time, including the payment of all required fees. City acknowledges that the Restaurant Operations shall be entitled to run specialty events from time to time without approval of the City Manager or his/her designee, including cooking demonstrations through the Food Truck(s), visits by celebrity chefs through the Food Trucks, special dining experiences and the like.
- 21.2 The City Manager or his/her designee shall evaluate requests for special events permits on a case-by-case basis in accordance with the City's Special Events Requirements, as may be amended from time to time (the "Special Event"). In the event that a special event and/or

film permit is requested by an entity other than the Concessionaire, and the proposed special event and/or film production is scheduled to occur within the Riverfront Area, as such Concession Area is delineated in the Site Plan, and would cause the operations within the Riverfront Area to cease wholly or partly, and provided that the Concessionaire is not in default under the Agreement at the time of the request, the Concessionaire agrees to cooperate with the City and the special event or film permittee to allow use of such Concession Area during the period of the special event or film production, including set-up and break-down time. City agrees to provide no less than thirty (30) days prior written notice to Concessionaire of any such proposed special event and/or film permit.

- 21.2.1 Should the Concessionaire be displaced from all or any portion of the Concession Area due to a special event or film production, then the Concessionaire shall be entitled to a “Displacement Fee” (as hereinafter defined). For purposes of this subsection only, “displacement” shall mean that the Concessionaire cannot provide the food and beverage services or conduct retail sales as a result of a special event or film production under a permit requested by a person other than the Concessionaire.

The Displacement Fee for the Concession Area, when applicable, will be calculated by the City Manager or his/her designee and Concessionaire at the start of each Agreement year. The Displacement Fee shall be based upon the average of daily revenues generated by the Concessionaire in the Concession Area, and shall be based upon the highest revenues generated during the Agreement years over the last three (3) full years of revenues for the Concession Area (provided, that if a Force Majeure Event affected the generated revenue during such three (3) year period, then the generated revenue shall be equitably increased for any diminution in revenue on account of the Force Majeure Event), multiplied by the number of days that Concessionaire is displaced, provided, that, for any displacement prior to the third anniversary of the Commencement Date, the Displacement Fee will be mutually agreed upon by Concessionaire and the City Manager or his or her designee. The City shall cause the Displacement Fee to be paid directly to the Concessionaire by the special event permittee or film production (as the case may be), and Concessionaire shall pay to the City the City Displacement Fee with respect thereto. The Concessionaire may waive, in writing, all or a portion of the Displacement Fee, at its sole option, in exchange for other consideration(s) of equal value from the special event permittee or film production, as may be negotiated directly between the Concessionaire and the special event permittee or film production (“Alternative Consideration”), but shall nonetheless pay the City the City Displacement Fee based upon the full amount of the Displacement Fee.

- 21.2.2 Notwithstanding anything to the contrary, if a special event or film production occurs in the Concession Area, Concessionaire shall not be liable for any damage to the Concession Area or areas on the public park outside of the Concession Area as defined in **Subsection 10.1, which was** caused by such event or production, any acts or omissions of the special event permittee or film production crews, charges, fees or other expenses, governmental or otherwise, in connection with such special event or film production, nor for waste clean-up, removal, or other obligations under this Agreement with respect to the waste generated by the special event permittee or film

production during the permitted time, it being understood that any rights under this Agreement against the Concessionaire on account thereof are hereby expressly waived.

21.3 City Special Events.

Notwithstanding **Subsections 21.1 and 21.2** above, and in the event that the City, at its sole discretion, deems that it would be in the best interest of the City, the City reserves the right to hold City-produced special events and/or City-produced productions at the Riverfront, and reserves the right to displace the Concessionaire, but will take all reasonable measures to permit the Concessionaire to continue its Concession Operations. In such cases, Concessionaire agrees to cooperate with the City, provided Concessionaire is allowed to remain open during City-produced special events and/or productions. If the Concessionaire is not required to close in response to the City-produced special event and/or production, Concessionaire agrees to cooperate with the City. If the Concessionaire is allowed to remain open during City-produced special events and/or productions, the Concessionaire may be allowed to have in operation its normal daily complement of equipment and staff. "Normal" shall be defined as equipment and staff, approved by the City, that the Concessionaire has available for the public on a normal day, 365 days per year. Notwithstanding the above, such equipment or staff shall not be increased or altered during City-produced special events and/or productions, unless the Concessionaire obtains the prior written consent of the City Manager or his/her designee.

21.5 Sponsorships; Co-Branding.

21.5.1 The City reserves unto itself all present and future rights to negotiate all forms of endorsement and/or sponsorship agreements based on the marketing value of any City trademark, property, brand, logo and/or reputation (hereinafter referred to in this subsection as a "City Mark" or the "City Marks"). Any and all benefits derived from an endorsement and/or sponsorship agreement based on the marketing value of a City Mark, including any monetary contributions, shall belong solely and exclusively to the City. The foregoing is not intended to limit the right of Concessionaire or any Subconcessionaire to enter into endorsement and/or sponsorship agreements, provided same do not interfere with the rights of the City hereunder, and only upon the prior written consent of the City Manager or his/her designee.

21.5.2 Concessionaire shall be specifically prohibited from entering into, or otherwise creating, endorsements or sponsorship agreements with third parties which are based solely or in any part on the marketing value of a City Mark. This shall include, for example purposes only, any agreement between the Concessionaire and a food and beverage and/or skin care product company for the designation of a product(s) as the official product(s) of Cape Coral.

21.5.3 The prohibition on Concessionaire entering into endorsements or sponsorship agreements, pursuant to this **Subsection 21.5**, shall not be deemed to include nor prohibit the Concessionaire's right (a) to sell advertising for display in locations not plainly visible to the general public (but, for example, visible to people in the Concession Area), such as the underside of umbrellas (if any), menu display boards contained within a kiosk or hut) and, subject to the approval of the City Manager or his or her designee and the City Council, such

other advertising; or (b) to offer the exclusive sale, rental or use of any particular brand or product that would otherwise be permitted for use or sale pursuant to this Agreement, subject to the Concessionaire's disclosure of same, as required pursuant to this paragraph, and subject to the City's rights in the following paragraphs. Moreover, the City will not limit Concessionaire's ability to negotiate a reduced rate for purchase from any vendor whose product(s) Concessionaire uses or offers for sale or rent pursuant to this Agreement. Prior to entering into any such agreements or arrangements, Concessionaire shall provide the City for the prior written approval by the City Manager or his or her designee with an itemized list describing such agreements or arrangements which may be imminently entered into or made, which list shall be updated by Concessionaire within thirty (30) days of a particular brand or product being added or deleted, as the case may be. Any gross receipts derived by Concessionaire under this paragraph are intended to be included as part of Gross Receipts as calculated under this Agreement. Notwithstanding the preceding, any agreements or arrangements which have been entered into or made, or which may be imminently entered to or made, pursuant to a written contractual agreement or verbal agreement, that Concessionaire has made, or intends to imminently make, regarding the exclusive sale, rental, or use of any brand or product are subject to the approval of the City Manager's or his or her designee, at the City Manager's or designee's discretion.

21.5.4 Concessionaire shall not secure endorsements/sponsorships involving the following categories: tobacco, vaping, firearms, intimate apparel, religious or political, gambling, prescription medication, intimate personal products (including male enhancement or feminine hygiene products) and any other category that is now or hereafter prohibited by federal law, state law, or the City Code..

21.5.5 Intentionally deleted.

21.5.6 Intentionally deleted.

21.5.7 The City may desire to promote "Cape Coral, Florida" or other City or CRA branded logos, symbols, or slogans through, among other things, co-branding with Concessionaire. Concessionaire agrees to reasonably cooperate with the City in the co-branding effort and to incorporate the City's name and/or logo on certain equipment, if requested, and in the manner to be determined, by the City in consultation with Concessionaire, with respect to any new equipment acquired by Concessionaire after the date of the approval of the equipment pursuant to Subsection 3.1.1 by the City Manager or his or her designee. In conjunction with the co-branding rights granted under this Agreement, the City grants to Concessionaire a limited, nonassignable, nonexclusive, royalty-free, revocable license during the Term to use the City's name, trade name, trademarks and/or logo to be provided by the City (the "City Marks") solely for the purpose of co-branding as set forth herein, provided, however, that the license granted herein shall not include the right to use the City Marks with respect to the sale of any merchandise, novelties, or other products without the prior written consent of the City Manager or his or her designee. The Concessionaire acknowledges and agrees that the license granted hereunder transfers no right, title or interest in and to the City Marks except the limited license hereunder and that any use of the City Marks by Concessionaire and the goodwill associated with such use will inure to the City's benefit. Prior to use of the City Marks, the Concessionaire shall submit all such material to the City Manager

or his or her designee for its prior approval. The Concessionaire agrees to use the City Marks in identical form to the specimens of the City Marks to be provided by the City without any alteration therefrom. The City represents and warrants to the Concessionaire that the City Marks do not and will not infringe any copyrights, trademarks, rights of privacy or any other rights of others and hereby indemnifies and holds harmless Concessionaire with respect thereto. No license is granted hereunder for the use of the Marks for any purpose other than strictly in accordance with this Agreement. Upon any termination or expiration of this Agreement, the Concessionaire shall immediately cease all use of the City Marks, provided, that, the Concessionaire shall have the right to continue to use photographs and other images containing the City Marks for archival and promotional purposes on its website and social media platforms.

21.5.8 City acknowledges that Concessionaire and its related entities are the sole and exclusive owners of the trademarks, service marks, trade names and logos used at or in connection with the Concessionaire's Services (together, the "Concessionaire's Marks"). City agrees that it will not make any use of the Concessionaire's Marks except with Concessionaire's prior written consent, which consent will not be unreasonably withheld, conditioned or delayed and that any use of the Concessionaire's Marks by City and the goodwill associated with such use will inure to Concessionaire's benefit. City acknowledges and agrees that it will not acquire any interest in the Concessionaire's Marks or the goodwill associated with the Concessionaire's Marks by virtue of this Agreement or City use of the Concessionaire's Marks. The Concessionaire represents and warrants to the City that the Concessionaire's Marks do not and will not infringe any copyrights, trademarks, rights of privacy or any other rights of others and hereby indemnifies and holds harmless the City with respect thereto. Upon any termination or expiration of this Agreement, the City shall immediately cease all use of the Concessionaire's Marks, provided, that, the City shall have the right to continue to use photographs and other images containing the Concessionaire's Marks for archival and promotional purposes on its website and social media platforms.

SECTION 22. NO IMPROPER USE.

The Concessionaire will not use the Concession Area, or any facilities, furnishings or equipment thereon, for any improper, immoral or offensive purpose, or for any purpose in violation of any Federal, State, County, or municipal ordinance, rule, order or regulation, or of any governmental rule or regulation now in effect or hereafter enacted or adopted (in any such case, "Improper Acts"). In addition, in the event that the Concessionaire has actual knowledge of any person engaged in Improper Acts, it shall notify the Cape Coral Police Department. Without limiting the Concessionaire's indemnity obligations pursuant to Section 17 and other provisions of this Agreement, the Concessionaire will protect, indemnify, and forever save and keep harmless the City, its officers, officials, employees, contractors, and agents, from and against damage, penalty, fine, judgment, expense or charge suffered, imposed, assessed or incurred for any violation, or breach of any law, ordinance, rule, order or regulation occasioned by any negligent act or omission of the Concessionaire, or any officers, directors, employee, contractors (including any Subconcessionaire) or agents regarding the Concession Area in violation of the first sentence of this **Section 22**. In the event of any violation by the Concessionaire or if the City Manager or his/her authorized representatives shall deem any conduct on the part of the Concessionaire to be objectionable or improper, the City Manager shall have the right to suspend the Concession Operations should the Concessionaire fail to correct any such violation, conduct, or practice, to the reasonable satisfaction

of the City Manager, within twenty-four (24) hours after receiving written notice of the nature and extent of such violation, conduct, or practice, provided, that, if such violation is not susceptible to be cured within such twenty-four (24) hour period, then Concessionaire shall not be subject to suspension provided that it commences to cure such violation within such 24-hour period and completes such cure with all due diligence promptly, but in no event shall such extended cure period exceed seventy-two (72) hours from the time of written notice thereof. Subject to the cure period, any such suspension will continue until the violation is cured. The Concessionaire further agrees not to commence operations during the suspension until the violation has been corrected to the reasonable satisfaction of the City Manager or his or her designee. Notwithstanding the foregoing, Concessionaire is not liable for any acts or omissions of the public except to the extent caused by the negligence or willful misconduct of Concessionaire.

SECTION 23. NOTICES.

Whenever it is provided herein that notice, demand, request, consent, approval or other communication shall or may be given to, or served upon, either of the parties by the other, or whenever either of the parties desires to give or serve upon the other any notice, demand, request, consent, approval or other communication with respect hereto or to the Concession Area, each such notice, demand, request, consent, approval or other communication shall be in writing (whether or not so indicated elsewhere in this Agreement) and shall be effective for any purpose only if given or served in person with a signed receipt, by certified or registered U.S. Mail, return receipt requested, or by a recognized national courier service, postage prepaid in all instances, addressed as follows:

If to Concessionaire	The Reef Cape Coral LLC 3580 SW 8 th St. Cape Coral FL 33991 Attn: Stephen Soloway Email: stephen_soloway@outlook.com
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With copy to:	Email:
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If to City:	City Manager City of Cape Coral PO Box 150027 Cape Coral, FL 33915-0027
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With copy to:	City Attorney City of Cape Coral PO Box 150027 Cape Coral, FL 33915-0027
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The Concessionaire and the City may change the above mailing address at any time upon giving the other party written notification. All notices under this Concession Agreement must be in writing.

SECTION 24. LAWS.

24.1 Compliance.

Concessionaire shall comply with all applicable City, County, State, and Federal ordinances, statutes, rules and regulations, including but not limited to all applicable environmental City, County, State, and Federal ordinances, statutes, rules and regulations.

24.2 Equal Employment Opportunity.

Neither Concessionaire nor any Affiliate of Concessionaire performing services hereunder, or pursuant hereto, will discriminate against any employee or applicant for employment because of race, creed, sex, color, national origin, religion, sex, gender identity, sexual orientation, disability, marital or familial status or age. Concessionaire will make good faith efforts to utilize minorities and females in the work force and in correlative business enterprises.

Concessionaire and any Affiliate of Concessionaire shall abide by the requirements of 41 C.F.R. §§ 60-1.4(a), 60-300.S(a) and 60-741.S(a). These regulations prohibit discrimination against qualified individuals based on their status as protected veterans or individuals with disabilities, and prohibit discrimination against all individuals based on their race, color, religion, sex, sexual orientation, gender identity or national origin. Moreover, these regulations require that covered prime contractors and subcontractors take affirmative action to employ and advance in employment individuals without regard to race, color, religion, sex, sexual orientation, gender identity, national origin, protected veteran status or disability.

24.3 No Discrimination.

Concessionaire shall be prohibited from discrimination in employment, housing, public accommodations, and public services, or with respect to any use, service, maintenance, or operation within the Concession Area, on account of actual or perceived race, color, national origin, religion, sex, intersexuality, gender identity, sexual orientation, disability, marital and familial status, or age, ancestry, height, weight, domestic partner status, labor organization membership, or political affiliation. All services offered in the Concession Areas shall be made available to the public, subject to the right of the Concessionaire and the City to establish and enforce rules and regulations to provide for the safety, orderly operation and security of the facilities.

SECTION 25. EARLY TERMINATION RIGHT IN EVENT OF FINANCIAL EMERGENCY.

25.1 For purposes of this Section 25, the term “Financial Emergency” shall mean the occurrence of any of the following conditions:

- (a) The City shall become unable to pay its debts as they become due (including operating expenses, short-term loans, bond debt service or other long-term debt payments);

- (b) The City shall fail to pay uncontested claims from creditors within 90 days after the claim is presented;
- (c) The City shall fail to transfer at the appropriate time, due to lack of funds:
 - i. Taxes withheld on the income of employee; or
 - ii. Employer and employee contributions for federal social security or any pension, retirement or benefit plan of any employee; or
- (d) Failure for one pay period to pay, due to lack of funds,
 - i. Wages and salaries owed to employees; or
 - ii. Retirement benefits owed to former employees

For purposes of this Section 25, the term “Qualified Appraiser” means an individual with verifiable education and experience in appraising the future income stream of businesses that are the same as, or substantially similar to, the businesses comprising the Concession Operations, and who has a designation awarded by a generally recognized professional appraiser organization on the basis of demonstrated competency.

25.2 If a Financial Emergency occurs and/or is continuing and the City Council tentatively approves (i.e., subject to any other required approvals, including a voter referendum) a sale of the City property that encompasses the Concession Area (the “Concession Area Property”), then the City shall have the right to terminate this Agreement upon not less than one hundred eighty (180) days’ prior written notice to Concessionaire (“Early Termination Notice”), provided the (a) date specified in such Early Termination Notice shall not be earlier than the first day of the sixth (6th) Agreement Year and (b) City shall pay Concessionaire the Early Termination Payment, determined in accordance with the following provisions of this Section 25.

25.3 The Early Termination Payment is intended to compensate Concessionaire for the loss of anticipated profits that it would derive from the Concession Operations for the time remaining in the Term from and after the early termination date specified in the Early Termination Notice, less the fair market value of any FF&E the Concessionaire elects to remove from the Concession Area (“FF&E Value”) plus the reasonable costs incurred by Concessionaire in connection with the early termination of the Term that would not be payable by Concessionaire at the expiration of the Term, such as reasonable attorneys’ fees and costs and the fees payable to any appraiser engaged by Concessionaire, that are supported by documentation to be provided to the City (“Early Termination Expenses”). Following the Concessionaire’s receipt of the Early Termination Notice, the City and Concessionaire shall endeavor to reach a mutual agreement as to the Early Termination Payment. If the parties cannot reach agreement within ten (10) Business Days from the Concessionaire’s receipt of the Early Termination Notice, the Early Termination Payment shall be determined as follows. The City and Concessionaire each shall appoint one (1) Qualified Appraiser (as defined below) within ten (10) Business Days after a written request for appointment of appraisers has been given by either the City or Concessionaire to the other. If either the City or Concessionaire fails to appoint its appraiser within such ten (10) Business Day period, such appraiser shall be appointed by the Circuit Court of the Twentieth Judicial Circuit in and for Lee County, Florida upon application of the other. Each such

Qualified Appraiser shall appraise the anticipated lost profits that Concessionaire would derive from the Concession Operations for the time remaining in the Term from and after the early termination date specified in the Early Termination Notice, less the FF&E Value plus Early Termination Expenses, and submit his or her written report setting forth the appraised Early Termination Payment within thirty (30) days after the appointment of both such Qualified Appraisers. If the higher appraised value of such two (2) appraisals is not more than one hundred ten percent (110%) of the lower appraised value, the fair market rental value of the premises shall be the average of the two (2) appraised values, but shall not be more than Three Hundred Thousand (\$300,000), adjusted annually during the Term commencing on the first anniversary of the Commencement Date by an amount equal to the percentage change in the Consumer Price Index, All Urban Consumers (CPI – U.S. City Average All Items; base year 1982-84 = 100) as published by the United States Department of Labor, Bureau of Labor Statistics, per Agreement Year then remaining in the term (pro-rated for any partial Agreement Year) less the FF&E Value plus the Early Termination Expenses (the “Early Termination Payment Cap”). If the higher appraised value is more than one hundred ten percent (110%) of the lower appraised value, the City and Concessionaire Tenant shall agree upon and appoint a neutral third Qualified Appraiser within ten (10) Business Days after both of the first two (2) appraisals have been submitted to the City and Concessionaire. If the City and Concessionaire do not agree and fail to appoint such neutral third Qualified Appraiser within such ten (10) Business Day period, such neutral third Qualified Appraiser shall be appointed by the Circuit Court of the Twentieth Judicial Circuit in and for Lee County, Florida upon application of either the City or Concessionaire. The neutral third Qualified Appraiser shall appraise the anticipated lost profits that Concessionaire would derive from the Concession Operations for the time remaining in the Term from and after the early termination date specified in the Early Termination Notice and submit his or her written report setting forth the appraised Early Termination Payment to the City and Concessionaire within thirty (30) days after his or her appointment (or as soon thereafter as practicable). The Early Termination Payment shall be the average of the two (2) appraised values in such three (3) appraisals that are closest to each other (unless the differences are equal, in which case the three (3) appraised values shall be averaged), but in any case, not more than the Early Termination Cap. The Early Termination Payment determined in accordance with this paragraph, shall be conclusive and binding upon the City and Concessionaire.

25.4 Notwithstanding the date specified as the termination date in the City’s Early Termination Notice, Concessionaire shall not be required to quit and surrender the Concession Area until such time as the Early Termination Payment amount has been agreed upon or determined through the appraisal process set forth in the foregoing provisions. Concessionaire shall surrender the Concession Area in as good condition and repair as the Concession Area was in as of the date of the Early Termination Notice. For the avoidance of doubt, Concessionaire shall remain liable for its responsibilities associated with Hazardous Materials pursuant to Section 17.

25.5 The Early Termination Payment shall be made by the City at the closing of the Concession Area Property sale transaction.

SECTION 26. MISCELLANEOUS.

26.1 No Partnership.

Nothing contained in this Agreement shall constitute or be construed to be or create a partnership, joint venture or agency relationship between the City and Concessionaire, it being

acknowledged that each of the parties is acting as an independent contractor hereunder.

26.2 Modifications.

With the sole exception of incorporation of, or amendments to, the exhibits to this Agreement in accordance with the terms of this Agreement, this Agreement cannot be changed or modified except by agreement in writing executed by all parties hereto. Concessionaire acknowledges that no modification to this Agreement may be agreed to by the City unless approved by the Mayor and City Council, except where such authority has been expressly provided herein to the City Manager or his or her designee.

26.3 Complete Agreement.

This Agreement, together with all exhibits incorporated hereto, constitutes all the understandings and agreements of whatsoever nature or kind existing between the parties with respect to the subject matter hereof and Concessionaire's operations, as contemplated herein.

26.4 Headings.

The section, subsection and paragraph headings contained herein are for convenience of reference only and are not intended to define, limit, or describe the scope or intent of any provision of this Agreement.

26.5 Binding Effect.

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.

26.6 Clauses.

The illegality or invalidity of any term or any clause of this Agreement shall not affect the validity of the remainder of the Agreement, and the Agreement shall remain in full force and effect as if such illegal or invalid term or clause were not contained herein unless the elimination of such provision detrimentally reduces the consideration that either party is to receive under this Agreement or materially affects the continuing operation of this Agreement.

26.7 Severability.

If any provision of this Agreement or any portion of such provision or the application thereof to any Person or circumstance is, to any extent, finally determined by a court of competent jurisdiction to be invalid or unenforceable, or shall become a violation of any local, State, or Federal laws, then the same as so applied shall no longer be a part of this Agreement but the remainder of the Agreement, such provisions and the application thereof to other persons or circumstances, shall not be affected thereby and this Agreement as so modified shall be valid and enforceable to the fullest extent permitted by law.

26.8 Right of Entry.

The City, at the direction of the City Manager, shall at all times during hours of operation, subject to reasonable prior notice, have the right to enter into and upon any and all parts of the Concession Areas for the purposes of examining the same for any reason relating to the obligations of the parties to this Agreement.

26.9 Not a Lease.

It is expressly understood and agreed that no part, parcel, building, facility, equipment or space is leased to the Concessionaire, that Concessionaire is a concessionaire and not a lessee; and that the Concessionaire's right to operate the Concession Operations shall continue only so long as this Agreement remains in effect.

26.10 Use of Jaycee Park.

Jaycee Park is for the use and enjoyment of the public, for recreation and other public purposes and the public's right to such use shall not be infringed upon by any activity of the Concessionaire. Upon execution of this Agreement, Concessionaire acknowledges that all of the parks are public and, as such, concession operations must not restrict, or appear to restrict, access to the general public, or in any way limit the public nature or ambiance of the riverfront. The Concessionaire will conduct its Concession Operations so as to maintain a reasonably quiet and tranquil environment for the adjacent area and shall make no public disturbances.

26.11 Conflict of Interest.

Concessionaire shall perform its services under this Agreement and conduct the Concession Operations contemplated herein in a manner so as to show no preference for other concession operations/facilities (e.g., particularly concession operations behind private property along the City's riverfront) owned, operated, managed, or otherwise controlled by Concessionaire with regard to its responsibilities pursuant to this Concession Agreement.

26.12 Remedies Cumulative.

Each right and remedy of either party provided for in this Agreement shall be cumulative and shall be in addition to every other right or remedy provided for in this Agreement, or now or hereafter existing at law or in equity or by statute or otherwise (except as otherwise expressly limited by the terms of this Agreement), and the exercise or beginning of the exercise by a party of any one or more of the rights or remedies provided for in this Agreement, or now or hereafter existing at law or in equity or by statute or otherwise (except as otherwise expressly limited by the terms of this Agreement), shall not preclude the simultaneous or later exercise by such party of any or all other rights or remedies provided for in this Agreement or now or hereafter existing at law or in equity or by statute or otherwise (except as otherwise expressly limited by the terms of this Agreement).

26.13 Procedure for Approvals and/or Consents.

In each instance in which the approval or consent of the City Manager or his/her designee is allowed or required in this Agreement, it is acknowledged that such authority has been expressly provided herein to the City Manager or his/her designee by the Mayor and City Council of the City. In each instance in which the approval or consent of the City Manager or his/her designee is allowed or required in this Agreement, Concessionaire shall send to the City Manager a written request for approval or consent (the "Approval Request"). The City Manager or his/her designee shall use good faith efforts to respond to the Approval Request within thirty (30) days from the date of such Request (i.e. to provide written notice to Concessionaire approving of, consenting to or disapproving of the Request) unless a different time period is provided in this Agreement as to the specific request. However, except as otherwise provided in this Agreement, the City Manager or his/her designee's failure to consider such Request within this time provided shall not be deemed a waiver, nor shall Concessionaire assume that the Request is automatically approved and consented too. The Subsection shall not apply to approvals required herein by the Mayor and City Council. Notwithstanding the foregoing, with respect to the approvals by the City Manager (or his or her designee) required for the Preliminary Plans and Specifications pursuant to Subsection 7.1.1 and the Plans and Specifications pursuant to Subsection 7.1.3, if the City Manager fails to grant or deny its consent within the twenty (20) Business Day period specified, the Concessionaire may transmit a second request for approval bearing the following legend at the top of the first page thereof, set forth in capital letters and in a type size not less than 14 point:

FAILURE TO RESPOND TO THIS SECOND REQUEST FOR APPROVAL WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF THIS NOTICE (WHICH CONSTITUTES THE TIME PERIOD PROVIDED IN THE CONCESSION AGREEMENT BETWEEN CITY OF CAPE CORAL, FLORIDA AND REEF, LLC) SHALL CONSTITUTE AUTOMATIC APPROVAL OF THE MATTERS DESCRIBED HEREIN WITH RESPECT TO SECTION [] ***[FILL IN APPLICABLE SECTION]*** OF SUCH CONCESSION AGREEMENT.

26.14 No Waiver.

No waiver of any covenant or condition of this Agreement by either party shall be deemed to imply or constitute a waiver in the future of the same covenant or condition or of any other covenant or condition of this Agreement. Further, nothing in this Agreement or in the parties' acts or omissions in connection herewith shall be deemed in any manner to waive, impair, limit or otherwise affect the authority of the City in the discharge of its police, regulatory or governmental power.

26.15 No Third Party Beneficiary.

Except as otherwise expressly provided herein, nothing in this Agreement shall confer upon any person or entity, including, but not limited to Subconcessionaires, other than the parties hereto and their respective successors and permitted assigns, any rights or remedies by reason of this Agreement.

26.16 Concessionaire's Compliance with Florida Public Records Law

26.16.1. Pursuant to Section 119.0701 of the Florida Statutes, if the Concessionaire meets the definition of "Contractor" as defined in Section 119.0701(1)(a), the Concessionaire shall:

- (1) Keep and maintain public records required by the City to perform the service;
- (2) Upon request from the City's custodian of public records, provide the City with a copy of the requested records or allow the records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided in Chapter 119, Florida Statutes, or as otherwise provided by law;
- (3) Ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed, except as authorized by law, for the duration of the contract term and following completion of the Agreement if the Concessionaire does not transfer the records to the City;
- (4) Upon completion of the Agreement, transfer, at no cost to the City, all public records in possession of the Concessionaire or keep and maintain public records required by the City to perform the service. If the Concessionaire transfers all public records to the City upon completion of the Agreement, the Concessionaire shall destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. If the Concessionaire keeps and maintains public records upon completion of the Agreement, the Concessionaire shall meet all applicable requirements for retaining public records. All records stored electronically must be provided to the City, upon request from the City's custodian of public records, in a format that is compatible with the information technology systems of the City.

26.16.2 Request for Records; Noncompliance.

- (1) A request to inspect or copy public records relating to the City's contract for services under this Concession Agreement must be made directly to the City. If the City does not possess the requested records, the City shall immediately notify the Concessionaire of the request, and the Concessionaire must provide the records to the City or allow the records to be inspected or copied within a reasonable time.
- (2) Concessionaire's failure to comply with the City's request for records shall constitute a breach of this Agreement, and the City, at its sole discretion, may: (1) unilaterally terminate this Agreement; (2) avail itself of the remedies set forth under this Agreement; and/or (3) avail itself of any available remedies at law or in equity.
- (3) A Concessionaire who fails to provide the public records to the City within a reasonable time may be subject to penalties under Section 119.10, Florida Statutes.

26.16.3 Civil Action.

- (1) If a civil action is filed against a Concessionaire to compel production of public records relating to the City's contract for services under this Concession Agreement, the court shall assess and award against the Concessionaire the reasonable costs of enforcement, including reasonable attorney fees, if:
 - a. The court determines that the Concessionaire unlawfully refused to comply with the public records request within a reasonable time; and
 - b. At least eight (8) business days before filing the action, the plaintiff provided written notice of the public records request, including a statement that the Concessionaire has not complied with the request, to the City and to the Concessionaire.
- (2) A notice complies with subparagraph (1)(b) if it is sent to the City's custodian of public records and to the Concessionaire at the Concessionaire's address listed on its contract with the City or to the Concessionaire's registered agent. Such notices must be sent by common carrier delivery service or by registered, Global Express Guaranteed, or certified mail, with postage or shipping paid by the sender and with evidence of delivery, which may be in an electronic format.
- (3) A Concessionaire who complies with a public records request within eight (8) business days after the notice is sent is not liable for the reasonable costs of enforcement.

IF THE CONCESSIONAIRE HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, FLORIDA STATUTES, TO THE CONCESSIONAIRE'S DUTY TO PROVIDE PUBLIC RECORDS RELATING TO THIS AGREEMENT, CONTACT THE CUSTODIAN OF PUBLIC RECORDS AT:

**CITY OF CAPE CORAL
ATTENTION: CITY CLERK
1015 CULTURAL PARK BLVD.
CAPE CORAL, FL 33990
E-MAIL: KBRUNS@CAPECORAL.GOV
PHONE: 239-574-0411**

26.17 Time is of the Essence.

Time is of the essence with respect to all matters in, and requirements of, this Agreement as to both the City and the Concessionaire including, but not limited to, the times within which the Concessionaire must commence and complete construction of the Work and commence the Concession Operations, but subject to Unavoidable Delays.

SECTION 27. LIMITATION OF LIABILITY.

The City desires to enter into this Agreement placing the operation and management of the Concession Area(s) in the hands of a private management entity only if so doing the City can place a limit on its liability for any cause of action for breach of this Agreement, so that its liability for any such breach never exceeds the sum of \$100,000.00. Concessionaire hereby expresses its willingness to enter into this Agreement with a \$100,000.00 limitation on recovery for any action for breach of contract. Accordingly, and in consideration of the City's entering into this Agreement, the City shall not be liable to Concessionaire for damages to Concessionaire in an amount in excess of \$100,000.00, for any action for breach of contract arising out of the performance or non-performance of any obligations imposed upon the City by this Agreement. Nothing contained in this paragraph or elsewhere in this Agreement is in any way intended to be a waiver of limitation placed upon the City's liability as set forth in Florida Statutes, Section 768.28. Notwithstanding any other provision herein to the contrary, Concessionaire shall not be entitled payment or compensation of any kind from the City for indirect, incidental, punitive, exemplary or consequential damages of any kind or nature. Notwithstanding the foregoing, the limitation contained herein shall not apply to a failure of the City to pay the Early Termination Fee, if applicable.

SECTION 28. GOVERNING LAW AND VENUE.

This Agreement shall be deemed to have been made and shall be construed and interpreted in accordance with the laws of the State of Florida. This Agreement shall be enforceable in Lee County, Florida, and if legal action is necessary by either party with respect to the enforcement of any and all the terms or conditions herein, exclusive venue for the enforcement of same shall lie in Lee County, Florida.

SECTION 29. WAIVER OF JURY TRIAL.

CITY AND CONCESSIONAIRE HEREBY KNOWINGLY AND INTENTIONALLY WAIVE THE RIGHT TO TRIAL BY JURY IN ANY ACTION OR PROCEEDING THAT CITY AND CONCESSIONAIRE MAY HERINAFTER INSTITUTE AGAINST EACH OTHER WITH RESPECT TO ANY MATTER ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE CONCESSION AREA.

SECTION 30. REPRESENTATIONS AND WARRANTIES OF CONCESSIONAIRE.

Concessionaire represents and warrants that Concessionaire is a limited liability company duly organized and validly existing and in good standing under the laws of the State of Florida and has full power and authority to execute, deliver and perform this Agreement. This Agreement and all other instruments and agreements required to be delivered by Concessionaire pursuant to this Agreement are, or will when executed and delivered, be duly authorized, executed and delivered by Concessionaire and constitute the legal, valid and binding obligations of Concessionaire enforceable in accordance with their respective terms. None of the execution, delivery or performance of this Agreement, or any instrument or agreement required to be delivered by Concessionaire pursuant hereto, nor the consummation of the transactions contemplated hereby or thereby, is prohibited by, or requires Concessionaire to obtain additional consents, approvals or authorizations of, or notices to or filings or registrations with, any further Person(s) having jurisdiction over Concessionaire, other

than those that have been obtained prior to the date hereof. The execution and delivery by Concessionaire of this Agreement and the performance by Concessionaire of its obligations hereunder do not and will not conflict with, or result in a breach of or a default or violation under any provision of any governing document of Concessionaire, any material contract or agreement to which Concessionaire is a party or any applicable Requirement or decree, judgment, regulation, order or rule of any Governmental Authority having jurisdiction over Concessionaire or to Concessionaire's knowledge, and except as otherwise provided in this Agreement, the Concession Area.

[SIGNATURES CONTINUED ON NEXT PAGE]

IN WITNESS WHEREOF, the parties hereto have caused their names to be signed and their seals to be affixed, all as of the day and year first above written, indicating their agreement.

ADOPTED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF CAPE CORAL, FLORIDA AT THEIR REGULAR SESSION THIS _____ day of _____, 2024.

Attest:

Kimberly Bruns,
City Clerk

John Gunter,
Mayor

DATE

Witnesses:

VENDOR NAME

Signature of Witness #1

NAME
TITLE

DATE

Printed name of Witness #1

Signature of Witness #2

Printed name of Witness #2

**EXHIBIT LIST [NEEDS TO BE UPDATED WITH REFERENCES TO “BEACH”
REPLACED]**

- Exhibit 1.0* Concession Area
- Exhibit 1.1* Form of Confirmation of Commencement Date Certificate
- Exhibit 1.3* Form of Assignment of Construction Agreement and Consent
- Exhibit 1.4.3* Budget
- Exhibit 2.2* Site Plan
- Exhibit 3.1.1* Photos and Specifications of Beach and Pool Equipment
- Exhibit 3.1.4* Design, Type Material and Color of any and all Beach and Pool Equipment
- Exhibit 3.1.5* Beachfront Area Site Plan (to reflect placement and quantity of Beach and Pool Equipment)
- Exhibit 3.2.2* Material Terms of Major Food Group, LLC Restaurants Subcontract
- Exhibit 3.2.3* Menu and Price Schedule for Restaurants
- Exhibit 3.4.3* Health and Wellness Center Offerings and Rate Card
- Exhibit 3.5.1* Beach-Related Sundries Offerings and Rate Card
- Exhibit 3.6.2* Retail Pavilion Offerings and Fees to be Charged to Subconcessionaires
- Exhibit 3.7.2* Plan for Removal and Storage of Beach and Pool Equipment and Dispensing Facilities
- Exhibit 3.9* Hurricane Preparedness Plan
- Exhibit 3.12* Value-Add Enhancements/Public Benefits
- Exhibit 7.2* Timeline
- Exhibit 7.4* Construction Insurance Requirements
- Exhibit 7.6* Construction Agreements Required Clauses
- Exhibit 10.9* Rules and Regulations for Driving on Beach
- Exhibit 13.1* Signage Criteria
- Exhibit 14* Insurance Requirements
- Exhibit 14.1* Liability Insurance Requirements
- Exhibit 14.2* Property Insurance Requirements
- Exhibit 14.3* Other Insurance Requirements
- Exhibit 17.5* Approved Beachfront Area and Pool Area Signage

Exhibit 1.0

Concession Area (sketch to be replaced with more accurate sketch and legal)

EXHIBIT 1.1
FORM OF CONFIRMATION OF COMMENCEMENT DATE CERTIFICATE

THIS CONFIRMATION OF COMMENCEMENT DATE CERTIFICATE (this “**Certificate**”) is made as of this ___ day of _____, 202__ by and between the CITY OF CAPE CORAL, FLORIDA, a municipal corporation duly organized and existing under the laws of the State of Florida (the “**City**”), and _____ (“**Concessionaire**” and together with the City, each a “**Party**” and collectively, the “**Parties**”).

WHEREAS, the Parties entered into that certain Concession Agreement For Management And Operation Of A Café, Bistro & Food Truck Park by and between the City and Concessionaire dated as of _____, 2024 (the “**Concession Agreement**”) pursuant to which this Certificate is delivered.

WHEREAS, the City and Concessionaire desire to confirm the Commencement Date and the Expiration Date of the Concession Agreement as set forth below.

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

1. Recitals and Capitalized Terms. The recitals set forth above are true and correct and are incorporated herein by this reference. Capitalized terms used but not defined in this Certificate have the meanings set forth in the Concession Agreement.

2. Confirmation of Dates.

(a) The Commencement Date is _____, 202__.

(b) The Expiration Date is the date that is **nine (9) years** and three hundred sixty-four days from the Commencement Date or _____, 202__.

3. Except for the certifications contained in this Certificate, all terms of the Concession Agreement shall remain unchanged and are hereby ratified and confirmed in all respects.

IN WITNESS WHEREOF, the City and Concessionaire have duly executed this Certificate as of the date and year first written above.

THE CITY:

CITY OF CAPE CORAL,
FLORIDA, a municipal corporation
of the State of Florida

By: _____
Name:
Title:

CONCESSIONAIRE:

NAME

By: _____
Name:
Title:

Exhibit 1.3
FORM OF ASSIGNMENT OF CONSTRUCTION AGREEMENTS AND
CONSENT ASSIGNMENT OF CONSTRUCTION AGREEMENTS

FOR VALUE RECEIVED, the undersigned **VENDOR NAME**, (“Concessionaire”)[This should come from Fortress], as of this ___ day of _____, 202__ (the “Effective Date”) assigns to **THE CITY OF CAPE CORAL, FLORIDA**, a municipal corporation duly organized and existing under the laws of the State of Florida (the “City”), pursuant to that certain Concession Agreement by and between the City and Concessionaire dated as of _____, 202__ (the “Concession Agreement”), all of Concessionaire’s right, title and interest under all existing and future general contractor’s agreements, architect’s agreements, plans and specifications, engineers’ agreements, and any other agreements for the provision of labor, materials, services or supplies, as amended, between Concessionaire and any other person or entity (collectively, the “Construction Agreements”) relating to the construction of the Work, as defined and described in the Concession Agreement. The Construction Agreements include, but are not limited to, that certain [Construction Contract] between Concessionaire and _____, a _____ (“Contractor”) dated _____, 202__, that certain [Architect Agreement] between Concessionaire and _____, a _____ (“Architect”), dated _____, 202__ and that certain [Engineering Agreement] between Concessionaire and _____, a _____ (“Engineer”) dated _____, 202__.

THIS ASSIGNMENT OF CONSTRUCTION AGREEMENTS (“Assignment”) constitutes a present and absolute assignment to the City as of the Effective Date; provided, however, that for so long as no Event of Default (as defined in the Concession Agreement) has occurred or is continuing under the Concession Agreement, as applicable, and until the earlier of (i) termination of the Concession Agreement, (ii) City’s exercise of its remedy for an Event of Default as provided in the Concession Agreement, or (iii) completion of the Work in accordance with the Concession Agreement (“Final Completion”), the City grants Concessionaire a license to use all Construction Agreements for completion of the Work in accordance with the Concession Agreement. Upon the occurrence of (a) an Event of Default under the Concession Agreement, which continues beyond any applicable notice and cure period or (b) the termination of the Concession Agreement, or (c) Final Completion, the City may, in the City’s sole discretion, give notice to any of Contractor, Architect, Engineer and/or any other party to a Construction Agreement of the City’s intent to enforce the rights of Concessionaire under the applicable Construction Agreement and may initiate or participate in any legal proceedings respecting the enforcement of said rights. Concessionaire acknowledges that solely by accepting this Assignment, the City does not assume any of Concessionaire’s obligations under the Construction Agreements.

Concessionaire represents and warrants to the City, as of the Effective Date, that (a) all Construction Agreements entered into by Concessionaire are in full force and effect and are enforceable in all material respects in accordance with their terms and to Concessionaire’s knowledge, no default, or event which would constitute a default after notice or the passage of time, or both, exists with respect to any of the Construction Agreements, (b) Concessionaire has delivered copies of all Construction Agreements to the City and such copies are true, complete and correct in all material respects as of the date of this Assignment, and (c) Concessionaire has not assigned any of Concessionaire’s rights under the Construction Agreements to any person or entity. Concessionaire shall deliver to the City true, complete and correct copies of all Construction Agreements entered into after the date hereof, promptly upon execution thereof.

Concessionaire agrees (a) to pay and perform all obligations of Concessionaire under the Construction Agreements, (b) to enforce in Concessionaire's reasonable business judgement the full and prompt performance of all obligations of any other person or entity under the Construction Agreements, (c) [intentionally omitted], and (d) not to further assign, for security or any other purposes, Concessionaire's rights under the Construction Agreements without the City's prior written consent.

Unless otherwise defined herein, capitalized terms used in this Assignment shall have the meanings attributed to such terms in the Concession Agreement. This Assignment shall be governed by, and construed and enforced in accordance with the laws of the State of Florida, without regard to conflicts of laws. Except as otherwise expressly provided under the terms and conditions herein, the terms of this Assignment shall bind and inure to the benefit of the heirs, executors, administrators, nominees, successors and assigns of the parties hereto. All exhibits, schedules, riders and other items attached hereto are incorporated into this Assignment by such attachment for all purposes.

To facilitate execution, this Assignment may be executed in as many counterparts as may be convenient or required. It shall not be necessary that the signature and acknowledgment of, or on behalf of, each party, or that the signature and acknowledgment of all parties required to bind any party, appear on each counterpart. All counterparts shall collectively constitute a single instrument. This Assignment may be transmitted and/or signed by facsimile or e-mail transmission (e.g., "pdf" or "tif"). The effectiveness of any such documents and signatures shall have the same force and effect as manually-signed originals and shall be binding on all parties to this Assignment.

[Remainder of Page Intentionally Left Blank]

IN WITNESS WHEREOF, Concessionaire intending to be legally bound has executed this Assignment as of the date first written above.

CONCESSIONAIRE:

VENDOR NAME

By: _____

Name:

Title:

CONSENT

THIS CONSENT (“Consent”) is made by _____, a _____ (“Contractor”), this ____ day of _____, 202__, to and for the benefit of THE CITY OF CAPE CORAL, FLORIDA, a municipal corporation duly organized and existing under the laws of the State of Florida (the “City”), with agreement by **VENDOR NAME** (“Concessionaire”)[should come from Fortress].

Contractor and Concessionaire have entered into that certain _____ dated _____, 202__ (the “Construction Agreement”), providing for [construction] [design] [engineering] of the Work in the Concession Area, as such terms are defined in that certain Concession Agreement by and between the City and Concessionaire dated as of _____, 202__ (the “Concession Agreement”).

Concessionaire has assigned the Construction Agreement to the City pursuant to the Assignment of Construction Agreements (the “Assignment”) to which this Consent is attached.

The City has required, as a condition of occupancy of the Concession Area and execution of the Work, that Contractor execute this Consent.

NOW THEREFORE, Contractor agrees as follows:

1. Contractor represents and warrants to the City, that the Construction Agreement is in full force and effect and is enforceable in all material respects in accordance with its terms and to Contractor’s knowledge, no default, or event which would constitute a default after notice or the passage of time, or both, exists with respect to the Construction Agreement.

2. Contractor agrees that if, at any time, the City elects to undertake or cause the completion of construction of the Project in accordance with the Construction Agreement and gives Contractor written notice of such election (an “Election Notice”), then, so long as the City assumes and performs the payment obligations of Concessionaire under the Construction Agreement accruing from and after the date of the Election Notice, then Contractor shall continue to perform its obligations under the Construction Agreement in accordance with the terms thereof for the benefit and account of the City in the same manner as if performed for the benefit of account of Concessionaire in the absence of the Assignment. Unless and until the City expressly assumes the obligations of Concessionaire under the Construction Agreement (and then only to the extent the same arise from and after such assumption), the City shall not be a party to the Construction Agreement and will in no way be responsible to any party for any claims of any nature whatsoever arising or which may arise in connection with the Construction Agreement.

3. Contractor further agrees that, in the event of a breach by Concessionaire of the Construction Agreement, Contractor will give written notice to the City at the address shown below its signature of such breach. Unless and until the City expressly assumes the obligations of Concessionaire under the Construction Agreement (and then only to the extent the same arise from and after such assumption), the City shall not be a party to the Construction Agreement and will in no way be responsible to any party for any claims of any nature whatsoever arising or which may arise in connection with the Construction Agreement.

4.

a. Contractor agrees, notwithstanding anything to the contrary contained herein, that upon an Event of Default (as defined in the Concession Agreement) by Concessionaire resulting

in a termination of the Concession Agreement, or City's exercise of its remedy for an Event of Default as provided in the Concession Agreement, until and unless the City gives Contractor an Election Notice, the City, at its election, may terminate the Construction Agreement for any or no reason and the City shall not be responsible to any party for any claims of any nature whatsoever arising or which may arise in connection with the Construction Agreement.

b. [Additionally, if requested by the City in writing, Contractor will continue as the general contractor for construction of the Project for up to thirty (30) days after such termination or City's exercise of its remedy for an Event of Default under the Concession Agreement (the "Transition Period") on the same terms and conditions as set forth in the Construction Agreement, provided that Contractor is paid by the City in accordance the Construction Agreement for all work, labor and materials rendered pursuant to the Construction Agreement performed during the Transition Period.] **[APPLICABLE TO CONSTRUCTION CONTRACT]**

c. [Subject to Contractor's receipt of the payments prescribed by Section 4.b. above, Contractor will engage in reasonable, good faith efforts to cooperate with any other general contractor selected by the City in order to assure a smooth transition, including, without limitation, delivering to the City or its designee copies of all project records in Contractor's possession or control that Concessionaire is entitled to obtain under the terms of the Construction Agreement.] **[APPLICABLE TO CONSTRUCTION CONTRACT]**

5. Nothing in this Consent shall supersede or modify any provisions of the Construction Agreement as between Concessionaire and Contractor. By its joinder in the execution of this Consent, Concessionaire agrees that any action by Contractor in accordance with the terms hereof shall not constitute a violation by Contractor of any term of the Construction Agreement or of any obligation Contractor has or may have to Concessionaire. For instance, in the event the City terminates the Construction Agreement as provided in Section 4 hereof, Concessionaire shall remain liable for all amounts due Contractor in accordance with the applicable termination provisions of the Construction Agreement.

6. This Consent shall be governed by, and construed and enforced in accordance with, the laws of the State of Florida.

7. EACH OF THE UNDERSIGNED PARTIES HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY, AFTER OPPORTUNITY FOR CONSULTATION WITH INDEPENDENT COUNSEL, WAIVES ITS RIGHT TO TRIAL BY JURY IN ANY ACTION OR PROCEEDING TO ENFORCE OR DEFEND ANY RIGHTS OR OBLIGATIONS UNDER OR ARISING IN CONNECTION WITH THIS CONSENT.

8. Contractor warrants and represents that it has no knowledge of any prior assignment(s) of any interest in the Construction Agreement that remains in effect.

9. To facilitate execution, this Consent may be executed in as many counterparts as may be convenient or required. It shall not be necessary that the signature and acknowledgment of, or on behalf of, each party, or that the signature and acknowledgment of all parties required to bind any party, appear on each counterpart. All counterparts shall collectively constitute a single instrument. This Consent may be transmitted and/or signed by facsimile or e-mail transmission (e.g., "pdf" or "tif"). The effectiveness of any such documents and signatures shall have the same force and effect as manually-signed originals and shall be binding on all parties to this Consent.

IN WITNESS WHEREOF, Contractor intending to be legally bound has executed this Consent as of the date first written above.

CONTRACTOR:

_____,
a _____

By: _____

Name:

Title:

Contractor's Address: [

_____]

[_____]

[_____]

CONCESSIONAIRE:

VENDOR NAME

By: _____

Name:

Title:

Concessionaire's Address: [

_____]

[_____]

[_____]

Exhibit 1.4.3
Budget

Exhibit 2.2
Site Plan

Exhibit 3.1.1

Exhibit 3.1.4

Exhibit 3.1.5

Exhibit 3.2.2

Exhibit 3.2.3
Menu and Price Schedule for Restaurants
(to be submitted for City's approval by April 1, 2026)

Exhibit 3.4.3

Exhibit 3.5.1

Exhibit 3.6.2
Retail Pavilion Offerings and Fees to be Charged to
Subconcessionaires (to be submitted for City's approval by April 1,
2026)

Exhibit 3.7.2

Exhibit 3.9 Hurricane Preparedness Plan
(to be submitted for City's approval by **April 1, 2024**)

Exhibit 3.12
Value-Added Enhancements/Public Benefit Requirements

Exhibit 7.2
Timeline

Exhibit 7.4
Construction Insurance Requirements

As set forth in the Compliance Agreement.

Exhibit 7.6
Construction Agreements Required Clauses

As set forth in the Compliance Agreement

Exhibit 10.9

Exhibit 13.1
Signage
Criteria
(to be provided by City to Concessionaire by or before Occupancy Date)

Need sign on Del Prado pointing to Jaycee Park and The Reef

Exhibit 14
Insurance
Requirements

Commercial General Liability Insurance. From and after the Occupancy Date, Concessionaire, at its sole cost and expense, shall carry or cause to be carried commercial general liability insurance on a comprehensive basis, including contractual liability, to cover the Premises and the Concessionaire's operations and indemnity obligations to the extent the same is available related thereto, whether conducted on or off the Concession Area, in an amount of not less than Ten Million Dollars (\$10,000,000) per occurrence for bodily injury and property damage, subject to adjustment for inflation, such limits can be obtained through a combination of primary and umbrella/excess policies, and designating Concessionaire as a named insured and the City as an additional insured. Such insurance shall meet all of the standards, limits, minimums and requirements described in *Exhibit 14.1*.

Property Insurance. From and after the Occupancy Date, Concessionaire, at its sole cost and expense, shall carry or cause to be carried **"All Risk"** (or its equivalent) property damage insurance protecting Concessionaire and the City as their interests may appear against loss to the Concession Area and Concession Area Structures and meeting all of the standards, limits, minimums and requirements described in *Exhibit 14.2*.

Other Insurance. From and after the Occupancy Date, Concessionaire shall procure and carry insurance meeting all of the standards, limits, minimums, and requirements described in *Exhibit 14.3*.

Construction Insurance. Prior to the commencement of any Work, and only if the Property and Liability coverage above does not otherwise apply, Concessionaire shall procure or cause to be procured, and after such dates shall carry or cause to be carried the insurance required by *Exhibit 7.4*, until final completion of the Work, in addition to and not in lieu of the above-described coverages.

Additional Coverage. Concessionaire shall maintain such other insurance, in such amounts as from time to time reasonably may be required by the City, against such other insurable hazards as at the time are commonly insured against in the case of facilities in South Florida of a size, nature and character similar to the size, nature and character of the Concession Area and the Concession Operations.

City Cooperation. To the extent necessary, the City will cooperate with Concessionaire to provide any information or consents needed by insurance carriers to issue the policies required under the Concession Agreement and this Exhibit to cover the Concessionaire and the City, as applicable.

General Provisions Applicable to All Policies

Insurance Companies. All of the insurance policies required by this Article shall be procured from companies licensed or authorized to do business in the State of Florida that have a rating in the latest edition of **"Best's Key Rating Guide of "A:VII"** or better or another comparable rating reasonably acceptable to the City, considering market conditions.

Required Forms. All references to forms and coverages in this **Exhibit 14** shall be those used by the Insurance Services Organization (ISO) or equivalent forms reasonably satisfactory to The City in all material respects.

Required Certificates. Certificates of insurance evidencing the issuance of all insurance required by this **Exhibit 14** to the extent then required, describing the coverage and providing for thirty (30) days prior notice to the City by the insurance company of cancellation or non-renewal (except as otherwise set forth in the section titled “Required Insurance Policy Clauses,” below), shall have been delivered to the City by the Occupancy Date, and a renewal policy replacing any policies expiring during the Term, or a certificate thereof, together with evidence that the full premiums have been paid, shall be delivered to the City prior to the date of expiration of any insurance policy. The certificates of insurance shall be issued by or on behalf of the insurance company and shall bear the original signature of an officer or duly authorized agent having the authority to issue the certificate. The insurance company issuing the insurance, or its duly authorized agent, shall also deliver to the City proof reasonably satisfactory to the City that the premiums for at least the first year of the term of each policy (or installment payments to the insurance carrier then required to have been paid on account of such premiums) have been paid. During the performance of any construction work, Concessionaire shall deliver to the City an entire duplicate original or a copy (certified by Concessionaire to be true, complete and correct) of each policy. At all other times, Concessionaire shall deliver to the City an entire duplicate original or a copy (certified by Concessionaire to be true, complete and correct) of each policy (which may be redacted with respect to premium amounts or, if the policy covers other properties owned by Concessionaire’s Affiliates, redacted with respect to information relating to such other properties) within a reasonable period of time after the City’s request therefor. Concessionaire shall notify the City of any material changes in the coverage provided under any policy promptly after requesting an insurance company to make such change or receiving any notice from an insurance company advising Concessionaire of any such change; provided, however, that no such change may reduce or otherwise modify the insurance coverage required under this Concession Agreement.

CERTIFICATE HOLDER MUST READ:

City of Cape Coral
(INFO)

All certificates of insurance, endorsements, and exemption letters must be submitted to the City’s servicing agent at:

EMAIL: _____

Compliance with Policy Requirements. Concessionaire shall not violate or permit to be violated any of the conditions, provisions or requirements of any insurance policy required by this Agreement, and Concessionaire shall perform, satisfy and comply with, or cause to be performed, satisfied and complied with, all conditions, provisions and requirements of all insurance policies.

Required Insurance Policy Clauses. Each policy of insurance required to be carried pursuant to the provisions of this Article and each certificate issued by or on behalf of the insurer shall contain (i) a provision stating substantially that no act or omission of Concessionaire (or any other Person) or any use or occupation of the Concession Area for purposes more hazardous than are permitted by the policy shall invalidate the policy as to the City or affect or limit the obligation of the insurance company to pay to the City the amount of any loss sustained and that no act or omission of the City shall invalidate the policy as to Concessionaire or affect or limit the obligation of the insurance company to pay to Concessionaire the amount of any loss; (ii) a written waiver of the right of subrogation against all of the named insureds and additional insureds, including the City in its capacity as the owner of the Concession Area, with respect to losses payable under such policy; (iii) a clause designating the City, as its interests may appear, as loss payee or additional insured for losses in excess of Five Hundred Thousand Dollars (\$500,000) per occurrence, adjusted for inflation; and (iv) an agreement by the insurer that such policy shall not be canceled, materially modified (except with respect to premium amounts), or denied renewal without at least thirty (30) days prior written notice to the City and the City’s Risk Management

Division, specifically covering, without limitation, cancellation or non-renewal, except that ten (10) days' notice or statutory notice, whichever is greater, shall be given with respect to cancellation or non-renewal for any non-payment of premium.

Separate Insurance. Concessionaire shall not carry separate liability or property insurance concurrent in form or contributing in the event of loss with that required by this Concession Agreement to be furnished by Concessionaire, unless the City is included therein as an additional insured with respect to liability or loss payee with respect to property, as their interests may appear, with loss payable as in this Concession Agreement provided. Concessionaire shall immediately notify The City of the carrying of any such separate insurance and shall cause the same to be delivered as in this Concession Agreement hereinbefore required.

Duration of Policies. Concessionaire shall procure policies for all insurance required by any provision of this Concession Agreement for periods of not less than one (1) year or the remainder of the policy term if insured under an existing blanket policy and shall procure renewals thereof from time to time to ensure continuous coverage, except that Builders' Risk Insurance shall only be renewed for the term of any construction period.

Blanket or Umbrella Policies. The insurance required to be carried by Concessionaire pursuant to the provisions of this Concession Agreement may, at Concessionaire's election, be effected by blanket, wrap-up and/or umbrella policies issued to Concessionaire covering the Concession Area, Concession Area Structures and other properties owned or leased by Concessionaire or its Affiliates, provided such policies otherwise comply with the provisions of this Concession Agreement and allocate to the Concession Area and Concession Area Structures the specified coverage, including, without limitation, the specified coverage for all insureds required to be named as insureds or additional insureds hereunder, without possibility of reduction or coinsurance by reason of, or because of damage to, any other properties named therein. If the insurance required by this Concession Agreement shall be effected by any such blanket or umbrella policies, Concessionaire shall furnish to the City, upon the City's request, certificates of insurance and copies (certified by Concessionaire to be true, complete and correct, which may also be redacted with respect to premium amounts or, if the policy covers other properties owned by Concessionaire's Affiliates, redacted with respect to information relating to such other properties) of such policies as provided in the paragraph titled "Separate Insurance," above, together with schedules annexed thereto setting forth the amount of insurance applicable to the Concession Area and Concession Area Structures.

Exhibit 14.1
Liability Insurance Requirements

The commercial general liability insurance required by **Exhibit 14** shall consist of commercial general liability insurance protecting against liability for bodily injury, death, property damage and personal injury. Such insurance shall (within the limits of the insurance required by **Exhibit 14**:

- i. contain blanket contractual liability insurance covering written and oral contractual liability;
- ii. contain contractual liability insurance specifically covering Concessionaire's indemnification obligations under **Section 17**, to the extent such indemnification obligation is for an insurable risk;
- iii. contain independent contractors coverage;
- iv. contain a notice of occurrence clause;
- v. contain a knowledge of occurrence clause;
- vi. contain an unintentional errors and omissions clause;
- vii. contain coverage for suits arising from the use of reasonable force to protect persons and property;
- viii. contain an endorsement providing that excavation and foundation work are covered and the "XCU" exclusions have been deleted;
- ix. contain a waiver of completion and occupancy condition;
- x. contain no exclusions unless specifically approved in each instance by the City, other than the industry standard exclusions for projects of similar size and location;
- xi. contain Products Liability/Completed Operations coverage; and
- xii. provide for a deductible determined by Concessionaire, but not more than One Hundred Thousand Dollars (\$100,000) per loss, subject to adjustment for inflation.

Exhibit 14.2
Property Insurance Requirements

The property insurance required by **Exhibit 14** shall consist at least of property damage insurance under an “All Risk” policy or its equivalent covering the Concession Area and all Improvements (including without limitation the Concession Area Structures) with replacement cost valuation and an “agreed amount endorsement” to be effective not later than promptly following the date the Concessionaire receives a Certificate of Occupancy for any portion of the Concession Area (the “CO Date”) in an amount not less than the full Replacement Value (as defined below), negating any coinsurance clauses and including the following coverages or clauses:

- (a) coverage for physical loss or damage to the Improvements;
 - (b) a replacement cost valuation without depreciation or obsolescence clause;
 - (c) debris removal coverage;
 - (d) provision for a deductible determined by Tenant, but not more than Two Hundred Fifty Thousand Dollars (\$250,000) per loss (for other than flood or windstorm, with regard to which the deductible shall be a commercially reasonable amount), subject to adjustment for inflation;
 - (e) contingent liability from operation of building laws;
 - (f) demolition cost for undamaged portion coverage;
 - (g) increased cost of construction coverage;
 - (h) flood coverage (to the extent available at commercially reasonable rates, limits and deductibles);
 - (i) windstorm coverage (to the extent available at commercially reasonable rates, limits and deductibles);
 - (j) coverage for explosion caused by steam pressure-fired vessels (which coverage may be provided under a separate policy reasonably approved by the City);
 - (k) business interruption coverage in accordance with Exhibit 14.3;
 - (l) a clause designating the City as additional insureds, as its interests may appear;
- and
- (m) contain no exclusions unless approved in writing by the City, other than the industry standard exclusions for facilities of similar size and location.

Concessionaire shall be named insured, and the City shall be additional insureds, as its interests may appear. The City shall be designated loss payee, as its interests may appear, on such “All Risk” policy for the benefit of the City and the Concessionaire. If not included within the “All Risk” coverage above, Concessionaire shall also carry or cause to be carried coverage against damage due to (i) water and sprinkler leakage and collapse, which shall be written with limits of coverage of not less than the full Replacement Value per occurrence, with a deductible of not more than Two Hundred Fifty Thousand Dollars (\$250,000), subject to adjustment for inflation and (ii) flood, to the extent available at commercially reasonable rates, limits and deductibles.

If Concessionaire elects to insure its personal property used in connection with the Concession Operations, the replacement value of such personal property shall be added to the amount of insurance required by this Exhibit 14.2. For the purposes of this Exhibit 14.2, any rate, limit or deductible shall be “commercially reasonable” if such rate, limit or deductible is comparable to the rates, limits or deductibles in the insurance carried by similar facilities in South Florida of a size, nature and character similar to the size, nature and character of the Concession Area and the Concession Operations.

For purposes of this Exhibit 14.2, “Replacement Value” means the full cost of replacing the Improvements according to Requirements in effect at that time, including, without limitation, all hard costs of construction as well as the costs of post-casualty debris removal, and soft costs, including without limitation, architects’, engineers’, surveyors’, assessors’ and other professional fees and development fees.

Exhibit 14.3
Other Insurance Requirements

The “Other Insurance” required by **Exhibit 14** shall consist at least of the following:

(a) Business Interruption Insurance effective no later than the Commencement Date to include so-called “Rent Insurance” on an “All Risk” basis in an amount determined by Concessionaire but not less than the Minimum Guaranteed Annual Concession Fee and Impositions. The insurance specified in this subsection shall:

- (i) provide coverage against all reasonably insurable risks of physical loss or damage to the Improvements;
- (ii) Extra Expense coverage, with a limit of at least One Million Dollars (\$1,000,000), adjusted for inflation, to cover overtime and other extra costs incurred to expedite repairing or rebuilding the damaged portion of the Premises;
- (iii) provide for coverage through the attainment of pre-existing business levels;
- (iv) contain flood and windstorm coverage to the extent available at commercially reasonable rates, limits and deductibles;
- (v) contain explosion caused by steam pressure fired vessels coverage (which coverage may be provided under a separate policy reasonably approved by the City);
- (vi) provide for a deductible determined by Concessionaire, but for not more than Two Hundred Fifty Thousand Dollars (\$250,000), and thirty (30) days wait period for Builders risk policy per loss (other than for flood or windstorm, with regard to which the deductible shall be a commercially reasonable amount), subject to adjustment for inflation;
- (vii) designate the City and Concessionaire as loss payee but shall be payable only to Concessionaire with respect to Business Interruption proceeds not exceeding One Hundred Thousand Dollars (\$100,000), subject to adjustment for inflation, per occurrence; and
- (viii) contain no exclusions, unless approved by the City, other than industry standard exclusions for facilities of similar size and location.

Notwithstanding the foregoing, Concessionaire may elect to exclude the Beachfront Area from its business interruption coverage, but the coverage shall in any case be in an amount not less than ninety-five percent (95%) of the Minimum Guaranteed Annual Concession Fee plus one hundred percent (100%) of the Impositions.

(b) Statutory Workers’ Compensation with limits sufficient to respond to Chapter 440, Florida Statutes and any other insurance required by law covering all employees of Concessionaire or any entity performing work on or for the Concession Area and/or the Improvements (unless and to the extent provided by such other parties), including Employers Liability coverage, all in amounts not less than the statutory minimum, except that Employers Liability coverage shall be in an amount not less than (i) One Million Dollars (\$1,000,000) Bodily Injury by Accident, (ii) One Million Dollars (\$1,000,000) Bodily Injury by Disease and (iii) One Million Dollars (\$1,000,000) Bodily Injury by Disease, each employee, all subject to adjustment for inflation.

(c) After CO Date, Boiler and Machinery Insurance, covering the entire heating, ventilating and air-conditioning systems, in all its applicable forms, including Broad Form, boiler explosion,

extra expense and loss of use in an amount not less than the replacement cost of such heating, ventilating and air conditioning systems, located on any portion of the Concession Area and other machinery located on any portion of the Concession Area, which shall designate the Concessionaire as named insured and loss payee and designate the City as an additional insured.

(d) Automobile liability insurance covering any owned, non-owned and hired automobile or other motor vehicle used in connection with the Concession Operations in an amount not less than One Million Dollars (\$1,000,000), subject to adjustment for inflation, per occurrence, with a deductible determined by Tenant of not more than Ten Thousand Dollars (\$10,000) per loss, subject to adjustment for inflation.

(e) Concessionaire shall cause any architects or engineers to maintain architects and engineers errors and omissions liability insurance specific to the activities or scope of work such consultants will perform. If coverage is provided on a "claims made" basis, the policy shall provide for the reporting of claims for a period of five (5) years following the completion of all construction activities. The minimum limits acceptable shall be One Million Dollars (\$1,000,000) per occurrence and Three Million Dollars (\$3,000,000) in the annual aggregate.

Exhibit 17.5