

Old Bakery and Emporium Park Concession Agreement

This Park Concession Agreement (Agreement) is entered into by the City of Austin, a home rule municipality, through its Parks and Recreation Department (City), and the Austin Parks Foundation (APF), a Texas non-profit Corporation. City owns the Old Bakery and Emporium located at 1006 Congress (Site), and wishes to permit the APF to manage and operate a concession at the Site. Effective Date shall be the date this Agreement is signed by the last of the two parties.

1. PURPOSE

APF and the City through its Parks and Recreation Department (PARD) conducted a one- (1) year pilot concession program, under which APF operated and managed a food and beverage concession at the Site in the area shown on **Attachment A**, attached hereto and incorporated herein, in exchange for the use of 10% of the revenue, which will be used as matching funds for a grant application that will provide substantial park improvements to the Old Bakery and Emporium site.

APF requests to enter into a new agreement with the City to continue management and operations of a food and beverage concession at the Old Bakery and Emporium.

2. Term of Agreement

The term of this agreement shall be for a period of two (2) years from the Effective Date, unless previously terminated as provided herein or as otherwise agreed to in writing by the parties. Each party acknowledges that a concession agreement for the Site for any period beyond the two-year term shall be subject to the competitive solicitation process or negotiation and execution of a new agreement possibly revising terms as determined by the City.

3. GOALS and OBJECTIVES

1. Prepare and offer for sale cooked and pre-packaged food items such as but not limited to baked goods, pastries, sandwiches, coffee, and non-alcoholic beverages.
2. Utilize revenue generated from concession sales to maintain the Site and to assist in funding future site improvements to the Site during the term of this Agreement.

4. APF OBLIGATIONS

1. Solicit and contract with a vendor(s) acceptable to the City and approved by the PARD Director prior to entering or conducting operations on the Site. APF shall provide the City with the business name and contact information for all approved vendors.
2. Provide an accounting of all funds designated for improvements to the Site from the Temporary Park Concession Agreement between APF and the City executed on September 22, 2011 (Temporary Agreement), within thirty days of the Effective Date of this Agreement. All funds from the Temporary Agreement shall be used for improvements to the Site during the term of this Agreement unless otherwise agreed to by the parties.
3. Provide City with an Emergency Management and Operations plan to be reviewed and approved by the City.
4. Operate and manage an on-site food and beverage concession serving breakfast and lunch items to the general public.
 - a. Hours of operation shall be Monday through Friday between 7:00 a.m. and 3:00 p.m. Alternate days and hours of operation are subject to the prior approval and discretion of the PARD Director.
 - b. Additional days and hours of operation may be added based on vendor need and for special events including but not be limited to the Old Bakery Artist Reception, Chuy's Parade, ROT Rally, Capital Tree Lighting and Downtown Stroll.
 - c. Vendor(s) shall remit, to APF, a minimum of ten percent (10%) of monthly revenue (less sales tax) from all concession sales generated at the Site at the beginning of each month for the previous month's sale.
5. Obtain written consent, through the PARD Director or designee, for any alterations, improvements, or additions, in, on, or about the exterior of the Site.
6. Prior to conducting concession operations at the Site, APF shall obtain written consent, through the PARD Director or designee, for the concession equipment and vehicle specifications included in **Attachment B** attached hereto and incorporated herein. **Attachment B** shall include proposed concession equipment and vehicle specifications, including but not limited to color, materials, dimensions, weight and utilities, as well as designate which improvements are permanent or temporary specific to the vendor.
7. Provide the City with a concession schedule, menu and price listing, and documentation of APF and vendor required insurance coverage listing the City as an additional insured. APF and its vendors shall maintain insurance in the amounts shown in **Attachment C**.

8. Ensure prices of all items offered for sale are properly displayed. The manner and location of posting will be subject to approval by the PARD Director or designee.
9. Vendor(s) shall develop and maintain written procedures for receiving, investigating and responding to questions, concerns and inquiries from the City and general public, and provide a copy to the City.
10. APF shall ensure vendor(s) obtains and arranges for all utilities including electricity, water or other utilities needed for operations. APF shall be solely responsible for the payment of utility charges for the duration of the agreement. Utilities shall have separate metering and billing capabilities from the Old Bakery and Emporium facility.
11. Ensure vendor(s) provide assistance, upon request, to individuals with disabilities.
12. Ensure all concession equipment and utilities are shut off prior to completion of daily operations.
13. Maintain Site in a clean and sanitary condition and require vendor(s) to comply with all applicable federal, state, and local health, safety, and environmental laws, ordinances, and other governmental provisions prevailing in performing under this Agreement.
14. Ensure the vendor(s) obtains and maintains licenses, permits, registrations, and certificates required by law to perform under this Agreement.
15. Equipment, supplies, and materials necessary to perform under this Agreement shall be stored in an area designated and approved by the City. Storage facilities shall be maintained to ensure aesthetic and structural integrity.
16. All disposable products such as cups, napkins, cutlery, and plates shall be of recycled or biodegradable content.
17. Furnish trash and recycling receptacles for the disposal of waste and recyclable products generated from concession services
18. Monitor litter and ensure all trash, from within the service area, is contained in trash receptacles daily.
19. Litter and trash shall be disposed of daily in an area to be designated by the City.
20. No Styrofoam or glass containers of any kind shall be used in the dispensing of food and/or beverages.
21. In the event the agreement between APF and its vendor(s) is terminated or expires, APF shall notify the City's Contract Manager in writing within five (5) business days of the last day of operations by such vendor. APF shall conduct a walkthrough with the City and vendor

prior to and after the vendor leaves to ensure all concession equipment and property is removed from the premises within thirty (30) days of vendor's written notice.

22. Indemnify and hold harmless the City from and against any and all liability, damages, costs, and expenses, including, but not limited to, defense costs arising from or related to any violation on the part of APF or its employees, agents, vendors or subcontractors of any such laws, rules, regulations, ordinances, or directives. APF shall require this provision in each of its agreements with vendors it contracts with.

23. Collect and maintain records of the amount collected from vendor(s) for future Site improvements. APF shall retain at least ten percent (10%) of the revenue generated from concession sales to be used as matching funds for a grant application that will provide substantial park improvements to the Site. APF will submit a proposal for grant funds to grantor/agency for type of grant/grant name during the term of this Agreement. The grant application must name the City as a co-recipient and must be approved by the PARD Director. The terms and conditions for the site improvements will be identified under a Parkland Improvement Agreement to be executed between the parties within 120 days of award of grant funding. If APF is unsuccessful in obtaining grant funds for whatever reason, APF must submit a site improvement plan that utilizes all revenue received from its vendors. This plan must include a description of proposed improvements and an implementation schedule to be approved by the PARD Director. If APF fails to obtain grant funds or submit a site improvement plan, then APF shall remit an accounting and all funds accumulated during the term of this Agreement and the Temporary Concession Agreement to the City.

24. No portion of the funds collected under this Agreement shall be used for APF administration costs but solely for improvements to the Site.

5. CITY OBLIGATIONS

- A. Allow APF to operate and manage a food and beverage concession at the Site.
- B. Oversee and monitor APF's performance under this Agreement through periodic site visits and reporting requirements.
- C. Review all reports received under Section Seven (7) of this Agreement.
- D. Provide APF with a calendar of events, including official City holidays, observed by the Old Bakery and Emporium.
- E. Grant approved vendor(s) the right to store certain equipment, supplies and materials in a designated area approved by the City. Storage space located inside the Old Bakery and Emporium is not available for use.
- F. Provide and/or coordinate daily trash collection services at the site.

6. CONSIDERATION

APF shall require its vendor(s) to maintain records and remit to APF a minimum of ten percent (10%) of monthly revenue from all concession sales generated on site on a monthly basis within two (2) weeks of preceding report month.

7. REPORTS

(1) APF shall prepare and submit a report in the form prescribed in **Attachment D** attached hereto and incorporated herein to the Contract Manager within ten business days of each month during operation. APF shall provide the City with the following information:

- i. Total gross revenue for all items sold by vendor(s) at the site.
- ii. Total expenses.
- iii. Total revenue paid to APF by the vendor.
- iv. Total of balance of account established to be used for grant applications and for future site improvements to the Old Bakery and Emporium outdoor space.

(2) Updates and proposed plans regarding the Downtown Austin Plan, related to the Old Bakery and Emporium, these updates include, but are not limited to public engagement efforts, concept and design development, implementation time line and construction document preparation. The reports will be provided on a quarterly schedule, with the first report due August 15, 2013. All subsequent quarterly reports will be due the 15th of the month. APF shall submit to the Contract Manager, on a monthly basis, or as reported by the vendor, a copy of the vendor's sales tax report required by the Texas Comptroller of Public Accounts.

(3) The City may conduct an audit of APF's records and its vendor(s) as necessary to ensure compliance with this Agreement. APF agrees to allow the City or other authorized representatives of the City access to its records as they relate to the performance of this Agreement and will require such right to audit in all of its contracts with its vendors. APF shall retain all such records for a period of three (3) years after the expiration or termination of this Agreement or until all audit or litigation matters that the City has brought to the attention of APF are resolved, whichever is longer.

8. CONTACT PERSON(S)

The City will appoint a Contract Manager to be the primary contact for APF. APF shall provide the City with a least one contact person who can be reached during the days and times necessary to carry out services under the agreement. The Contract Manager may use monthly meetings between the PARD Director and APF as an opportunity to discuss concession management and operations.

9. TERMINATION

Termination for Public Safety. The City shall have the right to terminate this Agreement without prior notice due to APF's or its vendors' action or inaction that results in an immediate threat to public health, safety and welfare and for which there is no cure.

Mutual Termination. Either party may terminate this Agreement for convenience and without cause or further liability by providing written notice at least 45 days prior to the termination date designated in such notice to the other party.

Upon termination of this Agreement any remaining funds paid by or due from vendor(s) to APF shall be accounted for and remitted to the City, or the parties may enter into such agreement as necessary. The City shall not be liable or responsible for any damages or costs incurred by APF or its vendors due to termination or expiration of this Agreement.

10. Miscellaneous

(1) Dispute Resolution.

- i. If a dispute arises out of or relates to the Agreement, or the breach thereof, the parties agree to negotiate prior to prosecuting a suit for damages. However, this section does not prohibit the filing of a lawsuit to toll the running of a statute of limitations or to seek injunctive relief. Either party may make a written request for a meeting between representatives of each party within fourteen (14) calendar days after receipt of the request or such later period as agreed by the parties. Each party shall include, at a minimum, one (1) senior level individual with decision-making authority regarding the dispute. The purpose of this and any subsequent meeting is to attempt in good faith to negotiate a resolution of the dispute. If, within thirty (30) calendar days after such meeting, the parties have not succeeded in negotiating a resolution of the dispute, they will proceed directly to mediation as described below. Negotiation may be waived by a written agreement signed by both parties, in which event the parties may proceed directly to mediation as described below.
- ii. If the efforts to resolve the dispute through negotiation fail, or the parties waive the negotiation process, the parties may select, within thirty (30) calendar days, a mediator trained in mediation skills to assist with resolution of the dispute. Should they choose this option; the City and APF agree to act in good faith in the selection of the mediator and to give consideration to qualified individuals nominated to act as mediator. Nothing in the Agreement prevents the parties from relying on the skills of a person who is trained in the subject matter of the dispute or a contract interpretation expert. If the parties fail to agree on a mediator within thirty (30) calendar days of initiation of the mediation process, the mediator shall be selected by the Travis County Dispute Resolution Center (DRC). The parties agree to

participate in mediation in good faith for up to thirty (30) calendar days from the date of the first mediation session, and APF agrees it will compel participation of its vendors in mediation if applicable to the dispute. The City and APF will share the mediator's fees equally and the parties will bear their own costs of participation such as fees for any consultants or attorneys they may utilize to represent them or otherwise assist them in the mediation.

- (2) No Third Party Rights. The provisions and conditions of this Agreement are solely for the benefit of the City and APF, and are not intended to create any rights, contractual or otherwise, to any other person or entity.
- (3) No Partnership or Joint Venture. APF shall operate as an independent contractor and not as an officer, agent, servant, or employee of the City.
- (4) Non-Discrimination Ordinances. APF and its vendors shall comply with all provisions of AUSTIN, TEX., CODE Title 5. (Civil Rights), as amended, recodified or reenacted from time to time, relating to equal opportunity in employment and business practices. Such provisions are incorporated in this Agreement and by reference made a part of this Agreement as though fully set forth in this Agreement.
- (5) No Hazardous Materials. APF covenants and agrees that neither APF nor any of its agents or vendors shall cause or permit any Hazardous Material to be brought upon, kept, used, stored, generated, or disposed of in, on, or about the Site, or transported to or from the Site.
- (6) Condition of Premises. APF accepts the Site in its present condition, "as-is", finds it suitable for the purposes intended, and further acknowledges that it is thoroughly familiar with such condition by reason of a personal inspection and does not rely on any representations by City as to the condition of the Site, or its suitability for the purposes intended.
- (7) Assignment. APF will not assign any of its rights or obligations under this Agreement without the prior written approval of the PARD Director.
- (8) Claims. In the event that any claim, demand, suit or other action (Claim) is made or brought by any person, firm, corporation or other entity against APF or its vendors related to the Site or to products sold at the Site, APF shall provide written notice of such Claim to the City's Contract Manager within two calendar days of the date APF or any of its employees or representatives first learned of the Claim. Notification from APF shall include, the names and addresses of the person, firm, corporation or other entity making the Claim, and if known, the basis of such claim.
- (9) Compliance with Health, Safety, and Environmental Regulations. APF, its vendors, and their respective employees and subcontractors, shall comply fully with all applicable

federal, state, and local health, safety, and environmental laws, ordinances, rules and regulations in the performance of the services, including but not limited to those promulgated by the City and by the Occupational Safety and Health Administration (OSHA). In case of conflict, the most stringent safety requirement shall govern. APF shall indemnify and hold the City harmless from and against all claims, demands, suits, actions, judgments, fines, penalties and liability of every kind arising from the breach of APF's obligations under this paragraph.

- (10) **Survivability of Obligations.** All provisions of the Agreement that impose continuing obligations on the parties, including but not limited to the warranty, indemnity, and confidentiality obligations of the parties, shall survive the expiration or termination of this Agreement.

EXECUTED by the authorized representatives of the Parties on the dates indicated below.

AUSTIN PARKS FOUNDATION
a Texas non-profit organization

CITY OF AUSTIN,
a home-rule municipal corporation

By: _____

By: _____

Title: _____

Title: _____

Date: _____, 2013

Date: _____, 2013

Attachments:

Attachment A: Site Map

Attachment B: Vendor Proposal

Attachment C: Insurance Requirements

Attachment D: Monthly Concessionaire Report