

RESOLUTION NO. 2022-32205

A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AUTHORIZING THE CITY MANAGER TO ENTER INTO CONCESSIONAIRE AGREEMENTS WITH SELECTED RESTAURANTEURS, AS THE CITY MANAGER MAY DEEM APPROPRIATE, TO PROVIDE OUTDOOR FOOD AND BEVERAGE SERVICE AND CONSUMPTION ON CITY RIGHTS-OF-WAY, PROVIDED THAT SAID CONCESSIONAIRE AGREEMENTS ARE SUBSTANTIALLY SIMILAR, WITH REGARD TO ALL MATERIAL TERMS AND CONDITIONS, TO THE TEMPLATE CONCESSIONAIRE AGREEMENT ATTACHED HERETO AS EXHIBIT "A", AND FURTHER, AUTHORIZING THE CITY MANAGER TO NEGOTIATE CONCESSION AGREEMENTS WITH TERMS MATERIALLY DIFFERENT FROM THE APPROVED TEMPLATE, AND AUTHORIZING THE CITY MANAGER TO SUSPEND AND/OR TERMINATE ANY CONCESSION AGREEMENT IF THE CITY MANAGER DEEMS IT TO BE IN THE CITY'S BEST INTEREST.

**WHEREAS**, the City Commission today creates, solely in the City's proprietary capacity and not in furtherance of any regulatory function, a concession agreement program for selected restaurants with brick-and-mortar facilities and inside seating to offer food and beverage services on the rights-of-way abutting the physical establishment. The Program is intended to serve the valid public purpose of promoting the quality of the City's iconic brand by establishing high quality outdoor food and beverage service on City property, and positively represent the City's brand by providing a public space where residents and visitors can enjoy the City's world-renowned architecture and scenic sun-drenched vistas; and

**WHEREAS**, the City currently and successfully utilizes a concession agreement model with Smith and Wollensky restaurant to facilitate outdoor dining on the City's property adjacent to that full-service restaurant (and has successfully used this model for many years there), and has now determined to implement this successful paradigm Citywide; and

**WHEREAS**, those outdoor cafés in the concession program must always be operated and maintained at the highest levels of quality and service, befitting an internationally renowned resort destination like the City of Miami Beach, if the City's public purpose is to be achieved; and

**WHEREAS**, the concessionaires in this concession program will include only the best restaurants in the City, chosen at the City Manager's sole discretion, and it will be exclusively those concessionaires who are offered a contract to represent the City's proprietary interests that shall be authorized to sell food and beverages for dining at outdoor cafés on the public rights-of way abutting a restaurant's indoor establishment, except that all existing sidewalk café operators shall be offered the opportunity to enter into a concession agreement for the contract term beginning October 1, 2022; and

**WHEREAS**, because the concession program will be available only to each restaurant abutting the public right-of-way with available space to locate the concession where the City's land-use regulations allow sidewalk cafes, a competitive bidding framework for award of each concession agreement would apply in this case; and

**WHEREAS**, the City Commission approves the agreement template, attached here as Exhibit A; and

**WHEREAS**, the City Commission delegates to the City Manager or her designee the authority to execute, at her discretion, all concession agreements, consistent with the terms of this resolution and the agreement attached here, after receiving a letter of interest from a proposed concessionaire (on a form to be approved and distributed by the City Manager or her designee); and

**WHEREAS**, the City Commission authorizes the City Manager to negotiate, at her sole discretion, concession agreements with terms materially different from the approved template, with the City Manager retaining the option to seek City Commission approval of such changes, by resolution of the City Commission; and

**WHEREAS**, notwithstanding any provision to the contrary in this resolution, nothing herein shall preclude the City Manager from seeking direction from the City Commission regarding any matter arising out of or related to the agreement, including, without limitation, any approval contemplated under the agreement (within the timeframe specified therefor) or any proposed amendment or modification to the agreement; and

**WHEREAS**, there shall be no change permitted to currently applicable hours for alcohol service and consumption unless approved by the City Commission; and

**NOW, THEREFORE, BE IT DULY RESOLVED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, that:**

The Mayor and the City Commission hereby authorize the City Manager to enter into concession agreements with selected restaurateurs, as the City Manager may deem appropriate and consistent with the recitals set forth here, to provide outdoor food and beverage service and consumption on City rights-of-way, without competitive bidding or any further action or approval of the City Commission being necessary, provided that said concessionaire agreements are substantially similar, with regard to all material terms and conditions, to the template concessionaire agreement, authorize the City Manager to negotiate concession agreements with terms materially different from the approved template to be individually approved, if at all, by resolution of the City Commission, and authorize the City Manager to suspend and/or terminate any concession agreement if he or she deems it to be in the City's best interest.

**PASSED AND ADOPTED** this 22 day of Jun, 2022.



\_\_\_\_\_  
Mayor Dan Gelber

**ATTEST:**



\_\_\_\_\_  
Rafael E. Granado, City Clerk

(Sponsored by Mayor Dan Gelber, Vice-Mayor Kristen Rosen Gonzalez, Commissioner Alex Fernandez, Commissioner David Richardson, and Commissioner Mark Samuelian)



**APPROVED AS TO  
FORM & LANGUAGE  
& FOR EXECUTION**

  
\_\_\_\_\_  
City Attorney

6-9-22  
\_\_\_\_\_  
Date

# MIAMI BEACH

## COMMISSION MEMORANDUM

TO: Honorable Mayor and Members of the City Commission  
FROM: Rafael A. Paz, City Attorney  
DATE: June 22, 2022

SUBJECT: A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AUTHORIZING THE CITY MANAGER TO ENTER INTO CONCESSIONAIRE AGREEMENTS WITH SELECTED RESTAURANTEURS, AS THE CITY MANAGER MAY DEEM APPROPRIATE, TO PROVIDE OUTDOOR FOOD AND BEVERAGE SERVICE AND CONSUMPTION ON CITY RIGHTS-OF-WAY, PROVIDED THAT SAID CONCESSIONAIRE AGREEMENTS ARE SUBSTANTIALLY SIMILAR, WITH REGARD TO ALL MATERIAL TERMS AND CONDITIONS, TO THE TEMPLATE CONCESSIONAIRE AGREEMENT ATTACHED HERETO AS EXHIBIT "A"; AND FURTHER, AUTHORIZING THE CITY MANAGER TO NEGOTIATE CONCESSION AGREEMENTS WITH TERMS MATERIALLY DIFFERENT FROM THE APPROVED TEMPLATE, AND AUTHORIZING THE CITY MANAGER TO SUSPEND AND/OR TERMINATE ANY CONCESSION AGREEMENT IF THE CITY MANAGER DEEMS IT TO BE IN THE CITY'S BEST INTEREST.

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### ANALYSIS

Pursuant to the request of Mayor Dan Gelber, Vice-Mayor Kristen Rosen Gonzalez, Commissioner Alex Fernandez, Commissioner David Richardson, and Commissioner Mark Samuelian, the above-referenced Ordinance is submitted for consideration by the Mayor and Commission at the June 22, 2022 City Commission Meeting.

### SUPPORTING SURVEY DATA

N/A

### FINANCIAL INFORMATION

N/A

### Applicable Area

Citywide

Is this a "Residents Right to Know" item, pursuant to City Code Section 2-14?

Does this item utilize G.O. Bond Funds?

Yes

No

**Legislative Tracking**

Office of the City Attorney

**Sponsor**

Mayor Dan Gelber, Vice-Mayor Rosen Gonzalez, Commissioners Fernandez, Richardson and Samuelian

**ATTACHMENTS:**

**Description**

- ▣ Commission Memorandum
- ▣ Resolution
- ▣ Exhibit "A" - Concession Agreement

## COMMISSION MEMORANDUM

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**FROM:** Rafael A. Paz, City Attorney 

**DATE:** June 22, 2022

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The proposed Resolution (the "Resolution"), which is sponsored by Mayor Dan Gelber, Vice-Mayor Kristen Rosen Gonzalez, Commissioner Alex Fernandez, Commissioner David Richardson, and Commissioner Mark Samuelian, if approved, creates a concession agreement program for outdoor dining on the public rights-of-way, approves a template agreement for concessionaires, and authorizes the City Manager, pursuant to the terms of the concession agreement, to suspend or terminate any concession agreement if she deems it to be in the City's best interest to do so.

The attached proposed template concession agreement contains the following general terms:

1. Two-year term from October 1, 2022 to September 30, 2024;
2. A cumulative per square-foot fee of \$32 for cafes on sidewalks and \$75 for parking space cafes;
3. Consumer protection terms and conditions for concessionaires;
4. Notices of breach of contract replace code violations previously found in the sidewalk café ordinance;
5. Binding arbitration replaces court for disputes;
6. Suspension for public safety or other emergencies; termination for convenience and/or for cause.

### **BACKGROUND**

The proposed Resolution would create, solely in the City's proprietary capacity and not in furtherance of any regulatory function, a concession agreement program for selected restaurants with brick-and-mortar facilities and inside seating to offer food and beverage services on the rights-of-way abutting the physical establishment. The Program is intended to serve the valid public purpose of promoting the quality of the City's iconic brand by establishing high quality outdoor food and beverage service on City property, and positively represent the City's brand by providing a public space where residents and visitors can enjoy the City's world-renowned architecture and scenic sun-drenched vistas.

The City currently and successfully utilizes a concession agreement model with Smith and Wollensky restaurant to facilitate outdoor dining on the City's property adjacent to that full-service restaurant (and has successfully used this model for many years there), and this Resolution proposes to implement this successful paradigm Citywide.

Those outdoor cafés in the proposed concession program are intended to always be operated and maintained at the highest levels of quality and service, befitting an internationally renowned resort destination like the City of Miami Beach, if the City's public purpose is to be achieved.

Because the concession program will be available only to each restaurant abutting the public right-of-way with available space to locate the concession where the City's land-use regulations allow sidewalk cafes, a competitive bidding framework for award of each concession agreement would not apply in this case.

The proposed Resolution also delegates to the City Manager or her designee the authority to execute, at her discretion, all concession agreements, consistent with the terms of the proposed Resolution and the template agreement attached here, after receiving a letter of interest from a proposed concessionaire (on a form to be approved and distributed by the City Manager or her designee).

The proposed Resolution also authorizes the City Manager to negotiate, at her sole discretion, concession agreements with terms materially different from the approved template, with the City Manager retaining the option to seek City Commission approval of such changes, by resolution of the City Commission.

The proposed Resolution also provides that, notwithstanding any provision to the contrary, nothing shall preclude the City Manager from seeking direction from the City Commission regarding any matter related to the Resolution or the concession agreement, including any approval contemplated under the agreement (within the timeframe specified therefor) or any proposed amendment or modification to the agreement.

Finally, the proposed Resolution also provides that there shall be no change permitted to currently applicable hours for alcohol service and consumption unless approved by the City Commission.

RAP/RFR/mm

## CONCESSION AGREEMENT

**THIS CONCESSION AGREEMENT** ("the Agreement") is made this \_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, and shall become effective on the Commencement Date as defined in Section 3(A), between the CITY OF MIAMI BEACH, FLORIDA, a municipal corporation of the State of Florida, operating in its proprietary capacity (hereinafter called the "City"), having its principal address at 1700 Convention Center Drive, Miami Beach, Florida, 33139, and the Concessionaire listed in Section 2(A) below (hereinafter called "Concessionaire"). The City and Concessionaire are sometimes hereinafter referred to collectively as the "Parties" and individually as a "Party".

WHEREAS, the City has created a concession program (the "Program") on the City's public rights-of-way for a valid public purpose, including increasing the quality of the outdoor dining experience for the City's residents and visitors and promoting the City's iconic worldwide brand by allowing residents and visitors to enjoy food and beverage service while surrounded by the City's world-renowned architecture and scenic sun-drenched vistas; and

WHEREAS, the City has created this Program in its proprietary capacity with respect to the use of City-owned property or rights-of-way dedicated to the public and not in any regulatory capacity; and

WHEREAS, participation in the Program will be limited to restaurant operators who, in the City Manager's sole discretion, best reflect the City's vision to be a cleaner, safer, more beautiful and vibrant, mature and stable, cultural, entertainment and tourism capital; and those that are operated and maintained in accordance with the highest level of service and quality, befitting the status of a recognized world-class international resort destination like the City;

NOW, THEREFORE, in consideration of the Recitals and the mutual promises herein made and for other good and valuable consideration, the receipt and sufficiency of which the Parties hereby acknowledge, the City and Concessionaire hereby agree as follows:

### ARTICLE I GENERAL TERMS AND CONDITIONS

1. **PURPOSE:**

The Parties hereby incorporate by this reference the Recitals set forth above. The Parties mutually agree that the Program and its objectives are in the vital and best interests of the City and in furtherance of the public purposes set forth above.

2. **CONCESSION:**

The City hereby grants to the Concessionaire, and the Concessionaire hereby accepts from the City, the rights to maintain, manage, and operate an outdoor food and beverage concession (the "Concession") within the Concession Area (as hereinafter defined), in accordance with the purpose(s) and subject to all the terms and conditions herein contained.

# Exhibit "A"



- A. The Concessionaire is: [Owner/Tenant/Operator of restaurant space]
- B. The Concession site is: [Restaurant name and address]
- C. All Current Ultimate Beneficial Owners and/or Corporate Officers of this Restaurant: [List all]

(Failure to accurately disclose all ultimate beneficial owners and corporate officers shall constitute an incurable breach of this Agreement pursuant to Section 8(A)(iv)(below)).

3. **AGREEMENT TERM/TIMELINE:**

- A. Term: Two years; October 1, 2022 ("Commencement Date") through September 30, 2024.

Contract Manager: [Right-of-way Manager for the City's Public Works Department or his/her designee].

4. **PAYMENT FOR CONCESSION:**

- A. **CONCESSION FEE:** Concessionaire agrees to pay to the City, for the use of the rights-of-way:
  - i. FOR SIDEWALK SPACE SOUTH OF 63<sup>RD</sup> STREET, EXCEPT FOR SIDEWALK SPACE WITH UP TO 30 SEATS LOCATED WITHIN THE COLLINS PARK ARTS DISTRICT OVERLAY: [\$17 x square feet annually]
  - ii. FOR ON-STREET PARKING SPACES: [\$60 x sq ft]
  - iii. FOR SIDEWALK SPACE NORTH OF 63<sup>RD</sup> STREET, AND SIDEWALK SPACE WITH UP TO 30 SEATS WITHIN THE COLLINS PARK ARTS DISTRICT OVERLAY: No Concession Fee.
- B. **MONITORING FEE:** FOR SIDEWALK SPACE SOUTH OF 63<sup>RD</sup> STREET, EXCEPT FOR SIDEWALK SPACE WITH UP TO 30 SEATS LOCATED WITHIN THE COLLINS PARK ARTS DISTRICT OVERLAY, AND FOR ALL ON-STREET PARKING SPACES CITYWIDE: [\$15 x square feet annually]
- C. **PAYMENT TERMS:** The Concession Fee and Monitoring Fee shall be paid by or before the commencement of the Term. Notwithstanding the foregoing, if the sum of the Concession Fee and the Monitoring Fee is higher than \$2,000, the fees may be paid in four installments as follows: (i) twenty-five percent (25%) of the Concession Fee and Monitoring Fee shall be paid by or before the effective date of this Agreement and (ii) the remaining seventy-five percent (75%) shall be paid in up to three equal payments by the first day of the sixth (6<sup>th</sup>), twelfth (12<sup>th</sup>), and eighteenth (18<sup>th</sup>) months following the effective date of this agreement.

- D. **FEE WAIVER:** The City Manager, in her sole discretion and judgment, may suspend or prorate the annual Concession Fee and Monitoring Fee in cases of public construction or public emergency situations, without suspending or terminating this Concession Agreement.
- E. **TAXES, ASSESSMENTS:** Concessionaire agrees and shall pay, before delinquency, all taxes and assessments of any kind (including, without limitation, ad valorem taxes, if assessed, and/or Resort Taxes) levied or assessed upon the City and/or Concessionaire and/or the Concession Area including, without limitation, any such taxes and/or assessments that may be levied and/or assessed against the City and/or Concessionaire and/or the Concession Area by reason of this Agreement, or by reason of the business or other operations and/or activities of Concessionaire upon or in connection with the Concession Area.

5. **NOTICES:**

Any notices required under this agreement shall be delivered via e-mail to the following addresses:

**FOR THE CONCESSIONAIRE:**

**FOR THE CITY:** [concessionnotices@miamibeachfl.gov](mailto:concessionnotices@miamibeachfl.gov)

6. **DEFINED TERMS:**

As used herein the term:

- A. **"APPROVED SITE PLAN"** means an engineering drawing, signed and sealed by a duly licensed architect or engineer, which accurately depicts the layout and dimensions of the Concession Area and the adjacent private property; proposed location, size and number of tables, chairs, umbrellas, and any other Concession Facilities and location of doorways, steps, trees and/or landscaped areas, fountains, parking meters, fire hydrants, bus shelters, directory/kiosks, public benches, trash receptacles, and any other existing public fixtures, furnishings and/or other obstruction(s) within the proposed Concession Area. The Site Plan shall be approved by the City Manager prior to the execution of this Agreement, and the Concession shall be specifically limited to the subject area shown on the Approved Site Plan.
- B. **"CITY MANAGER"** means the City Manager of the City of Miami Beach or his or her designee(s).
- C. **"CONCESSION"** means the use by Concessionaire of an approved Concession Area (as defined herein) for outdoor seating in connection with the operation of food and beverage services, ancillary to the operation of Concessionaire's Full-Service Restaurant, that is primarily characterized by tables and chairs, which may be shaded by awnings, canopies or umbrellas, but may also include such other

Concession Facilities (as defined herein) for the purpose of advancing the City's proprietary purposes for the Concession program.

- D. **"CONCESSION AREA"** means the area set forth for food and beverage service on the Approved Site Plan, signed and sealed by a duly licensed engineer or architect, and approved by the City's Public Works Department, attached as Exhibit A and incorporated herein.
- E. **"CONCESSION FACILITIES"** means nonpermanent fixtures, furnishings and equipment associated with the operation of the Concession and approved administratively by the City Manager and by the required City Departments for placement on the City right-of-way, including tables, chairs, umbrellas, planters, heaters, fans, rolling service stations, service carts, bussing stations, menus, and/or menu boards. Photographs, drawings or manufacturer's brochures fully describing the appearance and dimensions of all proposed tables, chairs, umbrellas, and any other Concession Facilities related to the operation of the Concession shall be provided by Concessionaire and attached to this Agreement, along with invoices and proof of payment (if Concessionaire wishes to claim entitlement to payment after a termination without cause) as Exhibit B.
- F. **"CONCESSIONAIRE"** means the concessionaire identified in Section 2(A) of this Agreement including, but not limited to, any owner, manager, employee, contractor, agent, officer, director, representative, or any other individual or entity acting for, by, through or on behalf of any of the foregoing.
- G. **"FULL-SERVICE RESTAURANT"** means a brick-and-mortar food service establishment that is maintained and operated as a place where food and/or beverages are prepared and/or served and sold for consumption within the premises, or a business establishment which has, as an ancillary or secondary use, or part thereof, where food and/or beverages are prepared and/or served and sold for consumption within the premises. A restaurant that has an occupational license or certificate of use that is limited to take-out service and does not have inside seating will not qualify as a Full-Service Restaurant.
- H. **"RIGHT-OF-WAY"** means land in which the state, the Florida Department of Transportation, Miami-Dade County, or the City owns the fee or has an easement or other rights devoted to or required for use as a sidewalk, transportation facility, or street.
- I. **"SIDEWALK"** means that portion of the right-of-way which is located between the curb line or the lateral line of a street and the adjacent property line, and which is intended for use by pedestrians; provided that on Lincoln Road Mall, a sidewalk shall mean a right-of-way as defined in this section, but shall only refer to that area between the property line and the centerline of the right-of-way, exclusive of landscaped areas and a 12 foot wide clear path for emergency and maintenance vehicular access.

7. **GENERAL REQUIREMENTS:**

- A. **COMPLIANCE WITH ALL APPLICABLE LAWS AND CONTRACTS TERMS:**  
The Concessionaire agrees to be bound by all terms and conditions contained in this Agreement and shall comply with all federal, state, and local laws and regulations that may govern the Concessionaire's business. Without limiting the generality of the foregoing, the Concessionaire specifically agrees to and shall fully and strictly comply with the conditions set forth in the Concession Area Physical Terms and Specifications found in Article II of this Agreement and incorporated herein and the Consumer Protection Terms and Conditions found in Article III of this Agreement and incorporated herein.
- B. **CHANGES TO APPROVE SITE PLAN/CONCESSION FACILITIES:** The Concessionaire shall not make any change to the Concession Facilities or to the configuration of the Approved Site Plan without the prior written consent of the Right-of-Way Manager for the City's Public Works Department or his/her designee, which consent (if given at all) shall be at the Right-of-Way Manager's (or his/her designee's) sole discretion.
- C. The parties agree that violation of any of these terms and conditions set forth in these subsections will be considered material breaches of this Agreement, subjecting the Concessionaire to the Termination for Cause provisions set forth in Section 8(A).

8. **TERMINATION:**

- A. **TERMINATION FOR CAUSE:**
- i. **Monetary Default:** If the Concessionaire fails to pay any money due to the City under this Agreement, or due to the City under any other authority, by the due date, then upon 15 days prior written notice from the City, the City may, at its sole discretion, suspend this Agreement until all outstanding amounts are paid, or terminate the Agreement altogether. Late payments for Concession Fee and Monitoring Fees shall accrue at the rate of ten percent per annum for the first 30 days. If the Concession Fee and Monitoring Fee are not paid within 60 days after it is due, the Concession Agreement shall terminate automatically. Any continued operation of a Concession after termination of this Agreement shall be construed as operating a business on the public right-of-way without lawful authority, and the City Manager shall have the right to remove, upon 24 hours' written and/or verbal notice to the Concessionaire, any and all Concession Facilities used in connection with the Concession, and/or compel the termination of all Concession activities by all available means.
  - ii. **Non-Monetary Default:** If the Concessionaire breaches any non-monetary provision of this Agreement, the City Manager may (after at least one prior Notice of Breach of Concession Agreement for the same breach), suspend this Agreement until the City Manager is satisfied that the breach has been

cured and will not be repeated, or terminate the Agreement altogether.

iii. **Life Safety Breaches and/or Approved Site Plan breaches:** Life Safety breaches and/or Approved Site Plan breaches shall be corrected immediately. "Life Safety" breaches are defined as those conditions which, in the reasonable determination and judgment of the City Manager, involve serious danger and/or risk to the public health, safety or welfare (including, without limitation, blocking pedestrian pathways and violations of the state accessibility code for building construction). "Approved Site Plan" breaches are defined to include those instances where the Concessionaire is operating outside of the permitted Concession Area. Violations shall include, without limitation, a table or tables set up outside the approved boundaries of the "Approved Site Plan", and/or umbrellas, heaters, fans, bussing stations and other Concession furniture found to be outside the "Approved Site Plan", but shall not be deemed to include instances where a chair or chairs are moved outside the approved boundaries of a site plan by a Concession patron(s). If such life safety breaches and/or Concession Approved Site Plan breaches are not or cannot be corrected immediately, the City Manager may, at his or her sole discretion, suspend operation of the Concession until such time as the breach(es) is corrected to the satisfaction of the City Manager.

iv. **Uncurable Default:** If the default is of a nature that cannot be cured, such as, without limitation, fraud against a consumer or against the City, or a material misrepresentation in connection with Contractor's performance under this Agreement, such as concealing or attempting to conceal the true current and past ownership interests and corporate officers in Concessionaire's current or past corporate entity(ies), so as to avoid disclosure to the City of any person who, at any time, serves or previously served as a corporate officer or owner of Concessionaire's business, the termination shall be effective upon receipt of the termination notice and no cure period shall apply.

v. **Cross-Default:** In the event that the City has terminated the Concessionaire for cause under a separate concession agreement under the Program, the City Manager, at his or her sole discretion, shall have the right to terminate this Agreement for cause, upon providing Concessionaire with ninety (90) days prior written notice.

B. **TERMINATION WITHOUT CAUSE:** Either party may terminate this Agreement without cause upon ninety (90) days prior written notice to the other party. If the Concession Area consists of both space on City parking spaces and space on other City rights-of-way, either party may terminate the Agreement as to either or both of those areas under this provision.

i. **Termination without cause by the City:** If the City Manager terminates this Agreement without cause, upon written request by the Concessionaire,

the City shall pay to the Concessionaire the unamortized value of any Concession Facilities, as defined in Section 6(E) of this Agreement, that are subject to removal, which shall be computed as the purchase price actually paid minus three percent (3%) of that amount for each month after purchase, up to a maximum payment of \$100,000. To be eligible for this payment, the Concessionaire must provide the City with itemized evidence of each purchase and itemized evidence of payment within ten (10) days of the effective date of this Agreement or within ten (10) days of delivery, whichever occurs later. This itemized Concession Facilities proof of purchase and payment shall be attached as Exhibit B to this Agreement. Only Concession Facilities appearing on the Approved Site Plan shall be eligible for reimbursement. If the City terminates this Agreement without cause, the prorated Concession Fee and Monitoring Fee representing the remainder of the contract year shall also be refunded. Concessionaire's SOLE REMEDY upon termination without cause shall be the payment of the unamortized value of the Concession Facilities per this Section and refund of the prorated Concession Fee and Monitoring Fee; and upon payment thereof (if owed) the City shall not have and shall not owe any further obligation or liability to the Concessionaire.

- ii. **Termination without cause by Concessionaire:** If Concessionaire terminates this Agreement without cause, the City shall be entitled to retain the Concession Fee and Monitoring Fee.
- iii. **Termination or Suspension by the City due to Public Health, Welfare or Safety Concern:** In the event of public health, welfare, or safety concern, upon verbal or written notice, the City Manager may immediately suspend use of the Concession Area for a time certain, or terminate the Agreement on a given date. If the City terminates this Agreement due to a public health, welfare or safety concern, a pro rata portion of the Concession Fee and Monitoring Fee representing the remainder of the Term shall be refunded. If the City suspends this Agreement due to a public health, welfare or safety concern, a pro rata portion of the Concession Fee and Monitoring Fee representing the length of the suspension shall be refunded.
- iv. **Termination or Suspension by the City due to City Project:** In the event of a current or upcoming City project (or project of another governmental entity) at the Concession Site, upon verbal or written notice, the City Manager may immediately suspend use of the Concession Area for a time certain, or terminate the Agreement on a given date. A project includes, but is not limited to, maintenance, repairs, and/or construction on or around the Concession Area. If the City terminates this Agreement due to a City project, a pro rata portion of the Concession Fee and Monitoring Fee representing the remainder of the Term shall be refunded. If the City suspends this Agreement due to a City project, a pro rata portion of the Concession Fee and Monitoring Fee representing the length of the suspension shall be refunded.

- v. **Clearing the Public Right-of-Way:** Upon termination or suspension of this Agreement, by any party for any reason, Concessionaire shall immediately remove all Concession Facilities and employees/agents from the public right-of-way, including from the Concession Area. If the Concessionaire fails to do so, the City may remove all property from the public right-of-way and store it or dispose of it as it sees fit at Concessionaire's expense, without any liability to the City. Alternatively, or in addition, the City may cite the Concessionaire under the City Code or criminally charge the Concessionaire under applicable criminal ordinances and/or statutes for any applicable offenses.

9. **NO ASSIGNMENT:**

Concessionaire shall not have the right to assign or transfer all or any part of the Concession Area or the Concession Agreement.

10. **USE:**

The Concession Area shall be used solely for the purpose of outdoor cafe dining. If the Concession Area is used for any other purpose, the City Manager shall have the option of immediately terminating this Agreement.

11. **NO CITY LIABILITY FOR CONCESSIONAIRE'S ACTIVITIES ON RIGHT-OF-WAY; INDEMNIFICATION BY CONCESSIONAIRE:**

The City shall not be liable for any of Concessionaire's activities on the public right-of-way and/or arising out of the Concessionaire's use of the Concession Area. Concessionaire shall defend, indemnify and hold harmless the City, its agents and employees, from and against any and all claims, demands, liabilities, damages, judgments, orders, decrees, actions, proceedings, fines, penalties, costs and expenses, including without limitation, court costs and reasonable attorneys' fees (collectively, "Claims") arising from or relating to any violation of law, loss of life, damage or injury to persons, property or business occurring in, about or from the Concession Area or any area adjacent thereto, or directly or indirectly caused by or in connection with any violation of this Agreement or use of the Concession Area by, or any other act or omission of, Concessionaire, any other occupant of the Concession Area, or any of their respective agents, employees, invitees or contractors.

12. **INSURANCE REQUIREMENTS REQUIRED TO BE MAINTAINED DURING THE CONTRACT TERM:**

Concessionaire agrees to indemnify, defend, save and hold harmless the City, its commissioners, officers and employees, from any and all claims, liability, lawsuits, damages and causes of action which may arise out of this Agreement or the Concessionaire's activity on the public right-of-way. Concessionaire agrees to meet and maintain for the entire contract term, at its own expense, the following requirements:

- A. Commercial general liability insurance, in the amount of \$1,000,000.00 per occurrence for bodily injury and property damage. The City of Miami Beach, Florida, must be named as an additional insured on this policy, and an endorsement must be issued as part of the policy reflecting compliance with this requirement.
- B. For Concession operations which serve alcoholic beverages, liquor liability insurance, in the amount of \$1,000,000.00 per occurrence for bodily injury and property damage. The City of Miami Beach, Florida, must be named as an additional insured on this policy, and an endorsement must be issued as part of the policy reflecting compliance with this requirement.
- C. Workers' compensation and employers' liability as required by the State of Florida.
- D. All policies must be issued by companies authorized to do business in the state and rated B+:VI or better per Best's Key Rating Guide, latest edition.
- E. The City must receive 30 days' written notice prior to any cancellation, non-renewal or material change in the coverage provided.
- F. Concessionaire must provide and have approved by the City an original certificate of insurance as evidence that the requirements set forth in this section have been met prior to commencing operations.
- G. Failure to comply with these requirements at any time shall cause an immediate suspension or revocation of the use of the Concession Area.

13. **ACCESS TO CONCESSION AREA:**

The City may enter the Concession Area at any time without prior notice to Concessionaire for any purpose, including, without limitation: (1) to confirm performance under the Agreement; (2) observe and inspect the Concession Area; (3) to maintain, repair and improve the Concession Area; and (4) any other lawful purpose the City determines necessary for the conduct of its business.

14. **OTHER GOVERNMENTAL APPROVALS:**

Concessionaire agrees that it will secure all necessary contracts, permits, leases, or any other required permissions from any governmental authority requiring it in the location where the Concession Area is located. This includes obtaining a Business Tax Receipt from the City prior to opening. Also, a separate review and approval from the Florida Department of Transportation ("FDOT") or Miami-Dade County may be necessary.

15. **GOVERNMENTAL REGULATIONS AND COMPLIANCE WITH LAWS:**

The Concessionaire covenants and agrees to fulfill and comply with all statutes, ordinances, rules, orders, regulations, and requirements of any and all governmental bodies, including but not limited to Federal, State, Miami-Dade County, and City governments, and any and all of their departments and bureaus applicable to the



Concession Area and Concessionaire's proposed use(s) thereof, and shall also comply with and fulfill all rules, orders, and regulations for the prevention of fire, all at Concessionaire's own cost and expense. The Concessionaire shall pay all cost, expenses, claims, fines, penalties, and damages that may be imposed because of the failure of the Concessionaire to comply with the Agreement, and shall indemnify and hold harmless the City from all liability arising from each non-compliance, except where such non-compliance is caused by the sole negligence or willful misconduct of the City or its officers, agents and employees.

16. **WAIVER OF ANY CLAIMED FIRST AMENDMENT RIGHT TO SOLICIT PASSERSBY:**

Concessionaire acknowledges and agrees that it is offered this Agreement in order for it to market, advance, and promote the City's iconic worldwide brand through its outdoor dining operation on City property. Concessionaire further acknowledges and agrees that Concessionaire's sales tactics in or around the Concession Area are or may reasonably be construed as reflections of the City's brand. Soliciting passersby defeats the public purpose advanced by this Agreement by damaging the City's brand, and taking away from residents', visitors', and tourists' ability to relax and enjoy a stroll on the City's scenic promenades. Therefore, Concessionaire specifically agrees not to solicit passersby or to distribute commercial handbills to passersby as set forth in paragraph 84 of this Agreement. Concessionaire hereby knowingly, intelligently, and voluntarily waives any putative free speech right under the First Amendment to the United States Constitution or under any provision of the Florida Constitution (or any other source of such a putative right) to do so. Concessionaire has had the opportunity to consult an attorney prior to executing this Agreement (including the foregoing waiver), and has made the voluntary and informed decision to do so.

17. **DISPUTES:**

This Agreement shall be governed by, construed, and enforced in accordance with the Laws of the State of Florida, to the fullest extent permitted by such laws, without giving effect to its conflicts of law rules. Any dispute between or among the Parties (in any combination), including disputes arising out of, relating to, or in connection with this Agreement, shall be resolved by binding arbitration before one arbitrator, fluent in English, pursuant to the Commercial Arbitration Rules of the American Arbitration Association ("AAA Rules") in force on the date of the Request for Arbitration. The venue and seat of the arbitration shall be Miami Beach, Florida. The language of the arbitration shall be English.

The Parties agree that, for the sake of efficiency, Notice(s) of Breach of Concession Agreement shall not be subject to arbitration unless and until the City Manager suspends or terminates this Agreement. If the City Manager suspends or terminates this Agreement, it is the intent of the Parties that all matters prerequisite to a suspension or termination for (if any), and/or matters regarding payment due from the City upon a termination without cause, shall be arbitrated once, only after a suspension or termination has been ordered. Terminations or suspensions by the City due to a public health, welfare or safety concern, and/or due to a City project, shall be final and not subject to challenge.

The Parties also specifically waive any possible right to collect prevailing party attorney's fees.

The Parties also waive any and all rights to seek lost profits, consequential, special or punitive damages for any breach of this Agreement or for any breach of any duty, obligation, or other rule under any statutory or common law cause of action that may be waived by contract under applicable law.

18. **NO PROPERTY RIGHTS CONFERRED BY THE AGREEMENT:**

**Concessionaire acknowledges and agrees that the nature of the Concessionaire's relationship with the City is that of a City contractor and that no other relationship either expressed or implied shall be deemed to apply to the parties under this Agreement. No property rights of any nature whatsoever shall be created on the part of the Concessionaire by this Agreement, and termination of this Agreement for any reason shall not be deemed to implicate any property right or to be a taking under any statutory or constitutional provision.**

19. **INSPECTOR GENERAL AUDIT RIGHTS:**

- A. Pursuant to Section 2-256 of the Code of the City of Miami Beach, the City has established the Office of the Inspector General which may, on a random basis, perform reviews, audits, inspections and investigations on all City contracts, throughout the duration of said contracts. This random audit is separate and distinct from any other audit performed by or on behalf of the City.
- B. The Office of the Inspector General is authorized to investigate City affairs and empowered to review past, present and proposed City programs, accounts, records, contracts and transactions. In addition, the Inspector General has the power to subpoena witnesses, administer oaths, require the production of witnesses and monitor City projects and programs. Monitoring of an existing City project or program may include a report concerning whether the project is on time, within budget and in conformance with the contract documents and applicable law. The Inspector General shall have the power, as it relates to any violation of this Agreement, to audit, investigate, monitor, oversee, inspect and review operations, activities, performance, activities of Concessionaire, its officers, agents and employees, lobbyists, City staff and elected officials to ensure compliance with the terms of the Concession Agreement and to detect fraud and corruption. For the avoidance of doubt, nothing set forth herein shall be construed to grant to the City or the Inspector General any audit or other rights with respect to any matter or activity that is unrelated to the Concession Agreement.
- C. Upon ten (10) days written notice to Concessionaire, Concessionaire shall make all requested records and documents relating to an alleged violation of the Concession Agreement available to the Inspector General for inspection and copying. The Inspector General is empowered to retain the services of independent private sector auditors to audit, investigate, monitor, oversee, inspect and review operations activities, performance and procurement process including but not limited to project design, bid specifications, (bid/proposal) submittals,

activities of Concessionaire, its officers, agents and employees, lobbyists, City staff and elected officials to ensure compliance with the contract documents and to detect fraud and corruption.

- D. The Inspector General shall have the right to inspect and copy all documents and records specific to the participation in this Concession Agreement in Concessionaire's possession, custody or control which in the Inspector General's sole judgment, pertain to performance of the Agreement.
- E. Concessionaire shall make available at its office at all reasonable times the records, materials, and other evidence relating to any alleged violation and performance of this Agreement, for examination, audit, or reproduction, until three (3) years after final payment under this Agreement or for any longer period required by statute or by other clauses of this contract. In addition:
  - i. If this Agreement is completely or partially terminated, Concessionaire shall make available records relating to the work terminated until three (3) years after any resulting final termination settlement; and
  - ii. Concessionaire shall make available records relating to appeals or to litigation or the settlement of claims arising under or relating to this Agreement until such appeals, litigation, or claims are finally resolved.
- F. The provisions in this section shall apply to Concessionaire, its officers, agents, and employees.
- G. Nothing in this section shall impair any independent right to the City to conduct audits or investigative activities. The provisions of this section are neither intended nor shall they be construed to impose any liability on the City by Concessionaire or third parties.

20. **FLORIDA PUBLIC RECORDS LAW:**

- A. Concessionaire shall comply with Florida Public Records law under Chapter 119, Florida Statutes, as may be amended from time to time, for any records directly associated with this Agreement or alleged violation thereof.
- B. The term "public records" shall have the meaning set forth in Section 119.011(12), which means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business of the City.
- C. Pursuant to Section 119.0701 of the Florida Statutes, if Concessionaire meets the definition of "Contractor" as defined in Section 119.0701(1)(a), Concessionaire shall:
  - i. Keep and maintain public records required by the City to perform the

service;

- ii. 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;
- iii. 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 this Agreement if Concessionaire does not transfer the records to the City;
- iv. Upon completion of this Agreement, transfer, at no cost to the City, all public records in possession of Concessionaire or keep and maintain public records required by the City to perform the service. If Concessionaire transfers all public records to the City upon completion of this Agreement, Concessionaire shall destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. If Concessionaire keeps and maintains public records upon completion of this Agreement, 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.

**D. REQUEST FOR RECORDS; NONCOMPLIANCE**

- i. A request to inspect or copy public records relating to the City's contract for services must be made directly to the City. If the City does not possess the requested records, the City shall immediately notify Concessionaire of the request, and Concessionaire must provide the records to the City or allow the records to be inspected or copied within a reasonable time.
- ii. 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 and/or (2) avail itself of the remedies set forth under this Agreement.
- iii. If Concessionaire fails to provide the public records to the City within a reasonable time, the Concessionaire may be subject to penalties under s. 119.10.
- iv. In the event the City is found liable as a result of Concessionaire's failure to comply with Florida's Public Records Act, the Concessionaire shall indemnify the City for any fees, costs or other liability the City may incur.

**E. The Concessionaire represents and warrants that it is familiar with the terms and requirements of Florida's Public Records Act, Chapter 119.**

- F. IF CONCESSIONAIRE HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, FLORIDA STATUTES, TO CONCESSIONAIRE'S DUTY TO PROVIDE PUBLIC RECORDS RELATING TO THIS AGREEMENT, CONTACT THE CUSTODIAN OF PUBLIC RECORDS AT: [insert contact]

21. **FORCE MAJEURE:**

No party hereto shall be liable for its failure to carry out its obligations under the Agreement during a period when such party is rendered unable, in whole or in part, by Force Majeure to carry out such obligations. A "Force Majeure" event is an event that (i) in fact causes a delay in the performance of the Concessionaire or the City's obligations under the Agreement, and (ii) is beyond the reasonable control of such party, which may include events such as war, civil insurrection, riot, fires, epidemics, pandemics, terrorism, sabotage, explosions, embargo restrictions, quarantine restrictions, transportation accidents, strikes, strong hurricanes or tornadoes, earthquakes, or other acts of God which prevent performance. Force Majeure shall not include technological impossibility, inclement weather, or failure to secure any of the required permits pursuant to the Agreement. If the City or Concessionaire's performance of its contractual obligations is prevented or delayed by an event believed by to be Force Majeure, such party shall immediately, upon learning of the occurrence of the event or of the commencement of any such delay, but in any case within fifteen (15) business days thereof, provide notice to the other party. 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 Force Majeure, and the burden of proof of the occurrence of a Force Majeure event shall be on the requesting party. In no event will any condition of Force Majeure extend this Agreement beyond its stated term.

22. **NO WAIVER OF SOVEREIGN IMMUNITY:**

- A. The City desires to enter into this Agreement only if in so doing the City can place a limit on the City's liability for any cause of action, for money damages due to an alleged breach by the City of this Agreement, so that its liability for any such breach never exceeds the sum of \$100,000. Concessionaire hereby expresses its willingness to enter into this Agreement with Concessionaire's recovery from the City for any damage action for breach of contract to be limited to a maximum amount of \$100,000.

Accordingly, and notwithstanding any other term or condition of this Agreement, Concessionaire hereby agrees that the City shall not be liable to the Concessionaire for damages in an amount in excess of \$100,000 for any action or claim for breach of contract arising out of the performance or non-performance of any obligations imposed upon the City by this Agreement.

- B. Moreover, nothing in this Agreement shall be deemed or otherwise interpreted as waiving the City's sovereign immunity protections, or as increasing the limits of liability set forth in §768.28, Fla. Stat.. The limit of the City's liability for breach of this Agreement shall be limited in amount and shall not exceed the limitations of

liability for tort actions set forth in §768.28(5), Fla. Stat..

23. **ENTIRE AGREEMENT:**

This Agreement and attached exhibits contain the entire agreement of the Parties and no representations or promises have been made except those that are specifically set out in this Agreement. All prior and contemporaneous conversations, negotiations, possible and alleged agreements and representations, covenants, and warranties with respect to the subject matter of this Agreement, and any part hereof, are waived, merged herein and superseded hereby.

24. **SEVERABILITY:**

If any section, paragraph, clause or provision of this Agreement is adjudged by a court, agency or authority of competent jurisdiction to be invalid, illegal or otherwise unenforceable, all remaining parts of this Agreement shall remain in full force and effect and the Parties shall be bound thereby so long as principal purposes of this Agreement remain enforceable.

25. **THIRD PARTY BENEFICIARIES:**

This Agreement shall be binding upon and inure to the benefit of the Parties hereto. Nothing in this Agreement is intended to confer any rights, privileges, benefits, obligations or remedies upon any other person or entity except as expressly provided for herein.

26. **COMPUTATION OF TIME:**

In computing any period of time prescribed in this Agreement, the day of the act, event or default from which the designated period of time begins to run, shall not be included. The last day of the period shall be included unless it is a Saturday, Sunday or legal holiday, in which event the period shall run until the end of the next day which is not a Saturday, Sunday or legal holiday.

27. **CONSIDERATION:**

By their signature below, the parties hereby acknowledge the adequacy and sufficiency of consideration provided in this Concession Agreement and forever waive the right to object to or otherwise challenge the same.

28. **NO PARTNERSHIP OR JOINT VENTURE:**

It is understood and agreed that nothing contained in this Agreement shall be deemed or construed as creating a partnership or joint venture between the parties or any third party, or cause any party to be responsible in any way for the debts and obligations of the other party. Concessionaire shall be solely liable for all claims arising out of the use of the Concession Area.

29. **CONSULTATION:**

Notwithstanding any provision to the contrary in this Agreement, nothing herein shall preclude the City Manager from seeking direction from the City Commission regarding any matter arising out of or related to this Agreement, including, without limitation, any approval contemplated under this Agreement (within the timeframe specified therefor) or any proposed amendment or modification to this Agreement.

30. **NOT A LEASE:**

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

31. **NO LIEN:**

In the event any notice or claim of lien shall be asserted against the interest of the City on account of or arising from any work done by or for Concessionaire, or any person claiming by, through or under Concessionaire, or for improvements or work, the cost of which is the responsibility of Concessionaire, Concessionaire agrees to have such notice or claim of lien cancelled and discharged within fifteen (15) days after notice to Concessionaire by City. In the event Concessionaire fails to do so, City may terminate this Agreement for cause without liability to City.

**ARTICLE II**

**CONCESSION AREA PHYSICAL TERMS AND SPECIFICATIONS**

32. **PROHIBITED CONCESSION OPERATIONS:**

- A. There shall be no concessions permitted and/or placed within a section of the 1100 block of Lincoln Road Mall, between Lenox Avenue and Alton Road; said section as more specifically defined by the following description:

Land description:

A portion of Lincoln Road lying between Alton Road and Lenox Avenue, as shown on "Commercial Subdivision," according to the plat thereof, as recorded in Plat Book 6, at Page 5 of the Public Records of Miami-Dade County, Florida, being more particularly described as follows:

Commence at the southwest corner of Lot 6, Block 39 of said "Commercial Subdivision;" thence south 89'08;deg;55" west along the south line of Block 39 of said "Commercial Subdivision," a distance of 11.20 feet; thence south 00'51;deg;05" east, a distance of 25.00 feet to the point of beginning; thence continue south 00'51;deg;05" east, a distance of 50.00 feet; thence south 89'08;deg;55" west along a line 25.00 feet north and parallel with the south right-of-way line of said Lincoln Road, a distance of 190.08 feet; thence north 00'51;deg;05 west, a distance of 50.00 feet; thence north 89'08;deg;55" east along

a line 25.00 feet south and parallel with the north right-of-way line of said Lincoln Road, a distance of 190.08 feet to the point of beginning.

Said land situate, lying and being in the City of Miami Beach, Miami/Dade County, Florida; containing 9,504 square feet, more or less.

- B. There shall be no personal property or equipment relating to the operation of a restaurant, including, without limitation, concession furniture, garbage receptacles, storage containers, back-of-house operation, equipment or supplies, or any other similar item permitted and/or placed within the improved section of Euclid Avenue, between Lincoln Road and Lincoln Lane South, which section is more particularly described as follows:

Land description:

A portion of Euclid Avenue right-of-way as shown on the plat of "Second Commercial Subdivision of the Alton Beach Realty Company", according to the plat thereof, as recorded in Book 6, at Page 33, and the plat of "Lincoln Subdivision" according to the plat thereof, as recorded in Plat Book 9, at Page 69, both recorded in Public Records of Miami-Dade County, Florida; bounded on the north by the extension of the south right-of-way line of Lincoln Road; bounded on the south by the extension of the north right-of-way line of Lincoln Lane South; bounded on the east by the east right-of-way line of Euclid Avenue and bounded on the west by the west right-of-way line of Euclid Avenue, less the northerly 30 feet.

Said land situate, lying and being the City of Miami Beach, Miami-Dade County, Florida; containing 8,400 square feet, more or less.

33. **SITE PLAN AND CONCESSION FACILITIES:**

Concessionaire shall provide the City Manager or City Manager's designee with a Site Plan signed and sealed by a duly licensed architect or engineer, which accurately depicts the layout and dimensions of the existing sidewalk area and adjacent private property; proposed location, size and number of tables, chairs, umbrellas, and any other Concession Facility; and location of doorways, steps, trees and other landscaped areas, fountains, parking meters, fire hydrants, bus shelters, directory/kiosks, public benches, trash receptables, and any other existing public fixtures, furnishings and/or other obstruction(s) within the proposed Concession Area. Concessionaire shall also provide photographs, drawings or manufacturer's brochures fully describing the appearance and dimensions of all proposed Concession Facilities related to the operation of the Concession Area. The site plan and Concession Facilities shall be approved by the City Manager prior to Concessionaire commencing use of the Concession Area. Additionally, the Site Plan and the design, type, material, and color of any and all furniture, tables, chairs, umbrellas and other Concession Facilities proposed to be used on the Concession Area shall be approved in writing by the City Manager or designee prior to Concessionaire operating the Concession Area. The approved Site Plan and approved Concession



Facilities documentation will be attached as Exhibits A and B to the Concession Agreement. The approved Site Plan for concessions located on City parking spaces on a roadway shall comply with the Parking Space Restaurant Concession Design Guidelines, which will be attached as Exhibit D to the Concession Agreement. Only restaurants located at the ground level of a building shall be eligible to create a parking space concession, except for restaurants in the South of Fifth neighborhood, which shall be defined as the area of the City south of 5th Street, excluding Washington Avenue between 4th and 5th Streets. The approved Site Plan for concessions on Ocean Drive shall comply with the Ocean Drive Restaurant Concession Design Guidelines, which will be attached as Exhibit E to the Concession Agreement.

Thereafter, Concessionaire shall not change, alter, or modify said City-approved Site Plan or design, type, material and color of any Concession Facilities without securing the prior written consent of the City Manager or his or her designee and any other required governmental approvals, and, if so approved, an updated Exhibit will be made a part of and incorporated into the Concession Agreement. Concessionaire shall be specifically limited to use of the Concession Area shown on the approved Site Plan.

34. **ANCILLARY USE:**

Concession Areas may only be used as an ancillary use to the restaurant immediately in front of the Concession Area. The outdoor seating for the Concession Area may not be used for calculating seating requirements pertaining to location of, applications for, or issuance of, a liquor license, nor shall the Concession Area seating capacity be used as the basis for computing required seating for restaurants, or as grounds for claiming exemption from such requirements under the provisions of any applicable City, County, and/or State law.

35. **ALCOHOL SERVICE:**

Concessionaire shall be permitted to serve, for sale and consumption within the Concession Area, food and beverages, including the sale and on-premises serving/consumption of alcoholic beverages, as permitted under applicable law.

36. **HOURS OF SALE OF ALCOHOLIC BEVERAGES:**

A. Alcoholic beverages shall not be offered for sale or consumption in the Concession Area between the hours of 1:30 a.m. and 8:00 a.m., and shall not be consumed at the Concession Area between the hours of 2:00 a.m. and 8:00 a.m.

B. **OCEAN DRIVE:** Notwithstanding subsection (A), alcoholic beverages may be offered for sale or consumption and may be consumed at Concession Area located on Ocean Drive, between 5th Street and 15th Street:

- i. until 7:00 a.m. on January 1 (New Year's Day) or, if January 1 is on a Sunday, until 7:00 a.m. on Monday if the day that is observed as a national holiday for New Year's Day is on Monday, and (ii) until 7:00 a.m. during certain major event days or weekends as may be designated by the city

commission or as may be designated by the city manager following approval by the city commission, under the following conditions:

- ii. The police department and the code compliance department of the city must be notified by a letter, received no later than 15 business days prior to either: 1. January 1, or 2. the day on which alcohol sales are to be extended, stating that the alcoholic beverage establishment intends to serve alcoholic beverages for on-premises consumption and, if the alcoholic beverage establishment is located on Ocean Drive between 5th Street and 15th Street, for consumption at the establishment's Concession until 7:00 a.m.;
  - iii. If deemed reasonably necessary by the police chief, or the police chief's designee, off-duty police officers must be provided at the alcoholic beverage establishment until 7:00 a.m.;
  - iv. There are no pending city Code violations against the alcoholic beverage establishment and the alcoholic beverage establishment has not had more than one adjudicated city Code violation per year within the prior 24 months; notwithstanding the foregoing, the conditions in this subsection may be waived by the City Manager in his or her sole discretion;
  - v. No delinquent or past due monies are owed to the city;
  - vi. Outdoor entertainment or open-air entertainment is not allowed;
  - vii. No violation of the city's noise ordinance shall be permitted;
  - viii. No violation of the approved fire code occupancy load shall be permitted;
  - ix. All required city permits and licenses are current;
  - x. The state license is current;
  - xi. The alcoholic beverage establishment has been in continuous operation for the prior 24 months in the city, is licensed as an alcoholic beverage establishment, and (i) is permitted to serve alcoholic beverages for on-premises consumption until 5:00 a.m., or (ii) is located in the MXE mixed use entertainment district south of 16th Street and permitted to serve alcoholic beverages for on-premises consumption until 2:00 a.m.; and
  - xii. Any other conditions required by the City Manager in order to protect the public health, safety, or welfare of the City, its residents, and its visitors.
- C. **ALTON ROAD CORRIDOR:** Alcoholic beverage establishments, whether as a main use, conditional use, or accessory use, that are located on the west side of Alton Road and east of Alton Court, between 5th Street and 11th Street, and

between 14th Street and Collins Canal; and properties on the east side of West Avenue, between Lincoln Road and 17th Street, except alcoholic beverage establishments fronting Lincoln Road between West Avenue and Alton Road that have active outdoor dining Concession Agreements shall only serve alcoholic beverages at Concessions during hours when food is served in the restaurant, shall cease Concession operations at 12:00 a.m., and shall not be permitted to have outdoor speakers.

- D. **SUNSET HARBOUR NEIGHBORHOOD**: Alcoholic beverage establishments, whether as a main use, conditional use, or accessory use, that are located in the Sunset Harbour neighborhood, which is generally bounded by Purdy Avenue to the west, 20th Street and the waterway to the north, Alton Road to the east, and Dade Boulevard to the south shall cease Concession operations no later than 12:00 a.m.
- E. **MXE MIXED USE ENTERTAINMENT DISTRICT**: Alcoholic beverage establishments with Concession Agreements shall only serve alcoholic beverages at Concession Areas during hours when food is served in the restaurant and shall not be permitted to have outdoor speakers anywhere within the public right-of-way.
- F. **SOUTH OF FIFTH STREET**: Alcoholic beverage establishments with Concession Agreements shall only serve alcoholic beverages at Concessions during hours when food is served, shall cease Concession operations no later than 12:00 a.m. (except as otherwise provided herein), and shall not be permitted to have outdoor speakers. Alcohol beverage establishments that have maintained an active business tax receipt and sidewalk cafe permit uninterrupted from June 28, 2016 until September 30, 2022, or an establishment that has obtained approval for an alcoholic beverage establishment from a land use board, and which land use board order is active and has not expired prior to June 28, 2016, that allow service of alcoholic beverages after 12:00 A.M. may continue to do so, but shall not serve alcoholic beverages later than 1:30 a.m., and alcoholic beverages may not be consumed at Concessions after 2:00 a.m. Should an alcoholic beverage establishment with a Concession Agreement allowing alcohol service after 12:00 A.M., as provided in the immediately preceding sentence above, be delinquent in a payment obligation to the city, and/or receive two final adjudications of violations of City Code section 12-5 (special event permit), or section 46-152 (noise ordinance), that alcoholic beverage establishment shall only be allowed to serve alcoholic beverages at its Concession until 12:00 a.m. for a 12-month period.
- G. Noncompliance with this section shall be deemed a breach of the Concession Agreement due to Public Health, Welfare or Safety Concern entitling the City to the remedies set forth in Agreement Section 8(B).

37. **OTHER GOVERNMENTAL APPROVALS**:

During the Contract Term, Concessionaire shall be solely responsible for applying for, obtaining, and maintaining all governmental approvals required for the operation of the

restaurant and Concession Area, including, without limitation, a BTR to operate the restaurant adjacent to the proposed Concession Area; Certificate of Use for the restaurant; liquor license; and, if applicable, State or County approval for Concessions located on those entities' rights-of-way.

38. **FULL-SERVICE RESTAURANT:**

The restaurant associated with Concessionaire's Concession operation must have inside seating and cannot be limited to take-out service.

39. **NO ILLEGAL USE:**

It is understood and agreed that the Concession Area shall be used by the Concessionaire during the Term of the Concession Agreement only for the purposes set forth therein, and for no other purposes or uses whatsoever. The Concessionaire will not make or permit any use of the Concession Area that, directly or indirectly, is forbidden by law, ordinance or government regulation, or that may be dangerous to life, limb or property. Concessionaire may not commit (nor permit) waste on the Concession Area, nor permit the use of the Concession Area for any illegal purposes, nor commit a nuisance on the Concession Area. In the event that the Concessionaire uses the Concession Area (or otherwise allows the Concession Area to be used) for any purposes not expressly permitted herein, or permits and/or allows any prohibited uses as provided herein, then the City may declare the Concession Agreement in default without notice to Concessionaire, restrain such improper use by notice of violation, arrest, injunction or any other available remedy.

40. **CITY AGREEMENTS BINDING:**

Sale of non-alcoholic beverages on the Concession Area shall be subject to any exclusive contract that the City executes. The City will notify Concessionaire upon entering into any such contract.

41. **ELECTRICITY:**

Concessionaire may make written request to the City Manager to use City electricity for powering floor fans during the summer months. Summer months are defined as the period beginning on May 1 and ending on September 30. The City Manager will make electrical outlets operable upon payment of a flat fee, which fee shall be determined, and may be adjusted from time to time, in the reasonable judgment and discretion of the City Manager, for each of the calendar days during the summer months. City electrical outlets will be restricted to powering floor fans only. Using the electrical outlets for powering lights, menu board lighting, and any other electrical device is strictly prohibited. Concessionaires violating this restriction will have the electrical boxes deactivated and forfeit any monies paid for electrical use. Fans must be UL approved for outdoor use. Extension cords are not allowed.

In no event, however, shall the City be liable, whether to Concessionaire and/or any third parties, for an interruption or failure in the supply electricity services approved for the

Concession Area.

**PERMITTED CONCESSION FRONTAGE; REQUESTS FOR EXPANSIONS**

**42. PERMITTED CONCESSION FRONTAGE:**

Concessions are restricted to the sidewalk frontage of the restaurant to which the Concession Agreement is issued or, if the restaurant is an ancillary and/or secondary use to another type of business establishment, the Concession shall be restricted to the sidewalk frontage of the building (or portion thereof) of the "primary" business establishment (within which the restaurant is located). Only a restaurant whose premises are on a ground floor adjacent to and fronting the sidewalk may be awarded a Concession Agreement. Concessions may be extended into a loading zone fronting a restaurant as provided in section 47 below.

**43. REQUESTS FOR EXPANSION:**

A Concession, upon prior written request by the Concessionaire to the City Manager, may be permitted, at the sole discretion of the City Manager, to extend by a maximum total of 50 feet in the right-of-way on one side and/or the other side of the Concession Area (of the business establishment where the restaurant is located); the Concessionaire shall make written application to the City Manager setting forth the reason(s) for the proposed expansion and provide a Site Plan showing the proposed expansion. All requests for expansions pursuant to this section shall be reviewed by the City Manager on a case-by-case basis. In reviewing such requests, the city manager, in making their determination to approve or deny, shall perform and consider the following:

- A. Pedestrian access.
- B. Visibility of the front of the adjacent owner's business.
- C. Obstructions.
- D. Accessibility to the adjacent owner's business by patrons.
- E. The City Manager may solicit input from businesses and property owners on the same block including, without limitation, the immediately adjacent (i.e., next door) business and property owners.
- F. The City Manager shall provide written notice to the adjacent business establishment (tenant) and property owner on to whose frontage the Concession proposes to expand. The notification shall include the following information: the name and address of the Concessionaire requesting the expansion; the approximate location and size of the area requested; and the name and address of the city official and/or employee to forward comments to, and the time period within which to forward said comments (which time period shall be no less than 14 days). Said notice shall be sent, as to the adjacent business establishment (tenant), to the name and address on file with the City for the establishment's

occupational license and, for the property owner, to the name and address identified in the records of the Miami-Dade County Property Tax Appraiser's Officer. Any objections not submitted and received by the City within the date provided in the notice shall be deemed waived.

- G. The city manager may also consider any history of violations and/or warnings issued to the Concessionaire.

44. **ADDITIONAL FEE:**

In the event of approval by the City Manager to expand a Concession Area, the additional square footage will be computed into the new Concession Fee and Monitoring Fee .

45. **NEW ADJACENT CONCESSIONAIRE:**

Notwithstanding the City Manager's approval of a Concession expansion, in the event that the adjacent business establishment and/or property owner (on to which a Concession has expanded) subsequently elects to request a Concession Agreement to operate a Concession in front of its premises, that new proposed Concessionaire shall provide the City Manager with notice of such intent stating the proposed Concessionaire's name; the property address; the name of the business establishment and/or the restaurant (of which the proposed Concession will be a part); and the anticipated opening date. The City will provide the business establishment (tenant) and property owner which is currently expanding into the proposed Concessionaire's frontage with a courtesy copy of the notice. Following receipt of said written notice by the City, and provided that the new proposed Concessionaire enters into a Concession Agreement, as well as any other required permits and/or licenses for operation of the business establishment and/or restaurant associated with the proposed new Concession, then the City Manager's prior consent for expansion shall terminate, and the City shall provide written notice to the adjacent Concessionaire, advising it of such termination, and providing a termination date therefore. The City's notice shall provide the adjacent property owner with at least seven calendar days' notice prior to the effective date of termination of the expansion. Upon the termination date of the City's consent to expansion, the Concession Agreement, Site Plan, and Concession Fee and Monitoring Fee will be adjusted accordingly.

46. **LINCOLN ROAD EXPANSION:**

In the case of Concessions on Lincoln Road, an expansion of a Concession Area across the centerline of Lincoln Road Mall may also be allowed. The Concessionaire shall make written application to the City Manager setting forth the reason for the proposed expansion and provide a Site Plan showing the proposed expansion. Requests for expansions pursuant to this section may be reviewed by the City Manager, at the City Manager's sole discretion, on a case-by-case basis. In reviewing such requests, the City Manager may consider the following illustrative considerations, such as whether:

- A. The Concessionaire would otherwise be significantly deprived of the use of the right-of-way for which the Concession Agreement is sought;

- B. There are special circumstances and conditions that exist, which were not self-created by the Concessionaire, and are peculiar to that portion of the right-of-way, and are not generally applicable to other rights-of-way in the immediate area;
- C. The granting of the expansion is the minimum that will allow the Concessionaire's reasonable use of the area for its Concession operations; and
- D. The granting of the expansion will not significantly impair the ability of pedestrians on that particular portion of Lincoln Road Mall to walk comfortably from one side of the mall to the other.
- E. In the event of approval by the city manager to expand a Concession Area pursuant to this section, the additional square footage will be computed into the new Concession Fee and Monitoring Fee .

47. **LOADING ZONE EXPANSION:**

Loading zones in front of a ground floor restaurant use with sidewalk frontage and a Concession Agreement may be used as part of an expanded Concession Area when the street on which the loading zone is located is closed to traffic, provided that the loading zone is within a street area that is regularly closed to traffic during certain days or hours, a minimum of five days each week. All platforms, tables and chairs in the loading zone shall be removed at the close of business each night. Use of a loading zone will require the prior written approval of the City Manager, which approval, if given at all, shall be at the sole discretion of the City Manager. Such approval, including the adjustment to the Concession Fee and Monitoring Fee , would be memorialized as an amendment to the Concession Agreement. Additionally, the City Manager or City Manager's designee, at his or her sole discretion, may suspend or revoke the approval for use of a loading zone.

**GENERAL SITE PROVISIONS**

48. **CLOSURE DURING HIGH IMPACT PERIODS:**

The City Manager may, upon declaration of a high impact period, order the immediate suspension and closure of all or part of the Concession operations including, without limitation, the removal of all or any Concession Facilities. This closure shall not exceed a period of 72 hours or the end of the High Impact Period, whichever occurs last.

49. **CLOSURE DURING MAJOR WEATHER EVENTS:**

Upon written and/or verbal notification by the City Manager of a hurricane or other major weather event, or the issuance of a hurricane warning by Miami-Dade County, whichever occurs first, Concessionaire shall, within no more than four hours of notice, remove and place indoors all Concession Facilities located on the Concession Area. The notification by the City Manager of a hurricane or other major weather event, or the issuance of a hurricane warning, shall constitute a public health, safety or welfare concern, as referenced in section 8(B). The City Manager may remove, relocate, and/or store any

Concession Facilities found on the Concession Area that has otherwise not been removed by Concessionaire pursuant to this subsection. Any and all costs incurred by the City for removal, relocation and/or storage of Concession Facilities shall be the responsibility of the Concessionaire. Concession Areas will not re-open for business following a hurricane or other major weather event until notified by the City Manager. Violation of this subsection shall result in the suspension, for up to 30 days, of the Concession privileges under the Concession Agreement.

50. **INTERFERENCE AND OBSTRUCTION:**

Concessionaire shall not interfere with patrons of adjoining Concession Areas, or limit their free, unobstructed passageway as required in this Agreement. The Concessionaire shall take any and all actions to assure that its use of the Concession Area in no way interferes with pedestrians utilizing the right-of-way and in no way limits their free, unobstructed passage thereto.

51. **CONCESSION PLACEMENT:**

Concessions shall be located in such a manner that a distance of not less than five feet is maintained at all times as a clear and unobstructed five-foot pedestrian path around public amenities and areas such as, by way of example, fountains, landscaped areas (excluding City planters), and seating/shade structures. A five-foot pedestrian path shall also be required and established where the City Manager, in his or her sole judgment and discretion, determines that the operation of a Concession inhibits pedestrian access to an adjacent business establishment or adversely affects the visibility of an adjacent storefront. Notwithstanding the preceding, the City Manager, in the City Manager's sole judgment and discretion, and on a case-by-case basis, may approve and allow for a pedestrian path of less than five feet where a Concessionaire's Concession operation would be significantly impacted. In considering such cases, and in determining whether Concessionaire is "significantly impacted," the City Manager may, in his or her sole discretion, consider the following illustrative criteria:

- A. The Concessionaire would otherwise be significantly deprived of the use of the Concession Area that is/would be the subject of the Concession Agreement;
- B. There are special circumstances and conditions that exist, which were not self-created by the Concessionaire, and are peculiar to that portion of the Concession Area, and are not generally applicable to other Concession Areas in the immediate area;
- C. The granting of the expanded area is the minimum that will allow Concessionaire reasonable use of the area for its Concession operations; and
- D. The granting of the expanded area will not significantly impair the ability of pedestrians on that particular portion of the right-of-way to walk comfortably from one side of the right-of-way to the other.



- E. No tables, chairs, umbrellas, or other Concession Facility shall be permitted within ten feet of a bus bench and/or bus shelter. A distance of five feet shall be maintained from taxi stands, fire hydrants, bike racks, directory signage/kiosks, and/or other similar public street furniture and/or fixtures.
- F. No tables, chairs, umbrellas or other Concession furniture shall be permitted within five feet of an alley, pedestrian crosswalk, or corner curb cut.
- G. The pedestrian path for Lincoln Road shall be a 12-foot clear path for emergency and maintenance vehicles. The exact location of the path on each block shall be determined by the City Manager, in the City Manager's reasonable judgment and discretion, and shall be incorporated into the Concession site plan map of Lincoln Road.

52. **ACCESSIBILITY:**

Concessionaire shall comply with all applicable accessibility codes, including the Americans with Disabilities Act (ADA) and state code provisions addressing accessibility for building construction.

53. **NO BARRIERS:**

No object shall be permitted around the perimeter of an area occupied by tables and chairs which would have the effect of forming a physical or visual barrier, discouraging the use of the tables and chairs by the public or, in the case of Lincoln Road, which would have the effect of obstructing the pedestrian path or public access between the north and south sides of Lincoln Road.

54. **MAINTENANCE:**

The Concessionaire is responsible for maintaining the Concession Area, the Concession Facilities, sidewalk, and street immediately adjacent to the restaurant in a clean, neat, and orderly appearance at all times. The area of the sidewalk, curb and gutter immediately adjacent to the Concession shall be cleared of all debris during hours of operation, and again at the close of each business day, or as may otherwise be determined by the City Manager. The Concessionaire shall be responsible for pressure cleaning the floor surface on which the Concession is located at the close of each business day. The City shall pressure wash the right-of-way from time to time in accordance with such schedule as shall be established in the reasonable judgment and discretion of the City Manager. In establishing said schedule, the City Manager shall use reasonable efforts to assure that the City's pressure cleaning of the public right-of-way occurs at such times as will cause the least disruption to Concession operations.

55. **APPEARANCE:**

Tables, chairs, umbrellas, and any other Concession Facility shall be maintained in a clean, attractive, and orderly appearance, and shall be maintained and kept in good repair

at all times.

56. **QUALITY OF CONCESSION FACILITIES:**

All Concession Facilities shall be of high quality, design, materials, and workmanship so as to ensure safety and convenience to the public.

57. **SITE PLAN ADHERANCE:**

Only the Concession Facilities specifically shown on the approved site plan shall be permitted on the Concession Area. A copy of the Approved Site Plan shall be maintained on the premises of the business establishment/restaurant with the Concession, and shall be available for inspection by city personnel at all times.

58. **UMBRELLAS:**

Umbrellas shall be fire-retardant, pressure-treated or manufactured of fire-resistant material. No portion of an umbrella shall be less than six feet eight inches above the right-of-way. Two or more umbrellas may not be clipped, zipped or otherwise fastened together in order to form a tent-like structure. Clear plastics or other materials may not be fastened, rolled or otherwise be attached to umbrella edges in order to create an enclosure.

A. Notwithstanding the provision of the foregoing section, and subject to the City's Planning Department review and approval, the following provisions shall apply to Concessions located on the west sidewalk on Ocean Drive, between 5<sup>th</sup> Street and 15<sup>th</sup> Street:

- i. A maximum of three umbrellas may be zipped together;
- ii. Rain gutters may be installed between zipped umbrellas; and
- iii. Colorless and transparent roll-down tarps may be permitted to be attached to umbrellas provided that the tarps are only utilized during periods of strong wind or rainfall. Within one hour of the cessation of such wind and/or rainfall, the roll-down tarp shall be removed from the umbrella/awning system and stored on private property.

59. **NO PHYSICAL ATTACHMENTS:**

All tables, chairs, umbrellas, and any other Concession Facility shall be readily removable, and shall not be physically attached, chained, or in any other manner affixed to any public structure, street furniture, signage, and/or other public fixture, or to a curb and/or public right-of-way.

A. Notwithstanding the provisions of section above, on the west sidewalk on Ocean Drive, between 5<sup>th</sup> Street and 15<sup>th</sup> Street, umbrellas may be affixed to the sidewalk with an in-ground mount system that is flush with the sidewalk or with a bolted metal plate not to exceed nine inches by nine inches in size. A detailed

engineering design, and a structural analysis of either the mount system or metal plate, shall be submitted to the City's Department of Public Works for review and approval. If permitted, such mount system or metal plate must be easily removable (as determined by the City) to provide a smooth ADA-compatible surface when the mount system or metal plate is removed. In the event that the Concession Agreement expires or is terminated, the umbrellas and entire mount system or metal plates shall be removed and a standard concrete sidewalk shall be re-installed, subject to the review and approval of the City's Department of Public Works and to a condition that is acceptable to the City.

60. **NO STACKING OF CHAIRS:**

Concessionaire shall not stock or pile up chairs on the right-of-way, except, where allowed by the Concession Agreement, on Lincoln Road.

61. **STORAGE OF CONCESSION FACILITIES:**

Concession Facilities including, without limitation, rolling service stations, service carts, and bussing stations, may only be maintained in the Concession Area during hours of operation; provided however, that planters that are permitted pursuant to these Terms and Conditions, and which cannot be readily removed, may remain within the Concession Area. Please see Section 65 for further restrictions relating to the Lincoln Road Mall. Notwithstanding the foregoing, tables, chairs and umbrellas may remain on the Concession Area after-hours. Concessionaire shall neatly stack and/or secure all tables and chairs (and close-up all umbrellas) which remain in the Concession Area at the close of business each day, in order to prohibit the unauthorized use of such Concession furniture during non-business hours.

- A. Notwithstanding anything contained in this section, the City Manager may require a Concessionaire to store its tables, chairs and/or umbrellas off of the public right-of-way if, in the City Manager's sole judgment and discretion, the City Manager determines that the Concession Area and immediately adjacent public right-of-way are not being adequately maintained in accordance with the Concession Agreement.

62. **STORAGE OF CONCESSION EQUIPMENT:**

During non-business hours, storage of dishes, silverware or other similar Concession equipment is not allowed in the Concession Area, in any other portion of the public right-of-way, or outside the structural confines of the building in which the restaurant is located.

63. **SIGNAGE:**

The Concessionaire shall not permit the painting and display of any signs, plaques, lettering or advertising material of any kind on or near the Concession Area without first having obtained the prior written consent of the City Manager, except the restaurant name and/or its logo may be permitted on umbrellas but such logos and/or lettering may not exceed six inches in height.

64. **PLANTERS:**

The City Manager may permit the use of planters manufactured of terra-cotta or polymer materials with the number and size to be reviewed by the City Manager prior to placing on the Concession Area. Placement of planters within the Concession Area shall be five (5) feet apart or greater. It shall be the Concessionaire's responsibility to immediately remove planters upon written and/or verbal notice from the City Manager, in case of emergency or other circumstances, as provided in this division. Maximum size of planters shall not exceed the following:

- A. Rectangular planters: 30 inches long, by 15 inches wide by 20 inches high
- B. Round planters: 24 inches diameter by 24 inches high.
- C. Planters 20 inches or higher shall be on rollers or on rolling bases.
- D. The combination of planters and plant height should not exceed a table height or 34 inches.

Plants shall be properly maintained. Distressed plants shall be promptly replaced. Plant fertilizers which contain material that can stain the sidewalks shall not be allowed. Water drainage from any plants onto the sidewalk shall not be allowed. Potted plants shall have saucers or other suitable systems to retain seepage. All approved planters shall be included in the approved Site Plan.

65. **LINCOLN ROAD SPECIFIC CONDITIONS:**

- A. Concessionaire and Concession Facilities shall not interfere with patrons of other Concession Areas, or limit their free, unobstructed 12 feet passageway.
- B. Concessionaire and Concession Facilities shall not have rolling service stations, service carts, and bussing stations placed within five feet of the walls, columns, or posts of the Lapidus Structures, City planters, or in front of other storefronts and/or business establishments.
- C. Tables, chairs and closed-up umbrellas may only remain on the right-of-way (within the Concession Area) as long as they are placed in an orderly manner.

66. **ALTON ROAD GATEWAY AREA DEVELOPMENT CLEAR PEDESTRIAN PATH:**

A. Concessionaire and Concession Facilities shall not interfere with patrons of other Concession Areas, or limit their free, unobstructed 10-foot passageway except along the portions of West Avenue, Alton Road, and 5th Street/MacArthur Causeway south of 6th Street, where it shall be a minimum of five feet wide. The clear pedestrian path may be reduced by up to five feet for the sole purpose of accommodating the trunk diameter of canopy street trees when adjacent to a building.

67. **SECURITY:**

Concessionaire may, at its sole discretion and sole cost and expense, provide security for

the Concession Area. Concessionaire may provide security personnel during operating hours. City shall have no liability to Concessionaire for any personal injury, damage or loss of personal property, fixtures, equipment, or other property arising from theft or vandalism, or other act or omission of any person or entity upon the Concession Area.

68. **PROHIBITED ITEMS:**

No food preparation, food storage, expanded polystyrene food service articles, single-use plastic beverage straws, single-use plastic stirrers, refrigeration apparatus or equipment, or fire apparatus or equipment, shall be allowed on the Concession Area or the right-of-way. In addition, expanded polystyrene food service articles, single-use plastic beverage straws, and single-use plastic stirrers shall not be provided to Concessionaire's patrons.

Exception. The provisions in this section shall not restrict a Concessionaire from providing a beverage with, or offering the use of, a single-use plastic beverage straw or single-use plastic stirrer to an individual with a disability or medical condition that impairs the consumption of beverages without a single-use plastic beverage straw or single-use plastic stirrer.

69. **NO PLASTIC BAGS:**

Single-use carry out plastic bags shall not be allowed on the Concession Area or the right-of-way and shall not be provided to Concessionaire's patrons.

70. **NO FOOD AND/OR BEVERAGE DISPLAY(S):**

No food and/or beverage display(s) shall be permitted in any Concession Area and/or on the right-of-way, nor shall any food and/or beverage display(s) be maintained within the restaurant/business establishment's premises in such a way that the placement of such display(s) is/are clearly visible from the Concession Area and/or the right-of-way.

71. **MENU BOARDS:**

Menu board means a board allowing for the posting of a restaurant's complete menu, and fabricated in such a manner so as not to constitute a form of general advertising or establishment identification. The location, size, design, materials, and color of the menu board shall be approved by the City Manager and shown on the Concession site plan. Menu boards shall be no larger than six square feet; may not be internally illuminated; and the top of the board shall not exceed five feet, six inches from grade. The menu board shall not be a sandwich board sign (as Concessionaire may not erect any permanent improvements or place temporary improvements or other Concession Facilities on the Concession Area without the City Manager's consent. One menu board shall be permitted per Concession Area for every 50 feet of frontage. No food or drink special(s) may be displayed, disclosed, or posted on any menu board or sandwich board sign. Specials board(s) are prohibited in all Concession Areas and any other portion of the public right-of-way. Food or drink menu special(s) shall not be displayed, disclosed, posted or permitted to remain in any Concession Area and/or the public right-of-way, except at a

table presently occupied by a patron; nor shall any food or drink menu special(s) be displayed, disclosed or posted within the restaurant/business establishment's premises in such a way that the placement of such display, disclosure, or posting is clearly visible from the Concession Area and/or public right-of-way.

A sandwich board sign means a freestanding, A-frame structure located on a sidewalk which may be affixed in position or is collapsible and which contains a sign (as defined in section 114-1 of the City Code). The sandwich board sign shall not be a menu board (as defined above) or a specials board, which is defined as Specials board means a board allowing for the posting of a restaurant's daily food and/or drink specials.

72. **SANITATION:**

Concessionaire specifically agrees to operate its concession in compliance with all City sanitation rules, regulations, and ordinances, and any other applicable law, regulating sanitation.

**ARTICLE III**  
**CONSUMER PROTECTION TERMS AND CONDITIONS**

73. **OPERATION:**

Concessionaire shall designate a competent full-time manager to oversee the day-to-day operations, who will act as primary point of contact for the City

74. **OFFICERS AND OWNERS:**

No corporate officer or owner of Concessionaire in the immediately preceding 12-month period (each, a "corporate officer"), or any person owning, directly or indirectly, ten percent or more of the Concessionaire business in the preceding 12-month period (each, an "owner") may have a prior history of four or more code violations relating to the operations of the Concession Area.

75. **QUALITY:**

Concessionaire shall always offer high quality food, service, and cleanliness as evidenced by government inspections, minimal complaints to the City or consumer protection agencies, and (at a minimum) above-average ratings on online web-based platforms, social networking sites or online review sites such as Yelp, Google, and/or Trip Advisor.

76. **COMPLAINTS:**

Concessionaire shall endeavor to operate free from complaints pertaining to the Concessionaire and/or the business establishment/restaurant. If a complaint is received, the Concessionaire shall communicate with the complainant to attempt to respond to the complaint and correct any shortcomings in quality or service at the Concession. Concessionaire shall never communicate rudely or antagonistically with any complainant.

77. **DISCLOSURES:**

A Concession must display or disclose, in writing, actual prices for food and drink menu item(s), and display or disclose, in writing, actual prices and accurate terms and conditions for any food and drink menu special(s). The displayed price for the food or drink menu item(s) or food and drink menu special(s) (and, if applicable, the terms and conditions for any food and drink menu special(s) must be in a size (font) and typeface, which is at least as large as the name of the menu item. Such prices (and, if applicable, terms and conditions) must be displayed adjacent to the name, description, photograph, and/or image of each menu item or menu special. All menu prices must be displayed in numeric format. A Concession may not charge a price that is greater than the price displayed or disclosed for any food or drink menu item(s) or food or drink menu special(s). In the event that a Concession patron makes a unique or special request for a food or drink menu item not listed on the menu, the Concession must disclose, to the patron, the price of the unique or specialty requested food or drink menu item, prior to agreeing to prepare the food or drink menu item. A menu that prominently displays the name of the Concessionaire; actual prices for food and drink menu item(s) and for food and drink menu special(s); and, if applicable, accurate terms and conditions for any food and drink menu special(s) must be provided to each sidewalk café patron.

78. **APPROVED MENU:**

The sample menu approved for use by the Concession Area operator is attached hereto as Exhibit C. Any changes to the sample menu shall require the approval of the City Manager and be attached as an exhibit to the Agreement.

79. **AUTOMATIC GRATUITIES OR SERVICE CHARGES:**

A Concessionaire that automatically includes a gratuity, service charge, minimum charge, corkage fee, set up fee, sharing fee or charge, or other similar charge, either in the price of the meal or drink or separately imposed for all items ordered, must display the actual percentage or amount of each such gratuity, charge, and/or fee on the menu and on the face of the customer's bill. If the Concessionaire automatically includes gratuity, service charge, or similar charge, the percentage and actual amount must also be listed on the document (whether physical or digital) that a customer is required to authorize for a credit card payment. Additionally, if a space for an additional tip is provided to the customer on the credit card authorization, it must be labeled "ADDITIONAL TIP" if any gratuity or service charge was automatically added to the customer's bill. Also, the menu, bill, and credit card authorization form must state that any automatically added service charge or gratuity is suggested only, and may be altered or eliminated by the customer, if they wish to do so. This disclosure serves to provide the customer notification that an automatic gratuity, charge, and/or fee is being included by the Concessionaire. The disclosure of each gratuity, charge, and fee within the menu must not be smaller than 14-point font, and the disclosure within the bill and/or credit card authorization must not be smaller than 12-point font. Suggested, automatically added, gratuity or service charges may only be 15%, 18%, and/or 20% of the pre-tax sale amount. If a suggested gratuity or service charge is automatically included, a suggested additional tip or service charge may only be 5% or less of the pre-tax sale amount.

80. **TAXES:**

A Concessionaire that includes a gratuity or tip as a charge must separately itemize and

state the actual amount of this charge on the face of the customer's bill and receipt, and such gratuity or tip must only be calculated based on the pre-tax sale amount of the food or drinks. Service charges that are not paid directly to the waitstaff, minimum charges, corkage fees, set up fees, sharing fees or charges, or other similar charges imposed by a Concessionaire as part of the charges for furnishing, serving, or preparing food products must be subject to sales tax and surtax. A Concessionaire must state the total combined percentage and amount of city, county, and state taxes on the face of the customer's bill and receipt, and must label such taxes accurately.

81. **HOSPITALITY TRAINING:**

For Concessionaires operating on Ocean Drive, between 5th Street and 15th Street, every manager and every employee assigned to work in the Concession Area must successfully complete a hospitality training program. Each new manager and employee will also need to comply with this requirement. Concessionaire shall (i) maintain records on premises evidencing compliance with this section; and (ii) submit to the City Manager, on an annual basis, an affidavit, in the form provided by the City, confirming compliance with this section.

82. **SALE OF CIGARS AND CIGARETTES:**

The sale of cigars and cigarettes in the Concession Area to seated patrons, by a vendor licensed on the premises with the consent of the restaurant and Concessionaire, is permitted provided that such sale or transaction shall only occur on such premises, and not on other city rights-of-way. Any solicitation of passersby or obstruction of the right-of-way shall be prohibited. Goods and merchandise transported from one location to another shall be covered and obscured from view. Vendors shall not use flashing lights, signs, markings, or other devices to call attention to themselves or the goods and merchandise, and shall not otherwise violate the provisions of section 74-1 of the City Code.

83. **HAWKING:**

Concessionaire shall not:

- A. solicit any pedestrian(s) located on the sidewalk abutting a Concession Area, or on the right of way within 20 feet of the outer perimeter of a Concession Area, for the purpose of inducing such pedestrian to patronize any business establishment or Concession, or purchase any food, beverage, product, or service, unless the pedestrian first affirmatively communicates a desire to receive information about the Concession's food, beverages, products, or services;
- B. distribute any commercial handbill(s) (which is defined to mean any handbill, menu, coupon, flyer, paper, document, circular, folder, booklet, letter, card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed or painted matter or object that conveys any information about any good or service provided by a business) to any pedestrian(s) located on the sidewalk abutting a Concession Area, or on the right-of-way within 20 feet of the outer perimeter of a Concession Area, unless the pedestrian first affirmatively communicates a desire to receive information about the Concessionaire's food, beverages, products, or services; and/or
- C. display any commercial handbill(s) in such a way that impedes, hinders, delays, or



obstructs any pedestrian's(s') gait or path of travel.

84. **NOISE:**

There shall be no live entertainment or speakers placed in the Concession Area unless expressly permitted as a special event permit, issued by the City's Special Events Permit Office. Concessionaire shall at all times operate its business in compliance with the City's noise ordinance.

85. **OVERSIZE DRINKS:**

Concessionaire voluntarily agrees not to serve or allow the consumption of any beverage on the public right of way that exceeds 22 ounces in size, except that standard bottles of unaltered wine up to 750 ml or water or champagne up to 1.5 L may be served at a table in the Concession area.

86. **SMOKING:**

Participant voluntarily agrees not to allow smoking of any vapor-generating devices, including but not limited to hookah smoking, within the Concession Area.

87. **UNIFORMS:**

Participant voluntarily agrees to require all employees visible to the public to wear a uniform such as basic black or a logo bearing uniform produced by Concessionaire.

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

**FOR THE CITY:**

**FOR CONCESSIONAIRE:**

**CITY OF MIAMI BEACH, FLORIDA**

By: \_\_\_\_\_  
**CITY MANAGER**

By: \_\_\_\_\_

\_\_\_\_\_  
**Print Name**


\_\_\_\_\_  
**Name and Title of Signatory**

**FOR CITY:**

**APPROVED AS TO FORM:**

By: \_\_\_\_\_  
**City Attorney      Date**

**TEMPLATE  
APPROVED AS TO  
FORM & LANGUAGE  
& FOR EXECUTION**

 6-9-22  
\_\_\_\_\_  
**City Attorney      Date**