

This Como Amusement Park Management and Food Service Agreement (“Agreement”) is entered into this \_\_\_ day of \_\_\_\_\_, 2018 (the “Effective Date”) between the City of Saint Paul, through its Division of Parks and Recreation (“**City**”), and Lancer Foods, d/b/a Zooper Food, LLC and Como Amusement, LLC (“**Operator**”).

WHEREAS, the City and Operator entered into a Como Amusement Park Management Agreement (“Management Agreement”) dated October 10, 2004 and an Amended and Restated Como Amusement Park Management Agreement with Como Amusement LLC dated March 10, 2008, pursuant to which the City granted to Operator an exclusive right to operate and manage Como Town Amusement Park through January 31, 2026 in return for an investment in the commissary and

WHEREAS, the City and Operator entered into a Food and Beverages Services Agreement dated October 10, 2004 (the “Food Agreement”) and an Amended and Restated Food and Beverages Services Agreement with Zooper Food dated March 10, 2008, pursuant to which the City granted to Operator an exclusive license to operate the VC Café and to provide catering services at the Visitor Center Café, the Visitor Center and the Marjorie McNeely Conservatory through January 31, 2026 in return for an investment in the VC Café kitchen; and

WHEREAS, Operator has agreed to pay for construction of a new Main Food Concession building, necessitated by the City’s construction of a new Seal Habitat which will demolish the existing Zooper Food building, in return for which the City will grant an extension to the Term of the Food Agreement; and

WHEREAS, operations under the Food Agreement and Management Agreement, together with their amendments, are so intertwined that City believes that they should be performed by a single vendor; and

WHEREAS, City and Operator wish to combine the Management Agreement, as amended by the Management First Amendment and the Food Agreement, as amended by the First Food Amendment, into this Agreement, with an extended Term to acknowledge the additional significant investments Operator will make;

NOW THEREFORE, in consideration of the mutual agreements contained herein, and for other good and valuable consideration, the receipt and legal sufficiency of which is hereby acknowledged, the parties agree as follows:

## **1. DEFINITIONS.**

The following words and phrases, when used in this Agreement, shall have the meanings

given to them in this Section:

- 1.1 **"Agreement"** shall mean this Management and Food and Beverage Services Agreement, as the same may be amended from time to time as provided herein.
- 1.2 **"Alcoholic Beverage Services"** shall mean the sale and service of alcoholic beverages at any catering event held at the VC.
- 1.3 **"Amusement Park" or "Como Town"** shall mean the area of Como Park which is approximately 164,000 square feet and adjacent to the Como Zoo and Conservatory and used for amusement rides.
- 1.4 **"Annual Payment"** shall mean the annual base payment, before Commissions, due to the City by Operator in consideration of the operation and management rights granted herein as more specifically set forth in Section 8.1 herein.
- 1.5 **"Catering Commissions"** shall mean the commissions due to City by Operator herein based on the Net Receipts of food and beverages, alcoholic and non-alcoholic, sold during catering events held at the VC Cafe, MMC or VC provided by Operator as more specifically described in Section 8.2 herein.
- 1.6 **"City"** shall mean the City of Saint Paul.
- 1.8 **"Commission"** shall mean the Food, Ride, and Catering Commissions paid by Operator to the City under this Agreement.
- 1.9 **"Como Park"** shall mean the Como Regional Park owned by City located on 378 acres of land and 72 acres of water in Saint Paul, Minnesota.
- 1.10 **"Como Park Zoo and Conservatory Campus"** shall mean the Como Zoo, the amusement park adjacent to Como Zoo and the Marjorie McNeely Conservatory, including the triangle of land in front of the Marjorie McNeely Conservatory, which is bounded by Aida, Estabrook and Eason streets.
- 1.11 **"Como Zoo" or "Zoo"** shall mean the entire zoo, owned and operated by the City located within Como Park.
- 1.12 **"Conservatory" or "MMC"** shall mean the Marjorie McNeely Conservatory located in Como Park that is owned and operated by the City, including

without limitation the Children's Gallery, Fern Room, Bonsai Room and the secondary lobby.

- 1.13 **"Event of Default"** shall mean any acts referenced in Sections 14.1 or 14.2 herein that constitute a default under this Agreement.
- 1.14 **"Fees"** shall mean the Food and Catering Commissions paid by the Operator to the City under this Agreement.
- 1.15 **"Final Plans"** shall mean the plans of the build of the Main Food Concession Building, as approved by Operator and City.
- 1.12 **"Food and Beverage Services"** shall mean the sale of food and non-alcoholic beverages at the VC Café and the Amusement Park and Zoo.
- 1.13 **"Food Commissions"** shall mean the Commissions due to City by Operator based on the Net Receipts of food and non-alcoholic beverages sold at the Amusement Park and Zoo and the VC Cafe as more specifically described in Section 8.1 herein. "Food Commissions" shall not include any revenue or Net Receipts of food and beverages sold at catered events held at the VC Cafe, MMC, VC, or Amusement Park and Zoo.
- 1.14 **"General Manager"** shall mean the individual(s) hired by Operator to provide on-site general management of all aspects of the Operator's operations at the Campus and the Amusement Park and Zoo.
- 1.15 **"Intellectual Property"** shall mean the name of the Amusement Park "ComoTown", advertising materials (print, radio, television or otherwise), and promotional materials and programs developed by Operator for the Amusement Park including without limitation, any and all trade names, trademarks, service marks, copyrights and patents for the same.
- 1.16 **"Main Food Concession Building"** shall mean the structure constructed by Operator for the purpose of serving as the Amusement Park's and Zoo's main food service building.
- 1.17 **"Maintenance Program"** shall mean the program Operator institutes for the regular maintenance of the mechanical rides and play structures within the Amusement Park as more specifically defined in Section 7.2 herein.
- 1.16 **"Net Receipts"** shall mean gross revenue actually received by Operator minus applicable taxes.

- 1.17 **"Operator"** shall mean Lancer Foods, d/b/a Zooper Food, LLC and Como Amusement, LLC, Minnesota entities.
- 1.18 **"Personal Property Items"** shall mean any and all items located within the VC Cafe and VC furnished by the Operator that are not real property or permanently affixed thereto including, without limitation, any and all furniture, equipment, inventory, carts, kiosks, tables, chairs, benches, vending machines, and signage.
- 1.19 **"Ride Commissions"** shall mean the commissions due to the City by Operator based on the Net Receipts of rides sold at the Amusement Park as more specifically described in Section 8.2.
- 1.20 **"VC"** or **"VERC"** shall mean the visitor center building located within the Como Park Zoo & Conservatory.
- 1.21 **"VC Cafe"** shall mean the 2,500-square foot area within the VC designated for a cafe for the purpose of serving as the VC's main food service building.
- 1.22 **"VC Café Kitchen"** shall mean the kitchen located within the VC Café.
- 1.23 **"VC Closure"** shall mean the closure of any material part or the whole VC by the City or any third party for any reason during the Term of this Agreement.
- 1.24 **"Zoo Closure"** shall mean the closure of any material part of or the whole Zoo by the City or any third party for any reason during the term of this Agreement.

## **2. GRANT OF LICENSE; SERVICES; TERM.**

- 2.1 License. City hereby grants to Operator an exclusive license during the term of this Agreement to operate the VC Cafe and provide the Services at the VC Cafe, VC, and MMC and to manage and operate the Amusement Park and provide the services described in 2.2. So long as this License remains in full force and effect, City shall not authorize or permit any other person or entity, and shall not on its own behalf, unless as otherwise specified herein in Section 2.4 below, provide the Services at the VC and MMC.

## 2.2 Services.

### A. VC Café.

B. : City grants to Operator the sole and exclusive right to:

- (i) provide Food and Beverage Services at the VC Cafe;
- (ii) provide exclusive food and beverage catering and related services for events in and at the VC Cafe and MMC;
- (iii) provide exclusive food and beverage catering and related services for events in areas of and at the VC, other than the VC Cafe except as set forth in 2.4 below;
- (iv) provide Alcoholic Beverage Services with respect to catering at the VC and MMC, subject to and to the extent permitted by local and federal law, rules, and regulations and except as set forth in 2.4 below;
- (v) provide catering for all private rentals that are held in a tent within the boundaries of the Como Park Zoo and Conservatory Campus;
- (vi) secure 10 dates each season for the East Picnic Pavilion in advance of the general public for the Term of this Agreement, which shall be no more than two weekend days per month (Friday, Saturday or Sunday) for the months of May through September; and
- (vii) select and purchase such food, beverage, and catering brands and items from suppliers on terms acceptable to Operator including, cooperative sponsor agreements and promotional benefit programs (collectively referred to as "**Services**"). Operator hereby agrees to provide the Services in accordance with the provisions of this Agreement.

### C. Como Amusement.

City grants to Operator the sole and exclusive right to:

- (i) provide Food and Beverage Services in the Amusement Park and Zoo;
- (ii) provide catering, including Food and Beverage Services, and related services for events in and at the Amusement Park during the term of this Agreement, and exclusive catering at the picnic shelter at the Zoo so long as the picnic shelter is in operation;
- (iii) provide catering, including Food and Beverage Services, and related services for all events in and at the Zoo grounds, subject to the following exceptions:
  - (a) the City or the Como Friends will be entitled to sponsor eight (8) events per year on the Zoo grounds and
  - (b) product sampling as defined in §2.4.

(iv) provide portable carts and kiosks and vending machines at the Amusement Park and Zoo;

(v) provide Alcoholic Beverage Services with respect to catering at the Amusement Park and Zoo, subject to and to the extent permitted by local and federal law, rules, and regulations. In the event that the sale of alcohol is permitted at the Amusement Park and Zoo during the term of Agreement, Operator shall have the exclusive right to hold any licenses and permits required for such sale;

(vi) provide mobile, coin-operated rides throughout the Amusement Park and if rides are allowed in the Zoo, the exclusive right to provide mobile, coin-operated rides at the Zoo;

(vii) sell merchandise and apparel within the Amusement Park, but only to the extent that such merchandise is not in conflict with items sold by the Como Friends.

(viii) provide games of skill and conduct activities for a charge within the Amusement Park including, without limitation, sand art, spin art, face painting, rock climbing, temporary tattoos, and puppet shows, and to the extent such activities are permitted on Zoo grounds, at the Zoo.

2.3 Term. The term of this Agreement shall commence on the Effective Date of this Agreement and continue through January 31,2036, unless sooner terminated pursuant to § X.

2.4 Limited Exceptions to Operator's Exclusivity.

A. VC Cafe:

(i) Operator acknowledges that there will be 5 occasions per year for special events sponsored by and with food and beverages paid for by the City or Como Friends which may be catered by entities other than Operator.

(ii) The City will have 3 times per year to use the entire first floor of the VC including the VC Cafe and use a caterer other than Operator.

(iii) Staff or volunteer training, recognition ceremonies and meetings or events for campus or Como Friends staff, board members or volunteers of the Como Friends, or City sponsored education programs such as birthday parties and overnights are exceptions to the exclusive right of Operator to cater events in the VC and MMC.

- (iv) During any of the events listed above the Operator may have an employee present to insure the security of the kitchen. The City will pay the cost of one Operator employee for any of the events listed in (i)-(iii) above.

**B. Como Amusement Park:**

- (i) Notwithstanding any provision in this Agreement, City shall have the right to authorize product sampling at the Zoo of foods, beverages and other commodities, provided that the samples to be distributed are substantially less than a full-size product, the sampling is permitted during limited hours, the samples are offered only in specific areas of the Zoo, the sample products are not competitive with or substantially similar to the products offered by Operator in the Zoo or Amusement Park, and such product sampling provides mutual benefit to Operator and City.
- (ii) Both parties agree and recognize that the City and its agent, Como Friends, have the opportunity to offer a soda sponsorship. Operator agrees to cooperate with City in implementing a soda sponsorship agreement provided that the City allows Operator to have input in negotiating the costs and quality of products provided under the soda sponsorship agreement.

**3. SPACE USE/EXPANSION OF VC CAFÉ.**

- 3.1 Space Availability. During the Term of this Agreement, City shall provide Operator: (i) the VC Cafe space and expansion, which Operator built out pursuant to the terms of the Previous Agreements, to operate and render the Services set forth herein, (ii) areas within the VC, designated by City and Operator, and (iii) areas designated by the City to provide catering services within the VC from time to time. At all time before, during and after the Term of this Agreement, City shall retain ownership of all space provided and licensed to Operator herein.

Upon termination of this Agreement, the VC Cafe build-out and the expansion will remain the property of City except any and all Personal Property Items located in the VC Cafe will remain the property of Operator. Operator will also retain ownership of any Personal Property Items it owns and places in any area of the VC . Upon termination of this Agreement for any reason, Operator shall be given a reasonable amount of time to remove its Personal Property items.

3.2 Zooper Food Rebuild: As a condition of this Agreement, Operator agrees to finance the building of the Main Food Concession Building in coordination with Como's Seal & Sea Lion project at an estimated construction cost of \$1,385,066.. Lancer will also invest additional resources to equip the Main Food Concession Building. Bidding and construction will be led by Como Park Zoo and Conservatory and designated Project Management team which will select the architect and contractors for the Project. Operator shall pay the City within 24 months of the commencement of the Project.

3.3 Use of Education Portable Building and Trailer. As a result of space allocation determinations within various buildings located on the Como Park Zoo and Conservatory Campus, the Operator and the City have made the following accommodations and commitments.

3.3.1 The City has designated space in the basement of the VC previously allocated for the City's education program for use by the Operator to support the VC Café and catering operations in the VC.

3.3.2 The City has granted Operator's use of the portable building space formerly used for education programs for occupancy by Operator's sales and administrative staff. The City is responsible for maintaining access to utilities and data lines while the Operator has access to the space. The Operator is responsible for maintaining all other operating systems and performing any and all maintenance required as well as for costs associated with its use. When Operator vacates the building, the City will resume functional use of the building and/or the underlying grounds.

3.3.3 To replace the space granted for use by Operator as described in Section 3.3.1, Operator shall provide City 480 sq/ft of space suitable for office occupancy at the time it initiates new construction for its office operations currently located in the former education portable building as described in Section 3.3.2. Should the space not be provided upon the completion and functional occupancy of the VC Café Kitchen expansion project set forth in Section 3.2 herein, the City will reclaim the use of the space referenced in Section 3.3.1

3.3.4 The Operator has granted the City use of its former operations trailer for the use of its education programs that were displaced. The Operator will be responsible for delivering use of the trailer in a working condition suitable for occupancy and use for a summer seasonal program upon the execution of this Agreement. The City and Operator will mutually inspect and determine such suitability. Following the inspection and delivery, the City will be then be responsible for maintaining all other operating systems and performing any and all maintenance required as well as for costs associated with its use during the time that the City occupies it. The obligation to furnish this space will be discontinued at such a time when Operator both vacates the portable building as set forth in Section 3.3.2 and furnishes the 480 sq/ft as described in Section 3.3. Should the trailer require to be re-located to accommodate projects initiated by the Operator prior to delivery, Operator shall be responsible for facilitating and/or paying for a move provided that the City identify a suitable location of close proximity. Suitability of location is the exclusive determination of the City.

#### **4. OPERATION AND MANAGEMENT.**

4.1 General Oversight and Management. The License granted herein by City gives Operator the full and exclusive right to operate, manage, and supervise any and all activities and Services provided in the VC Cafe and the Amusement Park provided that such oversight and management complies with the terms of this Agreement.

#### 4.2 Periods of Operation.

4.2.1 The VC Cafe shall be open to the public on the days and during the hours the VC is open to the public as determined by the City. City shall provide Operator with written notice of the VC's period of operation. If weather or other circumstances require Operator to shorten hours it may be done with the City's consent, such consent not to be unreasonably withheld. Both parties understand and agree that catering events scheduled by the City and provided by the Operator may occur from time to time before or after the standard hours of operation of the VC.

4.2.2 The Amusement Park shall be open to the public on the days and during the hours determined by Operator provided that Operator shall use its best efforts to maximize the benefit of the Amusement Park space. Notwithstanding the foregoing, the Amusement Park shall be open daily to the public at a minimum during the public hours of the Zoo, weather permitting. Operator shall provide City with written notice of the Amusement Park's period of operation. City understands and agrees that catering events scheduled by Operator and certain small stage events may occur from time to time before or after the standard hours of operation of the Amusement Park. Operator shall provide the Services at the Zoo during the hours of operation of the Zoo.

4.3 Menus and Pricing. It is agreed and understood that Operator will develop, and change seasonally, a set of menus and pricing for food, beverages, and catering services offered in the VC Café and at the Amusement Park and Zoo. Upon request by the City, Operator shall forward City a copy of all items offered and their prices. Food prices, offerings, and prices shall be comparable to those offered by other food service providers at similar facilities in the Minneapolis and St. Paul area. Operator will work with the City in good faith to provide some menu offerings that specifically promote health and nutrition.

4.4 Sales of Alcoholic Beverages. Operator will serve and sell alcoholic beverages only in conjunction with events catered by the Operator at the VC and Amusement Park, subject to and in compliance with local and/or state licensing requirements. It is agreed and understood that in the event the sale of alcoholic beverages is permitted at the VC Cafe during the Term of this Agreement, Operator shall have the exclusive right to hold any and all licenses and permits required for such sale.

4.5 Quality. Operator shall not offer for sale any food or beverage items which are spoiled, of poor quality or otherwise unfit for consumption. All food and beverages sold by Operator shall conform to applicable federal, state and county food and health laws, ordinances and regulations in all respects. City shall have the right, at its own expense, to inspect Operator 's food service facilities at the VC Café, the Amusement Park and the Zoo and to order improvement in the quality of sanitation or products. City will use its best efforts to avoid peak service times for such inspections. Such right is separate and distinct from any health inspections performed by the State of Minnesota

pursuant to its duty to inspect licensed food establishments. The quality of the food and beverages served and sold by Operator at the VC Café, the Amusement Park and the Zoo shall be comparable to those sold in similar facilities in the Minneapolis and St. Paul area. Operator will provide City, immediately upon Operator's receipt, copies of any citations, or notices to appear from the health department or any other governmental agency as it relates to Operator's Services at the VC, as well as copies of any Operator field inspection reports in response thereto.

#### 4.6 Catering.

##### A. Amusement Park and Zoo:

- (i) Operator shall be responsible for the scheduling and booking of catered and other entertainment events held at the Amusement Park. Operator shall be responsible for the handling of all rentals and accommodations required for all catered events for outside groups and organizations such as tents, party equipment, flowers, entertainment, and valet parking. Operator shall be solely responsible for the collection of all amounts billed including without limitation rental fees, audio/visual fees, security, parking, florist and any other charges. Operator shall also be responsible for the scheduling and booking of all catered events held at the picnic shelter of the Zoo. City shall be responsible for booking all events at the Zoo.
- (ii) Operator shall be solely responsible for scheduling, booking, and approving events to be held in the Amusement Park provided that such events shall be limited to those events which are consistent with the family nature of the Amusement Park and that portray the Como Zoo and Conservatory plant and animal collections in a respectful manner and must comply with all applicable local, state and federal regulations. Such events may be regularly scheduled or one-time events. Operator has sole discretion in the promotion of the events.

##### B. VC Café, VC, MMC:

- (i) **Menus and Pricing.** It is agreed and understood that Operator will develop, and change seasonally, a set of menus and pricing for catering services offered at the VC. Food prices and quality for catered events shall be comparable to those offered by caterers providing food and beverage to similar events in the Minneapolis and St. Paul area.
- (ii) **Booking and Event Planning/Coordination.** The Operator will field all calls for rental functions and catering in the VC. If Operator has a prospective customer for a catered event at the VC, other than the VC Cafe, Operator will

book the event through the City. The City has sole responsibility for scheduling and booking all events held in the VC or MMC other than the VC Cafe. Operator shall be responsible for the scheduling and booking of all catered events held at the VC Cafe.

- (iii) Coordination of Other Rentals. The City shall be responsible for the handling of all aspects of rentals in the MMC including, without limitation, party equipment, flowers, entertainment, and valet parking. The Operator shall be responsible for handling accommodations for rentals in the VC for which they are the exclusive caterer. The Operator shall be solely responsible for the collection of all amounts billed in this regard including, without limitation, rental fees, audio/visual fees, security, parking, florist and/or any other charges.
- (iv) Catering Set-Up and Clean Up. Except as provided in this Section, Operator shall be responsible for all catering set-ups and clean-up for all Operator catered events held at the VC. Set-ups and clean-up include, but are not necessarily limited to, all required linen, decor, portable audio visual, trash removal to dumpster, and cleaning required during the event to maintain necessary level of cleanliness and safety throughout the event. However, the City shall be responsible for table and chair setup and removal for each event, and for the after- event floor cleaning in the area the event is held.

#### 4.7 Promotional and Marketing Activities.

- (i) ~~Zooper Foods~~ A. VC Cafe VC Café Operator and City agree to cooperate in planning and funding of promotion and marketing activities as it relates to the rental of the VC. Advertising will be coordinated with the City and to the extent practical, cooperative advertising programs will be developed by Operator and the City.

Subject to the City's written approval, Operator shall develop and provide brochures and marketing materials for Services offered by Operator at the VC. In addition, Operator shall make available to VC visitors customer surveys for the Services and catering operations. Completed surveys will be provided to the City for review of customer satisfaction issues.

#### B. Como Amusement

- (i) Except as set forth in Section §\_\_herein, Operator is responsible at its own expense for naming the Amusement Park and creating its brand through

advertising print, radio, television and promotional activities. ("**Intellectual Property**"). Operator agrees not to bring into disrepute or adversely affect the integrity, image or reputation of the City or Como Park in any advertising or promotional materials produced by Operator. As consideration for the significant financial investment by Operator in creating the Intellectual Property, it is agreed and understood that Operator retains sole rights to the Intellectual Property **created** herein.

- (ii) City shall obtain Operator's approval, which may not be unreasonably withheld, on any advertising developed by the City referencing or promoting the Amusement Park.

C. City. Operator shall obtain permission from the City to use the Como Zoo brand and likeness in any advertising developed by Operator referencing or promoting its operations under this Agreement. The City represents and warrants that any pre-approved Como Zoo brand or likeness will not infringe on the rights of any third party.

4.8 Public Use. Operator shall not interfere with the public use of the VC, the Amusement Park and Zoo and shall use its best efforts not to allow any boisterous or disorderly persons to loiter about the VC Café or the Amusement Park.

4.10 Maintenance of Como Park's Reputation. Operator recognizes that Como Park possesses a special, unique and extraordinary character and that Operator has been chosen to receive the License and provide the Services at the VC, Amusement Park and Zoo to further Como Park's reputation. Operator agrees that it will use its best efforts to ensure that its employees, agents and representatives do not take any action that will harm, bring into disrepute, or adversely affect the integrity, image or reputation of Como Park or the City of Saint Paul.

4.11 Licenses and Permits. It is Operator's responsibility to know what licenses or permits are required to conduct its business, and provide the services set forth in this Agreement, and to obtain all such license and permits prior to commencing operation. Upon request, the Division of Parks and Recreation shall execute such documents and instruments and take such actions as may be reasonably required to assist Operator in obtaining such licenses and permits. Operator shall be allowed to use the City's liquor license for the VC as is permitted by resolution by the St. Paul City Council. It is expressly understood that this liquor license will only be used for private events catered by Operator and will not be used for the general concession operation. Operator shall, upon being invoiced by the City, reimburse the City for the cost of said license annually. Failure to obtain the necessary

licenses and/or permits or suspension or revocation of the licenses during the term of the Agreement shall be considered an Event of Default.

**5. DUTIES OF CITY.**

5.1 Security Services. City shall provide, without additional charge, normal security services in all areas of the Como Park Zoo and Conservatory Campusto the same extent and at the same level provided elsewhere on the Zoo grounds . Operator may, in its discretion and at its own expense, hire additional security services for the VC Café or the Amusement Park. Any additional security which is required by law or by the City as a condition of licenses or permits shall be provided and paid for by the Operator.

5.2 Utilities.

5.2 Utilities.

5.2.1 The City will pay for water and electricity for the Operator for Operator's normal operations at the VC and for carts on the Zoo grounds.

5.2.2 The City will also provide water to Operator for Operator's normal operations at the Amusement Park except that this will not include provision of water for any water ride or feature at the Amusement Park which would increase the water usage beyond the current level.

5.2.3 Operator will pay for electricity in Como Town and in the Main Zoo Concession Building on Zoo grounds, and for all telephone, internet and Wi-Fi access at any of its locations.

5.2.3 Operator will pay for all costs associated with establishing electricity and water to new location for its operations.

5.3 Janitorial and Cleaning. City shall keep the VC and the Amusement Park and Zoo clean and neat at all times by providing, at its cost and expense:

5.3.1 janitorial services (and all related cleaning supplies) for the restrooms located in the VC and the Amusement Park;

5.3.2 daily pick up and removal of trash and litter in the VC;

5.3.3 daily pick up and removal of trash and litter in the Amusement Park and the Zoo, except that Operator shall be responsible for the clean-up

- of litter within fifteen feet of its carts, kiosks, and eating areas;
- 5.3.4 cleaning of all ground and patio surfaces of the VC ;
  - 5.3.5 cleaning of all ground and patio surfaces of the Amusement Park and the Zoo, except within fifteen feet of carts, kiosks, and eating areas maintained by Operator.
  - 5.3.6 daily pick up of trash from the trash barrels in the Amusement Park and Zoo;
  - 5.3.7 City further agrees to maintain all such areas, on an ongoing basis, consistent with City's standards for facilities owned by the City similar to the VC. Operator is responsible for keeping the Cafe clean and removing the trash and recycling to the dumpsters.
- 5.4 Removal of Trash from Dumpsters. City, at its own expense, shall be responsible for the removal of all trash from the VC, Amusement Park and Zoo, including trash generated by Operator's operations at those locations. City shall establish a contract to remove such trash on a regular basis. City and Operator shall be jointly responsible for keeping the area around its dumpster(s) clean and odor free.
- 5.5 Groundskeeping. City shall be responsible at its own cost for all groundskeeping and landscaping maintenance required at the Amusement Park, including without limitation maintenance of lawn, watering of bushes and plants, removal of brush and leaves, and snow removal.
- 5.6 Free Admission. If the City determines that it must charge admission fees in order to operate the Zoo and Conservatory, the Operator will be able to decide whether the Amusement Park area should be separately accessible without an admission fee. Operator agrees that it will not charge an admission fee at any time without the prior written consent of the City.

## **6. OPERATOR PERSONNEL.**

- 6.1 Employment. Operator shall hire, train, employ, supervise discipline and terminate all personnel as shall be necessary for the efficient performance of its obligations under this Agreement. All personnel so hired by Operator shall be employees of Operator and not of City.
- 6.1.1 Operator agrees that appropriate pre-employment security checks and screening will be carried out for all employees at the VC to the extent permitted by law.

- 6.1.2 Operator agrees that appropriate pre-employment security checks and screening will be carried out for all employees to the extent permitted by law. Operator shall perform BCA background checks on Operator employees employed in the Amusement Park; however, nothing herein shall be construed as Operator conveying any guaranty on the accuracy of the background check result or analysis or that no person who has been convicted of a crime listed in Minn. Statute Section 299C.61 is employed in the Amusement Park.
- 6.1.3 Operator agrees that it will not knowingly employ anyone who cannot and does not provide the appropriate documentation indicating a legal right to work in the United States. Operator shall not knowingly employ or permit to work on the premises in the processing, handling, preparing and serving of food or beverages any person who is infected with any disease or illness in a communicable form or who is a carrier of any such disease or illness insofar as such restrictions are legally permissible. All persons engaged in the processing, handling, preparing and serving of food and beverages shall wear appropriate attire, shall be clean and sanitary in their personal habits, shall take suitable precautions to prevent hair or other such matter from coming in contact with food, and shall exercise other health and safety measures as appropriate under the highest standards applicable to food service providers, or as otherwise required by state or federal regulations.
- 6.2 Manager. Operator shall operate the VC Cafe and Amusement Park and conduct the Services herein under the supervision of an on-site manager. There will be a General Manager for all Campus Operations. Operator shall provide a summary of the General Manager's qualifications and contact information to the City upon written request,
- 6.3 Training and Supervision. Operator shall train and closely supervise all of its employees so that they are aware of and perform in accordance with the high standards of cleanliness, courtesy and service required by City and Operator. This training includes, but is not limited to training required by any local, state or federal governmental agency covering Operator's operations at the VC and the Amusement Park and Zoo. Operator shall train all of its employees involved in the sale and service of alcoholic beverages and in alcohol awareness, which includes training based on any applicable law of the State of Minnesota. This training may include, without limitation, policies and procedures developed by Operator dealing with alcohol management and a nationally-recognized program such as "Techniques for Effective Alcohol Management" ("**TEAM**") or "Techniques for Intervention Procedures

by Servers of Alcohol" ("T.I.P.S.")).

- 6.4 Security. Operator shall adhere to all of City's security policies. Operator and its employees, whether full-time, part-time or on-call, shall be subject to City's security and security clearance procedures.
- 6.5 Uniforms; Identification Tags. In connection with the operation of the VC Café, Amusement Park and Zoo and performance of the Services hereunder, Operator's non-management employees shall be neatly attired in clean, commercially-attractive uniforms as required by Operator. Operator will provide all of its employees at the VC Café, Amusement Park and Zoo with name tags. Operator's employees shall be required to wear their name tags at all times when on duty at those locations.
- 6.6 Wage and Hour Laws. Operator shall comply with all federal and state equal opportunity, wage and hour and tax laws covering employees.
- 6.7 Nondiscrimination. The Operator agrees that during the term of this Agreement, that (1) no person, on the ground of race, sex, color; creed, religion, sexual or affectional orientation, age, disability, familial status, marital status, status with respect to public assistance, national origin or ancestry shall be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination in the use of the VC Cafe, Amusement Park or Zoo (2) that in connection with the construction of any improvements and the furnishing of services therein, no discrimination shall be practiced in the selection of employees and contractors, by contractors in the selection and retention of first-tier subcontractors, and by first-tier subcontractors in the selection and retention of second-tier subcontractors, (3) that such discrimination shall not be practiced against the public in their access to and use of the facilities and services provided for as public accommodations (such as eating and recreation) operated hereunder, (4) that the Operator shall at all times be in compliance with all federal, state or local laws or regulations relating to non-discrimination; and (5) that Operator will take appropriate action to ensure applicants for employment and employees of the Operator are not discriminated against. Such action shall include, without limitation, the following: employment, promotion, transfer, recruitment, layoff, termination, wage, salary, compensation, training, and apprenticeship. Operator agrees to post in conspicuous places available to employees and applicants for employment notices setting forth the provision of this nondiscrimination clause.

## **7. REPAIR AND MAINTENANCE.**

#### **A. Visitor Center Cafe.**

- (i) Physical Structure. During the Term of the Agreement, the City shall be responsible for the maintenance and repair of the physical structure of the VC and all physical structures located within the VC including the roof, windows and doors, exterior walls, heating, air conditioning and ventilation.
- (ii) Personal Property. Operator will provide for maintenance and repair of the Personal Property Items café owned by Operator and used in the VC Cafe. Operator will advise City in writing of any problems or issues relating to the Personal Property Items that affect Operator's ability to perform the Services hereunder.
- (III) Key Core Installation. Operator must install a key core in its space that is compatible with the City key cores, and provide designated City staff with keys to the Operator's space.
- (IV) Future Construction. Services related to this Agreement may require ongoing investment in infrastructure by Operator. Operator investments which result in permanent buildings or structures become part of the real property of the location shall belong to the City following termination of this Agreement. Specific written authorization by the City is required prior to Operator initiating improvements to the real property. At the time that a project is proposed for consideration, the application of any provisions similar to Section 3.2 for Operator recovery of value following the termination of this Agreement shall be addressed and documented as part of that process. Absent any specific documentation otherwise, no compensation to the Operator shall be due by the City for projects where documentation does not exist. In the event that Operator proposes to undertake significant new private investment in the premises with the consent of the City, such investment will not result in automatic extension of the term of this Agreement, and instead parties must negotiate an Amendment to this Agreement. In any such negotiations, the City will consider the feasibility of extension of the term based upon the amount of investment, the benefit to the City and the existing length of the term of the Agreement.

#### **B. Amusement Park and Zoo**

- (i) Physical Structure: During the Term of the Agreement, the Operator shall be responsible for the maintenance and repair of the physical structures built by Operator located within the Como Campus including the roof, windows and doors, exterior walls, heating, air

conditioning and ventilation.

- (ii) Operator will provide for maintenance and repair of the Personal Property Items owned by Operator in the Amusement Park and the Zoo. Operator shall establish a preventive maintenance program for the mechanical rides and play structures within the Amusement Park and shall repair and replace such rides and structures on an ongoing basis at Operator's cost and expense, when items become worn, lost or in need of repair ("**Maintenance Program**"). The Maintenance Program must include a written daily sign-off to verify that maintenance and inspections have been completed. Operator shall maintain complete and accurate records of maintenance performed on all such items. Copies of these records must be made available to City upon request. Operator will advise City in writing of any problems or issues relating to the Personal Property that affect Operator's ability to perform the Services hereunder. In conjunction with the Maintenance Program, Operator shall, as it deems necessary, set up a reserve fund to maintain an inventory of spare parts for the mechanical rides.

C. General:

- (i) Unsafe Conditions. City and Operator shall each immediately notify the other of any unsafe condition within the VC or Amusement Park. Operator shall cooperate fully with City in the investigation of any accidental injury or death occurring at the VC or Amusement Park including a prompt report thereof to City.
- (ii) Right of Entry. At all times during the Term of this Agreement, the City shall have the right, by itself, or with its agents and employees, to enter into and upon the VC Café , Main Food Concession Building and Amusement Park premises during reasonable business hours or, in the event of an emergency, at any time for any legitimate purpose.

8. **FEES TO CITY; ACCOUNTING.**

A. **VC Café**

- (i) Food Revenue Commission. In consideration of the License granted herein, Operator shall pay the following commissions to City in each year during the Term based on the Net Receipts of Food and Beverage Services provided by Operator in the VC Cafe and within the VC ("**Food Commissions**"):

For commission on food sales in the VC Cafe from \$ 0- \$700,000

Years	Summer	Off-Season
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2015-23	13%	10%
2024-36	14%	10%

Summer months are considered to be May 1st - August 31st and off-season months are September 1st - April 30th.

In any year that net receipts exceed \$700,000, the commissions on food sales in excess of \$400,000 for the summer months shall increase to 16% and the commissions on food sales in excess of \$300,000 in the off-season months shall increase to 13%.

Net Receipts shall be determined for every year during the Term of this Agreement individually and shall not cumulate to any previous determinations of prior years. Food Commissions due to City from Operator shall be made monthly upon Operator's determination of Net Receipts for the month provided that such calculation shall occur within twenty (20) business days following the end of each calendar month. A statement of Net Receipts shall be provided to City with each payment. Total net receipts shall be reconciled at the end of the year, and any payments necessary to make up the deficiency in fees paid to the City pursuant to the formula listed above shall be payable within thirty (30) calendar days of the end of the year. Net receipts shall include any coupon or otherwise discounted sales excluding Operator employee sales under Section 8.3, provided however, that such discounted sales shall only be applicable to the calculation of Net Receipts to the extent of cash actually received by Operator.

- (ii) VC Catering Commission. In consideration for the License granted herein, Operator shall pay City ten percent (10%) of Net Receipts for Food and Beverage Services provided during catering events by Operator for events held at the VC, except for City or Como Friends sponsored events for which the City or Como Friends has received a discounted price.

Net Receipts shall be determined for every year during the Term of this Agreement individually and shall not cumulate to any previous determinations of prior years. Catering Commissions due to City from Operator shall be made monthly upon Operator's determination of Net Receipts for the month provided that such calculation shall occur within twenty (20) business days following the end of each calendar month. A statement of Net Receipts shall be provided to City with each payment.

**B. Amusement Park**

(i) Annual Payment. As consideration for the operation and management of the Amusement Park Operator is entitled to any profits over and above the payment of the annual payment and designated commissions due to the City, as set forth herein. Operator shall pay City an annual payment, during the term of this Agreement, in accordance with the following table ("**Annual Payment**"):

<b>Years 2011-23:</b>	<b>\$170,000.00</b>
<b>Years 2024-36</b>	<b><u>__\$175,000</u></b>

The amount will be paid to City in four equal installments of 25% due on or before May 1, July 1, September 1 and November 1 of each year.

(ii) Ride Revenue Commission. Operator shall pay the following commissions to City in each year during the Term based on Net Receipts from rides in the Amusement Park ("**Ride Commissions**"):

<u>Annual Net Receipts</u>	<u>% of Net Receipts</u>
\$ 0- \$ 199,999.99	0 %
\$200,000.00- \$1,000,000.00	2.5%
\$1,000,000.01-\$1,500,000.00	3.0%
\$1,500,000.01 and above	1.5%

Net receipts will be determined for each year and are not cumulative. Ride Commissions due to the City are based upon Operator's determination of Net Receipts for the year, which must be calculated within 45 business days following the end of each calendar year. A statement of Net Receipts must be provided with each payment.

Examples: In Year 1, if Net Receipts received from rides in the Amusement Park are \$1,000,000, the City is owed \$20,000.00 [ $\$1,000,000 - \$200,000 = \$800,000$ .  $\$800,000 \times .025 = \$20,000$ .] In Year 2, if Net Receipts received from rides in the Amusement Park are \$1,500,000, the City is owed \$35,000.00 [ $\$1,000,000 - \$200,000 = \$800,000$ .  $\$800,000 \times .025 = \$20,000$ .  $\$500,000 \times .03 = \$15,000$ .  $\$20,000 + \$15,000 = \$35,000$ ]

(iii) Food Revenue Commission. Operator shall pay the following commissions to City in each year during the Term based on the Net Receipts of Food and Beverage Services provided by Operation in the Amusement Park and Zoo ("**Food Commissions**")

<u>Month Net Receipt is earned</u>	<u>% of Net Receipts</u>
May –August	20%

September – April

15%

Net receipts will be determined for each year and are not cumulative. Food Commissions owed to the City will be paid monthly and are based upon Operator's determination of Net Receipts for the previous month, which must be calculated within 20 business days following the end of each calendar month. A statement of Net Receipts must be provided with each payment.

Example: If Operator's Net Receipts received from food and beverages in the Amusement Park and Zoo are \$2,000,000, of which \$1,500,000 was earned during May- August and \$500,000 was earned during September – April, City is owed \$375,000 in Food Commissions. [ $\$1,500,000 \times .02 = \$300,000$ .  $\$500,000 \times .015 = \$75,000$ .  $\$300,000 + \$75,000 = \$375,000$ .]

- (iv) Zoo Catering Commission. Operator shall pay City 12% of Net Receipts from all rental revenue received by Operator from rental of the picnic shelter at the Zoo, and of revenue for Food and Beverage Services provided during catering events by Operator for events held at the Zoo and Amusement Park,
- (V) Vending Machine Commission. Operator shall pay 12% of Net Receipts from food and beverage vending machines which it is authorized to place on the Zoo grounds. Vending machines in the Amusement Park are limited to a total of eight (8), similar in style and offerings to those existing at the time this Agreement is executed. Operator is not required to pay any commissions on the vending machines in the Amusement Park.
- C. Como Park Concessions. If during the term of this Agreement additional Como Park concession operations are managed by Operator the percentage rate of Net Receipts for those concessions will be the percentages set forth under § 8.B.iii above.
- C. Staff Discounts. City understands and agrees that Operator may grant its employees staff discounts on select Services and products offered by Operator at the Amusement Park and Zoo. City further understands and agrees that sales of Services and products by Operator to its employees at a staff discount shall not be included in the calculation of Net Receipts for determining the Ride Commissions, Food Commissions or Catering Commissions due to the City under this Section.
- D. Record Keeping. Operator shall use such point-of-sale equipment as it reasonably deems necessary to properly and accurately record all Net Receipts. City shall have the right at its sole cost and expense, at any time, to review and to inspect such equipment.
- E. Annual Audit. City shall have the right, at its own expense, to audit the books and records of Operator covering Operator's operation of the VC Cafe and Services at the VC, the Amusement Park and Zoo at Operator's corporate or accounting offices.

Operator agrees to reasonably cooperate with such audit. If, as a result of the audit, City does not agree with any determination of Net Receipts by Operator, City must promptly (but not later than 30 calendar days after the completion of such audit) give written notice to Operator of any exceptions thereto (in reasonable detail describing the nature of the disagreement asserted). If City and Operator reconcile their differences, the calculation of Net Receipts or Fees will be adjusted accordingly and will thereupon become binding, final and conclusive upon all of the parties hereto and enforceable in a court of law.

If City and Operator are unable to reconcile their differences in writing within 20 calendar days after written notice of exceptions is delivered to Operator ("**Reconciliation Period**"), the items in dispute will be submitted to independent auditors, mutually acceptable to City and Operator, for final determination, and will become binding, final and conclusive upon all of the parties hereto and enforceable in a court of law. The independent auditors may consider only the items in dispute and will be instructed to act within 20 calendar days (or such longer period as City and Operator may agree) to resolve all items in dispute. If City and Operator fail to select the independent auditors within seven calendar days after the expiration of the Reconciliation Period, City and Operator will each select an independent auditor who in turn shall select a third independent auditor to conduct the final determination and such determination will become binding, final and conclusive upon all parties hereto and enforceable in a court of law.

## **9. INSURANCE AND INDEMNIFICATION.**

9.1 Indemnification by Operator. The Operator agrees to defend and indemnify, the City of Saint Paul and its agents, officers and employees thereof from all claims, demands, actions or causes of action of whatsoever nature or character, arising out of or by reason of the use of the VC Café and Amusement Park property by the Operator, or the use or condition of the VC Café and the Amusement Park Property as a result of the operations or business activities of the Operator or from the provision of the Food and Beverage Services by the Operator under this Agreement unless such claim, demand, action or cause of action arises out of willful misconduct or gross negligence of the City.

9.2 Insurance Requirements of Operator. The Operator shall acquire and keep in effect during the term of this Agreement the following insurance policy coverage:

9.2.1 FIRE AND ALL RISK INSURANCE on the Personal Property items owned by Operator at the VC Café and within the VC with limits of not

less than replacement cost coverage shall be purchased by the Operator. Said insurance shall name the City of Saint Paul as an additional insured.

- 9.2.2 COMMERCIAL GENERAL OR PUBLIC LIABILITY INSURANCE including blanket contractual liability coverage, personal injury liability coverage and broad form property damage liability endorsement with a combined single limit of not less than \$1,200,000 per occurrence, \$2,000,000 aggregate, shall be purchased by the Operator. Such insurance shall: (a) name the City of Saint Paul as additional insured; (b) be primary with respect to Operator's insurance or self-insurance; (c) include an "all services, products or completed operations " endorsement; (d) be written on an "Occurrence" Form policy basis; and (e) not contain an "aggregate" policy limit unless specifically approved in writing by the City.
- 9.2.3 WORKERS' COMPENSATION INSURANCE with not less than statutory minimum limits; and EMPLOYERS' LIABILITY INSURANCE for all of Operator's employees at the VC with minimum limits of at least \$500,000 per accident, \$500,000 per employee and \$500,000 per disease, with an all states endorsement.
- 9.2.4 LIQUOR LIABILITY INSURANCE - \$1,000,000 aggregate. Coverage shall include Bodily Injury, Property Damage and Loss of Means or Support.

9.3 The Operator shall supply to the City current insurance certificates for policies required in Section 9.2. The said certificates shall certify whether or not the agent has errors and omissions insurance coverage. The limits cited under each insurance requirement above establish minimums; and it is the sole responsibility of the Operator to purchase and maintain additional insurance that may be necessary in relation to this lease. City may request increases in the limits to reflect the increased municipal exposure due to changes to Minn. Stat. Chapter 466 during the Term of the Agreement. Nothing in this contract shall constitute a waiver by the City of any statutory limits or exceptions on liability.

Operator shall place the insurance with responsible insurance companies authorized and licensed to do business in the State of Minnesota and approved by City.

- 10. **REPRESENTATIONS AND WARRANTIES OF CITY.** City hereby represents, warrants and covenants to Operator that:

- 10.1 Title. City holds good and marketable title to the Como Park, Zoo and Conservatory Campus, VC and Amusement Park area free and clear of all liens, restrictions, encumbrances, pledges, claims and rights whatsoever. City has the full legal right, power and authority required by law to execute and deliver this Agreement and to assign, transfer and deliver the Amusement Park area and an area within the VC for the operation of the Como Park, Zoo and Conservatory Campus, VC Café and Comotown.
- 10.2 Effect of Agreement. The execution and delivery of this Agreement by City shall not cause City to breach or be in default under any material agreement to which City is a party or may be bound thereby.
- 10.3 Litigation. As of the date hereof, City has not received any notice(s), whether oral or written, of any default(s) under any lease, financing or other agreement pertaining to the Como Park, Zoo and Conservatory Campus, amusement park or VERC or their redevelopment, use or occupancy thereof. There are no claims, actions, suits, proceedings, arbitrations, investigations or hearings or notice of hearings pending, or to City's knowledge, threatened nor is City in default under any order, license, regulation or demand of any federal, state, local or foreign court or governmental, administrative or self regulatory body or agency or any unsatisfied judgment against City that may adversely affect the ability of City to perform its obligations hereunder or which otherwise relates to this Agreement. There is not in existence at present any order, judgment, or decree of any court or other tribunal or any agency enjoining or requiring City to take any action of any kind or which may adversely affect this Agreement.
- 10.4 Environmental Matters. City represents and warrants that: (i) City is, and at all times has been, in full compliance with, and has not been and is not in violation of or liable under, any local, state, or federal environmental, health and safety requirements; (ii) neither City nor any of its predecessors or third party operators, has received any written or oral notice, report or other information regarding any actual or alleged violation of any environmental, health and safety requirements, or any liabilities or potential liabilities (whether accrued, absolute, contingent, unliquidated or otherwise), that relate to the VC, including any investigatory, remedial or corrective obligations; (iii) there are no pending or threatened claims, encumbrances, or other restrictions of any nature arising under or pursuant to any environmental, health and safety requirements, with respect to or affecting the Como Park, Zoo and Conservatory Campus, VC or Amusement Park; (iv) no underground storage tanks, asbestos-containing material in any form or

condition, landfills, surface impoundments, or disposal areas exist on the Como Park, Zoo and Conservatory Campus, VC or Amusement property; (v) City has not treated, stored, disposed of, arranged for or permitted the disposal of, transported, handled, or released any substance, including without limitation any hazardous material, on the VC property in a manner that has given or would give rise to any environmental, health and safety liabilities, including any liability for response costs, corrective action costs, personal injury, property damage, or attorney fees, pursuant to CERCLA or any other environmental, health and safety requirement; and (vi) City is unaware of any test results, reports, studies, analyses, tests, or monitoring possessed or initiated by City pertaining to hazardous materials or hazardous activities in, on, or under the Como Park, Zoo and Conservatory Campus, VC and Amusement Park, or concerning compliance by, or liabilities of, City, or any other person for whose conduct City is or may be held responsible, with or under local, state and federal environmental, health and safety requirements. Operator agrees to comply with all ordinances, laws, rules and regulations enacted by any governmental body or agency relating to the control, abatement or emission of air and water contaminants and the disposal of refuse, solid wastes or liquid wastes as they apply to the Como Park, Zoo and Conservatory Campus, VC Café, Amusement Park and Operator's Services during the term of this Agreement. Operator shall bear all costs and expenses arising from compliance with said ordinances, laws, rules, or regulations and shall indemnify, defend, save and hold harmless the City from all liability, including without limitation, fines, forfeitures and penalties arising from the failure by Operator to comply with such ordinances, laws, rules or regulations unless such liability is a result of the willful misconduct or gross negligence of the City.

- 10.5 Taxes. All taxes related to the VC of any nature required by law to be paid on or before the execution of this Agreement ("**Taxes**") have been paid in full and all tax returns have been timely and accurately filed or properly accrued for if not required to be paid prior to the execution of this Agreement. No claim of Taxes due is being contested by City, no request by City is pending for extensions of time for payment of Taxes, and no notice of additional assessment has been received by City or is threatened. There are no tax liens upon the VC, and the City has not granted or been requested to grant waivers of any statutes of limitations applicable to any claim for Taxes. During and after the term of this Agreement, in the event taxes of any kind are assessed against the Operator as a result of its use of the VC Café, or as a result of its Services or operations therein, City agrees to credit the Food Commissions and Catering Commissions due herein by Operator, or if already paid, return a portion of the Food Commissions and/or Catering Commissions paid

herein, by an amount equal to such tax assessment, including any and all penalties and interest incurred by Operator in conjunction with the assessment, providing that Operator is in compliance with the terms of the Agreement.

- 10.6 Government Approvals. City has obtained all approvals, authorizations, and consents required to be obtained by City for the use of any portion of the VC and Amusement Park and for the execution and delivery of this Agreement. Operator shall be responsible for obtaining all necessary license, permits, or consents for the construction of the new Food building, and operation of the VC Cafe and Amusement Park and provision of catering services carried out under this Agreement.
- 10.7 Noninterference. City shall not interfere or obstruct Operator's access to the Commissary Building, VC Cafe and Amusement Park under control of Operator, except as expressly provided in this Agreement.
- 10.8 Authorization and Enforceability. This Agreement has been duly and validly authorized, executed and delivered by City and constitutes a legal, valid and binding obligation of City enforceable against City in accordance with its terms, except to the extent that such enforcement may be limited by bankruptcy, insolvency or other similar laws presently or hereinafter in effect affecting the enforcement of creditor's rights generally. No agreement restricts City in the execution and performance of this Agreement.

Each of the representations, warranties and covenants contained herein is independent of every other, and shall not in any way limit, restrict, modify, or be deemed or construed in any way to limit, restrict or modify any other warranty or representation.

11. **REPRESENTATIONS AND WARRANTIES OF OPERATOR.** Operator hereby represents, warrants and covenants to City that:
  - 11.1 Organization and Good Standing of Operator. Operator is a corporation duly organized, validly existing and in good standing under the laws of Minnesota. Operator has full power and authority to make the representations, warranties and representations made under this Agreement, to execute and deliver this Agreement, and to perform its obligations under this Agreement.
  - 11.2 Effect of Agreement. The execution and delivery of this Agreement by Operator shall not cause Operator to breach or be in default under any material agreement to which Operator is a party or may be bound thereby.

To the best of Operator's actual knowledge Operator is not in default under any agreements or understandings pertaining to its right to use or occupy the VC, or provide the Services required hereunder.

- 11.3 Authorization and Enforceability. This Agreement has been duly and validly authorized, executed and delivered by Operator and constitutes a legal, valid and binding obligation of Operator enforceable against Operator in accordance with its terms, except to the extent that such enforcement may be limited by bankruptcy, insolvency or other similar laws presently or hereinafter in effect affecting the enforcement of creditor's rights generally. No agreement restricts Operator in the execution and performance of this Agreement. No consents or approvals are necessary under any agreement to which Operator may be a party or may be bound thereby in connection with the execution and delivery of this Agreement by Operator.

Each of the representations, warranties and covenants contained herein is independent of every other, and shall not in any way limit, restrict, modify, or be deemed or construed in any way to limit, restrict or modify any other warranty or representation.

## 12. **CASUALTY LOSS OF VC.**

- 12.1 Destruction of the Whole or Material Portion. If fire or other casualty shall render the whole or any material portion of the VERC inoperative for a period of 60 days or more, then Operator shall have the option of either: (i) terminating this Agreement without penalty, or (ii) requiring the City to repair and restore the VC and VC Cafe to as near its condition prior to the fire or other casualty as is reasonably possible and request that the City do so by providing written notice within 30 days from the date of such damage or destruction; and this Agreement shall remain in full force and effect. Operator's duties under this Agreement shall be suspended, or modified as appropriate until the City has completed the repairs and restoration of the VC and VC Cafe and this Agreement shall be extended for a period equal to the period of such suspension.
- 12.2 Partial Destruction. In the event that twenty percent (20%) or less of the value of the VC is damaged or destroyed by fire or other casualty and neither the whole nor any material portion of the VC Cafe or the VC is inoperative, then the City shall repair and restore the VC and/or VC Cafe to as near their condition prior to the fire or other casualty as is reasonably possible with all due diligence and speed. Operator's duties under this Agreement shall be suspended until the City has completed the repairs and restoration of the VC

and/or VC Cafe and this Agreement shall be extended for a period equal to the period of such suspension.

- 12.3 VC Closure. In the event any material portion of or the entire VC is closed by City or any third party for any reason ("VC Closure") for a period of 30 days or more, Operator may: 1) reduce the level of Services as may be appropriate in connection with such VC Closure; 2) terminate the Agreement without penalty to the Operator and pursue any other legal or equitable remedies available to Operator. Notwithstanding the above, in the event that the Zoo is ordered closed for greater than 30 days in response to a regional public health crisis such as "avian influenza", Operator and City shall cooperate in finding solutions to maintain and renegotiate their contractual relationship under this Agreement.

Notwithstanding the foregoing, if the fire or other casualty or closure is determined to be caused primarily by the activities of the Operator it shall be the solely the City's determination whether to terminate the Agreement and whether to repair or restore the VC Cafe.

13. CASUALTY LOSS OF AMUSEMENT PARK; ZOO CLOSURE.

- 13.1 Destruction of the Whole or Material Portion. If fire or other casualty shall render the whole or any material portion of the Amusement Park inoperative for a period of 60 days or more, then Operator shall have the option of either: (i) terminating this Agreement without penalty, or (ii) repairing and restoring the Amusement Park to as near its condition prior to the fire or other casualty as is reasonably possible and notify the City that it will be doing so by providing written notice within 30 days from the date of such damage or destruction; and this Agreement shall remain in full force and effect. Operator's duties under this Agreement shall be suspended, or modified as appropriate until the City has completed the repairs and restoration of the Amusement Park and this Agreement shall be extended for a period equal to the period of such suspension.
- 12.2 Partial Destruction. In the event that twenty percent (20%) or less of the value of the Amusement Park is damaged or destroyed by fire or other casualty and neither the whole nor any material portion of the Amusement Park is inoperative, then the Operator shall repair and restore the Amusement Park to as near their condition prior to the fire or other casualty as is reasonably possible with all due diligence and speed. Operator's duties

under this Agreement shall be suspended until the Operator has completed the repairs and restoration of the Amusement Park and this Agreement shall be extended for a period equal to the period of such suspension.

- 12.3 Zoo Closure. In the event any material portion of or the entire Zoo is closed by City or any third party for any reason ("Zoo Closure") for a period of 30 days or more, Operator may take any one or more of the following actions in its sole discretion: 1) reduce the level of Services as may be appropriate in connection with such Zoo Closure; 2) reduce the Annual Payment by \$25,000 for each 30 day period of the Zoo Closure, or 3) terminate the Agreement, collect the amounts set forth herein as payable upon termination and pursue any other legal or equitable remedies available to Operator.
- 12.4 Notwithstanding the foregoing, if the fire or other casualty or closure is determined to be caused primarily by the activities of the Operator it shall be the solely the City's determination whether to terminate the Agreement and whether to repair or restore the Zoo.

14. **LIENS.** The Operator shall use its best efforts to avoid the filing or establishment of any mechanic's liens or other liens against the VC or Amusement Park property for labor, materials or services furnished in connection with any additions, modifications, improvement, repairs, renewals or replacements made to either property. If a lien is filed with the City, Operator shall notify the City of its existence and shall have 60 days from the date notice is provided to the City to, in good faith, contest any such claim or lien filed or established and in such event may permit the items contested to remain undischarged and unsatisfied during the period of such contest. If, in the opinion of the City, the nonpayment of any such items subjects the property to any loss or forfeiture, the City may require the Operator to deposit in escrow with the City a sum of money, a bond, or an irrevocable letter of credit acceptable to the City equal to the amount of the lien. Following the 60-day period granted to Operator above, the City may use the escrow account to promptly pay all such unpaid items.

#### 15. **DEFAULT AND REMEDIES.**

- 15.1 Default by Operator. An "**Event of Default**" by Operator shall be deemed to have occurred upon the occurrence of any one or more of the following:

15.1.1 Failure to Pay. In the event that Operator fails to make any

payment to City as required in this Agreement, and such failure continues for a period of 30 days after receipt of written notice of such nonpayment.

15.1.2 Failure to Retain Insurance. In the event Operator fails to retain proper insurance as required herein, and such failure continues for a period of 15 days after receipt of written notice of such failure.

15.1.3 Failure to Obtain or Revocation of License. In the event that Operator fails to obtain or any permit or license necessary to carry on the Services under this Agreement or such permit or licenses are suspended or revoked, and such failure continues for a period of fifteen days after receipt of written notice of such failure.

15.1.4 Other Breaches. In the event that Operator breaches any obligation under this Agreement, other than those referred to in clauses (a) or (b) of this Section, and such breach continues for a period of 60 days after receipt of written notice of such breach.

15.1.5 Bankruptcy. In the event Operator files a voluntary petition in bankruptcy, insolvency or a petition for reorganization in any state or Federal court or a receiver is appointed for all or any substantial portion of Operator's property or an order or decree of bankruptcy, insolvency or reorganization issued, City may terminate this Agreement.

15.1.6 Involuntary Judgment. An order, judgment or decree shall be entered by any governmental body of competent jurisdiction appointing, without the application or consent of Operator, a custodian, receiver, trustee, liquidator, sequestrator or similar officer for Operator or for all or any substantial part of its property, or any substantial part of the property of Operator shall be sequestered, any such order, judgment or decree of appointment or sequestration shall remain in force undismissed, undischarged, unstayed and unvacated for a period of 60 days after its date of entry.

15.2 Default by City. An "**Event of Default**" by City shall be deemed to have occurred upon the occurrence of any one or more of the following:

14.2.1 In the event City fails to retain proper insurance, or to self insure, as provided herein, and such failure continues for a period of 30 days after receipt of written notice of such failure.

14.2.2 Breach. In the event that City breaches any obligation under this Agreement and such breach continues for a period of 60 days after receipt of written notice of such breach; however, breach by the City of its obligation referred to in Section 14.2.1 of this Section and Sections 2.1 or 3.1 shall constitute an event of default under this Agreement immediately without written notice or after the expiration of any cure period explicitly specified in those Sections.

### 15.3 Remedies.

15.3.1 Termination. The party claiming the occurrence of an Event of Default under this Agreement as defined in Sections 14.1 or 14.2 above may, in its sole discretion, elect to terminate this Agreement by providing notice of such termination to the other party. This Agreement shall be deemed to be terminated immediately upon receipt of such notice, or on such other date as may be set forth in the notice. Termination by the party is without prejudice to its right to recover damages, if legally recoverable on account of such breach.

15.3.2 Cumulative Remedies. No remedy herein conferred up on or reserved to City or Operator within this Agreement is intended to be exclusive of any available remedy or remedies, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Agreement or existing at law or in equity or by statute.

15.4 Waiver. No delay or omission to exercise any right or power occurring upon breach, default or termination shall impair any such right or power or shall be construed to be a waiver thereof. Any such right may be exercised from time to time and as often as may be deemed expedient. In the event any covenant, agreement, or representation contained in this Agreement is breached by either party and thereafter waived by the other party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other concurrent, previous, or subsequent breach or default hereunder.

## 16. MISCELLANEOUS.

16.1 Force Majeure. Neither party shall be considered in default in performance of any non-monetary obligation under this Agreement to the extent that performance of such obligation is prevented or delayed by any cause beyond

its reasonable control, including, without limitation, acts of God; acts or omissions of governmental authorities or the other party; strikes; lockouts or other industrial disturbances; acts of public enemies; wars; blockades; riots; disturbances; epidemics; floods; hurricanes; tornadoes; and any other similar acts, events, or omissions.

- 16.2 No Partnership. Neither Operator nor City is, nor shall either hold itself out to be, an employee, agent, subsidiary, affiliate or partner of the other party for any purpose, including reporting to any governmental authority, and neither party shall have the authority to bind the other party to any obligation. All employees of Operator or City shall remain employees of Operator or City, respectively, and under no circumstances shall any person employed by either Operator or City be deemed to be an employee of the other party.
- 16.3 Assignment. Neither Operator nor the City shall not have the right to assign, transfer or convey this Agreement, without the prior written consent of the other party hereto. Notwithstanding this provision, the City hereby understands and agrees that Operator may assign this Agreement to a third party that buys all of the membership interests of Operator or substantially all of the assets of Operator for the purpose of continuing Operator's business.
- 16.4 Attorney's Fees. If City or Operator commences or engages in any action by or against the other party arising out of or in connection with this Agreement, each party shall be responsible for payment of its own attorneys' fees and other costs incurred in connection with the action, preparation for such action, any appeals relating thereto and enforcing any judgments rendered in connection therewith.
- 16.5 Good Faith. Both parties shall cooperate in the implementation of the provisions of this Agreement in a spirit of good faith and fair dealing so as not to defeat the rights of the parties as set forth herein. Both parties further agree that any consent or approval required hereunder shall be given or withheld on a reasonable and timely basis unless otherwise stated to the contrary in this Agreement.
- 16.6 Notices. All notices, requests, demands and other communications that are required to be given under this Agreement shall be in writing and shall be deemed to have been duly delivered: (i) on the date of delivery if personally delivered; (ii) on the date of transmission with confirmed receipt by telephone if delivered by facsimile; or (iii) on the date on which return receipt

is signed or delivery is refused if dispatched by registered or certified first class mail, Federal Express or similar service, postage prepaid, return receipt requested, to the party to whom the same is to be given at the following address, and to such additional parties as may be requested in writing:

If to City, to: THE CITY OF SAINT PAUL  
Como Park Zoo and Conservatory  
Estabrook Drive  
Saint Paul, MN 55103  
Attn: Como Campus Manager  
Phone : (651) 487-8237  
Fax: (651) 487-8255

If to Operator, to: Zooper Food LLC /Como Amusement LLC  
1255 Trapp Road  
Eagan, MN 55121  
Phone: (651) 290-9864  
Fax: (651) 290-9442  
Attn: Glenn Baron, President

- 16.7 Governing Law. This Agreement shall be governed by, construed and enforced in accordance with the internal laws of the State of Minnesota, without regard to choice of law provisions and venue shall be in the district court of Ramsey County.
- 16.8 No Waiver. The making or failure to make any payments, take any action, or waive any rights shall not be deemed an amendment of this Agreement, nor consent to such action or to any future action or failure to act, unless the party required to so consent or act expressly agrees in writing.
- 16.9 Entire Agreement. This Agreement constitutes the entire Agreement of the parties and supersedes all prior or contemporaneous agreements, whether oral or written, between the parties. This Agreement may not be amended or modified except in a writing signed by all of the parties hereto.
- 16.10 Severability. If any paragraph, subparagraph, sentence, clause, phrase, or portion of this Agreement is, for any reason, held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the

remaining portions of this Agreement, provided that the substantial economic benefits of this Agreement and the intent of the parties is not frustrated thereby.

- 16.11 Captions. The captions in this Agreement are for convenience only and in no way define, limit or otherwise describe the scope or intent of this Agreement, or any provision hereof, or in any way affect the interpretation of this Agreement.
- 16.12 Further Acts. Each party agrees to perform any further acts and to execute, acknowledge and deliver any documents, which may be reasonably necessary to carry out the provisions of this Agreement.
- 16.13 Approvals. Consents and approvals required in this Agreement to be obtained from City or Operator shall be in writing and shall not be unreasonably withheld or delayed.
- 16.14 Amendments. Notwithstanding anything herein contained to the contrary, this Agreement may be terminated, and the provisions of this Agreement may be, in writing, by mutual consent of the parties.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the day and year first above written.

CITY:

OPERATOR:

By: \_\_\_\_\_  
Mayor

By: \_\_\_\_\_  
Glenn Baron, President

\_\_\_\_\_  
Director of Finance

Approved as to form:

\_\_\_\_\_  
Director of Parks and Recreation

\_\_\_\_\_  
Assistant City Attorney

DRAFT