

GRANT OF CONCESSION AND AGREEMENT TO LEASE

THIS GRANT OF CONCESSION AND AGREEMENT TO LEASE (the "Agreement") is made and entered into effective this ____ day of _____, 2023 (the "Effective Date"), by and between the CITY OF COMMERCE CITY, a Colorado home rule municipality whose address is 7887 East 60th Avenue, Commerce City, Colorado (the "City"), and M & M TASMANIAN DEVIL, INC., d/b/a M & M & THINGS, a Colorado corporation whose principal business address is 2501 15th Street, #2E, Denver, CO 80211 ("Concessionaire").

WHEREAS, the City is the owner of a concrete Concession Stand structure at Pioneer Park, 5902 Holly Street, Commerce City, Colorado; and

WHEREAS, the City has agreed to grant a non-exclusive right to operate a concession business to the Concessionaire, and to lease the Concession Stand to the Concessionaire for the purpose of operating the concession business.

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained in this Agreement, the sufficiency of which is hereby acknowledged, the parties agree as follows:

I. GRANT OF CONCESSION.

A. Grant and Lease. The City hereby GRANTS to Concessionaire the non-exclusive right to maintain and operate a concession sales business for the sale of foodstuffs, nonalcoholic beverages, and small items of merchandise typically associated with recreational areas (the "Concession") within the concession stand presently existing, and in its present condition, at Pioneer Park, 5902 Holly Street, Commerce City, Colorado, as depicted in Exhibit A, attached hereto and incorporated herein by this reference (the "Concession Stand"), and hereby LEASES the Concession Stand to Concessionaire, all in accordance with and subject to the terms and conditions of this Agreement. The Concessionaire shall provide for the operation of the Concession from the Concession Stand at all dates and times more fully described in the Operation Schedule contained herein, subject to certain exceptions as determined by the City, such as during certain previously approved special events at and within Pioneer Park.

B. Controlling Terms. The terms of this Agreement will control if the terms of any exhibit, attachment, or invoice conflict with this Agreement.

C. Products for Sale. The City shall have the authority to approve any and all items held for sale by Concessionaire. All items sold by Concessionaire shall be in soft wrappers, and none shall be sold in glass containers. All beverages shall be dispensed in appropriate plastic or paper containers. Concessionaire shall provide disposable paper products and utensils.

D. Maintenance of Premises.

1. Concessionaire shall at all times operate and maintain the Concession Stand in a manner and condition that will meet the requirements of the Tri-County Health Department and authorities of any government agency having jurisdiction over the Concession Stand. Concessionaire shall obtain all licenses and permits required by any state, county, municipal or other governmental authority. Fees for such licenses and/or permits are the responsibility of Concessionaire and are not deductible from gross revenues.

2. Concessionaire shall maintain the Concession Stand in a clean and sanitary condition at all times, and such responsibility for maintenance shall extend to the interior of the Concession Stand and exterior

counter maintenance on a daily basis, e.g., empty trash as needed, pick up trash on floor, wipe off counters, etc. All trash shall be properly disposed of nightly and placed in the dumpster on site at the park. Deliveries must be received and stored immediately by the Concessionaire.

E. Concessionaire Representations. Concessionaire warrants and represents that it has the requisite authority, capacity, experience and expertise to operate the Concession business in compliance with the provisions of this Agreement and all applicable laws. Concessionaire acknowledges that the City is relying on Concessionaire's expertise, skill, and knowledge, and that the Concessionaire's obligations and liabilities will not be diminished by reason of any approval or review by the City.

F. Operation of the Concession. Concessionaire shall operate the Concession business in a professional, workmanlike, and timely manner. Concessionaire will furnish all labor, materials, tools, supplies, machinery, utilities, and other equipment that may be necessary for the satisfactory operation of the Concession business. Concessionaire will monitor, supervise, and otherwise control and be solely responsible for all persons or entities performing work on its behalf.

G. Modification of Premises. Concessionaire shall make no modification to the Concession Stand without first obtaining the express written permission of the City. Any permanent structural modification or equipment attached to the structure and approved by the City shall become the property of City. In the event this Agreement is terminated for any reason, it is agreed that Concessionaire may remove equipment furnished by Concessionaire pursuant to direction of the City or, in the alternative, Concessionaire may sell said equipment to the City at and for a price negotiated and mutually agreed upon by the City and Concessionaire.

H. Equipment; Emergency Situation. Concessionaire is responsible for operation and maintenance of all equipment necessary for operation, including equipment loaned to Concessionaire by City for the duration of the operation as set forth in Exhibit B, List of Equipment Owned by the City (the "City Equipment"). The City Equipment will be in good working order at the time this Agreement commences. Any replacement or repair required of any equipment shall be at the sole cost and expense of Concessionaire. Procurement of any other equipment shall be Concessionaire's responsibility and at Concessionaire's sole cost and expense. The City shall be responsible for the operation and maintenance of the permanent structure. Concessionaire will be provided with the appropriate call-out procedures adopted by the City's Department of Parks, Recreation & Golf in the event of an emergency situation dealing with the permanent structure.

I. Correction of Errors. Concessionaire will correct any errors or omissions in the operation of the Concession business and any work deemed unsatisfactory or unacceptable by the City in a prompt manner.

J. Subcontractors. Concessionaire will not engage subcontractors to operate the Concession.

K. Licenses & Permits. Concessionaire will be responsible to obtain all required licenses and permits, as may be required under applicable federal, state, or local laws. Concessionaire will pay any and all license and permit fees.

L. Rate of Progress. Concessionaire's timely and reliable operation of the Concession Stand in accordance with the Operation Schedule and other requirements and expectations contained herein is a material term of this Agreement.

M. Monitoring and Evaluation. The City reserves the right to monitor and evaluate the progress and performance of Concessionaire to ensure that the terms of this Agreement are being satisfactorily met in

accordance with the City's and other applicable monitoring and evaluating criteria and standards. Concessionaire will cooperate with the City relating to such monitoring and evaluation.

N. Drugs, Alcohol, Workplace Violence, and Harassment; Compliance with Applicable Law. Concessionaire and its employees and agents, while performing the Services or while on City property for any reason during the Term, will adhere to the City's policies applicable to City employees regarding drugs, alcohol, workplace violence, and harassment. Policies will be made available to Concessionaire upon request. Concessionaire will comply with all applicable federal, state and local laws, ordinances and regulations.

O. Non-Exclusivity. The City may engage other persons or entities to operate the Concession as may be reasonably necessary (for example, for special events). Concessionaire acknowledges that it is not entitled to perform any work except as assigned under this Agreement and is not guaranteed any amount of work.

P. Personnel Standards. Personnel employed by Concessionaire shall at all times maintain high standards of hygiene and convey an image consistent with the City's standards and values and treat patrons with courteous consideration at all times. In the event such standards are not maintained, in the judgment of the City, the City may demand the removal of any such personnel, and failure to comply with such demand shall be deemed a breach of this Agreement.

II. RENTAL; FEE STRUCTURE.

A. Monthly Rental Fee. The selected Concessionaire will be responsible for paying the City a Base Minimum Monthly Rental Fee of \$300 from March through October annually. Notwithstanding the foregoing, if the Concession Stand fails to be used or open for business at least once during any month from November 1 through the last day of February, the rental fee for such month shall be waived.

B. Monthly Fee Due Date; Sales and Revenue Statements. On or before the 30th day of each month (the "Due Date"), Concessionaire shall pay to the City the Monthly Rental Fee. Concessionaire shall be assessed a late payment fee of twenty-five dollars (\$25.00) for any payment that remains unpaid after the Due Date. All payments and statements required under this Agreement shall be dropped off in-person or mailed to the City's Finance Department via a check or money order to: 7887 E. 60th Avenue, Commerce City, CO 80022.

C. Year-End Financial Statement; Payments. The Concessionaire shall submit a year-end financial statement to the City with the final payment of the calendar year.

D. Price Control. The City shall have the right to approve prices of all items sold hereunder by Concessionaire, which approval shall not be unreasonably withheld.

E. Appropriation. No provision of this Agreement shall constitute or be deemed a multiple fiscal-year debt or financial obligation of the City in any manner, for any reason whatsoever.

III. TERM AND TERMINATION.

A. Term. The term of this Agreement will be from the Effective Date until December 31, 2023 ("Term"), unless the Term is extended in by validly executed written amendment. The City may extend the Term for up to two (2) potential 1-year Renewal Terms, provided however that the Fee rates set forth in section II above shall not be modified to decrease the compensation structure due and owing to the City for any and all Renewal Terms.

B. Termination.

1. Generally. The City may terminate this Agreement without cause if the City determines that such termination is in the City's best interest. The City will effect such termination by giving written notice of termination to Concessionaire, specifying the effective date of termination, at least fourteen (14) calendar days prior to the effective date of termination.

2. For Cause. If, through any cause, Concessionaire fails to fulfill its obligations under this Agreement in a timely and proper manner, violates any provision of this Agreement or violates any applicable law ("Breach"), the City may terminate this Agreement for cause immediately upon written notice of termination to Concessionaire. Concessionaire will not be relieved of liability to the City for any damages sustained by the City by virtue of any Breach.

3. Effect of Termination. In the event of any termination by the City, the City shall not be liable to Concessionaire for anticipated profits or any and all other types of anticipated future expenses or costs whatsoever. Unless otherwise instructed in writing, Concessionaire will immediately discontinue operation of the Concession business upon receipt of a notice of termination.

C. Removal of Equipment. In case of Breach or termination hereunder, or at the end of the term hereof without renewal, Concessionaire shall vacate the premises within five (5) working days thereafter, and any equipment, materials or supplies not removed from the premises by Concessionaire shall be stored by the City at Concessionaire's expense. Perishable food items, if any, shall be inventoried by the City and then destroyed. The Concession Stand shall be left in as good and as clean a condition as at the commencement of this Agreement, ordinary wear and tear excepted.

IV. **INDEMNITY.**

Concessionaire will be liable and responsible for any and all damages to persons or property caused by or arising out of the negligent or willful actions or omissions in the operation of the Concession by the Concessionaire, its employees, agents, or other persons acting under Concessionaire's direction or control. Concessionaire will indemnify and hold harmless the City, its elected and appointed officials and its employees, agents and representatives (the "Indemnified Parties"), from any and all liability, claims, demands, actions, damages, losses, judgments, costs or expenses, including, but not limited to, attorney fees, which may be made or brought or which may result against any of the Indemnified Parties as a result or on account of the negligent, grossly negligent, willful and wanton, or intentional actions or omissions of Concessionaire and/or its employees, agents or representatives or other persons acting under Concessionaire's direction or control. The provisions set forth in this Section will survive the completion of the operation of the Concession business and the satisfaction, expiration or termination of this Agreement.

V. **TAXES.**

This Agreement is expressly conditional upon the Concessionaire's timely payment of all applicable taxes and fees, including but not limited to all relevant sales taxes, income taxes, and use taxes. Furthermore, this Agreement is expressly conditional upon the Concessionaire's timely completion of all returns and other required forms and documents for any of the aforementioned or non-mentioned taxes and fees. Failure to comply with this provision will be considered breach of contract by the Concessionaire and the City shall be entitled to all damages, costs, and attorneys' fees as they may relate to this Agreement.

VI. INSURANCE.

A. Required Policies. Concessionaire will procure and keep in force the following insurance subject to the conditions below, for the duration of this Agreement:

1. Commercial General Liability Insurance. Comprehensive general liability insurance insuring against any liability for personal injury, bodily injury or death arising out of the operation of the Concession with at least **One Million Dollars (\$1,000,000)** each occurrence.

2. Products and Completed Operations Insurance. Products and completed operations insurance insuring against any liability for bodily injury or property damage caused by the operation of the Concession with a combined single limit of at least **One Million Dollars (\$1,000,000)**.

3. Comprehensive Automobile Liability Insurance. Comprehensive automobile liability insurance insuring against any liability for personal injury, bodily injury or death arising out of the use of motor vehicles and covering operations on or off the site of all motor vehicles controlled by Concessionaire that are used in connection with operation of the Concession, whether the motor vehicles are owned, non-owned or hired, with a combined single limit of at least **One Million Dollars (\$1,000,000)**.

4. Other Insurance. Workers' compensation insurance (unless Concessionaire provides a completed Declaration of Independent Contractor Status Form) and other insurance required by applicable law.

The limits of any insurance required by this Agreement will not limit Concessionaire's liability.

B. Terms of Insurance.

1. Additional Insured. Except for the professional liability policy, if applicable, and workers' compensation policy, **all required insurance policies shall name the City as an additional insured** and will provide that the City, although named as an additional insured, will nevertheless be entitled to recovery under said policies for any loss occasioned to the City or its officers, employees or agents by reason of the negligence of Concessionaire or its officers, employees, agents, subcontractors or business invitees. The insurance policies will be for the mutual and joint benefit and protection of Concessionaire and the City. **Such policies will be written as primary policies not contributing to and not in excess of coverages the City may carry.**

2. Qualification; Deductible. Insurance required by this Section will be with companies qualified to do business in the State of Colorado and may provide for deductible amounts as Concessionaire deems reasonable for the operation of the Concession, but in no event greater than **Ten Thousand Dollars (\$10,000.00)**, and Concessionaire will be responsible for the payment of any such deductible.

3. Cancellation. No such policies will be cancelable or subject to reduction in coverage limits or other modification unless previously approved by the City in writing.

4. Coverage Type. Concessionaire will identify whether the type of coverage is "occurrence" or "claims made." If the type of coverage is "claims made," which at renewal Concessionaire changes to "occurrence," Concessionaire will carry a twelve (12) month tail. Concessionaire will not do or permit to be done anything that will invalidate the policies.

5. Evidence of Coverage. Before commencing work under this Agreement, Concessionaire will provide certificates of insurance policies and all necessary endorsements evidencing insurance

coverage required by this Agreement. The City will not be obligated under this Agreement until Concessionaire provides acceptable such certificates of insurance and endorsements. If the Term extends beyond the period of coverage for any required insurance, Concessionaire will, at least ten (10) days before the expiration of any such insurance coverage, provide the City with new certificates of insurance and endorsements evidencing either new or continuing coverage.

VII. COMPLIANCE WITH C.R.S. § 8-17.5-102; VERIFICATION OF LAWFUL PRESENCE.

A. Certification. Concessionaire hereby certifies that, as of the date of this Agreement, it does not knowingly employ or contract with an illegal alien who will perform work under this Agreement and that Concessionaire will participate in the E-verify Program or Department Program as defined in C.R.S. § 8-17.5-101 in order to confirm the eligibility of all employees who are newly hired to perform work under this Agreement.

B. Pre-Employment Screening. Concessionaire is prohibited from using either the E-verify Program or Department Program procedures to undertake pre-employment screening of job applicants while the Concession is being operated.

C. Concessionaire Obligations. Concessionaire will not knowingly employ or contract with an illegal alien to perform work under this Agreement or contract with a subcontractor that fails to certify to Concessionaire that the subcontractor will not knowingly employ or contract with an illegal alien to perform work under this Agreement. If Concessionaire obtains actual knowledge that a subcontractor performing work under this Agreement knowingly employs or contracts with an illegal alien, Concessionaire will:

1. Notify the subcontractor and the City within three (3) days that Concessionaire has actual knowledge that the subcontractor is employing or contracting with an illegal alien; and
2. Terminate the subcontract with the subcontractor if within three (3) days of receiving the notice required pursuant to this subparagraph d the subcontractor does not stop employing or contracting with the illegal alien; provided, however, that Concessionaire will not terminate the contract with the subcontractor if during such three (3) days the subcontractor provides information to establish that the subcontractor has not knowingly employed or contracted with an illegal alien.

D. Compliance with Investigation. Concessionaire will comply with any reasonable request by the Colorado Department of Labor and Employment (the “Department”) made in the course of an investigation undertaken by the Department pursuant to Article 17.5 of Title 8, C.R.S.

E. Violation. If Concessionaire violates this Section, the City may terminate this Agreement for breach of contract and Concessionaire will be liable for actual and consequential damages to the City.

VIII. NOTICES.

Except for routine communications, written notices required under this Agreement and all other correspondence between the parties will be directed to the following and will be deemed received when hand-delivered or three (3) days after being sent by certified mail, return receipt requested:

If to the City:

Recreation Supervisor - Athletics

If to Concessionaire:

Manager

Parks, Recreation & Golf
City of Commerce City
13905 E. 112th Ave
Commerce City, CO 80022

M & M Tasmanian Devil, Inc.
2501 15th St #2E
Denver, CO 80211

The parties may agree to delivery of notices via electronic mail.

IX. GENERAL PROVISIONS.

A. Independent Contractor. **The relationship between Concessionaire and the City will be as independent contractor, and neither the City nor Concessionaire will be deemed or constitute an employee, servant, agent, partner or joint venturer of the other. Concessionaire is obligated to pay federal and state income tax on any money earned pursuant to this Agreement, and neither Concessionaire nor Concessionaire's employees, agents or representatives are entitled to workers' compensation benefits, unemployment compensation benefits, sick and annual leave benefits, medical insurance, life insurance, or pension or retirement benefits from the City.**

B. No Assignment. Concessionaire will not assign or transfer any rights, interests, or obligations under this Agreement without the City's prior written consent.

C. Governing Law; Jurisdiction and Venue; Recovery of Costs. This Agreement will be governed by the laws of the State of Colorado without regard to its conflicts of laws provisions. For all claims arising out of or related to this Agreement, Concessionaire consents to the exclusive jurisdiction of and venue in the state courts in the County of Adams, State of Colorado. Concessionaire waives any exception to jurisdiction because of residence, including any right of removal based on diversity of citizenship. The prevailing party in any litigation to resolve a dispute between the parties arising from this Agreement will be entitled to recover court costs and reasonable attorney fees from the non-prevailing party.

D. Governmental Immunity. No term or condition of this Agreement will be construed or interpreted as an express or implied waiver of any of the immunities, rights, benefits, protections, or other provisions of the Colorado Governmental Immunity Act, C.R.S. §§ 24-10-101, *et seq.*

E. Time of the Essence. Concessionaire acknowledges that time is of the essence in the performance of this Agreement. Concessionaire's failure to complete any of the Services during the Term, or as may be more specifically set forth in an exhibit, notice to proceed, change order, or any approved progress schedule, will be deemed a breach of this Agreement.

F. No Third-Party Beneficiaries. Enforcement of the terms and conditions of this Agreement and all rights of action relating to such enforcement will be strictly reserved to the parties. Any person other than the City and Concessionaire will be deemed to be only an incidental beneficiary under this Agreement.

G. No Waiver. The waiver of any breach of a term of this Agreement, including the failure to insist on strict compliance or to enforce any right or remedy, will not be construed or deemed as a waiver of any subsequent breach of such term; any right to insist on strict compliance with any term; or any right to enforce any right or remedy with respect to that breach or any other prior, contemporaneous, or subsequent breach.

H. Rules of Construction. Neither party will be deemed to have drafted this Agreement. This Agreement has been reviewed by all parties and will be construed and interpreted according to the ordinary meaning of the words used so as to fairly accomplish the purposes and intentions of all parties. No term of this Agreement will be construed or resolved in favor of or against the City or Concessionaire on the basis

of which party drafted the uncertain or ambiguous language. Where appropriate, the singular includes the plural and neutral words and words of any gender will include the neutral and other gender. Paragraph headings used in this Agreement are for convenience of reference and will in no way control or affect the meaning or interpretation of any provision of this Agreement.

I. Severability. A holding by a court of competent jurisdiction that any term of this Agreement is invalid or unenforceable will not invalidate or render unenforceable any other term of this Agreement.

J. Acknowledgement of Open Records Act. Concessionaire acknowledges that the City is a public entity subject to the Colorado Open Records Act, C.R.S. § 24-72-201, *et seq.*, and this Agreement and any related documents are subject to public disclosure.

K. Authority. The parties represent and warrant that they have taken all actions necessary to legally authorize the undersigned signatories to execute this Agreement for the parties and to bind the parties to its terms. The signatories represent and warrant that each has legal authority to execute this Agreement for the party he or she represents and to bind that party to its terms.

L. Counterparts. This Agreement may be executed in any number of counterparts, each deemed to be an original, and, taken together will constitute one and the same instrument.

M. Entire Agreement; Modification; Binding Effect. This Agreement contains the entire agreement of the parties relating to the subject matter of this Agreement and, except as expressly provided, may not be modified or amended except by validly executed written agreement of the parties. All prior and contemporaneous agreements and understandings, whether oral or written, are superseded by this Agreement and are without effect to vary or alter any terms or conditions of this Agreement. This Agreement will be binding upon, and will inure to the benefit of, the parties and their respective heirs, personal representatives, successors and assigns.

[Remainder of this page intentionally left blank – signature page(s) follow(s).]

IN WITNESS WHEREOF, the parties have executed this Agreement as of the Effective Date.

CITY OF COMMERCE CITY

Jason Rogers, City Manager
City Manager's Office

ATTEST:

APPROVED AS TO FORM:

Dylan A. Gibson, City Clerk

Matt Hader, Interim City Attorney

M & M TASMANIAN DEVIL, INC.

Signature

Printed Name, Title

EXHIBIT B

List of Equipment Owned by the City

Ice Machine, Refrigerator, Freezer

Stainless Steel Tables (3)

Stainless Steel Sink (1)



7887 East 60th Avenue

Commerce City, Colorado 80022

Phone (303) 289-3627

EQUIPMENT DECLARATION

Company: _____

Date: _____

Address: _____

State and Zip: _____

Note: Construction equipment that was not otherwise subjected to the Commerce City sales or use tax, and which is located within the boundaries of the City of Commerce City for a period of thirty (30) consecutive days or less, will be subjected to the use tax of Commerce City on a prorated basis if the equipment is declared in advance. **If the equipment is not declared in advance or is located within the City for over thirty (30) consecutive days, the amount of tax due will be calculated on 100% of the original purchase price.**

The tax on Declared Equipment will be calculated using the following method: **The original purchase price of the equipment will be multiplied by a fraction, the numerator of which is one (1) and the denominator which is twelve (12); and the result will be multiplied by four and one-half percent (4.5%) to determine the amount of Use Tax payable to the City.** Example: thirty (30) days or less = $\frac{1}{12}$ x purchase price of the equipment x 4.5%.

In order for a taxpayer to qualify for this exemption, the taxpayer must comply with the procedures described in Section 29-2-109(4) of the Colorado Revised Statutes by completing this form and remitting the tax due to the Finance Department of the City of Commerce City. **If the taxpayer does not file this form the exemption herein provided for will be deemed waived by the taxpayer.**

A separate declaration form must be used for each individual piece of equipment.

Construction Equipment Declared:

Description of Equipment and/or VIN number: _____

Purchase price of above equipment and date purchased: _____

Date equipment will enter the City: _____

Date equipment will be removed from the City: _____