

TO: JAMES L. APP, CITY MANAGER
FROM: ANN ROBB, DIRECTOR, LIBRARY & RECREATION SERVICES
SUBJECT: BARNEY SCHWARTZ PARK CONCESSION OPERATIONS
DATE: September 16, 2008

Needs: For the City Council to consider awarding a contract for concessions at Barney Schwartz Park.

Facts:

1. Due to a move outside the state, the Barney Schwartz Park concessionaire is no longer able to provide concession services.
2. Requests for Proposals were solicited for concession operations at Barney Schwartz Park. Three proposals were received by the deadline, from Fabiola and Jose Abarca, Two Brothers Catering & Event Planning, and Central Coast Softball Tournaments.
3. Staff has reviewed the proposals and found all three to be responsive, meeting selection criteria. Based on proposed menus, staff recommends awarding the contract for the Soccer stand to Fabiola and Jose Abarca, and awarding the Softball stand to Two Brothers Catering & Event Planning.

Analysis & Conclusion: Food and beverage concession is desirable at Barney Schwartz Park. It provides a valuable service for park users during sporting events, tournaments, and other activities at the park. It is also a source of revenue for the city. The city is currently without a contract concessionaire at Barney Schwartz Park. Three responsive proposals were received, with the highest scores going to Two Brothers Catering & Event Planning and Fabiola and Jose Abarca.

Policy Reference: 2006 Contract with Paso Robles Lions Club

Fiscal Impact: Loss of \$250 - \$500 per month revenue each month if Barney Schwartz Park operates without a contracted concessionaire.

Options:

- a. Authorize the City Manager to enter into a contract with Two Brothers Catering & Event Planning, and Fabiola and Jose Abarca. In the event that the contractors do not complete the term of the contract, authorize the City Manager to select a concessionaire from one of the other responsive proposals.
- b. Amend, modify or reject the foregoing option.

CONCESSION AGREEMENT

This agreement ("Agreement") entered into this ___ day ____, is between the City of El Paso de Robles, a municipal corporation ("CITY") and _____("CONCESSIONAIRE") (individually, "Party"; collectively, "the Parties").

RECITALS

WHEREAS, CONCESSIONAIRE represents that it is an experienced retail vendor of prepared food and related items and is competent to operate two (2) concession stands (the "Concession Stands") at Barney Schwartz Park, 2970 Union Road, Paso Robles, California (the "Park"); and

WHEREAS, CITY controls the Concession Stands at the Park and is willing to grant CONCESSIONAIRE the right to operate such Concession Stands in strict accordance with the terms and conditions in this Agreement;

NOW, THEREFORE, IT IS AGREED by and between CITY and CONCESSIONAIRE as follows:

AGREEMENT

1. INCORPORATION OF RECITALS. The recitals set forth above and the introductory paragraph preceding the recitals are hereby incorporated into this Agreement as if set forth herein in full.

2. TERM OF AGREEMENT. The term of this Agreement shall commence on the date of its execution by both parties and shall continue for an initial term of two (2) years. Within the sole discretion of the City, this term may be extended at its expiration for two additional two year periods; provided that the total extended term does not exceed six (6) years.

3. CONCESSION GRANTED. CITY grants to CONCESSIONAIRE an exclusive revocable license to operate the Concession Stands at the Park (the "Concession"). CONCESSIONAIRE agrees to operate the Concession Stands in a professional and businesslike manner and in strict compliance with this Agreement's terms and conditions.

4. LOCATION OF CONCESSIONAIRE'S FACILITIES.

(a) Concession Stands. The Concession Stands are located at Barney Schwartz Park in approximately the locations indicated on Exhibit A, attached hereto and incorporated herein. One of the Concession Stands is located adjacent to the Park's

baseball/softball facility and the other is located adjacent to the Park's soccer/football facility. Utilities include access to electricity and water.

(b) Alterations Prohibited. CONCESSIONAIRE shall make no substantial alterations of Concession Stands without the prior written consent of CITY.

(c) Signage. All signage exhibited or used at Concession Stands by CONCESSIONAIRE shall receive written approval from CITY prior to display.

5. DAYS AND HOURS OF OPERATION. CONCESSIONAIRE shall operate the Concession Stands, at a minimum, during all regularly scheduled sporting events at the Park, including but not limited to all adult and youth athletic league games, and all adult and youth tournaments, whether independently sponsored, sponsored or co-sponsored by CITY. The Concession Stands shall open no later than the start of the first regularly scheduled game on the day scheduled for athletic league games or tournament and shall not close until the completion of the final game scheduled for the same day. CITY shall provide CONCESSIONAIRE with a schedule of regularly scheduled sporting events at the Park upon the execution of this Agreement. CITY shall provide CONCESSIONAIRE with new schedules of sporting events at the Park from time to time as necessary to give CONCESSIONAIRE reasonable notice of all regularly scheduled sporting events.

6. OPERATION OF CONCESSION STANDS. In the event sporting events are scheduled at the same time on both the baseball/softball facility and the soccer/football facility, CONCESSIONAIRE shall operate both Concession Stands simultaneously. However, in the event that only one of the two athletic facilities (either the baseball/softball facility or the soccer/football facility) is in use for a regularly scheduled sporting event at a given time, CONCESSIONAIRE has the option of operating only the Concession Stand located closest to the athletic facility in use during the time that the single athletic facility is in use.

7. UTILITIES. CONCESSIONAIRE shall pay the full cost of installation and the monthly charges associated with providing telephone service to the Concession Stands. CITY shall be responsible for the cost of all other utilities furnished to the Concession Stands. Any and all utility installation requires the prior written consent of CITY.

8. PERMITTED MERCHANDISE. Concessionaire's merchandise may consist of hot and cold food and beverages (including beer/wine), candy, snacks, clothing and novelties. All beer and wine sales must be provided in cups that shall be provided by the City for a fee separate from the monthly fee charged, and adhere to the following conditions: secure and furnish proof of liability insurance specific to alcohol sales; secure and furnish proof of all necessary permits/licenses for the sale of alcohol;

secure and furnish proof of provision of licensed and bonded security at city standards during events when alcohol is sold; restricting alcohol consumption to designated areas; no alcohol sales during youth events, secure and furnish proof by way of adopted meeting minutes of endorsement by the Paso Robles Softball Association, Paso Robles Youth Sports Council, the Parks & Recreation Advisory Committee, and City Council. The CONCESSIONAIRE may additionally contract with independent tournament organizers for the sale of merchandise associated with the tournament. All items sold, including but not limited to items provided by independent tournament organizers, shall be approved by the CITY's Director of Library and Recreation Services, which approval shall not be unreasonably withheld.

9. EQUIPMENT. CITY has furnished each Concession Stand with commercial refrigeration, soda dispensing machines, microwave oven, popcorn maker and hot dog steamer (the "City Equipment"). City has furnished the softball area concession stand with an ice maker. CITY shall, at its sole expense, maintain and repair the City Equipment subject to normal use by CONCESSIONAIRE. Upon CITY's reasonable determination that CONCESSIONAIRE has negligently or willfully misused or damaged City Equipment, CONCESSIONAIRE shall, at its sole expense, repair or replace such City Equipment. CONCESSIONAIRE shall furnish, install, maintain and repair, at its sole expense, all other equipment necessary to provide the permitted merchandise to the public.

10. PERMITS AND APPLICABLE LAWS. CITY shall acquire, at its sole cost all necessary permits and licenses from the County of San Luis Obispo Department of Environmental Health (the "DEH") for the purpose of operation of the Concession. CONCESSIONAIRE shall acquire at its sole cost all necessary permits for the sale of alcohol. CONCESSIONAIRE shall operate the Concession in accordance with standards set forth for concession operations by the DEH. Concessionaire shall obtain and maintain a City of Paso Robles business license.

"Applicable Laws" shall include all City, County, State and Federal ordinances, regulations and statutes now in force or which may hereafter be in force during the time of its performance with regard to the subject of this Agreement.

11. SANITATION. CONCESSIONAIRE shall maintain and clean the interior and exterior of the Concession in accordance with the standards set forth by the DEH and the California Health and Safety Code (Articles #7, #8), including routine daily janitorial service. In maintaining the Concession Stands, CONCESSIONAIRE shall use biodegradable materials and cleaning supplies that are suitable for disposal into a septic system. A copy of the Material Safety Data Sheet (MSDS) for all cleaning materials shall be submitted to CITY for approval prior to use on the interior or exterior of the Concession Stands. A copy of the MSDS for such cleaning materials must additionally be kept on the site of each Concession Stand, and at the location where such cleaning

materials are stored. The City shall be responsible for routine building maintenance. "Routine building maintenance" shall include, but not be limited to, structural repairs, plumbing and electrical repairs.

12. COMPENSATION TO CITY. In consideration of the Concession granted by this Agreement, CONCESSIONAIRE hereby agrees to pay to CITY a monthly fee for use of the Concession Stands for each month that the CONCESSIONAIRE is entitled to operate the Concession Stands pursuant to this Agreement (the "Monthly Fee"). The Monthly Fee shall be Two hundred fifty eight dollars (\$258) per stand each month that there are scheduled league and tournament sports activities in each respective area (soccer and softball), and one hundred twenty five dollars (\$125) per stand for each month there are no scheduled league and tournament sports activities in each respective area, for the first twelve months after this Agreement is executed. The Monthly Fee shall thereafter be adjusted annually based upon the increase in the Consumer Price Index (CPI) for the San Francisco-Oakland-San Jose area for Urban Wage Earners and Clerical Workers. In no event shall the annual fee adjustment for CPI exceed eight percent (8%). Should this CPI index no longer be published, a similar index shall be substituted by the CITY. CONCESSIONAIRE shall pay the Monthly Fee to CITY's Finance Department by the 10th day of each month for each month that CONCESSIONAIRE operates the Concession Stands. Failure to pay the Monthly Fee by the 25th day of the month in which it is due shall be grounds for termination as a violation of this Agreement pursuant to Section 13. An additional per cup fee, separate from the monthly fee, shall be paid the City if alcohol is sold. That fee shall be \$0.75 per cup. Cups will be provided by the City.

13. TERMINATION. Both Parties shall have the right to terminate this Agreement for any reason whatsoever at any time by serving upon the other Party sixty (60) days advance written notice of termination. This notice of termination shall be deemed served and effective for all purposes on the date it is deposited in the U.S. mail, postage prepaid, addressed to the other Party at the address indicated in Section 24. However, if CONCESSIONAIRE operates the Concession in violation of this Agreement or in a manner which creates a hazard or nuisance, CITY may immediately terminate this Agreement by personally serving written notice of termination upon CONCESSIONAIRE at the address indicated in Section 24.

14. NO COMPENSATION FOR LOSS OF PROFITS OR GOODWILL. The Parties expressly agree that CONCESSIONAIRE shall be deemed not to have acquired any goodwill in the operation of the Concession granted by this Agreement. The Parties therefore expressly agree that CONCESSIONAIRE shall not be entitled to recover for the loss of any goodwill or profits upon the termination of this Agreement for any reason at any time. In addition, the Parties expressly agree that goodwill shall not be considered a factor in any agreement between CONCESSIONAIRE and any

subsequent concessionaire of CITY regarding the transfer of equipment or fixtures either during or after the term of this Agreement.

15. CITY NOT LIABLE FOR LOSS OF BUSINESS. If for any reason it becomes necessary to close the Park or to restrict access near or around Concession Stands, CITY shall not incur any liability for damages due to CONCESSIONAIRE's loss of business.

16. ASSIGNMENT PROHIBITED. CONCESSIONAIRE shall not assign or otherwise transfer this Agreement, or any interest or portion of this Agreement without the express prior written consent of CITY. Any such attempt at assignment or transfer shall be null and void.

17. INDEMNITY. The CONCESSIONAIRE shall be solely responsible for, and shall indemnify, defend (by counsel reasonably acceptable to the City Attorney) and hold the CITY, its members, officers, directors, agents, employees, volunteers and any other person acting for or on behalf of the CITY (collectively, the "Indemnified Parties") harmless from and against any and all costs, claims, losses, damages, causes of action and liability which may arise by reason of any occurrence attributable to or arising out of the CONCESSIONAIRE's use of the Concessions of this Agreement, including but not limited to failures to observe or perform any obligation of the CONCESSIONAIRE's under this Agreement or the CONCESSIONAIRE's presence, activities, equipment, property and maintenance of the Concessions, including without limitation any claim or cause of action for injury to or death of any person or damage to any property arising out of any such occurrence occurring from and after the date hereof. CONCESSIONAIRE'S obligations under this section 17 shall extend to claims arising after the termination of this Agreement for any reason.

The CITY shall have no liability to the CONCESSIONAIRE, and the CONCESSIONAIRE waives all claims against the CITY, arising from, or in any way related to, occurrences within the scope of the indemnity set forth in this Section 17, except to the extent caused by the sole negligence or willful misconduct of the CITY or its employees.

CONCESSIONAIRE waives any right of recovery against the City, its officers, employees and agents for indemnification, contribution or declaratory relief arising from or in any way connected with the Concession even if the City, its officers, employees or agents seek recovery against Concessionaire.

18. INSURANCE. The CONCESSIONAIRE shall, at its sole cost and expense, obtain and keep in force during the term hereof: commercial general liability insurance insuring the CONCESSIONAIRE and endorsed to name the CITY, its officers, agents, employees, and volunteers as additional insured against claims for bodily injury, personal injury and property damage, providing coverage in an amount not less than Two Million Dollars (\$2,000,000) per occurrence, covering the operation and

maintenance of the Concessions, with the general aggregate coverage limit applying separately to the CITY for the duration of this Agreement. If the aggregate limit does not apply separately to the CITY for the duration of this Agreement, the minimum general aggregate limit shall be Five Million Dollars (\$5,000,000).

Upon execution of this Agreement, the CONCESSIONAIRE shall deliver to the CITY current certificates evidencing the existence and amounts of this insurance, with the additional insured required under this Section 18. Each policy shall contain an endorsement providing that it cannot be cancelled or subject to non-renewal or reduction in coverage except after thirty (30) days' prior written notice from the insurance company to the CITY. Proof of liability insurance in compliance with the terms and conditions of this Section shall be provided to the CITY by the CONCESSIONAIRE annually, prior to expiration of the previous insurance certification, or by January 1, whichever occurs first.

19. WORKERS' COMPENSATION.

(a) Covenant to Provide. CONCESSIONAIRE warrants that it is aware of the provisions of the California Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code. CONCESSIONAIRE further agrees that it will comply with such provisions.

(b) Waiver of Subrogation. CONCESSIONAIRE and CONCESSIONAIRE's insurance company agree to waive all rights of subrogation against CITY, its elected or appointed officials, agents, and employees for losses paid under CONCESSIONAIRE's workers' compensation insurance policy.

20. AMENDMENTS. Modifications or amendments to the terms of this Agreement shall be in writing and executed by both Parties. Any purported modification or alteration which is not in writing and executed by both Parties shall have no effect on this Agreement.

21. INDEPENDENT CONTRACTOR. In the operation of the Concession granted by this Agreement, CONCESSIONAIRE is an independent contractor and is not an agent or employee of CITY. CONCESSIONAIRE, its officers, employees, agents, and subcontractors, if any, shall have no power to bind or commit CITY to any decision or course of action, and shall not represent to any person or business that they have such power. CONCESSIONAIRE has and shall retain the right to exercise full control of the supervision of the services and over the employment, direction, compensation, and discharge of all persons assisting CONCESSIONAIRE in the performance of the Concession. CONCESSIONAIRE shall be solely responsible for all matters relating to the payment of its employees, including compliance with social security and income tax

withholding, workers' compensation insurance, and all other regulations governing such matters.

22. NONDISCRIMINATION. During the term of this Agreement, CONCESSIONAIRE agrees as follows:

a. CONCESSIONAIRE shall not discriminate against any employee or applicant for employment because of race, color, creed, religion, sex, age, handicap, medical condition, sexual preference, marital status, ancestry or national origin. CONCESSIONAIRE shall, in all solicitations or advertisements for employees placed by or on behalf of CONCESSIONAIRE, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, age, handicap, medical condition, sexual preference, marital status, ancestry or national origin.

b. There shall be no discrimination against or segregation of any person or group of persons on account of race, color, creed, religion, sex, age, handicap, medical condition, sexual preference, marital status, ancestry or national origin in the use, occupancy, tenure or enjoyment of the Concessions, or any part thereof.

23. HAZARDOUS SUBSTANCES. CONCESSIONAIRE and those acting by, through or under CONCESSIONAIRE, shall not improperly store, handle, treat, use release, dispose of, discharge or produce any hazardous substances or hazardous waste, or any pollutant, contaminant or toxic substance as those terms are defined in or as may be regulated or governed by any federal, state or local laws or ordinances intended to protect health, safety or the environment. CONCESSIONAIRE shall be responsible to remediate and clean up any and all such hazardous substances, pollutants, contaminants or toxins. CONCESSIONAIRE agrees to release, to defend with counsel acceptable to CITY, indemnify and to hold CITY harmless of, from and against any and all claims, expense, loss or liability suffered by CITY by reason of CONCESSIONAIRE's breach of any of the provisions of this Section 23 or any claims by CONCESSIONAIRE's employees, agents, contractors, visitors or assigns, if permitted under this Agreement, caused by, related, to, or arising from such breach. The indemnity contained in this Section 23 shall survive the expiration or earlier termination of this Agreement.

24. NOTICE. Any notices or other communications to be given to either Party pursuant to this Agreement shall be in writing and delivered personally or by U.S. mail, postage prepaid, addressed to the Party at the address set forth below. Either Party may change its address for notices by complying with the notice procedures in this Section 24. Notice so mailed shall be deemed effective as of the date of mailing and deemed delivered three (3) business days after deposit in the U.S. mail. Nothing shall preclude the giving of notice by facsimile machine provided, however, that notice by

facsimile machine shall be followed by notice deposited in the U.S. mail as discussed above.

CITY

CITY OF PASO ROBLES
1000 Spring Street
Paso Robles, California 93447
Attention: City Manager

CONCESSIONAIRE

25. RECORDS AND AUDIT. Concessionaire shall establish and maintain records pertaining to this Agreement. Concessionaire accounting systems shall conform to generally accepted accounting principles and all records shall provide a breakdown of total costs charged under this Agreement, including properly executed payrolls, time records, utility bills, invoices and vouchers.

Concessionaire shall permit City and its authorized representatives to inspect and examine Concessionaire's books, records, accounts, and any and all data relevant to this Agreement at any reasonable time for the purpose of auditing and verifying statements, invoices, or bills submitted by Concessionaire pursuant to this Agreement and shall provide such assistance as may be reasonably required in the course of such inspection. City further reserves the right to examine and re-examine said books, records, accounts, and data during the three (3) year period following the termination of this Agreement; and Concessionaire shall in no event dispose of, destroy, alter, or mutilate said books, records, accounts, and data in any manner whatever for three (3) years after the termination of this Agreement.

Pursuant to California Government Code Section 10527, the parties to this Agreement shall be subject to the examination and audit of representative of the Auditor General of the State of California for a period of three (3) years after final payment under the Agreement. The examination and audit shall be confined to those matters connected with the performance of this Agreement including, but not limited to, the cost of administering the Agreement

26. GOVERNING LAW AND CHOICE OF FORUM. This Agreement shall be administered and interpreted under California law as if written by both Parties. Any litigation arising from this Agreement shall be brought in the Superior Court of San Luis Obispo County.

27. COSTS AND ATTORNEYS' FEES. If either Party commences any legal action against the other Party arising out of this Agreement or the performance thereof, the prevailing party in such action may recover its reasonable litigation expenses, including court costs, expert witness fees, discovery expenses, and attorneys' fees. In any action seeking recovery of monetary damages, the plaintiff shall not be considered to be the prevailing party unless it recovers at least 66% of the dollar amount requested in the complaint's prayer for relief.

28. CAPTIONS. The captions of this Agreement are for convenience only and are not a part of this Agreement and do not in any way limit or amplify the terms and provisions of this Agreement.

28. CONCESSIONAIRE'S LIABILITY FOR PROPERTY TAX. The Parties expressly agree that they are creating a revocable license to use property and not a possessory interest in land. If, however, the County Assessor or other taxing entity finds that this Agreement creates a possessory interest subject to property taxation, CONCESSIONAIRE expressly agrees to pay any property tax levied on the premises as a result of such finding.

29. BINDING EFFECT. The provisions of this Agreement shall inure to the benefit of and be binding upon the CITY and the CONCESSIONAIRE and their respective successors.

30. WAIVER.

(a) Effect of Waiver. Waiver by either Party of any default, breach, or condition precedent shall not be construed as a waiver of any other default, breach, or condition precedent or any other right under this Agreement.

(b) No Implied Waivers. The failure of either Party at any time to require performance by the other Party of any provision hereof shall not affect in any way the right to require such performance at a later time.

31. FORCE MAJEURE. Except as otherwise provided in this Agreement, if the performance of any act required by the Agreement to be performed by either CITY or CONCESSIONAIRE is prevented or delayed by reason of any act of God, strike, act of terrorism, lockout, labor trouble, inability to secure materials, restrictive governmental laws or regulations or any other cause (except financial inability) not the fault of the Party required to perform the act, the time for performance of the act will be extended for a period equivalent to the period of delay and performance of the act during the period of delay will be excused.

32. SEVERABILITY. If any court of competent jurisdiction or subsequent preemptive legislation holds or renders any of the provisions of this Agreement unenforceable or invalid, the validity and enforceability of the remaining provisions, or portions thereof, shall not be affected.

33. INTEGRATION. This Agreement, including Exhibit A, represents the entire understanding of CITY and CONCESSIONAIRE as to those matters contained herein and supersedes all prior negotiations, representations, or agreements, both written and oral. This Agreement may not be modified or altered except in accordance with Section 20.

Executed by CITY and CONCESSIONAIRE on the date shown next to their respective signatures. The effective date of this Agreement shall be the date of execution by CITY as shown below.

DATED: _____

CONCESSIONAIRE

DATED: _____

CITY MANAGER
CITY OF EL PASO DE ROBLES

ATTEST:

CITY CLERK

EXHIBIT A
Map of Locations of Concessions

[Attached]