

Scott W. Cichon
Robert A. Merrell III
John P. Ferguson
Mark A. Watts
Heather Bond Vargas
Michael J. Woods
Raymond L. Schumann
Kathleen L. Crotty
Michael O. Sznajstajler
Mathew S. Welch
Robert E. Doan
William A. Rice
Douglas J. Collins
Sara E. Glover
Holly W. Zitzka
Jessica L. Gow
Nika K. Hosseini
Sydney V. Cichon
Brandon T. Byers



Daytona Beach • DeLand

149 South Ridgewood Avenue, Suite 700
Daytona Beach, Florida 32114
(386) 255-8171
CobbCole.com

OF COUNSEL
Larry D. Marsh
Frederick B. Karl, Jr.

RETIRED
Thomas S. Hart

William M. Cobb
(1881-1939)
Thomas T. Cobb
(1916-2004)
W. Warren Cole, Jr.
(1926-2008)

June 28, 2022

VIA EMAIL (separately)

TO: Mayor David Alfin
Councilman Ed Danko
Councilman John Fanelli
Councilman Nick Klufas
Councilman Eddie Branquinho

CC: City Manager Denise Bevan
City Attorney Neysa Borkert

Re: Concession Agreement (RFP-P-17-41)
Amendment to Concession Agreement

Dear Mayor and Council Members:

As you know, my law firm and I have the pleasure of representing your concession company, Green Lion Café, Inc. ("Green Lion"), in connection with the City's attempt to revise the terms of the Concession Agreement (RFP-P-17-41), dated September 1, 2017 ("Existing Contract").

I was dismayed to see that, once again, the City Council provided themselves and their staff unlimited time to discuss (sometimes accurately and sometimes not) the issue directly impacting the Green Lion, approximately 20-30 of your residents who are employees of the Green Lion, and hundreds of residents and golfers who support the Green Lion, while only giving the owners of the Green Lion 3 minutes. While I wish the public frustration that was exhibited could have been tempered, it's hard to blame them when 5 years of their sole risk and effort are in jeopardy. If my client would have been provided the simple decency of speaking without time limits last Tuesday, he would have discussed the following issues, so that the Council could have made an informed decision.

Current Status: The City and the Green Lion are parties to a current and enforceable concession agreement – the Existing Contract – which has a valid term through August 31, 2027.

June 28, 2022

I understand that the City is looking to terminate that Existing Contract early, which the City can only do relying upon Section 6.C. of the Existing Contract, which is a provision that the City admits was intended only if the City had to close the golf course, which is not happening. The Green Lion has upheld and exceeded every obligation, commitment and expectation in the Existing Contract. **Please note that the Green Lion reserves any and all rights to legally challenge the City's attempt to terminate the Existing Contract using that provision.**

Staff's Attempt to Change the Status: The document that was provided to the Council for approval – Concession Lease Agreement – is a new and totally different agreement from the Existing Contract. In 2017, the City requested proposals for a concession agreement ... not a lease agreement. You requested proposals for someone to provide services that the City needed to provide its residents and invitees (and which the City had shown the City could not provide adequately). A concessionaire does not pay electricity, propane, water, for POS systems, property tax, etc. A concessionaire provides a service on your property and you cover those costs. While a tenant might be responsible for some/all of those costs, a concessionaire is not. Unilaterally changing a contract and hoisting those costs on your concessionaire is not commercially reasonable and how can any future contracting party with the City trust that the City won't do the same thing to them?

Council's Unanimous Vote: At the May 3rd Council meeting, you unanimously voted that if the City would break even after 2 years, the Council would be happy to extend the Green Lion's agreement.

Yet, based on the Council's June 21st vote, the Council is asking the Green Lion to pay 86% over fair market value. And to top it off, the Green Lion was given a 10-day ultimatum to take-it or leave-it, after the City staff refused to consider the Green Lion's positions and added more expenses to the Green Lion (after the May 3rd meeting) and the City Council refused to give them more than 3 minutes (at the June 21st meeting).

The presentation at the June 21st Council meeting was, at best, misleading. The City has two material expenses for purposes of the break-even analysis – electricity and water.

- a. According to the City staff, the electricity bill for the restaurant is \$9,000 per year (which is \$3.95/sq ft).
- b. According to the City, the entire water bill for that meter is \$24,864/year and since the City does not want to incur the cost to separately meter the water, the Council allocated one-half to the restaurant, so the City is bearing the cost of \$12,432 (\$4.69/sq ft).

As to the Green Lion being asked to pay 86% over fair market value, your own appraiser determined that FMV was \$9-10/square foot including utilities. However, the City is requiring the Green Lion to pay rent at \$9/square foot PLUS electricity at \$3.95/sq ft PLUS water at \$4.69/sq ft. That's \$17.64/sq ft, when your appraiser said \$9-10 sq. ft. Using \$9.50/sq ft., that's \$8.14 sq ft increase divided by \$9.50 sq ft., which equals 86%.

June 28, 2022

City's Immediate Profit (i.e. City Immediately Breaking Even): Attached hereto is an Amendment to the Existing Contract that clearly shows all of the things that the Green Lion has agreed to change, including agreeing to pay \$9.50 sq ft for the entire property (including the full deck) ... even though they have a binding agreement through August 31, 2027 to continue doing exactly what the City requested in 2017.

At \$9.50 sq ft (which is the reasonable compromise), the City is receiving \$25,184.50 annually starting day 1 of the attached Amendment. Using the City staff's own figures, the City's expenses for utilities from the Green Lion's use of the premises is \$21,432. **The City is making a profit immediately of \$3,752.50.**

On May 3rd, the Council unanimously agreed that they wanted the City to break even after 2 years. With the attached, the City gets a profit immediately (not even just break even after 2 years). If the Green Lion would have been provided more than 3 minutes to speak, they could have outlined the foregoing. They could have showed you that their desired Amendment is fair to both sides AND gets the City Council where they unanimously wanted to be 2 years earlier.

The City is getting more than what it wanted. There is no justification for changing from a concession to a lease agreement. There is no need to hide other changes to the relationship in a new agreement. There is an Existing Contract ... the attached shows exactly what has changed. The attached and the foregoing shows that the City is getting exactly what the City Council asked for.

The attached document is imminently fair and reasonable in light of all of the facts and puts the City in a materially better financial position while retaining an amenity that the City literally begged and prayed for in 2017.

Hopefully you agree and instruct staff not to terminate the Existing Contract based on an inapplicable provision and agree to proceed with execution of the attached so that City has an amenity that is a positive destination for all of its residents.

Sincerely,



John P. Ferguson

Direct Dial (386) 323-9247

Email John.Ferguson@CobbCole.com

Fax (386) 323-9206

**AMENDMENT TO
CONCESSION AGREEMENT**

THIS AMENDMENT TO CONCESSION AGREEMENT (this "Amendment") is made and entered into as of the ___ day of _____, 2022, with an effective date of September 1, 2022 ("Effective Date"), by and between **THE GREEN LION CAFÉ, LLC**, a Florida limited liability company ("Tenant"), and **CITY OF PALM COAST**, a Florida municipal corporation ("City").

WITNESSETH:

WHEREAS, Tenant and City entered into that certain Concession Agreement, dated September 1, 2017 (the "Agreement") providing Tenant with the right to operate the concessions at the Golf Course; and

WHEREAS, the term of the Agreement was set to expire on August 31, 2022, and pursuant to Paragraph 6.A. of the Agreement, Tenant provided City with proper notice to extend the Agreement for an additional 5 years through August 31, 2027 ("Renewal Term");

WHEREAS, City and Tenant both desire to amend the Agreement for the Renewal Terms as provided herein;

NOW, THEREFORE, for and in consideration of the mutual promises and covenants hereinafter set forth and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties covenant and agree to amend the Agreement, as follows:

1. **Definitions; Effective Date.** All capitalized terms used herein and not otherwise defined herein shall have the meaning ascribed to them in the Agreement. For purposes of the Agreement, as amended hereby, the capitalized "Term" shall include the Renewal Term commencing on September 1, 2022 ("Amendment Effective Date"). The Amendment shall become effective on the Amendment Effective Date, and the terms of the Agreement, without reference to this Amendment, shall control the parties.

2. **Changes to Agreement.** Tenant and City agree to revise the Agreement as provided in this Paragraph 2.

a. **Definition of Leased Premises.** Paragraph 1.A. of the Agreement is amended to delete the sentence "Improvements to the Leased Premises are set forth in Exhibit A, Owner and Tenant Improvements" and replaced with the following: "*Leased Premises is further defined in Exhibit A attached hereto.*"

b. **Additional Obligations of Tenant (including Propane):** The Agreement is amended by inserting the following as new Paragraph 1.M.:

Tenant will license and maintain a Point of Sale (POS) system for facility/food and beverage reservations which is different from the POS system licensed and maintained by the City. Tenant will purchase and maintain for its own use heaters for outdoor use, rather than City being obligated to provide. City will provide and be responsible for the following for the Leased Premises: utilities, electricity, refuse, water/sewer, and hot water booster as needed for Tenant to comply with health and

safety regulations. Tenant will provide and be responsible for the following: all other utilities including propane, telecom and internet.

c. **Hours of Operation.** Paragraph 3.F. of the Agreement is hereby amended to change the hours of operation as follows:

Tenant shall operate and be open seven days a week for the following minimum hours during the Term:

** Monday – Thursday: 9:00 a.m. to 8:00 p.m.*

** Friday – Sunday: 8:00 a.m. to 8:00 p.m.*

Tenant shall have the option to extend or retract such hours upon City approval provided that such hours do not extend before 7:00 a.m., nor later than 11:00 p.m. or retract to closing earlier than 5:00 p.m. Operations may be closed for Thanksgiving and December 24 and December 25. Such closures shall be noticed to the public no less than one week in advance.

d. **Contract Documents.** Paragraph 4 of the Agreement is amended by deleting “v. Performance Bond” and inserting “v. *First Amendment to Concession Agreement.*”

e. **Removal of Termination without Cause.** The Agreement is revised by deleting in its entirety Paragraphs 6.C.

f. **Description of Leased Premises.** Exhibit A to the Agreement is amended, by deleting the existing Exhibit A and attaching the revised Exhibit A, which is attached hereto as **Exhibit A.**

g. **Pricing.** Exhibit B to the Agreement is amended, as of the Effective Date, by deleting the existing Exhibit B and attaching the revised Exhibit B, which is attached hereto as **Exhibit B.**

h. **Insurance Requirements.** Exhibit C to the Agreement is amended, as of the Effective Date, by deleting the existing Exhibit C and attaching the revised Exhibit C, which is attached hereto as **Exhibit C.**

3. **Miscellaneous.** This First Amendment shall be binding upon the parties as of the date of the last signature below and shall be effective as of the Amendment Effective Date. The parties covenant, agree and acknowledge the sufficiency of the consideration provided herein by the other party. This First Amendment and the documents contemplated by it record the final, complete, and exclusive understanding between the parties hereto regarding the Agreement and this First Amendment. To the extent of a conflict between the terms of the Agreement and this First Amendment, the terms of this First Amendment shall control. Except as amended and modified by this First Amendment, all other terms of the Agreement remain in full force and effect, in accordance with its respective terms. This First Amendment may be executed in counterparts. Each executed counterpart will constitute an original document, and all executed counterparts, together, will constitute the same agreement.

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

Witnesses:

(Name Typed or Printed)

(Name Typed or Printed)

(Name Typed or Printed)

(Name Typed or Printed)

GREEN LION CAFÉ, LLC

By: _____
Name: Christopher J. Marlow
Title: Manager
Date: _____, 2022

CITY OF PALM COAST

By: _____
Name: _____
Title: City Manager
Date: _____, 2022

Exhibit A
Description of Leased Premises

Leased Premises:

The Leased Premises located at the Palm Harbor Golf Course Clubhouse, 100 Cooper Lane, Palm Coast, Florida 32137, and includes the restaurant, made up of the indoor dining room with bar, the indoor kitchen, kitchen office and the outdoor patio. There is also an approximate 21' long by 5' wide outdoor fenced-in storage location adjacent to the west side of the Clubhouse included in the Leased Premises along with an additional private locked storage room of approximately 10' by 12' in the Golf Maintenance building. The legal capacity for the indoor dining room is 78 pursuant to the Fire Marshall's Capacity Rating.

Square Footage

For pricing purposes, the square footage of the Leased Premises is 2,651 square foot as follows:

[Insert City's Chart with Green Lion agreeing to pay in full for all space including the full deck without discount, except that Tenant is willing to increase the rent from \$9.00/sq ft to \$9.50/sq ft.]

**Exhibit B
Pricing**

Monthly Lease Fee Payment

[Insert City's Ex B]