



Staff Summary Report

Council Meeting Date: 01/22/09

Agenda Item Number: _____

SUBJECT: Request approval of Diablo Stadium Non-Spring Training concession agreement between the City of Tempe, and Aramark Entertainment.

DOCUMENT NAME: 20090122prtd01 **SPORTS ADMINISTRATION/POLICIES (0105-01-07)**

SUPPORTING DOCS: No

COMMENTS: This contract is expected to produce approximately \$18,000 in revenue per year.

PREPARED BY: Travis Dray, Deputy Parks and Recreation Deputy Manager, 480-350-5182

REVIEWED BY: Mark Richwine, Parks and Recreation Manager, 480-350-5325

LEGAL REVIEW BY: David Park, Assistant City Attorney, 480-350-8907

FISCAL NOTE: Current revenues from this contract are approximately \$18,000 annually.

RECOMMENDATION: Staff recommends approval of the agreement and the authorization for the Mayor to execute it.

ADDITIONAL INFO: Angels Baseball have entered into a separate agreement, to which the team has granted Aramark Entertainment concession rights at team events during the teams occupancy at Diablo Stadium. The lease agreement (C2004-252) with Angels Baseball asks that The City of Tempe negotiate a separate agreement with the concessionaire selected by the club.

TRAINING CONCESSION AGREEMENT

This Non-Spring Training Concession Agreement ("Agreement") is made and entered into this _____ day of _____, 2009 by and between the City of Tempe, an Arizona municipal corporation ("CITY") and Aramark Entertainment, LLC, a Delaware limited liability company ("CONCESSIONAIRE").

RECITALS

A. WHEREAS, the CITY owns and operates Tempe Diablo Stadium and the surrounding improved real property (the "**Premises**") located in Tempe, Arizona, and as more particularly defined in the Lease Agreement between the Team and the CITY, dated November 18, 2004, CITY contract number C2004-252 (the "**Lease**"); and

B. WHEREAS, the CITY has granted to Angels Baseball LP, a California limited partnership, d/b/a the Angels, a Major League Baseball club (the "**Team**"), the rights to use the Premises for spring training baseball games and other events; and

C. WHEREAS, CONCESSIONAIRE and the Team have entered into a separate agreement (the "**Team Agreement**") pursuant to which the Team has granted CONCESSIONAIRE certain concessions rights at Team events on the Premises during the Team's occupancy period for Spring Training as defined in the Lease; and

D. WHEREAS, the CITY desires to exercise its rights under Section 8(b) of the Lease to negotiate a separate agreement for concession services with the CONCESSIONAIRE for the City's Non-Spring Training season uses of the Premises, and CONCESSIONAIRE desires to enter into such an agreement on the terms and conditions hereinafter set forth.

NOW, THEREFORE, for and in consideration of the mutual covenants and promises of the parties hereto and upon the express terms and conditions hereinafter set forth, it is agreed by and between the parties as follows:

AGREEMENT

1. DEFINITIONS: The following terms shall be defined as follows:

(a) The term "**gross revenues**" means the total amount received by, or accruing to, CONCESSIONAIRE from all sales, for cash or credit, whether collected or not, pursuant to the terms of this Agreement. Gross revenues do not include sales and use taxes or taxes of similar nature: gratuities collected for and on behalf of CONCESSIONAIRE'S employees; or credit and debit card transaction fees. In cases where any sales tax is prepaid by the CONCESSIONAIRE and included in the retail price, as a result of which it is not separately collected by the CONCESSIONAIRE, the

amount of tax on retail sales so paid by the CONCESSIONAIRE shall be excluded from gross revenues.

(b) The term "**Stadium**" shall mean Tempe Diablo Stadium, Tempe, Arizona.

(c) The term "**concessions**" includes and means the concession stands, bar and liquor dispensing facilities, and all hawking of food and beverages, vending machines, the dispensing of food, alcoholic and non-alcoholic beverages in the Stadium, and all food and beverages catered to individuals or groups within the Stadium.

(d) The term "**parking lots**" shall mean the paved areas adjacent to the Stadium devoted to Stadium parking.

(e) "**Contract Year**" means each one-year period commencing on April 1, the first Contract Year to commence on April 1, 2007 or the effective date of formal action by CITY and CONCESSIONAIRE whichever occurs later. For the purposes of this agreement and for any financial accounting used to calculate payments to CITY, the "Contract Year" shall be the period of Non-Spring Training use as defined in the Lease annually which may be amended from time to time by mutual agreement between the CITY and Team and which may apply to this agreement with CONCESSIONAIRE.

2. CONCESSIONS: The CITY hereby hires CONCESSIONAIRE, and CONCESSIONAIRE agrees to operate, the concessions at the Stadium, for the sale of food and beverages during the Non-Spring Training season during the term of this Agreement.

3. FINANCIAL TERMS: Not later than the 20th day of each month following the end of a quarter (quarters shall be January-March, April-June, July-September, October-December), CONCESSIONAIRE shall deliver to CITY a true and correct statement of gross revenues derived by CONCESSIONAIRE from the sale of food and beverage products (including all catered food and beverages) during that quarter for any and all Non-Spring Training uses of the stadium in which the CONCESSIONAIRE had applicable sales. Simultaneously with the delivery of each such statement, CONCESSIONAIRE shall pay to the CITY:

(a) Twenty percent (20%) of gross revenues as defined in paragraph 1(a) above, for all non-catered concessions.

(b) Twenty-five percent (25%) of gross revenues as defined in paragraph 1(a) above, for all catered concessions, unless agreed upon in writing by both parties prior to the sale of such catered concessions.

4. RESTRICTIONS ON SALES BY OTHERS: The CITY hereby grants and confers upon the CONCESSIONAIRE the exclusive right at the Stadium throughout the term of this Agreement to sell food and beverages at Non-Spring Training season uses. The CITY further grants CONCESSIONAIRE a non-exclusive right to sell food and beverages in all parking lots as defined in paragraph 1(d). CONCESSIONAIRE shall have no right to sell novelties of any type at Non-Spring Training uses. The CITY shall use its

best efforts so as not to permit or allow any salesperson or vendor to sell or distribute any food or beverage products, in the Stadium at any time when concessions are being operated by CONCESSIONAIRE or at reasonable times before and after such operation. From time to time there may be events scheduled at the Stadium for which the anticipated crowds are too small to warrant CONCESSIONAIRE'S performance of concessions services. In such event, CONCESSIONAIRE may, on a case-by-case basis, waive its exclusive rights to allow others to perform such operations, which waiver will not be withheld by CONCESSIONAIRE unreasonably; provided that CONCESSIONAIRE shall not be required to permit any third party to use any of CONCESSIONAIRE'S food service equipment at the stadium. Where CONCESSIONAIRE so chooses to waive its exclusive rights, CONCESSIONAIRE shall not be entitled to request a buyout or any form of compensation from third parties in exchange for CONCESSIONAIRE'S waiver. At the request of the CITY, the CITY and the CONCESSIONAIRE may meet annually to review the granting by CONCESSIONAIRE of such waivers during the prior year.

5. POWERS RESERVED TO CITY: The quality, quantity, price and brands of all items of food, liquor, beer and other items to be sold under this Agreement shall be determined by the CONCESSIONAIRE after consultation with the CITY and the CONCESSIONAIRE shall attempt to satisfy every reasonable request of the CITY. In general, prices charged by the CONCESSIONAIRE shall be comparable to prices charged at comparable facilities.

6. DEFAULT BY CONCESSIONAIRE: In the event that the CONCESSIONAIRE shall commit a material breach of any term, condition or covenant contained herein and shall fail to cure same within twenty (20) days after receipt of written notice from the CITY so to do, then the City may, at its option, terminate this Agreement by complying with Section 13 below; provided, however, that if such default by its nature cannot be cured within twenty (20) days and does not involve the payment of money, then if the CONCESSIONAIRE shall not immediately upon notice from the CITY commence curing such default and diligently and continuously pursue such remedy and cure such default within (3) three days, then CITY may, at its option, terminate this Agreement by complying with Section 13 below. The termination of this Agreement by the CITY because of the happening of said events of default shall be without prejudice to any claims which the CITY may have against the CONCESSIONAIRE growing out of the CONCESSIONAIRE'S default under this Agreement. No failure of the CITY to exercise any right, power or privilege shall operate as a waiver thereof, or as a waiver of any other right.

7. HOLD HARMLESS: CONCESSIONAIRE shall indemnify, defend and save harmless the CITY, its employees, officers and directors, from any and all alleged claims, demands, suits, actions, proceedings, loss, cost and damages of every kind and description, including reasonable attorney's fees or litigation expenses, which may be brought or made against or incurred by the CITY, its employees, officers and directors, on account of loss of or damage to any property or for injuries to or death of any person caused by, arising out of any act, omission, professional error, fault, mistake or negligence of CONCESSIONAIRE, its employees, agents or representatives, in connection with or incident to the performance

of this Agreement. The CONCESSIONAIRE'S obligation under this paragraph does not extend to any liability ultimately determined by law or judicial order to have been caused by or arising out of any act, omission, professional error, fault, mistake, negligence or willful misconduct of the CITY, or its employees, officers and directors. The CONCESSIONAIRE shall require any subcontractor to indemnify and defend the CITY, its employees, officers and directors, by inserting indemnity language equal to this paragraph, in any subcontract agreement or arrangement the CONCESSIONAIRE enters into related to this Agreement.

8. INSURANCE: Prior to commencing any work or services under this Agreement, CONCESSIONAIRE shall procure and maintain for the duration of the Agreement insurance against claims for injuries to persons and damages to property, which may arise from or in connection with the performance of the work hereunder by the CONCESSIONAIRE, his agents, representatives, employees, or subcontractors, from the use, occupancy, or operations of the CONCESSIONAIRE at the Stadium for the sale of the CONCESSIONAIRE'S products as follows:

(a) Commercial General Liability: \$10,000,000 combined single limit per occurrence for bodily injury and property damage, including coverage for contractual liability (including defense expense coverage for additional insureds), personal injury, broad form property damage, products, completed operations, and product liability. The general aggregate limit shall apply separately to this project/location or the general aggregate shall be twice the required occurrence limit.

(b) Automobile Liability: \$5,000,000 combined single limit per accident for bodily injury and property damage, including coverage for owned, hired, and non-owned vehicles as applicable.

(c) Workers' Compensation and Employers Liability: Workers' Compensation and Employers Liability statutory limits as required by the State of Arizona.

(d) For bodily injury or damages, fatal or non-fatal, including Liquor Liability insurance coverage to two or more persons for any one accident to the extent of \$10,000,000 per occurrence.

(e) Fire insurance with standard extended and "all risk" property coverage provisions and vandalism and malicious mischief endorsement in an amount equal to the replacement value of the Equipment and Additional Equipment (as such terms are hereinafter defined).

(f) The CITY, its officers, agents, employees and volunteers shall be included as an additional insured with respect to matters covered by this Agreement on the coverages set forth in Sections (a) , (b), (d) and (e) , above, as its interest may appear, and such coverage shall be primary to any insurance carried by CITY. CONCESSIONAIRE will deliver to CITY certificates of such insurance within (10) ten

days of the execution hereof. All such policies of insurance shall be non-cancellable without thirty (30) days prior written notice to CITY.

(g) Such worker's compensation, employer's liability, fidelity bonds or similar insurance as may be required by law.

(h) The parties reserve the right to evaluate the above insurance requirements throughout the course of this Agreement. Any changes to the insurance requirements shall be by mutual consent, and the parties agree to act in good faith in negotiating such requirements considering the insurance market and the risks associated with the performance of this Agreement. In the event the parties are unable to reach an agreement as to the insurance requirements, either party may terminate the agreement, in accordance with Section 13 below, upon thirty (30) days written notice to the other party.

9. OPERATIONAL PROCEDURES: The CONCESSIONAIRE agrees to keep all office space, concession stands, storage rooms, alcoves, booths, kitchens and service areas and other areas used by CONCESSIONAIRE (limited to production and serving areas) in a clean and sanitary condition at all times.

10. PERMITS, LICENSES, FOOD AND BEVERAGE LAWS: All valid requirements of federal, state and local laws and regulation pertinent to or affecting the handling and disposal of food, beverage, tobacco, and other goods or merchandise served or sold must be complied with, and the CONCESSIONAIRE must procure and keep in force all permits and licenses required by such laws and regulations. The CONCESSIONAIRE agrees to obtain and continue in force an on-sale general liquor license issued pursuant to the laws of the State of Arizona for the Stadium. It is hereby understood by and between the parties that the original cost of obtaining said liquor license and the annual renewal of said license, is the cost of the CONCESSIONAIRE. The CITY shall have the right to determine whether alcoholic beverages can be served at non-Team events.

11. EMPLOYEES: The CONCESSIONAIRE will employ trained and neatly uniformed employees and said employees shall conduct themselves at all times in a proper and respectful manner, and if any such employee shall conduct himself or herself in an improper or disrespectful manner, he or she shall be dismissed for cause upon the written request of the CITY or its representatives, and not again be employed in the concessions. Said dismissal shall be in accordance with any applicable federal, state or local laws which may be in effect and further shall be in compliance with any applicable union or labor organization agreements which may be in effect at the time of said dismissal. CONCESSIONAIRE also agrees to have a manager, who is acceptable to the CITY, on the premises during business hours.

12. UTILITIES: Utilities used by the CONCESSIONAIRE in the operation of the Concession are to be provided by the CITY without charge to the CONCESSIONAIRE.

The CITY shall also arrange and pay for the removal from the Stadium of trash resulting from the operation of the concessions.

13. EFFECT OF TERMINATION OF THE TEAM AGREEMENT:

(a) In the event of a termination of the Team Agreement for any reason whatsoever, this Agreement shall automatically terminate unless otherwise mutually agreed in writing between the CITY and the CONCESSIONAIRE.

(b) The CITY recognizes that, in the event of termination of this Agreement for any reason, such termination shall not affect the Team Agreement, which shall remain in full force and effect until its termination or expiration in accordance with its terms. The CITY further recognizes, as stated in Section 14 below, that, pursuant to the Team Agreement, the CONCESSIONAIRE is purchasing and installing at the Stadium certain Equipment and Additional Equipment (as such terms are defined in the Team Agreement) to which the CONCESSIONAIRE shall retain title until termination of the Team Agreement. Accordingly, the CITY agrees that, following termination of this Agreement, the CITY shall have no right to use, or permit any third party to use, the Equipment and Additional Equipment without the express written consent of the CONCESSIONAIRE. The CONCESSIONAIRE agrees to act reasonably in giving such consent provided the CONCESSIONAIRE receives fair cash consideration for the use of the Equipment and Additional Equipment and provided that the CONCESSIONAIRE receives adequate protection against damage to, or theft of, such Equipment and Additional Equipment.

14. EQUIPMENT: The parties acknowledge that CONCESSIONAIRE is providing certain equipment at the Stadium in accordance with Team Agreement.

15. ACCOUNTING RECORDS, REPORTS, DUE DATES, AUDITS:

The CONCESSIONAIRE shall, at its own expense, maintain such accounting records as may be approved by the CITY, and the CONCESSIONAIRE shall use good accounting practices which conform to generally accepted accounting principles. The CITY shall have the right to verify all books, correspondence, memoranda, or other records of the CONCESSIONAIRE, relating to this Agreement, during the period of this Agreement, and for such time thereafter as may be necessary to accomplish such verification. The CITY shall have the further right to audit the books, correspondence, memoranda or other records of the CONCESSIONAIRE relating to this Agreement.

16. TERM OF CONCESSION AGREEMENT: The term of this Agreement shall be for a period equal to CONCESSIONAIRE'S term with the Team and including through December 31 of such termination year of the Team agreement.

17. CANCELLATION, TERMINATION OR INTERRUPTION OF EVENT: The CONCESSIONAIRE understands that the CITY will reserve the right in the CITY'S sole and arbitrary discretion to cancel any event or performance upon the Premises, during the performance thereof, and to dismiss the audience or cause the same to be dismissed, and the CONCESSIONAIRE hereby agrees that it will not make, and will use its best efforts

to prevent anybody over whom it has control to make, against the CITY, or its officials, officers, employees, agents and volunteers, any claims for damages to the CONCESSIONAIRE or other party arising out of any act of the CITY, its officials, officers, employees, agents or volunteers, in the exercise of the CITY discretion as aforesaid.

18. RIGHT OF ENTRY: The CITY, its elected officials, officers, employees, agents and representatives, shall be permitted to enter the Premises at all reasonable times to examine the same or to make such repairs therein as shall be deemed required by the CITY.

19. STATEMENT OF ATTENDANCE: The CITY agrees to use its best efforts to promptly furnish to CONCESSIONAIRE statements of attendance at all Non-Spring Training uses held on the Premises.

20. DELIVERIES: Deliveries of all supplies, goods, wares, merchandise and equipment shall be made at the service entrance of the Stadium. The CITY reserves the rights to determine the time of all deliveries made to the CONCESSIONAIRE; provided, however, in setting delivery times, the CITY shall consider the CONCESSIONAIRE'S business operations.

21. NO DISCRIMINATION: The CONCESSIONAIRE agrees not to discriminate against any employee or applicant for employment because of race, religion, familial status, gender, gender identity, age, color, sex, sexual orientation, disability or national origin, or any other characteristics protected by law. This provision shall include, but not be limited to, employment, upgrading, demotion, or transfer, recruitment, layoff, or termination, rates of pay or other forms of compensation and selection for training including apprenticeship. The CONCESSIONAIRE agrees to post hereafter in conspicuous places, available for employees and applicants for employment, notices setting forth the provisions of this non-discrimination clause. The CONCESSIONAIRE further agrees to insert this provision in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials. The CONCESSIONAIRE and its employees shall not discriminate because of race, religion, familial status, gender, gender identity, age, color, sex, sexual orientation, disability or national origin, or any other characteristics protected by law against any person by refusing to furnish such person any accommodation, facility, service or privilege offered to or enjoyed by the general public. Nor shall the CONCESSIONAIRE or its employees publicize the accommodations, facilities, services or privileges in any manner which would directly or inferentially reflect upon or question the acceptability of the patronage of any person because of race, religion, familial status, gender, gender identity, age, color, sex, sexual orientation, disability or national origin, or any other characteristics protected by law.

22. ENTIRE AGREEMENT: This Agreement shall constitute the entire understanding between the parties with respect to the subject matter hereof and supersedes all prior agreements whether written or oral and cannot be modified or amended unless by a written instrument signed by the parties.

23. NOTICES; All notices required by this Agreement shall be in writing and shall be sufficiently given and served upon the other party if sent by United States mail, postage prepaid, certified mail, return receipt requested, and addressed as follows:

IF SENT TO THE CITY: CITY OF TEMPE, ARIZONA
c/o Parks and Recreation Manager
3500 South Rural
Tempe, Arizona 85282

or at such other place as the CITY may, from time to time, designate by notice to CONCESSIONAIRE.

IF SENT TO CONCESSIONAIRE: Aramark
9400 West Maryland Ave
Glendale, AZ 85303
Attention: District Manager

With a required copy to: ARAMARK Sports and Entertainment
Services, LLC
1101 Market Street
Philadelphia, PA 19107
Attn: Associate General Counsel, Sports and
Entertainment

or at such other place as CONCESSIONAIRE may, from time to time, designate by notice to the CITY.

24. CANCELLATION OF AGREEMENT: This Agreement is subject to cancellation pursuant Section 38-511 of the Arizona Revised Statutes relating to conflicts of interest.

25. ASSIGNMENT: Neither party may assign this Agreement, or any rights or obligations hereunder, without the prior written consent of the other; provided that CONCESSIONAIRE may assign this Agreement to any affiliate of ARAMARK Sports and Entertainment Services, LLC, but no such assignment shall relieve CONCESSIONAIRE of its obligations hereunder.

26. DISPUTE RESOLUTION: In the event of a dispute between the parties to this Agreement regarding a provision of this Agreement, a party's performance of its obligations as stated in this Agreement or any other matter governed by the terms of this Agreement, the parties will meet in good faith to attempt to resolve the dispute. If the parties fail to resolve the dispute, then the parties agree that the dispute may be resolved through mediation. If mediation is agreed to by the disputing parties, the disputing parties shall mutually agree upon the services of one (1) mediator whose fees and expenses shall

be borne equally by the disputing parties. If the dispute is not resolved within a reasonable time, the disputing parties shall be free to use other remedies available to them to resolve the dispute.

27. INDEPENDENT CONTRACTOR: The relationship between the parties is that of independent contractors and nothing contained in this Agreement shall be construed as establishing an employer/employee relationship, partnership or joint venture between the parties.

28. FORCE MAJEURE: The parties shall not be liable for any failure by them to fulfill their responsibilities and obligations under this Agreement by reason of fire, strike, war, insurrection, government restrictions, labor dispute, third party breach or other cause beyond their control.

29. COUNTERPARTS: This Agreement may be executed in one or more counterparts, each of which shall be an original, but all of which taken together shall constitute one and the same document.

30. AMENDMENTS: Any amendments or alternative or supplementary provisions to this Agreement must be made in writing and duly executed by an authorized representative or agent of each of the parties hereto.

31. SEVERABILITY: The invalidity of any provision contained herein or portion of a provision shall not affect the validity of any other provision contained herein or the remaining portion of the applicable provision.

32. SUCCESSORS AND ASSIGNS: This Agreement shall inure to the benefit of and be binding upon the parties hereto and their successors and permitted assigns. A waiver of any breach hereunder shall not be deemed a waiver of any subsequent breach.

33. GOVERNING LAW: This Agreement shall be governed by the laws of the State of Arizona without regard to conflicts of law jurisprudence and any litigation between the parties regarding this Agreement or the performance of any of the obligations contained in this Agreement shall be initiated in Maricopa County, Arizona.

34. COOPERATION OF THE PARTIES: The parties agree to cooperate in good faith to reasonably complete the obligations set forth in this Agreement.

35. NO THIRD BENEFICIARIES: This Agreement is solely for the benefit of the parties signing it and does not create nor shall it be construed to create rights in other parties other than as stated in the Agreement. No parties outside of this Agreement may enforce the terms and conditions of this Agreement.

36. CAPTIONS: The captions and headings of the various sections of this Agreement are for convenience and identification only, and shall not be deemed to limit or define the contents of the respective sections.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed on the day and year first above written.

CITY OF TEMPE, ARIZONA

ARAMARK ENTERTAINMENT, LLC

By: _____
Mayor

By: _____
Name:
Title:

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney