

186315
30000151

AGREEMENT

CONCESSION SERVICES AT EASTMORELAND GOLF COURSE

1. NATURE OF THE AGREEMENT

This Concession Agreement is between Cumpston Bros., Inc. (Concessionaire), and the City of Portland, by and through Portland Parks and Recreation, a municipal corporation of the State of Oregon (City or PP&R). Subject to the terms and conditions of this Agreement, Concessionaire has the right, license and privilege to operate concession services at the City's Eastmoreland Golf Course (Golf Course or Premises).

2. SCOPE OF CONCESSIONAIRE SERVICES

The Concessionaire shall provide services specifically to the Bureau of Parks and Recreation. The Concessionaire shall provide the City the following general and specific services:

A. General Services

The Concessionaire shall operate and use the clubhouse facility for the purposes of collecting greens fees on behalf of the City and providing starter services, golf shop merchandising, food and beverage services, cart rentals, golf instruction, club repair, and other services and operations common to golf facilities, except as otherwise agreed between the parties in writing.

B. Specific Services

In providing the general services described above, Concessionaire shall provide not less than the following specific services:

- (1) Golf Shop Operation -- Concessionaire shall operate a complete and first-class golf shop. It shall, at all times, maintain golf merchandise, supplies, and equipment in keeping with the demand, provided that no individual line or make of golf merchandise, supplies or equipment shall be handled exclusively to the detriment of other lines or makes. Concessionaire at its own expense shall install such merchandising fixtures and equipment, office furniture and equipment, and golf club equipment, as may be appropriate and necessary. The cash register for greens fees must dispense a dated ticket to be given to each customer for verification while on the golf course. Concessionaire shall purchase, install, and use the point-of-sale system specified by the City. The City shall reimburse Concessionaire for said purchase. The City shall have the right to access the point-of-sale system remotely or on-site at any time to run reports and verify data.

- (2) Driving Range Operation -- Concessionaire shall operate the driving range at the golf course. It shall provide an adequate supply of good golf balls to efficiently operate the driving range. The driving range shall remain open during daylight hours and until at least 10:00 pm from March 1 through October 31 and until at least 8:00 pm from November 1 through February 28 or as otherwise directed by the Golf Manager. Concessionaire shall keep the practice range equipment in good repair. No later than June 30, 2009, Concessionaire shall purchase and install new driving range targets, of a type agreed to by both parties. The Concessionaire shall consider installing a ball machine to dispense range balls.
- (3) Restaurant Operation -- Concessionaire shall operate a "Class A" restaurant, and shall, at its own expense, provide all dishes, glasses, flatware, utensils, and other items needed to operate the restaurant. Any City equipment used by the Concessionaire shall be maintained, repaired, or replaced by Concessionaire. All equipment shall be maintained in good, aesthetically pleasing condition.
- (4) Utilities and Janitorial Services -- Concessionaire agrees to pay for all electric power used in connection with (a) operation and storage of the motorized golf carts, (b) operation of the clubhouse, including the golf shop and restaurant, and (c) operation of the driving range. City shall pay for water. Concessionaire shall pay for all telephone service and garbage. Concessionaire shall provide janitorial supplies and services. Concessionaire shall keep the premises in a clean, safe and sanitary condition at all times, and the premises shall be open to inspection by authorized representatives of City upon demand.
- (5) Starting & Marshalling -- Concessionaire shall provide starters and marshals as needed to facilitate a good golf operation. Concessionaire shall be responsible for all starting of golf play and for control of both the first and tenth tees at all times. Concessionaire shall patrol the course during busy times to maintain speedy play and to detect players without properly dated tickets. The City reserves the right to take over starting and marshalling services at any time.
- (6) Protection of City Interest -- Concessionaire shall in all circumstances protect the interests of the City and the public. No person shall be afforded free use of the golf course or facilities unless approved by the City.
- (7) Golf Course Superintendent -- Concessionaire shall consult with City's Golf Course Superintendent to determine when the golf course may be in a condition rendering it unsatisfactory for golf play. The City's Golf Course Superintendent may direct that the golf course be closed. Concessionaire shall refuse rental of motorized golf carts if, in the opinion of the City's

Golf Course Superintendent, the carts might cause damage to the golf course itself.

- (8) Full-time Management and Staff -- Concessionaire shall devote full time, skill, labor and attention to duties in the operation of this golf course, the clubhouse and concessions, and shall be responsible for all management activities. Concessionaire shall be present on the premises for, at a minimum, forty (40) hours each week, as would apply to normal business practices, notwithstanding reasonable time for vacations and sick leave, etc. The full-time, on-site clubhouse manager will maintain at least 20% ownership interest in the concession business.

(9) Policies

- (a) Concessionaire shall establish and promulgate rules and regulations as approved by the Director of Parks relating to the use of the golf course and to the conduct of the players and other persons while on the premises.
- (b) Concessionaire will perform its operation in full accordance with the provisions of the "Operations Manual for the Portland Municipal Golf Courses," including those sections relating to restaurant and golf pro shop operations and standards, updated at the discretion of the City.
- (c) Concessionaire shall maintain all concession facilities in a neat, clean, safe, and orderly condition. Concessionaire shall be responsible for janitorial and general maintenance of the clubhouse interior, including maintenance of the clubhouse doors and windows, planting areas adjacent to the clubhouse, and daily parking litter removal unless otherwise deemed to be the City's responsibility in this Agreement, Section 3: Scope of City Services and Rights. The City will reimburse the Concessionaire for repairs to the doors and windows if the reason for the repair is from normal wear and tear. The Concessionaire must obtain written approval from the City prior to making any repairs. The City will be responsible for any repairs on the interior of the building as a result of vandalism that occurs during non-business hours when the Concessionaire, its employees or visitors are not present. The City will also be responsible for repairs as a result of vandalism on the exterior of the building, while the Concessionaire will be responsible for any repairs on the exterior of the building as a result of misuse by the Concessionaire or its employees. The City will not reimburse the Concessionaire for any repairs required in the interior of the building as a result of vandalism or misuse that occur during business hours.
- (d) Concessionaire shall ensure, for the benefit of the City and the public, that all persons using the clubhouse, grounds, and golf course shall

conduct themselves in an orderly manner. Concessionaire shall have the right under authority provided by the City to cause unruly persons, those under the influence of intoxicants, or uncooperative individuals causing undue delay on the golf course to be expelled from the golf course premises.

- (e) Concessionaire shall not foster nor permit any illegal activity on the concession premises or on the golf course. No illegal activity nor any activity which may reflect to the discredit of the City will be tolerated, and any such activity shall be considered by both parties to be grounds for the City's termination of this Agreement.
 - (f) Concessionaire shall answer and handle all complaints and shall supervise a public relations program. In dealing with the public, Concessionaire shall always act as the City's representative, and will not speak toward City policies or decisions in a derogatory manner.
 - (g) Concessionaire shall promptly pay all bills, wages and other expenses incurred in connection with the services or facilities covered by this Agreement.
 - (h) Concessionaire shall actively assist the City in achieving its affirmative actions goals as specified in the City's current Affirmative Action Plan and Portland Parks and Recreation's most recent Affirmative Action Compliance Plan.
 - (i) Concessionaire shall timely report to the City any damage or injury incidents on a Parks' incident report form. Concessionaire shall cooperate fully with the City in the investigation of any damage to persons or property occurring on or about the Golf Course.
- (10) Hours -- Concessionaire shall provide service to meet seasonal public demand, and shall keep the golf clubhouse open each day that the golf course is open for play, and at other reasonable hours as prescribed by the Director of Parks. The golf course shall remain open for play unless an emergency, a natural disaster, or an act of war requires it to be closed. In the event that the City determines that regular maintenance requires that all or a portion of the course should be closed to play, it shall coordinate such closing with the Concessionaire prior to actual closing. Concessionaire shall give verbal notice and shall post notification of closing in a conspicuous place, in order to maintain proper public relations with the golfers.

- (11) Concessionaire Fiscal Responsibilities

- (a) Concessionaire shall collect all greens fees and motorized golf cart fees on behalf of the City in accordance with the schedule of fees established by the City. Concessionaire will accept bank payment cards in transacting for greens fees or other golf course services, and shall be responsible for payment of all associated bank payment card processing fees. Date of receipt for tournament income will be considered to be the last day of the tournament.
- (b) Concessionaire shall deposit all such greens fees and cart fees daily into a City bank account. Concessionaire shall submit daily to the City a scanned copy of the bank-validated deposit slip and daily golf report via email, plus two physical bank-validated copies of the deposit slip, all cash register tapes and the daily golf report via mail or courier.
- (c) Concessionaire shall develop, install, and maintain reasonably appropriate accounting, operating, and administrative controls governing the financial aspects of its operations, such controls to be consistent (in all material respects) with generally accepted accounting principles.
- (d) Concessionaire shall maintain a set of all financial, vendor, employee and operating records relating to the course on site at the course. At any time during the term of this agreement, City shall have the right to inspect the books, records, invoices, deposits, canceled checks, or other financial data or transactions of the Course at reasonable times and during normal business hours.
- (e) The City or its authorized representative shall have the authority to inspect, audit, and copy on reasonable notice and from time to time any records of the Concessionaire regarding its billings, payments or work under this agreement. The Concessionaire shall retain these records for inspection, audit, and copying for at least three (3) years from the date of completion or termination of this agreement.
- (f) Concessionaire shall purchase, install, and use the point-of-sale system specified by the City. The City shall reimburse Concessionaire for said purchase. The City shall have the right to access the point-of-sale system remotely or on-site at any time to run reports and verify data.
- (g) Concessionaire shall be responsible for any loss or theft of City funds while the same are in its possession or control. Concessionaire shall provide City with a fidelity bond in the amount of \$50,000 and a performance bond in the amount of \$50,000, in a form approved by the City Attorney.

- (12) Special Tournaments -- Concessionaire must make the golf course available and assist in the staging of special events deemed by the City to be in the City's best interests in promotion of the golf program.
- (13) Annual Marketing Plan -- Concessionaire shall provide an annual marketing plan to City for review, with a due date to be determined by the City.
- (14) Electric Golf Carts -- Concessionaire shall obtain forty-four (44) new electric golf carts no later than June 30, 2009 for use at the Course. The Concessionaire will also have an additional 16 operable golf carts for use at the Course for a total fleet of 60 carts available for rental. After June 30, 2009 Concessionaire shall not rent golf carts more than five (5) years old unless otherwise approved in writing by the City. No later than June 30, 2012 the Concessionaire shall obtain an additional number of new electric golf carts for use at the Course, for a total fleet of 60 operable electric golf carts. After June 30, 2012 gas powered golf carts will not be used at the facility unless agreed to in writing by the City.
- (15) The Concessionaire will adhere to the fountain and bottle/can agreement with The Pepsi Bottling Group in effect through December 31, 2011. The Concessionaire will adhere to any future bottle/can agreement as required by the City.

3. SCOPE OF CITY SERVICES AND RIGHTS

A. To assist Concessionaire in carrying out its obligations under this Agreement, the City shall provide the following services:

- (1) Upkeep and maintenance of the golf course, driving range turf and fencing surrounding the range.
- (2) Structural and mechanical maintenance of the clubhouse, including heating and cooling units, hood system, alarm system, fire suppression system, and sprinkler system. The Concessionaire will be responsible for repairing any of the items above as a result of misuse by the Concessionaire, its staff or visitors.
- (3) Periodic inspection of the Premises and City owned fixtures and equipment.
- (4) Annual spring plantings adjacent to clubhouse.
- (5) Periodic sweeping of the parking lot.

B. The City shall reserve the following rights:

- (1) Prior to the Concessionaire entering into a purchase or lease agreement for golf carts, the City shall have the right to approve the agreements.
- (2) The City reserves the right to require the Concessionaire to adhere to the fountain and bottle/can agreement with The Pepsi Bottling Group through December 31, 2011, and any future fountain and bottle/can agreement.

4. COMPENSATION

A. Compensation to Concessionaire

As compensation for services to be rendered hereunder, the City shall pay the concessionaire 11% of the monthly greens fees. This payment shall be considered full compensation for work performed, for services rendered, and for all labor, materials, supplies, equipment, and incidentals necessary to perform the work and services.

B. Compensation to City

In consideration for the rights granted by the City to Concessionaire, Concessionaire shall pay to the City the following amounts:

- (1) Two and one half percent (2.5%) of the gross revenues from all sales, rentals and golf club repair work in the golf shop.
- (2) Four percent (4%) of the gross revenues from all food and non-alcoholic beverage sales (including vending machines).
- (3) Six percent (6%) of the gross revenues from beer and wine sales.
- (4) Ten percent (10%) of the gross revenues from liquor sales and room rental fees.
- (5) Fifty percent (50%) of the gross revenues from all driving range sales up to a threshold (specified below), after which the City shall receive twenty-five percent (25%) of the gross revenues above the threshold. The threshold shall increase three and one half percent (3.5%) annually as outlined in the schedule below:

FY 2008-09	\$340,000
FY 2009-10	\$351,900
FY 2010-11	\$364,217
FY 2011-12	\$376,964
FY 2012-13	\$390,158

After the end of FY 2012-13 the City's revenue percentage for all driving range sales shall return to fifty percent (50%). At the City's sole discretion, the City may amend this agreement to include a new driving range revenue incentive structure for the second term of this agreement.

- (6) Fifteen percent (15%) of the gross revenues from all lottery proceeds the Lottery Commission pays the Concessionaire in commissions.
- (7) Ten percent (10%) of the gross revenues from all other sources except golf instruction charges and allowances on trade-ins.

5. BILLING AND PAYMENT PROCEDURE

The City and Concessionaire shall pay each other the amounts due under Section 4, COMPENSATION, monthly. At the end of each month, the City will total the daily cash reports provided by Concessionaire under Section 2(B)(11), Concessionaire Fiscal Responsibilities, for that month, and will pay to the Concessionaire the amount due within ten (10) working days after receipt of the final daily golf report and supporting documents. At the end of each month, Concessionaire will total the gross receipts from the golf shop, restaurant and all other sources for that month, and will pay to the City the amount due within ten (10) working days after the end of the month. Concessionaire shall pay fifty percent (50%) of monthly driving range sales each month. If annual driving range sales exceed the threshold specified in Section 4(B), any additional amounts owed to Concessionaire shall be paid within ten (10) working days after the end of the fiscal year.

6. ALTERATIONS AND IMPROVEMENTS

- A. Concessionaire shall not make or allow to be made any alterations, additions or improvements to or of the premises or any part thereof or its contents without first obtaining the written consent of PPR. Any authorized alterations, additions or improvements to the premises by Concessionaire shall be made by Concessionaire at Concessionaire's own expense. Upon expiration or termination of this agreement and at Concessionaire's own expense, Concessionaire shall remove all alterations, additions or improvements made by Concessionaire and designated by PPR to be removed, and shall repair any damages caused by the removal.
- B. All work performed to the premises shall be done in strict compliance with all applicable building, fire, sanitary and safety codes, and other applicable laws, statutes, permitting regulations, and ordinances. Prior to the commencement of any work, Concessionaire shall submit to PP&R and obtain PP&R's written consent to all of the following: Concessionaire's plans, specifications and work drawings detailing the alteration, construction or changes to the premises proposed by Concessionaire; Concessionaire's estimated costs; and, the names of Concessionaire's general contractors and major subcontractors, along with copies of contractors/subcontractors' certificates of insurance and bonding. As required

by law, Concessionaire shall apply for permits and submit permit plans to the City of Portland's Bureau of Development Services or other appropriate City bureaus, or government agency with permitting responsibility, within ten (10) days of obtaining PP&R's written consent to Concessionaire's plans and specifications.

All Concessionaire improvement plans for construction, alteration or changes to the premises shall be signed and sealed by an architect or engineer licensed by the State of Oregon, as required by BDS or other appropriate City bureaus.

Concessionaire shall provide PP&R with proof of valid permits prior to commencement of any work and proof of inspection approval after work completion. The City of Portland's Bureau of Development Services or other appropriate City bureaus shall be considered separate regulating or permitting bodies. The Concessionaire shall be responsible for the cost of improvements including any and all permitting fees assessed.

- C. PP&R's written consent and approval of proposed or constructed Concessionaire improvement shall create no responsibility or liability on the part of PP&R for design completeness, sufficiency, or compliance with all laws, rules and regulations of governmental agencies or authorities, and shall not be construed as PP&R's warranty or approval of the adequacy, competence, experience, bonding or licensure of any contractors/subcontractors or the quality of the work that may be performed by these persons. Concessionaire remains liable to PP&R for non-compliance and defects in any work performed by Concessionaire's contractors/subcontractors.

- D. All work shall be completed in a good workmanlike manner. PP&R's employees or agents shall have the right at all reasonable times to inspect the quality and progress of the work. Concessionaire shall provide PP&R all construction drawings (inclusive of architectural, structural, mechanical, and electrical drawings), at completion of Concessionaire's construction.

- E. Concessionaire shall maintain a capital improvements ledger for all capital improvements with ledger items to be substantiated with sufficient backup documentation, including canceled checks and credit card statements. Concessionaire agrees to invest a minimum of \$70,000 to complete the following improvements no later than June 30, 2009:

- (1) Electric retrofit of cart storage to accommodate forty-four (44) electric golf carts inside, as well as outlets for sixteen (16) golf carts outside.
- (2) Installation of a wall between the service and bar areas.
- (3) Installation of permanent walls surrounding the video poker area.
- (4) Refinish of bar top and pro shop counter.
- (5) Painting of walls in bar, banquet, and lottery areas.

(6) Purchase of new dining room chairs for bar and restaurant.

(7) Purchase of new flat screen televisions for bar.

(8) Installation of new carpet in lobby and bar areas.

(9) Repair and painting of slat wall in pro shop.

(10) Painting of driving range walls

(11) Installation of new paved area to south of clubhouse.

F. If this Agreement is renewed, the Concessionaire agrees to invest a minimum of \$50,000 to complete the following improvements no later than June 30, 2014:

(1) Refinish of bar top and pro shop counter.

(2) Painting of walls in bar, banquet, and lottery areas.

(3) Purchase of new dining room chairs for bar and restaurant.

(4) Other improvements as agreed to by both parties.

G. Concessionaire agrees to complete other improvements as necessary to operate the Clubhouse in the manner defined in this agreement.

7. EFFECTIVE AND TERMINATION DATES

This Agreement shall be effective as of January 1, 2009 and shall terminate as of December 31, 2013. At the sole discretion of the City and at the request of the Concessionaire, the contract may be renewed for one additional term not to exceed the original five year term of the Agreement (City Code 5.32.070).

8. TERMINATION OF AGREEMENT

A. The City and Concessionaire, by mutual written agreement, may terminate this Agreement at any time.

B. The City, on ninety (90) days written notice to the Concessionaire, may terminate this Agreement in its sole discretion if it determines in good faith that such termination is necessary in the public interest. Termination under this subsection shall in that event be the City's only remedy under this Agreement, except as provided in subsection 9(A), PAYMENT ON TERMINATION.

C. Either the City or the Concessionaire may terminate this Agreement in the event of a breach of the Agreement by the other. An event of breach shall occur if a party fails to perform a material obligation of this Agreement, or if the Concessionaire is bankrupt or insolvent or if a receiver or trustee is appointed to take charge of any of the assets of Concessionaire. Prior to such termination for breach, however, the party seeking the termination shall give to the other party written notice of the breach and of the party's intent to terminate. If the party has not entirely cured the breach within fifteen (15) days of the notice, then the party giving the notice may terminate the Agreement at any time thereafter by giving a written notice of termination.

D. Responsibilities upon termination

- (1) The Concessionaire must vacate the Golf Course premises upon the date specified in the written notice of termination required under Section 8(B) or 8(C), whichever applies.
- (2) In order to accommodate a smooth transition in changing of concessionaires resulting in a minimal impact on service to the public, the succeeding concessionaire will be required to purchase Concessionaire's inventory as follows:
 - (a) Golf pro shop merchandise between one and twelve months old at 100% of invoice prices.
 - (b) Merchandise between one and two years old at 25% off of invoice prices.
 - (c) Merchandise more than two years old, damaged or shopworn merchandise will not be required to be purchased by a succeeding concessionaire.
 - (d) The credit ledger kept for amateur tournament winnings will be subtracted from the purchase price of existing inventory.
 - (e) Saleable food and beverage items which are inventory of the restaurant operation will be purchased by succeeding concessionaire at invoice prices.
- (3) Payment for Concessionaire's inventory shall be made within thirty (30) days of the day Concessionaire leaves the premises.
- (4) Concessionaire shall relinquish all claims to any equipment, furnishings, and fixtures owned by the City, attached to the building, and/or contained in Exhibit B. Concessionaire shall maintain said equipment, furnishings, and fixtures in good working order and if replacement is necessary of any City

owned items during the term of this agreement the Concessionaire will have the right to replace such items and retain ownership at the termination date, unless otherwise agreed upon by both parties.

- (5) Any equipment, furnishings, and fixtures purchased and installed by the Concessionaire during the term of this agreement, not attached to the building and not included in the list in Exhibit B, shall be the property of the Concessionaire. Concessionaire shall have the right to sell said property as it sees fit, unless a depreciation schedule has been agreed to in writing by the City.
- (6) If this Agreement is terminated under Section 8(A) or 8(B) or by the Concessionaire under Section 8(C) before the end of any five-year term, City shall reimburse Concessionaire for investments made in the current term and listed in Exhibit C of this agreement based on a straight line monthly depreciation schedule beginning on the day the improvements are completed and ending on December 31 of the final year of the current term. If this Agreement is terminated by the City under Section 8(C), Concessionaire shall not receive reimbursement for improvements made.
- (7) The City shall assume any outstanding cart agreements as specified below:
 - (a) Upon request by the Concessionaire, the City shall assume any outstanding cart lease agreements in effect as of the termination date, provided the Concessionaire relinquishes without payment all ownership or possession rights to such golf carts.
 - (b) Upon request by the Concessionaire, the City shall assume any outstanding cart purchase agreements in effect as of the termination date, provided the Concessionaire relinquishes without payment all ownership rights to such golf carts.
- (8) Concessionaire shall deliver all keys to the City and shall surrender the premises to the City in its condition as of the effective date of this agreement, subject to reasonable wear and tear. All repairs for which Concessionaire is responsible shall be completed prior to such surrender. All Concessionaire property shall be removed immediately upon termination, and a failure to do so shall be considered abandonment of such property. Should Concessionaire fail to effect the removals or make repairs, City may do so and charge the cost to Concessionaire. Concessionaire shall be responsible for all costs and damages to City as a result of Concessionaire's failure to surrender the premises in accordance with the agreement, and this clause shall survive the termination of the agreement.

9. PAYMENT ON TERMINATION

- A. In the event of termination under Section 8(A) or 8(B) TERMINATION OF AGREEMENT, hereof, the parties shall pay each other in accordance with the provisions of Section 4, COMPENSATION, for work performed prior to the termination date.
- B. In the event of termination under Section 8(A) or 8(B) or by the Concessionaire under Section 8(C) TERMINATION OF AGREEMENT, hereof, the City shall pay the Concessionaire for improvements in accordance with Section 8(D)(6).
- C. In the event of termination under Section 8(C), TERMINATION OF AGREEMENT, hereof, due to a breach by either party, then the parties shall pay each other as provided in Section 10, REMEDIES, below.

10. REMEDIES

- A. In the event of termination under Section 8(C), TERMINATION OF AGREEMENT, hereof, by the City due to a breach by the Concessionaire, then the City may complete the work either itself or by agreement with another concessionaire, or by a combination thereof.
- B. The remedies provided to the City under Sections 8, TERMINATION OF AGREEMENT, and 10, REMEDIES, hereof, for a breach by the Concessionaire shall not be exclusive. The City also shall be entitled to any other equitable and legal remedies that are available.
- C. In the event of breach of this Agreement by the City, then the Concessionaire's remedy shall be limited to termination of the Agreement and receipt of payment as provided in Sections 8(C), TERMINATION OF AGREEMENT, and 9(B), PAYMENT ON TERMINATION, hereof.

11. CITY'S RESERVED RIGHTS

All rights not specifically granted to Concessionaire hereunder are reserved to City, with said rights not to be exercised by City in a manner, which unreasonably interferes with Concessionaire's ability to comply with the terms and conditions of this agreement.

12. CITY CONTRACT MANAGER

- A. The City Contract Manager shall be John Zoller or such other person as shall be designated in writing by the Director of Parks.
- B. The Contract Manager is authorized to approve work and billings hereunder, to give notices referred to herein, to terminate this Agreement as provided herein, and to carry out any other City actions referred to herein.

13. COMPLIANCE WITH LAWS

- A. In connection with its activities under this Agreement, the Concessionaire shall comply with all applicable federal, state, and local laws and regulations.
- B. In the event the Concessionaire provides goods or services to the City in the aggregate in excess of \$2,500 per fiscal year, Concessionaire agrees he has certified with the City's Equal Employment Opportunity certification process.

14. OREGON LAW AND FORUM

- A. This Agreement shall be construed according to the law of the State of Oregon, excluding its choice of law principles.
- B. Any litigation between the City and the Concessionaire arising under this Agreement or out of work performed under this Agreement shall occur, if in the state courts, in the Multnomah County Court having jurisdiction thereof, and if in the federal courts, in the United States District Court for the District of Oregon.

15. AUDIT OF PAYMENTS

- A. The City, either directly or through a designated representative, may audit the records of the Concessionaire at any time during the term of the agreement and up to three (3) years after the termination date.
- B. In the event that said audit identifies material deficiencies in Concessionaire record keeping practices, said practices will be corrected as recommended by the audit.
- C. If an audit discloses that payments to the Concessionaire under Section 4, COMPENSATION, and Section 5, BILLING AND PAYMENT PROCEDURE, were in excess of the amount to which the Concessionaire was entitled, or that the payments to the City were less than the amount to which the City was entitled, then Concessionaire shall repay the amount of the excess or deficiency to the City.
- D. If an audit discloses that payments to the City under Section 4, COMPENSATION, and Section 5, BILLING AND PAYMENT PROCEDURE, were in excess of the amount to which the City was entitled, or that payments to the Concessionaire were less than the amount to which the Concessionaire was entitled, then the City shall repay the amount of the excess or deficiency to the Concessionaire.

16. INDEMNIFICATION

- A. Concessionaire shall indemnify, protect and defend the City, its directors, officers, employees and agents, against, and hold the City, its directors, officers, employees and agents, harmless from any and all liabilities, obligations, losses, damages, fines, penalties, claims, demands, suits, actions, causes of action, charges, judgments, costs and expenses (including all reasonable attorneys' fees and court costs) (collectively, "Losses") of any nature whatsoever that may be imposed upon, incurred or paid by, or asserted against the City, its directors, officers, employees and agents or any interest therein to the extent that such Losses are the result of, arise from, or are in connection with any of the following:
- (1) Any injury to or death of any person or any damage to property occurring from any use of or cause in, on or about the Premises to the extent arising from the acts or omissions of Concessionaire or its agents, representatives, employees, contractors, subcontractors, successors, assigns or invitees;
 - (2) The use, non-use, condition, possession, occupation, operation, repair, maintenance or management of the portion of the Premises occupied and maintained by Concessionaire or any part thereof, or of the Concessionaire improvements or any component thereof to the extent arising from the acts or omissions of Concessionaire or its agents, representatives, employees, contractors, subcontractors, successors, assigns or invitees;
 - (3) Any construction, reconstruction, repairs, changes or alterations on or to, or any work done in, on or about, the Premises or any part thereof by or at the direction of Concessionaire.;
 - (4) Any negligent or tortious act on the part of Concessionaire or any of its agents, representatives, employees, contractors, subcontractors, successors, assigns or invitees;
 - (5) The release of any Hazardous Substance on the Premises or the migration of any Hazardous Substances to other properties or released into the environment, caused by or resulting from the negligence or willful misconduct of Concessionaire or its agents, representatives, employees, contractors, subcontractors, successors, assigns or invitees.
 - (6) Failure of Concessionaire to comply with any contract or agreement, including this Agreement, to which Concessionaire is a party or any law, regulation, rule, ordinance, statute or decision, in each case affecting the Premises, or Concessionaire's use thereof, or Concessionaire's occupancy, use, possession, operation, repair, maintenance or management of or any portion of the Premises pursuant hereto.
- B. Exclusion. There is hereby expressly excluded from the scope of the foregoing indemnity any matter to the extent that such matter results from the negligence or willful misconduct of City or its directors, employees, agents, contractors or

licensees.

- C. Contractors and Other Authorized Users. Concessionaire will include City-approved indemnification language in its contracts and other written authorizations with third parties indemnifying the City from any and all claims related to the contract work or authorized uses.
- D. Defense of Claims. If any action or proceeding is brought against the City, its directors, officers, employees or agents, which action or proceeding is based upon a claim for which Concessionaire is obligated to indemnify the City hereunder, Concessionaire shall, upon notice from the City, defend such action or proceeding through counsel reasonably acceptable to City.

17. INSURANCE

During the term of this agreement, the Concessionaire shall maintain insurance that satisfies the City's standard insurance requirements, as they may change, for permit and license holders. A copy of City's current requirements is attached as **Exhibit A**.

18. FIRE INSURANCE

- A. All property insurance, including coverage for fire damage, maintained by the City upon the golf clubhouse shall be for the sole benefit of the City in the event the Clubhouse should be destroyed by fire, the elements, or any other cause, or if it shall be so damaged that it cannot be repaired with reasonable diligence within ten (10) months, then the right, license and privilege conveyed by Section 1, NATURE OF THE AGREEMENT, shall, at the City's option, cease and become null and void from the date of such damage or destruction. In such event, Concessionaire shall immediately surrender the premises to the City, and shall have no claim against the City, for loss of profits or otherwise.
- B. Neither Concessionaire nor the City shall be liable to the other for loss arising out of damage to or destruction of the club house or any other portion of the premises to which Concessionaire has been given access, or to the contents thereof, when such loss is caused by any of the perils which are or could be included in or insured against by a standard form of fire insurance with extended coverage, including sprinkler leakage insurance, if any. All such claims for any and all loss, however caused, are hereby waived. Such absence of liability shall exist whether or not the damage or destruction is caused by the negligence either of the Concessionaire or of the City, or by any of their respective agents or employees. It is the intention and agreement of the parties that the payment provisions established in this Agreement have been fixed in contemplation that each party shall fully provide its own insurance protection at its own expense to cover the risk of loss described in this Section, and that each party shall look to its respective insurance carrier for reimbursement of any such loss, and, further, that the insurance carriers shall not be entitled to subrogation under any circumstances.

against any party to this Agreement. Neither Concessionaire nor City shall have any interest or claim in the other's insurance policy or policies, nor in the proceeds thereof, unless specifically covered in the policy. If, however, a party's insurance policy, obtained to cover risk of loss described in this Section, is subject to a deductible applicable to each and every loss, then each party reserves the right to hold the other responsible for any loss for which that party otherwise would be legally responsible, up to the amount of the deductible, which in no event shall exceed the amount of \$100,000.

19. SUBCONTRACTING

The Concessionaire shall not subcontract its work under this Agreement, in whole or in part, without the written approval of the City. The Concessionaire shall require any approved subcontractor to agree, as to the portion subcontracted, to fulfill all obligations of the Concessionaire as specified in this Agreement. Notwithstanding City approval of a subcontractor, the Concessionaire shall remain obligated for full performance hereunder, and the City shall incur no obligation other than its obligations to the Concessionaire hereunder. Concessionaire agrees that if subcontractors are employed in the performance of this Agreement, Concessionaire will require subcontractors to indemnify the City to the City's satisfaction and to provide insurance in accordance with Exhibit A of this Agreement. If a subcontractor is used, the "gross revenue" amounts used to calculate the City's compensation per Section 4(b) will be the gross revenue received by the subcontractor, not what the subcontractor pays to the Concessionaire.

20. ASSIGNMENT

The Concessionaire shall not assign this Agreement, in whole or in part, or any right or obligation hereunder, without the prior written approval of the City.

21. INDEPENDENT CONTRACTOR STATUS

- A. The Concessionaire is engaged as an independent contractor and will be responsible for any federal, state, and local taxes and fees applicable to payments hereunder.
- B. The Concessionaire, its subcontractors, and their employees, are not employees of the City and are not eligible for any benefits through the City, including without limitation federal social security, health benefits, workers' compensation, unemployment compensation, and retirement benefits.

22. FORCE MAJEURE

Neither the City nor the Concessionaire shall have breached this Agreement by reason of any failure to perform a substantial obligation under the Agreement if the failure arises out of causes beyond its control and without its fault or negligence. Such

causes may include, without limitation, acts of God or the public enemy, acts of the federal, state, or local governments, fires, floods, epidemics, volcanic eruptions, quarantine restrictions, strikes, freight embargoes, and unusually severe weather. Should either the City or the Concessionaire fail to perform because of a cause described in this subsection, the City and the Concessionaire shall make a mutually acceptable revision in the SCOPE OF SERVICES and COMPENSATION provided for in this Agreement.

23. NOTICE

All notices under this Agreement shall be in writing and shall be deemed validly given if sent by mail, nationally recognized courier or facsimile transmission, and shall be effective upon receipt. If any such notice or communication is not received or cannot be delivered due to a change in the address of the receiving party of which notice was not previously given to the sending party or due to a refusal to accept by the receiving party, such notice or other communication shall be effective on the date delivery is attempted. Notices should be addressed as follows, except that Concessionaire's communications to City concerning insurance coverage should be sent to the addresses described in **Exhibit A**:

If to the City: John Zoller
Bureau of Parks and Recreation
1120 SW Fifth Avenue, Rm. 1302
Portland, Oregon 97204 -1933

If to Concessionaire: Cumpston Bros. Inc.
2425 SE Bybee Blvd.
Portland, OR 97202

24. SEVERABILITY

If any provision of this Agreement is determined by a proper court to be invalid, illegal or unenforceable, such invalidity, illegality or unenforceability shall not affect the other provisions of this Agreement and this Agreement shall remain in full force and effect without such invalid, illegal or unenforceable provision.

25. AMENDMENTS

A. The City and the Concessionaire may amend this Agreement at any time only by written amendment executed by the City and the Concessionaire. Any amendment that increases the amount of compensation payable to the Concessionaire or which extends the term of Agreement must be approved by ordinance of the City Council. The City Project Manager may agree to and execute any other amendment on behalf of the City.

- B. Any change in the SCOPE OF CONCESSIONAIRE SERVICES shall be deemed an amendment subject to Subsection (A).

26. INTEGRATION

This Agreement contains the entire agreement between the City and the Concessionaire and supersedes all prior written or oral discussions or agreements.

27. NON-WAIVER

The City and the Concessionaire shall not be deemed to have waived any breach of this Agreement by the other party except by an express waiver in writing. An express written waiver as to one breach shall not be deemed a waiver of any other breach not expressly identified, even though the other breach be of the same nature as that waived.

28. PROHIBITED INTEREST

- A. No City officer or employee, during his or her tenure or for one year thereafter, shall have any interest, direct or indirect, in this Agreement or the proceeds thereof.
- B. No City officer or employee who participated in the award of this Agreement shall be employed by the Concessionaire during the period of the Agreement.

29. PAYMENTS TO VENDORS AND SUBCONTRACTORS

The Concessionaire shall pay timely all suppliers, lessors, and contractors providing services, materials or equipment for carrying out its obligations under this Agreement. The Concessionaire shall not take or fail to take any action in a manner that causes the City or any materials that the Concessionaire provides hereunder to be subject to any claim or lien of any person without the City's prior written consent.

30. BUSINESS LICENSE

Concessionaire shall obtain a City of Portland business license as required by PCC 7:06.010 prior to beginning work under this Agreement. Contractor shall provide a business license number in the space provided at the end of this Agreement.

31. COMPLIANCE WITH FEDERAL TAX REQUIREMENTS

The parties hereto recognize that the City may decide at some point in the future to finance other improvements at Eastmoreland Golf Course with the proceeds of tax-exempt bonds issued by the City. In such an event, the parties hereto intend for the provisions of this Agreement to comply with applicable U.S. Treasury Department rulings, revenue procedures, notices, announcements and regulations (the "IRS

Management Contract Rules") published pursuant to Section 103 of the Internal Revenue Code of 1986, as amended applicable to the management of facilities financed with the proceeds of tax-exempt bonds. Currently, the IRS Management Contract Rules are contained in Rev. Proc. 93-19 (Internal Revenue Bulletin 1993-11). The parties hereto agree to amend this Agreement if the IRS Management Contract Rules are interpreted to require this Agreement to be amended to ensure that the interest on any future bonds issued to finance facilities at the Eastmoreland Golf Course remains tax-exempt.

32. PROPERTY TAXES

- A. Pursuant to Oregon Revenue and Taxation Code, PP&R hereby notifies Concessionaire that one or more of the rights granted to Concessionaire under this Agreement may be construed by Oregon state or county taxing authorities as creating a possessory interest in the Premises that is subject to property taxation and that, if so, Concessionaire may be subject to the payment of property taxes levied on such possessory interest.
- B. If any other real property or personal property taxes or assessments of any kind are levied with respect to the Concessionaire's use of the Premises, Concessionaire shall be responsible for such taxes or assessments. If bills for such taxes or assessments are sent to PP&R, rather than Concessionaire, PP&R shall timely provide Concessionaire with such bills or, if appropriate, with an invoice and documentation evidencing Concessionaire's share of such taxes or assessments.
- C. Concessionaire shall pay all taxes or assessments for which it is responsible, above, before the same become delinquent. Concessionaire shall have the right, at no cost to PP&R, to contest with the taxing authorities any such taxes or assessments described in Sections 32.A. or 32.B.

33. NO PARTNERSHIP

Nothing contained in this Agreement is intended to create, or shall in any even or under any circumstance be construed as creating a partnership or joint venture between the City and Concessionaire.

186315

CONCESSIONAIRE

CUMPTON BROS. INC.

By: [Signature]

Title: SECRETARY - TREASURER

Date: 12-29-2008

Business License # 335168

Tax ID # 93-1099582

Social Security # _____

APPROVED AS TO FORM:

[Signature]
Assistant City Attorney

CITY OF PORTLAND

By: [Signature]

Name: DAN SALTZMAN

Title: Commissioner

Date: 12/31/08

By: _____

Name: _____

Title: _____

Date: _____

Exhibit A**STANDARD INSURANCE
REQUIREMENTS****INSURANCE**

At all times during the life of this Agreement, or as may further be required by this Agreement, CONCESSIONAIRE at its own cost and expense, shall provide the insurance specified as follows:

1. **Evidence Required**

CONCESSIONAIRE and its contractors or subcontractors, if any, shall maintain on file with the Property Manager, Portland Parks and Recreation, a certificate of insurance certifying the coverage required under this Agreement. Such certification shall be submitted to PP&R at or before execution of this Agreement and then annually for the duration of the Agreement. The adequacy of the insurance shall be subject to the approval of the City Attorney. Failure to maintain liability insurance shall be cause for immediate termination of this Agreement by the City.

2. **Notice of Cancellation, Renewal, Reduction or Material Change in Coverage**

The insurance policy shall provide that the insurance shall not terminate or be materially changed without thirty (30) days written notice first being given to Portland Parks and Recreation. Notices shall be sent to the PP&R's Manager, Strategy, Planning and Business Development, 1120 SW 5th Ave, Suite 1320, Portland, Oregon 97204. If the insurance coverage is canceled, terminated, or reduced prior to completion of the Agreement, the CONCESSIONAIRE or its contractors or subcontractors, if any, shall provide a new policy with the coverage required under this Agreement. The CONCESSIONAIRE and its contractors shall maintain continuous, uninterrupted coverage for the duration of the permit.

3. **Insurance Required**

- A. CONCESSIONAIRE and its contractors and subcontractors, if any, shall maintain public liability and property damage insurance, that protects the CONCESSIONAIRE and the City and its officers, agents and employees from any and all claims, demands, actions and suits for damage to property or personal injury, including death, arising from the Concessionaire's work under this Agreement. The insurance shall include coverage for any damages or injuries arising out of the use of automobiles or other motorized vehicles by the CONCESSIONAIRE and its contractor or subcontractors, if any. The insurance shall provide coverage for not less than \$100,000 for personal injury to each person, \$2,000,000 for each

occurrence, and \$2,000,000 for each occurrence involving property damage; or a single limit policy of not less than \$2,000,000 covering all claims per occurrence.

- B. The insurance shall be without prejudice to coverage otherwise existing and shall name as additional insureds the City and its officers, agents and employees. Notwithstanding the naming of additional insureds, the insurance shall protect each insured in the same manner as though a separate policy had been issued to each, but nothing herein shall operate to increase the insurer's liability as set forth elsewhere in the policy beyond the amount or amounts for which the insurer would have been liable if only one person or interest had been named as insured. The coverage shall apply as to claims between insureds on the policy.
- C. Workers Compensation Insurance. CONCESSIONAIRE, its contractors or subcontractors, if any, and all employers on its behalf are subject employers under Oregon Workers Compensation Law for this Agreement and shall comply with ORS Chapter 656 which requires them to provide Oregon workers compensation coverage in accordance with Oregon law for all of their subject workers. CONCESSIONAIRE and its contractors and subcontractors shall provide and maintain a certificate of current and effective coverage with the City at all times during the term of this agreement.
- D. Commercial Liquor Liability. Concessionaire shall carry commercial liquor liability including coverage for damages arising out of the selling, serving, or furnishing of any alcoholic beverage with a limit of \$2,000,000 per occurrence/\$2,000,000 aggregate limit or the minimum limits required by statute if higher.

3. Special Provisions

- A. The foregoing requirements as to the types and limits of insurance coverage to be maintained by CONCESSIONAIRE, and any approval of said insurance by the CITY is not intended to and shall not in any manner limit or qualify the liabilities and obligations otherwise assumed by CONCESSIONAIRE pursuant to this Agreement, including but not limited to the provisions concerning indemnification.
- B. PP&R reserves the right to terminate or suspend the Agreement in the event of non-compliance with the insurance requirements of this Article. In no event shall any suspension entitle CONCESSIONAIRE to an extension of the term of the Agreement specified in this Article.

* (Note: General liability limits may be increased, at the discretion of the City's Risk Manager, relative to risk involved) , and will be increased in accordance with any increase in the limitations of liability applicable to the CITY under the Oregon Tort Claims Act, ORS 30.260 to 30.300).

Exhibit B

CLUBHOUSE	
CITY OWNED EQUIPMENT	
1	WALKIN REFRIGERATOR
1	DISHWASHING SYSTEM
1	HOOD VENT SYSTEM
1	TRAULSEN REFRIGERATOR/FREEZER COMBO
1	TRAULSEN UNDER GRILL REFRIGERATIONS DRAWERS
1	BLODGETT OVEN
1	BUILT-IN KITCHEN SINK & COUNTER STAINLESS STEEL
8	METRO DRY STORAGE SHELVES STAINLESS WALKIN & DRY STORAGE
155	HARDWOOD CHAIRS
22	HARDWOOD TABLES
1	METAL DESK CIRCA 1950
1	METAL FILE CABINET SHAW WALKER CIRCA 1950
1	SECURITY SYSTEM CLUBHOUSE
1	FIRE SYSTEM CLUBHOUSE
1	SECURITY SYSTEM CART BARN
1	COMPUTER & MONITOR FOR TEE TIME SYSTEM INSTALLED 2008
3	WOODEN PICNIC TABLES IN GRASS AREA
1	MAIN PRO SHOP COUNTER
2	SODA DISPENSERS WITH ICE BINS NEW NEVER USED

** After they are purchased by the Concessionaire the following will be added to this list:
new dining room chairs for bar and restaurant, and new flat screen televisions for bar.

Exhibit C

If this Agreement is terminated under Section 8(A) or 8(B) or by the Concessionaire under Section 8(C) before the end of any five-year term, City shall reimburse Concessionaire for investments made in the current term and listed in Exhibit C of this agreement based on a straight line monthly depreciation schedule beginning on the day the improvements are completed and ending on December 31 of the final year of the current term. If this Agreement is terminated by the City under Section 8(C), Concessionaire shall not receive reimbursement for improvements made.

- 1) Electric retrofit of cart storage to accommodate forty-four (44) electric golf carts inside, as well as outlets for sixteen (16) golf carts outside.
- 2) Installation of a wall between the service and bar areas.
- 3) Refinish of bar top and pro shop counter.
- 4) Painting of walls in bar, banquet, and lottery areas.
- 5) Repair and painting of slat wall in pro shop.
- 6) Painting of driving range walls.
- 7) Installation of new paved area to south of clubhouse.