

CONCESSION AGREEMENT
RFP-PR-17-41

THIS CONCESSION AGREEMENT ("Agreement") made and entered into this ____ day of _____, 20____ by and between TCC Marlow Enterprises, Inc. dba The Green Lion Cafe, a Florida corporation, with offices at 500 N. AIA (Oceanshore Blvd.) Flagler Beach, FL 32136, ("Tenant"), and the City of Palm Coast, a Florida municipal corporation, with offices at 160 Lake Avenue, Palm Coast, Florida 32164, herein called ("City").

WITNESSETH:

WHEREAS, City controls, owns, operates, and maintains a golf course in the City of Palm Coast, Florida known as the Palm Harbor Golf Course ("Golf Course"), with the power to grant rights and privileges with respect thereto, and

WHEREAS, Tenant is engaged in the business of operating Food and Beverage facilities as a service to the public, and

WHEREAS, proposals were received for the operation of a food and beverage concession at the Golf Course pursuant to the Concession Operation and Management of Palm Harbor Food and Beverage Facilities Request for Proposal, RFP-PR-17-41 ("RFP") and the specifications contained therein, and Tenant was selected by this process and determined to be qualified to operate the concession, and

WHEREAS, City, on the terms and conditions herein contained, is willing to grant to Tenant the right to operate the food and beverage concession at the Golf Course;

NOW, THEREFORE, for and in consideration of the premises and mutual covenants contained herein, City and Tenant agree as follows:

1. Leased Premises.

- A.** City hereby provides Tenant with concession space and concession related operating and storage space located within the Golf Course ("Leased Premises"). The Leased Premises are described in detail in the RFP which is attached hereto and incorporated herein. Improvements to the Leased Premises are as set forth in Exhibit A, Owner and Tenant Improvements. All Tenant Improvements are at the sole cost of Tenant and must be pre-approved in writing by City.
- B.** Tenant acknowledges that from time to time, special events, group outings and City golf programs take place at the Golf Course. Tenant shall cooperate with City to accommodate these occasions and provide adequate seating space as needed.
- C.** During the term of this Agreement, Tenant shall be responsible for maintenance of all furniture, fixtures and equipment on the Leased Premises
- D.** In addition, and with the written approval of City, kiosks, patio-type tables and similar facilities may be located in other areas of the Golf Course if doing so is warranted for enhanced customer service, and does not interfere with other Golf Course activities.
- E.** In addition to the exclusive use of the Leased Premises described herein, Tenant shall possess a non-exclusive right of ingress and egress to and from the Leased Premises as may be necessary on through areas designated by the City, subject to Golf Course rules

and regulations, including security regulations, as may be amended from time to time, provided that Tenant's exercise of such right shall not impede or interfere unduly with the operation of the Golf Course by City, its patrons and other authorized occupants.

- F. Tenant shall also have the right to the use of reasonably adequate parking facilities for its employees employed at the Golf Course in common with other employees, which facilities shall be located in an area designated by the City for employee parking. Only Tenant employees assigned to this concession shall use the employee parking facilities.
- G. City shall have the right to enter upon the Golf Course, including the Lease Premises, at all times for any purpose, including without limitation, inspecting the Golf Course or the Leased Premises or for making improvements or repairs thereto or thereon.
- H. Tenant shall not place or install any racks, stands or other display of merchandise or trade fixtures in any Golf Course property outside the Leased Premises without the express prior consent of the City.
- I. Tenant acknowledges and agrees that City shall have the right at all times to change, alter, expand, and contract the Golf Course including the Leased Premises. Without limiting the generality of the foregoing, Tenant acknowledges and agrees that the Golf Course (i) may from time to time hereafter undergo renovation, construction, and other modifications; and (ii) the City may from time to time adopt rules and regulations relating to security and other operational concerns that may affect Tenant's business.
- J. The term "common areas" means all other areas and facilities located within the Golf Course that are determined by City from time to time to be for the general use and convenience of the patrons of the Golf Course and other occupants and visitors of the Golf Course. City may, in its sole discretion, and without any liability to Tenant (a) change the common areas, and (b) increase or decrease the common areas (including conversion of common areas to leasable areas and the conversion of leasable areas to common areas). City will, in its sole discretion, maintain the common areas, establish and enforce Golf Course rules and regulations concerning the common areas, temporarily close portions of the common areas for maintenance purposes, and make changes to the common areas including changes in the location of driveways, entrances, exits, parking spaces, parking areas, and the direction of the flow of traffic.
- K. Tenant hereby waives all claims against City and releases City from all losses that Tenant suffers or incurs arising out of or in connection with any changes to the Golf Course or any portion of the Golf Course including the Leased Premises and Tenant further agrees that Tenant will not be entitled to any rent abatement or any other rent relief in connection with said changes.

2. Concession Rights Granted

- A. For and in consideration of the prompt payment of the compensation to City as hereinafter provided, City hereby grants to Tenant, subject to all of the terms and conditions herein, the exclusive right and obligation to operate and maintain the food and beverage services operation as set forth in the RFP.
- B. Tenant shall not use nor permit the Leased Premises to be used for any purpose other than as set forth herein except with the prior written consent of City, nor for any use in violation of any applicable present or future law, ordinance, rule or regulation of any governmental authority, agency, department or officer thereof.
- C. In no event will Tenant engage in any activity on the Golf Course outside the Leased Premises for the recruitment or solicitation of business without the written consent of City.

3. Standards of Conduct

- A. Tenant shall be responsible for the professional quality, accepted standards, technical accuracy and the coordination of all services furnished by the Tenant under this Agreement as well as the conduct of its staff, personnel, employees, and agents.
- B. If the City determines that any employee or representative of Tenant is not satisfactorily performing his or her assigned duties or is demonstrating improper conduct pursuant to any assignment or work performed under this Contract, the City shall so notify the Tenant in writing. Tenant shall immediately remove such employee or representative of the Tenant from such assignment.
- C. Tenant agrees to comply with Federal, State, and local environmental, health, and safety laws and regulations applicable to the services and rights granted hereunder.
- D. Tenant shall ensure that all services hereunder are provided after the Tenant has obtained, at its sole and exclusive expense, any and all permits, licenses, permissions, approvals or similar consents.

4. Contract Documents.

The following documents are an essential part of this Agreement and are incorporated herein by reference and are made a part hereof:

- i. Concession Operation and Management of Palm Harbor Food and Beverage Facilities RFP RFP-PR-17-14 including instructions, scope, bond and insurance requirements ("RFP")
- ii. Addenda
- iii. Bid - However, if Tenant terms and conditions contained it Tenant's bid conflict with the terms and conditions herein, this Agreement prevails.
- iv. Americans with Disabilities Affidavit
- v. Performance Bond

5. Compensation.

Tenant shall compensate the City in accordance with Exhibit B, Pricing Structure.

6. Term and Termination.

- A. This Agreement shall become effective on the date of full execution of this Agreement by the parties and shall continue for five years ("Term") unless sooner terminated in accordance with this Agreement. Following the initial term and at the sole option of CITY, this Agreement may be renewed for two (2) successive periods not to exceed five (5) years each. The Tenant's services shall begin upon written notification to proceed by City. Time is of the essence in the performance of all services provided by Tenant under the terms of this Agreement.
- B. In the event that Tenant, without request or objection by City, shall continue to occupy the Leased Premises beyond the Term of this Agreement, such holding over shall not constitute a renewal of this Agreement, but shall be considered a month-to-month tenancy only upon the terms incorporating all terms and conditions of this Agreement. No such holdover shall be deemed to operate as renewal or extension of the Term. Such month-to-month tenancy may be terminated by City or Tenant by giving thirty (30) days' written notice of said termination to the other party at any time. Tenant will have no rights to renew or extend the term of this Agreement.
- C. Either party may terminate this Agreement for convenience upon ninety (90) days advance written notice.

- D. City shall have the right to terminate this Agreement by way of a written notice, in case Tenant fails to perform in accordance with terms and conditions of this Agreement or otherwise commits a breach of the Agreement hereunder and fails to remedy such breach within fifteen (15) days after receipt of written notice of default.
- E. Upon receipt of a notice for any termination herein, the parties shall cooperate with each other and use all commercially reasonable efforts to effect a smooth transition process. Tenant shall return and make available to City all supplies, equipment, materials and other property provided by City to Tenant.

7. Indemnification

- A. Tenant shall indemnify, hold harmless, and defend the City, from and against any and all claims, damages, losses, and expenses including, but not limited to, attorney's fees, arising out of or resulting from the performance or provision for services under this Agreement, including damage to persons or property, provided that same is caused in whole or part by the error, omission, negligent act, failure to act, malfeasance, misfeasance, conduct, or misconduct of Tenant, its agents, servants, officers, officials, employees, or subcontractors.
- B. Nothing herein shall be deemed to affect the rights, privileges, and immunities of the City as set forth in Section 768.28, Florida Statutes.
- C. In claims against any person or entity indemnified under this Section by an employee of Tenant or its agents or subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Section shall not be limited by a limitation on amount or type of damages, compensation, or benefits payable by or for Tenant or its agents or subcontractors, under Workers Compensation acts, disability benefits acts, or other employee benefit acts.
- D. The execution of this Agreement Tenant shall obligate the Tenant to comply with the indemnification provision in this Contract; however, the Tenant must also comply with the provisions of this Contract relating to insurance coverage.

8. Bonds and Insurance

- A. Tenant, at its sole cost and expense, shall, at all times, maintain insurance and bonds as set forth in Exhibit C, Insurance Requirements
- B. If Tenant fails to maintain the required insurance coverage and City does not elect to obtain the necessary coverage on Tenant's account, the City may deny Tenant entry to the Golf Course and may treat such failure to maintain insurance coverage as an immediate voluntary termination of this Agreement by Tenant.

- 9. Notice** Any notices which may be permitted or required hereunder shall be in writing and shall be deemed to have been duly given as of the date and time the same are personally delivered, transmitted electronically (i.e., telecopier device) or within three (3) days after depositing with the United States Postal Service, postage prepaid by registered or certified mail, return receipt requested, or within one (1) day after depositing with Federal Express or other overnight delivery service from which a receipt may be obtained, and addressed as follows:

To Tenant at the following address:

Christopher Marlow, Director
TCC Marlow Enterprises, Inc.
P.O. Box 2225
Flagler Beach, FL 32136

To City at the following address:

City of Palm Coast
160 Lake Avenue
Palm Coast, FL 32164

or to such other address as either party hereto shall from time to time designate to the other party by notice in writing as herein provided.

10. Miscellaneous

- A. Assignment.** The Tenant shall not assign this Agreement, any rights under this Agreement or any monies due or to become due hereunder nor delegate or subcontract any obligations or work hereunder without the prior written consent of the City.
- B. Choice of Law, Jurisdiction.** This Agreement shall be interpreted and enforced under the laws of the State of Florida. Venue for any legal proceeding related to this Agreement shall be in the Seventh Judicial Circuit Court in and for Flagler County, Florida. City and Tenant, in the event of litigation under this Agreement, hereby waive, to the fullest extent permitted by law, any right to a trial by jury.
- C. Entire Agreement.** This Agreement constitutes the entire understanding between City and Tenant. Neither this Agreement nor any provision hereof may be changed, modified, waived, discharged or terminated except by an instrument in writing signed by the party against whom the enforcement of any such change, modification, or amendment is sought.
- D. Force Majeure** Neither party shall be considered in default in performance of its obligations hereunder to the extent that performance of such obligations, or any of them, is delayed or prevented by Force Majeure.
- E. Legal Fees.** In the event of any dispute hereunder or of any action to interpret or enforce this Agreement, any provision hereof or any matter arising here from, the prevailing party shall be entitled to recover its reasonable costs, fees and expenses, including, but not limited to, witness fees, expert fees, consultant fees, attorney fees (in-house and outside counsel), paralegal and legal assistant fees, costs and expenses and other professional fees, costs and expenses whether suit be brought or not, and whether in settlement, in any declaratory action, at trial or on appeal. This provision shall survive the termination or expiration of this Agreement.
- F. No Joint Venture or Partnership.** Nothing contained in this Agreement shall create or be deemed to create any partnership or joint venture relationship between City and Tenant, nor be construed to give City any interest in the business of Tenant, and Tenant shall have no power or right to obligate or bind City in any manner whatsoever.
- G. No Waiver.** In the event Tenant shall fail to perform any of the terms or conditions of this Agreement, City shall have all equitable and legal rights and remedies permitted by law, including, without limitation, the right to terminate this Agreement effective immediately.

No waiver by City of any default or breach of this Agreement shall be considered a waiver of any other or subsequent default or breach.

H. Severability. If any provision of this Agreement or the application thereof to any person or circumstances shall, for any reason and to any extent, be invalid or unenforceable, the remainder of this Agreement and the application of such provision to other persons or circumstances shall not be affected thereby but rather shall be enforced to the greatest extent permitted by law.

IN WITNESS WHEREOF, the duly authorized representatives of the parties have executed this Agreement.

TENANT

CITY OF PALM COAST

By: _____

By: _____

Name: Christopher J. Marlow

Name: Jim Landon

Title: Director

Title: City Manager

Date: _____

Date: _____

Exhibit A
Owner and Tenant Improvements

- **Owner Improvements**
 - Oven
 - 12 x 12 Walk-In Cooler
 - Dumpster

- **Tenant Improvements** – improvements to be made by Tenant at its costs, including but not limited to any required permit costs. All Tenant Improvements must be pre-approved in writing by City.
 - Sand and Stain the Deck
 - New Flooring
 - Paint inside dining room
 - New lighting fixtures and fans inside and outside and related electrical expenses
 - Relocation of the Ice machine and related plumbing and electrical expenses
 - Plants
 - New Bar (and any costs associated with removal of existing bar)

**Exhibit B
Pricing Structure**

- A. Lease Fee Components:** The Lease Fee paid by Tenant to City for use of the Leased Premises in accordance with this Agreement is made up of the following three (3) components.
1. Base Rent- \$ _____/month*
 2. Initial Capital Improvement Recovery (\$ _____/month) - Capital Improvement Recovery will be paid through the end of the first five (5) year term only. (\$ _____/54 months = \$ _____)
 3. Quarterly Revenue Sharing
 - o 0% if Gross Quarterly Revenue is less than \$100,000
 - o _____% of total Gross Quarterly Revenue if Gross Quarterly Revenue is equal to or greater than \$100,000.
- B. Lease Fee Payments:** The Lease Fee paid by Tenant to City for use of the Leased Premises shall be paid as follows:
1. First 6 months – \$ 0.00 Lease Fee
 2. Month 7 through Month 60 – payable on the first of each month
 - a. Base Rent of \$ _____/month
 - b. Initial Capital Improvement Recovery (\$ _____/month). Initial Capital Improvement Recovery will be paid from Month 7 until the end of the first five (5) year term only.
 3. The first Quarterly Revenue Sharing payment shall be due January 15, 2019 - based upon the gross quarterly revenue from the prior three (3) month period October 1, 2018 through December 31, 2018. Thereafter, quarterly payments will be made every April 15th, July 15th, October 15th and January 15th covering the prior three (3) month period throughout the term of the Agreement.

* Base Rent to increase 10% beginning on year 6 if contract is renewed.

**Exhibit C
INSURANCE AND BOND
REQUIREMENTS**

1. GENERAL REQUIREMENTS.

- 1.1. Prior to performance under this Agreement, Tenant shall furnish City with a Certificate of Insurance evidencing the Property and Casualty (an all-risk policy for full replacement value of all Leased Preises improvements, structures, equipment and personal property, Liquor Liability Insurance, Pollution Liability Insurance, Workers' Compensation/Employer's Liability, Commercial General Liability, and Automobile Liability Insurance. The City, its officials, officers, and employees shall be named Loss Payee under the Property and Casualty Insurance and Additional Insured under the Commercial General Liability policy using CG 1185 or its equivalent, as well as additional insured under the business auto policy. The Certificate of Insurance shall provide that the City shall be given not less than thirty (30) days written notice prior to the cancellation or restriction of coverage. The insurance provided by Tenant shall apply on a primary basis and any other insurance or self-insurance maintained by the City or the City's officials, officers, or employees shall be in excess of and not contributing with the insurance provided by or on behalf of the Tenant. The Workers' Compensation Policy and the Commercial General Liability required by this Agreement shall be provided on an occurrence rather than a claims-made basis.
- 1.2. Tenant waives all rights against City for recovery of damages to the extent covered by Commercial General Liability, Commercial Umbrella Liability, Business Auto Liability or Workers Compensation and Employers Liability insurance maintained per requirements herein.
- 1.3. Compliance with the insurance requirements set forth herein shall not relieve Tenant, its employees or agents of liability from any indemnification obligation under this Agreement.
- 1.4. Companies issuing policies other than Workers' Compensation, must be authorized to conduct business in the State of Florida. In addition, such companies other than those authorized by Section 440.57, Florida Statutes, shall have and maintain a Best's Rating of "A" or better and a Financial Size Category of "VII" or better according to A.M. Best Company.

2. COVERAGE AMOUNTS.

2.1. Workers' Compensation/Employer's Liability.

- A. Workers Compensation Coverage** SUPPLIER'S insurance shall cover Tenant for liability which would be covered by the latest edition of the standard Workers' Compensation Policy, as filed for use in Florida by the National Council on Compensation Insurance, without restrictive endorsements.
- B. Employers Liability Coverage**

\$500,000.00	(Each Accident)
\$500,000.00	(Disease-Each Employee)
\$500,000.00	(Disease-Policy Limit)

2.2. Commercial General Liability.

	LIMITS
General Aggregate (per project)	\$5,000,000.00
Personal & Advertising Injury Limit	\$1,000,000.00
Each Occurrence Limit	\$5,000,000.00

The CGL limits may be satisfied by a combination of primary CGL and Umbrella/Excess coverage. When Umbrella/Excess is provided it shall follow form.

2.3. Automobile Liability Insurance.

LIMITS
Each Occurrence Bodily Injury and \$1,000,000.00 Property Damage Liability Combined

2.4. Liquor Liability Insurance

LIMITS
\$1,000,000.00

2.5. Pollution Liability Insurance

LIMITS
\$1,000,000.00

2.6. Property and Casualty (an all-risk policy for full replacement value of all Leased Premises improvements, structures, equipment and personal property)

3. Bonds

Comprehensive Dishonesty, Destruction and Disappearance (3-D Bond): Tenant shall obtain and maintain throughout the term of this Agreement (including any renewal period) a 3-D Bond, or equivalent, in an amount not less than Two Hundred Thousand Dollars (\$200,000.00), or limit carried, whichever is greater, from a surety or insurance company authorized to conduct business in the City acceptable to the City covering as a minimum Depositor's Forgery and all employees who may handle funds or property in connection with the Golf Course.