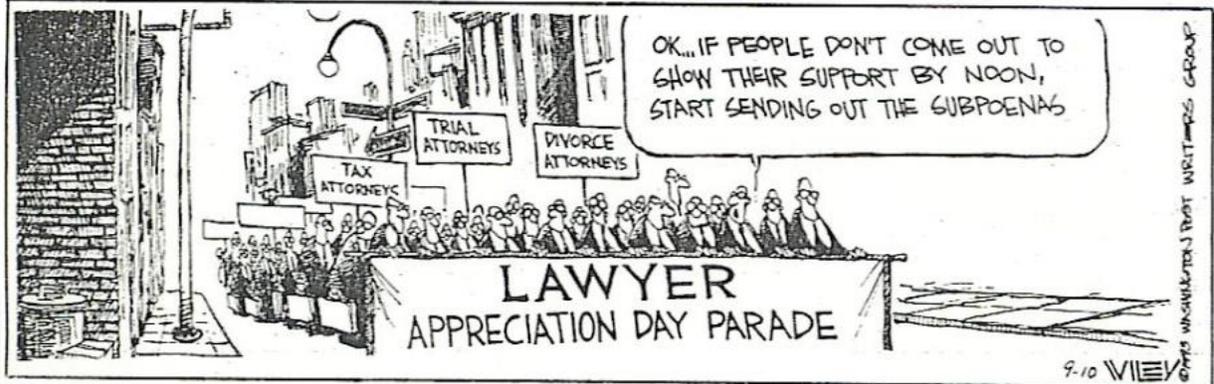


Life in the Big City

Enforcing City Contracts

Thursday, July 14, 2016; 11:00 AM—1:00 PM

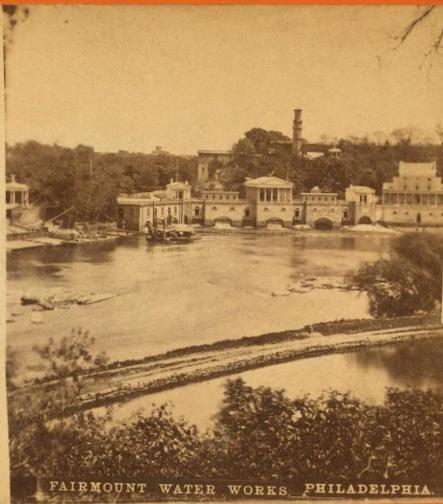
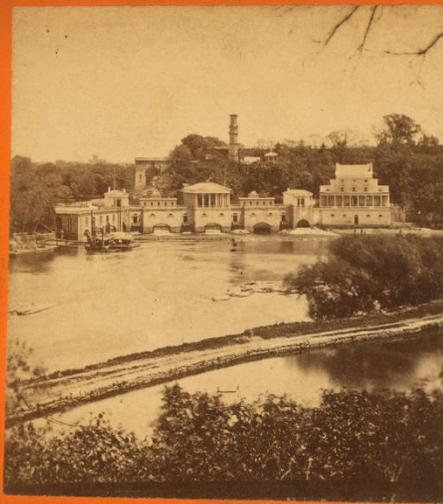
NON SEQUITUR







AMERICAN VIEWS.



FAIRMOUNT WATER WORKS PHILADELPHIA.

STANDARD SERIES.





RESTAURANT CONCESSION AGREEMENT

THIS RESTAURANT CONCESSION AGREEMENT (“Concession Agreement”), dated as of _____, 2005 (the **“Effective Date”**), is entered into between **THE CITY OF PHILADELPHIA**, a corporation and body politic existing under the laws of the Commonwealth of Pennsylvania (**“City”**), acting through its **FAIRMOUNT PARK COMMISSION (“Commission”)** and its **PROCUREMENT DEPARTMENT (“Department”)** and _____, a Pennsylvania limited liability company, (**“Licensee”**).

ARTICLE 1
BASIC INFORMATION; DEFINITIONS

Basic Information. Each reference in this Concession Agreement to any of the following terms shall incorporate the information set forth below for such term:

* * *

- (c) Minimum Fee: The Minimum Fee is fully set forth in **Schedule 1**, which is attached to and part of this Concession Agreement. The Minimum Fee shall be paid to Commission, as provided in **Section 4.1** below.

Definitions: Unless the context otherwise specifies or requires, the following terms shall have the meanings set forth below in this **Section 1.2**:

“**License Fee**” or “**License Fees**” means, collectively, the Minimum Fee, Percentage Fee and Additional Fees, if any.

“**Percentage Fee**” in each Year (defined below) of the Term means three percent (3%) of the annual Gross Sales (defined below) in the subject Year of the Term, if any.

LICENSE FEE

4.1 Minimum Fee.

(a) Licensee shall pay each month's installment of the Minimum Fee, in advance, beginning on the earlier of (i) the date on which Licensee first opens for business in the Licensed Space, or (ii) April 1, 2006 (the "Fee Commencement Date") and thereafter on or before the first (1st) day of each successive calendar month during the Term as further described in **Schedule 1** attached hereto, without setoff, counterclaim or deduction, unless otherwise expressly provided for herein. The Minimum Fee shall be prorated for partial months at the beginning and at the end of the Operation Term.

4.2 Percentage Fee. In addition to the Minimum Fee, Licensee shall, as set forth in Licensee's Proposal, pay to City during each Year a Percentage Fee in an amount equal to three percent (3%) of all Gross Sales, without setoff, counterclaim or deduction, unless otherwise expressly provided for herein:

(a) Commencement of Percentage Fee Payments; Monthly Statements of Gross Sales; Adjustment of Percentage Fee for Uncollected Sales. Licensee's obligation to pay a Percentage Fee during or with respect to any one Year shall first accrue on the third (3rd) anniversary of the Operation Term Commencement Date and shall be payable monthly thereafter within twenty (20) days following the end of the subject month.

Trash Removal.

(a) Storage. Licensee shall at all times place and store all trash, garbage and other refuse created by or in connection with its Business inside the Licensed Space in the area designated as “**Trash Storage Area**” in **Exhibit A-2**. In no event shall such trash, garbage or refuse be placed or stored in any area of the Licensed Space or Water Works other than the Trash Storage Area. Licensee is prohibited from placing and using dumpsters, bins or containers of any kind for the storage of such trash, garbage or refuse in the exterior of the Licensed Space.





DEFAULT; REMEDIES

20.1 Events of Default. Each of the following events shall constitute an “**Event of Default**” under this Concession Agreement:

(b) Payment Default. A default by Licensee in the payment when due of any License Fee or other sum payable under this Concession Agreement and the continuation of such default for a period of ten (10) days after written notice that the same is due; provided that, if Licensee has failed two (2) or more times in any twelve-month period to pay any License Fee or other sum within ten (10) days after the due date, no notice period shall thereafter be applicable;

(c) Performance Default. A default by Licensee in the performance of any of the other terms, covenants, agreements or conditions contained in this Concession Agreement and, if the default is curable, the continuation of such default for a period of thirty (30) days after notice by City or, if the default is of a nature as to require more than thirty (30) days to remedy, if Licensee fails to commence to cure such default within such 30-day period and/or fails to diligently pursue such cure to completion, but in no event shall such default continue more than ninety (90) days from the City’s notice;

20.2 City’s Remedies Upon an Event of Default.

(a) Cumulative Remedies. Upon the occurrence of any Event of Default set forth in Section 20.1, the City, at its sole option, may exercise any one or more of the following remedies:

[Termination]

[Confession of Judgment]

[Lots of other Fun Stuff]

30.07 No Waiver.

(a) The waiver by either party of any agreement, condition, or provision contained in this Concession Agreement shall not be deemed to be a waiver of any subsequent breach of the same or any other agreement, condition, or provision contained in this Concession Agreement, nor shall any custom or practice that may grow up, prevail, or arise between the parties in the administration of the terms of this Concession Agreement be construed to waive or to lessen the right of a party to insist upon the performance by the other in strict accordance with the terms of this Concession Agreement. The subsequent acceptance of License Fee by City shall not be deemed to be a waiver of any preceding breach by Licensee of any agreement, condition, or provision of this Concession Agreement, other than the failure of Licensee to pay the particular License Fee so accepted, regardless of City's knowledge of such preceding breach at the time of acceptance of such License Fee.

(b) The City's failure to respond orally or in writing to any request or offer from Licensee to modify or waive any of Licensee's obligations under this Concession Agreement does not constitute the City's consent to Licensee's request or offer. Licensee agrees it must strictly and promptly comply with its obligations under this Concession Agreement unless and until its request or offer to modify or waive any provision of this Concession Agreement is explicitly accepted in writing by the City.

[Also called “Integration Clause” or “Zipper Clause”]

30.14 Complete Agreement. This Concession Agreement, including the Addendum and Exhibits, if any, which are attached hereto and by this reference are incorporated herein, shall be considered to be the only agreement between the parties hereto. All negotiations, prior understandings, and oral agreements have been merged into and included herein, and shall not be effective for any purpose except as contained herein. There are no outstanding oral agreements between the parties hereto affecting this Concession Agreement, and this Concession Agreement supersedes and cancels any and all previous negotiations, arrangements, agreements and understandings, if any, between the parties hereto with respect to the subject matter hereof, and none of such matters shall be used to interpret or construe this Concession Agreement. There are no representations or warranties between the parties other than those contained in this Concession Agreement. No provision of this Concession Agreement may be amended or added to except by an agreement in writing signed by the parties hereto or their respective successors in interest and approval at the sole discretion of City and Commission.

[From Concession Agreement Schedule 1]

	YEAR	MINIMUM FEE	PERCENTAGE FEE
INITIAL 10 YEAR TERM	1	\$ 120,000	0%
	2	\$ 120,000	0%
	3	\$ 120,000	0%
	4	\$ 122,400	3%
	5	\$ 122,400	3%
	6	\$ 122,400	3%
	7	\$ 124,848	3%
	8	\$ 124,848	3%
	9	\$ 124,848	3%
	10	\$ 127,345	3%
FIRST 5 YEAR RENEWAL OPTION	11	\$ 127,345	3%
	12	\$ 127,345	3%
	13	\$ 129,892	3%
	14	\$ 129,892	3%
	15	\$ 129,892	3%
SECOND 5 YEAR RENEWAL OPTION	16	\$ 132,490	3%
	17	\$ 132,490	3%
	18	\$ 132,490	3%
	19	\$ 135,139	3%
	20	\$ 135,139	3%
THIRD 5 YEAR RENEWAL OPTION	21	\$ 135,139	3%
	22	\$ 137,842	3%
	23	\$ 137,842	3%
	24	\$ 137,842	3%
	25	\$ 140,599	3%

[Excerpt of letter from concessionaire as respondent to City's request for proposals. Letter was a supplement to concessionaire's proposal and was attached to the concession agreement and incorporated into it.]

QUESTION NUMBER ONE: CLARIFICATION OF OUR TEAM'S CONCESSION FEE PROPOSAL

The RFP states that the selected Concessionaire will be responsible for offsetting Fairmount Park's costs associated with the maintenance, repairs and security of the Water Works facility. The exact sum associated with facility maintenance, repairs and security was not disclosed.

In an effort to properly respond to this topic, our Team determined that we are willing to pay \$120,000 IN TOTAL annual guaranteed payment to cover the unknown maintenance, repairs and security costs. It is our intent that the remaining annual balance—once maintenance repairs and security costs are covered—will be paid to the Fairmount Park Commission as Concession Fee.

Commencing with the end of Year Three of our concession, we propose an additional payment of 3% of gross revenue to be paid to Fairmount Park. Based on an annual gross revenue of \$3,000,000, this will result in an additional \$90,000 per year above and beyond the guaranteed \$120,000. In addition, our annual guaranteed payment of \$120,000 will escalate 2% at the end of Year Three and will continue to do so at the end of every subsequent three year cycle.

How to Write and Send a Default Notice

1. In writing and clearly dated.
2. Correct addressee. See notice provision in contract.
3. Proper manner of delivery. Contract should specify when delivery occurs.
 - A. Often by certified mail, return receipt requested.
 - B. Within Philadelphia, courier service with delivery receipt.
 - C. Other methods. Fax? E-Mail?
4. Copies to all required parties. See notice provision in contract.
5. Identify the contract at issue.
6. Identify the obligation and the contract provision that imposes it. (Identify each breached obligation separately.)
7. Explain the failure or breach.
8. State the applicable cure period, if any, and the contract provision that gives it.
9. State the consequences of the party's failure to cure; namely, your client has remedies under the contract.
10. Confirm that each default is separate and distinct, and that each will give rise to your client's remedies.
11. State that your client does not waive any other defaults not mentioned in the letter and that your client reserves all its rights and remedies under the contract, at law, and in equity.
12. Issue for City of Philadelphia attorneys: Who to "cc" and all that implies?

SHELLEY R. SMITH
City Solicitor

LAWRENCE K. COPELAND
Senior Attorney
Tel. (215) 683-5039
Fax (215) 683-5069

May 24, 2013

VIA CERTIFIED MAIL WITH RETURN RECEIPT REQUESTED; AND VIA E-MAIL

Re: Concession Agreement dated _____, 2005 (the “Concession Agreement”), between the City of Philadelphia and _____
– Default Notice

Dear _____ :

This letter constitutes the City of Philadelphia’s notice of default under the Concession Agreement to _____, the Licensee under the Concession Agreement, as more fully set forth below. Unless defined otherwise in this letter, each capitalized term used in this letter has the meaning assigned to it in the Concession Agreement.

=====

2. **Failure to Pay Percentage Fee.** Since the third anniversary of the Operations Term, Concession Agreement Section 4.2(a) requires the Licensee to pay a Percentage Fee monthly to the City equal to 3% of the Licensee’s Gross Sales. The Percentage Fee is due 20 days following the end of each month. The Licensee has never paid the Percentage Fee and, therefore, has defaulted under Concession Agreement Section 4.2(a). If the Licensee fails to cure its default in payment of the Percentage Fee within 10 days following your receipt of this notice, the Licensee will have committed an Event of Default under Concession Agreement Section 20.1(a).

=====

3. Failure to Provide Gross Sales Statement. Also since the third anniversary of the Operations Term Commencement Date, Concession Agreement Section 4.2(a) requires the Licensee to provide the City a written statement of Licensee's Gross Sales simultaneously with Licensee's Percentage Fee payment. The Licensee is required to show in its Gross Sales statement the basis of the Licensee's Percentage Fee payment. The Licensee has not provided a Gross Sales statement to the City for any month since the third anniversary of the Operations Term Commencement Date and, therefore, has defaulted under Concession Agreement Section 4.2(a). If the Licensee fails to cure its default in providing all past due Gross Sales statements within 30 days following your receipt of this notice, the Licensee will have committed an Event of Default under Concession Agreement Section 20.1(b).

=====

4. Failure to Provide Annual Audit. Concession Agreement Section 4.3 requires the Licensee to cause its accountant to provide an Annual Audit to the City on or before 105 days following the end of each Year of the Term. Further, Section 4.3 requires that the Annual Audit be made by an independent certified public accountant and certify the Licensee's Gross Sales for the period covered by the Annual Audit. Under the Concession Agreement, a "Year" is a 12-month period that ends December 31. More than 105 days have passed since December 31, 2012, but the Licensee has not provided an Annual Audit as required by Section 4.3. In fact, the Licensee has never provided an Annual Audit to the City as required by Section 4.3 despite a Parks and Recreation Department official's requests that the Licensee do so.

The Licensee has defaulted under Concession Agreement 4.3 because it has failed to provide an Annual Audit to the City. If the Licensee fails to cure its defaults in providing the Annual Audit within 30 days following your receipt of this notice, the Licensee will have committed an Event of Default under Concession Agreement Section 20.1(b).

=====

The Licensee's defaults listed above are separate and distinct from each other, and each default, if not timely cured by the Licensee, will give rise to a separate and distinct Event of Default that enables the City to exercise all its rights and remedies under the Concession Agreement, at law, and in equity.

The City does not waive the Licensee's default of any provision of the Concession Agreement not addressed in this letter or any existing Events of Default by the Licensee. The City also does not waive any additional default by Licensee of a Concession Agreement provision that is mentioned in this letter, including but not limited to Licensee's continuing failure to pay utility invoices, its continuing failure to pay the Percentage Fee, or its continuing failure to provide Gross Sales statements and the Annual Audit.

The City reserves all its rights and remedies against the Licensee under the Concession Agreement, at law, and in equity.

Sincerely,

Lawrence K. Copeland

Attachments (5)

cc: , Deputy Mayor

, Chief Integrity Officer

How to Write and Send a “Termination” Notice

Note: Notice does not necessarily have to be for termination. Could be for exercise of other remedies under contract, at law, or in equity.

1. In writing and clearly dated.
2. Correct addressee. See notice provision in contract.
3. Proper manner of delivery. Contract should specify when delivery occurs.
4. Copies to all required parties.
5. Identify the contract at issue.
6. Refer to earlier correspondence (lays out a clear trail). Consider whether to include other information already set forth in default letter.
 - A. Identify the obligation and the contract provision that imposes it. (Identify each breached obligation separately.)
 - B. Explain the failure or breach.
 - C. State the applicable cure period, if any, and the contract provision that gives it.
 - D. State the consequences of the party’s failure to cure; namely, your client has remedies under the contract.
 - E. Confirm that each default is separate and distinct, and that each will give rise to your client’s remedies.
7. State what contract obligates the party to do on or before termination – remove personal property and fixtures; repairs; return confidential materials to City; cease work; report on work up to date of termination; untangle online products; etc.
8. State that your client does not waive any other defaults not mentioned in the letter and that your client reserves all its rights and remedies under the contract, at law, and in equity.
9. Issue for City of Philadelphia attorneys: Who to “cc” and all that implies?

SHELLEY R. SMITH
City Solicitor

LAWRENCE K. COPELAND
Senior Attorney
Tel. (215) 683-5039
Fax (215) 683-5069

February 11, 2014

VIA PERSONAL DELIVERY WITH DELIVERY RECEIPT; AND VIA E-MAIL

Re: Concession Agreement dated September 22, 2005 (the “Concession Agreement”), between the City of Philadelphia and
– Events of Default

Dear _____ :

I am writing on behalf of the City of Philadelphia to provide notice under the Concession Agreement. Pursuant to Concession Agreement Section 20.2(a)(ii), by this letter the City terminates the Concession Agreement and the Term effective 5:00 PM, Friday, February 21, 2014.

I use capitalized terms in this letter as defined in the Concession Agreement.

In my letter to you of January 31, 2014, I recounted more than a year of the City’s work to get the Licensee to cure its Events of Default. In that letter I also set forth the City’s demand that the Licensee cure its Events of Default by 5:00 PM yesterday, February 10, 2013. City officials had hoped that my letter would prompt the Licensee to finally cure all its Events of Default, but the Licensee did not cure them.

In accordance with Concession Agreement Section 22.1, the Licensee is obligated to leave the Licensed Space and turn it over to the City in good condition and repair, except ordinary wear and tear, Casualty, and condemnation. Under Concession Agreement Section 11.1(d), the Licensee is obligated to remove all of the Licensee’s Property from the Licensed Space and to repair all damage occasioned by removal of the Licensee’s Property.

, Esquire
January 31, 2014
Page 2 of 2

Under the Concession Agreement, the City has additional rights and remedies it may choose to exercise against the Licensee. The City reserves its additional rights and remedies against the Licensee under the Concession Agreement as well as those rights and remedies the City has at law and in equity.

Sincerely,

Lawrence K. Copeland

cc:

VIA PERSONAL DELIVERY WITH DELIVERY RECEIPT OBTAINED; AND VIA E-MAIL

VIA E-MAIL AND HARD COPY BY INTEROFFICE MAIL

Mayor Michael A. Nutter
Shelley R. Smith, City Solicitor

Hope Caldwell, Chief Integrity Officer

You told a lot of really great lawyer jokes at the party. My favorite was after everyone left and you said to me "But, seriously, I have this little problem I was wondering if you could help me with..."



ROTTEN CARDS