



CITY OF MARTINEZ

**CITY COUNCIL AGENDA
March 18, 2015**

TO: Mayor and City Council
FROM: Michael Chandler, Senior Management Analyst
Patty Lorick, Recreation Supervisor
SUBJECT: Concession Operator's Agreement
DATE: March 11, 2015

RECOMMENDATION:

Approve a motion authorizing the Acting City Manager to execute a Concession Operator's Agreement with Marty Ochoa.

BACKGROUND:

The City has maintained an agreement with concessionaire Marty Ochoa for his provision of concession services at the Waterfront Park/Joe DiMaggio Ballfield Complex ("Waterfront Park") for the past 21 years from April 1st to October 31st. During this time, the general public has enjoyed his services for reasonably-priced food and beverage items. Mr. Ochoa has also supplied and maintained all the major equipment in the concession stand. The parties have a mutual interest in continuing the arrangement for concessionaire services on terms generally consistent with the existing agreement. Additionally, the parties have interest in providing Mr. Ochoa the right of first refusal to operate the City's concession stand at the Rankin Aquatic Center.

A routine survey of other local municipalities regarding their arrangements for concessions yielded limited results. Many cities no longer use concessionaires and rely instead on vending machines for these services. The City's terms are comparable with those agencies that indicated they engage a concessionaire.

Key terms of the attached Concession Operator's Agreement include the following:

- Initial term of 3 years (May 1, 2015 to April 30, 2018), with 2 one-year options to extend upon mutual written consent.
- Waterfront Park primary season April 1st to October 31st; Rankin Aquatic Center primary season June 1st to September 15th.
- Compensation to the City for provision of concessionaire services:
 - Greater of \$375/month or 9% of gross sales at Waterfront Park for initial term
 - Greater of \$200/month or 9% of gross sales at Rankin Aquatic Center for initial term
 - Increase in percentage of gross sales to 9.5% for any extended term(s)

- Food concessions at Rankin Aquatic Center limited to pre-packaged goods only.
- Concessionaire has maintenance responsibility for any City concession stand it operates.
- Concessionaire is responsible for utilities at the Waterfront Park stand from April 1st to October 31st (not applicable to Rankin Aquatic Center as utility expenses related to that operation will be minimal).
- Public liability insurance will be increased from \$1M to the current standard of \$2M combined per occurrence.
- Alcohol sales limited to Waterfront Park and subject to numerous conditions.
- Concessionaire precluded from selling alcohol during any professional or semi-professional sporting events held at fields at Waterfront Park.

FISCAL IMPACT:

Revenue from the Agreement goes to the General Fund. Based on historic trend, the projected revenue for 7 months of operating the Waterfront Park concession stand is \$6,000. Due to anticipated construction of Waterfront Park later this year, however, the season is expected to be shortened by a month or two and revenue is expected to decline accordingly to approximately \$4,000. Waterfront Park is not slated for completion until late 2016 as such, no revenue from the concession stand's operation for calendar 2016 is anticipated at this time.

Construction of the Rankin Aquatic Center concession stand has not been completed and therefore no historic revenue data is available. Based on the minimum revenue specified in the Agreement, the City can expect at least \$700 per season for a projected 3 ½ months of operating the Rankin Aquatic Center concession stand at a rate of \$200 per month (with the September partial month's rent prorated) if the Concessionaire exercises his right of first refusal to operate.

ACTION:

Motion authorizing the Acting City Manager to execute a Concession Operator's Agreement with Marty Ochoa.

Attachments:
Concession Operator's Agreement

APPROVED BY:


Acting City Manager

**CITY OF MARTINEZ
CONCESSION OPERATORS AGREEMENT**

This agreement is entered into on _____, 2015 by and between the City of Martinez, a Municipal Corporation (hereinafter called "City") and Marty Ochoa, a sole proprietorship (hereinafter called "Concessionaire").

RECITALS

- A. The City owns a municipal concession stand in the Martinez Waterfront/Joe DiMaggio Ballfield complex ("City Concession Stand"). City desires to make available food and beverage services during certain events to be provided through the Concessionaire as set forth herein.
- B. The Concessionaire desires to provide approved concession services with reasonably priced food and beverage service to the general public as approved by the City and the County Health Department and is desirous of having the right to the exclusive use of the City's concession stand for its operations at the events and for the hours set forth in this Agreement.
- C. In addition, the City owns a municipal concession stand at Rankin Aquatic Center ("Rankin Aquatic Concession Stand"). The City and Concessionaire desire to provide for the potential future operation of the Rankin Aquatic Concession Stand by Concessionaire, subject to the terms and conditions hereof.

NOW, THEREFORE, FOR THE FOLLOWING PROMISES, CONSIDERATIONS AND COVENANTS, THE PARTIES AGREE AS FOLLOWS:

- 1. **TERM:** The Term of this Agreement shall be 36 months, commencing on May 1, 2015 and ending on April 30, 2018.
 - a) This Agreement may be extended for two (2) one-year options upon the mutual written agreement of the parties hereto.
 - b) This Agreement may be terminated by either party for any reason by giving the other party (60) days advance, written notice of the intention to terminate this Agreement.
- 2. **USE:**
 - a) Concessionaire shall have exclusive use of the City Concession Stand during the events and for the operating hours set forth in this Agreement.
 - b) Concessionaire shall have the right of first refusal to the exclusive operation of the Rankin Aquatic Concession Stand. In the event that City determines that it wishes to contract for operation of the Rankin Aquatic Concession

Stand, City will notify Concessionaire in writing. Within fifteen (15) calendar days, Concessionaire shall notify the City in writing if Concessionaire intends to exercise his right of first refusal to operate. In the event that the City has not received Concessionaire's written exercise of the right of first refusal within said fifteen (15) day calendar period, Concessionaire shall have waived his right to the exclusive operation of the Rankin Aquatic Concession Stand and City may offer the operation of said stand to other contractors. In the event that Concessionaire does notify the City of its exercise of the right of first refusal, Concessionaire's food items at the Rankin Aquatic Concession Stand shall be limited to the sale of pre-packaged goods.

3. Maintenance Responsibility:

- a) City Concession Stand: For and in consideration of the exclusive use of the City Concession Stand, for the events and hours set forth herein during the Term hereof, in addition to the Compensation set forth in Section 7, below, Concessionaire shall have the sole responsibility for the maintenance of the following portions of the City Concession Stand: all interior surfaces and improvements, the service area, the storage cabinets, sinks and appliances, including the refrigerator unit. Concessionaire shall maintain same in a clean, safe and operable condition at all times. Concessionaire shall be responsible for all clean up of the area surrounding the City Concession Stand each day of operation and shall ensure that the area is clean of all debris and that such debris is placed in appropriate trash receptacles at the close of each business day.
- b) Rankin Aquatic Concession Stand: Upon the exercise of the right of first refusal, for and in consideration of the exclusive use of the Rankin Aquatic Concession Stand, for the events and hours set forth herein during the Term hereof, in addition to the Compensation set forth in Section 7, below, Concessionaire shall have the sole responsibility for the maintenance of the following portions of the Rankin Aquatic Concession Stand: all interior surfaces and improvements, the service area, the storage cabinets, sinks and appliances, including the refrigerator unit. Concessionaire shall maintain same in a clean, safe and operable condition at all times. Concessionaire shall be responsible for all clean up of the area surrounding the Rankin Aquatic Concession Stand each day of operation and shall ensure that the area is clean of all debris and that such debris is placed in appropriate trash receptacles at the close of each business day.

4. EVENTS AND OPERATING HOURS:

- a) City Concession Stand: City shall provide Concessionaire detailed programming hours predicated on seasonal league and tournament participation levels as identified by the City at the playing fields located in

Waterfront Park during the primary season of April 1st to October 31st. Concessionaire is obligated to operate only those hours specified by the City. Maximum daily operation shall be restricted to 8 a.m. – dusk on each day of play identified by the City. City may at some time during the Term of this Agreement, enter into a separate agreement for the use of the playing fields located at Waterfront Park by a professional or semi-professional sports team or teams. Nothing in this agreement entitles or shall be construed to entitle Concessionaire to provide alcohol sales as part of its concession services at the City Concession Stand during any professional or semi-professional sporting events held at any of the fields at Waterfront Park, it being expressly understood by the Parties hereto, that the City will enter into a separate agreement relating to the provision of concession services during any such professional or semi-professional sporting events.

- b) Rankin Aquatic Concession Stand: In the event that the option for the Rankin Aquatic Concession Stand is exercised, the operation of said stand shall occur only during the primary pool season of approximately June 1st to September 15th. City shall provide Concessionaire detailed programming hours predicated on pool operation hours and programmed activities. Concessionaire is obligated to operate only those hours specified by the City.

5. SECURITY DEPOSIT: It is understood that upon entering this Agreement, Concessionaire shall have provided the City a One Thousand Five Hundred dollar (\$1,500.00) cash deposit to insure maintenance of the maintenance and good condition of all interior facilities as set forth in Section 3, above and the payment of all Compensation as set forth herein. Said deposit shall be refundable, less any amounts incurred by the City to replace or repair the facilities identified in paragraph 3, pay any and all Compensation and Utility Charges due and unpaid as of the date of termination hereof. All charges applied against this deposit shall be detailed to the Concessionaire in writing after the facility has been inspected at the end of the Term or upon earlier termination hereof. Any balance of the deposit owed to the Concessionaire shall be paid by the City to Concessionaire within 30 days after termination of this Agreement. Interest earned on the deposit shall accrue to the benefit of the City.

6. UTILITIES: City shall, at its cost, provide water, sewer and garbage disposal for the Concessionaire's operations. Concessionaire shall provide payment for all gas and electricity consumption from April through October of each year ("Utility Charges"). Cost of transferring billing or separating metering shall be paid by Concessionaire.

7. COMPENSATION: Concessionaire agrees to compensate the City during each month of Concessionaires operation at the City Concession Stand a season of between April 1 and October 31 at a rate of \$375 per month or 9% of gross sales at the City Concession Stand during the previous month, whichever is greater. In the event that the option for the Rankin Aquatic Concession Stand is exercised, Concessionaire agrees to compensate City at an additional rate of \$200 per month or 9% of gross sales at the Rankin Aquatic Concession Stand during the previous month, whichever is greater.

Payment is due in full on or before the 10th day of the month following each month of Concessionaire's operation during the Term hereof. Concessionaire shall record each sale by way of a cash register which numerically counts each transaction and records same on a continuous tape. Concessionaire shall provide City with a detailed daily gross proceeds sheet including a copy of the cash register tape, with each payment. In the event that the parties agree to extend the Term of this Agreement in accordance with the provisions of paragraph 1 hereof, Concessionaire agrees to compensate the City for the City Concession Stand at the rate of \$375 per month or 9.5% of gross sales at the City Concession Stand, whichever is greater, and at the rate of \$200 per month or 9.5% of gross sales at the Rankin Aquatic Concession Stand, whichever is greater, during each month of operation during the extended Term.

8. INSURANCE: Without limiting Concessionaire's indemnification provided hereunder, Concessionaire shall take out and maintain at all times during the Term of this Agreement, the following policies of insurance with a Best rating of no less than A:VII.

(a) WORKERS COMPENSATION

Workers' Compensation insurance to cover its employees as required by the Labor Code of the State of California for all of Concessionaire's employees, agents or volunteers. All such Workers' Compensation policies shall be endorsed with the provision that it will not be canceled without first giving thirty (30) days prior notice to the City.

All such Workers' Compensation insurance shall include the following language: "All rights of subrogation are hereby waived against the City, its officers and employees when acting within the scope of their appointment or employment."

(b) GENERAL LIABILITY INSURANCE

Commercial general liability insurance, written on an occurrence basis, including personal injury and property damage insurance for all activities of Concessionaire arising out of or in connection with this Agreement, written on a commercial general liability form including, but not limited to, Broad Form Property Damage, blanket contractual, completed operations, cross liability, x, c, u hazards, subcontractors named as additional insured (inapplicable if no subcontractors or sub-consultants), vehicle coverage, products liability and employers non-ownership liability coverage, and including coverage for alcohol sales, in an amount no less than \$2 million dollars combined, single limit personal injury and property damage for each occurrence. The commercial general liability policy shall be endorsed with the following language:

- i) The CITY OF MARTINEZ is named as an additional insured for all liability arising out of the operations by or on behalf of the named insured, and this policy protects the additional insured, its officials, officers, agents and employees against liability for personal and bodily

injuries, deaths or property damage or destruction arising in any respect, directly or indirectly in the performance of this Agreement.

ii) The inclusion of more than one insured shall not operate to impair the rights of one insured against another insured, and the coverages afforded shall apply as though separate policies had been issued to each insured.

iii) The insurance provided herein is primary and no insurance held or owned by the CITY OF MARTINEZ shall be called upon to contribute to a loss.

iv) The coverage provided by this policy shall not be canceled without thirty (30) days prior written notice given to the CITY OF MARTINEZ.

(c) REQUIRED DOCUMENTATION

Concessionaire shall submit to City certificates and endorsements in a form acceptable to the City evidencing its required insurances and signed by the insurance agent and companies named. Any deductible or self-insured retentions must be declared to and approved by City. At the option of City, insurer shall reduce or eliminate such deductible or self-insured retention as respects City, its officers and employees or Concessionaire shall procure a bond guaranteeing payment of losses and related investigations, claims, administration and defense expenses.

9. LICENSING: Concessionaire shall acquire the appropriate business license(s) through the City. Concessionaire shall provide the required Contra Costa County Health inspection for the facility operation(s), which must be issued in Concessionaire's own name). Copies of all required licenses as set forth in this Agreement shall be provided by Concessionaire to the City prior to the effective date of this Agreement. In no event shall Concessionaire commence operation at the City Concession Stand or the Rankin Aquatic Concession Stand prior to the issuance of all licenses required herein.

10. MENU/NON-FOOD SALES: Concessionaire shall provide the City with a complete list of all food and beverage items for sale and a complete price list. All items for sale and the prices to be charged therefore must be approved, in advance in writing by the City. Any menu additions or pricing changes during the Term hereof, must also be approved in writing in advance by the City. Non-food sale items may be sold under the terms and conditions of this Agreement without prior approval of stock and pricing by City. The City reserves the rights to sell non-food souvenirs or to contract for non-food sales to other recognized groups or individuals in the area of the City Concession Stand or the Rankin Aquatic Concession Stand at any time during the Term hereof.

11. ALCOHOL SALES: The privilege of conducting the sale of alcohol by Concessionaire at the City Concession Stand shall be subject to the sole, unfettered discretion of the City Council. The City Council may, at any time during the Term hereof, approve, approve with specific conditions, deny or revoke the approval of the sale of alcohol by Concessionaire at the City Concession Stand. In this regard, Concessionaire understands and agrees that the approval and execution of this Agreement

in no way guarantees the approval of the sale of alcohol. In the event that City approves of the sale of alcohol by Concessionaire at the City Concession Stand, the following conditions shall be implemented:

- a) Concessionaire must secure an appropriate license issued by the California Department of Alcoholic Beverage Control to sell or distribute alcohol of any kind at the City Concession Stand.
- b) Alcohol sales will be restricted to beer only.
- c) Concessionaire shall provide/maintain on file with City a Five Hundred Dollar (\$500.00) performance bond to insure compliance with all City and State alcoholic beverage sales regulations. Any violation will result in forfeiture of all bond amounts. Any interest accrued on this bond shall benefit the City.
- d) Concessionaire shall not sell alcohol when organized youth programs are in session at the ball fields. The City shall provide the concessionaire a schedule of all youth activities.
- e) The hours of alcohol sales shall be restricted to Monday through Friday 5:00 p.m. to dusk and Saturdays/Sundays 10:30 a.m. to dusk for adult league and tournament activities as well as pre-arranged special events.
- f) The City reserves the right to terminate Concessionaires privilege to sell alcoholic beverages at any time during the term of this Agreement for any reason or no reason whatsoever.

12. REPAIR AND REPLACEMENT: City agrees to repair or replace, at its sole discretion, any equipment, structural defect or landscaping which is damaged or becomes inoperable due to normal wear and tear. However, whether such repairs or replacement are to occur is left solely within the sole unfettered discretion of the City, based on economic and all other considerations; and the parties acknowledge that in the event City declines to repair or replace said items, use of the facility or any of its improvements or appliances becomes damaged, inoperable or falls into a state of disrepair, City may, upon such an eventuality, immediately terminate this Agreement without advance notice to the Concessionaire.

13. IMPROVEMENTS: Any permanent building improvement selected by Concessionaire shall require the advance written approval of the City which may be withheld for any reason or no reason whatsoever. Any persons performing any work on the City Concession stand or the Rankin Aquatic Concession Stand shall be appropriately licensed, shall provide performance and payment bonds in an amount determined by the City and shall provide insurance acceptable to the City naming the City as an additional insured. All improvements shall be insured in amounts and under terms satisfactory to City.

Failure to comply with any provision of this Paragraph 13 will subject any improvement installed by Concessionaire to removal at Concessionaire's cost.

14. WARRANTIES: Concessionaire warrants it possesses or will possess the financial resources to discharge each and every condition and covenant it has agreed to

perform herein. Concessionaire further warrants that the undersigned possesses the full and unfettered authority to enter into and execute this Agreement

15. RELATIONSHIP OF PARTIES: Concessionaire is an independent contractor operating and having control of his/her work and the manner in which it is performed. Concessionaire is not considered to be an officer, employee, or an agent of City and no joint venture or other business relationship between City and Concessionaire is created hereby. Concessionaire shall not have any power to bind or commit the City to any decision or course of action and shall not represent to any person or party that they are acting as agent for or have the power to bind the City. Further, no provision shall be made by City for the withholding of income or sales taxes for the State of California or the Federal Government. Concessionaire shall be solely responsible for the reporting of income and sales for taxable purposes.

16. NO LIABILITY: The City shall not be liable to Concessionaire or any of its staff for any claim, damage or injury of any sort as a result of City's failure to perform any portion of this Agreement.

17. INDEMNITY: Concessionaire assumes all responsibility for damages to property or injury or death to persons caused by the negligent performance errors or omissions of Concessionaire and/or its agents or employees. To the extent permitted by law, Concessionaire shall indemnify, hold harmless, release and defend City, its officials, officers, employees and agents (City Indemnitees) from and against any and all actions, claims, demands, damages, disability, losses, failure to comply with any current or prospective laws, and expenses including attorneys' fees and other defense costs or liabilities of any nature that may be asserted by any person or entity including Concessionaire from any cause whatsoever including another's concurrent negligence arising out of or in any way connected with the activities of Concessionaire, its employees and agents hereunder and of the condition of City Concession Stand or the Rankin Aquatic Concession Stand during Concessionaire's use thereof, excepting only liability arising out of the sole active negligence or willful misconduct of City

This indemnification obligation is not limited in any way by any limitation on the amount or type of damages or compensation payable by or for Concessionaire under Workers' Compensation, disability or other employee benefits acts, acceptance of insurance certificates and endorsements required under this Agreement, or the terms, applicability or limitations of any insurance held by Concessionaire. This indemnification shall survive termination of this Agreement for any reason.

18. ASSIGNMENT/TRANSFER: Concessionaire shall not voluntarily or involuntarily transfer, sell, assign or dispose of the privileges set forth in this Agreement without the prior written approval of City. In the case of a proposed sale or transfer of the rights and privileges granted under this Agreement, Concessionaire shall notify the City in writing, at least ninety (90) days prior to any prospective sale or transfer. Within said 90 day period, City may make any and all desired inquiries into the qualifications of the prospective transferee and Concessionaire shall assist City in any such inquiry. City

shall have the right in its sole and absolute discretion to approve or disapprove of the transfer of this Agreement to any prospective transferee.

19. NOTICES: Except as otherwise specifically provided in this Agreement, any notice, submittal or communication required or permitted to be served on a party, may be served by personal delivery to the person or the office of the person identified below, or by overnight delivery service. Service may also be made by mail, by placing first-class postage, and addressed as indicated below, and depositing in the United States mail to:

CITY:
Michael Chandler
Senior Management Analyst
City of Martinez
525 Henrietta Street
Martinez, CA 94553

CONCESSIONAIRE:
Marty Ochoa
1170 Veale St.
Martinez, CA 94553

20. SUCCESSORS AND ASSIGNS: City and Concessionaire each binds itself, its partners, successors, legal representatives and assigns to the other party to this Agreement and to the partners, successors, legal representatives and assigns of such other party in respect of all promises and agreements contained herein.

21. ENTIRE AGREEMENT: This Agreement is the entire Agreement between the parties.

22. MODIFICATION: The Agreement shall not be modified except in writing executed by all parties.

23. NON-DISCRIMINATION: Concessionaire shall comply with all Federal, State and Local laws, statutes, ordinances, rules and regulations, and the orders and decrees of any court or administrative bodies or tribunals in any manner affecting the performance of this Agreement, including without limitation laws requiring licensing and non-discrimination in employment because of race, creed, color, sex, age, marital status, physical or mental disability, national origin or other prohibited bases.

24. TIME OF ESSENCE: Time is of the essence in the completion of the work Concessionaire is required to perform hereunder and in each of the provisions of this Agreement.

25. GOVERNING LAW: This Agreement shall be governed by the laws of the State of California. Venue shall be in the County of Contra Costa.

26. FINAL EXPRESSION: This writing is intended both as the final expression of the Agreement between the parties hereto with respect to included terms and a complete and exclusive statement of the terms of the Agreement, pursuant to Code of Civil Procedure, section 1856. No modification hereof shall be effective unless and until

such modification is evidenced by a writing signed by all parties to this Agreement.

27. ASSURANCE OF PERFORMANCE: Each party to this Agreement undertakes the obligation that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party, the other may in writing demand adequate assurance of due performance and until such assurance is received may, if commercially reasonable, suspend any performance for which the agreed return has not been received. After receipt of a demand for assurance, either party's failure to provide within a reasonable time but not exceeding thirty (30) days, such assurance of due performance as is adequate under the circumstances is a repudiation of this Agreement by that party. Acceptance of any improper delivery of service or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

Except as provided herein, Concessionaire shall retain the exclusive authority to determine its policies, programs and rules.

CONCESSIONAIRE:

CITY OF MARTINEZ

BY: _____
Marty Ochoa

BY: _____
Acting City Manager

DATE: _____

DATE: _____