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MEMORANDUM

To: Mayor and City Council
From: Brent Walker, Parks and Recreation Manager
Date: September 22, 2014
Subject: **RFP 2014-06 Brook Run Skate Park Concessionaire Award**

ITEM DESCRIPTION

Approval of a contract for with Robb Hart and Ian Awtberry dba: Layback Grind LLC to manage concessionaire services and programs such as selling refreshments and merchandise, and offering classes, camps and special events at the Brook Run Skate Park.

BACKGROUND

Under the original management arrangement inherited from DeKalb County’s operation of the skate park, the facility was managed by an independent contractor and staffed by County employees which cost the City in excess of \$4000 per month with revenues averaging only \$2,000 per month.

The City saw an opportunity to reduce the costs of operations while still providing oversight of the park by offering a revenue sharing agreement to Woody’s Halfpipe, which operated the skate park until this past year. After their contract ended the City solicited a new vendor for these services in April of this year. Layback Grind LLC was the only response received.

This agreement stipulates a revenue sharing arrangement whereby the City will receive 3% of the monthly retail net profits for a period of 3 months beginning October 1, 2014 with the option for renewal for five additional 12 month periods beginning January 1st of each subsequent year. The skate park will remain as a free facility but the city will see a significant savings by not paying for management services and receiving revenue through this sharing arrangement while also providing recreational programs and additional oversight of the skate park.

No set open hours have been determined at this time however, facility hours will initially be concentrated to the afternoon when the majority of park users are present. Layback Grind intends to expand operational hours as business increases and new opportunities present themselves.

A draft of the agreement with Layback Grind LLC is attached to this memorandum.

RECOMMENDED ACTION

Staff respectfully requests that Council: (1) award a contract to Robb Hart and Ian Awtberry dba: Layback Grind LLC (2) authorize the City Manager and Staff to execute the necessary documents.

AGREEMENT BETWEEN THE CITY OF DUNWOODY AND LAYBACK GRIND LLC.

This Agreement (the "Agreement") is made this ____ day of _____, 2014, by and between Layback Grind LLC (hereinafter referred to as "Company"), and the City of Dunwoody, Georgia ("Dunwoody").

WITNESSETH:

WHEREAS, Company is engaged in the business of providing skateboarding programs and concessions in parks; and

WHEREAS, the City of Dunwoody is interested in providing a recreational activity for its citizens in Brook Run Park and Company is willing to provide same at the park at its expense and provide the skate park experience to visitors of Brook Run Park; and

WHEREAS, Company is willing and able to render said services pursuant to the provisions of this Agreement.

NOW, THEREFORE, in consideration of the mutual terms, conditions and covenants set forth herein, the parties hereto agree as follows:

1. Services.

Company agrees to render services (the "Services") to the City of Dunwoody managing in the City's Brook Run Park, the Skate Park Facility ("City Park") as set forth in Exhibit "A," "Scope of Services." Company agrees to perform the Services as stated in the Scope of Services in exchange for the City's authorizing Company to utilize the City's park for conduct of its business and for further consideration as described in this Agreement.

2. Compensation.

a. Fee. In consideration for use of the City Park, Company shall pay Dunwoody 3% of its annual retail and concession net profits, as further described and defined in Exhibit "B." The City of Dunwoody shall not be responsible for any cost of its operation. The entirety of the fee arrangement between the City and Company shall be as provided in Exhibit B.

b. Manner of Payment. Company agrees to pay said compensation amount to the City on a monthly basis by submitting the payment along with the accounting of the necessary documentation sufficient for the contractual payment to be evident to the City from the documentation provided, or as otherwise authorized under Exhibit B.

3. Relationship of Parties.

a. Independent Contractors. Nothing contained herein shall be deemed to create any relationship other than that of independent contractor between Dunwoody and Company. This Agreement shall not constitute, create, or otherwise imply an employment, joint venture, partnership, agency or similar arrangement between Dunwoody and Company. It is expressly agreed that Company is acting as an independent contractor and not as an employee of the City of Dunwoody in providing the Services under this Agreement.

b. Employee Benefits. Company shall not be eligible for any benefit available to employees of Dunwoody including, but not limited to, workers' compensation insurance, state disability insurance, unemployment insurance, group health and life insurance, vacation pay, sick pay, severance pay, bonus plans, pension plans, or savings plans.

c. Payroll Taxes. Company shall be responsible for all FICA, federal and state withholding taxes and workers' compensation coverage for any individuals assigned to perform the Services in furtherance of this Agreement.

4. Term

This Agreement shall be effective upon its execution (the "Effective Date") and shall terminate on December 31, 2014 ("Initial Term"). This Agreement shall automatically renew for additional one-year terms ("Renewal Terms") unless the City of Dunwoody chooses to terminate this Agreement pursuant to the provisions of this Agreement by giving written notice to Company no later than thirty days prior to the conclusion of the Initial or Renewal Term(s). The total renewable terms of this Agreement shall be no more than five (5) calendar years and if parties wish to renew for additional one-year terms, this Agreement (or as amended) shall be executed by mutual consent of the parties at that time, but in any event no later than thirty (30) days prior to the conclusion of the last Renewal Term under this Agreement.

5. Termination For Cause.

Either party shall have the right to terminate this Agreement if the other party is in default of any obligation hereunder and such default is not cured within twenty (20) days of receipt of a notice from the other party specifying such default. "Default" shall mean:

- a. If Company fails to make payments when due or fails to perform or observe any of its duties or obligations under the terms of this Agreement;
- b. If Dunwoody fails to perform or observe any of its duties or obligations under the terms of this Agreement;

- c. If either Dunwoody or Company shall have made any warranty or representation in connection with this Agreement which is found to have been false at the time such warranty or representation was made and is materially harmful to the other party.

6. Termination of Services and Return of Property.

Upon the expiration or earlier termination of this Agreement, Company shall immediately terminate the Services hereunder and shall deliver promptly to Dunwoody all property relating to the Services that is owned by Dunwoody. Furthermore, Company shall remove any furnishings or equipment owned by Company and leave that portion that has become a fixture of the Park or cannot be removed without damage to the infrastructure of the City.

7. Standard of Performance and Compliance with Applicable Laws.

Company warrants and represents that it possesses the special skill and professional competence, expertise and experience to undertake the obligations imposed by this Agreement. Company agrees to perform in a diligent, efficient, competent and skillful manner commensurate with the highest standards of the profession, and to otherwise perform as is necessary to undertake the Services required by this Agreement, including the requirements set forth in the Certification of Sponsor Drug Free Workplace Exhibit "C".

Company warrants and represents that it will, at all times, observe and comply with all federal, state, local and municipal ordinances, rules, regulations, relating to the provision of the Services to be provided by Company hereunder or which in any manner affect this Agreement.

8. Conflicts of Interest.

Company warrants and represents that:

- a. the Services to be performed hereunder will not create an actual or apparent conflict of interest with any other work it is currently performing; and
- b. Company is not presently subject to any agreement with a competitor or with any other party that will prevent Company from performing in full accord with this Agreement; and
- c. Company is not subject to any statute, regulation, ordinance or rule that will limit its ability to perform its obligations under this Agreement. The parties agree that Company shall be free to accept other work during the term hereof; provided, however, that such other work shall not interfere with the provision of Services hereunder.

9. Proprietary Information

Company acknowledges that it may have access to and become acquainted with confidential and other information proprietary to Dunwoody including, but not limited to, information concerning Dunwoody, its operations, customers, citizens, business and financial condition, as well as information with respect to which Dunwoody has an obligation to maintain confidentiality (collectively referred to herein as “Proprietary Information”). Company agrees not to disclose, directly or indirectly, to anyone or to use or to allow others to use, for any purpose whatsoever, any Proprietary Information of any type, whether or not designated confidential or proprietary, acquired in the course of performing under this Agreement. The obligations of Company under this section shall survive the termination of this Agreement.

10. Indemnification and Insurance.

Company agrees to defend, indemnify and hold harmless the City of Dunwoody, its officers, employees, officials and agents, from and against any and all claims, losses, liabilities or expenses (including, without limitation, attorneys’ fees) which may arise, in whole or in part, out of a breach by the Indemnitor of its obligations under this Agreement and as a result of any physical damage to person or property as a result of the Services provided by Company herein. City of Dunwoody shall have no liability over anything occurring as a result of anybody’s use of Company’s concessions or as a result of Company’s management of the Skate Park, which is acknowledged by Company as an assumption of risk on behalf of itself and acceptance of all responsibility therefor. City of Dunwoody further disclaims all liability associated with the Services provided herein as a result of the use of the City’s property in any way, and make no warranties as to the safety of the Park for conduct of said services, including the conditions of the ground or the Skate Park utilized in the Services provided herein and Company acknowledges its responsibility to ensure the safety of all persons utilizing said Park during its responsibility. Insurance requirements are attached hereto as Exhibit “D”.

11. Assignment.

Company shall not assign this Agreement without the prior express written consent of Dunwoody. Any attempted assignment by Company without the prior express written approval of Dunwoody shall at Dunwoody’s sole option terminate this Agreement without any notice to Company of such termination.

12. Notices.

All notices or other communications required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been duly given when delivered personally in hand, or when mailed by certified or registered mail, return

receipt requested with proper postage prepaid, addressed to the appropriate party at the following address or such other address as may be given in writing to the parties:

If to the City:

City Manager
Dunwoody City Hall
41 Perimeter Center East
Suite 250
Dunwoody, Georgia 30346

With copies to:

City Clerk
Dunwoody City Hall
41 Perimeter Center East
Suite 250
Dunwoody, Georgia 30346

If to the Company:

Layback Grind LLC.
c/o _____

13. Governing Law and Consent to Jurisdiction.

This Agreement is made and entered into in the State of Georgia and this Agreement and the rights and obligations of the parties hereto shall be governed by and construed according to the laws of the State of Georgia without giving effect to the principles of conflicts of laws. The jurisdiction for resolution of any disputes arising from this Agreement shall be in the State Courts of DeKalb County, Georgia.

14. Waiver of Breach.

The waiver by either party of a breach or violation of any provision of this Agreement shall not operate or be construed to constitute a waiver of any subsequent breach or violation of the same or other provision thereof.

15. Severability.

If any provision of this Agreement is held to be unenforceable for any reason, the unenforceability thereof shall not affect the remainder of the Agreement, which shall remain in full force and effect, and enforceable in accordance with its terms.

16. Entire Agreement. This Agreement which includes the exhibits hereto contains the entire agreement and understanding of the parties with respect to the subject matter hereof, and supersedes and replaces any and all prior discussions, representations and understandings, whether oral or written.

IN WITNESS WHEREOF, the parties have executed this Agreement through their duly authorized representatives.

CITY OF DUNWOODY, GEORGIA

By: _____
Michael G. Davis

Title: Mayor

Approved as to form:

City Attorney

Attest:

City Clerk

Layback Grind, LLC

By: _____

Title: _____

Date of Execution _____

EXHIBIT "A"

SCOPE OF SERVICES

Layback Grind will have access to the area designated in Attachment A within Brook Run Park to operate a Concession/Retail Venue and offer Skateboarding/Bicycle Programs and Events under the terms of this contract. The following provisions will apply for the length of the contract:

City Responsibilities:

- Allow access to the area designated in Attachment A for the Operation of the Brook Run Skate Park and the support structures to operate the amenity
- Provide janitorial services to the public accessible restrooms in the facility and to the skate park amenity
- Provide utilities except phone or internet connectivity.
- Provide a link and logo of Layback Grind on the City Parks and Recreation website
- Under the direction of the Parks Manager, allow for the installation of promotional signage and directional signage throughout the park to the amenity.

Layback Grind Responsibilities:

- Provide concessions and retail amenities to park users.
- Provide Skate Park Programs to include lessons, camps, special events and demonstrations.
- Maintain consistent open hours for the skate shop facility.
- Pressure wash the Skate Park and de-gum the cement of Skate Park on an as needed bases
- Renovate the building reserved for concessions under the direction of the Parks Manager
- Monitor and enforce Skate Park Rules and provide oversight of the skate park amenity and report any issues to the Parks Manager and City of Dunwoody Police Department
- Provide Security System monitoring for retail spaces.

EXHIBIT “B”

FEE STRUCTURE

Enforcement and administration.

(a)

The city Finance Department shall administer and enforce the provisions of this article.

(b)

The city Finance Department, in conjunction with the city finance director, shall have the power and authority to make reasonable rules and regulations not inconsistent with this article or other laws or ordinances for the administration and enforcement of the provisions of this article and the collection of the tax.

(c)

The city Finance Department or any person authorized in writing by the city manager may examine the books, papers, records, financial reports, and facilities of any operator and any operator liable for the rent in order to verify the accuracy of and return made or to ascertain and determine the amount of payment which should be paid.

(e)

In administering this article, the city Finance Department may require the filing by operators of reports relating to operational income.

Rent imposed; exceptions.

(a)

There is imposed, assessed, and levied, and there shall be paid a rental fee of three percent (3%) of the monthly concession and retail revenue net profits generated in the city. All revenue from programs such as classes, camps and events will be excluded from the rental fee.

Filing return; payment.

(a)

The rent shall become due and payable from the occupant at the time sales are generated. All such rents collected by the operator shall be due and payable to the city on or before the 20th day of every month next succeeding the month in which the sale occurs.

(b)

On or before the 20th day of every month, a return for the preceding month shall be filed with the city for the collection and payment of the rent imposed by this article. The return shall be in such form as the city shall prescribe, and shall show the gross sales, the amount of rent due for such month, and such other information as the city may require.

(c)

The person required to file the return shall deliver the return and, at the same time, deliver the remittance of the net amount of the rent due to the city.

Delinquent penalty.

Any operator who fails to pay the rent to the city on or before the due date shall pay a penalty of ten percent of the rent not paid plus interest on the unpaid rent at the rate of one percent per month.

EXHIBIT "C"

CERTIFICATION OF SPONSOR

DRUG-FREE WORKPLACE

I hereby certify that I am a principle and duly authorized representative of _____, ("Contractor"), whose address is

_____, _____, _____, _____, and I further certify that:

- (1) The provisions of Section 50-24-1 through 50-24-6 of the Official Code of Georgia Annotated, relating to the "Drug-Free Workplace Act" have been complied with in full; and
- (2) A drug-free workplace will be provided for Contractor's employees during the performance of the Agreement; and
- (3) Each Subcontractor hired by Contractor shall be required to ensure that the subcontractor's employees are provided a drug-free workplace. Contractor shall secure from that subcontractor the following written certification: "As part of the subcontracting agreement with Contractor, _____ certifies to Contractor that a drug-free workplace will be provided for the Subcontractor's employees during the performance of this Agreement pursuant to paragraph (7) of subsection (b) of the Official Code of Georgia Annotated, Section 50-24-3"; and
- (4) The undersigned will not engage in unlawful manufacture, sale, distribution, dispensation, possession, or use of a controlled substance or marijuana during the performance of the Agreement.

CONTRACTOR:

Date: _____ Signature: _____

Title: _____

EXHIBIT "D"**INSURANCE REQUIREMENTS**

Within 10 days of execution of this Agreement, and at all times that this Contract is in force, the Company shall obtain, maintain and furnish the City Certificates of Insurance from licensed companies doing business in the State of Georgia with an A.M. Best Rating A-6 or higher and acceptable to the City covering:

1. Statutory Workers' Compensation Insurance

(a) Employers Liability:

Bodily Injury by Accident - \$1,000,000 each accident

Bodily Injury by Disease - \$1,000,000 policy limit

Bodily Injury by Disease - \$1,000,000 each employee

2. Comprehensive General Liability Insurance

(a) \$2,000,000 limit of liability per occurrence for bodily injury and property damage Owner's and Contractor's Protective

(b) Blanket Contractual Liability

(c) Blanket "X", "C", and "U"

(d) Products/Completed Operations Insurance

(e) Broad Form Property Damage

(f) Personal Injury Coverage

3. Automobile Liability

(a) \$ 500,000 limit of liability

(b) Comprehensive form covering all owned, non-owned and hired vehicles

4. Umbrella Liability Insurance

(a) \$3,000,000 limit of liability

(b) Coverage at least as broad as primary coverage as outlined under Items 1, 2 and 3 above

5. The City of Dunwoody, Georgia, and its subcontractors and affiliated companies, their officers, directors, employees shall be named on the Certificates of Insurance as additional insured and endorsed onto the policies for Comprehensive General Liability, Automobile Liability and Umbrella Liability insurance maintained pursuant to this Contract in connection with liability of the City of Dunwoody and their affiliated companies and their officers, directors and employees arising out of Contractor's operations. Copies of the endorsements shall be

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furnished to the City upon execution of this Agreement. Such insurance is primary insurance and shall contain a Severability of Interest clause as respects each insured. Such policies shall be non-cancelable except on thirty (30) days written notice to the City. Any separate insurance maintained in force by the additional insured named above shall not contribute to the insurance extended by Contractor's insurer(s) under this additional insured provision.

Certificate Holder should read: The City of Dunwoody, 41 Perimeter Center East, Suite 250, Dunwoody, Georgia 30346.

*Affidavit Verifying Status
for City Public Benefit Application*

By executing this affidavit under oath, as an applicant for a(n) _____ [type of public benefit], as referenced in O.C.G.A. § 50-36-1, from _____ [name of government entity], the undersigned applicant verifies one of the following with respect to my application for a public benefit:

- 1) _____ I am a United States citizen.
- 2) _____ I am a legal permanent resident of the United States.
- 3) _____ I am a qualified alien or non-immigrant under the Federal Immigration and Nationality Act with an alien number issued by the Department of Homeland Security or other federal immigration agency.

My alien number issued by the Department of Homeland Security or other federal immigration agency is:_____.

The undersigned applicant also hereby verifies that he or she is 18 years of age or older and has provided at least one secure and verifiable document, as required by O.C.G.A. § 50-36-1(e)(1), with this affidavit.

The secure and verifiable document provided with this affidavit can best be classified as:
_____.

In making the above representation under oath, I understand that any person who knowingly and willfully makes a false, fictitious, or fraudulent statement or representation in an affidavit shall be guilty of a violation of O.C.G.A. § 16-10-20, and face criminal penalties as allowed by such criminal statute.

Executed in _____ (city), _____(state).

Signature of Applicant

Printed Name of Applicant

SUBSCRIBED AND SWORN
BEFORE ME ON THIS THE
___ DAY OF _____, 20___

NOTARY PUBLIC
My Commission Expires:

Attachment A



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