

**Agenda Item: Discuss and Consider Award of Contract to Kona Ice for Area 1 East Beach in the amount of \$6875.00.**

**Background:**

Kona Ice's current agreement for frozen novelties at East Beach has expired. Staff conducted a sealed bid in January for this area and only received one bid for the frozen novelties. Kona has been the vendor for the past four years at East Beach and has been a great vendor to work with. They provide a great service for all beach goers.

Staff has included in the agreement that the vendor must be open every weekend from March until September.

**Staff Recommendation:**

Staff is requesting approval to award the contract to Kona ice for Area 1 East Beach. The agreement will be a 2 year agreement in the amount of \$6875.00, East Beach is a Tier II park and the base rate is \$5850.00

**Funding Source (if a budgetary item):**

**CONCESSION AGREEMENT FOR THERESA KASHUDA AND  
MTM ICE LLC D/B/A KONA ICE GALVESTON BAY AREA  
AT APFFEL "EAST BEACH" PARK FOR FROZEN NOVELTIES**

THE STATE OF TEXAS                   §  
   §  
COUNTY OF GALVESTON           §

This Agreement is effective on \_\_\_\_\_, 2017, by and between the Park Board of Trustees of the City of Galveston (hereinafter referred to as "Park Board") and MTM Ice LLC d/b/a Kona Ice Galveston Bay Area and Theresa Kashuda (hereinafter referred to as "Concessionaire").

WHEREAS, the City of Galveston ("City") has transferred the management and control of Apffel "East Beach" Park to the Park Board;

WHEREAS, Concessionaire has a desire to enter into a Concession Agreement with the Park Board;

NOW, THEREFORE, for and in consideration for the premises hereinafter set forth, and in accordance with the above quoted authority, Park Board hereby grants to Concessionaire a non-exclusive authority to sell ice cream, snow cones, soft drinks, bottled water and prepackaged snacks.

This Agreement is granted subject to the following conditions:

1.     **Term.** The term of this Agreement shall commence on March 29, 2017, and terminate on March 29, 2019, unless sooner terminated under the provisions herein. Concessionaire may request an additional two (2) year term. This additional term is contingent on the approval of Park Board and subject to any additional terms and conditions. There is no guarantee that an additional term of two (2) years will be given. Concessionaire will be operating at Apffel "East Beach" Park.

2.     **Concession Fee.** Concessionaire agrees, on a yearly basis, to pay Park Board the amount of \$6,875, due in three payments. The first payment of \$2,291.66 is due at signing and a payment of \$2,291.67 is due the first of each May and July, 2017. The payment of \$6,875 is due each year, in three payments of \$2,291.67 on March 29, and \$2,291.67 on May 1 and July 1, 2018.

3.     **Laws & Restrictions.** Concessionaire shall, in connection with any current or future improvements, use or maintenance of the premises and all activities associated therewith, strictly comply with all applicable laws, rules, ordinances, restrictions, and regulations. Concessionaire shall secure and maintain all permits and licenses required for her activities at her own expense, including, without limitation, a vendor permit from the City, if applicable. No non-moveable structure may be constructed or allowed on the premises.

4. **Scope and Use.** Concessionaire has a non-exclusive right to sell ice cream, snow cones, soft drinks, bottled water and prepackaged snacks. No glass containers will be allowed on or about the premises. All city codes must be complied with and all needed permits obtained prior to the sale or lease. This is a non-exclusive use.

A. Concessionaire must operate the vending trailer in a safe manner. Park Board reserves the right, and Concessionaire agrees, to limit and/or restrict vending operations at any beachfront locations.

B. No other use under this concession agreement shall be permitted, other than the rights herein specifically granted, unless consent to such use is obtained, in writing, from Park Board's authorized representative.

C. No portion of the concession premises is being leased to Concessionaire. Concessionaire is a licensee and not a lessee of the concession premises, and the right of Concessionaire to occupy the concession premises shall continue only so long as all of the terms of this Agreement are strictly and promptly complied with by Concessionaire.

D. Park Board retains the right to award other concession agreements, licenses, or permits to other parties, and to make any and all improvements it deems necessary to the premises during the term of this Agreement. This Agreement is non-exclusive. There may be other vendors that sell the same or similar products. Also Park Board may have marketing agreements which allow for the free handout of items that may be the same or similar as the products sold by Concessionaire.

5. **Taxes.** Any and all taxes which may be lawfully imposed upon the property or business of the Concessionaire on the premises shall be paid promptly by the Concessionaire. Concessionaire shall furnish Park Board with receipts and any other verification requested by Park Board.

6. **No Assignment.** The Concessionaire shall not mortgage, pledge, hypothecate, transfer or assign this Agreement or any privileges hereunder, or any interest whatsoever in connection with this Agreement.

7. **Park Board Rules.** The use and occupation of the premises shall be subject to any and all rules and regulations as may be prescribed by Park Board from time to time. Violation of any rule or regulation of Park Board, after a notice and a ten-day (10) opportunity to cure, is grounds for termination.

8. **Right of Re-Entry.** The right is hereby reserved to Park Board, the City, and to the State of Texas, their officers, agents, and employees to enter upon the said premises at any time for inspection or for any governmental purpose, to remove persons, equipment, fixtures, goods, debris, improvements, or other material required or necessary for any official purpose, and Concessionaire shall have no claim for damages of any character on account thereof against Park Board, the City, or the State of Texas, or any officer, agent, or employee thereof.

9. **Exoneration.** Park Board and the City, and their officers, agents, and employees shall not be responsible to Concessionaire or any other person for: (1) damages to property or injuries to persons which may arise from the use or occupation of the premises by Concessionaire; (2) damages to the property of the Concessionaire; (3) injuries to the person of the Concessionaire's officers, agents, servants, or employees, or any other persons who may be on the premises at their invitation or the invitation of any one of them, and the Concessionaire shall hold Park Board and the City harmless from any and all such claims, even though such claims may be caused, or alleged to be caused, in whole or in part, by the negligence of Park Board, the City, or its respective officers, agents, or employees.

10. **Notice.** Any notice hereunder shall be deemed to have been duly given if and when enclosed in a properly sealed envelope or wrapper, sent by certified mail, addressed and deposited postage pre-paid in a post office or branch office regularly maintained by the United States Government, to the following addresses:

Concessionaire:	MTM Ice LLC d/b/a Kona Ice Galveston Bay Area and Theresa Kashuda
Address:	3110 Gray Thrush Missouri City, Texas 77459
Cell:	713-817-4046
Fax:	281-778-0263
Email:	Kash@Kona-Ice.com
Park Board:	Park Board of Trustees of City of Galveston, Texas Attention: Ms. Kelly de Schaun Executive Director
Address:	601 Tremont Galveston, Texas 77550
Telephone:	409.763.5141
Telefax:	409.762.8911
Email:	<a href="mailto:kdeschaun@galvestonparkboard.org">kdeschaun@galvestonparkboard.org</a>

Either party may notify the other of any change of address by written notice.

11. **Termination.**

A. This Agreement may be terminated by Park Board upon the happening of any of the following events:

(1) Lapse in required insurance coverage by Concessionaire or failure by Concessionaire to strictly comply with any provisions in this Agreement relating to insurance coverage, allowing any unsafe or dangerous equipment or condition to exist, or by violation of any applicable law, ordinance, rule, or regulation. Termination may be immediate and without advance notice.

(2) The commission by Concessionaire of any act of insolvency, the filing of any voluntary or involuntary actions concerning Concessionaire under any state or federal bankruptcy or other laws for the protection of debtors, an assignment by Concessionaire for the benefit of creditors, or the appointment of a Receiver for Concessionaire or the business of Concessionaire conducted on the premises.

(3) A breach by the Concessionaire of any other terms or conditions of this Agreement, provided that Concessionaire, subject to any express provision in this Agreement to the contrary, shall first be entitled to ten (10) days' written notice with the opportunity to cure the default of any other such term or condition within such period, but provided further that Concessionaire will be entitled to notice of default and an opportunity to cure only twice during the term of this Agreement. Any such termination shall be without waiver of any cause of action which may have theretofore accrued. Any waiver by Park Board shall not operate to modify this Agreement, nor shall it in any manner prejudice any rights of Park Board regarding any future violation of any term of this Agreement by Concessionaire.

(4) Concessionaire is convicted of a felony or crime involving a moral turpitude.

(5) By either party giving ninety (90) days' written notice.

B. This Agreement may be terminated by either party with thirty (30) days' prior written notice upon the happening of any of the following events:

(1) In the event that Park Board should lose the right to possession of the premises for any reason, including but not limited to, easement, lease, condemnation, exercise of power of eminent domain, failure to extend a license to use, reversion to prior owners, loss of title or loss of license or loss of management; or

(2) In the event that a storm or other natural force causes erosion of the beach on the premises to the extent that it is no longer practical for Concessionaire to conduct the activities permitted herein on the premises.

12. **Insurance.** Throughout the term of this Agreement or any extensions thereof, Concessionaire shall maintain insurance against public liability for injury to persons (including death) or damage to property resulting from or arising out of, or alleged to have arisen from or resulted from, the operations of the Concessionaire in or about the premises. Such insurance policy shall be in an amount not less than \$1,000,000, combined single limit coverage, or such greater amount as shall be from time to time required by Park Board, and shall name Park Board and the City as an additional named under said policy, and said policy shall provide for thirty (30) days' notice to Park Board prior to any cancellation or revision of said policy. Such policy shall be in form and with an insurance carrier acceptable to the Executive Director or Park Board. Concessionaire agrees that it will make no claim nor authorize any claim to be made against and will provide waivers of subrogation from its insurers as to Park Board, its employees, servants, or agents in connection with or as a result of fire, explosion, or other casualty injuring persons or damaging the contents, equipment, furniture, or fixtures in or about the premises. Concessionaire shall at all times provide Park Board with a current copy of all such insurance policies, and with a

current copy of certificates of insurance providing for thirty (30) days' notice prior to cancellation or revision as above provided.

**13. INDEMNITY. CONCESSIONAIRE HEREUNDER AGREES TO FULLY INDEMNIFY, DEFEND, AND HOLD HARMLESS PARK BOARD, THE CITY, AND THEIR INDIVIDUAL TRUSTEES, COUNCIL MEMBERS, OFFICERS, AGENTS, AND EMPLOYEES FROM ANY AND ALL EXPENSES, DAMAGES, CLAIMS OR CAUSES OF ACTION THAT MAY ARISE IN CONNECTION WITH (A) CONCESSIONAIRE'S FAILURE TO PERFORM ITS OBLIGATIONS HEREIN OR (B) CONCESSIONAIRE'S USE AND OPERATION OF THE PREMISES, INCLUDING WITHOUT LIMITATION, ATTORNEYS' FEES AND COSTS OF DEFENSE. THIS INDEMNITY AGREEMENT IS INTENDED TO ENCOMPASS ANY AND ALL MANNER OF CLAIMS (WHETHER FOR BODILY INJURY, DEATH, PROPERTY DAMAGE, FINES, OR CITATIONS FOR VIOLATIONS OF ANY LAW, STATUTE, ORDER, OR REGULATION, OR OTHERWISE), ARISING OUT OF ANY ACTIVITIES WHATSOEVER, INCLUDING BUT NOT LIMITED TO, CLAIMS CAUSED BY THE NEGLIGENCE OF PARK BOARD, THE CITY, AND THEIR INDIVIDUAL TRUSTEES, COUNCIL MEMBERS, OFFICERS, AGENTS, AND EMPLOYEES. IT IS THE EXPRESS INTENTION OF THE PARTIES HERETO THAT THE INDEMNITY PROVIDED FOR IN THIS PARAGRAPH IS INTENDED BY CONCESSIONAIRE TO INDEMNIFY AND PROTECT PARK BOARD, THE CITY, AND THEIR INDIVIDUAL TRUSTEES, COUNCIL MEMBERS, OFFICERS, AGENTS, AND EMPLOYEES FROM THE CONSEQUENCES OF PARK BOARD, THE CITY, AND THEIR INDIVIDUAL TRUSTEES, COUNCIL MEMBERS, OFFICERS, AGENTS, AND EMPLOYEES, WRONGFUL ACTS AND NEGLIGENCE, WHETHER OR NOT THE NEGLIGENCE IS THE SOLE CAUSE OR CONCURRING CAUSE IN THE INJURY, DEATH, OR DAMAGE. THE PROVISIONS OF THIS PARAGRAPH SHALL SURVIVE THE TERMINATION OF THIS CONCESSION AGREEMENT FOR ANY REASON.**

**14. Limits of Liability.** Concessionaire agrees to look solely to Park Board for the performance of its obligations under this Concession Agreement, and agrees that in no event is the City or the individual members of Park Board liable or responsible in any manner for this Concession Agreement, nor for any breach thereof.

**15. Access and Signage.** Concessionaire shall have reasonable access to the premises over the property of Park Board by virtue of such avenues of ingress and egress, and at such time as Park Board shall direct. Concessionaire shall have no rights, express or implied, in any property belonging to or subject to the management of Park Board, other than the premises. Concessionaire shall not in any manner restrict the public from free access to and use of the beach and to the waters of the Gulf of Mexico, as required by the Texas Open Beaches Act. Concessionaire, and its agents, employees, and vendors shall, in no way, interfere with, impede or adversely affect any property, business or patrons of Park Board. All signage on the premises or advertising the premises shall be subject to prior approval of the Executive Director of Park Board. All signage must include the Park Board logo, name, and telephone number, and shall request that any problems be reported.

16. **No Obstruction.** Concessionaire shall not keep or display anything or otherwise obstruct the beaches, roads, driveways, walkways, or area ways adjacent to the premises.

17. **Fire Protection.** Concessionaire shall install and maintain fire extinguishers and other fire protection and safety devices as may be required from time to time by any governmental or other agency having jurisdiction.

18. **Miscellaneous.**

A. Concessionaire agrees that all her employees in and about the premises will wear neat and attractive uniforms which are compatible with those worn by Park Board employees or as Park Board shall otherwise direct, and all employees of Concessionaire will at all times maintain a neat and attractive appearance, a professional demeanor and be polite and courteous at all times.

B. Concessionaire may use a golf cart or push cart. This use of the golf cart or push cart is for improving service to park patrons. The continued use of the golf cart or similar motorized vehicle will be at the sole discretion of the Galveston Island Beach Patrol. Concessionaire acknowledges that this use may be disallowed by the Galveston Island Beach Patrol for safety concerns. Concessionaire agrees to follow all City ordinances or regulations even if the use is disallowed by future ordinances or City regulations.

C. Concessionaire will pay the cost of trash and garbage removal, except for routine removal of trash from barrels and routine raking of sand.

D. During the entire time during which this Agreement shall be in effect, Concessionaire will be responsible for all expenses in any manner arising from its duties and activities hereunder.

E. All equipment or other physical objects in or about the premises shall be safe, clean, in good working order, and aesthetically appealing in the opinion of the Park Board. No motor vehicles shall be permitted to remain on the premises except for such limited period of time as may be necessary for loading or unloading equipment without the prior written approval of Park Board.

F. Concessionaire acknowledges that there may be other concessionaires in the same area.

19. **Attorneys' Fees.** Concessionaire agrees to pay all attorneys' fees incurred by the Park Board in any manner in connection with the preparation of this Concession Agreement, any negotiations associated therewith, securing all necessary approvals therefore, enforcing any provisions hereof, and any disputes or questions regarding this Agreement.

20. **Concessionaire's Acknowledgement.**

A. Concessionaire acknowledges and understands the recitals in this Concession Agreement and takes the premises subject to the matters identified therein.

B. There may be third parties having rights or claims of rights to East Beach, including, without limitation, the premises. Concessionaire acknowledges that it takes any concession rights subject to the rights, if any, of those third parties. The development and activities to be conducted on the premises may be subject to considerable restrictions, including, without limitation, the Texas Open Beaches Act and the Texas Dune Protection Act. Park Board will have the right but not the obligation to prevent others from establishing concessions upon certain areas of the premises, to the extent that third parties may have rights in those areas. Concessionaire recognizes that the concession to be granted is not an exclusive right to operate the desired concession, and that other persons may attempt to operate competing concessions. Concessionaire's rights with respect to the premises are granted by Park Board and accepted by Concessionaire in "AS IS" condition and "WITH ALL FAULTS" and without any representation or warranty of any nature whatsoever by Park Board. Concessionaire by acceptance of this concession represents that Concessionaire has made such inspection and investigation relating to the premises as Concessionaire deems necessary or appropriate for its purposes.

C. Concessionaire may not restrain or prevent the use of the premises by any person. All persons shall have the right to use their own personal property and equipment in or about the premises. Concessionaire may not interfere with any person's right to use the beach.

D. Concessionaire acknowledges Park Board cannot assure Concessionaire that the beach will maintain its current configuration and that the beach is subject to erosion, seaweed landings, weather and tidal events. Park Board cannot assure that the impact of these environmental events will be addressed in a manner that is sufficient to Concessionaire. Park Board will not be held responsible for any loss of business due to the impact and management of these types of events. Concessionaire acknowledges that Park Board is not making any promise or warranty that it will add sand to the premises or otherwise nourish the premises in the future. Concessionaire acknowledges that Park Board may add sand or nourish certain portions of the beach and may not add sand or nourish the premises leased by Concessionaire.

21. **Hours of Operation.** It is a condition of this agreement that Concessionaire will operate every weekend from March through September.

22. **Force Majeure.** Neither party is required to perform any term of this Agreement if performance is prevented by force majeure, which includes acts of God, civil riot, flood, or other natural cause.

23. **Environmental Stewardship.** The Galveston Park Board recognizes a shared responsibility between it and its concessionaires to act as a positive force for the protection and enhancement of our Island's natural resources. In this important effort, the Park Board reaches out and partners with its concessionaires in the implementation of environmental stewardship and sustainability practices that can be applied to daily business operations. Concessionaires operating



under the jurisdiction of the Park Board are expected to participate in this effort and incorporate sound environmental practices that achieve the overarching goal of protection, sustainability and enhancement of our natural resources.

IN TESTIMONY WHEREOF, the parties hereto have each caused this instrument to be executed on this \_\_\_\_\_ day of \_\_\_\_\_, 2017.

Park Board of Trustees of the City of Galveston

\_\_\_\_\_  
By: Kelly de Schaun  
Title: Executive Director

MTM ICE LLC d/b/a Kona Ice Galveston Bay Area

\_\_\_\_\_  
Theresa Kashuda, Member

Theresa Kashuda, Individually

\_\_\_\_\_  
Theresa Kashuda



Boddeker Rd

Kone Ice

Kona Ice

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Google Earth

1954

Imagery Date: 11/21/2015 29°19'44.51" N 94°43'55.55" W elev 3 ft eye alt 2663 ft





ATV - Used TO pull  
Kart









*Trailer*





TRUCK

