

## **CONCESSION LICENSE AGREEMENT FOR SUNNYVALE GOLF COURSE**

An exclusive and revocable Concession License Agreement (“License”) is hereby granted by CITY OF SUNNYVALE, a municipal corporation of the State of California, to KSM Sunnyvale, LLC., an Illinois limited liability company, as Licensee, to manage, operate and supervise sales of food, beverages and related services associated with Sunnyvale Golf Course including the restaurant building (attached hereto as Exhibit “A”) and all related services for a term beginning on June 1, 2016, by all listed parties and ending at 11:59 p.m. on December 31, 2026, unless sooner terminated subject to the conditions contained in this License (the “Term”). At City’s and Licensee’s mutual discretion, this License may be extended for three (3) additional five (5) year terms on mutually agreed upon terms and conditions beyond the Term described above. If the parties reach agreement, a written amendment to the License shall be executed by both parties.

### **I. DEFINITIONS**

As used in this License, the following words and phrases, unless provided otherwise, shall have the following meanings:

- A. “City” shall mean City of Sunnyvale.
- B. “City Council” shall mean the City Council of the City of Sunnyvale.
- C. “Clubhouse” shall mean the pro shop/restaurant building, and adjacent patios, walkways and planters located at the course.
- D. “Employee” shall mean any person employed by and paid solely by Licensee for any purpose.
- E. “Licensee” shall mean KSM Sunnyvale LLC., an Illinois limited liability company licensed to do business in California.
- F. “Pro shop” shall mean those portions of the Clubhouse dedicated to sale of golf merchandise and green fees including the entire East portion of the Sunnyvale Golf Course Clubhouse.
- G. “Restaurant” shall mean those portions of the Clubhouses and associated areas dedicated to provision of food and/or beverage services including the West

portion of the Clubhouse and adjacent patios and pathways at Sunnyvale Golf Course (See Exhibit “A”)

- H. “Manager” shall mean a particular employee designated by the Licensee to act on the behalf of the Licensee in any license-related matter.
- I. “Shall”, when used herein, is mandatory.
- J. “Sunnyvale Golf Course” shall mean that particular golf course owned by or leased to City, located at 605 Macara Ave., Sunnyvale, CA.
- K. “Golf Operations Manager” shall mean the City employee with the title of “Golf Operations Manager”.
- L. “Net Revenue” shall mean the Gross Revenue received by Licensee from sales of food, beverages and related services at the Sunnyvale Golf Course as permitted in Section II.A.1 and II.A.2 less Cost of Goods Sold.
- M. “Gross Revenues” shall mean all monthly receipts related to or derived from Licensee’s sales of food, beverages and related services at the Sunnyvale Golf Course as permitted in Section II.A.1 and II.A.2 below from cash or credit transactions recognized during the Term, computed on an accrual basis, determined in accordance with generally accepted accounting principles applied on a consistent basis. Gross Revenues shall be reduced by any refunds, rebates, discounts, and credits of a similar nature given, paid, or returned by KSM.

Gross Revenues shall not include:

- Applicable gross receipts taxes, admission, cabaret, excise, sales, and use taxes, or similar governmental charges collected directly from customers or their guests or as a part of the sales price of any goods or services;
- Service charges that are percentage gratuities added to billings, to the extent paid to employees of the Club
- Proceeds paid as a result of an insurable loss, unless paid for the loss or interruption of business, to the extent such sums are used to remedy said loss;

- N. “Cost of Goods Sold” shall mean direct cost attributable to the production of the goods sold at the club. This amount includes the cost of the materials used in creating the good.

## II. **EXCLUSIVE USE**

- A. In order to enable Licensee to exercise the privileges and rights herein licensed and to perform the duties and obligations herein imposed, City grants to Licensee:
1. The exclusive use of the Restaurant at Sunnyvale Golf Course for the sale of food, beverages and related services including banquets, catering and other related events.
  2. Exclusive right for the sale of food, beverages (including alcoholic beverages, no outside alcohol allowed and beverage cart services) and related services including banquets, catering and other related events at Sunnyvale Golf Course.
  3. Licensee shall have the right to enter upon and traverse the Sunnyvale Golf Course, including the Clubhouse as necessary to exercise its rights and obligations hereunder as well as such other locations within the golf course grounds and facilities outside of the Restaurants as may be established, subject to written approval of City as to each particular location and any improvements.
  4. Licensee shall occupy the Restaurant and any other locations as may be approved for sale of food, beverages and related services including banquets, catering and other related events, and for no other purpose.
  5. City covenants that so long as there is not an uncured default by Licensee of any material term of this License or any violation of relevant local or state law, Licensee shall, to the extent necessary to exercise the privileges and duties of Licensee hereunder, quietly hold, occupy, possess and enjoy the Restaurant and such other locations within the golf course grounds and facilities outside of the Restaurants as may be agreed hereunder throughout the Term of this Agreement, free from hindrance, ejection, removal,

prohibition or disturbance by the City or any other party claiming under, through, or by right of City unless both parties have agreed to mutually terminate the License.

B. Licensee shall occupy and operate Restaurant as a licensee and not as a lessee.

### **III. PRIVILEGES AND DUTIES OF LICENSEE**

A. Licensee shall do the following:

1. Exercise each privilege and right hereby licensed and perform each duty imposed herein in full compliance with the Sunnyvale Municipal Code and other ordinances of the City; all rules, regulations, and policies of the City, and all applicable laws of the State of California and the United States of America.
2. Enforce all rules and regulations.
3. Establish, operate, manage, and supervise sales of food, beverages and related services at the Golf Course.
4. Present proposals to City for its approval of food and beverage services and related events outside of designated restaurant buildings as shown in Exhibit "A" provided, however, that each additional location and any improvements are to be provided and maintained by Licensee.
5. Maintain for sale, or for use in connection with the services of meals, and at all times, a reasonable stock of food, alcoholic and non-alcoholic beverages, confections, and other articles in amounts sufficient to meet customer demands and which are of industry standard quality and are of such purity and content so as to comply with applicable federal, state, and local food, health and sanitation laws and regulations. City in no way warrants that Licensee shall be able to obtain license(s) to engage in the sale of liquor. The acquisition of such license(s), however, is required within 90 days of June 1, 2016.

6. Supervise the Restaurant, preserve order, and provide for security, including the exclusion of trespassers and prevention of injury to the Restaurant by customers and others.
7. Keep the Restaurant open to the public between the hours of 6:30 a.m. and sunset on each day the Course is open for play, except during such times when closure is necessary due to construction of structural additions or other physical improvements to the Clubhouse. Nothing herein shall preclude Licensee from remaining open additional hours subject to any and all City ordinances, or County or State laws or regulations as related to food and beverage service businesses.
8. Restaurant may be closed temporarily during inclement weather that significantly reduces the amount of play on the golf courses. Licensee shall notify the Golf Operations Manager in advance of closing and shall reopen the facilities as soon as weather conditions have improved.
9. Retain for a minimum of 40 hours per week in the Restaurant at least one “manager” who is experienced in the operation of restaurants and food and beverage services, authorized to represent and act for Licensee in matters pertaining to the exercise of the privileges and duties hereby licensed. Licensee shall keep City informed in writing of the identity of such person(s) and conduct all general business through the manager(s).
10. Employ at its sole cost and responsibility such employees as it deems necessary.
11. No employee of Licensee shall be deemed to be an employee, agent or representative of City at any time or for any purpose whatsoever.
12. Licensee shall require all employees to be neatly dressed and courteous at all times, and to refrain from boisterous or objectionable conduct when at work on City property.
13. Furnish, maintain, and operate the Restaurant and provide all other services and facilities offered in connection therewith in a high quality manner, and furnish and maintain a standard of service at least equal to the

better class of similar businesses in the City and in adjacent communities during the entire term of this License at prices comparable to those prevailing for similar services and facilities without discrimination. Licensee shall provide prompt, clean, courteous and efficient service.

14. Provide breakfast, lunch, bar and banquet menus and promote sale of banquet and meeting services for the Restaurant.
15. Provide prompt, courteous and efficient customer service.
16. Provide the Director of Public Works on September 1 of each year with an annual operations and marketing plan including a list of all activities including, but not limited to, food and beverage sales, banquets, facility rentals, special events, promotions and advertising.
17. Provide City with reasonable access to and the right to inspect all menus, lists and schedules of prices for services or products provided.
18. Covenant and agree to discontinue and remedy all reasonably objectionable practices upon demand of City if and when the City raises good faith objections to the conditions of those portions of the Golf Course and buildings occupied by Licensee, the quality of the food, articles sold, or character of the service.
19. Meet not less than once per month with the Golf Operations Manager at a regularly scheduled time and date to discuss and review the operation of the Restaurant by Licensee. In addition, Licensee shall during the Term maintain accounting records on a modified accrual basis (i.e. revenue is booked when cash is received and expenses are booked when goods/services are authorized). Within twenty (20) days after the close of each calendar month during the Term, Licensee shall submit a financial statement to City showing the financial activities for food and beverage operations conducted by Licensee at Sunnyvale Golf Course for the preceding calendar month and calendar year to date
20. Follow the procedure for handling complaints established by standard operating procedures of City. In this regard, the parties recognize that the

Golf Operations Manager of City is designated to represent the Department of Public Works in resolving all such complaints.

21. Authorize the Director of Public Works of City or his designee to inspect the premises occupied by Licensee not less than twice per year to determine whether Licensee is complying with the requirements of the License.
22. Provide City's recognized Golf Clubs, a list of which the parties shall agree upon in writing and in good faith, with limited use of space within the Restaurant for club activities at low or no cost. Licensee will be solely responsible for determining frequency, type of use, and cost, and will determine a method of scheduling that will best serve that purpose. Use of Restaurant space by retail customers will take priority over Golf Club use, when insufficient space exists for both user groups.
23. Keep all fixtures and equipment within those areas occupied by Licensee clean, neat, safe, sanitary and in good order at all times.
24. Store all waste matter, garbage and refuse in a manner satisfactory to City and arrange for the disposal thereof at the expense of Licensee.
25. Promptly remove and dispose of any waste and/or refuse resulting from food and beverage operations which has been blown by wind or otherwise transported from the areas occupied by Licensee into adjacent areas of the Golf Course properties.
26. Comply with all requirements of City, or State Department of Health Services, or measures in health or sanitary regulation adopted by any legal authority, and grant access for inspection purposes to any duly authorized representative of the State Department of Health Services or City.
27. Refrain from selling beer, wine and liquor for consumption off the Golf Course premises. Restrict sale of beer, wine and liquor to consumption within Restaurant and Golf Course premises.

28. Refrain from selling any food or beverage item supplied in a breakable glass container, for consumption on Golf Course premises, outside the Restaurant.
29. Refrain from installing or permitting the installation or use of any vending machine, pinball machine, video game machine, or similar equipment without first having obtained the written consent of the Superintendent of Parks and Golf of City.
30. Refrain from attaching, hanging, or otherwise affixing any sign or advertising matter on the exterior of the Clubhouses, or anywhere on the Course properties without first having obtained the written consent of the Superintendent of Parks and Golf of City.
31. Refrain from installing any newspaper rack or other object to be placed and maintained outside the Clubhouses, whether attached thereto or free-standing, or anywhere on the Courses, without first having obtained the written consent of the Superintendent of Parks and Golf of City.
32. Not permit other businesses, vendors, customers, or any other person or entity to directly provide services or entertainment to customers; or, display or sell goods, wares or merchandise either within the interior or exterior of the Clubhouse, or anywhere on the Course, without first having obtained written consent of the Superintendent of Parks and Golf of City.
33. Not conduct any business activity at the Course and Restaurant for any other purpose except sale and service of food and beverages, and related events, or except such activities for which written consent of the Superintendent of Parks and Golf of City has first been given.
34. Not make any alterations, changes or additions to the Restaurant or to any fixtures or equipment owned by City without first having obtained written consent of the Superintendent of Parks and Golf of City.
35. Provide a sufficient quantity of expendable equipment, including but not limited to tables, chairs, linen, glassware, dishes, cutlery and kitchen utensils.



36. On or before April 1, 2016, and every April 1 thereafter, file with City a signed inventory of any furnishings, equipment, fixtures and amenities owned by Licensee and used in operation of the Restaurant.
37. Promptly pay all moneys required to be paid to the City, and all expenses incurred in operating the restaurant and other facilities on the Course where food and beverages are sold;
38. Obtain and pay for any permit or license required by the Sunnyvale Municipal Code (as it currently provides or may hereafter be amended) or any other ordinance, or law of the State of California or the United States of America;
39. Pay any and all taxes, levies, charges, or assessments, including but not limited to personal property taxes, sales and use taxes, assessed against Licensee, or its possessory interest in the property of the Clubhouse occupied by Licensee, or its property, including inventories used in performing its duties and obligations or exercising its privileges under this License, for whatever purposes in connection with the operation of the Restaurant; and,
40. Keep Restaurant occupied by Licensee free from any liens arising out of the work performed, materials furnished, or obligations incurred by Licensee. Licensee shall have no power to establish or permit the creation of any such lien.
41. Furnish and pay all charges for gas, electricity, water, garbage, sewer and grease trap service to the Restaurant.
42. Furnish and pay all charges for telephone, internet and cable television or satellite television service to the Restaurant.
43. Furnish and pay all costs in connection with janitorial and maintenance services within the Restaurant occupied by Licensee. The janitorial and maintenance services shall include but not be limited to:
  - a) Clean entire areas licensed by the Licensee regularly and as-needed including but not limited to interior furnishings, equipment,

fixtures, windows (inside and outside), flooring, ceilings and walls as needed.

- b) Inspect and maintain facilities regularly during operating hours.
- c) Check (no less than every 2 hours the facilities are open) and maintain restrooms and related equipment in proper working order. Thoroughly clean related equipment, fixtures, and surfaces, and provide adequate stock of paper and soap products.
- d) Maintain exterior of the facilities and windows including cleaning and painting.
- e) Replace electric lights/bulbs as necessary.
- f) Provide and maintain appropriate and high quality floor coverings throughout the Restaurant.
- g) Keep areas occupied by Licensee in a clean and sanitary condition, reasonably free from garbage, refuse, and waste at all times to the satisfaction of City and to a level of quality to that of similar facilities in the community.
- h) Repair and replace anything broken or damaged as a result of any act or neglect by Licensee in all areas of the Clubhouse building.

#### IV. **DUTIES OF CITY.**

- A. City shall, in conjunction with Licensee's service, do the following:
  - 1. Publicize the Restaurant in the Library and Community Services Department's "Activities Guide" as long as the City publishes and distributes it during the length of this agreement; one-half of a full page will be provided in each edition.
  - 2. Publicize the Restaurant on the City's web site and provide a link to the Licensee's web site.
  - 3. Approve, by the Director of Public Works or his designee, the annual operations and marketing plan including a list of all activities, including but not limited to, menus, programs, banquets, services, promotions,

advertising and special events and their associated fees. All new services, programs and activities instituted after the annual approval of the operations plan shall be submitted in writing to the Director of Public Works for approval. Approvals hereunder shall not be unreasonably withheld or delayed by the City.

4. Determine, as established by the Director of Public Works or his designee, when fees may be waived or adjusted excluding promotions and discounts offered temporarily by the Licensee.

B. City shall be responsible for providing and maintaining only the following, within the Restaurant:

1. Restaurant facility, complete with supporting structural members, smoke/fire detection system, fire suppression system, kitchen hood vent system and required gas/electrical/plumbing services, roofs, ceilings and walls.
2. Infrastructure of the patio and portions of the perimeters of the buildings, including existing entrances and seating areas and staircase and excluding patio surface coverings.
3. The existing interior lavatories, with all required plumbing and fixtures.
4. The existing air conditioning and heating systems.
5. The existing light fixtures.
6. Parking lot of the facility
7. Building entrance of the facility
8. Subject to the agreement of both parties, any other items not specifically listed in this section that would typically be the responsibility of the property owner
9. Certain miscellaneous furnishings, equipment, fixtures are provided in an “as-is” condition and shall not be maintained by the City. These items currently located in the restaurant include, but are not limited to: ovens, sinks, refrigeration equipment, fryers, beverage dispensers, food preparation counters and dishwasher stations. Licensee may use these

items or notify the City in writing of any items they do not want and dispose of them in a mutually agreeable manner. Licensee is solely responsible for all costs associated with use, maintenance, and disposal.

10. Within the kitchens and bar areas, roughed in plumbing only.
  11. Locks and fasteners on doors and windows.
  12. Graffiti removal on all exterior building surfaces.
  13. Windows not broken as a result of any act or neglect of Licensee.
- C. City shall provide and be responsible for the existing off-street parking and parking lots, including lighting system at the Course and any security required in connection therewith. Licensee shall share the use of these facilities with customers and visitors of the Course. Designated parking for a mobile food truck and the use of existing utility connections.

## V. **CAPITAL INVESTMENT**

- A. Licensee shall make a minimum capital investment between One-Hundred Fifty Thousand Dollars (\$150,000) and One-Hundred Seventy-Five Thousand Dollars (\$175,000) during the Term. “Start-up” capital investments shall include but not be limited to: technology (computers, point of sale system, event software, website development, supplies, smallwares, paint, carpet etc.); marketing (pre-paid advertising, signage and local public relations campaign etc.); transition personnel (corporate payroll for human resources, accounting, operations, culinary etc.); liquor license and equipment (office, kitchen, banquet, tables, chairs etc.). All items that are equipment used in the operation of the restaurant shall be inventoried as set forth in section III.A.36 of this agreement and remain the property of the Licensee. “Infrastructure” capital investments are defined as modifications or enhancements of the existing, permanent infrastructure that shall become the property of the City upon installation. Capital investments shall include but not be limited to renovation of restaurant interior and exterior and renovation of restaurant patio. All of these improvements become the property of the City upon installation.

1. Licensee shall prepare plans and specifications in consultation with City.
  2. Licensee shall receive approval of all plans and specifications by the Director of Public Works and/or his designee(s) prior to filing of final plans and specifications. City shall be provided with two complete sets of final plans and specifications before construction begins and two complete sets of “as-built” plans and specifications at the completion of construction.
  3. Prior to construction, Licensee shall have obtained all necessary permits authorizing construction of the Project from City and other public agencies having jurisdiction over the Project, in compliance with all applicable laws, regulations, codes and the permitting process.
  4. Licensee shall provide City with written financial documentation showing related costs, upon the completion of all infrastructure capital investments.
- B. Additional remodel of the Clubhouse or Restaurant, construction of additions to the Clubhouse or Restaurant, and/or remodel or construction of concession building may be proposed at any time by the Licensee, or the City. City shall review all such projects and their associated costs on a case-by-case basis, and Licensee shall not undertake any such project without the prior express written consent of the City.
- C. City shall not award a contract for construction of remodel and/or additions or authorize construction thereof within the Licensee areas of use unless Licensee shall have been given a reasonable opportunity to review the associated plans and specifications.
- D. Capital investments are at the sole expense of the Licensee and City shall not be required to reimburse Licensee for any expenses incurred, regardless of whether or not the License is terminated by mutual agreement of the parties or by City’s sole option.

## **VI. PAYMENTS TO CITY, RECORDS, AND ACCOUNTS**

Licensee, in consideration of the privileges and rights allowed by this License, shall pay to the City the following sums: Beginning License Year 3, or the twenty-fifth (25th) month, the license fee shall be as set forth in the table shown below. All payments due to the city that are late or not submitted on the first day of each month shall incur a 10% penalty fee that will be due with the payment.

<b>Year of Agreement</b>	<b>Amount of annual and monthly fee</b>
Stub Period (June 1, 2016 - December 31, 2016)	\$3,500 (\$500.00 per month on starting date)
Year 1 (January 1, 2017 - December 31, 2017)	\$6,000 (\$500.00 per month)
Year 2 (January 1, 2018 - December 31, 2018)	\$6,000 (500.00 per month)
Year 3 (January 1, 2019 - December 31, 2019)	\$22,500 (\$1,875.00 monthly)
Year 4 (January 1, 2020 - December 31, 2020)	\$24,000 (\$2,000.00 monthly)
Year 5 (January 1, 2021 - December 31, 2021)	\$25,000 (\$2083.33 monthly)
Year 6 (January 1, 2022 - December 31, 2022)*	\$26,000 (\$2,166.67 monthly) or 3% of Net Revenue received during License Year, whichever is greater
Year 7 (January 1, 2023 - December 31, 2023)*	\$27,000 (\$2,250.00 monthly) or 3% of Net Revenue received during License Year, whichever is greater
Year 8 (January 1, 2024 - December 31, 2024)*	\$28,000 (\$2,333.33 monthly) or 3% of Net Revenue received during License Year, whichever is greater
Year 9 (January 1, 2025 - December 31, 2025)*	\$29,000 (\$2,416.67 monthly) or 3% of Net Revenue received during License Year, whichever is greater
Year 10 (January 1, 2026 - December 31, 2026)*	\$30,000 (\$2,500.00 monthly) or 3% of Net Revenue or 3% of Net Revenue received during License Year, whichever is greater

\*For Years 6 through 10 above, Licensee shall pay the indicated monthly fee provided, however, at the end of each year, a true-up will be made to determine how much (or if) any additional fee is due in the event that 3% of Net Revenue received by Licensee for such applicable Year exceeds the amount of the fee paid for the applicable year. Any excess fee due to the City such year (if any) shall be paid by January 15<sup>th</sup> of each succeeding year.

## **VII. COMPENSATION OF LICENSEE**

Licensee shall be entitled to keep and retain fees and revenues collected from all operations of the Restaurant less all operating and other expenses for which Licensee is made responsible pursuant to this agreement, and those amounts described in SECTION VI, above.

## **VIII. INDEMNIFICATION, INSURANCE**

- A. Licensee shall indemnify and hold harmless the City, its officers, employees and agents ("City Indemnified Parties"), from and against any and all claims, demands, orders, decrees or judgments for injury or death or damage to person or property, loss, damage and liability (including all costs and attorneys' fees incurred in defending any claim, demand or cause of action) (collectively, "Losses"), occasioned by, arising out of, or resulting from any negligent act or omission or willful misconduct on the part of Licensee, or its agents or employees except to the extent such Losses arise due to (i) the gross negligence or willful misconduct of the City Indemnified Parties.
- B. City shall indemnify and hold harmless the Licensee, its officers, employees and agents ("Licensee Indemnified Parties"), from and against any and all Losses, occasioned by, arising out of, or resulting from the gross negligence or willful misconduct on the part of City Indemnified Parties except to the extent such Losses arise due to (i) the negligence or willful misconduct of Licensee.
- C. Licensee shall procure and maintain for the duration of the contract general liability insurance against claims for injuries to persons or damages to property which may arise from or in connection with the Licensee's activities or because of this License subject to the following minimum scope and limits:

Minimum Scope and Limits of Insurance Licensee shall maintain limits no less than:

1. **Commercial General Liability**: \$1,000,000 per occurrence and \$2,000,000 aggregate for bodily injury, personal injury and property damage. ISO Occurrence Form CG 0001 or equivalent is required.
2. **Automobile Liability**: \$1,000,000 per accident for bodily injury and property damage. ISO Form CA 0001 is required.
3. **Workers' Compensation: Statutory Limits** and **Employer's Liability**: \$1,000,000 per accident for bodily injury or disease.

Deductibles and Self-Insured Retentions

Any deductibles or self-insured retentions must be declared and approved by the City. The licensee shall guarantee payment of any losses and related investigations, claim administration and defense expenses within the deductible or self-insured retention.

Other Insurance Provisions

The **general liability** to include a blanket additional insured endorsement to comply with the following additional insured requirements:

1. The City of Sunnyvale, its officials, employees, agents and volunteers are to be covered as additional insured with respects to liability arising out of activities performed by or on behalf of the Licensee; products and completed operations of the Licensee; premises owned, occupied or used by the Licensee; or automobiles owned, leased, hired or borrowed by the Licensee. The coverage shall contain no special limitations on the scope of protection afforded to the City of Sunnyvale, its officers, employees, agents or volunteers.
2. For any claims related to this project, the Licensee's insurance shall be primary as to Licensee's express obligations under the Indemnification provision of this License. . Any insurance or self-insurance maintained by the City of Sunnyvale, its officers, officials, employees, agents and volunteers shall be excess of the Licensee's insurance and shall not contribute with it.



3. Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not affect coverage provided to the City of Sunnyvale, its officers, officials, employees, agents or volunteers.
4. The Licensee's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
5. Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, cancelled by either party, reduced in coverage or in limits except after thirty (30) days prior written notice by certified mail, return receipt requested, has been given to the City of Sunnyvale.

#### Acceptability of Insurers

Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A:VII, unless otherwise acceptable to the City of Sunnyvale.

#### Verification of Coverage

Licensee shall furnish the City with original Certificates of Insurance, naming the City as additional insured on the General Liability policy, and endorsements affecting the coverage required. The certificates are to be signed by a person authorized by that insurer to bind coverage on its behalf. City shall be provided with updated Certificates prior to any expiration date of coverage.

- D. Licensee shall fill out and forward to the City an accident report for any injury that takes place in and around the Restaurant within twenty-four (24) hours of Licensee becoming aware of such injury.

### **IX. TERMINATION, REMOVAL, DEFAULT, BANKRUPTCY**

- A. Upon expiration of the term of this License, or upon the sooner termination of such term from whatever cause, Licensee:
  1. May remove any and all furnishings, equipment, merchandise and supplies purchased by Licensee and noted in their annual inventory list provided in writing to the City; provided, however, that:

- a) Licensee is not then in default in the payment of any fees, portion of gross revenue or any other monies required to be paid to City, or in the performance of any duty, obligation, covenant or agreement contained herein;
    - b) Licensee shall leave the Restaurant in good order, condition and state of repair, reasonable wear and tear and damage by the elements excepted, together with any alterations, changes, additions or improvements thereto; and,
    - c) Licensee shall be responsible for any damage to the Restaurant occasioned by the removal of any furnishings, or equipment; and for such damage, if any, City shall have lien on said items of personal property until such damages be paid. The City lien is additional security for performance of the License obligations and supercedes any other creditor lien.
  - 2. Shall peaceably and quietly leave, surrender and yield up to City the Restaurant.
  - 3. If Licensee is entitled to remove any item of personal property described in Section 1, and such item is not so removed within thirty (30) days of termination of the agreement, then such property shall be deemed abandoned by Licensee and absolute title thereto shall immediately vest in City and may be disposed of by City as it sees fit.
- B. City reserves the right to terminate this License:
- 1. If at any time Licensee is in default in the payment of any fees, or any other monies required to be paid to City, or in the performance of any duty, obligation, covenant or agreement contained herein (time expressly declared to be of the essence), upon fifteen (15) days written notice to Licensee and Licensee fails to correct such default within said fifteen (15) day period; provided, however, that:
    - a) Licensee shall not be entitled to and expressly waives any other form of demand or notice (written or oral);

- b) City shall have the full right, at its election, to enter the Restaurant and take immediate and sole possession thereof;
    - c) City shall have the right to bring suit for and collect all fees and any other monies required to be paid to City and which shall have accrued up to the time of entry described above;
    - d) Upon such termination, this License and all rights and privileges herein licensed shall become void to all intents and purposes whatsoever; or,
  - 2. If Licensee fails to keep in full force and effect at any time the policies of insurance or faithful performance deposit required above upon five (5) days written notice to Licensee and Licensee fails to correct such default within said five (5) day period.
- C. This License and all rights and privileges herein licensed shall immediately (and without any demand or notice written or oral) cease, determine, come to an end, and become void, and the City immediately may enter the Restaurant and take immediate and sole possession thereof, without prejudice to the right of City to recover from Licensee all unpaid fees or any other monies required to be paid to City and which shall have accrued up to the time of the entry described above, if:
- 1. Licensee at any time during the term of this License become insolvent, or if proceedings in bankruptcy shall be instituted by or against Licensee, or if Licensee shall be adjudged bankrupt or insolvent by any court, or if a receiver or trustee in bankruptcy or a receiver of any property of Licensee shall be appointed in any suit or proceeding brought by or against Licensee, or if Licensee shall make an assignment for the benefit of creditors, or if any action is taken against or suffered by Licensee under any insolvency or bankruptcy act.
- D. In the event of termination of the License, because of the default of Licensee upon any of the grounds set forth above or in the event of the automatic termination of this License, City reserves the right to remove any personal property belonging to Licensee from the Restaurant and to store such personal property at the sole cost

and expense of Licensee, and City shall have a lien on such personal property for and until all and any storage charges are paid.

- E. Licensee reserves the right to terminate this License if at any time City is in default in the performance of any material duty, obligation, covenant or agreement contained herein (time expressly declared to be of the essence), upon fifteen (15) days written notice to City and City fails to correct such default within said fifteen (15) day period. Upon mutual written agreement of the parties, the License may be terminated without cause prior to the end of the agreement term.

## **X. PROHIBITIONS**

- A. Licensee shall not do any of the following acts, except as herein otherwise provided:
1. Assign or transfer this License or any of the rights or privileges herein licensed, or any part thereof. The License is personal to Licensee and any attempt to transfer or assign this License shall terminate it.
  2. This License cannot be assigned involuntarily or by operation or process of law.
  3. Make any alterations, changes, or additions to the Restaurant occupied by Licensee, or to any fixtures or equipment owned by City without first having obtained written consent of City thereto, provided that any alterations, changes or additions consented to shall be at the sole cost of Licensee and shall become the property of City upon termination of this License, for whatever cause.
  4. Let, sublet, sublicense or assign any or all portions of the Restaurant occupied by Licensee.
  5. Commit, permit or allow any nuisance or waste in, or injury to, any of the portions of the Restaurant, or to permit the use of any of such portions of the Restaurant for any illegal purpose.
  6. Bind or attempt to bind City to any contracts or obligations of any nature.

**XI. FORCE MAJEURE**

- A. An act or event is a “Force Majeure Event” if such act or event is beyond the reasonable control, and not the result of the fault or negligence, of the affected Party and such Party has been unable to overcome such act or event with the exercise of due diligence (including the expenditure of commercially reasonable sums). Subject to the foregoing conditions, “Force Majeure Event” shall include the following acts or events: (i) natural phenomena, such as storms, hurricanes, floods, lightning, volcanic eruption and earthquakes; (ii) explosions or fires arising from lightning or other causes unrelated to the acts or omissions of the Party seeking to be excused from performance; (iii) acts of war or public disorders, civil disturbances, riots, insurrection, sabotage, epidemic, terrorist acts, or rebellion; (iv) Changes in applicable law or other action by a Governmental Authority, including a moratorium on any activities related to this Agreement; and (v) the impossibility for one of the Parties, despite its reasonable efforts, to obtain, in a timely manner, any approval by a governmental authority necessary to enable the affected Party to fulfill its obligations in accordance with this Agreement, provided that the delay or non-obtaining of such approval by a governmental authority is not attributable to the Party in question and that such Party has exercised its commercially reasonable efforts to obtain such approval.
- B. Except as otherwise specifically provided in this Agreement, neither Party shall be considered in breach of this Agreement or liable for any delay or failure to comply with the Agreement, if and to the extent that any failure or delay in such Party’s performance of one or more of its obligations hereunder is attributable to the occurrence of a Force Majeure Event; provided, that the Party claiming relief under this Article shall (i) notify the other Party, in writing, of the existence of the Force Majeure Event as soon as reasonably practicable and in any event within five (5) business days after becoming aware of such existence, (ii) immediately exercise all reasonable efforts necessary to minimize delay caused by such Force Majeure Event, (iii) immediately notify the other Party, in writing, of the cessation

or termination of said Force Majeure Event, and (iv) resume performance of its obligations hereunder as soon as practicable thereafter.

- C. If any Force Majeure Event shall have occurred that has affected Licensee's performance of its obligations hereunder and has continued for a period of one hundred twenty (120) consecutive days or one hundred eighty (180) days in the aggregate, then either party shall be entitled to terminate this Agreement upon thirty (30) days written notice to the other.

## **XII. NOTICES**

- A. Any action, notice, or request required to be taken, given or made by City hereunder may be taken, given, or made by the City Manager of City or such other person or persons as s/he may authorize for the purpose. All notices, requests, or other papers required to be given or delivered to Licensee shall be deemed to be duly and properly given or made if mailed to Licensee, postage prepaid, addressed to:

KemperSports  
500 Skokie Blvd  
Suite 444  
Northbrook, Ill 60062

Or, personally delivered to Licensee at such address or at such other addresses as Licensee may designate in writing to City. All notices, requests, or other papers required to be given or delivered to City shall be deemed to be duly and properly given or made if mailed to City, postage prepaid, addressed to:

Director of Public Works  
City of Sunnyvale  
Post Office Box Number 3707  
Sunnyvale, California 94088-3707

Or, personally delivered to Director of Public Works at City Hall, 456 West Olive Avenue, Sunnyvale, California, or at such other address as City may designate in writing to Licensee.

- B. Nothing in this provision shall be construed to prohibit communication by more expedient means, such as by telephone, e-mail or facsimile transmission, to accomplish timely communication. However, to constitute effective notice, written confirmation of a telephone conversation or an original of an e-mail or facsimile transmission must be sent by first class mail, by commercial carrier, or hand-delivered. Each party may change the address by written notice in accordance with this paragraph. Notices delivered personally shall be deemed communicated as of actual receipt; mailed notices shall be deemed communicated as of three days after mailing, unless date is a date on which there is no mail service. In that event communication is deemed to occur on the next mail service day.

### **XIII. NATURE OF LICENSE; MODIFICATIONS**

- A. This License does not constitute a contract of employment and the relation of master and servant, employer and employee, does not and shall not exist between City and Licensee, or any of its employees. Licensee is, and at all times shall be, deemed to be an independent contractor.
- B. This License does not constitute a deed or grant of any easement by the City of Sunnyvale and does not constitute a lease or convey any rights associated with a leasehold interest.
- C. No assurances or inducements of any kind, not specifically set forth in the License, have been made to Licensee by anyone authorized by City to cause Licensee to execute these presents.
- D. Failure of City to insist upon a strict performance of any of the duties, obligations, conditions, covenants or agreements contained in this License shall not be deemed a waiver of any subsequent breach or default in the duties, obligations, conditions, covenants or agreements herein contained.
- E. Rights of City or Licensee hereunder shall be cumulative and not alternative and shall be in addition to any and all rights which City shall have as a matter of law.

- F. No agent, officer or employee of City has any authority to vary or extend the term of this License or any duty, obligation, covenant or agreement contained herein, or to make any statements or representations concerning this License, or the rights and privileges set forth herein, except such as are set forth in any written addendum to this License which has been approved by the Council.
- G. This License shall not become effective until receipt by the City of Sunnyvale of an original copy of this License with properly signed endorsement accepting the License subject to the conditions, duties, obligations, covenants or agreements contained herein. This License may be executed in duplicate counterparts.
- H. The City of Sunnyvale does not warrant or represent that the Restaurant, Clubhouse, golf course or other public places to which this License relates are safe, healthful or suitable for the purpose for which they are permitted to be used under this License.
- I. Licensee warrants that the undersigned is authorized by the corporation to execute this Agreement and bind the corporation and shall provide City proof upon request including, but not limited to, Articles of Incorporation or a corporate resolution.
- J. The language of this License shall be construed according to its fair meaning and not strictly for or against the City or Licensee.
- K. This License shall be enforced and interpreted under the laws of the State of California and the venue of any action brought under this License shall be in Santa Clara County.
- L. The provisions of this License shall contain the entire agreement between the parties hereto and said License shall not be modified except by a written amendment fully executed by both parties.
- M. If any provision of this License is determined to be void by any court of competent jurisdiction, then such determination shall not affect any other provision of the License and all such other provisions shall remain in full force and effect.



Licensee accepts the License set forth above and covenants and agrees (1) to be bound by and to comply with and perform each duty, obligation, covenant or agreement contained in the License in the manner and at the times set forth therein; and (2) to pay all fees at the times set forth herein, respectively, this \_\_\_\_\_ day of June, 2016.

IN WITNESS WHEREOF, the parties have executed this Agreement.

ATTEST:

CITY OF SUNNYVALE ("CITY")

\_\_\_\_\_

City Clerk

By

\_\_\_\_\_

City Manager

APPROVED AS TO FORM:

KSM Sunnyvale, LLC

\_\_\_\_\_

City Attorney

By

\_\_\_\_\_

NAME

**EXHIBIT "A"**

Aerial Map of Restaurant Building

# Sunnyvale Golf Course Restaurant

## EXHIBIT A



First floor of the building is the Sunnyvale Pro Shop. The second floor is the restaurant and patio.