

Vista Park Gazebo Administration Agreement

This AGREEMENT is entered into this 1st day of August 2006 by and between the City of Fullerton, hereinafter referred to as "CITY" and the Summit Restaurant Company, a California Limited Liability Company, hereinafter referred to as "RESTAURANT".

WITNESSETH

WHEREAS, RESTAURANT desires to enter into a Use Agreement with CITY and CITY desires to allow RESTAURANT to use a certain premise as described in Section I of this Agreement under terms and conditions set forth herein; and

NOW, THEREFORE, in consideration of the promises and the respective and mutual Agreements contained herein, said parties hereby agree as follows:

I. PREMISES

Notwithstanding any rights RESTAURANT currently possesses under LEASE dated May 16, 1989 between CITY and RESTAURANT, which rights will remain unchanged, CITY additionally agrees to allow RESTAURANT to administrate rental and use of the Gazebo and Gazebo seating area (hereinafter referred to as "Gazebo") at Vista Park, as shown on Attachment A (Vista Park Gazebo Site Map), attached hereto.

II. LIMITATION OF THE USE AGREEMENT

This Agreement and the rights and privileges granted RESTAURANT in and to the Gazebo are subject to all covenants, conditions, restrictions, and exceptions of record or apparent. Nothing contained in this Agreement or in any document related hereto shall be construed to imply the granting to RESTAURANT of rights which exceed those granted in this Agreement.

III. ADMINISTRATION

For consideration herein described, RESTAURANT's administration of the premise shall be for the purpose of administration of Gazebo rentals and use. RESTAURANT shall be responsible for booking and overseeing all rentals, use and maintenance, as required by this Agreement, of the Gazebo. Except as otherwise stated in Section IX of this Agreement, RESTAURANT shall be fully responsible for all costs and expenses incurred related to the operation of the Gazebo.

The CITY'S Director of Park and Recreation or his or her designee and the RESTAURANT'S proprietor or his or her designee will serve as the parties' contacts and meet annually to review rules, regulations and operational procedures that pertain to use of the facilities on the PROPERTY. During these meetings, the RESTAURANT will provide the CITY with a summary of annual rentals and outline any proposed site modifications and maintenance scheduled at the Property.

IV. PAYMENTS

A. Initial Term

RESTAURANT shall pay three thousand three hundred dollars (\$3,300) per month for years one through five of the agreement and three thousand eight hundred dollars (\$3,800) per month for years six through ten of the agreement. Payments shall be paid subject to CITY invoice to RESTAURANT on a monthly basis by the 10th of each month to the City of Fullerton.

B. Extension of Term

Should the initial term and any term thereafter be extended pursuant to Section V. B. of this agreement, RESTAURANT shall pay four thousand four hundred dollars (\$4,400) per month for years 11 through 15, five thousand dollars (\$5,000) per month for years 16 through 20, five thousand eight hundred dollars (\$5,800) per month for years 21 through 25, and six thousand eight hundred dollars per month for years 26 through 30 of this agreement.

C. Late Fees

Payments made after the 15th of each month will be considered delinquent and a charge of 15% percent of the amount due shall be added to the payment. An additional charge of 15% of said payment shall be added for each additional month thereof that said payment remains unpaid.

V. TERM

A. Initial Term

The term of this Agreement shall commence on the Effective Date as shown on Page One (1) of this Agreement and remains in effect for a period of ten (10) years, unless terminated sooner pursuant to Section VI of this Agreement. The Agreement will automatically renew on the tenth anniversary of the Effective Date, unless RESTAURANT and CITY exercise their option to terminate the agreement as provided below.

B. Extension of Term

The term of this Agreement may be extended, with mutual agreement between the CITY and RESTAURANT, for four additional five (5) year terms at the conclusion of the first ten (10) year term. To be effective, RESTAURANT must send the Director of Parks and Recreation a written request to extend the Agreement for each additional five (5) year term at least three months prior to the end of the then current term. The City has 30 days to reply in writing to the extension request. The terms and conditions of this Agreement shall remain in effect throughout the duration of the initial term and any extension unless amended pursuant to Section XIV of this Agreement.

VI. TERMINATION

This Agreement may be terminated by either party with 60 days' written notice, to the other party without cause and for any reason.

VII. SUBLEASE OR ASSIGNMENT

Any sublease or assignment of RESTAURANT's interest in the premise or any part or portion thereof is prohibited. Any attempted sublease or assignment shall be null and void and shall be cause for immediate termination of this Agreement and shall confer no right, title, or interest in or to this Agreement.

VIII. ALTERATIONS AND IMPROVEMENTS

RESTAURANT will not make or cause any alterations or improvements to be made in or on the premise without the prior written approval of CITY's Parks and Recreation Department. RESTAURANT shall be financially responsible for all improvements unless specifically agreed to between RESTAURANT and CITY in writing and in advance of the performance of said work.

All improvements affixed to the premise by RESTAURANT shall become the property of CITY. At the expiration or early termination of this Agreement, RESTAURANT agrees to remove, at CITY's option, any and all such improvements, notwithstanding their becoming affixed to and part of realty. The payment of costs for said removal and repairs associated with said removal shall become the responsibility of RESTAURANT.

IX. MAINTENANCE OF PROPERTY

RESTAURANT shall keep the premise in a clean and orderly condition while not allowing trash of any kind to be piled or stored on the premise throughout the duration of Agreement. Restaurant shall be responsible for the general maintenance of the Gazebo. Maintenance shall include, but is not limited to, custodial service and painting, minor repairs, excluding any material structural repairs. The CITY will continue to be responsible for the maintenance of the area of Vista Park surrounding the Gazebo including but not limited to landscaping, irrigation, lighting, walkways, driveways, and parking areas.

In the event that RESTAURANT fails to maintain the Gazebo as required by this Agreement, CITY, upon five(5) days written notice to RESTAURANT, may undertake those responsibilities and charge and collect from RESTAURANT the costs relating to conducting the required maintenance.

X. NONDISCRIMINATION

RESTAURANT shall not deny benefits, including the rental of the Gazebo, harass or allow harassment, to any person on the basis of race, religion, color, national origin, ancestry, physical handicap, mental disability, medical condition, marital status, sexual orientation, age or sex, nor shall they discriminate unlawfully, harass or allow harassment against any employee or applicant for employment because of race, religion, color, national origin, ancestry, physical handicap, mental disability, medical condition, marital status, sexual orientation, age or sex.

XI. INSPECTION OF PREMISE

CITY, through its employees/agents, reserves the right of entry to enter in and upon the PROPERTY at all reasonable times during the term of this Agreement for the purpose of the inspection, protection and maintenance of the PROPERTY, to determine if RESTAURANT is in compliance with the provisions of this Agreement, or for any other reasonable purpose. CITY further reserves the right of entry and immediate possession of the PROPERTY in the case of an emergency. For purposes of this paragraph, "emergency" shall mean an imminent threat of PROPERTY damage or harm to persons necessitating possession of the PROPERTY by

Landlord. RESTAURANT shall not enter into any agreements restricting the use, granting easements over, or otherwise encumbering the PROPERTY.

XII. INSURANCE REQUIREMENTS

RESTAURANT shall procure and maintain throughout the duration of this Agreement, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the RESTAURANT's operations, occupancy of and use of the premise. RESTAURANT shall provide current evidence of the required insurance in a form acceptable to the CITY and shall provide replacement evidence for any required insurance which expires prior to the completion, expiration or termination of this Agreement.

Nothing in this section shall be construed as limiting in any way, the Indemnification and Hold Harmless clause contained herein in Section XIII or the extent to which RESTAURANT may be held responsible for payments of damages to persons or property.

A. Minimum Scope and Limits of Insurance

1. Commercial General Liability Insurance. LESSEE shall maintain commercial general liability insurance coverage in a form at least as broad as ISO Form #CG 001 ED. 11/88, with a limit of not less than \$1,000,000 each occurrence. If such insurance contains a general aggregate limit, it shall apply separately to the Agreement or shall be twice the required occurrence limit.

2. Business Automobile Liability Insurance. LESSEE shall maintain business automobile liability insurance coverage in a form at least as broad as ISO Form # CA 000 T ED. 6/92, with a limit of not less than \$1,000,000 each accident. Such insurance shall include coverage for owned, hired and non-owned automobiles.

3. Host Liquor Liability. LESSEE shall maintain a host liquor liability policy with a limit of not less than \$1,000,000 per occurrence. If such insurance contains a general aggregate limit, it shall apply separately to the Agreement or shall be twice the required occurrence limit.

4. Workers' Compensation and Employers' Liability Insurance. LESSEE shall maintain workers' compensation insurance as required by the State of California and employers' liability insurance with limits of not less than \$1,000,000 each accident.

5. All Risk Property Insurance. LESSEE shall maintain all risk property insurance including coverage for tenant improvements or betterments with a minimum limit equal to full replacement cost as approved by the CITY of the leased premises and with no coinsurance penalty provision.

B. Deductibles and Self-Insured Retentions

Any deductible or self-insured retention must be declared to and approved by the CITY.

C. Other Insurance Provisions

The required insurance policies shall contain or be endorsed to contain the following provisions:

1. Commercial General Liability, Business Automobile Liability and Host Liquor Liability.

The CITY, its elected or appointed officials, officers, employees and volunteers are to be covered as additional insureds with respect to liability arising out of RESTAURANT's operation or the ownership, occupancy, maintenance or use of the leased premises; or with respect to liability arising out of automobiles owned, leased, hired or borrowed by or on behalf of the RESTAURANT. The coverage shall contain no special limitations on the scope of its protection afforded to the CITY, its officials, officers, employees and volunteers.

2. Commercial General Liability, Business Automobile Liability and Host Liquor Liability.

This insurance shall be primary insurance as respects the CITY, its officers, employees and volunteers and shall apply separately to each insured against whom a suit is brought or a claim is made. Any insurance or self-insurance maintained by the CITY, its officers, employees and volunteers shall be in excess of this insurance and shall not contribute with it.

3. Workers' Compensation and Employers' Liability Insurance

Insurer shall waive their right of subrogation against CITY, its officers, employees and volunteers for work done on behalf of the CITY.

4. All Risk Property

CITY shall be named as a loss payee.

5. All Coverages

Each insurance policy required by this clause shall be endorsed to state that coverage shall not be canceled, except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the CITY.

D. Acceptability of Insurers

All required insurance shall be placed with insurers acceptable to the CITY with current BEST'S ratings of no less than B+, Class X. Workers' compensation insurance may be placed with the California State Compensation Insurance Fund. All insurers shall be licensed by or hold admitted status in the State of California. At the sole discretion of the CITY, insurance provided by non-admitted or surplus carriers with a minimum BEST'S rating of no less than A-, Class X may be accepted if RESTAURANT evidences the requisite need to the sole satisfaction of the CITY.

E. Verification of Coverage

RESTAURANT shall furnish the CITY with certificates of insurance which bear original signatures of authorized agents and which reflect insurers names and addresses, policy numbers, coverage, limits, deductibles and self-insured retentions. Additionally,

RESTAURANT shall furnish certified copies of all policy endorsements required herein. All certificates and endorsements must be received and approved by CITY before lessee occupies premises. The CITY reserves the right to require at any time complete, certified copies of any or all required insurance policies and endorsements.

XIII. INDEMNIFICATION

RESTAURANT agrees to accept the premise in an "as is" condition and shall defend, indemnify, and hold harmless CITY, its officers, agents, volunteers and employees from and against any and all claims, demands, losses, legal and investigation expenses, or liabilities of any kind or nature which CITY, its officers, agents, volunteers and employees may sustain or incur or which may be imposed upon any of them for injury to or death to persons, or damage to property as a result of, arising out of, or in any manner connected with this Agreement or with occupancy and use of the premise by RESTAURANT, its officers, agents, employees, subs of RESTAURANT, licensees, patrons, or visitors, except liability arising out of the sole negligence of CITY.

XIV. AMENDMENTS

This Agreement sets forth all of the Agreements and understandings of the parties and any modification shall be in writing and properly executed by both parties.

XV. NOTICES

All notices to this Agreement shall be addressed as set forth below or as either party may hereafter designate by written notice and shall be sent through the United States mail.

CITY

Parks and Recreation Department
City of Fullerton
303 W. Commonwealth Ave.
Fullerton, CA 92832
(714) 738 – 6575

RESTAURANT

Gary Parkinson
Summit House Restaurant
2000 E. Bastanchury Rd.
Fullerton, CA 92835
(714) 671 – 4111

XVI. DEFAULT

In the event there is a default by either Party with respect to any of the provisions of this Agreement or any obligations under it, including the payment of rent, the defaulting party shall be given written notice of such default. After receipt of such written notice, RESTAURANT shall have fifteen (15) days in which to cure any monetary default and thirty (30) days in which to cure any non-monetary default, provided RESTAURANT shall have such extended period as may be required beyond the thirty (30) days if the nature of the cure is such that it reasonably requires more than thirty (30) days and RESTAURANT commences the cure within the thirty (30) day period and thereafter continuously and diligently pursues the cure to completion.

If RESTAURANT does not provide evidence to CITY of the complete cure of the default within the applicable cure period, CITY may do any of the following:

- A. Terminate this Agreement. All rights of RESTAURANT and those who claim under RESTAURANT, stemming from this Agreement, shall end at the time of such termination; or

B. At CITY's sole option, correct any such default by performance of any act, including payment of money, and bill RESTAURANT for the cost thereof plus reasonable administrative costs.

C. In addition to the above, pursue any other remedies available at law or in equity.

This section shall not apply to extend the time period within which RESTAURANT may exercise any options or extend the time for any notices as to any options specified in Section V ("Term") herein.

XVII. COST OF SUSTAINING AN ACTION FOR BREACH OR DEFAULT

In the event either CITY or RESTAURANT commences legal action against the other claiming a breach or default of this Agreement, the prevailing party in such litigation shall be entitled to recover from the other costs of sustaining such action, including reasonable attorney fees, as may be fixed by the court.

XVIII. PUBLIC RECORDS

Any and all written information submitted to and/or obtained by CITY from RESTAURANT or any other person or entity having to do with or related to this Agreement and/or the PROPERTY, either pursuant to this Agreement or otherwise, at the option of CITY or as required by law, may be treated as a public record open to inspection by the public pursuant to the California Public Records Act (Government Code Section 6250, et seq.) as now in force or hereafter amended, or any Act in substitution thereof, or otherwise made available to the public. RESTAURANT hereby waives, for itself, its agents, employees, subtenants and any person claiming by, through or under RESTAURANT, any right or claim that such information is not a public record or that the same is a trade secret, or confidential, or not subject to inspection by the public, including without limitation the right to claim reasonable attorneys' fees and costs related to any such disclosure.

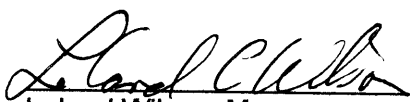
XIX. ATTACHMENTS TO AGREEMENT

This Agreement includes the following which is attached hereto and made a part hereof:

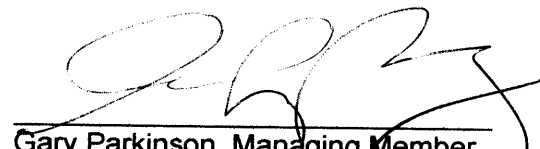
Attachment A: Site Map for property

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date written above.

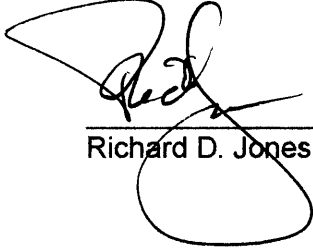
CITY OF FULLERTON:


Leland Wilson, Mayor

RESTAURANT:

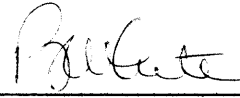

Gary Parkinson, Managing Member
Summit Restaurant Company, LLC

Approved as to Form:

A handwritten signature in black ink, appearing to read 'Richard D. Jones', written over a horizontal line.

Richard D. Jones, City Attorney

Attest:

A handwritten signature in black ink, appearing to read 'Beverley White', written over a horizontal line.

Beverley White, City Clerk