

Notice of Hearing: _____
Date of Hearing: _____
Date Adopted: _____
Date Published: _____
Date Effective: _____

RESOLUTION NO. _____

A RESOLUTION AUTHORIZING THE MAYOR TO ENTER INTO AN AGREEMENT BETWEEN THE CITY OF SIOUX FALLS AND THE OVERLOOK CAFÉ FOR THE MANAGEMENT OF THE OVERLOOK CAFÉ.

WHEREAS, the City of Sioux Falls (the “City”) and the Mikrho Management LLC (the “Management”) find that it is in the best interest of the people of the city of Sioux Falls, the Management, and the Overlook Café that it enter into an agreement between the City and Management, whereby the Management will operate and manage the Overlook Café; and

WHEREAS, the Management is best qualified to manage the operation of the Overlook Café; and

WHEREAS, the Management and the City find that it is in both parties’ best interest that an approximately five-year agreement be now executed and subsequently entered into;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY OF SIOUX FALLS, SD:

That the document attached to and part of this resolution entitled “Management Agreement for the Overlook Café,” being a five-year agreement for the Management to manage the Overlook Café, is hereby approved.

That the Mayor is authorized to sign such agreement after it is ratified and executed by the Management.

Date adopted: _____.

Mayor

ATTEST:

City Clerk

CITY USE ONLY			
Agreement No. _____	P.O. No. _____	Attorney _____	Code <u>atkl0960.docx</u>
CIP No. _____	Project _____	Finance _____	
Dept. No./MOU _____	Amount _____	City Engineer _____	

Management Agreement for the Overlook Café

Agreement made _____, 2013, between the City of Sioux Falls, SD (the “City”) and Mikrho Management LLC, P.O. Box 91805, Sioux Falls, SD 57109-1805 (the “Manager”).

The parties to this Agreement, in consideration of the mutual covenants and stipulations set out herein, agree as follows:

Defined Terms

Defined Terms. For purposes of this Agreement, the following terms have the meanings:

ADA means the American with Disabilities Act, 42 U.S.C. Sections 12101–12213, as amended, as it now exists, and as it may be amended in the future.

Budget means a projection of revenues and expenses for a specified purpose and period of time.

Capital Equipment means any and all furniture, fixtures, and equipment including furniture for sitting area, microwave(s), wine cooler, espresso machine, nacho machine, smoothie machine, soft drink dispensers, and any additional portal display cases, supplies, rental equipment, televisions, computers, printers, software, sound equipment, office equipment, and any other property the Manager is required to supply to support the delivery of services to be provided by the Manager as set forth in Exhibit A.

Capital Improvements mean any additions, alterations, renovations, repairs, and improvements to the Overlook Café with an initial dollar cost of not less than \$2,500.00 per project. Capital improvements will not include routine maintenance and repair projects, which in the aggregate do not exceed \$2,500.00 per project. Capital improvement items may or may not be capitalized as capital assets on the City’s balance sheets depending upon the City’s asset capitalization policy in effect at the time of acquisition.

Laws mean all federal, state, local, and municipal regulations, ordinances, statutes, rules, laws, and constitutional provisions.

Operating Account is as defined in Section Eleven, subparagraph 9, of this Agreement.

Operating Expenses mean the expenses and expenditures incurred by the Manager in promoting, operating, maintaining, and managing the Overlook Café that are required to

be accounted for in the operating account, all as determined in accordance with generally accepted accounting principles. Operating expenses include, but are not limited to, employee compensation including bonuses, benefits; operating supplies, materials, and parts costs; costs of any independent contractors; advertising, marketing, group sales, and public relations costs; commissions; and data processing costs. The Manager's costs of procuring, administering, and maintaining the insurance policies required pursuant to this Agreement; printing and stationery costs; postage costs; banking services fees; equipment rental costs; computer equipment purchase and lease costs, Internet, cable and telephone charges, telephone line(s) which have not been provided by the City; copier/printer/facsimile equipment lease charges, software costs, and website construction, maintenance, and hosting costs; repairs and maintenance consistent with Exhibit A; safety and medical expenses; and point-of-sale charges. Operating expenses do not include (i) the cost of property taxes for the facilities; (ii) telephone lines provided by the City; and (iii) utility charges that are the City's responsibility as set forth in Section Eleven, subparagraph 8.

Section One Management

1. **General.** The City grants to the Manager the exclusive right to operate, manage, market, and promote the Overlook Café as set forth in this Agreement including, but not limited to, the day-to-day operations of the Overlook Café and all activities therein, provided that the Manager must follow all applicable laws and the City's policies and guidelines involving the expenditure of City funds.
2. **Property Condition.** The Manager accepts the premises as being in an "as is" condition and shall return the premises in good working order, normal wear and tear excepted, in the event the Manager shall cease to manage the Overlook Café.
3. **City Access to Premises.** The City may enter upon the Overlook Café premises at any reasonable time for the purpose of inspecting the Overlook Café, trash collection and disposal, making repairs, or for any other reasonable purpose.
4. **Facility Access.** Subject to the approved operational plan as set forth in Section Fourteen, Manager shall ensure that the Overlook Café is open and available to all members of the public and that it will not enter into any leases or other agreements providing for the exclusive use of the Overlook Café by any person other than on a temporary basis.
5. **Contract Manager.** The Director of Parks and Recreation (the "Director") or his designee(s) will serve as contract manager. The contract manager will represent the City's interests to the Manager and will oversee the performance of the Manager. The Manager shall report to and be responsible to the contract manager.
6. **Execution of Contracts.** The Manager shall have the right to negotiate, execute (in Manager's own name), deliver, and administer service and other contracts involving the day-to-day operations of the Overlook Café as agent on behalf of the City. Any such material agreement shall contain standard indemnification and insurance

obligations on the part of each vendor, licensee, or service provider, as is customary for the type of service or obligation being provided or performed by such parties. The Manager shall obtain the prior approval of the City (which approval shall not be unreasonably withheld or delayed) before entering into any such contracts with a term that expires after the term of this Agreement, unless such contract, by its express terms, can be terminated by the Manager or the City following expiration of the term without any penalty. In connection with any contracts Manager enters into, Manager shall use its best efforts to include in such documents: (i) the right of Manager to assign, without cost, all of its rights and obligations to the City or to any successor management company retained by the City upon the expiration or termination of this Agreement; and (ii) the right of the City to assign, without cost, its rights and obligations to any successor management company retained by the City.

Section Two Term

This Agreement will commence on the last to occur of the signing of this Agreement by the Mayor, the attestation of this Agreement by the City Clerk, the approval of this Agreement by resolution adopted by the City Council, and the expiration of the time within which the City Council's approval of this Agreement may be challenged by referendum following the publishing of the City Council's resolution (the "Effective Date"), and will continue in full force and effect through January 31, 2018, unless earlier terminated under the provisions of this Agreement.

Upon the termination of this Agreement, the Manager will yield and deliver peaceably to the City possession of the Overlook Café (including any personal property belonging to the City) and any alterations, additions, or improvements thereto, promptly and in good condition, order, and repair, except for reasonable wear and tear. Further, the Manager agrees to be responsible for cleaning the Overlook Café to the satisfaction of the City.

Section Three Civil Rights and ADA

1. **ADA Requirements.** With respect to the Americans with Disabilities Act (ADA), the Manager will comply with Title III of the ADA and the provisions of auxiliary aids or alternate services as may be required by the ADA. The Manager is obligated to ensure the accessibility of any and all events taking place within the facility's structures and on the facility's property. The Manager is required to comply and be financially responsible for compliance with Title III of the ADA in connection with any event or activity held at the facility or on its property.

Furthermore, the Manager will require every licensee, lessee, tenant, promoter, or user of any portion of the Overlook Café to comply and to be financially responsible for compliance with Title III of the ADA in connection with any activities of such licensee, tenant, promoter, or user at the Overlook Café.

Nothing in this section or elsewhere in this Agreement will require the Manager to undertake any of the foregoing compliance activities, nor will the Manager have any liability under this Agreement if compliance requires any capital improvements or capital equipment purchases, unless the City provides funds for the needed capital improvements and capital equipment purchases.

2. **Civil Rights.** In addition to the undertaking required above, the Manager agrees to observe and fully comply with all nondiscrimination and antiharassment provisions of any federal, state, or local laws, which would include, but is not limited to:
 - (i) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq., and 45 CFR Part 80).
 - (ii) Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq., and 29 CFR Parts 1602, 1604, 1605, and 1606).
 - (iii) The Age Discrimination in Employment Act (29 U.S.C. 621 et seq., and 29 C.F.R. Part 1625).
 - (iv) The Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq., and 45 CFR Parts 90 and 91).
 - (v) The Americans with Disabilities Act of 1990, as amended.
 - (vi) The Rehabilitation Act of 1973 (29 U.S.C. 794 et seq., and 45 CFR Parts 84 and 85).
 - (vii) The Genetic Information Nondiscrimination Act of 2008 (42 U.S.C. 1635 et seq., and 29 CFR 1635).

Without limiting the foregoing, the Manager will not discriminate against any person based on the individual's race, religion, color, sex, national origin, ancestry, disability, age, genetic information, or creed. Manager will include the phrase "equal opportunity employer" or a similar phrase approved under South Dakota law in all solicitations or advertisements for employees.

The Manager will permit access to any and all records pertaining to hiring and employment and to other pertinent data and records for the purpose of enabling any investigative agency, commission, or court, or its representatives, to ascertain compliance with the above provisions.

Notwithstanding any provision in this Agreement to the contrary, if Manager is found liable under or to be in violation of any human rights or antidiscrimination laws under a final agency decision or court order, the Manager will be deemed to have materially breached this Agreement and the Agreement may be immediately terminated, in whole or part, by the City and the Manager shall be liable for any costs or expenses incurred by the City in obtaining from other sources the services to be rendered or performed under the contract so terminated or cancelled.

Section Four Compensation

The Manager shall make annual payment to the City Finance Office due January 30, the following year, of ten (10) percent of gross receipts.

Section Five Scope of Services

The Manager shall operate the Overlook Café in accordance with industry standards to provide a professionally run, family-oriented food service for park patrons and to book private rentals/catering events. The Manager shall provide services necessary for the operation and management of the Overlook Café as set forth in Exhibit A. The City shall provide for the City's responsibilities as set forth in Exhibit A. The Manager shall refrain from any business practice or promotional activity that is injurious or detrimental to the City or the goodwill associated with the Overlook Café and the Parks and Recreation system of the City.

Section Six Improvements

Any improvements made shall be done in accordance with Section Thirteen of this Agreement. The City may impose conditions upon the installation of any improvements. Violation of any of the conditions shall constitute grounds for termination of this Agreement.

Section Seven Compliance with Laws

The Manager shall comply with all federal, state, local ordinances, statutes, rules, and regulations that may apply to the operation of the Overlook Café, including any state competitive bid laws when City funds are expended.

Section Eight Insurance

1. **City-Required Insurance.** The City at its own expense shall procure and maintain property and liability insurance with insurance companies or pools licensed or authorized to do business in South Dakota, or self-insure for an equivalent amount.
2. **Manager-Required Insurance.** The Manager, at its cost, shall secure the insurance specified below. All insurance secured by the Manager under the provisions of this section shall be issued by insurance companies acceptable to the City. The insurance specified in this section may be in a policy or policies of insurance, primary or excess. Certificates of all required insurance shall be provided to the City upon execution of this Agreement.
 - a. **Workers' compensation insurance** providing the statutory limits required by South Dakota law, if the Manager has any employees. In addition, if the

Manager has any employees, it shall provide Coverage B, Employer's Liability Coverage, of not less than \$100,000 each accident, \$100,000 disease-policy limits. The required limit may be met by excess liability (umbrella) coverage.

- b. **Commercial general liability insurance** providing occurrence form contractual, personal injury, bodily injury, and a property damage liability coverage with limits of at least \$1,000,000 per occurrence, \$2,000,000 general aggregate, and \$2,000,000 aggregate products and completed operations. The required limit may include excess liability (umbrella) coverage. The policy shall name the City and its representatives as an additional insured. If "occurrence form" insurance is not available, "claims made" insurance will be acceptable. The policy shall be maintained for three years after completion of this Agreement.
- c. **Automobile liability insurance** covering all owned, nonowned, and hired automobiles, trucks, and trailers. The coverage shall be as broad as that found in the standard comprehensive automobile liability policy with limits of not less than \$1,000,000 combined single-limit each occurrence. The required limit may include excess liability (umbrella) coverage.
- d. **Liquor liability insurance** naming the City as an additional insured with single-limit coverage for personal and bodily injury and property damage of at least one million dollars (\$1,000,000) for each occurrence.
- e. At the City's request, Manager shall obtain such other insurance that is customary and standard for protection against claims, liabilities, and losses connected with the Overlook Café. The insurance required in subsection "d" above shall be provided as specifically directed by the City.

The Manager will provide the City with at least 30 days' written notice of an insurer's intent to cancel or not renew any of the insurance coverages.

The City's approval or acceptance of certificates of insurance does not constitute City assumption of responsibility for the validity of any insurance policies nor does the City represent that the above coverages and limits are adequate to protect any individual/group/business, its consultants' or subcontractors' interests, and assumes no liability thereof.

3. **Blanket Policies.** All insurance may be obtained by Manager or the City by endorsement or equivalent means under blanket insurance policies, provided that such blanket policies fulfill the requirements specified herein. All blanket insurance policies shall be in form and substance with deductible limits and self-insured retention, which are consistent with those that are generally accepted by the City.
4. **City as Additional Insured.** All insurance provided under this section shall name the City and its duly authorized representatives as an additional insured. The party procuring such insurance shall deliver to the other party policies or certified copies, signed by an authorized representative of the insurer, or in the case of blanket policies, certified abstract policies with respect to all policies so procured, including existing, additional, and renewal policies and, in the case of insurance about to expire, shall deliver evidence of renewal in binder form with respect to the renewal

policies not less than 45 days prior to the respective dates of expiration, and thereafter shall deliver policies, as aforesaid, or as the case may be, within 60 days succeeding the expiration dates.

5. **Notice of Cancellation.** All policies of insurance provided for under this section shall, to the extent obtainable, have attached thereto an endorsement that such policy shall not be canceled or materially changed without at least 30 days' prior written notice to the City, Manager, and any additional insured.
6. **Claims.** Manager and the City shall cooperate in a prompt manner in connection with the making of any claims and the collection of any insurance money that may be due and shall execute and deliver such proofs of loss and other instruments that may be required for the purpose of obtaining the recovery of any such insurance monies.
7. **Failure to Maintain Insurance.** If the Manager fails to obtain and maintain the insurance required pursuant to this section or if any insurer cancels or modifies such insurance without the City's consent, at the City's election (but without any obligation to do so), the City may procure similar insurance coverage and Manager shall reimburse the City for any premiums paid by the City within ten days of demand therefor. Any amounts unpaid shall accrue interest at the New York Prime Rate plus 5 percent from the day incurred. Manager shall not perform work during any period when any policy of insurance required hereunder is not in effect unless it gives evidence to the reasonable satisfaction of the City of the unavailability of such insurance.
8. **Risk Management.** The Manager shall cooperate in the implementation of any loss control recommendations, insurance coverage reviews, and collection appraisals for insurance purposes of the City.

Section Nine Independent Contractor Status/Employees

1. **Personnel.** Manager shall select, employ, and supervise any and all of the personnel necessary or required to carry out the services to be provided by the Manager as set forth in Exhibit A ("Overlook Café employees"). All personnel so employed shall be employees or independent contractors of the Manager, and the terms of their employment or engagement, including compensation, shall be at the sole discretion of the Manager. The salaries and all additional costs of engagement of the aforementioned personnel employed or contracted by Manager shall be borne by Manager.
2. **Not City Employees.** Overlook Café employees shall in every instance be deemed employees of Manager and not of the City. The City shall have no right to supervise or direct such employees.

3. **Reports.** Manager shall prepare and file punctually when due all forms, reports, and returns required by law relating to the employment of personnel of the Overlook Café or the operation of the Overlook Café.
4. **Independent Contractor.** Manager will not represent to anyone that its relationship to the City is other than that of an independent contractor, and the City and Manager may so inform any parties with whom they deal and may take any other reasonable steps to carry out the intent of this subsection.

Section Ten Indemnification

1. **Protect Against Liability.** Manager will use commercially reasonable efforts that are consistent with industry standards applicable to similar facilities to not do or permit any act or thing to be done on the Overlook Café premises that subjects the City to liability or responsibility for injury, damage to persons or property, or to any liability by reason of any violation of law or of any requirement. Manager shall use its best efforts to exercise such control over the Overlook Café so as to fully protect the City against any such liability. In addition, to the fullest extent permitted by law, Manager shall indemnify and save harmless the City and the City shall indemnify and save harmless the Manager against and from all liabilities, suits, obligations, fines, damages, penalties, claims, costs, charges, and expenses, including, without limitation, attorneys' fees and disbursements, which may be imposed upon or asserted against or reasonably incurred by the City or the Manager or any agency or subdivision thereof or their respective agents, employees, officers, or directors (the "indemnities") by reason of the acts or omissions of the other or its affiliates or the performance of each of their obligations hereunder, unless the same shall have been caused solely by the negligent or willful acts of such indemnities. If damage to the Overlook Café results from any removal made by the Manager or its agents, the Manager or tenant will repair the damage at its sole expense.
2. **Insurance.** The obligation of Manager under this section shall not in any way be affected by the absence in any case of covering insurance or by the failure or refusal of any insurance carrier to perform any obligation on its part under insurance policies affecting the Overlook Café.
3. **Indemnification.** Subject to Section Sixteen, subparagraph 6, of this Agreement, if any claim, action, or proceeding is made or brought against any indemnitee by reason pursuant to this section, then, upon demand by such indemnitee, the City or the Manager at its sole cost and expense, shall resist or defend such claim action or proceeding in such indemnitee's name, if necessary, by the attorneys for the City or the Manager's insurance carrier (if such claim, action, or proceeding is covered by insurance), otherwise by such attorneys as the other party shall approve. The parties agree that if the other party is named as party to an action, the other party will reasonably cooperate in the conduct of the proceedings.

Section Eleven Accounting

1. **Collection of Receipts/Payment of Expenses.** The Manager shall be responsible for the collection of all receipts generated by business operations at the Overlook Café, and the payment of all operating expenses incurred in the business operations associated with providing the services to be rendered by the Manager as set forth in Exhibit A, and the Manager shall account for the same consistent with the terms of this Agreement.
2. **Rent of Facilities.** The Manager shall have the exclusive right to rent the Overlook Café facilities for use by the public for educational activities, meetings, private gatherings, or other uses that may be developed for the Overlook Café by the Manager.

Subject to availability, the City shall have the right to use the Overlook Café rent-free for meetings, seminars, training classes, or other noncommercial uses, provided that the City shall promptly reimburse Manager for deposit into the operating account for any out-of-pocket expenses incurred by Manager in connection with such use. Such noncommercial use of the facility by the City shall (i) not compete with or conflict with the dates previously booked by Manager for paying events, and (ii) be booked in advance upon reasonable notice to Manager. Upon request of the City, the Manager shall provide to the City a list of available dates for City use of the Overlook Café. To the extent that Manager has an opportunity to book a revenue-producing event on a date that is otherwise reserved for use by the City, Manager may propose alternative dates for the City's event and the City shall use best efforts to reschedule its event to allow Manager to book the revenue-producing event.

3. **Rental Proceeds.** Pursuant to the terms of this Agreement, all proceeds from the renting of Overlook Café facilities set forth in this section shall be collected by Manager and be the property of the Manager.
4. **Manager's Right to Sell Commodities.** The City shall not authorize or permit any other person or entity and shall not on its own behalf sell, or offer for sale, at the Overlook Café any of the commodities for which the Manager has rights. This section is not applicable to separate City-sponsored catering events that may occur at the site.
5. **Remittance of Tax Due.** The Manager, unless it has subcontracted with other agencies to do so, shall collect, account for, and remit promptly to the proper governmental authority all applicable excise, sales, and use taxes or similar governmental charges collected at the Overlook Café directly from the patrons or guests, or as a part of the sales price of any goods, services, or displays such as admission, gross receipts, or similar or equivalent taxes.
6. **Accounting System.** Manager shall establish, implement, and supervise the accounting, inventory, and cost control systems necessary to carry out the services

to be provided by the Manager as set forth in Exhibit A. Manager shall maintain adequate control over the records of the Overlook Café and the acquisition and disposition of all personal property and all fixed assets used in the operation of the Overlook Café. (See Exhibit A.)

7. **Advertising and Promotion.** Except as otherwise expressly provided herein, Manager shall at its sole cost and expense pay the administrative and general expenses and the cost of Overlook Café advertising, business promotions, and public relations out of the operating account.
8. **Utilities.** Except for utilities that have been deemed to be the responsibility of the Manager as listed below, the City shall pay all utility charges assessed to the Overlook Café including garbage, alarm system, water, sewer, and electricity.

Telephone(s), point of sales, any additional telephone line(s) that are needed which have not been provided by the City, Internet (including wireless), and cable expenses, if any, shall be the responsibility of the Manager as set forth in Exhibit A.

9. **Operating Account(s).** The Manager shall create and maintain one or more separate commercial bank accounts (the "Operating Accounts") using Manager's tax identification number in the City of Sioux Falls, which shall be for the exclusive use of all receipts and disbursements related to this Agreement. Subject to the terms of this Agreement, all revenues and monies received by the Overlook Café shall be deposited by Manager into the Operating Accounts as soon as practicable upon receipt. The City may at any time obtain information and records from the bank concerning such accounts and inspect the same.

Section Twelve Inventory

The Manager shall provide the City, at the end of each calendar year, with an annual inventory of Manager's assets valued in excess of \$2,500.00 per item including, but not limited to, all furniture, fixtures, office equipment, supplies, and donated items at the Overlook Café, and deliver a written report of the foregoing to the City.

Further, Manager agrees to itemize the capital equipment it owns on an annual basis. The capital equipment listed shall be subject to the concurrence of the City.

The City may review and audit any other inventory for reasonableness.

Section Thirteen Budget

1. **Budget.** The Manager shall each year submit to the City an annual budget no later than October 31 for the coming calendar year, which shall be January through December of each year. The annual budget shall include projected gross revenue and expenses for the next calendar year.

2. **Schedule of Capital Improvements.** The Manager may annually, at the time of submission of the annual budget to the City, provide to the City a schedule of proposed capital improvements to be made at the Overlook Café, for the purpose of allowing the City to consider such projects and to prepare and update a long-range Capital Improvement Program.
3. **Responsibility for Capital Improvements and Capital Equipment.** The City will have the sole discretion to determine whether and to what level to fund Capital Improvements at the Overlook Café; provided, however, the City shall be under no obligation to make any capital improvement proposed by the Manager, and provided further, pursuant to Section Ten, subparagraph 1, of this Agreement, that the Manager shall have no liability for any claims, costs, or damages arising out of a failure by the City to make any capital improvements which were determined to be necessary for the safety, health, and welfare of the people; and provided further, that the Manager shall be solely responsible for all capital equipment expenditures in accordance with the terms set forth in Section Fifteen of this Agreement. Notwithstanding the foregoing, the Manager shall have the right (not the obligation) upon notice to the City and with the City's consent, to make capital expenditures at the Overlook Café for emergency repairs in accordance with the procedure for declaration of an emergency under Section 5.07 of the City's Home Rule Charter.
4. **Debt.** No City real property assets shall be encumbered by the Manager without City consent or approval.
5. **Liens.** Manager and the City shall use their best efforts to prevent any liens from being filed against the Overlook Café, which arise from any maintenance, repairs, alterations, improvements, additions, or replacements in or to the Overlook Café. Manager shall act for itself and the City in this regard unless the City directs otherwise, and if any liens are filed as a result of the Manager's actions, Manager shall prevent any liens from becoming delinquent. The cost thereof, if the lien was not occasioned by the fault of either party, shall be treated the same as the cost of the matter to which it relates. If the lien arises as a result of the fault of one party, then the party at fault shall bear the out-of-pocket cost of obtaining the lien release.

Section Fourteen Operational Plan

The Manager will prepare and maintain an operational plan for the Overlook Café activities by October 31 each year. The operational plan shall establish operational policies and procedures for services offered including, but not limited to, information regarding employee training, cash handling, menu/catering pricing consistent with the scope of Manager's Response to the City's Request for Proposal 13-0017, alcohol management plan, and staffing levels. Implementation of the plan shall be upon concurrence of the Director.

Section Fifteen Ownership of Assets/Repairs

The Manager shall retain ownership of and repair and replace as necessary all capital equipment, including furniture for sitting area, microwave(s), wine cooler espresso machine, nacho machine, smoothie machine, soft drink dispensers, and any additional portable display cases, supplies, rental equipment, televisions, computers, printers, software, sound equipment, office equipment, and any other property the Manager is required to supply to support the delivery of services to be provided by the Manager under Exhibit A. The City shall be the exclusive owner of all other property at the Overlook Café.

Upon expiration or termination of this Agreement, the City will retain all intangible property including, but not limited to, websites, domain names, Facebook pages, suppliers' lists, and customer lists. The ownership of inventory including food, beverage, and supplies, along with data and software utilized by the Manager in providing services under this Agreement will remain with the Manager.

Section Sixteen Expiration, Termination, Remedies, and Exculpation

1. **Grounds for Termination by the City.** The City may terminate this Agreement by notice to Manager if any one or more of the following events occur:
 - a. If Manager applies for or consents to the appointment of a receiver, trustee, or liquidator of all or a substantial part of its assets or makes a general assignment for the benefit of its creditors, or files a voluntary petition in bankruptcy or a petition seeking reorganization, composition, arrangement with creditors, liquidation, or similar relief under any present or future statute, law, or regulation, or files an answer admitting the material allegations of a petition filed against it in any proceeding under the Bankruptcy Code, or is adjudicated bankrupt or insolvent.
 - b. If any petition or complaint is filed without the application, approval, or consent of the City seeking reorganization, composition, arrangement with creditors, liquidation, or similar relief under any present or future statute, law, or regulation with respect to Manager seeking appointment of a receiver, trustee, or liquidator thereof of all or a substantial part of such party's assets, and such petition or complaint is pending and not withdrawn or dismissed for an aggregate of ninety (90) days (excluding any days during which such petition or complaint shall be stayed), whether or not consecutive.
 - c. If Manager breaches or fails to perform any term, covenant, or condition contained in this Agreement and fails to cure the alleged breach within thirty (30) days following written notice specifying the alleged default and the action required to cure the default.
2. **Grounds for Termination by the Manager.** The Manager may terminate this Agreement by notice to the City if the City breaches or fails to perform any term,

covenant, or condition contained in this Agreement and fails to cure the alleged breach within thirty (30) days following written notice specifying the alleged default and the action required to cure the default.

3. **Extension of Cure Period.** In the event a default, other than a default in the payment of money, is not reasonably susceptible to being cured within the thirty- (30-) day period, the defaulting party will not be considered in default if, within the allowed thirty- (30-) day period, the defaulting party will have commenced with due diligence to cure the noticed default and thereafter completes as soon as practicably possible the cure of the noticed default.
4. **Accounting Upon Termination or Expiration.** If this Agreement expires or is terminated as provided in this section, Manager shall prepare or cause to be prepared financial statements in accordance with the applicable provisions of Section Seventeen for the period between the end of the last preceding accounting period and the termination date, and Manager shall account to the City as of the date of termination for all amounts due and payable specified in such financial statements (such accounting shall be subject to post-termination adjustment to correct any errors in such statements; the obligation to make any such adjustment shall survive the expiration or sooner termination of this Agreement). In addition, as of the date of any such termination, Manager shall release, transfer, or remit to the City copies of all books, records, licenses, and property of the City held or controlled by Manager other than materials containing personnel records and shall take all other necessary measures to effectuate the orderly and prompt termination of the relationship contemplated by this Agreement.
5. **Remedies.** With or without terminating this Agreement, upon the occurrence of a default and a failure to cure within the cure period, if any, the party not in default will be entitled to all remedies available under applicable law. All remedies will be cumulative and nonexclusive of any other remedy.
6. **Officials Not Liable.** No official, director, officer, agent, or employee of the City shall be charged personally or held contractually liable by or to the Manager under any term or provision of this Agreement or because of any breach thereof or because of its or their execution, approval, or attempted execution of this Agreement. No Overlook Café trustee, advisory board member, director, or employee of the Manager shall be charged personally or held contractually liable by or to the City under any term or provision of this Agreement or because of any breach thereof or because of its or their execution, approval, or attempted execution of this Agreement.
7. **Waiver of Breach.** The waiver by the City or Manager of any breach of any term, covenant, or condition herein contained shall not be deemed to be a waiver of such term, covenant, or condition, or subsequent breach of the same or any other term, covenant, or condition herein contained. Any failure on the part of the City or Manager to require or exact full and complete compliance with any of the covenants, conditions, or agreements of this Agreement shall not be construed as in any manner changing the terms hereof or to prevent the City or Manager from

enforcing the full provisions hereof, nor shall the terms of this Agreement be changed or altered in any manner whatsoever other than by written agreement of the City and the Manager.

8. **Effects of Termination or Expiration.** In the event this Agreement expires or is terminated:
 - a. **Payment of Operating Expenses.** All operating expenses incurred or committed prior to the date of expiration or termination will be paid using funds on deposit in the operating accounts described in Section Eleven above; and
 - b. **Assignment of Contracts.** Without any further action on the part of Manager or the City, Manager will assign and the City will, or will cause another management company retained by it, to accept the assignment of Manager's rights, and assume and perform all of Manager's obligations, arising after the date of expiration or termination of this Agreement under any rental agreements, booking commitments, advertising agreements, concession agreements, and other contracts relating to the Overlook Café which have been executed by Manager, except (i) to the extent any agreement, commitment, or contract was executed by Manager in violation of any of the restrictions applicable to Manager's right to execute agreements, commitments, or contracts contained in this Agreement; and (ii) for any contracts, agreements, or commitment to which the consent of the other party (to the contract, agreement, or commitment) is required for the assignment and assumption unless the required consent is obtained (in the case of any required consent, Manager will use commercially reasonable efforts to obtain the required consents and the City will cooperate in any reasonable manner with Manager to obtain require consents).
9. **Surrender of the Premises and Other Assets.** Upon termination or expiration of this Agreement and in accordance with Section Two above, Manager will provide the City with all passwords, security information, and authorizations necessary for the City or the successor management company to access, assign, maintain, and operate all websites, Facebook pages, intellectual property rights, and vendor and supplier services.

Section Seventeen Financial Reports

1. **Financial Records and Agreements.** Manager shall keep complete and adequate books and records reflecting the results of the operations of the Overlook Café in accordance with generally accepted accounting principles. Manager shall at all times keep and maintain at the Overlook Café or its regular place of business all records, books of account, and other records relating to or reflecting the operations of Manager affecting the Overlook Café, including such records as may be reasonably required by the City to be maintained by the Manager and any information required to be maintained pursuant to any provisions of this Agreement. Upon request and subject to any restrictions imposed by applicable law, the

Manager shall furnish to City copies of all agreements and amendments thereto executed by the Manager. In the event a request for an agreement is made by a third party, the City agrees to notify the Manager of such request and the Manager shall timely set forth any legal objection, if any, whether such agreement may be turned over. The City Attorney's Office shall be the record keeper of all such agreements.

2. **Quarterly Financial Reports.** The Manager shall provide the City with quarterly financial statements by the end of the month immediately following the end of each quarter.
3. **Audit.** At the City's request, the Manager shall file with the City a certified audit report by July 31 covering all financial transactions of Manager for the preceding year. Costs associated with obtaining such certified audit report shall be an expense of the Manager. Such audit shall be performed by an external auditor approved by the City and shall be conducted in accordance with generally accepted auditing standards.
4. **No Removal.** Except as otherwise provided herein, no books and records, including, without limitation, books of account, and front office records, shall be removed from the Overlook Café or its regular place of business without the City's prior written approval. Upon any termination of this Agreement, all such books and records shall be the property of the Manager and shall be maintained by the Manager, provided that the City shall have the continuing right to review or copy all such books and records.
5. **Additional Reports.** Manager shall, upon the request of the City, prepare for the City or assist the City in the preparation of such additional financial reports with respect to the Overlook Café as may be reasonably required in the preparation of the annual Overlook Café financial report.
6. **City Inspection.** Manager, upon reasonable notice by the City to Manager, shall permit the City, acting through its employees and/or representatives, to make inspections, audits, examination, or abstracts of all records and books of account, including such records as may be reasonably required by the City to be maintained by Manager and information required to be maintained pursuant to any provision of this Agreement. Any such inspection or audit shall be conducted during the reasonable business hours of Manager, and Manager shall make all of the aforesaid records, books of account, and other documentation available within seven days of the written request by the City.
7. **Discrepancies.** Notwithstanding anything to the contrary contained in this Agreement, the City may terminate this Agreement if any inspection or audit by the City or its agents discloses (i) an intentional material discrepancy on the part of Manager; or (ii) an intentional material discrepancy made by a person other than those set forth in (i) above about which Manager had knowledge, did not disclose in writing to the City, and did not take such corrective action as Manager should deem reasonably necessary to avoid any further discrepancy. If any inspection or audit

discloses an intentional material discrepancy of Manager, the City shall inform Manager and Manager shall (i) make such monetary adjustments including payment to the City as may be required because of such discrepancy; and (ii) take such actions as Manager deems reasonably necessary to avoid any further intentional discrepancy.

8. **Fees.** If it is necessary that the City retain counsel to collect any sums ultimately determined to be owing to it from Manager arising from a breach of this Agreement, Manager will pay to the City the sums reasonably expended by the City, including reasonable attorneys' fees.
9. **Obligations Survive Termination.** The obligations of Manager under this section shall survive the termination of this Agreement.

Section Eighteen Voluntarily Enter into Agreement

The parties acknowledge that they are entering into this Agreement freely and voluntarily, that they have the opportunity to be represented and advised by counsel in the negotiations resulting in this Agreement, that they have ascertained and weighed all the facts and circumstances likely to influence their judgment, that they have given due consideration to the provisions contained herein, and that they thoroughly understand and consent to all provisions herein.

Section Nineteen Assignment

This Agreement and the rights and obligations hereunder shall not be assigned or transferred by either party without the prior express written consent of the other. Subject to that restriction, this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors, assigns, and legal representatives.

This Agreement is intended solely for the benefit of the City and the Manager and shall not be enforceable by or create any claim or right of action in favor of any other party.

Section Twenty Notices

All notices, demands, and other communications required or permitted under the provisions of this Agreement ("notice") shall, unless otherwise specified, be in writing, sent by hand delivery, or by certified first class mail, postage prepaid, with return receipt required, to the following addresses:

As to the City:

City of Sioux Falls, South Dakota
Office of the Mayor
224 West Ninth Street
P.O. Box 7402
Sioux Falls, SD 57117-7402
Phone: 605-367-8800
Fax: 605-367-8490

As to the Manager:

Mikrho Management LLC
P.O. Box 91805
Sioux Falls, SD 57109-1805
Phone: 605-376-3149

Or to such other address in the United States as the party to whom the notice is sent shall have designated in writing in accordance with the provisions of this section. Any such notice sent by mail shall be deemed effective when received. Any party to this Agreement may change its address by giving the other party written notice of its new address as herein provided.

Section Twenty-One No Waiver

If any one or more of the provisions of this Agreement shall be determined to be invalid, illegal, or unenforceable in any respect, the remaining provisions of this Agreement shall not be in any way impaired.

The failure of either party to insist upon a strict performance of any of the terms or provisions of the Agreement, or to exercise any option, right, or remedy herein contained, shall not be construed as a waiver or as a relinquishment for the future of such terms, provision, option, right, or remedy, but the same shall continue and remain in full force and effect. No waiver by either party of any term or provision hereof shall be deemed to have been made unless expressed in writing and signed by such party.

Section Twenty-Two Applicable Laws

This Agreement shall be governed by and interpreted under the substantive laws of the state of South Dakota without regard to principles of conflicts of law.

The section headings in this Agreement are intended solely for the parties' convenience and shall not affect the interpretation or construction of any portion or provision of this Agreement.

**Section Twenty-Three
Counterparts**

This Agreement may be executed in two or more counterparts, each of which will be deemed an original copy of this Agreement, and all of which, when taken together, will be deemed to constitute one and the same Agreement.

**Section Twenty-Four
Entire Agreement**

This Agreement represents the entire and integrated agreement between the City and the Manager with respect to the subjects described herein and supersedes all prior negotiation, representations, or agreements, oral or written. This Agreement may be amended or modified only in writing signed by the party to be bound by such amendment or modification of this Agreement. The parties waive their rights to amend or modify this Agreement in any other manner.

IN WITNESS WHEREOF, the parties have executed this Agreement the day and year first above written.

MAYOR

MIKRHO MANAGEMENT LLC

ATTEST:

FEDERAL TAX ID NO. 46-2305744

City Clerk

SALES TAX ID NO. _____

Exhibit A

City responsibilities:

1. Provide grounds maintenance responsibilities including, but not limited to, mowing, weed control, trimming, irrigation repair, landscape maintenance, tree trimming, sidewalk maintenance, and parking lot maintenance, along with providing semiannual interior/exterior window cleaning.
2. Provide exterior building maintenance and repairs.
3. Provide, repair, and maintain all signage and other nonstructural improvements or fixtures.
4. Provide paper products for restrooms.
5. Provide snow removal services for the parking lot and walkways.
6. Be responsible for maintenance and payment of utilities in accordance with Section Eleven, subparagraph 8, of this Agreement.
7. The City shall procure/contract all capital expenditures that are funded in whole or in part with funds provided by the City.
8. Subject to availability of funding, provide for repairs in excess of \$250 to City property and equipment inside the Café.
9. Replace when necessary all existing assets that are the property of the City.

Manager responsibilities:

1. Set hours of operation of the Overlook Café with concurrence of the City.
2. Employ, supervise, and direct employees for the successful delivery of food services and which is consistent with the provisions of this Agreement.
3. Collect all revenues generated by the Café.
4. Provide daily maintenance and repairs up to \$250 of all property and equipment inside the Café.
5. Repair and replace all other assets that are not the property of the City.
6. All food and beverages acquired and distributed by the Manager shall be stored and handled at all times consistent with applicable standards of sanitation, preservation, and purity.
7. Manager agrees that the use of beer and wine is intended for private rentals/caterings and to complement park patrons dining experience. Alcohol may

not be the focus of advertising or offered as a “special” such as “bucket night” or “2-for-1” promotion.

8. Provide janitorial services inside the building including providing necessary cleaning products.
9. Schedule private bookings.
10. Rent, lease, or purchase the capital equipment, along with any replacement capital equipment necessary to support the delivery of services by Manager in this Exhibit A, including, but not limited to, sitting area furniture, microwave, wine cooler, espresso machine, nacho machine, smoothie machine, soft drink dispensers, and any additional portable display cases. Any expenditure of funds for capital equipment and replacement capital equipment will be an expense of the Manager.
11. Obtain and maintain all licenses and permits necessary for the Manager to manage and operate the Café.
12. Provide office equipment, supplies, and uniforms as necessary for daily staff functions.
13. Develop an annual marketing plan and engage in marketing, advertising, solicitation, and promotional activities as necessary and appropriate to develop the potential of the Overlook Café.
14. Develop, maintain, and manage websites and Facebook pages and utilize other current and subsequently available internet-based technologies to market, promote, and advertise the Overlook Café.
15. Pursuant to Section Fourteen of this Agreement, develop and deliver to the City the operations plan which shall include policies and guidelines for public use of the Overlook Café.
16. Pay when due all operating expenses, including utilities as set forth in Section Eleven, subparagraph 8.
17. Maintain accurate and complete records with respect to its operations, equipment, and Café maintenance.
18. Include the City’s Parks and Recreation department logo in all promotional materials, including posters, flyers, and advertisements. Manager may also utilize the Falls Park logo on uniforms and elsewhere as appropriate.