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November 4, 2020

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Board of Park Commissioners
City of Madison

Re.: **Second Amendment to the Use Agreement for the Warner Park Stadium—A Long-term, No-bid Contract On the Fast Track**

Dear Commissioners:

The optics on this do not look good with even a little light is shined on it. If taxpayers were aware and better informed, I expect this would be a much different conversation and process. It appears these agreements have not had much, if any, real and meaningful public scrutiny, input, or discussion. They need to. While the Mallard's have been "good partners", which is great, that isn't a valid reason to give them a sweetheart deal, especially of this size. There are serious and legitimate issues with the proposed agreement, many of which I've detailed in the attached White Paper.

There is no compelling reason, including the arguments Mr. Knepp and Mr. Stenman made at the Finance Committee meeting last week and will likely make tonight, to rush into approval of this long-term, no-bid agreement. When their arguments are examined closely, they're creating a false sense of urgency. Why the push for quick approval of a contract of this size and length without better due diligence? Short-term, the City and Mallards can continue to operate under the existing agreement, which is for three more years, while the Mallards' verify their hardship and reasonable concessions, if appropriate, are negotiated. Long-term, the City needs to develop a more robust process for soliciting proposals and negotiating and approving a long-term agreement for use of Warner Park that is a win-win for the City and the team. The negative consequences of quickly approving this agreement are far greater than continuing to operate under the existing agreement. If the terms of a new, long-term agreement are fair and reasonable, there is no reason the City couldn't enter into a 10, 20, or 30-year agreement for the use of Warner Park.

In summary, there are serious and legitimate issues with the proposed agreement. It is not in the City's best interests. Do not approve it. Continuing to operate with the current three-year agreement is fine and it allows time for the Mallards to verify their hardship and negotiate any rent concessions, if necessary, with more scrutiny, input, and discussion. Operating with the current agreement also gives the City three years to develop a more effective and robust process for securing a long-term agreement that is a win-win for the City and the user.

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If you have any questions or I can be of any further assistance, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to be 'AS' or similar initials, written over a horizontal line.

Alex Saloutos

cc: Eric Knepp, Superintendent, Parks Division, City of Madison
Vern Stenman, President, Big Top Baseball

**WHITE PAPER
ISSUES AND CONCERNS
PROPOSED SECOND AMENDMENT TO THE
USE AGREEMENT FOR WARNER PARK
11/4/20**

Background

The Madison Mallard's, a summer-college league baseball team, has played at Warner Park since 2001. The ballpark is owned by the City of Madison and the Mallards' current use agreement, which is approved by the City Council, expires in three years. Warner Park has been a profitable ballpark for the Mallard's as evidenced by their investments in capital improvements to increase capacity, revenues and profits; attendance at games—they were 26th out of 358 MiLB, summer-college, and independent league baseball teams in North America in 2018; and the owners' acquisition of three more summer-college league baseball teams.

A new eight-year no-bid contract for the Mallards use of Warner Park is moving swiftly through the City's approval process with little scrutiny and public discussion or input. While their baseball season was cancelled due to COVID-19, the Mallards continue to use the ballpark for numerous revenue generating events and they received up to \$1,000,000 in CARES funds from the federal government. Yet, the Mallard's claim a financial hardship and are asking the City to accept just \$1 in rent for 2020 and in 2021 \$1 per ticket in rent after they've sold 120,000 tickets and other creditors are paid. For the next seven years, based on use agreements and leases for other comparable ballparks, the rent and terms in the proposed agreement also appear to be a sweetheart deal for the Mallards. Based on an analysis of the terms in the use agreement for the summer-college team in Lafayette, IN, the Mallard's rent is more than \$4,000,000 short over the eight-year term of the proposed agreement. In addition, while the Mallards are a for-profit-enterprise, they pay no property taxes while the City's Golf Enterprise, which is non-profit, must make a payment in lieu of taxes (PILOT) to the City.

2020—Mallard's Claim of Hardship and Request to Waive Rent.

1. The Mallard's rent this year is \$65,238. Because their baseball season was canceled due to COVID-19, they are claiming a financial hardship and as relief want to pay just \$1.
 - What evidence has the City examined to verify this financial hardship, such as financial statements, bank statements, and tax returns?
 - If none, why are the Mallard's given special treatment like this?
 - In lieu waiving the rent, why not spread the rent over the remaining three years of the current agreement?
2. While the baseball season was cancelled, the Mallards continue to run numerous events at Warner Park, charge admission for these events, sell concessions, and appear to have sold advertising and sponsorships.
 - What are the revenues from these events?
 - What was done with this money?
 - Why weren't any of these funds used to pay rent?
3. The Mallards received between \$350,000 and \$1,000,000 in CARES funds from the federal government due to COVID-19, which does not have to be repaid.
 - How much in CARES funds did Mallards receive?
 - Where did this money go?
 - Why weren't any of these funds used to pay rent?

4. Many of the Mallards staff, including owners, work for multiple organizations in the Big Top family of companies. Two of these companies, Baseball Like It Oughta Be, LLC and Big Top Events Soccer, LLC, received an additional \$300,000 to \$700,000 in CARES funds. Information on the amount of CARES funds received by the other related companies isn't publicly available.
 - How much in CARES funds did the related companies receive?
 - Where did this money go?
 - Why weren't any of these funds used to pay rent?

5. The Mallards want to pay \$1 in rent while they continue to use the ballpark to generate revenue and they received up to \$1 million in CARES funds. At the same time the City struggles to balance their budget, minimize cuts to critical services, and keep property taxes down.
 - What pay cuts, if any, have Mallard's owners and management taken? If none, why?
 - If the owners and management did take cuts, were they commensurate with the cut taxpayers and the City are being asked to take? If not, why?
 - Have other creditors waived Mallard's debts and, if so, who and what were the amounts?
 - If other creditors haven't waived debts, why should the City and taxpayers give them special treatment?

6. The owners of the Mallards appear to have profited from their use of Warner Park for 20 years, as evidenced by the improvements they've made to the ballpark to increase capacity, revenue, and profits and their acquisition of three additional summer-college baseball teams.
 - How much have the owners profited from their use of Warner Park?
 - Why do the owners keep the profits and the taxpayers cover their losses?

7. Madison property owners—who pay property taxes—have suffered financial hardships because of COVID-19 and the loss of business revenue and their jobs.
 - Will property owners who suffered losses due to COVID-19 be treated equally and have their property taxes reduced to \$1?
 - If not, why do the Mallards receive special treatment?

8. Homeowners in Madison who operate short-term rentals in their homes—which helps pay their property taxes and helps them stay in their homes—pay a 10% tax to the City on this income,
 - Will homeowners who suffered short-term rental losses due to COVID-19 be treated equally and pay \$1 in rental taxes?
 - If not, why do the Mallards receive special treatment?

2021—Another Rent Reduction and Putting the City Last In Line.

9. Rent for 2021 is \$67,195 in the current agreement. In lieu of paying the \$67,195, the Mallards propose to pay \$1 per ticket after selling 125,000 tickets. If 120,000 tickets are sold, rent is \$0. If 140,000 tickets are sold, the rent is \$15,000. If 180,000 tickets are sold, rent is \$55,000. The proposed rent for 2021 means there is a lot of downside for the city and not much, if any upside.
 - Why is the City paid last?
 - Who gets paid before the City?
 - Will the City be made whole on rent before the owner's earn a profit?
 - If not, why are owners profiting before the City is paid?
 - Why is the \$1 per ticket on the last tranche of tickets and not on all tickets sold?

- If rent is based on ticket sales—which means the City is sharing a large amount of risk with the owners—shouldn't the City receive significantly more rent than they otherwise would if the season is a success?

10. Published ticket prices for 2020 range from \$5 to \$79.

- Why just \$1 per ticket in 2021?
- Why not tier the per ticket charge to the amount of the Ticket? Say, \$1 per ticket for all tickets up to \$17 and \$2, \$3, or more for tickets over \$17?
- Or, why not a percentage of ticket revenue?

Eight-Year, No-bid Sweetheart Deal on Fast Track.

11. The proposed eight-year no-bid contract, which gives the Mallard's use of the ballpark through 2028, puts the City at a disadvantage in negotiating fair and reasonable terms. There are about 357 other MiLB, summer-college, and independent league baseball teams in North America.

- Why weren't bids from other teams solicited?
- Is a no bid, long-term contract of this magnitude consistent with City policies?
- Why do the Mallard's receive special treatment like this?

12. Based on a review of more than 30 leases for comparable ballparks, the facts and the evidence show that the terms of the proposed agreement for use of Warner Park, capacity 6,750, is a sweetheart deal for the Mallards. The net rent in the proposed agreement for 2021 through 2028, assuming ticket sales of 180,000 in 2021, is \$435,000. Neither the City or the Mallards are obligated to make any capital improvements during the term of the proposed agreement and the Mallards are responsible for maintenance.

By way of comparison, the Lafayette Aviators, also a summer-college team, signed a five-year use agreement in August 2020 for their ballpark, capacity 2,600. It gives them use of the ballpark three months of the year during the summer and includes an option for an additional five-years. The base rent is \$120,000 per year, fixed for five years, plus 15% of all team revenues over \$800,000 per year, including tickets, concessions, merchandise, sponsorships, advertising, game revenues and non-game revenue. Neither the owner or the team are obligated to make any capital improvements during the term of the agreement and the team is responsible for maintenance.

If the Mallards paid rent for Warner Park on terms similar to the Aviators' agreement, the Mallard's rent for 2021 through 2028 would conservatively be, based on industry averages for ticket, concession, and merchandise sales, about \$4,411,482. This is \$4 million more than the proposed agreement and does not include revenues from sponsorship, advertising, and other sources.

- What due diligence did the City perform on the proposed long-term no-bid agreement?
- What was the process for negotiating this long-term no-bid agreement?
- What subject matter experts represented the City and taxpayers in the due diligence and negotiations of the proposed agreement?

13. The City of Madison Golf Enterprise is not-for-profit and must make a Payment in Lieu of Taxes (PILOT) to the City every year. Golf Enterprise revenues in 2018 were \$2.4 million and their PILOT was \$198,000, about 8.25% of revenues.

- Why is the Golf Enterprise, which is not-for-profit, required to make a PILOT to the City for the use of City owned golf courses while the Mallards, which is a for-profit, is not required to for the use of Warner Park?

- If the Mallards paid a PILOT that was 8.25% of their revenues, how much would that be?
14. It is common for MiLB, summer-college, and independent league teams to provide financial statements and/or tax returns to the venue owner. However, the Mallards do not.
- How can the City determine the value of the use agreement to the Mallards without this information?
 - Why hasn't the City demanded this financial information so they can make an informed decision about the lease terms and rent?
 - Why are the Mallards given this special treatment?
15. The proposed agreement was on the consent agenda for the Finance Committee held on October 26, 2020, which approved the agreement without discussion. Evidence shows that the review and approval of the proposed agreement is a formality, literally a rubber stamp.
- What opportunities are there for meaningful input and discussion by the community and elected officials on the proposed agreement?
 - Why is an eight-year, no-bid contract of this magnitude not given more scrutiny?
16. During the term of the current agreement the Mallards have made improvements to the park, which the City owns, to increase ballpark capacity and the Mallard's revenues and profits. It is normal and customary for teams to pay for maintenance and capital improvements. Some teams pay for all maintenance and capital improvements. The proposed agreement claims the Mallards have invested \$5 million in maintenance and capital improvements at Warner Park. While it is clear that major improvements have been made to the ballpark based on the physical evidence, there is no evidence in the record who paid what for maintenance or capital improvements. An open records request was made on September 19, 2020 for documents related to the capital improvements to verify what was invested. As of November 4, 2020, 46 days later, the City has not produced any documents responsive to this request.
- What is the cost of the capital improvements the Mallards have made?
 - What was the impact of these improvements on their revenues and profits?
 - If these assets have value to the City, what is their present value?
17. Under the current agreement, including options, the Mallards have use of the ballpark through 2023, three more years. The proposed agreement, including options, gives the Mallards use of the ballpark through 2028, eight more years.
- Why is the City giving an eight-year no-bid contract of this magnitude to the Mallards?
 - Why the rush to approve an eight-year no bid contract of this magnitude on such favorable terms without more scrutiny, public input, or discussion?
 - Why not continue under the current agreement, which has three more years on it, while a more effective process for negotiating a long-term agreement is developed?
 - If the Mallard's do deserve rent relief, why not spread the 2020 rent over the next three years and tie the 2021 rent to ticket sales starting with the first ticket sold?

WARNER PARK USER AGREEMENT PROFORMA

Operating Revenues

Gate Receipts	\$1,860,361
Concessions and Catering	\$1,860,361
Merchandise/Novelties	\$ 547,165
Parking	
Luxury Suites	
Club Seats	
Loge Boxes	
Party Suites	
Advertising and Sponsorship	
Naming Rights	
Secondary Tenant(s)	
Other Events	
Other Revenue	
Total Operating Revenues	\$4,267,887

Assumptions

Attendance (per 2019)	218,866
Games (per 2019)	36
Average Ticket Price (2020 prices \$5 to \$79)	\$ 8.50
Concession Per Cap	\$ 8.50
Merchandise and Novelties Per Cap	\$ 2.50
Total Per Cap*	\$ 19.50

*MiLB per cap total of \$17 to \$22 per JJ Cooper, Executive Editor, Baseball 19.5

Loeb Field Model

Base Revenue	\$ 800,000
Revenue In Excess of Base	\$3,467,887
Total Revenue	\$4,267,887
Revenue Share Percentage	15.0%
Rent-Base	\$ 120,000
Rent-Revenue Sharing	\$ 520,183
Total Rent	\$ 640,183
Rent as a Percent of Operating Revenues	15.0%
Proposed Rent	
Variance	
Total Proposed Rent 2021-2028 (Net of Capital Contributions)	\$ 435,001
Total Rent Proforma B Term 2021-2028	\$4,411,282
Incremental Rent	\$3,976,281

WARNER PARK USER AGREEMENT PROFORMA

Year	Games	Est. Attendance	Proposed Rent	Loeb Field Model	
2020			\$ 1	\$ 1	
2021 (\$1 per capita over 125,000)	36	180,000	55,000	- 70,000	
2022	36	218,866	\$ 65,000	\$ 640,183	
2023	36	218,866	\$ 65,000	\$ 640,183	
2024	36	218,866	\$ 70,000	\$ 640,183	
2025	36	218,866	\$ 70,000	\$ 640,183	
2026	36	218,866	\$ 75,000	\$ 640,183	
2027	36	218,866	\$ 75,000	\$ 640,183	
2028	36	218,866	\$ 80,000	\$ 640,183	
Totals for 2021 to 2028	288	1,712,062	\$ 555,001	\$4,411,282	
Credit for Capital Improvements			\$ 120,000	\$ -	
Net Rent 2021 to 2028			\$ 435,001	\$4,411,282	\$3,976,281
Net Rent Per Game			\$ 1,510		
Net Rent Per Year			\$ 54,375		
Net Rent Per Capita			\$ 0.25		
Net Rent as a % of Revenue					1.3%

**MADISON MALLARDS
WARNER PARK
ATTENDANCE AND ESTIMATE TICKET REVENUE**

	Capacity	Ticket Price	Game	Season	Percent Capacity	Percent Revenue
Duck Blind Roof	233	\$ 34	\$ 7,922	\$ 285,192	3.5%	5.7%
Duck Blind General Admission*	700	\$ 32	\$ 22,400	\$ 806,400	10.4%	16.1%
Duck Blind Suites	500	\$ 74	\$ 37,000	\$ 1,332,000	7.4%	26.6%
Duck Blind Club	254	\$ 48	\$ 12,192	\$ 438,912	3.8%	8.8%
Bleachers	3,289	\$ 14	\$ 47,142	\$ 1,697,124	48.7%	33.9%
Bleachers 1--Wrigley Seating	228	\$ 9	\$ 2,052	\$ 73,872	3.4%	1.5%
Office Deck--TDS Picnic Tables	125	\$ 31	\$ 3,875	\$ 139,500	1.9%	2.8%
Office Suites--Budweiser Rooftop	60	\$ 55	\$ 3,300	\$ 118,800	0.9%	2.4%
New HP Suites/4-Top Tables	40	\$ 13	\$ 514	\$ 18,500	0.6%	0.4%
Left Field Berm Area	500	\$ 5	\$ 2,500	\$ 90,000	7.4%	1.8%
Subtotal	5,929		\$ 138,897	\$ 5,000,300	0.88	1.00
Standing room	821	\$ 5	\$ 4,105	\$ 147,780	12.2%	3.0%
Total	6,750		\$ 143,002	\$ 5,148,080	100.0%	103.0%
Average per cap ticket		\$ 21				
2019 Ave. Att./Est. Rev.	6,080	90.1%	\$ 128,800	\$ 4,636,789		
Less free tickets as % of total	25%		\$ 96,600	\$ 3,477,592		
Food and Beverage Revenue	\$ 8.50		\$ 31,060	\$ 1,118,146		
Total Revenue			\$ 127,659	\$ 4,595,737		
Number of games	36					

*Estimated ticket price

WARNER PARK TICKET PRICES

Main Stadium

Scout Seats	\$	17	
Dugout Seats	\$	14	
Terrace Seats	\$	12	\$ 14.33

Duck Blind

		Sunday-Thursday		Friday - Saturday		
Duck Blind General Admission	1,000	\$ 26	\$ 35	\$ 33	\$ 42	\$ 34
Duck Blind Level 2	250	\$ 79				
Duck Blind Level 3	200	\$ 72				
Duck Blind Level 4	100	\$ 69	\$ 73			
Duck Blind Club	<u>230</u>	\$ 48				
Subtotal Duck Blind	1,780					

Group Health Cooperative Backyard	\$	9	
Impact Left Field Suites	\$	60	
Budweiser Rooftop	\$	55	
TDS Picnic Tables			
TDS Triple Play Club	\$	31	
TICOR-West Bend 4-Top Tables	\$ 1,850	\$ 13	Season
TRICOR-West Bend Club	\$ 295	\$ 8	Season

**SECOND AMENDMENT TO THE USE AGREEMENT FOR
THE WARNER PARK STADIUM**

Between the City of Madison, Madison Mallards LLC and Northwoods League, Inc.

THIS AGREEMENT, made and entered into by and between the City of Madison, a Wisconsin municipal corporation (“City”), the Madison Mallards LLC, a Wisconsin limited liability company (“Mallards”), and Northwoods League, Inc., a for profit corporation created and existing under the laws of the State of Florida (“League”), is effective as of the date by which all parties have signed hereunder.

WHEREAS, on November 4, 2010, the City, the Mallards, and the League (the “Parties”) entered into the “Use Agreement Between the City of Madison, Madison Mallards LLC And Northwoods League, Inc. For the Use of Warner Park Stadium During the 2011-2020 Baseball Seasons” (the “Agreement”) which Agreement set forth the terms and conditions upon which the Mallards could use the City’s baseball stadium located at Warner Park (the “Ballpark”); and,

WHEREAS, the Agreement has an initial term of 10-years that expires on December 31, 2020, with three one-year renewals (for 2021, 2022 and 2023) available upon the Mallards’ request; and,

WHEREAS, pursuant to the November 4, 2010 “Agreement to Undertake Improvements to Warner Park Stadium Between the City of Madison and Madison Mallards LLC” (the “Improvement Agreement”), the Mallards and the City have made significant capital improvements to the Ballpark which improvements have benefited the facility and the City, and which Agreement expires upon the earlier of a written agreement of the City and the Mallards or June 20, 2021; and,

WHEREAS, on November 7, 2017, the Parties entered into the First Amendment to the Agreement (the “First Amendment”), under which, among other things, the City allowed the Mallards to use the renovated Duck Blind area of the Ballpark for public and private uses year-round; and,

WHEREAS, under the Agreement, the Improvement Agreement, and the First Amendment, the Ballpark has been greatly improved and its use by the Mallards and the League for summer baseball and other events has provided a family-friendly and community oriented entertainment option that has been very successful, drawing over 6,000 fans to Warner Park and the Ballpark for each game, and over 200,000 fans each year of the Agreement, allowing the Mallards to lead the League in annual attendance every year; and,

WHEREAS, the Mallards have invested more than \$5 million in improvements and maintenance of the Ballpark since 2010 and all capital improvements to the Ballpark are owned by the City of Madison and increase the value of the City’s asset; and,

WHEREAS, the COVID pandemic has created unprecedented challenges for the utilization of the Ballpark and the 2020 season has been cancelled, which significantly impacts the ability of the Mallards to meet the financial obligations under the existing agreement; and,

WHEREAS, the 2020 Mallards season has been cancelled due to restrictions on mass gatherings issued by Public Health of Madison and Dane County; and,

WHEREAS, the City desires to continue the relationship at the Ballpark to promote the public benefits of having a proven and successful operator manage the facility; and,

WHEREAS, given the success of the Agreement, and the desire of the Parties to provide additional long-term security to the current Ballpark operations, the Parties wish to extend the term of the current Agreement by allowing for an additional five option years and also to allow for a procedure to make future park improvements following the expiration of the Improvement Agreement.

NOW, THEREFORE, in consideration of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby mutually acknowledged, the Parties agree as follows:

1. Purpose. The purpose of this Second Amendment To The Use Agreement For The Warner Park Stadium During The 2011-2020 Baseball Seasons (“Second Amendment”) is to set forth the terms and conditions upon which the Mallards may exercise an additional five-one-year renewal periods, effectively extending the term of the Agreement, as amended, through 2028. Additionally, this Second Amendment will replace the Improvement Agreement as it relates to future Ballpark improvements, and to create a mechanism whereby League may, in its discretion, assume the rights and obligations of Mallards set forth in the Agreement in case of default of the Agreement by Mallards.

2. Improvement Agreement. Mallards and the City agree that the Parties have satisfied all terms and conditions of the separate 2010 Improvement Agreement and that the Improvement Agreement is terminated upon the effective date of this Agreement.

3. The eighth Recital of the Agreement is amended as follows:

~~“WHEREAS, the League is entering into this Agreement to undertake the same obligations and have the same duties as those undertaken and assumed by the Mallards pursuant to certain agreements between League and Mallards, League is a required signatory to this Agreement for the purpose of protecting League territory in case Mallards defaults as set forth in this Agreement, and League shall therefore have the option, at its discretion, to assume Mallards’ rights and obligations under this Agreement in the case of such default by Mallards.”~~

4. Section 3 of the Agreement is amended as follows:

“3. Renewal. This Agreement may be renewed for ~~three~~ eight one (1) year term(s) upon written notice from the Mallards to the City and League. Except as set forth in this paragraph, the renewal shall be on the same terms and conditions of this Agreement. If Mallards desires to renew this Agreement, Mallards must give notice in writing to the City and League a minimum of ~~one year~~ three months prior to the expiration of the initial term of this Agreement, and a minimum of six months prior to the expiration of any renewal term of this Agreement, by the mailing of notices by certified mail, return receipt requested, or by personal delivery to the Superintendent of Parks and League respectively at the addresses specified in Paragraph 18. The notice shall contain an

unequivocal and unconditional agreement to renew the lease for the renewal term, which shall be effective to renew the lease for one (1) year.

A. Changes in Terms of Lease. If Mallards or League desire any changes in the terms and conditions of the lease, the changes shall be proposed at the time of providing the notice of renewal. The City may accept such changes, decline to accept such changes, or negotiate the changes. If Mallards, City, and League do not agree upon any changes in the terms and conditions of a renewal of this Agreement at least three (3) months before the renewal term begins, the Agreement will be renewed on the same terms and conditions of this Agreement.

B. Change in Annual Game Rental Fee. If Mallards and League renew this Agreement, the annual Game Rental Fee set forth in Paragraph 8.a. of this Agreement for each renewal period shall be as follows:

2021: ~~\$67,195~~ \$1, with a \$1 per ticket payment to the City for all tickets sold in calendar year 2021 in excess of 125,000 tickets for games at the Ballpark.
2022: ~~\$69,211~~ \$65,000
2023: ~~\$71,288~~ \$65,000
2024: \$70,000
2025: \$70,000
2026: \$75,000
2027: \$75,000
2028: \$80,000”

5. Section 6.k of the Agreement is amended to read as follows:

“k. Mallards shall submit, by March 1 of each year, an annual neighborhood impact plan to the Board of Park Commissioners addressing how the Mallards will address its impacts on the neighborhood surrounding the Ballpark, including pedestrian safety, fireworks, noise, litter and other neighborhood impacts. The Mallards shall notify all stakeholders identified by the Parks Superintendent of this submission to the Board of Park Commissioners.”

6. Section 6.l. of the Agreement is amended to read as follows:

“l. Mallards shall submit, by March 1 of each year, an annual Fan Access Plan to the Board of Park Commissioners. This Plan will detail Mallards’ plan to provide sufficient parking at or near the Ballpark, and address customer access to the Ballpark by bus, bicycle and foot. Mallards shall also provide City with a copy of ~~Mallards’ Use Agreement for parking at North Town Center, or any other offsite parking agreements. venue. Mallards will provide for a minimum of 200 parking stalls outside of Warner Park.~~ If the Mallards fail to do not provide 200 off-site spaces parking stalls outside of Warner Park, the Board of Park Commissioners may reduce the maximum capacity of the Stadium for ~~Mallards games or events~~ by up to ~~1350-945~~ persons. The Board of Park Commissioners will consider the impact of the parking and access as detailed in the Plan on other users of Warner Park and the surrounding neighborhood in making

its decision regarding the maximum capacity. Any decision on reduction of capacity at the Ballpark may be appealed to the Common Council, but will be in effect during any appeal. A set amount of parking shall be reserved at the Warner Park Community and Recreation Center for persons using the Center ~~by the Board of Park Commissioners.~~”

7. Subsection 8.a. of the Agreement is amended as follows:

“8. Fees, Revenue and Related Financial Matters.

a. Game Rental Fee. The Mallards agree to pay an annual fee for use of the Ballpark (Game Rental Fee). The Game Rental Fee for each year for the term of this Agreement shall be:

2020: ~~\$65,238~~ \$1”

8. Subsection 8.b. of the Agreement is deleted and replaced as follows:

“b. Capital Improvements.

1) Definition. Capital Improvements are permanent improvements made to the Ballpark facilities, and includes fixtures and other movable equipment intended to have permanence at the Ballpark and valued at more than \$10,000.

2) Capital Improvement Approval Procedure. Any Capital Improvements desired by Mallards during the course of this Agreement that include City funding or that will be made by the City shall be submitted to the Parks Superintendent in writing prior to April 1 of each year for potential inclusion in the Capital Budget. Any Capital Improvements made and funded exclusively by Mallards are subject to approval by the Board of Park Commissioners. All improvements completed at the Ballpark must be approved by the City prior to work commencing. Capital Improvements to the Ballpark made without the City’s approval shall be removed and the Ballpark restored to the condition it was in prior to the improvement being made.

3) Construction and Acceptance of Capital Improvements. Following approval of a Capital Improvement as noted above, improvements may be constructed, with such work being subject to all City codes, permits and regulations. If the work is done by Mallards, following completion Mallards shall inform the City and the City shall inspect the Capital Improvements. If the work is satisfactory, the City shall inform Mallards of the same, after which Mallards shall donate the Capital Improvements to the City as provided for under Wis. Stat Sec. 62.15(1e). The City shall retain ownership of any Capital Improvement to the Ballpark funded in whole or in part by any source, and Mallards is not entitled to any reimbursement from the City in the event of the termination of this Agreement under Section 13, except as specifically provided elsewhere in this Agreement.”

- 4) Capital Improvement Rental Fee Credits. For any improvements to the Ballpark funded exclusively by Mallards that are approved by City, a dollar for dollar credit against Rental Fees will be provided to the Mallards up to \$120,000 of agreed upon value of improvements. No more than \$40,000 worth of credits can be applied in a given year, but unused credits may be utilized in future years.”

9. Section 11 of the Agreement is amended as follows:

- “11. Home Games. Mallards and League covenants that Mallards will play all its home games in Madison, Wisconsin, and that the Mallards shall not relocate or agree to relocate or permit the relocation of the Mallards outside the boundaries of Madison, Wisconsin, during the term of this Use Agreement. The City may waive this requirement for isolated exhibition games or if the Stadium is not available.”

10. Section 13 of the Agreement is amended as follows:

- “13. Default and Termination. In the event Mallards shall default in any of the amounts due to City as set forth in this Agreement or in the observance of any of the covenants, agreements, commitments, or conditions herein contained, and any such default shall continue unremedied for a period of fifteen (15) days after written notice thereof to Mallards and League by City, or (a) Mallards shall make an assignment of its property for the benefit of creditors, or (b) Mallards shall petition a court to be adjudged a bankrupt, or (c) if a petition in bankruptcy shall be filed in any court against Mallards for more than thirty (30) days, or (d) if Mallards be judicially determined to be insolvent, or (e) Mallards shall be adjudged a bankrupt, or (f) if a receiver or other officer shall be appointed to take charge of the whole or any part of Mallards' property or to wind up or liquidate it affairs, or (g) if Mallards shall seek a reorganization under any of the terms of the National Bankruptcy Act, as amended, or under any other insolvency law, or (h) ~~Team~~ Mallards shall admit in writing its inability to pay its debts as they become due, or (i) if any final judgment shall be rendered against Mallards and remain unsatisfied for a period of thirty (30) days from the date on which it becomes final; or (j) if Mallards shall abandon the facility Ballpark, should League fail to exercise the option to assume Mallards' rights and obligations under this Agreement within ten (10) business days of receiving notice of default from City as set forth herein, thereafter City may, at its option and in addition to all other rights and remedies which it may have at law or in equity against Mallards, including expressly the specific enforcement hereof, forthwith have the cumulative right to immediately terminate this Agreement and all rights of the Mallards hereunder and require payment of the Performance bond as set forth in Section 12.c.; but such receipt of payment from the performance bond and/or cancellation shall not constitute a cancellation or a waiver by the City of the remainder of the total amounts payable to City, or for any damages or losses for the unexpired portion of the demised term which may be sustained by the City on account of such default, assignment, insolvency, adjudication, or other default as provided hereinabove in this Section, including any expenses incurred in exercising its rights in this Agreement.

Notwithstanding the foregoing, and as set forth in Section 24, before exercising any other rights against Mallards permitted to City under this Section 13 City shall notify League in writing of such uncured default by Mallards, and League shall have ten (10) business days after receipt of such notice to cure any default by Mallards in payment of amounts due to City or make reasonable efforts to cure such breach, and any such payment by League of such amount due or reasonable efforts by League to make such payments or cure such breach shall constitute the exercise by League of its option to assume all of Mallards' rights and obligations set forth in this Agreement and League shall be deemed to have assumed all of Mallards' rights and obligations as set forth in this Agreement.

In the event of lapse of insurance policies or coverage and protection as required by this Agreement, City ~~may, without,~~ shall give League written notice of such default and League shall have three (3) business days after receipt of such notice from City to provide insurance policies or coverage and protection as required by this Agreement. Should League fail to provide City with satisfactory evidence of it having placed such insurance policies or coverage and protection, thereafter City may, without further notice of default, declare this Agreement terminated. Mallards shall have no access rights to or use of Ballpark unless all insurance policies required by this Agreement are in full force and effect.

In the event of any uncured default as defined in this Section, City may declare the present value (discounted at the prime rate of Citicorp Bank, N.A.) of the balance of the Game Rental Fee for the term of Agreement immediately due and payable and if not paid within ten (10) days after written notice to Mallards or League as the case may be, shall be entitled to immediate payment from the surety of the entire unpaid balance of the rent due as well as other costs incurred by City. In the event of termination of this Agreement for default, Mallards may make no claim for compensation for the capital improvements furnished under Section 8.b. and the Improvement Agreement and City shall retain title and ownership of the said Ballpark, together with all buildings and improvements thereon, without any payment whatsoever to Mallards. No improvements, buildings or fixtures shall be removed from the above-described Ballpark during the term of this Agreement or renewal period of this Agreement without the written consent of City, except any equipment or trade fixtures of Mallards which Mallards lawfully removes prior to the termination of this Agreement.”

11. Section 15 of the Agreement is amended as follows:

“15. Impossibility of Performance. ~~Neither City nor Mallards~~ City, Mallards and League shall not be obligated to or liable for the performance of any term or condition of this Agreement on ~~its~~ their part to be performed if such performance is prevented by fire, earthquake, flood, pandemic, act of God, riots or civil commotions, or by reason of any other matter or condition beyond the control of either party.”

12. Section 17 of the Agreement is amended as follows:

“17. Binding on Parties; Amendments. This Agreement shall be binding on the parties hereto, their respective heirs, devisees and successors and cannot be varied or waived by any oral representations or promise of any agent or other person of the parties hereto unless the same be in writing signed by the duly authorized agent or agents who executed Agreement, ~~except that for terms only affecting City and Mallards, or where specifically set forth in this Agreement, only those Parties need enter into a written amendment of the terms of this Agreement for it to be effective.~~”

13. Section 24 of the Agreement is amended as follows:

“24. League’s Obligations Right to Assume and Assign Mallard’s Rights and Obligations. ~~The League is a party to this Agreement and agrees that it is bound by all obligations and duties of the Mallards herein. As set forth in Section 13, League shall, in its sole discretion, have the right, but not the obligation, to elect to cure any noticed default or other such breach of this Agreement, and to thereupon assume the rights and obligations of Mallards under this Agreement. Thereafter, League shall have the right to assign Mallards’ rights and obligations under the Agreement upon approval by the City, which approval shall not be unreasonably withheld.~~”

14. Section 26 of the Agreement is amended as follows:

“26. No Waiver. No failure to exercise, and no delay in exercising, any right, power or remedy hereunder on the part of the City, ~~or~~ Mallards, or League shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power or remedy preclude any other or further exercise thereof or the exercise of any other right, power or remedy. No express waiver shall affect any event or default other than the event or default specified in such waiver, and any such waiver, to be effective, must be in writing and shall be operative only for the time and to the extent expressly provided by the City, ~~or~~ Mallards, or League therein. A waiver of any covenant, term or condition contained herein shall not be construed as a waiver of any subsequent breach of the same covenant, term or condition.”

15. Section 29 of the Agreement is created to read as follows:

“29. Status of Parties. It is agreed that Mallards and League are independent contractors and not employees or representatives of the City or each other, and that any persons who Mallards or League utilizes and provides for services under this Agreement are employees or volunteers of Mallards or League, respectively as the case may be, and are not employees or volunteers of the City of Madison. In addition, it is agreed that by granting Mallards and League the right to use the Ballpark for the purposes set forth herein, that the City is not granting Mallards or League the right to sell or distribute any City goods or services nor is there a community of interest, as that term is defined at Wis. Stat. Sec. 135.02(1), between the City, Mallards, and League as between any of them arising from this Agreement. The Parties acknowledge that this Agreement does not create a dealership under Wis. Stat. Ch. 135 as between any of them.”

IN WITNESS WHEREOF, the parties hereto have set their hands at Madison, Wisconsin.

MADISON MALLARDS, LLC

Vern Stenman, President

Date

NORTHWOODS LEAGUE, INC.

Dick Radatz, Chairman

Date

CITY OF MADISON

Satya Rhodes-Conway, Mayor

Date

Maribeth Witzel-Behl, City Clerk

Date

Countersigned:

David P. Schmiedicke, Finance Director

Date

Eric Veum, Risk Manager

Date

Approved as to form:

Michael Haas, City Attorney

Date

Execution of this Second Amendment by the City is authorized by Resolution Enactment No. RES-____-____, ID No. _____, adopted by the Common Council of the City of Madison on _____, 202__, and the Board of Parks Commissioners approval granted on _____, 202__.

USE AGREEMENT

BETWEEN

LAFAYETTE PARKS AND RECREATION

AND LAFAYETTE FAMILY ENTERTAINMENT, LLC

IN WITNESS WHEREOF, Lafayette Family Entertainment, LLC (“LFE”) an Indiana formed limited liability company and Lafayette Parks and Recreation (“LPR”), (collectively referred to herein as the “Parties”), have agreed to this Use Agreement (“Agreement”) as of the day and year indicated below.

WHEREAS, LFE has developed expertise in managing sports teams and desires to enter into a binding use agreement for Loeb Stadium located in Columbian Park in Lafayette, IN; and,

WHEREAS, LFE and LPR are entering into this Agreement for Loeb Stadium located within Columbian Park for the purpose of placing a summer college baseball team for the 2021 season and beyond; and

WHEREAS, pursuant to I.C. 36-10-3-11(a) (1), LPR may enter into contracts for the use of facilities for the operation of recreation programs and related services;

WHEREAS, Loeb Stadium will be available for other recreational, entertainment and civic uses as set forth herein;

WHEREAS, the following terms are binding between the parties.

NOW THEREFORE, the undersigned Parties hereby agree to the following binding terms:

1. **Stadium Term.** LFE shall have the non-exclusive right to use Loeb Stadium (the “Premises”) during the entirety of the following periods (the “Initial Term”):
 - a. May 15, 2021 to August 20, 2021
 - b. May 15, 2022 to August 20, 2022
 - c. May 15, 2023 to August 20, 2023
 - d. May 15, 2024 to August 20, 2024
 - e. May 15, 2025 to August 20, 2025

The administrative office space located on the “Premises” will be available for the exclusive use of LFE on a continuous basis commencing upon the issuance of a Certificate of Occupancy through August 31, 2025.

Provided neither party has provide their written notice of their intent not to renew prior to August 24, 2024, and provided LFE is not in default of the Use Agreement as of August 20, 2024, LFE and LPR agree that this Agreement will be extended for the following periods (“the Renewal Term”):

- a. May 15, 2026 to August 20, 2026

- b. May 15, 2027 to August 20, 2027
- c. May 15, 2028 to August 20, 2028
- d. May 15, 2029 to August 20, 2029
- e. May 15, 2030 to August 20, 2030

During the Renewal Term LFE shall continue to have use of the administrative office space on a continuous basis from September 1, 2025 through August 31, 2030.

Should LPR provide LFE with written notice not to renew prior to August 20, 2024, LPR hereby grants LFE a sixty (60) exclusive negotiating period beginning August 21, 2024, provided LFE is not in default, during which the Parties will work together in good faith to enter into a New Use Agreement between the Parties.

2. **Priority.** LFE shall have priority over all events on the Premises during the Term with the exception of Jefferson High School baseball games and IHSAA tournaments, this includes Jefferson High School rainout dates and practices. LFE agrees to black-out dates for Jefferson High School baseball games and IHSAA tournaments. LFE will make a good faith effort to accommodate American Legion Post 11 events. LPR agrees that dates for LFE baseball games, rained out or postponed baseball games, and other LFE events shall have priority over other previously scheduled LPR events with the exception of previously scheduled Jefferson High School games or IHSAA tournaments.
3. **Stadium Use Fee.** During the Initial Term, LFE shall pay to LPR a use fee of One Hundred Twenty Thousand Dollars (\$120,000.00) ("Minimum Use Fee") annually on or before the dates as listed herein:

June 15 – \$30,000

July 15 – \$35,000

August 15 – \$35,000

November 15 – \$20,000

During the Renewal Term, LFE shall pay to LPR a Minimum Use Fee that is equal to the average of total amount paid (Minimum Use Fee plus Additional Use Payment) for the 2024 and 2025 baseball seasons.

Additional Use Payment. If annual gross LFE Team Revenue, as defined below, exceeds Eight Hundred Thousand (\$800,000) (the "Adjusted Gross"), LFE shall pay to LPR as an Additional Use Payment an amount equal to Fifteen Percent (15%) of the Adjusted Gross in excess of Eight Hundred Thousand (\$800,000) (the "Additional Use Payment"). The Additional Use Payment is due annually on December 1st.

By example, if the Adjusted Gross is One Million Dollars (\$1,000,000), LFE will owe LPR Fifteen Percent (15%) of Two Hundred Thousand Dollars (\$200,000) on December 1st.

LFE Team Revenue is hereby defined as all revenue from summer college baseball games which includes but is not limited to sponsorships, ticket sales, concessions, game revenues and non-game revenue, less sales tax. LFE financial statements will be provided from which LPR can verify the Adjusted Gross and Additional Use Payment.

LPR shall be responsible for all utilities that service the entire stadium such as gas, electric, water and sewer. LFE shall not be responsible for the payment of use taxes, property taxes, property assessments or levies of any kind assessed against the Premises. Should any such amount be assessed by any governmental agency, LPR will credit such payments against the rent and/or reimburse LFE in full, as necessary. LPR shall reimburse any new local taxes assessed against LFE during the Term, such as an Amusement Tax.

4. Stadium Capital Improvements.

LFE will provide at its own expense furniture, fixtures and equipment for LFE offices located on the Premises; any items required for usage by LFE on the playing field, including but not limited to protective screens, which are not provided by LPR; any items required for usage by LFE in the team clubhouse, including but not limited to laundry facilities, which are not provided by LPR and any furniture, fixtures and equipment for the team merchandise store, including but not limited to shelving and display racks, which are not provided by LPR.

5. Operation and Maintenance. LFE agrees to provide maintenance of the Premises during the Term listed in Section 1. This maintenance shall include:

- a. Garbage removal
- b. Recyclables
- c. Cleaning and janitorial services
- d. Sweeping of concourse and sidewalks within the fenced area
- e. Weeding within the Premises
- f. Pressure washing as needed
- g. Moving and trimming of non-playing surface areas within the Premises (game surface maintenance provided by the groundskeepers)
- h. LFE shall prohibit the sale and use of items or merchandise by any team or group that could damage stadium turf. The lists of these items include, but are not limited to: metal cleats, sunflower seeds, peanuts, and gum.
- i. LFE shall leave the stadium in a clean and usable condition within 12 hours after completion of each game or use.
- j. LFE agrees to clean and maintain to LPR and industry standards.

- k. LFE shall make a good faith effort to be good stewards of the environment and work to reduce waste.
- l. LFE shall make a good faith effort to support and purchase from local vendors whenever possible.

LFE shall handle ticketing operations for all LFE events during the Term. LFE and LPR shall meet to discuss LFE's ticket prices prior to the publication thereof. LFE and LPR shall agree upon the minimum acceptable level of crowd control and security which LFE is required to provide for each event. It is anticipated that the crowd control and security needs will be representative of League and industry standards.

- 6. **Alterations and Improvements.** Alterations, additions, and improvements provided by LFE that do not become fixtures of the stadium shall remain property of LFE. Improvements by either party becoming fixtures shall become property of LPR unless otherwise noted herein. LFE shall not make any alterations, additions or improvements to the Premises without the prior written consent of LPR which consent will not be unreasonably withheld.
- 7. **Repairs.** LPR is responsible for all capital repairs or replacements of permanent stadium fixtures (including stadium and scoreboard), HVAC equipment, built-in refrigeration and other infrastructure items. It shall also be LPR's responsibility to make any required alterations and improvements to the Premises which are necessary to comply with applicable statutes, ordinances, governmental rules, regulations and codes and to protect the safety of LFE's employees and guests; LFE shall be responsible for any single repair cost that does not exceed five hundred dollars (\$500.00) and is not caused as a result of the willful misconduct or negligence of LPR or non-LFE users of the Premises. LFE and LPR shall jointly inspect the Premises by May 1st of each use period and once again prior to the end of each use period to determine repair responsibilities in accordance with the terms above. The Parties further agree to inspect the Premises prior to any non-LFE events for the purpose of allocating repair responsibilities. These events may include Lafayette Jefferson events and IHSAA tournament games. LFE shall be responsible for any maintenance, repairs or replacements caused by the willful misconduct or negligence of LFE. Absent negligence by LFE, LPR shall be responsible for major repairs to the turf during the Term.
- 8. **Warranties of Possession.** LPR warrants and covenants that it has the full right to make and enter into this Agreement. LFE warrants and covenants that it has the full right to make and enter into this Agreement.
- 9. **Liquor License.** LFE agrees that throughout the Term and any extension thereof, it shall possess and maintain in good standing a Beer and Wine Retailer – Restaurant license issued by the State of Indiana Alcoholic Beverage Commission. LFE agrees alcohol services shall never commence earlier than one and half hours prior to the start of the scheduled events and no later than the end of the seventh inning of each game.

10. **Delivery of Premises.** LPR agrees to deliver the Premises in clean and operable condition at the beginning to the Term listed in Section 1. The administrative office space located on the "Premises" will be available for the use of LFE commencing upon the issuance of a Certificate of Occupancy.
11. **Storage.** LPR agrees to provide LFE with ample storage within the Premises
12. **Groundskeeping.** LPR agrees to employ all grounds keepers needed to provide summer collegiate league baseball games during the Term. Ground keepers shall have the responsibility on maintaining the Premises' playing surface, including chalking for each game, moving of screens and equipment, tarping (with the aid of LFE), dragging and all other duties needed to facilitate the play of summer college baseball. Grounds keepers shall be employed by LPR but shall be coordinated and scheduled by LFE on game days. LFE shall reimburse LPR for grounds keepers used to prepare the field for summer college league games at a rate not to exceed \$15.00 per hour per grounds keeper. Chemicals and materials needed to facilitate LFE's summer college home games shall be provided at the expense of LPR. LPR agrees to maintain a field in accordance with LFE's league affiliation requirements.
13. **Concessions.** LFE shall have the exclusive right to use and occupy the concession areas on Premises during the Term for storage, preparation and sale of food, beverages, souvenirs, and other concessions ("Concessions"); and no other tenant, sub-tenant, licensees of LPR or other person shall have the right to use the Concession area or to sell food or beverages on the Premises, without the express written consent of LFE. The parties recognize the inherent benefit to both parties for the harmonious use of the Premises by all Stadium users. In furtherance of this goal, LPR shall have the right to use the Concession area for LPR events with the prior consent of LFE, which consent will not be unreasonably withheld. The specific terms of use by LPR shall be mutually agreed upon by the parties prior to any LPR event. LFE hereby expressly consents to the use of the existing concession areas, including the right to sell food and beverages and retain the profits therefrom, by Jefferson High School during Jefferson High School baseball games and IHSAA tournaments. The specific terms of use by Jefferson High School shall be mutually agreed upon by LFE and Jefferson High School after consultation with LPR. LFE shall be entitled to all profit from the Concessions, unless Concessions are subleased to outside entities who shall retain profits in accordance with the sublease. Concession revenue, less sales tax, shall be considered Team Revenue for the purposes of determining an Additional Use Payment under paragraph 3XX. LFE may restrict patrons from bringing food products and beverages into the Premises. LFE shall provide concession services of a high quality commensurate with industry standards prevailing in collegiate summer league/minor league facilities similar to Loeb Stadium. LFE agrees to make a good faith effort to use local vendors/business.

14. **Revenues.** LFE shall receive all income and revenues generated from LFE's use and operation of the Premises during the Term, including sale of premium seating licenses, signage and advertising sales, concessions and vending machine rentals, sales of souvenirs, sales of food and beverages, catering revenues, club membership fees, ticket revenues, broadcast and media fees and any other miscellaneous revenue. LFE is permitted to sell club presenting rights with approval of LPR. LFE shall not receive income and revenues generated from any non-LFE event, including but not limited to, Jefferson High School or IHSAA or American Legion Post 11 events unless agreed upon with LPR.
15. **Parking.** LPR shall provide free of charge handicap parking around the Premises complying with applicable Federal, State and local code for all events during the Term. If LFE secures parking facilities and charges a fee for patron parking, such revenues will be considered Team Revenue for purposes of determining the Additional Use Payment under paragraph 3.
16. **Surrender of Property.** On the ending time and date under Section 1, LFE shall peaceably surrender the Premises in as good a condition as the Premises was at the time of delivery of the Premises, with the exception of normal wear and tear.
17. **Advertising.** LFE shall have the right to sell all advertising within the Premises and receive all revenues flowing therefrom. However, LFE agrees and understands that the City of Lafayette retains the sole right and absolute discretion to name the Stadium and/or rename the Stadium and the field and the Stadium entrance plaza areas of the Stadium and retain all revenue from any such related agreement. LFE shall be sensitive to community standards for any advertising sold and LPR shall have the right to object to and require LFE to remove any advertising that, in the reasonable discretion of LPR, violates community standards. All LFE advertising revenue shall be considered Team Revenue for the purposes of determining the Additional Use Payment under paragraph 3.
18. **Team Name.** LFE shall have team and mascot naming rights, subject to the approval of LPR, provided that the first word of the team name shall be "Lafayette".
19. **Soccer.** Should LFE and LPR execute a Use Agreement for a Soccer Team to play its home games at the Stadium, LFE shall have team and mascot naming rights, subject to the approval of LPR, provided that the first word of the team name shall be "Lafayette".
20. **Non-LFE Events.** In the event LPR, or other third party users of the Premises, desire LFE to provide ticketing, concession, groundskeeping, cleaning or other services, the details of those additional services shall be outlined in a separate agreement between the parties. Revenues, if any, that LFE receives from LPR or Third Party events, are not subject to the Stadium Use Fee provision as referenced in paragraph 3.

21. **Insurance.** LFE shall at its own expense maintain in effect during the term of this Use Agreement (including all times LFE has access to any portion of the Premises outside of the baseball season) the following insurance with limits as shown or greater:

General Liability (including automobile) and Liquor Liability in minimum limits of \$1,000,000 each occurrence and \$2,000,000 general aggregate, combined single limit of \$1,000,000 bodily injury and \$1,000,000 property damage and \$2,000,000 general aggregate. Umbrella Liability with a minimum of \$1,000,000 limit per occurrence. LPR shall be named as an Additional Insured and be given a 30 day notice of cancellations, non-renewal or significant change of coverage. The General Liability policy shall include a Waiver of Subrogation endorsement in favor of LPR.

LFE's insurance shall be written on a "primary" basis and LPR's insurance program shall be in excess of all of LFE's available coverage.

Worker's Compensation at the statutory limit. Workers Compensation shall include a Waiver of Subrogation endorsement in favor of LPR.

22. **Status of Parties.** By executing this Agreement, the parties agree that each is acting as an independent contractor and not as the agent or employee of the other. Each party agrees to pay, as they become due, all federal and state withholding and income taxes, as well as other payroll taxes, including Social Security taxes due and payable on the compensation earned by their respective employees and to hold each other harmless from any and all taxes, penalties or interest which might arise by the failure to do so.
23. **Indemnification.** LFE agrees that it will indemnify and hold harmless LPR their officer's, agents and employees, including staff, from any loss, cost, damage, expense, attorney's fees, and liability by reason of bodily injury, property damage, or both of whatsoever nature or kind, arising out of or as a result of the negligent act or negligent failure to act of LFE or any of its agents for employees. LPR agrees that it will indemnify and hold harmless LFE, its officers, agents, and employees from any loss, cost, damage, expense, attorney's fees, and liability by reason of the negligent act or failure to act of LPR, the City of Lafayette, its employees or agents, including staff. In the event of loss, cost, damage or expense caused by the joint or concurrent negligence of LFE and LPR, they shall be borne by each party in proportion to its negligence.
24. **Waste and Nuisance Prohibited.** During the Term of this Agreement, LFE shall comply with all applicable laws or regulations affecting the Premises and shall not commit, or suffer to be committed, any waste on the Premises. LFE shall not do or permit to be done upon the Premises anything that constitutes a nuisance.
25. **Default.** If either party shall default in the performance of any obligations of said party to be performed under this Agreement and such a default shall continue for a period of thirty (30)

days after written notice of such default shall be given to the defaulting party by the non-defaulting party, the non-defaulting party shall be entitled to terminate this Agreement and all other remedies at equity and law.

In addition to the remedies set forth above, in the event of default by LFE and after the expiration of the period to cure, in addition to any other remedies at equity and law that LPR may have, LPR shall have the immediate right of re-entry and to removal all persons and property from the Premises.

26. **Force Majeure.** The parties shall not be liable for failure of performance under this Use Agreement if occasioned by declared or undeclared war, flood, fire, embargo, governmental orders, regulations, governmental expropriation, interruptions of transportation facilities, labor strikes, public health emergency, pandemic, epidemic, mandated shut down of LFE's team operations, terrorist event and disputes, or any other causes beyond the control of the parties.
27. **Frustration of Purpose.** If the fundamental reason for entering into the Use Agreement has been frustrated by an unanticipated supervening circumstance, the Parties agree to negotiate in good faith abatement to the Stadium Use Fee.
28. **Entire Agreement.** This Agreement supersedes all previous contracts or agreements between the parties with respect to the same subject matter and does constitute the entire Agreement between the parties hereto and LFE and LPR shall neither be entitled to other benefits than those herein specifically enumerated.
29. **Waiver of Breach.** The waiver by either party of a breach or violation of any provision of this Agreement shall not operate as nor be construed to be, a waiver of any subsequent breach hereof.
30. **Governing Law.** This Agreement shall be construed and governed by the laws of the State of Indiana.
31. **Severability.** In the event that any provision hereof is found invalid or unenforceable pursuant to judicial decree or decision, the remainder of this Agreement shall remain valid and enforceable according to its terms.
32. **Interpretation.** The parties hereto acknowledge and agree that (i) each party has reviewed the terms and provision of the Agreement; (ii) the rule of construction to the effect that any ambiguities are resolved against the drafting party shall not be employed in the interpretation of this Agreement; and (iii) the terms and provisions of this Agreement shall be construed fairly as to all parties hereto and not in favor or against any party, regardless of which party was generally responsible for the preparation of this Agreement.

33. **Amendments.** This Agreement may be amended only by an instrument in writing signed by the parties hereto.

34. **Execution.** This Agreement and any amendments thereto shall be executed in duplicate copies on behalf of LFE and LPR. Each duplicate copy shall be deemed an original, but both duplicate originals together constitutes one and the same instrument.

35. **Notices.** Notices or communications herein required or permitted shall be given the respective parties by registered or certified mail (said notices being deemed given as of the date of mailing) or by hand delivery at the following addresses unless either party shall otherwise designate its new address by written notice:

LFE

Stuart Gutwein
c/o Gutwein Law
250 Main Street, Suite 590
Lafayette, IN 47901

LPR

Claudine Laufman
Lafayette Parks and Recreation
1915 Scott Street
Lafayette, IN 47904

Dated this 24th day of August, 2020.

LAFAYETTE FAMILY ENTERTAINMENT, LLC ("LFE")

STUART R. GUTWEIN

By: [Signature]

Its: Under Power of

LAFAYETTE PARKS AND RECREATION ("LPR")

Maurice Denney

By: [Signature]

Its: _____