MEMORANDUM

Date: December 21, 2018

To: Charlie Hunsicker, Director, Parks and Natural Resources Department

Through: Mitchell O. Palmer, County Attorney

From: Alexandria C. Nicodemi, Assistant County Attorney

RE: Coquina Beach Concession Agreement; CAO Matter No. 2018-0366

This memorandum is in response to the above referenced Request for Legal Services ("RLS") in which you asked this office to draft a Second Amendment ("Second Amendment") to the Amended and Restated Franchise License Agreement between Manatee County and United Park Services, Inc. for the Concessions at Coquina Beach ("Restated Agreement"). This Second Amendment is drafted in response to RLS 2018-0281 in which this office advised that an amendment to the Restated Agreement will serve to reconcile any discrepancies in expenditures between both parties of the Restated Agreement. Per your request, I have drafted a Second Amendment to the Restated Agreement. Based on my review, I have made the appropriate edits so that it is in legally sufficient form. (See Attached).

Please provide the Manatee County Clerk of the Circuit Court’s Internal Auditing Department a copy of this Second Amendment to ensure all concerns have been properly addressed before presenting it to the Board of County Commissioners for consideration. The nature of this Second Amendment is such that it must go to the Board of County Commissioners for approval despite calling for the purchasing official’s signature.

This completes the response to your Request for Legal Services. If you have any further questions, comments, or concerns, please feel free to contact me.

Copies to: Ed Hunzeker, County Administrator
Dan Schlandt, Deputy County Administrator
Cheri Coryea, Deputy County Administrator
Debbie Voorhees, Contract Manager, Parks and Natural Resources Department

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* Board Certified in Construction Law
** Board Certified in City, County, & Local Government Law
SECOND AMENDMENT TO THE AMENDED AND REINSTATED
FRANCHISE LICENSE AGREEMENT
between
MANATEE COUNTY
and
UNITED PARK SERVICES, INC.
for
CONCESSIONS AT COUNTY FACILITIES AT COQUINA BEACH

This Second Amendment to the Amended and Reinstated Franchise License Agreement, hereinafter referred to as “Second Amendment”, is made and entered into as of __________, 2019, by and between MANATEE COUNTY, a political subdivision of the State of Florida, hereinafter referred to as “COUNTY,” and UNITED PARK SERVICES, INC., a Florida corporation, hereinafter referred to as “LICENSEE.”

WHEREAS, pursuant to the authority set forth in Section 125.01, Florida Statutes, the COUNTY owns concession facilities at Coquina Beach, 2650 Gulf Boulevard South, Bradenton Beach, Florida; and

WHEREAS, the COUNTY has solicited competitive proposals for the operation of concession services pursuant to Manatee County Request for Proposal No. 10-0620MA; and

WHEREAS, as a result of said Request for Proposal, the parties entered into a Franchise License Agreement for Concessions at County Facilities at Coquina Beach, dated June 20, 2010, which was amended and restated by the Amended and Reinstated Franchise License Agreement, dated March 1, 2017, as amended by the First Amendment to the Reinstated Agreement, dated June 20, 2017 (collectively, the “Agreement”); and

WHEREAS, the COUNTY and LICENSEE now wish to enter into this Second Amendment to reconcile past expenditures and capital improvements.

NOW, THEREFORE, in consideration of the mutual covenants, provisions, terms, promises, and conditions contained herein, the parties agree as follows:

A. Amendment and Restatement of Article 5. Article 5 of the Agreement is hereby amended and restated in its entirety to read as follows:

ARTICLE 5: MAINTENANCE OF RECORDS; REPORTS, AUDITS; LICENSES

5.1 LICENSEE shall maintain records, accounts, property records, and personnel records in accordance with generally accepted accounting principles, as deemed necessary by COUNTY to ensure proper accounting of funds and compliance with the provisions of this Agreement and provide reporting thereof to the COUNTY upon request. LICENSEE shall maintain records of all monies collected by LICENSEE in its operations under this Agreement.
5.2 LICENSEE shall provide a monthly report of revenue with gross receipts, in a form acceptable to the COUNTY. The report shall be applicable to the month for which payment is being made in accordance with the established due date. This report shall be signed by the Treasurer, President or CEO of LICENSEE certifying the accuracy of the report and gross receipts.

5.3 LICENSEE shall, at its own expense, obtain an annual audit of its financial statements, including an annual Balance Sheet and Statement of Income (P & L Report), related to its management of COUNTY Properties under this Agreement. As a part of this audit, an independent accountant shall attest to the accuracy of financial reports and subsequent gross receipts per month arising from LICENSEE'S operations. This audit report shall be submitted to the COUNTY by June 1st of each calendar year during the term and within ninety (90) calendar days of the termination of this Agreement. The term "audit" shall have the same meaning as that given to it in the Generally Accepted Auditing Standards promulgated by the Auditing Standards Board of the American Institute of Certified Public Accountants.

5.4 The term "gross receipts" as used in this Agreement shall mean all monies paid or payable to or considerations of determinable value received by the LICENSEE for sales made, transactions had, or for services rendered from all sources in the operation of the concession under this Agreement regardless of when or where the order is received or the goods delivered or services rendered, whether paid or unpaid, whether for cash or on a credit basis, or in consideration of any other thing of value; provided, however, that any sales taxes imposed by law directly payable by the LICENSEE to a taxing authority, sales refunds, and discounts/comps are excluded therefrom.

5.5 Upon request by COUNTY, LICENSEE shall provide COUNTY all information, reports, records and documents required by this Agreement. Inspection or copying of such information, reports, records and documents will occur during normal business hours, and as often as COUNTY may deem necessary. COUNTY shall have the right to obtain and inspect any audit pertaining to the performance of this Agreement or LICENSEE made by any local, state or federal agency. To the extent such materials are in the possession of a third party, LICENSEE must obtain and provide a copy of said audit to COUNTY, or certify in writing to COUNTY why it was unable to do so. LICENSEE shall retain all records and supporting documents related to this Agreement in accordance with all applicable laws, rules and regulations, and, at a minimum, retain all records and supporting documents related to this Agreement, except duplicate copies or drafts, for at least three (3) years after the termination date.

5.6 LICENSEE shall obtain any licenses required for its operations and maintain full compliance with any licensure requirements. Copies of reports provided to or by any licensing or regulatory agency shall be forwarded to COUNTY within ten (10) days of receipt by LICENSEE. LICENSEE shall immediately notify COUNTY if the required licenses of any of its principles or agents working on this Agreement are terminated, suspended, revoked or are otherwise invalid and/or are no longer in good standing.

5.7 The LICENSEE'S performance shall be reviewed at least annually by the COUNTY and a Vendor Performance Report of the review shall be completed and provided to LICENSEE. Any operational or compliance deficiencies shall be noted in the report and promptly remedied by LICENSEE. As part of the annual review, LICENSEE and COUNTY shall discuss any operational, policy or service modifications that would enhance the benefit and value of the
concession to the public. LICENSEE must obtain COUNTY approval prior to implementing any such modifications.

B. Amendment of Article 8. Article 8 of the Agreement is hereby amended to add the paragraph below. All other paragraphs remain unchanged.

The Original Franchise License Agreement for County Facilities and Coquina Beach dated June 20, 2010 (the “Original Franchise Agreement”) obligated the LICENSEE to utilize a portion of the revenues collected by LICENSEE for Capital Improvements to the park facilities. The parties acknowledge and agree that all payments, Capital Improvements, and expenditures, as identified in Exhibit “D”, attached hereto and incorporated herein, constitute the full and satisfactory performance by LICENSEE of this obligation during the entire duration of the Original Franchise Agreement as amended and restated by this Agreement. This section shall serve to release LICENSEE from any further obligations under said provision of the Original Franchise Agreement and reconcile any and all discrepancies pertaining to expenditures and compensation, including those related to Capital Improvements. Any claims, disputes, or causes of action relating to compensation prior to __________, 2019 arising from such provision of the Original Franchise Agreement are hereby waived. This paragraph shall not release LICENSEE from any ongoing obligations expressly set forth in this Agreement.

C. Other Provisions Unaffected. All other terms and conditions set forth in the Agreement which are not expressly amended herein shall remain in full force and effect.

D. Authority. Each of the COUNTY and the LICENSEE represents and warrants to the other its respective authority to enter into this Second Amendment.

E. Severability. The provisions of this Second Amendment are declared by the parties hereto to be severable. In the event any term or provision of this Second Amendment shall be held invalid by a Court of competent jurisdiction, such invalid term or provision should not affect the validity of any term or provision hereof; and all such terms and provisions hereof shall be enforceable to the fullest extent permitted by law as if such invalid term or provision had never been part of this Second Amendment; provided, however, if any term or provision of this Second Amendment is held to be invalid due to the scope or extent here thereof, then, to the extent permitted by law, such term or provision shall be automatically deemed modified in order that it may be enforced to the maximum scope and extent permitted by law.

WHEREFORE, the Parties have made and executed this Second Amendment to the Coquina Beach Concession Agreement as of the date set forth above.

UNITED PARK SERVICES, INC.  MANATEE COUNTY, a political subdivision of the State of Florida

By: ____________________________  By: ____________________________
    Alan Kahana, President                  Purchasing Official