

SNOW EQUIPMENT AND CITY PROPERTY USE AGREEMENT

Between the City of Madison and Madison Nordic Ski Club, Inc.
For the 2015-2018 Calendar Years

THIS AGREEMENT, entered into by and between the City of Madison, a municipal corporation (hereinafter referred to as “City”), and the Madison Nordic Ski Club, Inc., a Wisconsin corporation (hereinafter referred to as “Club”), is effective as of the date by which both parties have signed hereunder.

WITNESSETH:

WHEREAS, the City is the owner of certain park lands in the City of Madison, Dane County, Wisconsin, known as Elver Park, located at 1250 McKenna Blvd. in Madison, and certain equipment used for winter activities, including snow making machines and groomers (“Snow Equipment”); and,

WHEREAS, Club consists of City and area residents who together organize cross-country skiing races, maintain cross country ski trails, provide ski lessons, support high school and junior skiers, raise funds for projects (including for the City to purchase Snow Equipment), and provide assistance with the Madison Winter Festival; and,

WHEREAS, Club wishes to enter into an agreement to use the City’s Snow Equipment to make snow for the Winter Festival and at Elver Park, and to groom the City’s cross country ski trails at Elver Park and other approved locations, which use will benefit the City by providing a greater level of service than the Parks Division is able to provide.

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 Snow Equipment and City Property Use Agreement (“Agreement”) is to set forth the terms and conditions upon which the City will allow Club to use the City’s Snow Equipment, including, specifically, the City’s snow makers and groomers, to groom the City’s cross country skiing trails, and to store Club equipment at Elver Park.
2. Term. This Agreement shall run from the October 1, 2015 through Sept. 30, 2018. Unless this Agreement is terminated under Section 21, this Agreement may be renewed for an additional 3-year term upon written notice by the Club to the City no later than August 31, 2018. The City’s decision to renew or not renew the Agreement for the following three-year term will be based upon the Club’s performance under this Agreement and will solely be that of the Parks Superintendent, or his/her designee. The decision to renew or not renew the Agreement is not reviewable. The City shall inform Club within ten (10) days of receipt of Club’s notice of its intent to renew the Agreement.

3. Grant of Authority. By entering into this Agreement, the City grants Club the authority to use the City's Snow Equipment, for its designated purpose only, at Elver Park and other City owned lands that the City may, from time-to-time, make available for cross country skiing ("City Property"), to groom the City's cross country skiing trails, and to store Club equipment at Elver Park, pursuant to the terms and conditions as set forth in this Agreement.
4. Special Conditions of Use. By entering into this Agreement, Club agrees to the following special terms and conditions regarding the Club's use of the Snow Equipment and City Property:
 - A. Permissible Users.
 - 1) Any person operating or using the Snow Equipment on behalf of, in association with or at the direction of the Club, or using Club equipment on City Property, must be approved by the Parks Division and also meet the following requirements:
 - a) The person must be familiar with the equipment being used and have received appropriate training on the equipment's operation, use and maintenance;
 - b) The person must be competent and qualified to operate and maintain the equipment in a safe manner and in strict accordance with the manufacturer's manual; and,
 - c) The person shall comply with all applicable laws, regulations, ordinances, rules and orders, and exercise due regard for persons and property in the operation of the equipment.
 - 2) All users under this Agreement shall wear the proper personal protective equipment when operating any equipment. The Club agrees to provide all of its employees and volunteers with any necessary equipment.
 - B. Snow Making. The Club may use the City's snow making equipment at Elver Park, or other City Property, as follows:
 - 1) Parks will control the start and end dates for the making of snow at Elver Park. The Club must communicate in advance with the Parks Division when they plan to use the snow making equipment.
 - 2) The Club will be allowed to move the snow making equipment while at Elver Park.
 - C. Grooming of Cross County Trails by Club.

- 1) The Club will be allowed to use their own snowmobile groomer(s) to groom the cross country ski trails at Elver Park or any other location the City expressly grants permission for cross country skiing in the future.
- 2) The Club must keep a log of all grooming (what trails, what date, time and who performed grooming), and make it available to the Parks Division upon request.
- 3) Prior to any trail grooming, contact must be made with the Parks Division informing the Division of when and where grooming will occur.
- 4) The City's Piston Bully will not be allowed to be used by the Club for grooming at Elver Park or any other location, except for the Winter Festival as noted below.

D. Storage of Club Groomers at Elver Park.

- 1) The Club is allowed to store an ATV, Tidd Tech and other equipment as approved by the Parks Division, at the old concession building at Elver Park.
- 2) Storage of the above noted equipment is approved between December 1 and March 15.

E. Madison Winter Festival.

- 1) The Club may use the City's snow making equipment to make snow for the Madison Winter Festival. This snow making may occur at any agreed upon location.
- 2) The Club may use the City's Piston Bully snow groomer for the Winter Festival.
- 3) Parks is the approved transporter of City's Piston Bully and snow making equipment. The transportation of this equipment to and from the Winter Festival should be arranged by the Club with the Parks Division ahead of time.

F. Equipment Safety. Club shall maintain its own equipment, including safety equipment, in a safe working order at all times.

G. Additional Conditions.

- 1) The City may, at any time, suspend the Club's use of the Snow Equipment or City Property if the City has a need for the Snow Equipment or other use of the City Property. In addition, if the City determines the Equipment is being misused, operated in an unsafe manner, or in violation of rules of

use (however provided), it may terminate this agreement with no advance notice.

- 2) The Club assumes all risk and liability for damage to the Snow Equipment or City Property arising out of the Club's operations under this Agreement. The Club will promptly pay any charges the City incurs in repairing damage to or replacing the Snow Equipment or City Property, including reimbursement of any property insurance deductibles.
- 3) The Club agrees that the City shall not be held responsible for any damage or loss to any of the Club's property, or any of its employees' or volunteers' property, while engaging in activities covered by this Agreement, whether the damage is caused by the City, its employees, contractors or others.
- 4) The Club will promptly notify the City in the event of any incident involving the Snow Equipment, whether or not the incident causes bodily injury or property damage.

H. Modifications and Improvements to Premises. Club shall not make any modifications or changes to City Property except with the prior written approval of the Parks Superintendent, or designee.

I. Parking and Access. This Agreement does not convey any special right to Club, or Club's employees, volunteers, contractors, agents, customers, invitees, or any other third party, to use City parking spaces, driveways, delivery areas, bike paths, pedestrian walkways or other locations to park vehicles and/or access the City's Property. Any such use must be pursuant to the rules and regulations otherwise in place at the respective location, or as provided for in a separate agreement.

J. Weapons Prohibition. Club shall prohibit, and shall require its subcontractors to prohibit, its employees from carrying weapons, including concealed weapons, while using the City's Property under this Agreement.

5. Entire Agreement. The entire agreement of the Parties is contained herein and this Agreement supersedes any and all oral contracts and negotiations between the Parties.

6. Status of Club. It is agreed that Club is an independent contractor and not an employee or representative of the City, and that any persons who Club utilizes and provides for services under this Agreement are employees or volunteers of Club and are not employees or volunteers of the City of Madison.

7. Assignability and Subcontracting. Club shall not assign or subcontract any interest or obligation under this Agreement without City's prior written approval. All of the services provided for hereunder shall be performed by Club and employees or volunteers of Club.

8. No Realty. It is expressly understood and agreed that this Agreement is not a lease or a conveyance of realty, but merely a granting to Club the right to use the City's Snow Equipment and use and maintain City Property for the purposes set forth herein.
9. Access to City Property. This Agreement gives the Club the non-exclusive right to use City Property and Snow Equipment for specific purposes. In no case shall this limited grant of rights be interpreted to preclude the City's or the public's access to the City's Property.
10. 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. Any change in any provision of this Agreement may only be made by a written amendment, signed by the duly authorized agent or agents of the Club and the Parks Superintendent, or his/her designee.
11. No Waiver. No failure to exercise, and no delay in exercising, any right, power or remedy hereunder on the part of the City or Club 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 Club 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.
12. Indemnification. The Club shall be liable to and hereby agrees to indemnify, defend and hold harmless the City of Madison, and its officers, officials, agents, and employees against all loss or expense (including liability costs and attorney's fees) by reason of any claim or suit, or of liability imposed by law upon the City or its officers, officials, agents or employees for damages because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons or on account of damages to property, including loss of use thereof, arising from, in connection with, caused by or resulting from the Club's acts or omissions in the performance of this Agreement and use of the City's Snow Equipment, whether caused by or contributed to by the negligence of the City, its officers, officials, agents, or its employees.
13. Hazardous Substances; Indemnification. Club represents and warrants that its use of the City's Snow Equipment will not generate any hazardous substance, and it will not store or dispose on City property nor transport to or over City property any hazardous substance in violation of any applicable federal, state or local law, regulation or rule. Club further agrees to hold the City harmless from and indemnify the City against any release of such hazardous substance and any damage, loss, or expense or liability resulting from such release including all attorneys' fees, costs and penalties incurred as a result thereof except any release caused by the sole negligence or intentional acts of the City, its employees or agents. "Hazardous substance" shall be interpreted broadly to mean any substance or material defined or designated as hazardous or toxic waste,

hazardous or toxic material, hazardous or toxic radioactive substance, or other similar term by any federal, state or local environmental law, regulation or rule presently in effect or promulgated in the future, as such laws, regulations or rules may be amended from time to time; and it shall be interpreted to include, but not be limited to, any substance which after release into the environment will or may reasonably be anticipated to cause sickness, death or disease or damage to or loss of use of real or personal property.

14. Insurance.

- A. Required Insurance. The Club will insure, and will require each subcontractor to insure, as indicated, against the following risks to the extent stated below. The Club shall not commence work under this Agreement, nor shall the Club allow any Subcontractor to commence work on its Subcontract, until the insurance required below has been obtained and corresponding certificate(s) of insurance have been approved by the City Risk Manager.
- 1) Commercial General Liability. During the life of this Agreement, the Club shall procure and maintain Commercial General Liability insurance including, but not limited to, bodily injury, property damage, personal injury, products and completed operations in an amount not less than \$1,000,000 per occurrence. This policy shall also provide contractual liability in the same amount. Club's coverage shall be primary and noncontributory, and list the City of Madison, its officers, officials, agents and employees as additional insureds. Club shall require all subcontractors under this Agreement (if any) to procure and maintain insurance meeting the above criteria, applying on a primary basis and listing the City of Madison, its officers, officials, agents and employees as additional insureds.
- B. Acceptability of Insurers. The above-required insurance is to be placed with insurers who have an A.M. Best rating of no less than A- (A minus) and a Financial Category rating of no less than VII.
- C. Proof of Insurance, Approval. The Club shall provide the City with certificate(s) of insurance showing the type, amount, class of operations covered, effective dates, and expiration dates of required policies prior to commencing work under this Agreement. Club shall provide the certificate(s) to the City's representative upon execution of the Agreement, or sooner, for approval by the City Risk Manager. The Club shall provide copies of additional insured endorsements or insurance policies, if requested by the City Risk Manager.
- D. Notice of Change in Policy. The Club and/or Insurer shall give the City thirty (30) days advance written notice of cancellation, non-renewal or material changes to any of the above-required policies during the term of this Agreement.

- E. Insufficient Coverage. In the event of expiration, material change, or cancellation of insurance required by this Agreement, Club shall immediately cease use of the Premises and the provision of the services under this Agreement until such time as proof of the required insurance is provided to the City Risk Manager consistent with the requirements of this Section.
- F. Risk Manager. All information required to be provided to the Risk Manager should be addressed as follows:

City of Madison
Attention: Risk Manager
210 Martin Luther King Jr. Blvd., Room 406
Madison, WI 53703-3345

- 15. Non-Discrimination. In the performance of the services under this Agreement the Club agrees not to discriminate against any employee or applicant because of race, religion, marital status, age, color, sex, handicap, national origin or ancestry, income level or source of income, arrest record or conviction record, less than honorable discharge, physical appearance, sexual orientation, gender identity, political beliefs, or student status. Club further agrees not to discriminate against any subcontractor or person who offers to subcontract on this Agreement because of race, religion, color, age, disability, sex, sexual orientation, gender identity or national origin.
- 16. Severability. It is mutually agreed that in case any provision of this Agreement is determined by any court of law to be unconstitutional, illegal or unenforceable, it is the intention of the parties that all other provisions of this Agreement remain in full force and effect.
- 17. Notices. All notices to be given under the terms of this Agreement shall be in writing and signed by the person serving the notice and shall be sent registered or certified mail, return receipt requested, postage prepaid, or hand delivered to the addresses of the parties listed below:
 - City: Superintendent of Parks
City Parks Division
P.O. Box 2987
210 Martin Luther King, Jr. Blvd. #104
Madison, WI 53703
 - Club: Nordic Ski Club, Inc.
5184 Reynolds Ave.
Waunakee, WI 53597
- 18. Third Party Rights. This Agreement is intended to be solely between the parties hereto. No part of this Agreement shall be construed to add, supplement, amend, abridge or repeal existing rights, benefits or privileges of any third party or parties, including but not limited to employees of either of the parties.

19. Choice of Law and Forum Selection. This Agreement shall be governed by and construed, interpreted and enforced in accordance with the laws of the State of Wisconsin. The parties agree, for any claim or suit or other dispute relating to this Agreement that cannot be mutually resolved, the venue shall be a court of competent jurisdiction within Dane County, State of Wisconsin and the parties agree to submit themselves to the jurisdiction of said court, to the exclusion of any other judicial district that may have jurisdiction over such a dispute according to any law.
20. Compliance with Applicable Laws. The Club shall become familiar with, and shall at all times comply with and observe all federal, state, and local laws, ordinances, and regulations which in any manner affect the services or conduct of the Club and its agents and employees. The Club's failure to comply with any such laws, ordinances or regulations shall be a default subject to Section 21 of this Agreement.
21. Default/Termination.
 - A. Except where otherwise noted in this Agreement, in the event Club shall default in any of the covenants, agreements, commitments, or conditions herein contained, or fails to fully perform and carry out any term or condition of this Agreement to the satisfaction of the City, and any such default shall continue unremedied for a period of ten (10) days after written notice thereof to Club, the City may, at its option and in addition to all other rights and remedies which it may have at law or in equity against Club, including expressly the specific enforcement hereof, forthwith have the cumulative right to immediately terminate this Agreement and all rights of Club under this Agreement.
 - B. Notwithstanding paragraph A., above, the City may in its sole discretion and without any reason terminate this agreement at any time by furnishing the Club with ten (10) days' written notice of termination.
22. Authority. Club represents that it has the authority to enter into this Agreement. If the Club is not an individual, the person signing on behalf of the Club represents and warrants that he or she has been duly authorized to bind the Club and sign this Agreement on the Club's behalf.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their proper officers on the day and year first above written.

Madison Nordic Ski Club, Inc.

Cary Forest, President

Date

FOR THE CITY OF MADISON

Paul Soglin, Mayor

Date

Maribeth Witzel-Behl, City Clerk

Date

Approved:

David P. Schmiedicke, Finance Director

Date

Eric Veum, Risk Manager

Date

Approved as to form:

Michael P. May, City Attorney

Date

Execution of this Agreement by City is authorized by Resolution Enactment No. RES 14-_____, ID No. _____, adopted by the Common Council of the City of Madison on _____.