

**TOWN OF OYSTER BAY  
NASSAU COUNTY, NEW YORK**

**REQUEST FOR PROPOSALS**

**CONCESSION SERVICES  
TOBAY BEACH CONCESSION STANDS**



Submission Deadline: February 25, 2019, no later than 4:45 p.m. as set forth herein.

REQUEST FOR PROPOSALS  
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## **AUTHORIZED CONTACT PERSON**

Prospective firms are advised that the authorized Town of Oyster Bay contact person for all matters concerning this RFP is:

**JOSEPH G. PINTO**  
Commissioner of the Department of Parks  
Town Hall South  
977 Hicksville Road  
Massapequa, New York 11758  
(516) 797-4142  
jpinto@oysterbay-ny.gov

## **INTRODUCTION**

Pursuant to Section 104-b of the New York General Municipal Law and the written procurement policies and guidelines currently in effect in the Town of Oyster Bay (the “Town”), the Town of Oyster Bay Department of Parks (the “Department”) hereby solicits proposals to provide the certain designated Food and Beverage concessions at the Town of Oyster Bay TOBAY Beach Concession Facility located at the Town of Oyster Bay TOBAY Beach and Marina (the “Facility”). The term of the contemplated Concession License Agreement shall begin on April 1, 2019, and shall continue to and until March 31, 2024, unless extended in accordance with the terms of the License Agreement.

The intent of this RFP is to obtain the most qualified concessionaire to provide food and beverage service at the East, West, Main, Spray Park, Marina and Beach Access Tunnel Concessions. The operation should emphasize informal family dining in a casual beach atmosphere. As set forth below, selection will be based upon consideration of the overall qualifications, experience, financial status, and benefit to the Town, the type, mode and features of proposed operations and management, and the proposer’s recommendations for any capital additions or improvements to the Facility.

The Town reserves the right to negotiate with any and all proposers, to decline any and all proposals, and to select the proposer that, in the Town’s sole judgment, will best serve the needs of the Town and its residents.

## **SITE DESCRIPTION**

The Town of Oyster Bay TOBAY Beach and Marina is located on the south shore of Oyster Bay. The Facility includes a marina, two permanent restaurants, five concession stands, a mini-golf course and a spray park concession. The beach is maintained and manned with lifeguards from the Town of Oyster Bay from Memorial Day to Labor Day. Marina Summer Seasonal dates are approximately mid-April through mid-November of each year. The restaurants are primarily operated from Memorial Day through the second week of October; hours of operation are approximately from 11:00 a.m. to 10:00 p.m.

The scope of the concession operations which are subject to this Request for Proposal includes only the operation of the East, West, Main, Marina, and Beach Access Tunnel Concessions, along with the spray park concession stand. The operation of the restaurant concessions are subject to a separate Request for Proposals and Licensing Agreement. Proposers may submit proposals on one or both Requests for Proposals. However, each Request for Proposals must be responded to separately, and award shall be based upon separate Licensing Agreements.

### **FORM OF LICENSE AGREEMENT**

The successful proposer will be required to execute a license agreement with the Town in substantially the form annexed hereto as Appendix "A" (the "License Agreement"). Any objections to the terms and conditions of the proposed License Agreement must be set forth in the proposer's response to this RFP, as set forth below.

It is the intention of the Town to adhere substantially to the form of License Agreement annexed hereto, and the Town shall be under no obligation to modify any of the proposed terms and conditions of the License Agreement. Substantial, material changes to the annexed license agreement will not be considered, and the Town shall be under no obligation to modify any of the proposed terms and conditions of the form of License Agreement.

### **FORM OF PROPOSAL**

Proposers must submit ten (10) hard copies (one signed original and nine copies) and one (1) electronic copy of each proposal with additional relevant information. Proposals should be organized as described in Attachment No. 1 herein. Although disfavored, the submission of extraneous or voluminous additional materials not expressly required pursuant to this Request for Proposals (i.e. menus, promotional materials, and the like) is not prohibited.

### **SCHEDULE FOR PROPOSALS**

A non-mandatory site visit and walk-through of the Facility shall be held at the Facility on February 7, 2019 at 10:00 a.m.

The Town reserves the right, at its sole option, to conduct personal interviews of one or more of the proposers prior to selection. The dates and times for such personal interviews shall be scheduled for the mutual convenience of the Town and selected proposers.

Proposals must be received by the Department on or before February 25, 2019 no later than 4:45 p.m. To be considered timely received, both the hard copies and electronic copy of the proposal must be received by the Department on or before the deadline established herein. In the interest of fairness to all participants, no extensions or exceptions will be permitted, unless issued as an Addendum to this RFP and applicable to all proposers.

## **QUESTIONS, CLARIFICATIONS, and COMMUNICATIONS**

Any questions or requests for clarification of this RFP must be submitted in writing on or before February 12, 2019 to the Authorized Contact Persons identified above. E-mail and fax are acceptable; E-mail is preferable. Responses will be issued by the Town in the form of an Addendum to this RFP. The Town will make its best efforts to answer all questions received, but in no way warrants or covenants that responses will be provided to all questions. In the interest of fairness to all potential proposers, all questions, and any responses, will be shared with all who have expressed an interest in this RFP.

All communications during the RFP process must be directed solely to the Authorized Contact Person identified above. Communication with any other Town elected officials, employees or any member of the Town Evaluation Committee may be cause for disqualification from the RFP process.

## **QUALIFICATION BASED SELECTION PROCESS**

The Town, after receipt and review of responses to this RFP, reserves the right to reject all proposals based upon the information provided by the proposers in their proposal, any other source of reliable information concerning the proposers, and based upon subsequent negotiations between the Town and proposer firms. The review process of the RFPs submitted are described under the section entitled: "CRITERIA FOR EVALUATION AND AWARD."

## **CRITERIA FOR EVALUATION AND AWARD**

The process and criteria to be used by the Town in evaluating these proposals shall be the following:

a. **Evaluation Committee:**

The Town will review each proposal based upon rating criteria described in subparagraph b. below. Proposers may make a presentation to the Town Board on March 19, 2019 in order to demonstrate their qualifications and approach to the project. The final selection shall be made by the Town Board.

b. **Award Criteria:**

The Award Criteria to be considered by the Town Evaluation Committee shall include all of the criteria required pursuant to Guideline No. 6 as set forth in the Town's Procurement Policies and Procedures adopted on March 27, 2018, by Resolution No. 209-2018, with particular emphasis on the following:

i. **General Qualifications**

Proposer's experience and expertise in providing similar services, with emphasis on similar municipal concession and restaurant facilities on Long Island, and references reflecting similar work and related experiences.

ii. **Proposed Services/Products**

Responsiveness of proposed operating and management strategy, recognition of potential issues and problems, and effective, innovative and creative strategies for addressing same.

iii. **Financial Strength and Resources**

Proposer's demonstrated financial strength and resources and ability to fulfill the financial commitments and requirements of the RFP, including proposer's ability to finance and complete construction of any capital modifications or improvements to the Facility accepted by the Town.

iv. **Proposed Capital Improvements**

The attractiveness and potential benefits to the Town of the proposer's proposals for future capital modifications or improvements to the Facility, if any.

v. **Financial Proposal**

The financial benefit to the Town of the proposer's financial proposal over the term and duration of the License Agreement.

**USE OF SUBCONTRACTORS AND OTHER SUBORDINATE ENTITIES**

Prospective firms are advised that the Town will entertain proposals that include the use of subcontractors and/or other subordinate entities. In such event, the proposal must clearly state the extent and nature of the work proposed to be delegated to the proposed subcontractor or other subordinate entity. The same information required by this RFP to be provided by the proposer shall also be provided for each proposed subcontractor or other subordinate entity.

**FAMILIARIZATION WITH CURRENT PROGRAMS, FACILITIES AND DOCUMENTS**

The Town makes no representation or warranty concerning the current status or condition of the Facility or the accurateness or completeness of any information provided as part of the RFP process.

It is the sole responsibility of the proposers to familiarize themselves with the Facility and any other information which is necessary and relevant to the scope of this RFP and proposer's proposal hereunder.

## **ATTACHMENT NUMBER 1**

### **FORMAT OF PROPOSAL**

Proposals should be organized as shown below with tab dividers between sections and should include all the information indicated. Note that elaborate brochures or other presentations beyond those sufficient to present a complete and extensive response to this solicitation are not desired.

#### **SECTION A. INTRODUCTORY STATEMENT**

#### **SECTION B. QUALIFICATIONS AND APPROPRIATENESS OF PROPOSED STAFF**

Provide names and resumes of key personnel proposed for this project. The proposal should also include an organizational chart for the operation of the food and beverage service.

#### **SECTION C. APPROPRIATENESS AND QUALITY OF PROPOSER'S EXPERIENCE**

1. Proposer's experience and expertise in providing similar food, beverage and concession services, with emphasis on similar municipal concession and food service facilities on Long Island.
2. Minimum of five (5) references with contact information, reflecting similar work and related experience.

#### **SECTION D. PROPOSED MANAGEMENT AND OPERATING STRATEGY**

Proposed operating, management and marketing and sales strategy, recognition of potential issues and problems, and effective, innovative and creative strategies for addressing same.

#### **SECTION E. FINANCIAL INFORMATION**

Proposers must submit full, complete, and comprehensive financial information and data. This information shall include (i) a listing of all of the principals and investors (if any) having any role in the operation of the proposer's corporation; (ii) an audited and certified balance sheet from the proposer, principals, and investors (if any) noting all assets, liabilities, contingent liabilities, revenues, and other pertinent and relevant data; (iii) copies of the proposer's, principals' and investors' tax returns for the last five (5) years; (iv) a listing of any and all litigation to which the proposer, principals, and investors (if any) were a party, which listing shall include the full caption, venue, index or docket number, and a brief description of the disposition of the matter, if any; (v) and at least three (3) bank, credit, and business references.

Proposers, principals, and investors (if any) shall also be required to complete Town disclosure questionnaires, which are annexed at the end of this Attachment. By submitting a

proposal in response to this RFP, proposer consents to the conduct by the Town of such credit and background investigations as the Town in its sole discretion deems necessary and appropriate. The Town similarly reserves the right to share any information submitted in response to this RFP with outside, professional consultants to evaluate the proposal. Such information will, to the extent permitted by law, be kept confidential.

## **SECTION F. PROPOSED CAPITAL IMPROVEMENTS**

Proposer shall include a complete description of any capital additions, modifications or improvements the proposer intends to propose for the Facility, including the estimated cost and schedule for completion of said additions or improvements. Said description shall be accompanied by such preliminary and conceptual drawings, renderings and site plans as the proposer deems appropriate and necessary. The proposer shall describe in detail the justification for the proposed capital additions or improvements, including any anticipated operational and/or financial benefits to the Town to be derived therefrom. As provided in the attached draft license agreement, title to all improvements shall vest in the TOWN brick-by-brick during and following the performance of any work.

## **SECTION G. FINANCIAL PROPOSAL**

Proposer shall provide a detailed financial proposal describing the form and amount of the proposed license fee and any other type of financial remuneration to be paid to the Town by the proposer in consideration of the award of the concession and operating rights to the proposer. Said proposal must include a statement of a proposed monthly concession license fee to be paid to the Town, subject to the escalations set forth in the annexed form of license agreement (Appendix "A."). Proposer may also, at its discretion, propose any other form of alternative, additional or supplemental consideration it would like the Town to consider.

## **SECTION H. OBJECTIONS TO FORM OF LICENSE AGREEMENT**

Proposer shall identify any objections to the proposed form of license agreement annexed hereto as Appendix "A."

## **SECTION I. SUPPLEMENTAL INFORMATION**

Proposer may provide any additional information relevant to the proposer's qualifications or proposal for this project at the proposer's sole option.

CONTRACT# \_\_\_\_\_ TITLE \_\_\_\_\_

**TOWN OF OYSTER BAY  
DISCLOSURE QUESTIONNAIRE**

All questions on this questionnaire must be answered by an officer and any stakeholders who hold a majority or greater ownership interest in the proposer. Answers must be typewritten or printed in ink. If you need more space to answer any question, make as many photocopies of the appropriate page(s) as necessary and attach them to the questionnaire.

COMPLETE THIS QUESTIONNAIRE CAREFULLY AND COMPLETELY. FAILURE TO  
SUBMIT A COMPLETE QUESTIONNAIRE MAY MEAN THAT YOUR BID OR PROPOSAL  
MAY BE REJECTED AS NON-RESPONSIVE AND IT MAY NOT BE CONSIDERED FOR  
AWARD

**NOTE: All questions require a response, even if response is “none” or “not-applicable.” No blanks.**

**SECTION I: GENERAL INFORMATION**

1. Business name (legal name): \_\_\_\_\_
2. Federal Employer ID No. (FEIN): \_\_\_\_\_
3. d/b/a – doing business as (if applicable): \_\_\_\_\_  
County filed: \_\_\_\_\_
4. Website address (if applicable): \_\_\_\_\_
5. Business e-mail address: \_\_\_\_\_
6. Principal place of business address: \_\_\_\_\_
7. Telephone number: \_\_\_\_\_ 7. Fax number: \_\_\_\_\_
8. Does the business use, or has it used in the past five (5) years, any other business name, FEIN, or d/b/a other than what is listed in questions 1-3 above? Yes \_\_\_ No \_\_\_  
If yes, please provide details. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
9. Authorized contact:  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Telephone number: \_\_\_\_\_ Fax number: \_\_\_\_\_  
E-mail: \_\_\_\_\_

10. How many years has this entity been in business? \_\_\_\_\_
11. The proposer is a (check one):  Sole Proprietorship  Partnership  Corporation  
 Other (Describe) \_\_\_\_\_

**SECTION II: PRINCIPAL INFORMATION**

1. Principal Name \_\_\_\_\_  
Date of birth \_\_\_\_/\_\_\_\_/\_\_\_\_ % Equity Interest in Company \_\_\_\_\_  
Home address \_\_\_\_\_  
City/state/zip \_\_\_\_\_  
Telephone \_\_\_\_\_

2. Positions held in submitting business  
\_\_\_\_\_  
\_\_\_\_\_

3. Within the past five years, have you been a principal owner or officer of any business or not-for-profit organization other than the one submitting the questionnaire?  
YES \_\_\_ NO \_\_\_; If Yes, provide details. \_\_\_\_\_  
\_\_\_\_\_

4. Has any governmental entity awarded any contracts to a business or organization listed in question 3 above in the past five (5) years while you were a principal owner or officer?  
YES \_\_\_ NO \_\_\_; If Yes, provide details. \_\_\_\_\_  
\_\_\_\_\_

**SECTION III: DUE DILIGENCE QUESTIONS - TO BE COMPLETED IF CONTRACT VALUE IS \$25,000.00 OR OVER IN A 12 MONTH PERIOD.**

1. Does the business possess all certifications, licenses, permits, approvals, insurance, bonds or other authorizations issued by any local, state, or federal governmental entity in connection with the proposal/project, business services, operations, business, or ability to conduct its activities? Please note this does not include construction related activities such as building permits and certificates of occupancy.  
YES \_\_\_ NO \_\_\_ If no, please provide details \_\_\_\_\_  
\_\_\_\_\_
2. Does this business have one or more affiliates, and/or is it a subsidiary of, or controlled by, any other business?  
YES \_\_\_ NO \_\_\_ If Yes, provide details. \_\_\_\_\_  
\_\_\_\_\_

3. Has the proposer ever had a bond or surety cancelled or forfeited, or a contract with any entity terminated? YES \_\_\_ NO \_\_\_ If Yes, state the name of bonding agency, (if a bond), date, amount of bond and reason for such cancellation or forfeiture; or details regarding the termination.

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4. On a separate document attached hereto, list all contracts that business has entered into with any municipality in the past three (3) years. Please list the names, address and contact person for the contracting entities.

5. Has the proposer, during the past five (5) years, been declared bankrupt? YES \_\_\_ NO \_\_\_ If Yes, state date, court jurisdiction, amount of liabilities and amount of assets \_\_\_\_\_

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6. In the past five years, has this business and/or any of its owners and/or officers and/or any affiliated business, been the subject of a criminal investigation and/or a civil anti-trust investigation by any federal, state or local prosecuting or investigative agency?  
YES \_\_\_ NO \_\_\_ If Yes, provide details for each such investigation. \_\_\_\_\_

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7. In the past 5 years, have any owner and/or officer of any affiliated business been the subject of a criminal investigation and/or a civil anti-trust investigation by any federal, state or local prosecuting or investigative agency, where such investigation was related to activities performed at, for, or on behalf of an affiliated business.  
YES \_\_\_ NO \_\_\_ If Yes, provide details for each such investigation. \_\_\_\_\_

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8. In the past 5 years, has this business and/or any of its owners and/or officers and/or any affiliated business been the subject of an investigation by any government agency, including but not limited to federal, state and local regulatory agencies?  
YES \_\_\_ NO \_\_\_ If Yes, provide details for each such investigation. \_\_\_\_\_

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9. In the past 5 years, has any owner and/or officer of an affiliated business been the subject of an investigation by any government agency, including but not limited to federal, state and local regulatory agencies, for matters pertaining to that individual's position at or relationship to an affiliated business.  
YES \_\_\_ NO \_\_\_ If Yes, provide details for each such investigation. \_\_\_\_\_

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10. Has any current or former director, owner or officer or managerial employee of this business had, either before or during such person's employment, or since such employment( if the conduct pertained to events that allegedly occurred during the time of employment):

a) Any felony charge pending? YES \_\_\_ NO \_\_\_ If Yes, provide details for each such charge.

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b) Any misdemeanor charge pending? YES \_\_\_ NO \_\_\_ If Yes, provide details for each such charge. \_\_\_\_\_

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c) Any violations of administrative, statutory or regulatory provisions pending? YES \_\_\_ NO \_\_\_ If Yes, provide details for each such charge. \_\_\_\_\_

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d) In the past ten (10) years, you been convicted, after trial or by plea, of any felony and/or any other crime, an element of which relates to truthfulness.? YES \_\_\_ NO \_\_\_ If Yes, provide details for each such conviction.

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e) In the past ten (10) years, been convicted, after trial or by plea, of a misdemeanor? YES \_\_\_ NO \_\_\_ If Yes, provide details for each such conviction. \_\_\_\_\_

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f) In the past ten (10)years, been found in violation of any administrative, statutory, or regulatory provisions? YES \_\_\_ NO \_\_\_ If Yes, provide details for each such occurrence.

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11. In the past five (5) years, has this business or any of its owners or officers, or any other affiliated business had any sanction imposed as a result of judicial or administrative proceedings with respect to any professional license held? YES \_\_\_ NO \_\_\_; If Yes, provide details for each such instance.

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12. For the past five (5) tax years, has this business failed to file any required tax returns or failed to pay any applicable federal, state or local taxes or other assessed charges? YES \_\_\_ NO \_\_\_ If Yes, provide details for each such year. \_\_\_\_\_

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**SECTION IV: CONFLICT OF INTEREST**

Please disclose any conflicts of interest as outlined below. NOTE: If no conflicts exist, please expressly state "No conflict exists."

1. Any material financial relationships that your firm or any firm employee has that may create a conflict of interest or the appearance of a conflict of interest in being awarded this contract with the Town of Oyster Bay.

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2. Any family relationship that any employee of your firm has with any public servant that may create a conflict of interest or the appearance of a conflict of interest in being awarded this contract with the Town of Oyster Bay.

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3. Any other matter that your firm believes may create a conflict of interest or the appearance of a conflict of interest in being awarded this contract with the Town of Oyster Bay.

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# APPENDIX A

**LICENSE AGREEMENT**

DATED: \_\_\_\_\_, 2019

PARTIES: TOWN OF OYSTER BAY, a municipal corporation of the State of New York, having its principal office at Town Hall, 54 Audrey Avenue, Oyster Bay, New York 11771, and hereinafter referred to as the “TOWN,” acting for and on behalf of the DEPARTMENT OF PARKS, and hereinafter referred to as the “DEPARTMENT;” and

[PROPOSER], and hereinafter referred to as the “CONCESSIONAIRE.”

**WITNESSETH:**

WHEREAS, it is the general intent and purpose of this License Agreement (the “License Agreement”) to secure the efficient and beneficial operation of certain Food and Beverage Concession Services at the Town of Oyster Bay (“TOWN”) TOBAY Beach Concession Facilities located at the Town of Oyster Bay TOBAY Beach and Marina (“TOBAY”), and to provide for such future repairs, improvements and modifications as shall be deemed acceptable to and in the best interests of the TOWN and its residents;

NOW, THEREFORE, it is mutually agreed by and between the parties hereto as follows:

**USE**

1. The CONCESSIONAIRE agrees to maintain and operate a food and beverage concession service at TOBAY for the term set forth herein. The CONCESSIONAIRE shall use the facilities allocated to it in Paragraph 2 of this License Agreement, as set forth below, for no other purpose than the operation of food and beverage concession services in strict conformance with the terms and conditions of this License Agreement. No ownership or leasehold interest in the Facilities as described herein is or shall be conveyed under the terms of

this License Agreement, nor shall this License Agreement encumber or otherwise cloud the TOWN's fee simple interest in the FACILITIES.

#### FACILITIES

2. The CONCESSIONAIRE's operations shall consist of all those facilities at TOBAY designated by the Commissioner of the DEPARTMENT or his designee (the "COMMISSIONER") to be used by the CONCESSIONAIRE, limited to: the East, West, Main, Marina and Beach Tunnel Access Concessions; and any additional food and beverage dispensing facility, now or subsequently constructed or located at the premises, as designated and approved by the COMMISSIONER (the "FACILITIES"). The approximate location of the existing facilities subject to this License Agreement are depicted on the attached aerial photograph annexed hereto as Appendix "A".

#### TENT AND OTHER ENCLOSURES

3. The use and location of any tent or other temporary or seasonal enclosure or facility to be used in connection with the FACILITIES shall be subject to the advanced approval in writing of the COMMISSIONER.

#### HOURS OF OPERATION

4. The CONCESSIONAIRE shall, with the approval of the COMMISSIONER, establish its hours of operation. In no case shall the hours of operation extend past midnight. With respect to the Marina and West Concession facilities, CONCESSIONAIRE shall operate those facilities on all weekends and holidays.

#### PERSONNEL

5. The CONCESSIONAIRE agrees to have a sufficient number of trained, qualified, uniformed attendants on duty for the proper operation of the FACILITIES. The uniforms to be worn by CONCESSIONAIRE's employees and staff, which shall be furnished by

and at the sole expense of the CONCESSIONAIRE, shall be of a design subject to the approval of the COMMISSIONER and shall include the Town seal. Said personnel will be employed by, and will be employees of, the CONCESSIONAIRE. The CONCESSIONAIRE agrees to maintain an efficient staff, which at all times shall be courteous to the public and reflect favorably upon the TOWN. The CONCESSIONAIRE shall require its employees to observe a strict impartiality as to rates and service at TOBAY.

#### QUALIFICATIONS

6. The CONCESSIONAIRE warrants that it has (and will maintain during the term of this License Agreement) substantial financial capacity and resources sufficient to provide for the operation and maintenance of the FACILITIES in strict compliance with the terms and conditions of this License Agreement and has extensive experience in the operation and management of concessions similar in nature to the operation of the FACILITIES. The Concessionaire expressly recognizes that the financial data submitted in response to the RFP was relied upon by the Town, and warrants that such data remains accurate as of the date of execution.

#### GARBAGE REMOVAL

7. The CONCESSIONAIRE shall not permit garbage to accumulate. Garbage shall be stored by the CONCESSIONAIRE in closed containers to be supplied by and at the sole expense of the CONCESSIONAIRE prior to removal from the FACILITIES. Such containers shall, to the extent practicable, be shielded from public view. The CONCESSIONAIRE shall transport garbage to the TOBAY waste facility for removal by the TOWN. The CONCESSIONAIRE agrees to pay the TOWN for waste removal at the then prevailing rate.

MAINTENANCE AND CARE OF PREMISES

8. The CONCESSIONAIRE agrees that:

(a) The CONCESSIONAIRE shall keep any room, space or area under its control or used in connection with its food, beverage, and amusement service, including the bathrooms, in a clean and sanitary condition. In the case of bathrooms, it shall be the CONCESSIONAIRE's additional obligation to maintain all bathrooms in a clean and sanitary condition during those hours that are outside of the Park hours of operation.

(b) The CONCESSIONAIRE shall be responsible for the maintenance, repair, or replacement of the FACILITIES' fixed equipment and furnishings, to the extent that such fixed equipment and furnishings are necessary to the CONCESSIONAIRE's operations, as well as the interior and exterior structure, including, but not limited to, the mechanical systems, if any, and all other structures and equipment included within the FACILITIES licensed herein, it being the intent that CONCESSIONAIRE be responsible for all costs and expenses related to the operation of the FACILITIES. All such structures and equipment shall be operated and maintained in strict accordance with all applicable federal, New York State, Nassau County and Town codes, regulations and requirements as currently enacted and any future enactments, supplements or modifications.

(c) The COMMISSIONER or his authorized representative shall have the right to enter upon and inspect the FACILITIES at any time during the term of this License Agreement. If, as a result of such inspection, the COMMISSIONER determines that any deficiencies exist in the condition of those areas within the CONCESSIONAIRE's area of responsibility, the COMMISSIONER shall provide notice to the CONCESSIONAIRE in writing. The CONCESSIONAIRE shall commence appropriate corrective work within five (5) business days of the date of such notice, or immediately if such deficiencies pose an immediate health risk

or other danger to the public. If the CONCESSIONAIRE fails to complete the appropriate corrective work within a reasonable time of such notice, or immediately in case of health risks or other public danger, as determined by the COMMISSIONER in his sole discretion, the DEPARTMENT shall have the right to correct such deficiencies itself and to bill the CONCESSIONAIRE for the cost of such work. The CONCESSIONAIRE shall pay the bill for such work immediately upon presentation.

(d) If open, the TOWN agrees to remove snow from the premises surrounding and leading to the FACILITIES as needed to make the FACILITIES accessible to the public at the earliest possible opportunity.

(e) Upon termination of this License Agreement, the FACILITIES and any related premises, shall be returned to the TOWN broom clean and in as good order, condition and repair as they were in on the EFFECTIVE DATE (as defined in Paragraph 42), reasonable wear and tear excepted.

(f) The TOWN makes no representation or warranty concerning the present condition or state of maintenance, repair or code compliance of the FACILITIES. CONCESSIONAIRE accepts the FACILITIES in their "AS-IS" condition. Notwithstanding any other requirement of this License Agreement, it shall be the sole responsibility of the CONCESSIONAIRE, within thirty (30) days of the EFFECTIVE DATE to bring all areas of the FACILITIES under the CONCESSIONAIRE'S occupancy and use into full compliance with all then applicable federal, New York State, Nassau County and Town codes, regulations and requirements at its sole expense.

#### UTILITIES

9. The CONCESSIONAIRE shall be responsible for one-hundred (100%) percent of the utility costs of the FACILITIES as read on Electric Meter Number [insert meter

**number**] (currently marked "CONCESSIONAIRE"), Gas Meter Number [insert meter number], Water Meter Number [insert meter number], and costs associated with the Simplex system or any other notification system installed at the FACILITIES. The CONCESSIONAIRE agrees to be billed directly for these charges by the utility provider and to make appropriate arrangements for said direct billing of such utility services within thirty (30) days of the EFFECTIVE DATE. In the event that the CONCESSIONAIRE's failure to pay any utility bill results in a utility provider terminating any utility service and/or pursuing collection from the TOWN, the TOWN shall have the right to terminate the License Agreement without notice and to require the CONCESSIONAIRE to immediately vacate the FACILITIES and related premises.

#### PRICING

10. The CONCESSIONAIRE agrees that prices charged for its food and services, shall be comparable to those charged by beach concessions of similar quality and nature in Nassau County. The CONCESSIONAIRE shall be required at all times to post a menu and schedule of prices at all FACILITIES. It is agreed and understood that all income derived from the operation of the FACILITIES pursuant to this License Agreement shall belong to the CONCESSIONAIRE, except as provided for in Paragraph 43.

#### LICENSES AND PERMITS

11. The CONCESSIONAIRE shall procure, at its own cost and expense, all licenses or permits necessary for the lawful operation of the FACILITIES and its business, including, without limitation, certificates of occupancy. The TOWN shall provide reasonable cooperation to the CONCESSIONAIRE to obtain such license or permits.

#### BOARD OF HEALTH REQUIREMENT

12. The CONCESSIONAIRE warrants and agrees that all food, beverage, and amusement items that are offered for sale under this License Agreement shall be handled, served,

and/or sold in a clean and sanitary manner and in accordance with the requirements of the Nassau County Department of Health and any and all other applicable rules and regulations.

#### ASSUMPTION OF RISK

13. The CONCESSIONAIRE assumes all risk in the operation of the FACILITIES and agrees to comply with all federal, state, and local regulations and all rules, regulations, and ordinances of the TOWN, as well as rules and regulations of the DEPARTMENT. To the extent not undertaken by CONCESSIONAIRE pursuant to this License Agreement, the TOWN agrees to comply with any rule, regulation, or ordinance under which it has sole responsibility as the owner of TOBAY.

#### ADVERTISING

14. The CONCESSIONAIRE shall be permitted to advertise its products and programs offered at the FACILITIES, provided it does so in a reasonable manner and in good taste, which shall be determined by the COMMISSIONER in its sole and absolute discretion. The CONCESSIONAIRE shall bear all costs for advertising.

Subject to the provisions of Paragraphs 37 and 38, the CONCESSIONAIRE may, from time to time, and with the prior written approval of the COMMISSIONER, change the trade name under which it does business.

The CONCESSIONAIRE shall be permitted to erect signs, as necessary for the operation of its business to be conducted at the FACILITIES. The signs shall be made of wood or similar durable material. The size, design (which shall include the Town seal), copy, and location of any signs shall be subject to the prior written approval of the COMMISSIONER. The CONCESSIONAIRE agrees that any signs are intended solely to inform the public of the location and identity of the FACILITIES, including without limitation, restaurants in a tasteful and appropriate manner. The COMMISSIONER shall make the final decision as to what

constitutes a tasteful and appropriate manner. The CONCESSIONAIRE shall bear the cost of any signs, including any utility and maintenance costs associated therewith.

#### TELEPHONE

15. The CONCESSIONAIRE shall pay for its telephone and internet usage in the conduct of its business at the FACILITIES.

#### EQUIPMENT

16. The CONCESSIONAIRE has the right to use any fixed equipment belonging to the TOWN at the FACILITIES as of the EFFECTIVE DATE and any fixed equipment installed by the TOWN thereafter. The CONCESSIONAIRE may, with prior approval of the COMMISSIONER, purchase additional fixed equipment required and necessary for the operation of the FACILITIES.

#### SUPPLIES

17. The CONCESSIONAIRE agrees to provide, at its own cost and expense, all furnishings, equipment, fixtures, materials and supplies required or desired for the operation of a food, beverage, and amusement service as contemplated under this License Agreement.

#### REAL ESTATE TAXES

18. The CONCESSIONAIRE shall be responsible for paying real estate taxes or assessments, if any, on the real property subject to this License Agreement.

#### SUPERVISION

19. The CONCESSIONAIRE shall at all times have a manager, assistant manager, or other designated person in charge on duty. The COMMISSIONER shall have the right to approve the CONCESSIONAIRE's appointed senior manager. The CONCESSIONAIRE shall replace its senior manager if directed to do so by the COMMISSIONER. The COMMISSIONER may direct the replacement of any employee if the COMMISSIONER, in his

or her sole discretion, determines that the CONCESSIONAIRE's employee has failed to perform his or her duties in a professional manner.

#### ACCESS

20. The CONCESSIONAIRE shall grant access to the FACILITIES at all reasonable times to the COMMISSIONER or Deputy Commissioner of the DEPARTMENT, the TOWN Attorney or his duly designated representative, the Town Comptroller or his duly designated representative, any member of the Town Board or their duly designated representative(s), and the Town Supervisor or his duly designated representative.

#### VENDING MACHINES

21. The CONCESSIONAIRE agrees that it will not install any ATM, amusement, jukebox, arcade or other vending machines without the prior written approval of the COMMISSIONER.

#### ALTERATIONS

22. Any proposed modifications, alterations, repairs, replacement or construction to the FACILITIES made by the CONCESSIONAIRE, except those required on an emergency basis, must be approved in advance by the COMMISSIONER. The TOWN may, in its sole discretion, make any alterations, decorations, additions, or improvements to the FACILITIES and related premises at the TOWN's expense, provided that such improvements do not interfere with the CONCESSIONAIRE's operations. Nothing contained herein shall be deemed to obligate or require the TOWN to make any such alterations, decorations, additions, or improvements. Further, nothing contained herein shall be deemed to exempt the CONCESSIONAIRE from the Town's building code requirements.

## RECORDS AND ACCOUNTS

23. The CONCESSIONAIRE shall keep books and records of account in accordance with Generally Accepted Accounting Procedures. On or before the first day of April of each calendar year of this License Agreement, the CONCESSIONAIRE shall provide the TOWN with a copy of a Statement of Income and a Balance Sheet, in accordance with the Uniform System of Accounts or other previously established format, covering the CONCESSIONAIRE's operation under this License Agreement for the previous calendar year certified by its Chief Financial Officer. The CONCESSIONAIRE shall permit the TOWN or its duly authorized representative to inspect and audit appropriate books and records at any reasonable time during business hours after giving the CONCESSIONAIRE twenty-four (24) hours notice of the time and day of such inspection and audit.

## EXCLUSIVITY

24. So long as no Event of Default (as defined in Paragraph 34) exists, the TOWN shall not, during the period commencing on Memorial Day and concluding on Labor Day, permit any person, entity, or corporation to sell or bring onto the FACILITIES' premises, for general sale to the public, any goods or services permitted to be sold by CONCESSIONAIRE under this Agreement, with the exception of the goods or services authorized by the TOWN to be provided at the two (2) permanent restaurants which are the subjects of a separate License Agreement with the TOWN.

## EXCLUSIVE PRODUCT RIGHTS

25. In the event that the TOWN enters into an exclusive agreement with a national company for the providing of products, the TOWN reserves the right to require the CONCESSIONAIRE to serve or offer for sale only those products approved by the TOWN under such agreement. The TOWN shall give the CONCESSIONAIRE at least sixty (60) days

advance notice prior to the effective date of such agreement. During the term of this License Agreement, the CONCESSIONAIRE shall not enter into any exclusive product agreement with a national company.

#### FIRE INSURANCE

26. The TOWN agrees to include the FACILITIES' buildings and TOWN-owned furnishings and equipment on the TOWN's property insurance policy. The CONCESSIONAIRE agrees to obtain fire insurance for any personal property owned by the CONCESSIONAIRE.

The TOWN will determine the cost of such fire coverage and will invoice the CONCESSIONAIRE for the same which shall be paid to the TOWN within 30 days of receipt of the invoice. In the event of a loss, the TOWN will promptly make a claim against the policy, and reserve all proceeds received for necessary repairs or reconstruction. The CONCESSIONAIRE shall perform all necessary repairs or reconstruction in accordance with all applicable provisions contained in this License Agreement. CONCESSIONAIRE agrees to promptly commence and diligently pursue the restoration and repair of the FACILITIES and to restore the FACILITIES to the same or substantially similar condition as existed before the loss. The CONCESSIONAIRE shall bear any expense incurred beyond the insurance proceeds. The CONCESSIONAIRE shall be responsible for any policy deductible. Such policy deductible is subject to change at any time based upon the TOWN's property policy.

#### POSSESSION

27. It is expressly understood and agreed that no building space or equipment is leased to the CONCESSIONAIRE, but that during the term of this License Agreement, the CONCESSIONAIRE shall have unrestricted use and possession of the FACILITIES, except as provided in this License Agreement. The CONCESSIONAIRE has the right to occupy the

spaces assigned to it, operate under the license hereby granted to it, and continue in possession of the FACILITIES subject to the terms of this License Agreement only so long as the CONCESSIONAIRE strictly and properly complies with every provision contained in this License Agreement. No interest in real property is conveyed by virtue of or under this License Agreement.

#### TITLE TO EQUIPMENT

28. Title to all non-fixed equipment provided by the CONCESSIONAIRE shall remain with the CONCESSIONAIRE, and such equipment shall be removed by the CONCESSIONAIRE at the termination of this License Agreement. If any property remains on the FACILITIES after the expiration or termination of this License Agreement, the TOWN shall notify the CONCESSIONAIRE, and if the CONCESSIONAIRE fails to remove such property within ten (10) days from the date of such notification, the TOWN may deal with such property as though it had been abandoned and charge all costs and expenses incurred in the removal thereof to the CONCESSIONAIRE.

The CONCESSIONAIRE may move non-fixed equipment between the FACILITIES and its other facilities as needed, provided that no adverse impact upon the level of service at the FACILITIES occurs.

#### DAMAGE TO EQUIPMENT

29. The CONCESSIONAIRE agrees to be responsible to the TOWN for any damage or loss to TOWN equipment or property that occurs by reason of the CONCESSIONAIRE's negligence or other fault, or that of its patrons, employees, agents, contractors or suppliers.

### BAILMENT

30. The CONCESSIONAIRE agrees to be solely responsible for loss or damage to property turned over to it by any patron of the FACILITIES. CONCESSIONAIRE may limit its ability for any such loss or damage as provided under applicable law.

### WAIVER OF CLAIMS

31. The CONCESSIONAIRE waives any and all claims for compensation from the TOWN for any and all loss or damage sustained by reason of any defect, deficiency, or impairment of the structures, equipment, water supply systems, drainage systems, gas mains, electrical apparatuses, or wires furnished for the premises, or by reason of any loss of any gas supplies, water supplies, heat, or current, which may occur from time to time from any cause, or for any loss or damage resulting from fire, water, tornado, wind, or storm of any kind, civil commotion, or riot, and the CONCESSIONAIRE releases and discharges the TOWN and its agents from any and all demands, claims, actions, and causes of action arising from any of the causes aforesaid, unless caused by the negligence of the TOWN, its agents, or employees. The CONCESSIONAIRE further waives any and all claims for compensation or refund of any capital investment or investment in maintenance, repairs, furnishings or equipment, in the event this License Agreement is terminated by the TOWN for cause sooner than the fixed term provided in Paragraph 42.

Nothing herein should be construed as a waiver of the insurance claims described in Paragraph 26.

### INSURANCE AND WORKERS' COMPENSATION; INDEMNITY

32. The CONCESSIONAIRE agrees to obtain, from an insurance company authorized to do business in the State of New York and rated no less than "a" by AM Best's Rating, and to keep in force during the term of this License Agreement a policy of

comprehensive general liability on which the CONCESSIONAIRE is a named insured and the TOWN is an additional named insured pursuant to a contractual obligation, including, but not limited to, for the torts and negligence of the CONCESSIONAIRE's personnel, with a combined single limit of \$2,000,000 per occurrence for bodily injury and property damage plus excess liability insurance for all coverages included in the general liability policy in the amount of \$3,000,000 per occurrence.

The CONCESSIONAIRE shall comply with all provisions of New York Workers' Compensation Law and shall furnish a certificate showing evidence of current coverage prior to commencing any operation at the Facilities

All insurance coverage required by this Paragraph shall be subject to the approval of the Town Attorney.

All policies shall be issued in the name of the CONCESSIONAIRE, and the TOWN shall be listed as an additional named insured. The insurance policies required by this Paragraph shall not be canceled without thirty (30) days prior written notice to the TOWN. If the CONCESSIONAIRE fails to maintain such insurance policies and to obtain such policies and furnish certificates evidencing such coverage within thirty (30) days of the receipt of notice by the TOWN regarding this deficiency, the TOWN shall have the right to terminate this License Agreement as provided herein

The CONCESSIONAIRE agrees to indemnify, defend and hold the Town harmless for and against any personal injury, wrongful death or property damage or claim of monetary or other damages which occurs (i) during the term of this Agreement, (ii) during any lapse in insurance coverage or as a result of any failure by the CONCESSIONAIRE to abide by any notice or other term or provision of the policy, (iii) by the failure of CONCESSIONAIRE to

abide by any term or condition of this License Agreement, (iv) by negligence or intentional acts of CONCESSIONAIRE, its employees, agents or contractors, or (v) with respect to the elements covered under Paragraph 13 – Assumption of Risk.

The indemnity and hold harmless provisions of this Paragraph shall survive and be of full force and effect notwithstanding any lapse in the insurance coverage required under this Paragraph.

#### TERMINATION OF AGREEMENT

33. The TOWN has the right to terminate this License Agreement for cause as set forth herein.

34. The TOWN shall be permitted to terminate for cause if any one of the following events (“Events of Default”) occurs:

(a) The COMMISSIONER reasonably determines that the CONCESSIONAIRE has failed to fulfill its material obligations with sufficient diligence to ensure proper services within the term of this License Agreement, including any authorized extension;

(b) The CONCESSIONAIRE fails to pay its utility costs as described in Paragraph 10 and such failure continues beyond the notice and cure period set forth below;

(c) The CONCESSIONAIRE fails to maintain the insurance policies described in Paragraphs 26 and 32, or fails to furnish certificates and endorsement pages evidencing such policies within thirty (30) days of the receipt of notice from the TOWN sent in accordance with Paragraphs 26 and 32;

- (d) The CONCESSIONAIRE does not comply with all laws, ordinances, rules, or provisions governing this License Agreement;
- (e) The CONCESSIONAIRE engages in any immoral or illegal conduct or otherwise violates any law, rule, regulation, or judicial order applicable to the CONCESSIONAIRE, this License Agreement, or the CONCESSIONAIRE's operation of food, beverage, and amusement services;
- (f) The CONCESSIONAIRE assigns, or otherwise transfers, all or any of its interest in the License Agreement or in the premises, or otherwise causes a change in control in the CONCESSIONAIRE's ownership, without the prior written consent of the TOWN as described in Paragraphs 37 and 38;
- (g) The CONCESSIONAIRE is in default of any of the terms and conditions of this License Agreement and such failure continues beyond the notice and cure period set forth below;
- (h) The CONCESSIONAIRE does not timely make all payments to the TOWN required under this License Agreement, or under any other agreement, license, or concession agreement then pending between the TOWN and CONCESSIONAIRE (or affiliated entities) including, but not limited to, the monthly concession fee payments, and such failure continues beyond any notice and cure period as set forth below;

- (i) If any representation made by CONCESSIONAIRE in its response to the Request for Proposal For TOBAY Concession Facilities (“RFP”), a copy of which is attached hereto and made a part hereof, or at the presentation before the Town Board on [insert date] (the “Town Board Presentation”), is breached or determined to be untrue or inaccurate.
- (j) The CONCESSIONAIRE or any of its principals commit any act involving criminality, dishonesty, or moral turpitude or that otherwise could materially injure the Town’s reputation.

Upon the occurrence of any of the Events of Default described in (b), (d), (g) and (h) above, the TOWN, without prejudice or waiver of any of its rights or interests under the License Agreement or its remedies at law, shall give the CONCESSIONAIRE written notice of the Event of Default. The CONCESSIONAIRE shall have (i) five (5) business days with respect to any monetary default and (ii) thirty (30) days with respect to any other such default, from the date of such notice to cure the Event of Default, except if such default is not a payment default or otherwise susceptible to cure within thirty (30) days so long as the CONCESSIONAIRE commences to cure the default within thirty (30) days and thereafter diligently pursues the same to completion within a reasonable period of time (the “Cure Period”). If any Event of Default occurs for which there is no Cure Period or if the CONCESSIONAIRE fails to cure an Event of Default within the applicable Cure Period, the TOWN shall have the right to declare the CONCESSIONAIRE in default and to terminate the License Agreement and assume possession and control of the Facilities and all materials, equipment, and operations under this License Agreement. The TOWN may in addition thereupon, but shall not be required to, undertake all

necessary and appropriate measures to complete any uncompleted capital improvements and repairs at the sole cost of the CONCESSIONAIRE.

35. In the event of a termination of this License Agreement prior to the expiration the term hereof for any reason, CONCESSIONAIRE shall deliver to COMMISSIONER within two (2) business days a schedule of all future catered events for which a deposit has been paid to CONCESSIONAIRE, together with a copy of the contract and the amount of said deposit in cash or by certified check, which amounts shall be remitted to the TOWN and held in escrow by the TOWN pending either the satisfactory occurrence or cancellation of the event.

36. In the event that CONCESSIONAIRE does not vacate the FACILITIES as required following a termination or the expiration of the term of this License Agreement, CONCESSIONAIRE shall pay to the TOWN a monthly holdover fee equal to 200% of the Concession Fee (as defined in Paragraph 43). Because of the difficulty or impossibility of determining the TOWN's damages resulting from CONCESSIONAIRE's holding over and to avoid unnecessary litigation to determine same, the parties hereby agree to and adopt the holdover fee which represents a reasonable estimate of the license fee and liquidated damages to the TOWN. CONCESSIONAIRE expressly acknowledges and agrees that the holdover fee is not a penalty of any kind. Notwithstanding anything to the contrary herein contained, in the event that CONCESSIONAIRE shall holdover in excess of sixty (60) days, then in addition to liability for the payment of the holdover fee, CONCESSIONAIRE shall be liable to the TOWN for all losses and damages, including consequential damages, which the TOWN may reasonably incur or sustain by reason of such holding over, including, without, limitation, damages incurred or sustained by reason of the TOWN's inability to timely place a new operator as licensee of the

FACILITIES or any portion thereof as a result of such holding over. The foregoing shall not be deemed or construed as an extension or renewal of the term of this License Agreement and the TOWN reserves all legal rights to remove CONCESSIONAIRE from the FACILITIES.

#### MODIFICATION

37. The express terms of this License Agreement control and supersede any course of performance or usage of the trade inconsistent with any of the terms hereof. The License Agreement may be modified only by a writing duly executed by the TOWN and the CONCESSIONAIRE, and no modification of this License Agreement shall be effective until the modification has been agreed to in writing and duly executed by the Town Supervisor or his duly designated representative after approval and authorization by the Town Board.

#### TRANSFER OR ASSIGNMENT

38. The CONCESSIONAIRE may not assign, or otherwise transfer, all or any part of its interest in this License Agreement or in the FACILITIES or otherwise cause a change in control in the CONCESSIONAIRE's ownership without the prior written consent of the Town Board, which consent may be withheld in the TOWN's commercially reasonable discretion. The term "assign" shall mean the transfer or setting over of a right or interest. The term "change in control" shall mean any change in ownership equal to the percentage of votes or membership interests required to exercise decision-making authority.

39. In the event that the Town Board consents to the assignment or transfer of this License Agreement or the change in control in the CONCESSIONAIRE's ownership, the assignee, transferee, or new owner shall operate the food, beverage, and amusement services in a fashion substantially similar to the CONCESSIONAIRE's operation and in strict conformance with the terms, conditions and requirements of this License Agreement.

## FINANCING

40. Any collateralization or mortgage of this License Agreement in full or in part, or any of the CONCESSIONAIRE'S revenues, financial interests or rights hereunder, or any other financing agreement in connection with CONCESSIONAIRE's performance hereunder shall be subordinate to this Agreement and limited solely to financing in connection with the operation and improvements of the FACILITIES, and shall be submitted to the Town Attorney for review and subject to the prior approval of the Town Board, which shall not be unreasonably withheld. Under no circumstances shall the TOWN be liable or responsible for any indebtedness incurred by the CONCESSIONAIRE nor shall any improvements to the FACILITIES be mortgaged or a lien granted to any other party in connection with any financing obtained by the CONCESSIONAIRE for the operation of the FACILITIES.

## INDEPENDENT CONTRACTOR STATUS

41. The CONCESSIONAIRE agrees that it is, and shall at all times be deemed to be, an independent contractor, and it shall not, in any manner whatsoever, by its actions or deeds, commit the TOWN to any obligation irrespective of the nature thereof, and it shall not, at any time or for any purpose, be deemed an employee of the TOWN. It is further understood and agreed that no agent, servant, or employee of the CONCESSIONAIRE shall, at any time or under any circumstances, be deemed to be an agent, servant, or employee of the TOWN.

## TERM

42. The term of this License Agreement shall be for a period of five (5) years commencing on the date this License Agreement is fully executed (the "EFFECTIVE DATE"). The License Agreement may be renewed or extended upon the mutual consent of the parties for up to two (2) periods of five (5) years each provided that CONCESSIONAIRE has fully complied with the terms of this License Agreement and further provided that the

CONCESSIONAIRE provides notice to the TOWN at least six (6) months prior to the expiration of this License Agreement of its desire to exercise such extension option.

#### CONCESSION FEES

43. (a) The CONCESSIONAIRE shall pay the TOWN in accordance with the following schedule: [PROPOSER TO PROPOSE PAYMENT SCHEDULE AND AMOUNT]; followed by annual increases of 3% each year during the term of this License Agreement (the “Concession Fee”).

(b) The CONCESSIONAIRE agrees to pay a late charge of five (5%) percent of the monthly concession payment due if the concession payment is received by the TOWN after the 15th day of any month. The TOWN further reserves the right to require concession fees to be paid by certified check or by ACH. The TOWN shall exercise this option at its sole discretion by notifying the CONCESSIONAIRE by certified mail.

(c) The CONCESSIONAIRE shall provide security for the payments due hereunder in the form of a performance bond, in a form acceptable to the Office of the Town Attorney, which shall be provided to the TOWN prior to the CONCESSIONAIRE commencing operations. The amount of the performance bond shall be one-half of the total annual license fee, and in no case less than \$[insert figure]. All bonds delivered pursuant to this section shall be issued by a bonding company authorized to transact business in the State of New York and listed as approved for the issuance of such bonds by the United States Department of the Treasury.

(d) Except as provided below, the term “gross receipts” as used in this License Agreement shall mean the total amount received by, derived from the CONCESSIONAIRE by reason of the privileges granted under this License Agreement, including but not limited to amounts from any sales or rentals, rebates, the provision of any food

or beverage services, including catering services, and the provision of any other services authorized by this License Agreement.

The following shall be excluded or deducted from the gross receipts:

(i) Excise, sales, or other taxes that are imposed upon the sale or rental of goods or services that are collected by the CONCESSIONAIRE for the appropriate government or taxing authority, including any taxes or other levies of a different character imposed on the CONCESSIONAIRE subsequent to the date of this License Agreement that are intended as substitutes for or to complement any such taxes. This exclusion from the gross receipts is not intended to apply to any franchise, capital stock, income, or similar taxes that are based upon profits of the CONCESSIONAIRE.

(ii) Tips, gratuities, or other charges for merchandise or services that are included in the account or bill of a patron and for which the CONCESSIONAIRE makes actual payment to employees or others, provided, however, that any portions of such charges retained by the CONCESSIONAIRE shall be included in the gross receipts.

No deductions from the gross receipts shall be made for consideration paid by the CONCESSIONAIRE to travel agencies, group tour operators or organizers, outside salesmen, or promotional or booking organizations or services; nor shall any exclusion from the gross receipts be made for uncollectible patron accounts. No deduction or exclusion from the gross receipts shall be made for fees paid to credit card companies, to collection agencies, or to other outside parties engaged to assist in the collection of accounts receivable.

Immediately upon the sale of goods or services subject to license fees, those license fees shall immediately vest in and become the property of the TOWN, for which

the CONCESSIONAIRE shall be responsible until delivered to the TOWN as provided in this License Agreement.

The TOWN shall have the right to audit or cause to be audited the sales reports and financial statements that CONCESSIONAIRE is required to submit pursuant to this Agreement. If any such audit shall disclose an understatement of the gross receipts of the FACILITIES for any period or periods, CONCESSIONAIRE shall pay to the TOWN, within fifteen (15) days after receipt of the audit report, the understated Fee together with interest thereon at the rate of twelve percent (12%) per year (or, if lower, the maximum rate of interest allowed by law), calculated from the date when such fee should have been paid to the date of actual payment. Further, if such understatement for any period or periods shall be five percent (5%) or more of the originally reported gross receipts for such period or periods, CONCESSIONAIRE shall reimburse the TOWN for the cost of such audit including, without limitation, the charges of any independent accountant, and the travel expenses, room and board, and compensation of such accountant and of the employees of the TOWN.

#### FUTURE CAPITAL IMPROVEMENTS

44. The CONCESSIONAIRE may make additional capital improvements to the FACILITIES, at its own cost and expense, with no setoff from the Concession Fee payment to the TOWN, provided that all such capital improvements must be approved by the COMMISSIONER. Notwithstanding the foregoing, CONCESSIONAIRE shall make the capital improvements set forth in the RFP and at the TOWN Board Presentation.

(a) Designs for all capital improvements shall be developed by CONCESSIONAIRE, at its sole cost and expense, in accordance with the New York State Building and Fire Code and in compliance with the requirements of the Americans with Disabilities Act and other applicable codes, law, regulation, or ordinance. Design plans shall be

prepared and signed by architects and engineers licensed to practice in New York State. The CONCESSIONAIRE shall select all architectural and engineering consultants, including consultants selected for the development of the draft and final environmental impact statements, if required, each of whom shall be licensed to practice in New York State as needed, subject to the approval of the TOWN. Designs for all capital improvements shall be subject to the prior written approval of the COMMISSIONER before any advertising for or acceptance of bids or the award of contracts for construction. Bidders shall be required to pay wages at the prevailing rates set by the New York State Department of Labor. It shall be the CONCESSIONAIRE's responsibility to enforce these requirements.

(b) The TOWN's approval and acceptance of any capital improvement shall be conditioned upon the TOWN's receipt of a report from an independent construction consulting firm selected and retained by the TOWN at the expense of the CONCESSIONAIRE confirming that the construction of such capital improvement has been completed and setting forth: (i) the actual cost of construction of the completed capital improvement; and (ii) the date on which the construction was completed. No at-will termination payment shall be made for any capital improvement until it is accepted and approved by the DEPARTMENT.

(c) The CONCESSIONAIRE shall be solely responsible for any expenses in excess of originally-estimated costs of the project proposed by the CONCESSIONAIRE and approved by the COMMISSIONER. The TOWN shall have no liability whatsoever either to the CONCESSIONAIRE or the CONCESSIONAIRE's contractors, subcontractors, or suppliers for any additional expenses, except as provided by law.

(d) Title to all improvements shall vest in the TOWN brick-by-brick during and following the performance of any work.

(e) The CONCESSIONAIRE agrees to obtain, prior to the commencement of any construction projected to cost in excess of \$100,000, a performance bond and a payment bond in the full amount of the cost of construction for any and all capital improvements.

(f) Without limiting any of the foregoing, the design, construction and occupancy of any capital improvements shall be subject to the ordinary requirements for review and approval of new construction by the TOWN Department of Planning and Development; however, the TOWN shall waive all application and permit fees for said review and approval.

#### NOTICES

45. Any notices hereunder shall be in writing and shall be given upon delivery by: (i) hand delivery, (ii) delivery by a reputable, recognized national overnight courier service, or (iii) the United States Postal Service when sent by Priority Mail Express, in each instance, addressed to each party at its address set forth above. Any such notice, request or other communication shall be considered given or delivered, as the case may be, on the date of delivery or the date that delivery is refused as evidenced by the records of the courier or delivery service or the United States Postal Service, as applicable. Rejection or other refusal to accept or inability to deliver because of changed address of which no notice was given shall be deemed to be receipt of the notice, request or other communication. By giving at least five (5) business days prior notice thereof, any party may from time to time at any time change its mailing address hereunder.

46. In cases where notice is to be given to the TOWN, such notice shall be transmitted to:

Office of the Town Clerk  
54 Audrey Avenue

Oyster Bay, New York

with a copy to:

Office of the Town Attorney  
54 Audrey Avenue  
Oyster Bay, New York

47. In cases where notice is to be given to the CONCESSIONAIRE, such notice shall be transmitted to:

[Proposer and Proposer's Attorney]

#### MARKETING AND PUBLICITY

48. In connection with any marketing and publicity, the CONCESSIONAIRE shall agree with the following:

- a. Any signage, promotional materials, and advertising materials, whether in print, on-line, or on television, must be co-branded to include the Town's seal and/or wordmark(s);
- b. Any signage, promotional materials, and advertising, whether in print, on-line, or on radio or television, must make mention of the Town of Oyster Bay;
- c. Any events, programs, performers, artists, and other musical acts must be approved by the COMMISSIONER in advance of any advertising or promotional materials being distributed to the public, whether in print, on-line, or on radio or television;
- d. The concessionaire must agree to offer for sale Town merchandise if and when the Town decides to offer such merchandise for sale (i.e. shirts, hats, sweatshirts, etc.).

- e. Any sundries sold by the CONCESSIONAIRE, *i.e.* umbrellas, chairs, sunscreen, and the like, shall be competitively priced as measured against other similar concession operations in Nassau County.

49. At all times, the CONCESSIONAIRE must secure the approval of the Commissioner of the DEPARTMENT prior to the publication, transmission, dissemination, or posting of any signage, promotional materials, and advertising materials, whether in print, on-line, or on radio or television, which approval, if appropriate, shall be extended in a reasonably expeditious manner.

#### PARKING

50. The CONCESSIONAIRE shall make all reasonable efforts to control the flow traffic and parking in the areas around the FACILITIES. The TOWN shall designate area(s) at the FACILITIES for the exclusive use of the CONCESSIONAIRE so that the CONCESSIONAIRE may satisfy its obligation hereunder. CONCESSIONAIRE agrees to utilize valet parking services as it deems appropriate.

#### FORCE MAJEURE

51. No party shall be liable to another party, nor be deemed to have defaulted under or breached this License Agreement for any failure or delay in fulfilling or performing any term of this License Agreement due to any of the following causes beyond such party's reasonable control ("Force Majeure Events"): (i) acts of God; (ii) flood, fire, or explosion, (iii) war, invasion, terrorist attack, riot, or other civil unrest; (iv) national or regional state of emergency; and (v) shortage of adequate power or water. The lack of funds or other economic conditions shall not be deemed to be a Force Majeure event.

52. The party suffering a Force Majeure Event shall give notice within seven (7) days of the Force Majeure Event to any party to which performance is owed, stating the period of time that the occurrence is reasonably expected to continue. If the TOWN determines that no Force Majeure Event occurred, the TOWN shall notify the CONCESSIONAIRE of such fact in writing and the CONCESSIONAIRE shall, within five (5) business days of the date of such notice, resume operations.

53. Notwithstanding the foregoing provisions, the CONCESSIONAIRE shall use diligent efforts to end the failure or delay and ensure that the effects of such Force Majeure Event are minimized, mitigated, or otherwise eliminate, as the case might be.

#### MISCELLANEOUS

54. CONCESSIONAIRE shall comply with all applicable laws and regulations in operating the concession services under this License Agreement at the FACILITIES. The TOWN shall comply with all applicable laws and regulations relating to ownership of TOBAY and the FACILITIES.

55. This License Agreement is subject to the reasonable rules and regulation set by Commissioner of the DEPARTMENT and the TOWN.

56. If any term or provision of this License Agreement or the application thereof to any party or circumstances shall to any extent be invalid or unenforceable, the remainder of this License Agreement or the application of such term or provision to parties or circumstances other than those to which it is held invalid or unenforceable shall not be affected thereby, and each term and provision of this Agreement shall be valid and enforced to the fullest extent permitted by law.

57. One or more waivers by either party of the obligation of the other to perform any covenant or condition shall not be construed as a waiver of a subsequent breach of the same or any other covenant or condition. The failure of either party to seek redress for a violation of or to insist upon the strict performance of any term, covenant or condition in this License Agreement shall not prevent a similar act from constituting a default under this License Agreement.

58. Wherever herein the singular number is used, the same shall include the plural and the masculine gender shall include the feminine gender.

59. The terms, covenants and conditions herein contained shall be binding upon and inure to the benefit of the respective parties and their successors and permitted assigns.

60. The article, section and marginal headings herein are intended for convenience in finding the subject matters, and are not to be used in determining the intent of the parties to this License Agreement.

61. This License Agreement contains the entire understanding and agreement by and between the parties, and all prior and contemporaneous understandings, agreements and negotiations are herein merged. This License Agreement shall not be modified, terminated (except for a termination in accordance with the express provisions of this License Agreement), nor any provision waived except in writing signed by the CONCESSIONAIRE and the TOWN.

62. The interpretation and validity of this License Agreement shall be governed by the laws of the State of New York

63. This License Agreement shall be executed on behalf of the TOWN by the Town of Oyster Bay Supervisor, or his designee, after receiving approval from the TOWN Board.

64. Each and every provision of law required to be inserted in this License Agreement shall be and is inserted herein. Every such provision is to be deemed to be inserted herein, and if, through mistake or otherwise, any such provision is not inserted, or is not inserted in correct form, then this License Agreement shall, forthwith upon the application of either party, be amended by such insertion so as to comply strictly with the law and without prejudice to the rights of either party hereunder.

65. This License Agreement may be signed utilizing counterpart signature pages which when taken together shall constitute a complete and fully executed agreement. Facsimile or PDF copies of signatures shall be deemed to be the same or original signatures.

IN WITNESS WHEREOF, CONCESSIONAIRE and TOWN have respectively executed and delivered this License Agreement as of the date first above written.

TOWN OF OYSTER BAY

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

[PROPOSER]

\_\_\_\_\_  
By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

APPROVED:

\_\_\_\_\_  
Commissioner of Parks

\_\_\_\_\_  
Deputy Town Attorney

DRAFT