

ORDINANCE NO. 7531-19

AN ORDINANCE AUTHORIZING AND DIRECTING THE CITY MANAGER TO EXECUTE AND THE CITY CLERK TO ATTEST, ON BEHALF OF THE CITY OF NEWPORT NEWS, VIRGINIA, THAT CERTAIN AGREEMENT OF LEASE BY AND BETWEEN THE CITY OF NEWPORT NEWS, VIRGINIA, AND B-52 SMOKEHOUSE BBQ & LOUNGE, LLC, DATED THE 12TH DAY OF FEBRUARY, 2019.

WHEREAS, the City Manager has recommended that the City of Newport News (the "City") lease space at the Huntington Park Beach Lifeguard Station located at 9285 Warwick Boulevard for the operation of a concession stand (the "Project"); and

WHEREAS, the City has advertised, as required by law, the proposal to lease space for this Project and has received proposals from prospective vendors; and

WHEREAS, the City Manager has recommended to the City Council that a lease for this Project be awarded to B-52 Smokehouse BBQ & Lounge, LLC.

NOW, THEREFORE, BE IT ORDAINED by the Council of the City of Newport News, Virginia:

1. That it hereby authorizes and directs the City Manager to execute and the City Clerk to attest, on behalf of the City of Newport News, Virginia, that certain Agreement of Lease by and between the City of Newport News, Virginia, and B-52 Smokehouse BBQ & Lounge, LLC, dated the 12th day of February, 2019, a copy of which is attached hereto and made a part hereof.

2. That this ordinance shall be in effect on and after the date of its adoption, February 12, 2019.

PASSED BY THE COUNCIL OF THE CITY OF NEWPORT NEWS ON FEBRUARY 12, 2019

Mabel Washington Jenkins, MMC
City Clerk

McKinley L. Price, DDS
Mayor

A true copy, teste:

City Clerk

THIS AGREEMENT OF LEASE, made this 12th day of February, 2019, by and between the **CITY OF NEWPORT NEWS, VIRGINIA**, a municipal corporation of the Commonwealth of Virginia, (hereinafter called "City"), and **B-52 SMOKEHOUSE BBQ & LOUNGE, LLC**, a Virginia limited liability company (hereinafter called "Lessee").

WITNESSETH: That for and in consideration of the mutual covenants contained herein, the parties hereby agree as follows:

1. Leased Premises. City hereby leases and demises unto Lessee and Lessee hereby leases from City, a concession stand containing 640 square feet of operating space inside the Huntington Park Lifeguard Station building located at Huntington Park Beach, 9285 Warwick Boulevard, Newport News, Virginia.

2. Term. The initial term of this Lease shall be for the period commencing on March 1, 2019 and terminating on February 28, 2022, unless sooner terminated as provided herein. At the termination of the initial term of this Lease, the Newport News City Manager, in her sole discretion, may renew this Lease at the request of Lessee for no more than two (2) additional successive one (1) year terms. In no event shall this Lease extend beyond February 29, 2024.

3. Definition of "Term" and "Lease Year". Except where the context clearly requires otherwise, the word "term", whenever used in this Lease with reference to the term hereof, shall be construed to include any renewal term, as well as the original term. The words "Lease year," as used in this Lease, shall be construed to mean each twelve (12) month period commencing on the commencement of the term; provided, however, that the period of the term in which the Lease terminates shall be deemed to be a Lease year even if comprises less than twelve months.

4. Rent. Lessee covenants to pay all rents described below to City at the Department of Parks, Recreation and Tourism, Fountain Plaza Two, 700 Town Center Drive, Suite 320, Newport

News, Virginia, 23606, or to any other location requested by City in writing, without right of offset, and without prior demand therefor being made:

a. Minimum rent. Lessee shall pay annually to City for the use and occupancy of the leased premises the minimum sum of One Thousand Five Hundred and No/100 Dollars (\$1,500.00) payable in equal monthly installments of Three Hundred and No/100 Dollars (\$300.00) per month for the months of May through September, inclusive, of each Lease year (the "minimum rent"). Rent payments shall be due and payable in monthly installments, in advance, on or before the fifth (5th) day of each month. Should Lessee choose to have hours of operation at the leased premises in any month from October through April, inclusive, it shall pay to City Three Hundred and No/100 Dollars (\$300.00) per month, in advance, on or before the fifth (5th) day of each month, for any such month, or portion thereof, in which it operates.

b. Monthly additional rent. In addition to the minimum rent, Lessee shall pay to City as additional rent, five percent (5%) of Lessee's gross sales from the leased premises, for every month, or portion thereof, in which Lessee operates at the leased premises (hereinafter "monthly additional rent"). Such additional rent payments shall be due and payable in monthly installments on or before the fifteenth (15th) day of each following month.

c. Gross Sales Defined. The term "gross sales," as used in this Lease, means the amount of all sales, whether cash, credit, or C.O.D., of whatever character (including, but not being limited to, merchandise and service of all kinds and nature) made in, on, from or through the leased premises (including sales made from or through vending machines) by Lessee or any other occupant of the leased premises, less: (a) all credits, refunds, allowances and discounts granted to customers in respect of said sales and (b) all excise or sales taxes, if any, which are levied or

imposed by governmental authority upon or in connection with said sales, if a specific record of such taxes is made at the time of each sale and said taxes are separately charged to and collected by Lessee from its customers. Lessee covenants and agrees not to divert sales, directly or indirectly, from the leased premises to any other place of business.

d. Access to records. City shall be provided access to Lessee's sales records in order to verify the monthly additional rent. Records shall be maintained for the entire period of the Lease, including any extensions. Complete copies of the sales records shall be provided to City for audit at the end of each Lease year and at termination of the Lease. These records shall become the property of City.

5. Late Payments. Lessee covenants and agrees to pay a late payment charge of 10% on all rents (including minimum rent and monthly additional rent) and all other sums due under this Lease, if they are not paid by the fifteenth day of each month, City expressly reserving all other rights and remedies provided herein or by law in respect thereto. All unpaid rents and sums due under this Lease, including late payment charges, shall bear interest, from the date such sums become due and payable to the date of payment thereof, at an annual rate of ten percent (10%). Lessee further agrees to pay (or to reimburse City promptly if City elects to pay) any and all attorney's fees and court costs incurred in connection with the collection of delinquent rents and/or any enforcement of any Lease provisions due City under this Lease.

6. Assignment and Subletting. Lessee covenants that it will not assign this Lease, or sublet or permit any other person to occupy part or all of the leased premises, without City's prior written consent. If Lessee is a corporation, the sale or encumbrance of a majority of its outstanding voting stock (whether in one transaction or as the result of more than one transaction) shall be

deemed an assignment of this Lease. Likewise, if Lessee is a partnership, the sale or transfer of a majority of its partnership interests (whether in one transaction or as the result of more than one transaction) shall be deemed an assignment of this Lease. If, at any time during the term, City has knowledge that a person, firm or corporation other than Lessee is in possession of the leased premises without the written consent of City, City may, at its option, at any time thereafter, by written notice to Lessee, accept and treat such person, firm or corporation in possession as the assignee or sublessee of Lessee, in which event both Lessee and such assignee or sublessee shall be obligated to observe and perform all the covenants, conditions and provisions herein contained provided, however, that nothing herein shall affect City's other remedies for Lessee's default by wrongful assignment or subletting.

7. Default and Remedies. In the event the business being conducted on the leased premises shall at any time be substantially terminated, or in the event Lessee shall default in the payment of any installment of rent herein reserved, or in the event Lessee shall default in the performance of any of the terms, covenants, conditions or provisions herein contained binding upon Lessee and such default shall not be remedied, within five (5) days after written notice thereof shall have been given by City to Lessee, or in the event Lessee shall be adjudicated bankrupt or shall become insolvent or shall make a general assignment for the benefit of its creditors, or in the event a receiver shall be appointed for Lessee or a substantial part of its property and such receiver is not removed within five (5) days after appointment, City shall have the right (in addition to all other rights and remedies provided by law) to reenter and take possession of the leased premises, to terminate this Lease and to remove any property therein, without liability for damage to, and without obligation to store, such property. In the event of such termination, City may (but shall be under no

obligation to) re-let the leased premises, or any part thereof, from time to time, in the name of City or Lessee, without further notice, for such term or terms, on such conditions, and for such uses and purposes, as City, in its discretion, may determine, and may collect and receive all rents derived therefrom and apply the same, after deduction of all appropriate expenses (including, without limitation, leasing commissions, the cost of readying the leased premises for re-letting; attorneys' fees and other costs of collection) to the payment of the rent payable hereunder, Lessee remaining liable for any failure to so re-let the leased premises or any part thereof, or for any failure to collect any rent connected therewith.

8. Cancellation. Either party may cancel this Lease without cause, with ninety (90) days written notice prior to the first day of January of each year. City reserves all other rights and remedies allowed under law.

9. Indemnification and Insurance. Lessee shall defend, indemnify and same harmless City from any and all losses and claims of damage to property and bodily injury or death to any person or persons, which may arise out of, or be caused by, the use and maintenance of said property by Lessee. In addition, Lessee agrees to obtain and continually keep in force a general liability insurance policy with a company qualified to do business in the Commonwealth of Virginia and to have City named, at no cost to the City, as an additional insured thereon. The policy shall at least provide the following coverage:

- a. Bodily injury or death to any person or persons - \$1,000,000; and
- b. Physical damage to property - \$500,000.

Evidence of such insurance coverage and a copy of the additional insured endorsement, including renewals thereof, shall be provided to City and approved by the Newport News City Attorney, or his

designee.

10. Permitted Use. The leased premises shall be used only for the following activities and under the following conditions. No other activities or uses are permitted without the prior written consent of City:

a. Lessee shall sell hot and cold food, beverages and other sundry items from an indoor concession stand, in accordance with Lessee's response to City's Request for Proposals (RFP #18-3480-602).

b. Lessee shall remove all inventory of food and beverages at the termination of this Lease.

c. The minimum hours of operation shall be 11:00 a.m. to 6:00 p.m., seven (7) days a week, from Memorial Day through Labor Day, and on the weekends (Saturday and Sunday) between May 1 and Memorial Day and between Labor Day and September 30. Additional hours may be added at the discretion of Lessee. City's Director of Parks, Recreation & Tourism may, in his sole discretion, approve Lessee's advance request to reduce the hours of operation on a day-by-day basis for good cause shown by Lessee.

d. Lessee shall have the exclusive right to operate the concession stand at the Huntington Park Lifeguard Station during the term of this Lease and any renewals thereof. No business shall be conducted outside the leased premises without the prior written approval of the City's Director of Parks, Recreation & Tourism. Lessee shall be permitted to park a vehicle at the Huntington Park Lifeguard Station for purposes of preparing food to be sold from the concession stand, provided Lessee operates said vehicle in accordance with all applicable state and local laws and regulations. Lessee shall not vend from said vehicle.

e. Lessee shall also be responsible for the upkeep of the premises to include daily clean-up of the beach in the immediate vicinity of the concession stand, cleaning of two rest rooms during concession operation hours and cleaning the concession area. This shall include picking up trash, emptying trash receptacles, cleaning rest room floors and fixtures and restocking paper supplies in the rest rooms.

f. Lessee shall arrange for adequate trash containers and regular pick-up and removal of trash and garbage.

g. Lessee shall comply with all laws, rules, and regulations of the City, State and Federal governments as they pertain to the operation of the concession stand.

h. The serving of alcoholic beverages is prohibited. Such beverages may not be sold for on or off premises consumption.

i. All improvements to the building, including installation of large appliances, shall become the property of City at the termination of this Lease without any compensation therefor being due from City to Lessee.

j. City shall repair, as needed, the exterior of the building and the rest rooms.

k. City staff will open, close, and clean rest room facilities during non-operational hours of the concession. All paper supplies for the rest rooms will be furnished by City.

11. Taxes and Fees. Lessee covenants and agrees to pay all licenses, fees and taxes for the conduct of its business on the leased premises, and will not use or employ the said leased premises or any part thereof for any purpose or in any manner which might be construed as a nuisance or contrary to law. Lessee covenants and agrees to pay all taxes and assessments levied and assessed upon the leasehold. Lessee's personal property necessary for the conduct of its business at

the leased premises shall be registered or scheduled in the City of Newport News, Virginia, for property tax assessment purposes.

12. Right of Entry. The Lessee shall allow City access to the leased premises at any reasonable time, to examine or to make repairs, additions, or alternations to the premises. Additionally, City's Park Rangers and other designated representatives shall have the right to enter onto the leased premises during reasonable business hours for the purpose of ensuring that Lessee is complying with applicable laws and the terms of this Lease.

13. Utilities. City shall make all provisions for all utility services consumed at the leased premises, including, but not limited to, electricity, gas, water and sewage. However, if subsequent to the commencement of this Lease, any such utility service shall be separately metered to serve only the leased premises, then and thereafter, Lessee shall be responsible for the provisions of and payment for such utility service.

14. No Waiver. The failure of City, at any time, to require performance by Lessee of any provision hereof shall in no way affect the right of City thereafter to enforce the same. Nor shall the waiver by City of any breach of any provision hereof be taken or held to be a waiver of any succeeding breach of such provision or as a waiver of the provision itself.

15. Surrender of Premises. At the end of this Lease, Lessee shall return the property to City in the same condition as when the property was first leased to Lessee, except for ordinary wear and tear incidental to the use of the property.

16. Mechanic's Liens. Lessee shall not permit any mechanic's, materialman's or similar lien to stand against any portion of the leased premises for any labor performed or material furnished in connection with any work performed or caused to be performed by Lessee. If any such lien is filed

against the leased premises, Lessee shall discharge such lien by paying the amount secured thereby or providing a bond within twenty (20) days after it was filed and if Lessee fails to do so City may discharge the lien without inquiring into the validity thereof and Lessee shall promptly reimburse City for any amount so expended.

17. Condemnation. In the event that the whole of the leased premises are taken by the exercise of the power of eminent domain (or sold to the holder of such power, pursuant to a threatened taking) this Lease shall terminate as of the date of such taking. In the event any portion of the leased premises, are taken by the exercise of the power of eminent domain (or sold to the holder of such power, pursuant to a threatened taking), this Lease may, at the option of City or Lessee, be terminated by written notice given to the other within sixty (60) days after such taking or sale occurs. Lessee shall have no right in or to the proceeds of any award made in any such condemnation.

18. No Representations by City. Lessee agrees that City has not made any representation, express or implied, with respect to Federal, State or municipal laws or ordinances applicable to the leased premises or the property of which the leased premises constitute a part (including, without limitation, laws or ordinances relating to zoning or fire walls), and Lessee shall not have the right to terminate this Lease, nor shall it be entitled to any abatement of rent payable hereunder or any claim for damages, in the event the leased premises cannot be used by Lessee, in whole or in part, for the purpose for which Lessee intends to use the same.

19. Notices. Any notice herein provided or to be given to City shall be deemed to be given if and when posted in United States certified mail, postage prepaid, addressed to Director of Parks, Recreation & Tourism, 700 Town Center Drive, Suite 320, Newport News, Virginia 23606,

with a copy to the Purchasing Agent, 2400 Washington Avenue, Newport News, Virginia 23607-4300, and any notice herein provided for to be given to Lessee shall be deemed to be given if and when posted in United States certified mail, addressed to Lessee at B-52 Smokehouse BBQ & Lounge, 2710 N. Armistead Ave, Suite D, Hampton, Virginia 23666. Personal delivery may be used in lieu of mailing. Either party may change its address for notices herein by providing written notice of such change of address to the other party.

20. Entire Agreement. This Lease represents the entire agreement between City and Lessee and supersedes all prior negotiations, representations or agreements, either written or oral. This Lease may be amended only by written instrument signed by both City and Lessee.

IN WITNESS WHEREOF, City and Lessee have executed this Lease as of the day first above written.

[Signature Page Follows]

LESSOR: CITY OF NEWPORT NEWS, VIRGINIA,

By: _____
City Manager

ATTEST:

By: _____
City Clerk

APPROVED AS TO FORM:

By: _____
City Attorney

LESSEE: B-52 SMOKEHOUSE BBQ & LOUNGE, LLC

By: _____
Avery Brooks, its Manager/Member

sdm16734