

**MANAGEMENT AGREEMENT and  
TERMINATION OF EXISTING CONCESSION LICENSE**

This Management Agreement is made and entered into as of September 1, 2018 (“Effective Date”) by and between CITY OF SUNNYVALE, a municipal corporation of the State of California (“City”) and KSM Sunnyvale, LLC., an Illinois limited liability company (“KSM”), collectively referred to as the “Parties”.

**W I T N E S S E T H:**

WHEREAS, City owns the golf course and related facilities located in Sunnyvale, California known as “Sunnyvale Golf Course”, including the restaurant and related facilities located in Sunnyvale, California known as “Barrel19 Bistro & Bar”; and

WHEREAS, City and KSM entered into a Concession License Agreement on June 1, 2016, for the operation of Barrel19 Bistro & Bar, which will be terminated and superseded by this Management Agreement (“Agreement”); and

WHEREAS, City and KSM desire for KSM to manage, operate and supervise sales of food, beverages and related services at the Sunnyvale Golf Course during an initial Term of five (5) years, subject to the terms and conditions of this Agreement.

NOW, THEREFORE, for and in consideration of the mutual covenants, promises and agreements herein contained, the Parties hereto agree as follows:

**I. DEFINITIONS**

As used in this Agreement, 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 by KSM to work onsite at the Restaurant.
- E. “KSM” 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 KSM to act on the behalf of the KSM in any Agreement 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 KSM 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 and applicable Operating Expenses.
- M. “Gross Revenues” shall mean all monthly receipts related to or derived from 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.  
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 Restaurant
  - 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.
- O. “Operating Expenses” shall mean all operating expenses of the Restaurant incurred or paid on behalf of City during the Term, computed on an accrual basis, including, but not limited to, the following items:
- Salaries, wages, employee benefits, and payroll expenses, including without limitation, payroll service bureau fees, payroll taxes, Restaurant profit sharing programs, and insurance for all employees employed on-site in the direct operation of the Restaurant, excluding, however, service charges, which are defined as percentage gratuities added to billings and paid to employees (collectively, the “Gross Payroll”);
  - Marketing, advertising, and promotional expenses;
  - Purchase and replacement, as necessary, of inventories of maintenance parts and supplies, food stores and bar supplies;
  - Purchase and replacement, as necessary, of silver, chinaware, glassware, cooking utensils, and other similar items of equipment;

- Accrual of a reserve for insurance (including workers' compensation) and property taxes each month in an amount or at a rate that is sufficient to pay such insurance premiums or property taxes when they become due and payable;
- Insurance premiums, administrative and financing charges and expenses, property taxes, to the extent not provided for in the reserve established therefore and any deductible amounts required to be paid pursuant to Restaurant insurance coverage;
- Accounts receivable previously included within Gross Revenues, to the extent they remain unpaid ninety (90) days after the first billing;
- Auditing, accounting costs, computer fees (including costs to license and maintain accounting software), and reasonable legal fees incurred in respect of the operation of the Restaurant, including any reasonable financial management and reasonable accounting fees paid to third party accounting firms, if included in the Budgets;
- Costs incurred for utilities, including, but not limited to, all electric, gas, and water costs, and any other private utility charges incurred in connection with the operation of the Restaurant;
- Ordinary maintenance and repairs, exclusive of any capital improvements or capital replacements, which are hereby excluded;
- All out-of-pocket expenses incurred by KSM in providing the services under the terms of the Agreement, including without limitation, costs of recruitment (including applicable agent's fee), and other incidental expenses included in the Budget;
- All expenses set forth in the approved Budgets; and

- All other customary and reasonable expenses incurred in the operation of the Restaurant and the Improvements.

Any of the above provisions resulting in a double inclusion as an Operating Expense shall be allowed as an inclusion only once. Operating Expenses shall not include (i) depreciation or amortization, (ii) principal or interest payments on indebtedness, (iii) rental or lease payments for major items of furniture, fixtures, or equipment which, in accordance with generally accepted accounting principles, are purchased and capitalized as fixed assets, and (iv) federal, state and local income taxes of any nature or kind incurred by City or KSM.

## **II. TERM AND EXCLUSIVE USE**

- A. The Term of this Agreement shall be for an initial period of five (5) years with an option to renew for two (2) additional five-year periods upon mutual agreement by the Parties.
- B. In order to enable KSM to exercise the privileges and rights herein licensed and to perform the duties and obligations herein imposed, City grants to KSM:
  - 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. KSM 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. KSM 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 KSM of any material term of this Agreement or any violation of relevant local or state law, KSM shall, to the extent necessary to exercise the privileges and duties of KSM 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 Agreement.
- C. KSM shall occupy and operate Restaurant as a licensee and not as a lessee.

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

- A. Except as otherwise agreed by the parties and subject to the terms of this Agreement and the approved Budgets, KSM 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 KSM.

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.
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 11:00 a.m. and 7:00 p.m. on each day the Course is open for play, except during Monday and Tuesday, and except during such times when closure is necessary due to construction of structural additions or other physical improvements to the Clubhouse. During the mornings, KSM agrees to provide breakfast options available either at the Snack Shop or the Golf Pro Shop as agreed upon by the City. On Monday and Tuesday, KSM agrees to provide breakfast and pre-packaged food items for sale at the Snack Shop or the Golf Pro Shop as agreed upon by the City. Nothing herein shall preclude KSM 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. The hours of operation may be modified at any time by mutual agreement by the Parties.
8. Restaurant may be closed temporarily during inclement weather that significantly reduces the amount of play on the golf courses. KSM 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 KSM in matters pertaining to the exercise of the privileges and duties hereby licensed.

KSM shall keep City informed in writing of the identity of such person(s) and conduct all general business through the manager(s).

10. No employee of KSM shall be deemed to be an employee, agent or representative of City at any time or for any purpose whatsoever.
11. KSM 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.
12. 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 Agreement at prices comparable to those prevailing for similar services and facilities without discrimination. KSM shall provide prompt, clean, courteous and efficient service.
13. Provide breakfast, lunch, bar and banquet menus and promote sale of banquet and meeting services for the Restaurant.
14. Provide prompt, courteous and efficient customer service.
15. 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.
16. Provide City with reasonable access to and the right to inspect all menus, lists and schedules of prices for services or products provided.
17. 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 KSM, the quality of the food, articles sold, or character of the service.
18. 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 KSM. In addition, KSM 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, KSM shall submit a financial statement to City showing the financial activities for food and beverage operations conducted by KSM at Sunnyvale Golf Course for the preceding calendar month and calendar year to date

19. 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.
20. Authorize the Director of Public Works of City or his designee to inspect the premises occupied by KSM not less than twice per year to determine whether KSM is complying with the requirements of the Agreement.
21. 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. KSM 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.
22. Keep all fixtures and equipment within those areas occupied by KSM clean, neat, safe, sanitary and in good order at all times.
23. Store all waste matter, garbage and refuse in a manner satisfactory to City and arrange for the disposal thereof at the expense of KSM.
24. 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 KSM into adjacent areas of the Golf Course properties.

25. 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.
26. 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.
27. Refrain from selling any food or beverage item supplied in a breakable glass container, for consumption on Golf Course premises, outside the Restaurant.
28. 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.
29. 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.
30. 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.
31. 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.
32. 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.

33. 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.
34. Provide a sufficient quantity of expendable equipment, including but not limited to tables, chairs, linen, glassware, dishes, cutlery and kitchen utensils.
35. On or before April 1 of each calendar year during the Term, file with City a signed inventory of any furnishings, equipment, fixtures and amenities owned by KSM and used in operation of the Restaurant.  
  
Promptly pay on behalf of the City, as an Operating Expense, all expenses incurred in operating the restaurant and other facilities on the Course where food and beverages are sold; including but limited to all charges for gas, electricity, water, garbage, sewer and grease trap service to the Restaurant and all charges for telephone, internet and cable television or satellite television service to the Restaurant.
36. Obtain and pay for as an Operating Expense, 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;
37. Keep Restaurant occupied by KSM free from any liens arising out of the work performed, materials furnished, or obligations incurred by KSM. KSM shall have no power to establish or permit the creation of any such lien.
38. Arrange for and pay as an Operating Expense, all costs in connection with janitorial and maintenance services within the Restaurant occupied by KSM. The janitorial and maintenance services shall include but not be limited to:

- a) Clean entire areas licensed by the KSM 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 KSM 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 KSM in all areas of the Clubhouse building.

B. Budgets. All budgets, as hereinafter set forth (collectively, the “Budgets”), shall be prepared with the advice and counsel of City, based on what KSM believes to be reasonable assumptions and projections, and delivered to City for City’s review and written approval. All Budgets shall be presented in reasonable detail. KSM shall not be deemed to have made any guarantee or warranty in connection with the results of operations or performance set forth in the Budgets and the Parties acknowledge that the Budgets are based solely upon KSM’s judgment and the facts and circumstances known by KSM at the time of preparation.

1. Operating Budget. Prior to the Commencement Date, KSM shall submit to City, for City’s review and written approval, an Operating Budget setting

forth the forecasted revenues and expenses associated with the operations of the Restaurant for the current calendar year (“Operating Budget”), which ends on December 31, 2018. At least sixty (60) days prior to the first day of each calendar year (i.e., on or before November 1<sup>st</sup>) thereafter during the Agreement Term, KSM shall submit to City, for City’s review and written approval, an Operating Budget of the Restaurant for the upcoming calendar year within the Term.

2. Capital Expenditures Budget. Prior to the Commencement Date, KSM shall submit to City, for City’s review and written approval, a budget setting forth the proposed capital improvements (including equipment purchases and leases) within and to the Restaurant for the current calendar year (“Capital Expenditures Budget”). At least sixty (60) days prior to the first day of each calendar year thereafter during the Term, KSM shall submit to City, for City’s review and written approval, a Capital Expenditures Budget for the upcoming calendar year or part thereof within the Term.
3. City’s Review and Approval of Budgets. The Budgets shall be for City’s review and written approval, subject to the terms of this Agreement, which approval shall not be unreasonably withheld. City shall give its written comments and/or approval within thirty (30) days after KSM delivers the Budgets to City. If City fails to provide any comments or approval with respect to a Budget within such time period, then the City shall be deemed to have approved the Budget. In the event of disapproval of any Budgets, KSM shall continue operating the Restaurant pursuant to the Budgets then in effect, subject to increases in Operating Expenses required due to (i) increases in Gross Revenues or (ii) weather or other matters beyond the control of KSM, until such time as City and KSM agree upon the appropriate replacement Budgets.
4. Unanticipated Expenditures and Reallocation of Funds. City agrees that the Budgets are intended to be reasonable estimates, and, accordingly,

KSM shall be entitled from time to time to revise the Budgets to cover any expenditures that were unanticipated at the time of preparation of the Budgets but are reasonable and necessary to carry out the provisions of this Agreement; provided, however, that except as otherwise set forth in this Agreement, KSM shall be required to obtain City's prior written approval of any expenditures that would result in the total budgeted expenditures within the Budget being exceeded by more than five percent (5%). KSM is authorized to take all action reasonably deemed necessary by KSM to implement, perform, or cause the performance of the items set forth in the Budgets. City acknowledges that KSM has not made any guarantee, warranty, or representation of any nature whatsoever concerning or relating to (i) the Budgets, or (ii) the amounts of Gross Revenues or Operating Expenses to be generated or incurred from the operation of the Restaurant.

C. Financial Management, Accounting Records and Reporting. KSM will: (i) maintain all books, records, and other data associated with the financial activities of the Restaurant. All accounting records shall be maintained in a format consistent (in all material respects) with generally accepted accounting principles.

1. Financial Reporting. During the Term, KSM shall provide the following financial statements in a format reasonably specified by City:

(i) KSM shall submit to City, within twenty (20) days after the close of each calendar month, a financial statement showing in reasonably accurate detail the financial activities of the Restaurant for the preceding calendar month and the calendar year to date.

(ii) KSM shall submit to City, within sixty (60) days after the close of each calendar year, a financial statement showing in reasonably accurate detail the financial activities of the Restaurant for the calendar year then ended.

2. Internal Control. KSM agrees to develop, install, and maintain reasonably appropriate accounting, operating, and administrative controls governing the financial aspects of the Restaurant, such controls to be consistent (in all material respects) with generally accepted accounting principles.
  3. Records and Inspection. KSM shall maintain a set of all financial, vendor and operating records relating to the Restaurant. At any time during the Term, City shall have the right, after three (3) days prior written notice to KSM, to inspect the books, records, invoices, deposits, canceled checks, or other financial data or transactions of the Restaurant at reasonable times and during normal business hours; provided, however, City shall use its best efforts to not cause any disruptions in the operations of the Restaurant in connection with such inspections. Notwithstanding the foregoing, such inspection rights shall not extend to any inspection of KSM corporate records at its corporate office or any records relating to any other projects or locations. Upon expiration or termination of this Agreement, KSM will promptly turn over all such Restaurant records to City; however, KSM may retain copies as required by applicable records retention policies or law.
- D. Bank Accounts. KSM shall assist City in establishing, in City's name, utilizing the federal tax identification number of City, a deposit account (the "Deposit Account") and an operating expense account (the "Operating Expense Account"). City agrees that individuals designated by KSM, and approved in writing by City, shall be signatories on the accounts, and that City will not change the signatories of such accounts or close such accounts without the prior written consent of KSM. Additionally, KSM shall establish a payroll account (the "Payroll Account") in KSM's name. The records and bank statements shall be subject to inspection by City pursuant to the terms recited herein. All Gross Revenues of the Restaurant shall be collected, received, and deposited by KSM exclusively through the

Deposit Account in accordance with the terms of this Agreement. All Operating Expenses shall be handled and expended exclusively through the Operating Expense Account. All Gross Payroll for the Restaurant shall be handled and expended exclusively through the Payroll Account.

- E. Employees. As part of the Operating Budget, KSM shall (i) determine personnel requirements, recruitment schedules, and compensation levels, (ii) furnish job descriptions, performance appraisal procedures, employee benefit programs, and operational and procedural manuals for all personnel, and (iii) establish forms and procedures for employee compensation and Restaurant incentive programs. KSM shall hire, promote, discharge, and supervise all employees performing services in and about the Restaurant. All of the employees of the Restaurant shall be employees of KSM.
- F. Marketing. KSM shall develop the ongoing marketing plan for the Restaurant and define a schedule of marketing and advertising activities, which shall be submitted to City as part of the Operating Budget. KSM shall indicate on the premises that the Restaurant is being operated by KSM.
- G. Contracts. KSM shall negotiate, consummate, enter into, and perform, in the name of City, such agreements as KSM may deem necessary or advisable for the furnishing of all food, beverages, utilities, concessions, entertainment, operating supplies, equipment, repairs and other materials and services as KSM determines are needed from time to time for the management and operation of the Restaurant. Notwithstanding the above, any contract that exceeds Twenty-Five Thousand Dollars (\$25,000) in total payments over the term of such contract or which has a term of over one (1) year shall require the prior written consent of City, which consent shall be deemed to have been given if City neither consents nor disapproves in writing within ten (10) business days after KSM's written request for approval.
- H. Legal Action. KSM may not institute any legal action by or on behalf of City or the Restaurant without the prior written consent of City and City may not institute



any legal action by or on behalf of KSM without the prior written consent of KSM.

- I. Emergency Expenditures. In the event, at any time during the Term, a condition should exist in, on, or about the Restaurant of an emergency nature which, in KSM's sole and absolute discretion, requires immediate action to preserve and protect the Restaurant, to better assure the Restaurant's continued operation, or to protect the Restaurant's customers, guests, or employees, KSM is authorized to take all steps and to make all reasonable expenditures necessary to repair and correct any such condition, whether or not provisions have been made in the applicable Budgets for any such expenditures. City shall be notified of the need for, and estimated amount of, any such emergency expenditures as soon as reasonably practical.
- J. Other Duties and Prerogatives. KSM shall use commercially reasonable efforts to perform any act that KSM determines is necessary to operate and manage the Restaurant during the Term, subject to the terms and conditions hereof. In fulfilling its operational and managerial responsibilities hereunder, KSM shall have all rights ordinarily accorded to a manager in the ordinary course of business, including, without limitation, the collection of proceeds from the operation of the Restaurant, the incurring of trade debts in City's name (other than mortgage indebtedness), the approval and payment of obligations, and the negotiating and signing of leases and contracts. KSM shall not be obligated to advance any of its own funds to or for the account of City nor to incur any liability, unless City shall have furnished KSM with funds necessary for the full discharge thereof. Further, KSM shall not be obligated to sign any leases, contracts or other agreements in KSM's name. However, if for any reason KSM shall have advanced funds in payment of any reasonable expense in connection with the maintenance and operation of the Restaurant, City shall reimburse KSM within ten (10) days after invoice for the full amount of such payments. City's failure to reimburse KSM as provided herein for any such payment shall be an Event of Default by City.

#### **IV. FEES, EXPENSES AND RECEIPTS**

##### **A. Management Fees.**

1. Fixed Management Fee. City shall pay KSM a monthly fixed management fee equal to \$5,802.21 or approximately 4.16% (or 1/24<sup>th</sup>) of the total value of the Capital Equipment and Improvements List attached and incorporated as Exhibit "B" (the "Fixed Management Fee") for the first two (2) years of this Agreement. This fee shall be paid at the end of each month during the Term of this Agreement as long as KSM is in compliance with the terms of this Agreement. In the event City exercises an early termination for convenience in accordance with Section VII.C. below, the remaining balance of the total unpaid value of the Capital Equipment and Improvements List shall become due and payable to KSM upon termination of Agreement. All Capital Equipment and Improvements listed in Exhibit "B" shall become the property of the City upon full payment of the Fixed Management Fee either at the end of the two (2) year period or upon early termination.

2. Incentive Management Fee. Commencing on January 1, 2021,) City shall pay KSM an annual incentive management fee (the "Incentive Management Fee") calculated as follows:

Fifty percent (50%) of the Net Revenues, if any, for each calendar year beginning on January 1 with "Net Revenues" defined as the total Gross Revenues for the calendar year period minus the total Operating Expenses for the calendar year, up to a maximum of \$100,000 for each calendar year.

For example: If the total combined Gross Revenues for the calendar year equal \$1,000,000, and the Operating Expenses for the calendar year equal \$800,000, then the Net Revenues would be

\$200,000. KSM would be entitled to 50% of the Net Revenues = \$100,000.

3. The Incentive Management Fee shall be paid to KSM within thirty (30) days after KSM delivers to City the year-end Financial Statement for the full calendar year or any portion thereof in the event this Agreement is terminated prior to the end of a full calendar year period.

- B. Out-of-Pocket Expenses. In addition to all other fees and expenses recited herein payable to KSM, and subject to City's approval of same in the Budgets, it is agreed that City shall reimburse KSM within fifteen (15) days of invoice for all actual out-of-pocket expenses incurred by KSM in the performance of this Agreement. Out-of-pocket expenses shall include, but shall not be limited to, reasonable travel, air express, courier service, costs of recruitment (including applicable agent's fees), and other incidental expenses. Reimbursement for such out-of-pocket expenses will be made at actual cost and may be made directly from the Operating Expense Account.
- C. City's Receipts. During the Term, in each calendar month City shall receive the Positive Net Cash Flow for such calendar month after payment of the Management Fee and any other fees or out-of-pocket expenses owed to KSM, which amount shall be distributed, to the extent requested by City, within fifteen (15) days following the close of each calendar month ("City's Receipts"); provided, however, that a minimum balance of at least the Operating Expense Minimum and the Payroll Expense Minimum is maintained in the Operating Expense Account and the Payroll Account at all times. KSM may deduct any amounts owed to KSM from Gross Revenues before remitting City's Receipts to City.

**V. DUTIES OF CITY.**

- A. City shall, in conjunction with KSM'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 KSM'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 KSM.
- 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. KSM 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. KSM 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 KSM.
- 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. KSM shall share the use of these facilities with customers and visitors of the Course.
- D. Expenditures. City acknowledges that it is solely responsible for all Operating Expenses and capital expenditures required for or on behalf of the Restaurant, provided that such Operating Expenses and capital expenditures are made in accordance with the terms of this Agreement. City shall be responsible for all other expenditures and obligations in connection with the Restaurant, including without limitation, all federal, state and local taxes and all principal and interest payments on indebtedness.
- E. City’s Advances. City shall advance funds to the Operating Expense Account and the Payroll Account described in Section 3.5.2 to conduct the affairs of the Restaurant (“City’s Advances”) as set forth below. Such City’s Advances shall be

paid in the form and manner as shown on Exhibit C, through Automated Clearing House (“ACH”), or by wire transfer or authorization to apply funds from the Deposit Account towards the payment of such City’s Advances. City acknowledges and agrees that it has sole responsibility for providing City’s Advances and KSM shall have no responsibility to provide funds for the payment of any Operating Expenses, Gross Payroll, debts or other amounts payable by or on behalf of the Restaurant, the Sunnyvale Golf Course or City.

- F. Operating Expense Account. On or before the Commencement Date (and in any event, prior to KSM’s incurrence of any Operating Expenses), City shall remit to KSM for deposit into the Operating Expense Account, City’s Advances equal to one month’s estimated Operating Expenses (as specified in the approved Budget) (“Operating Expense Minimum”). City shall replenish the Operating Expense Account in order to maintain the Operating Expense Minimum in the Operating Expense Account as described below. KSM shall use the funds in the Operating Expense Account to pay the Operating Expenses of the Restaurant. On a monthly basis, KSM shall provide City with a statement describing the anticipated source and use of funds for the Restaurant for the next monthly period. Within twenty (20) days after City’s receipt of such statement from KSM, City shall remit to the Operating Expense Account the amount set forth in such statement, less the amount, if any, then on deposit in the Deposit Account to the extent City authorizes the transfer of such amount to the Operating Expense Account. The Parties agree to adjust the Operating Expense Minimum seasonally, or as otherwise required from time to time, in order to reflect the then-current payment obligations of the Restaurant.
- G. Payroll Account. On or before the Commencement Date (and in any event, prior to KSM’s incurrence of any Gross Payroll obligations), City shall remit to KSM for deposit into the Payroll Account, City’s Advances equal to one month’s estimated Gross Payroll obligations (as specified in the approved budget) (“Payroll Expense Minimum”), whichever amount is greater. City shall replenish the Payroll Account in order to maintain the Payroll Expense Minimum in the

Payroll Account as described below. On a bi-weekly basis, KSM shall fund payroll and the Gross Payroll obligations from the Payroll Account and concurrently provide City with a statement containing such funded Gross Payroll obligations of the Restaurant. Within twenty (20) days after City's receipt of such statement from KSM, City shall remit to the Payroll Account the amount set forth in such statement, less the amount, if any, then on deposit in the Deposit Account to the extent City authorizes the transfer of such amount to the Payroll Account. The Parties agree to adjust the Payroll Expense Minimum seasonally, or as otherwise required from time to time, in order to reflect the then-current payroll obligations of the Restaurant.

**VI. INDEMNIFICATION, INSURANCE**

- A. KSM shall indemnify and hold harmless the City, its officers, employees and agents ("City Indemnified Parties"), from and against any and all third party 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 KSM, 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 KSM, its officers, employees and agents ("KSM 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 KSM.
- C. As an Operating Expense, KSM shall procure and maintain for the duration of the contract the following insurance, which shall include general liability insurance against claims for injuries to persons or damages to property which may arise

from or in connection with the KSM's activities or because of this Agreement subject to the following minimum scope and limits:

Minimum Scope and Limits of Insurance. As an Operating Expense, KSM shall maintain limits no less than:

1. **Commercial General Liability:** \$3,000,000 per occurrence and \$6,000,000 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.
4. **Employment Practices ("EPLI")** of not less than \$5,000,000 each occurrence,
5. **Crime Liability Insurance** covering all employees who have access to or responsibility for or who handle City funds of not less than \$3,000,000 each occurrence

#### Deductibles and Self-Insured Retentions

Any deductibles or self-insured retentions must be declared and approved by the City.

#### 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 KSM; products and completed operations of the KSM; premises owned, occupied or used by the KSM; or automobiles owned, leased, hired or borrowed by the KSM. 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 KSM's insurance shall be primary as to KSM's express obligations under the Indemnification provision of this Agreement. Any insurance or self-insurance maintained by the City of Sunnyvale, its officers, officials, employees, agents and volunteers shall be excess of the KSM'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 KSM'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

KSM 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. KSM 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 KSM becoming aware of such injury.

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

- A. Upon expiration of the term of this Agreement, or upon the sooner termination of such term from whatever cause, KSM:
1. May remove any and all furnishings, equipment, merchandise and supplies purchased by KSM that is not part of the Capital Equipment and Improvement list attached and incorporated as Exhibit "B" and noted in their annual inventory list provided in writing to the City; provided, however, that:

- a) KSM 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) KSM 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) KSM 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 Agreement obligations and supersedes any other creditor lien.
- 2. Shall peaceably and quietly leave, surrender and yield up to City the Restaurant.
  - 3. If KSM 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 KSM 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 Agreement:

- 1. If at any time KSM 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 KSM and KSM fails to correct such default within said fifteen (15) day period; provided, however, that:
  - a) KSM 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 Agreement and all rights and privileges herein licensed shall become void to all intents and purposes whatsoever; or,
  - 2. If KSM 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 KSM and KSM fails to correct such default within said five (5) day period.
- C. City may terminate this Agreement for convenience, in its sole discretion, by providing at least ninety days (90) days advance written notice to KSM of such decision. Termination shall be effective following expiration of the notice period and payment of the Management Fee (including the remaining balance if before the initial 2-year period in accordance with Section IV.A.1 above) or any applicable Incentive Management Fee in full for the period through and including the termination date.
- D. This Agreement 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 Agreement 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. KSM at any time during the term of this Agreement become insolvent, or if proceedings in bankruptcy shall be instituted by or against KSM, or if

KSM shall be adjudged bankrupt or insolvent by any court, or if a receiver or trustee in bankruptcy or a receiver of any property of KSM shall be appointed in any suit or proceeding brought by or against KSM, or if KSM shall make an assignment for the benefit of creditors, or if any action is taken against or suffered by KSM under any insolvency or bankruptcy act.

- E. In the event of termination of the Agreement, because of the default of KSM upon any of the grounds set forth above or in the event of the automatic termination of this Agreement, City reserves the right to remove any personal property belonging to KSM from the Restaurant and to store such personal property at the sole cost and expense of KSM, and City shall have a lien on such personal property for and until all and any storage charges are paid.
- F. KSM reserves the right to terminate this Agreement 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 Agreement may be terminated without cause prior to the end of the agreement term.
- G. IN NO EVENT SHALL EITHER KSM OR CITY BE LIABLE FOR ANY INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES ARISING OUT OF THIS AGREEMENT OR PERFORMANCE OR NON-PERFORMANCE HEREUNDER (INCLUDING BUT NOT LIMITED TO LOST PROFITS, LOST BUSINESS AND LOSS OF GOODWILL) EVEN IF ADVISED OR AWARE OF THE POSSIBILITY OF SUCH DAMAGES.

#### **VIII. PROHIBITIONS**

- A. KSM shall not do any of the following acts, except as herein otherwise provided:
  - 1. Assign or transfer this Agreement or any of the rights or privileges herein licensed, or any part thereof. The Agreement is personal to KSM and any attempt to transfer or assign this Agreement shall terminate it.

2. This Agreement cannot be assigned involuntarily or by operation or process of law.
3. Make any alterations, changes, or additions to the Restaurant occupied by KSM, 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 KSM and shall become the property of City upon termination of this Agreement, for whatever cause.
4. Let, sublet, sublicense or assign any or all portions of the Restaurant occupied by KSM.
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.
7. In accordance with Council Policy 5.1.6 “Wage Theft Prevention Policy”, attached and incorporated as Attachment “C”, the following requirements shall apply:

If at any time during the term of this Agreement, a court or investigatory government agency issues a final judgment, decision or order finding that Contractor or an subcontractor it employs to perform work under this Agreement has violated any applicable wage and hour law, or Contractor learns of such a judgment, decision, or order that was not previously disclosed, Contractor shall inform the City no more than fifteen (15) days after the judgment, decision or order becomes final or of learning of the final judgment, decision or order. Contractor and its subcontractors shall promptly satisfy and comply with any such judgment, decision, or order, and shall provide the City with documentary evidence of compliance with the final judgment, decision or order within five (5) days of satisfying the final

judgment, decision or order. The City reserves the right to require Contractor to enter into an agreement with the City regarding the manner in which any such final judgment, decision, or order will be satisfied.

## **IX. 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 KSM'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.

## **X. 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 KSM shall be deemed to be duly and properly given or made if mailed to KSM, postage prepaid, addressed to:

KSM Sunnyvale, LLC  
c/o Kemper Sports Management, Inc.  
500 Skokie Boulevard, Suite 444  
Northbrook, Illinois 60062  
Attention: Steven K. Skinner, Chief Executive Officer

Or, personally delivered to KSM at such address, or at such other address as KSM 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 KSM.

- 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.

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

- A. This Agreement 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 KSM, or any of its employees. KSM is, and at all times shall be, deemed to be an independent contractor.
- B. This Agreement 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 Agreement, have been made to KSM by anyone authorized by City to cause KSM 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 Agreement 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 KSM 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 Agreement or any duty, obligation, covenant or agreement contained herein, or to make any statements or representations concerning this Agreement, or the rights and privileges set forth herein, except such as are set forth in any written addendum to this Agreement which has been approved by the Council.
- G. This Agreement shall not become effective until receipt by the City of Sunnyvale of an original copy of this Agreement with properly signed endorsement accepting the Agreement subject to the conditions, duties, obligations, covenants or agreements contained herein. This Agreement may be executed in duplicate counterparts.
- H. KSM 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.
- I. The language of this Agreement shall be construed according to its fair meaning and not strictly for or against the City or KSM.
- J. This Agreement shall be enforced and interpreted under the laws of the State of California and the venue of any action brought under this Agreement shall be in Santa Clara County.
- K. The provisions of this Agreement shall contain the entire agreement between the parties hereto and said Agreement shall not be modified except by a written amendment fully executed by both parties.
- L. If any provision of this Agreement is determined to be void by any court of competent jurisdiction, then such determination shall not affect any other provision of the Agreement and all such other provisions shall remain in full force and effect.
- M. The parties expressly acknowledge and agree that the Concession License Agreement for Sunnyvale Golf Course dated as of June 1, 2016 by and between

City and KSM is hereby terminated by mutual agreement of the parties effective as of the Effective Date of this Agreement.

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:  
Title:

- Exhibit A: Map of Restaurant Areas
- Exhibit B: Capital Equipment and Improvements List
- Exhibit C: Sample of City Advance Funding Form

## EXHIBIT "A"

Upstairs portion of the building located at the below address  
Barrel19 Bistro & Bar

605 Macara Ave.  
Sunnyvale, CA 94085

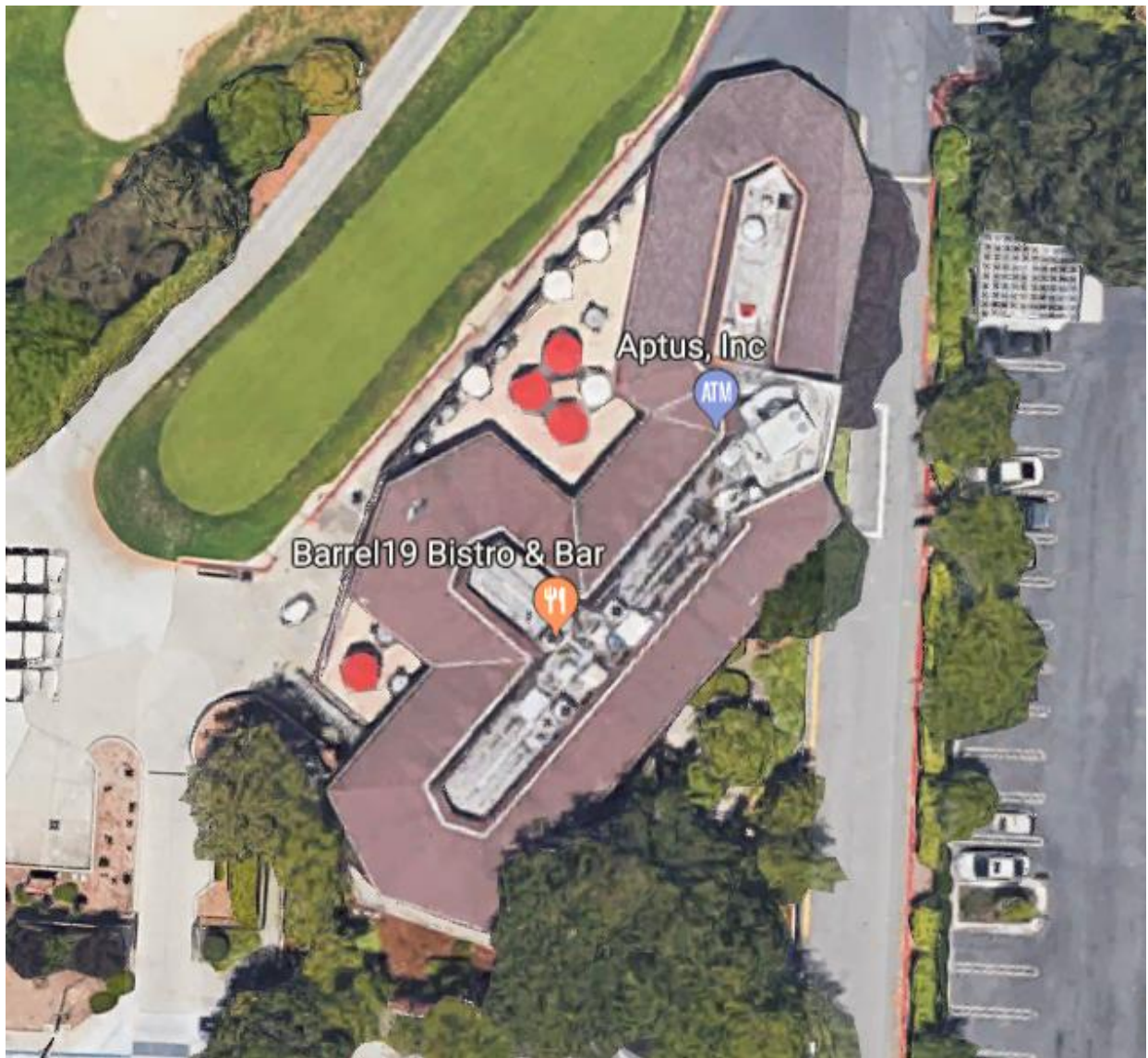






EXHIBIT B - Capital Equipment and Improvement List

Account Description	Date	Description	Quantity	Reference	Vendor	Total Cost
Buildings	07/14/16	New Carpet Throughout Building		Carpet	PKS Interiors	\$ 8,280.03
Capital Projects	07/27/16	Alarm System		Rewiring & Install	Bay Alarm Company	\$ 1,362.67
Capital Projects	07/27/16	Alarm System		Rewiring & Install	Bay Alarm Company	\$ 1,081.50
Capital Projects	07/27/16	Alarm System		Rewiring & Install	Bay Alarm Company	\$ 652.50
Start Up Expenses	07/27/16	Repair Bar Coolers		Repair & Maint	Ecolab Equipment Care	\$ 2,611.42
Start Up Expenses	07/27/16	Repair Kitchen Equipment		Repair & Maint	Ecolab Equipment Care	\$ 518.95
Start Up Expenses	07/27/16	Repair Kitchen Equipment		Repair & Maint	Ecolab Equipment Care	\$ 1,459.44
Buildings	08/03/16	Construction on Patio & Resurface		Construction	Custom Concrete Resurfacing Inc	\$ 1,000.00
Capital Projects	08/10/16	Televisions	5	Equipment	Fry's	\$ 2,214.08
Inventory-Supplies	08/16/16	China/Glass/Bar Stools		FF&E Supplies	R.W. Smith & Co - Sunnyvale	\$ 8,924.43
Buildings	08/17/16	Construction on Patio & Resurface		Building	Custom Concrete Resurfacing Inc	\$ 5,000.00
Buildings	08/22/16	Construction on Patio & Resurface		Building	Custom Concrete Resurfacing Inc	\$ 4,000.00
Buildings	08/24/16	Micros Wiring		Micros Wiring	We've Got it Wires Inc	\$ 2,402.45
Start Up Expenses	08/25/16	Sign for B-19 at Street		Building	Silicon Valley Signs	\$ 918.65
Start Up Expenses	08/25/16	Sign for B-19 at Street		Building	Silicon Valley Signs	\$ 516.96
Inventory-Supplies	08/31/16	China/Glass/Bar Stools		FF&E Supplies	R.W. Smith & Co - Sunnyvale	\$ 8,924.43
Computer Equipment	09/21/16	POS System		Equipment	Micros Leasing	\$ 6,065.45
Start Up Expenses	12/15/16	Espresso Machine	1	Equipment	Starbucks	\$ 5,689.00
Start Up Expenses	12/15/16	Espresso Machine	1	Equipment	Starbucks	\$ 10,811.93
Buildings	03/04/17	Dishwasher Drain Repair & Replace		Building	Plumbing Issuse	\$ 2,850.00
Buildings	03/04/17	Dishwasher Drain Repair & Replace		Building	Draing repair	\$ 350.00
Buildings	03/04/17	Dishwasher Drain Repair & Replace		Building	Draing repair	\$ 300.00
Start Up Expenses	04/14/17	Reach-In Freezer	1	Equipment	Meyers Restaurant Supply	\$ 4,880.54
Start Up Expenses	04/14/17	Banquet Charis	150	Equipment	Meyers Restaurant Supply	\$ 4,162.50
Start Up Expenses	04/14/17	Table Top Covers	6	Equipment	Meyers Restaurant Supply	\$ 294.84
Start Up Expenses	04/14/17	Folding Tables - 18" x 60"	14	Equipment	Meyers Restaurant Supply	\$ 1,011.64
Start Up Expenses	04/14/17	Banquet Table - Round 71"	15	Equipment	Meyers Restaurant Supply	\$ 2,775.75
Start Up Expenses	04/14/17	Banquet Table - Round 48"	1	Equipment	Meyers Restaurant Supply	\$ 80.76
Start Up Expenses	05/30/17	Deep Fryers - Meyers Restaurant	1	Equipment	Meyers Restaurant Supply	\$ 5,441.18
Start Up Expenses	07/28/17	Double Convection Ovens	1	Equipment	Meyers Restaurant Supply	\$ 8,126.30
Start Up Expenses	07/28/17	Sandwich Prep Table	1	Equipment	Meyers Restaurant Supply	\$ 2,087.45
Start Up Expenses	07/28/17	Movable Gas Connector	2	Equipment	Meyers Restaurant Supply	\$ 235.54
Buildings	07/14/16	Start of Construction for Barrel 19 Bistro & Bar @ 605 Macara Ave.		Construction	Jason Y LI	\$ 8,212.50
Buildings	07/20/16	20% after Demolition		Construction	Jason Y LI	\$ 6,570.00
Buildings	08/03/16	for electrical, plumbing and framing to begin		Construction	Jason Y LI	\$ 6,570.00
Buildings	08/03/16	Electrical Addition for coffee maker		Construction	Jason Y LI	\$ 1,650.00
Buildings	08/10/16	Health Dept. floor and wall repairs: Total cost \$4,000.00. Paid amount \$2,500.00. Balance after completion \$1,500.00		Construction	Jason Y LI	\$ 2,500.00
Buildings	08/10/16	Additional electricals for single faze POS Health Dept. floor and wall repairs: Total cost \$4,000.00. Paid amount \$2,500.00. <b>Balance after completion \$1,500.00</b>		Construction	Jason Y LI	\$ 650.00
Buildings	10/31/16	\$4,000.00. Paid amount \$2,500.00. <b>Balance after completion \$1,500.00</b>		Construction	Jason Y LI	\$ 1,500.00
Buildings	08/31/16	20% after rough inspection in complete		Construction	Jason Y LI	\$ 6,570.00
Grand total						\$ 139,252.89

# EXHIBIT C -Sample of City Advance Funding Form



August 7, 2018

City of Sunnyvale  
ATTN: Chip Taylor  
456 W. Olive Ave.  
Sunnyvale, CA 94086

## September 2018 Startup Funding Request

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### September 2018 Account Funding

Payroll Account	45,000
Operating Expense Account	17,000
Startup Inventory (Estimate)	<u>18,000</u>
	80,000

### Notes:

One Month of projected payroll  
One Month of projected expenses  
Estimate of August ending Inventory

**Total** 80,000

**Total Startup Funding Requested for September 2018** 80,000

Please Mail Funds to:

KemperSports Management Inc.  
ATTN: Dina Loomis  
500 Skokie Blvd., Suite 444  
Northbrook, IL 60062

Future requests will include ACH Instructions

Prepared by: Shawn Richter, Director of Accounting