

EXCLUSIVE NEGOTIATING AGREEMENT

35580

THIS EXCLUSIVE NEGOTIATING AGREEMENT (this "Agreement") is entered into as of June 15, 2020 (the "Effective Date"), by and between the CITY OF LONG BEACH, a municipal corporation ("City"), pursuant to a minute order adopted by its City Council at a meeting on March 10, 2020, and CHOURA VENUE SERVICES, a California corporation, dba Grand Food and Beverage ("Concessionaire") (Concessionaire and City are collectively referred to herein as the "Parties").

RECITALS

The following recitals are substantive part of this Agreement:

A. City is the owner of a public park commonly known as El Dorado Park more particularly described and/or depicted in the Site Map attached hereto as Exhibit "A" (the "Park").

B. A portion of the Park as shown on Exhibit "A" consists of existing improvements suitable for concessions and/or special events (the "Site"). The Site is not currently in use.

C. Concessionaire has expressed an interest in operating concessions at the Site to serve the public and has submitted documentation to City detailing its qualifications to so operate.

D. The purpose of this Agreement is to establish a period during which Concessionaire and City shall exclusively negotiate with each other toward a license, lease or concession agreement and other related documents, as mutually determined by the parties (collectively, "Lease") for Concessionaire's operation and improvement of the Site (the "Proposed Operation").

NOW THEREFORE, the Parties mutually agree as follows:

1. Agreement to Negotiate. City and Concessionaire agree that for the term of the Negotiating Period (as set forth in Section 2) each party shall negotiate diligently and in good faith with respect to the Proposed Operation of the Site to identify allowed uses and activities, hours of operation, rent structure, and other terms to (1) enhance park users' experience and offer new services; (2) generate general fund revenue needed to support overall Parks, Recreation and Marine Department services such as park operations and maintenance; and, (3) develop, operate, and maintain food and beverage concessions, event spaces, retail, or other customer-oriented services at the three locations. In furtherance thereof, Concessionaire shall provide City with its financial statements, financial models showing proposed revenue generation by the Proposed Operation and other proformas showing potential revenue to City. Any proposed or identified activities shall be conducted with the regard to preserving and protecting the open space and wildlife habitat surrounding the sites. If acceptable terms are reached,

City and Concessionaire agree to negotiate the terms of and prepare a Lease of the Site to Concessionaire and the Proposed Operation of the Site for presentation to the Parks and Recreation Commission and City Council for its consideration, action, and approval. The Lease will be in a format to be mutually negotiated by the Parties. City agrees to negotiate exclusively with Concessionaire for the operation and improvement of the Site, and not negotiate with any other person or entity for, or approve any other operations at, the Site or any portion thereof during the Negotiating Period. Notwithstanding anything to the contrary in this Agreement, the Parties acknowledge and agree that the City is negotiating with Little Brass Café Express, LLC, a California limited liability company ("Little Brass Café"), during the Negotiating Period and such negotiations shall not constitute a violation of this Agreement. The Parties further acknowledge and agree that negotiations with Concessionaire and Little Brass Café may result in separate agreements with each for operations of portions of the Site, an agreement with one but not the other for operation of the Site, or an agreement with a new entity owned and/or operated by both Concessionaire and Little Brass Café in partnership.

2. Negotiating Period. City and Concessionaire agree to negotiate exclusively (subject to negotiations with Little Brass Café) for one hundred eighty (180) days after the Effective Date (the "Negotiating Period"), subject to one (1) ninety (90) day extension period upon mutual agreement of the Parties, for the purpose of determining whether to enter into a Lease for the Site and, if so, the terms and conditions of such Lease. If, upon expiration of the Negotiating Period, a Lease has not been approved and executed by City and Concessionaire, then (i) this Agreement shall automatically terminate, (ii) Concessionaire shall have no further rights regarding the subject matter of this Agreement or the Site, and (iii) City shall be free to negotiate with any other person or entity with regard to the Site.

3. Lease. The Lease shall, without limitation, require Concessionaire to operate concessions which are open and accessible to the public and otherwise in accordance with all applicable rules and regulations governing Long Beach Park operations and otherwise.

4. Due Diligence. Concessionaire and its consultants, at Concessionaire's sole cost and expense, shall have the right to inspect the Site and conduct such engineering, hazardous or toxic material, pollution, seismic or other tests, studies and investigation as Concessionaire may require (collectively, the "Inspections").

(a) Concessionaire shall cause the Inspections to be conducted within park hours of operation and at times reasonably acceptable to City in a manner that does not materially adversely affect the Site or unreasonably disrupt or interfere with the operation of the Park or other permitted park activity. City may have a representative present at any Inspections of the Site. In conducting its Inspections at the Site, Concessionaire and its agents and representatives shall (i) not damage any part of the Site or any personal property owned or held by any third party, (ii) promptly repair any damage to the Site resulting directly or indirectly from the entry by Concessionaire or its agents, employees, contractors and representatives or from any such inspections, tests, investigations or studies, (iii) not injure or otherwise cause bodily harm to City, or its

tenants, agents, guests, invitees, contractors and employees, (iv) comply with all applicable laws, (v) promptly pay when due the costs of all inspections, tests, investigations, and studies done with regard to the Site, and (vi) not permit any liens to attach to the Site by reason of the exercise of Concessionaire's rights hereunder.

(b) As a condition precedent to the effectiveness of this Agreement, Concessionaire shall procure and maintain at Concessionaire's expense for the duration of this Agreement from an insurance company that is admitted to write insurance in the State of California or that has a rating of or equivalent to an A:VIII by A.M. Best and Company the following insurance:

(i) Commercial general liability insurance or self-insurance equivalent in coverage scope to ISO CG 00 01 10 93 naming the City of Long Beach, and its officials, employees, and agents as additional insureds on a form equivalent in coverage scope to ISO CG 20 26 11 85 from and against claims, demands, causes of action, expenses, costs, or liability for injury to or death of persons, or damage to or loss of property arising out activities performed by or on behalf of the Concessionaire in an amount not less than One Million Dollars (US \$1,000,000) per occurrence and Two Million Dollars (US \$2,000,000) in general aggregate.

(ii) Workers' compensation coverage as required by the Labor Code of the State of California and Employer's liability insurance with minimum limits of One Million Dollars (US \$1,000,000) per accident or occupational illness. The policy shall be endorsed with a waiver of the insurer's right of subrogation against the City of Long Beach, and their officials, employees, and agents.

(iii) Automobile liability insurance equivalent in coverage scope to ISO CA 00 01 06 92 in an amount not less than Five Hundred Thousand Dollars (US \$500,000) combined single limit (CSL) covering Symbol 1 ("any auto").

(iv) Professional liability or errors and omissions liability insurance in an amount not less than One Million Dollars (\$1,000,000) per claim and in aggregate covering the architectural, engineering, planning, or other professional services provided pursuant to this Agreement.

Any self-insurance program or self-insurance retention must be approved separately in writing by City and shall protect the City of Long Beach, and its officials, employees, and agents in the same manner and to the same extent as they would have been protected had the policy or policies not contained retention provisions. Each insurance policy shall be endorsed to state that coverage shall not be suspended, voided, or canceled by either party except after thirty (30) days prior written notice to City, and shall be primary and not contributing to any other insurance or self-insurance maintained by City. Concessionaire shall deliver to City certificates of insurance and original endorsements for approval as to sufficiency and form prior to the start of performance hereunder. The certificates and endorsements for each insurance policy shall contain the original signature of a person authorized by that insurer to bind coverage on its behalf.

“Claims-made” policies are not acceptable unless City Risk Manager determines that “Occurrence” policies are not available in the market for the risk being insured. In a “Claims-made” policy is accepted, it must provide for an extended reporting period of not less than one hundred eighty (180) days. Such insurance as required herein shall not be deemed to limit Concessionaire’s liability relating to performance under this Agreement. City reserves the right to require complete certified copies of all said policies at any time. Any modification or waiver of the insurance requirements herein shall be made only with the approval of City Risk Manager. The procuring of insurance shall not be construed as a limitation on liability or as full performance of the indemnification provisions of this Agreement.

(c) Promptly upon completion of each Inspection, Concessionaire shall cause the portion of the Site subject to such Inspection to be restored to the condition existing immediately prior to such Inspection. Concessionaire shall provide City, at no additional charge, with copies of the results of each Inspection made by or for Concessionaire concurrently with Concessionaire's receipt of such results. Such information shall be furnished without any representation or warranty whatsoever as to the truth or accuracy or completeness of such information and City shall rely on such information at its sole risk and expense with no recourse against Concessionaire or its consultants.

(d) In addition to the Inspections, Concessionaire shall have the right to conduct park user surveys and temporary “pop-up” events during the Negotiation Period, subject in both cases to the advance approval of the Director of the Parks, Recreation & Marine Department and/or the Parks and Recreation Commission. Copies of all survey data and “pop-up” results will be provided to the City.

(e) Concessionaire hereby indemnifies, defends, and holds harmless City and its officers, employees, directors, shareholders, agents, representatives, affiliates, contractors, invitees and tenants, and the heirs, executors, successors and assigns of all of the foregoing, and the Site, free and harmless from and against any and all claims, damages, liabilities, demands, actions, liens, stop notices, losses, costs and expenses (including without limitation reasonable attorneys' fees and court costs) arising from or as a result of Concessionaire’s occupancy of the Site or the Park (including without limitation the conduct of Inspections at the Site), except to the extent caused by an indemnified party's gross negligence, recklessness or intentional misconduct.

(f) Concessionaire's obligations under this Section 4 shall survive the expiration or termination of this Agreement.

5. No Predetermination of City Discretion. The Parties agree and acknowledge that nothing in this Agreement in any respect does or be construed to affect or prejudice the exercise of City’s discretion concerning consideration of the Proposed Operation or the Lease, or any submittal by Concessionaire. The Parties do not intend this Agreement to be a development agreement, lease, purchase agreement or other agreement for the lease or other conveyance of land or the construction or development of improvements thereon. The parties acknowledge that they have not agreed upon the

essential terms of the subject matter of an agreed transaction, and that such essential terms will be the subject matter of further negotiations. City does not intend by this Agreement to commit to a definite course of action with respect to the Proposed Operation or the Lease. City retains full discretion with respect to the Proposed Operation and the Lease, any CEQA documentation with respect to the Proposed Operation and the Lease, and any mitigation measures or alternatives to the Proposed Operation pursuant to CEQA, including a decision not to proceed with the Lease.

6. Costs and Expenses. All fees and expenses for engineers, architects, financial consultants, legal, planning and other consultants and contractors, retain by Concessionaire to perform Concessionaire's obligations under this Agreement, shall be the sole responsibility of Concessionaire. City shall not be obligated to pay or reimburse any costs or fees incurred by Concessionaire in performance of any of the obligations of Concessionaire under this Agreement, whether or not this Agreement is terminated, extended, or results in the execution of the Lease.

7. Change in Concessionaire. The qualifications of Concessionaire are of particular interest to City. Consequently, no person or entity, whether a voluntary or involuntary successor of Concessionaire, shall acquire any rights or powers under this Agreement, nor shall Concessionaire assign all or any part of this Agreement, without the prior written approval of City, which approval City may grant, withhold or deny at its sole and absolute discretion. Any other purported transfer, voluntarily or by operation of law, shall be absolutely null and void and shall confer no rights whatsoever upon any purported assignee or transferee.

8. Address for Notices. Any notices pursuant to this Agreement shall be in writing and sent (i) by Federal Express (or other established express delivery service which maintains delivery records), (ii) by hand delivery, or (iii) by certified or registered mail, postage prepaid, return receipt requested, to the following addresses:

To City: City of Long Beach
411 West Ocean Boulevard, 10th Floor
Long Beach, California 90802
Attn: City Manager

To Concessionaire: Grand Food and Beverage
4101 East Willow Street
Long Beach, California 90815
Attn: Dan D'sa

Any party may designate a different address for itself by notice similarly given. Any notice, demand or document so given, delivered or made by United States mail, shall be deemed to have been given upon actual delivery or attempted delivery, provided such attempted delivery is made on a business day. Any such notice, demand or document not given by registered or certified mail or by overnight delivery service as aforesaid shall be deemed to be given, delivered or made upon receipt of the same by the party to whom the same is to be given or delivered.

9. Default. Failure by either party to negotiate in good faith or to perform any other of its duties as provided in this Agreement shall constitute an event of default under this Agreement. The non-defaulting party shall give written notice of a default to the defaulting party, specifying the nature of the default and the action required to cure the default. If the default remains uncured fifteen (15) days after the date of such notice, the non-defaulting party may exercise the remedies set forth in Section 10.

10. Remedies for Breach of Agreement. In the event of an uncured default under this Agreement, the sole remedy of the non-defaulting party shall be to terminate this Agreement. Following the termination of this Agreement, neither party shall have any further rights, remedies or obligations under this Agreement, except as specifically set forth herein. Neither party shall have any liability to the other for monetary damages for the failure to reach agreement on a Lease despite its good faith efforts, and each party hereby waives and releases any such rights or claims it may otherwise have at law or at equity with respect to such failure. Furthermore, Concessionaire knowingly agrees that under no circumstance, including an uncured default by City under this Agreement, shall Concessionaire have the right to specific performance for conveyance of any right, title or interest in the Site or any portion thereof and Concessionaire shall not file a lis pendens with respect to the Site or any portion thereof. The Parties' rights and obligations under this Section 10 shall survive the expiration or termination of this Agreement.

11. Entire Agreement. This Agreement constitutes the entire understanding and agreement of the Parties, integrates all of the terms and conditions mentioned herein or incidental hereto, and supersedes all negotiations or previous agreements between the Parties or their predecessors-in-interest with respect to all or any part of the subject matter hereof.

12. Time of Essence. Time is of the essence of every portion of this Agreement in which time is a material part.

13. Agreement Does Not Constitute Development Approval. City reserves final discretion and approval as to any Lease and all proceedings and decisions in connection therewith. This Agreement shall not be construed as a grant of development rights or land use entitlements to construct the Proposed Operation or any other project on the Site. All design and building plans for the Proposed Operation (if any) shall be subject to the review and approval of City. By its execution of this Agreement, City is not committing itself to or agreeing to undertake the disposition of the Site to Concessionaire, or any other acts or activities requiring the subsequent independent exercise of discretion by City or any agency or department thereof.

14. Governing Law. This Agreement shall be construed in accordance with the laws of the State of California.

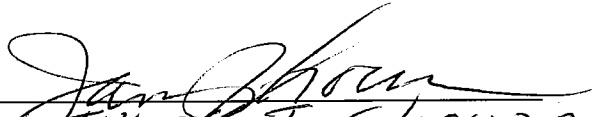
15. Amendments. This Agreement may not be altered, amended, changed, waived, terminated or modified in any respect or particular unless the same shall be in writing and signed by or on behalf of the Party to be charged therewith.

16. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, but which when taken together shall constitute one and the same instrument.

NOW THEREFORE, City and Concessionaire have executed this Exclusive Negotiating Agreement as of the date first set forth above.

CHOURA VENUE SERVICES, a California corporation

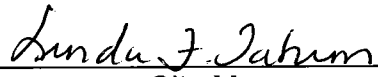
June 15, 2020

By 
Name JAMES J. CHOURA
Title OWNER

"Concessionaire"

CITY OF LONG BEACH, a municipal corporation

July 1, 2020

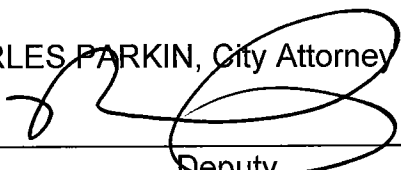
By 
City Manager

"City"

EXECUTED PURSUANT
TO SECTION 301 OF
THE CITY CHARTER

This Agreement is approved as to form on June 29, 2020.

CHARLES PARKIN, City Attorney

By 
Deputy