

USE AGREEMENT FOR THE OLBRICH BEACH HOUSE FOR 2017-2023

Between the City of Madison and BKM Group, LLC

THIS AGREEMENT, entered into by and between the City of Madison, a municipal corporation (hereinafter referred to as “City”), and BKM Group, LLC (hereinafter referred to as “Permittee”), is effective as of January 1, 2017.

WITNESSETH:

WHEREAS, Madison General Ordinances Sec. 8.17 allows for a person to obtain an annual parks vending permit, valid from April 15 of each year through April 14 of the following year (“Permit Year”), to allow the person to sell foods, beverages, goods, services and lessons in a City park; and,

WHEREAS, for many years, vendors have entered into agreements with the City allowing vendors to provide recreational, placemaking and concession services to City residents and visitors at City shelters and facilities located at numerous City parks, which agreements are in the public’s interests as they facilitate greater access and enjoyment of the City’s parks, lakes and recreational opportunities; and,

WHEREAS, the vendors provide services to City residents and visitors, such as canoeing, kayaking, and boating lessons, watercraft rentals, kids camps, and food and general concessions, that the City does not, and cannot, otherwise provide at these, or other, locations, but that are in the public’s interest, which services help the City with its placemaking efforts at the City’s parks; and,

WHEREAS, it is in the City’s interest to have only one vendor of these recreational and concession services at each Park to ensure that general public’s use of the Park is not interfered with, and that the vendor complies with general standards of safety and care in its dealings with the public; and,

WHEREAS, in 2016, following a Request for Proposals Process, Permittee was selected to provide placemaking services at the Olbrich Beach House in Olbrich Park, consisting of food and alcohol concessions in a biergarten setting; and,

WHEREAS, there are some needed capital investments to the Olbrich Beach House grounds and facilities that need to be made to provide the best and safest services possible, and these improvements can only be made by the Permittee if there is a contract confirming the relationship between the City and the Permittee.

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 Agreement is to set forth the terms and conditions upon which the City will allow Permittee to use a portion of the Olbrich Beach House and the surrounding area in Olbrich Park (hereinafter, the “Premises”) to conduct food and alcohol concessions.

The Premises is described as follows:

Portions of the Olbrich Beach House and surrounding lands, located within Olbrich Park, in the City of Madison, and more particularly described as follows: the existing large storage room, a portion of the men’s lobby on the western side of the building that will be converted into a separately restricted space, the bathrooms and other common areas of the Beach House, the concrete pad on the western side of the building, the designated grounds adjacent to the western side of the building, and the concrete pad (including a potential extension thereof) and front of the building on the western two-thirds (approximately) of the north side of the building.

A map depicting the Premises is attached hereto as Exhibit 1.

2. Term; Renewal. The initial term of this Agreement shall be from January 1, 2017 through December 31, 2019. Thereafter, Permittee may renew this Agreement for up to two additional terms of two-years each if mutually agreed to by the City and the Permittee, running from January 1, 2020 through December 31, 2021 and from January 1, 2022 through December 31, 2023. To renew this Agreement, Permittee must, no later than October 1 in the final year of the then-current term, provide the City Parks Division with written notice of its intent to renew the Agreement. The City’s decision to renew or not renew the Agreement will be based upon mutual agreement including the Permittee’s performance under this Agreement during through the renewal request. The decision to renew or not renew the Agreement is not reviewable, and solely that of the Parks Superintendent, or his/her designee. The City will notify Permittee in writing of its decision to renew or not renew this Agreement no later than December 1 in the final year of the then-current term.
3. Grant. City does hereby grant to Permittee permission to operate a biergarten at the Premises, including selling alcoholic and non-alcoholic concession products, and other related products, at the Premises, as set forth in this Agreement. Alcohol will be sold for consumption at the Premises only. The City will retain all riparian rights at the Premises and in no way does the Agreement transfer any riparian rights at Olbrich Park to the Permittee. As part of this grant of authority, Permittee shall have the exclusive use of the existing large storage room and that portion of the men’s lobby on the western side of the building that will be converted into a separately restricted space, along with the concrete pad and designated grounds adjacent to the western side of the building, and the concrete pad (including a potential extension thereof) and front of the building on the western two-thirds (approximately) of the north side of the building. Any other uses of Olbrich Park by Permittee not covered by this Agreement shall be subject to Parks Division approval and may require additional permits or agreements with the City.

4. Capital Improvements. The Parties agree that improvements, repairs and upgrades to the Premises (“Improvements”) will be necessary or may be desirable in order to facilitate Permittee’s offering of services at the Premises. Regarding these Improvements, the Parties agree as follows:
 - a. Timeline. The Parties will have the goal of completing the Improvements listed on Exhibit 2 by May 1, 2017. If the Improvements are not completed in all material respects to enable the opening of the Premises by Memorial Day 2017, the Parties shall determine a reasonable corresponding deferral of Permittee’s payment obligations under this Agreement. The City will cooperate and discuss with Permittee in good faith the specific details of, and timeframe for completing, all such Improvements such that they are completed in a reasonable manner that is mutually acceptable to both the City and Permittee.
 - b. Capital Investment. The Permittee agrees to make Improvements to the Premises with values of no less than \$62,500 in the aggregate over the lifetime of this Agreement (by Dec. 31, 2023).
 - c. Improvement Planning. The City and Permittee will conduct annual inspections of the facility to identify any planned Improvements and establish schedules for such work.
 - d. Plans and Approval. Prior to making any Improvement, Permittee must notify the Parks Superintendent, or representative, in writing of the anticipated Improvement. Except for Improvements to the electrical, plumbing, or other utility services to the Premises, or repairs under \$5,000, Permittee shall present the plans for the Improvements to the Board of Parks Commissioners, who shall either approve the Improvement, or reject the Improvement. If rejected, Permittee has no appeal rights, but may present a modified plan to the Board for reconsideration at a later date. Depending on the nature of the proposed Improvement, the Board of Parks Commissioners may require, before approving or rejecting the Improvement, an advisory opinion from the Board of Public Works. Notwithstanding the foregoing, the Improvements set forth on Exhibit 2 hereto are hereby approved by the City and Board of Parks Commissioners (the “Preapproved Improvements”).
 - e. Joint Participation. Upon notification of a proposed Improvement, the City may elect to participate in the project. If the City does elect to participate in an Improvement project, the Parties shall agree on each Parties’ respective shares. If the City determines that public bidding requirements are applicable, the City shall manage and oversee the project, accepting Permittee’s financial contribution to the Improvement prior to the start of construction. On any such City managed Improvement project, the City and its contractor shall coordinate the work schedule and plans with Permittee, and keep Permittee reasonably informed of the status of the project.

- f. Construction. Except as provided in the foregoing Subsections a. and e., the funding and construction of any Improvement under this Section is entirely the responsibility of the Permittee, who shall be responsible for obtaining any required permits, licenses, and approvals for the improvement.
 - g. Donation and Acceptance of Improvements. Once the Improvements are complete, Permittee shall notify the Parks Superintendent, or designee, who shall then have the Improvement inspected. If the Parks Superintendent, or designee, is satisfied that the Improvement is consistent with the approved plans, and there appear to be no obvious defects or deficient workmanship, the City will accept the Improvement, which will be considered a donation by Permittee to the City for the use and enjoyment of City residents who use the Premises.
 - h. Warranties and Representations. Permittee agrees that when making Improvements, it will ensure that any and all warranties and representations made to Permittee by the builder, contractor, manufacturer, etc., regarding the Improvement, shall also extend to the City, who shall assume ownership of the Improvement once completed.
 - i. Accounting. Upon the acceptance of the Improvement by the City, Permittee shall supply City with a final accounting of the costs of the Improvement, which amount will be applied towards Permittee's requirements under Subsection b.
 - j. Ownership of Improvements. Any Improvements made to the Premises pursuant to this Section shall be the property of the City upon completion and acceptance, where required, regardless of the source(s) of financial contributions for the improvement, except that the following items shall remain the property of Permittee and may be removed by Permittee from the Premises at the end of the term of this Agreement: coolers and refrigerators, stoves (if any) and tap system. While Permittee may use the Improvements pursuant to the terms and conditions of this Agreement, Permittee has no ownership right in any of said Improvements.
5. Conditions of Use. In entering into this Agreement, the Parties agree to the following terms and conditions regarding the Permittee's use of the Premises
- a. Services to be Provided at Premises. Permittee shall provide equipment and services to facilitate concessions at the Premises. This may include food and beverage (alcoholic and non-alcoholic) sales and selling supporting merchandise or equipment at the Premises. Alcohol will be sold for consumption at the Premises only. Permittee's services may also include youth and family activities or a play zone. A list of products and services will be provided to the City upon request by the Parks Division. Permittee shall provide these services for up to 55 hours per week at a minimum from Memorial Day weekend through Labor Day.
 - b. Co-Occupancy of Premises; Change in Status. Permittee is expected to occupy the Olbrich Beach House with another party during the lifetime of this Agreement (the "Co-Occupant"). The Co-Occupant shall have the exclusive use of the

existing refreshment and concession area along with the adjoining small storage/closet, as well as the non-exclusive use of the bathrooms and other common areas within the Beach House along with the concrete pad and beach area on the eastern side of the buildings, as identified on Exhibit 1. Co-Occupant is expected to conduct water sport equipment rental and instructional programs, run day camps, sell non-alcoholic concession products, and related products at the Premises, under the terms of a separate use agreement with the City. In lieu of Co-Occupant paying for utilities, Co-Occupant shall be responsible for cleaning and stocking the restrooms at the Beach House.

Permittee and the Co-Occupant shall both agree to act in good faith toward each other and not interfere with the other's use of the Beach House or surrounding area. Permittee agrees not to sell any products that are competitive with the products sold by Co-Occupant. Moreover, as part of the use agreement with the Co-Occupant, the City will not permit the Co-Occupant to sell food and beverage products that are competitive with the food and beverage products sold by Permittee. Should there be any issues between the Permittee and the Co-Occupant that cannot be resolved by Permittee and the Co-Occupant on their own, the Parks Division shall attempt to mediate the issue. If the Co-Occupant's agreement with the City is terminated for any reason prior to the end of this Agreement, Permittee and the City will discuss any changes that may be necessary to the terms of this Agreement. Co-Occupant and Permittee may enter into an agreement between them to set forth their respective rights and obligations with respect to the Olbrich Beach House.

- c. Permits and Licenses. Subject to Section 26.b., Permittee agrees, at its own expense, to obtain and keep current all licenses and permits necessary for the operation of Permittee's business, including an annual Parks Vending Permit under Madison General Ordinances Sec. 8.17 and a Class B alcohol license, and to comply with all Federal, State and City statutes, ordinances, rules and regulations applicable to Permittee's business. Permittee agrees to obtain all inspections by the Health Department, Fire Department or any other governmental agency that are required to operate the services authorized under this Agreement. Permittee shall provide the Parks Division with proof of such compliance upon request. Failure to comply with this provision shall be a default under this Agreement.
- d. Equipment. City shall be responsible for providing access to the Premises, access to water and electrical service, and functioning bathrooms at the Premises. Permittee shall provide all other equipment necessary to operate the facility, including, but not limited to, all kitchen equipment, safety equipment, exterior seating, concessions, products, refrigerators, freezers, microwaves, and cash registers. The Permittee and Co-Occupant shall be jointly responsible for the entire cost of cleaning supplies, soap, and paper products for the public bathrooms at the Olbrich Beach House. Permittee may place other equipment related to the operation of the Premises by the Permittee consistent with this Agreement in locations approved by the Parks Superintendent, or his/her designee. Permittee

may, solely at Permittee's expense, or along with Co-Occupant, install a security system at the Premises. Permittee may install or use other equipment with the written permission of the Parks Superintendent, or his/her designee. Upon request, Permittee shall provide the Parks Superintendent, or designee, with a current list of all the Permittee's equipment at the Premises.

- e. Utilities. Permittee is responsible for 100% of water, sanitary sewer, and gas and electric costs at the Premises. City will provide Permittee with the relevant meter data for the Premises. The failure to pay these bills by the due date is a default under Section 26. If Permittee fails to pay these utility bills and the City terminates this Agreement, the unpaid utility bills will be deducted from any remaining security deposit under Subsection t below.
- f. Product. Upon request by the Parks Superintendent or designee, the Permittee will provide a list of items offered for sale at the Premises by Permittee, including, but not limited to, food, beverages and confections, and related merchandise.
- g. Alcohol Sales. Permittee is permitted to sell food and beverages, including alcoholic beverages at the Premises. Permittee will be required to have a valid Class B license for the Premises. Permittee's operation is a fair-weather operation scheduled to be open up to 55 hours per week within Park open hours, weather permitting. Permittee shall not dispense or distribute alcohol after 9:30 p.m. The times of operation may be modified upon the written approval of Permittee and the Parks Superintendent, or his/her designee, subject to any conditions of the Permittee's Class B license. In addition, if ceasing to dispense or distribute alcohol at 9:30 p.m. results in repeated issues of customers not leaving the Premises by Olbrich Park closing time, Permittee may be required to cease dispensing or distributing alcohol at 9:00 p.m.

It is the responsibility of Permittee to manage the distribution of alcohol in compliance with all applicable laws, and Permittee is solely responsible for any incidents arising from any violation by Permittee of any such law(s). Permittee shall monitor the service of alcoholic beverages, make sure no one under the age of twenty-one (21) is drinking alcohol, and refuse service to people who appear to be intoxicated or using poor judgment in their drinking.
- h. Amplified Music Restriction. No amplified music requiring a PA2 permit shall be allowed during non-special event operations. Acoustic and background amplified music at a PA1 permit sound level is allowed to provide background music at the Premises. Amplification permits for special events must be secured through the Parks Division. PA1 permits have a sound limit of 75 decibels at 150 feet from the source. PA2 permits have a sound limit of 95 decibels at the sound board or 100 feet from the source, whichever is closer.
- i. Special Events. Permittee may hold up to four (4) days of special events and activities at the Premises each year with attendance of between 250 and 1,000

people. Any such special event or activity will not be charged a park event application fee, but other permit fees may apply depending upon the nature of the event or activity. Amplified music can be included in the special event application. All such special events or activities must be approved in advance by the Parks Division and coordinated with Co-Occupant. If a PA2 permit or event with an anticipated attendance of over 1,000 is requested, the Board of Park Commission must approve the event.

- j. Equipment Safety. Permittee shall maintain all of Permittee's equipment, including safety equipment, in a safe working order at all times and store said equipment in a safe manner to prevent any unauthorized use or operation thereof.
- k. Storage. Permittee may store equipment at the Premises necessary to provide the services set forth in this Agreement. The Permittee may store equipment inside the western side common area of the Beach House, outside the western side of the Beach House and inside the bathrooms during the 'off season' in a neat, orderly, and attractive manner as long as it does not interfere with utility or fire access, the use of the Beach House by Co-Occupant, or is otherwise a public nuisance.
- l. Maintenance. Permittee shall be responsible for maintaining the Premises in a clean, safe and attractive condition when the Premises is in operation or use, including keeping the grounds immediately adjacent to the Premises picked up of all paper and debris. Permittee agrees that should the Parks Division determine that the maintenance requirements of this Subsection are not being met after written notification to Permittee and reasonable time to rectify, the Parks Division may perform or have performed additional cleaning or maintenance, and charge the actual costs of such work to Permittee, payable within thirty (30) calendar days of the issuance of the invoice, or as a charge against the Permittee's security deposit.

Any custodial services, and any chemicals, trash-liners, soap and paper used by the Permittee pursuant to its obligations under this Subsection, are required to be in accordance with the City's Green Cleaning Program and comply with the green product standards, specifications and practices of this Program. Permittee is required to be familiar with the applicable standards of the City of Madison's Policy for a Sustainable Green Cleaning Program during the permit year. These standards are set forth in the City of Madison's Administrative Procedure Memorandum No. 4-6, available at <http://www.cityofmadison.com/mayor/apm/4-6.pdf>. The failure to abide by the requirements of this Program shall be a default subject to Section 26 of this Agreement; provided that if such failure is caused by Co-Occupant in connection with its cleaning of the restrooms, Permittee shall be permitted to cure such failure as set forth in Section 26.a.

- m. Disposal of Fats, Oils and Grease. Permittee shall take measures to keep leftover fats, oils, grease and other food scraps ("FOG") from going down the drains at the Premises, including, if necessary, a grease control device ("GCD"). Large amounts of FOG should be collected and stored in drums or barrels for recycling.

Small amounts can be poured into a sealed container and thrown away. Permittee should scrape or wipe FOG from dishware and cookware and put it in the trash. The City shall have the right of entry into the Premises at any time to make inspections, observation, measurements, sampling, testing, or records review of the GCD or Permittee's operations to ensure that the Permittee is in compliance with this Section. Operational changes, maintenance and repairs requested by the City to ensure compliance with this Section shall be implemented by Permittee at Permittee's sole expense.

- n. Refuse. Permittee is responsible for refuse disposal and recycling of waste from the Premises. Permittee may enter into an agreement with Co-Occupant to address this responsibility. The placement and manner of servicing of any dumpsters in Olbrich Park shall be subject to the approval of the Parks Superintendent or designee, such approval not to be unreasonably withheld.
- o. Alterations to Premises. No modifications of any kind, or fixtures, additions or removals shall be made to the Premises without the permission of the Parks Superintendent, or his/her designee. Any modifications shall be submitted in writing to the Parks Superintendent, or his/her designee, outlining the need, plan, cost, desire for financial or physical assistance and if the alteration will be considered an Improvement as set forth in Section 4 above. Notwithstanding the foregoing, the Preapproved Improvements detailed in Exhibit 2 are hereby consented to by the Parks Superintendent.
- p. Signage. All signs and banners, including menu boards, shall be approved by the Parks Superintendent or designee and the Zoning Administrator. Additionally, the Permittee shall post a readily observable sign at the Premises stating the Permittee's name, the Operating Agent and contact information as set forth below in Section 21.
- q. Weapons Prohibition. Permittee shall prohibit, and shall require its subcontractors to prohibit, its employees from carrying weapons, including concealed weapons, in the course of performance of work under this Agreement, other than while at the Permittee's or subcontractor's own business premises. This requirement shall apply to vehicles used at any City work site and vehicles used to perform any work under this Agreement, except vehicles that are an employee's "own motor vehicle" pursuant to Wis. Stat. Sec. 175.60(15m).
- r. Closing Date. The closing date of the Permittee's activities at the Premises shall be determined by Permittee, but such date shall occur no later than the Park Division's building winterization schedule, unless arrangements for winterizing of the Premises have been made by Permittee.
- s. Surrender of Premises. Upon the termination of this Agreement under Section 26, or, in the event that this Agreement is not renewed or expires under Section 2, Permittee shall vacate and remove all personal property no later than the end of the Agreement. However, with the Superintendent's written consent, the

Permittee may have additional time beyond the end of the Agreement to remove all equipment and property from the Premises.

The Permittee will deliver the facility to City in as good condition as the Premises was in at the commencement of the Agreement, with the exception of unavoidable wear and tear through careful use and with the exception of damage by fire, vandalism, natural disasters or other casualty beyond the control of Permittee. Permittee may be granted additional time to surrender the Premises under this Subsection by written agreement with the Parks Superintendent, or his/her designee.

Any damages to the Premises during the term of this Agreement beyond normal and expected wear and tear shall be the responsibility of the Permittee. If these damages are not repaired by the Permittee before surrender of the Premises to the City, the City shall cause the repairs to be made and charge the cost thereof against the security deposit as set forth in Subsection t below. Any balance still owing by Permittee in excess of the security deposit shall be due within thirty (30) calendar days of the invoice.

All equipment and other property of the City on the Premises shall remain the property of the City after the termination of this Agreement. No fixtures, whether or not purchased by Permittee, shall be removed from the Premises without the permission of the City. An inventory of City property and equipment will be performed before release. Any property of Permittee remaining on the Premises thirty (30) calendar days after surrender of the building will become the property of the City. Notwithstanding the preceding, Permittee must immediately surrender the Premises and remove all property therefrom in the event Permittee no longer meets the insurance requirements of Section 16.c.

- t. Security Deposit. The Permittee shall provide the City a security deposit in the amount of \$3,000 prior to occupying the Premises. To satisfy this security deposit requirement, the City agrees to either hold a check issued during each calendar year of the Agreement from Permittee for \$3,000 (in which case, upon receipt of a new check for a particular year, the City shall return or destroy any prior checks issued by Permittee pursuant to this Section), or hold Permittee's credit card information and an authorization to charge up to \$3,000. If, at the time of surrender of the Premises there are any damages or other assessable costs under this Agreement, City is permitted to either cash the check, deduct for any charges and return the balance to Permittee, or charge Permittee's credit card the assessable amount, up to \$3,000. Permittee must provide the Parks Division with a new check or an updated credit card authorization within fifteen (15) business days of changing banks. In cases where the damage and other assessable costs are greater than \$3,000, Permittee shall pay to the City the remaining balance within 30 calendar days of the invoice from the City. If it is discovered that the Permittee's check and/or credit card authorization are unable to satisfy the \$3,000 security deposit amount, the City is authorized to take possession of any personal

property of Permittee remaining on the Premises and sell this property to satisfy the security deposit requirement.

- u. Use Fee. For the use of the Premises and the right to provide the services set forth above herein, and in addition to the annual Parks Vending Permit under Madison General Ordinances Sec. 8.17, the utility costs imposed under Subsection e above, as well as the security deposit under subsection t above, Permittee agrees to pay the City a use fee (“Use Fee”) for each calendar year of the contract, according to the schedule set forth below. The Use Fee shall be paid in six equal monthly installments which shall be due on the last business days of each month from April through September of each calendar year of this Agreement.
- v. Payment Schedule. Permittee shall make all payments required under this agreement. A payment will be considered late, and a default of the terms of this Agreement, if not received within five (5) business days of the due date.

The following is a projected schedule of annual payments based on the currently anticipated capital improvement plans and permit fees.

Year	Est. Capital Improvements	Vending Permit	Use Fee	Financial Benefit to City
2017	\$37,500	\$900	\$13,000	\$51,400
2018	\$5,000	\$900	\$18,500	\$24,400
2019	\$5,000	\$900	\$23,500	\$29,400
2020	\$15,000	\$900	\$25,000	\$40,900
2021	N/A	\$900	\$27,000	\$27,900
2022	N/A	\$900	\$29,000	\$29,900
2023	N/A	\$900	\$30,000	\$30,900
Totals	\$62,500	\$6,300	\$166,000	\$234,800

- 6. 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. In the event of a conflict between the terms of this Agreement and the terms of any

document attached or incorporated herein, the terms of this Agreement shall control and supersede any such conflicting term.

7. Status of Permittee. It is agreed that Permittee is an independent contractor and not an employee or representative of the City and that any persons who Permittee utilizes and provides for services under this Agreement are employees of Permittee and are not employees of the City of Madison. In addition, it is agreed that by granting Permittee the right to use the Premises for the purposes set forth herein, that the City is not granting Permittee 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 and Permittee arising from this Agreement. The Parties both acknowledge that this Agreement does not create a dealership under Wis. Stat. Ch. 135.
8. Assignability and Subcontracting. Permittee shall not assign or subcontract any interest or obligation under this Agreement without City's prior written approval, including any lease, other than space in a boat storage rack, or exclusive use of the Premises. All of the services required hereunder shall be performed by Permittee and employees of Permittee. If Permittee is a corporation, partnership, limited partnership, limited liability company, limited liability partnership or other entity that is not an individual person, then an assignment prohibited within the meaning of this provision shall be deemed to include one or more sales or transfers, by operation of law or otherwise, or creation of new stock or ownership interests, by which an aggregate of 50% or more of Permittee's stock or ownership interests shall be vested in a party or parties who are not stockholders, partners, members or others who possess ownership interests in Permittee as of the date hereof.
9. No Realty. It is expressly understood and agreed that this Agreement is not a lease or a conveyance of realty, but merely a grant to Permittee of the right to conduct certain activities and provide certain services on City property for the benefit and convenience of the public, pursuant to Madison General Ordinances, Section 8.17.
10. Access to Premises. City, by its representatives, shall have access to Premises at any reasonable time provided such entry shall not interfere with Permittee's conduct of business. In case of emergency, the circumstances of which to be solely determined by City, City shall enter the Premises with or without force, as necessary, without assuming any liability for such entry and without affecting Permittee's obligations under this Agreement.
11. Designated Representative. Permittee shall designate a Contract Agent with primary responsibility for the oversight of this Agreement. In case the Contract Agents are replaced for any reason, or in the event of the death, disability, removal or resignation of the Contract Agents, Permittee will designate another Contract Agent within seven (7) calendar days by notifying the City as set forth below in Section 21.
12. Operating Agent. Permittee shall designate an Operating Agent of Permittee's activities at the Premises, who shall be the person primarily responsible for the day-to-day operation of the Permittee's activities at the Premises. Permittee shall provide the name

and contact information of a new Operating Agent to the Parks Superintendent, or his/her designee, within forty-eight (48) hours of any changes to the Operating Agent or the Operating Agent's contact information.

13. Advertising. It is understood that in the operation and conduct of this Agreement, City does not grant Permittee the right to sell or distribute any goods or services provided by City, nor does City grant Permittee the right to use a City trade name, trademark, logotype, advertising, or other commercial symbol without permission of the Park Superintendent or their designee. Notwithstanding the foregoing, the City acknowledges that Permittee will do business as "Olbrich Biergarten" and the City consents to Permittee's use of such name. In any commercial advertisement or announcement, Permittee may use the names of Olbrich Park, but any such advertisement or announcement must also indicate that Permittee's activities are not associated with or affiliated with the City.
14. 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 other than 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 Permittee and the Parks Superintendent, or his/her designee.
15. No Waiver. No failure to exercise, and no delay in exercising, any right, power or remedy hereunder on the part of the City or Permittee 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 Permittee 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.
16. Indemnification and Insurance.
 - a. Indemnification. The Permittee 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 Permittee's and/or Subcontractor's acts or omissions in the performance of this Agreement, whether caused by or contributed to by the negligence of the City, its officers, officials, agents, or its employees.

- b. Hazardous Substances; Indemnification. Permittee represents and warrants that its use of the Premises will not generate any hazardous substance, and it will not store or dispose on the Premises nor transport to or over the Premises any hazardous substance in violation of any applicable federal, state or local law, regulation or rule. Permittee 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.
- c. Insurance.
- (1) Required Insurance. The Permittee will insure, and will require each subcontractor to insure, as indicated, against the following risks to the extent stated below. The Permittee shall not commence work under this Agreement, nor shall the Permittee 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.
- (a) Commercial General Liability. During the life of this Agreement, the Permittee 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. Permittee's coverage shall be primary and noncontributory, and list the City of Madison, its officers, officials, agents and employees as additional insureds. Permittee shall require all subcontractors under this Agreement (if any) to procure and maintain insurance meeting the above criteria, applying on a primary and noncontributory basis and listing the City of Madison, its officers, officials, agents and employees as additional insureds.
- (b) Liquor Liability Insurance. Liquor Liability insurance in the amount of coverage of at least \$1,000,000 per occurrence listing the City of Madison, its officers, officials, agents and employees as additional insureds.

- (c) Automobile Liability. Business Automobile Liability insurance covering owned, non-owned and hired automobiles with limits of not less than \$1,000,000 combined single limit per accident. Permittee shall require all subcontractors under this Agreement (if any) to procure and maintain insurance covering each subcontractor and meeting the above criteria. This insurance shall be required for the full term of the Agreement and any renewal periods.
 - (d) Worker's Compensation. During the life of this Agreement, the Permittee shall procure and maintain statutory Workers' Compensation insurance as required by the State of Wisconsin. The Permittee shall also carry Employers Liability limits of at least \$100,000 Each Accident, \$100,000 Disease - Each Employee, and \$500,000 Disease - Policy Limit. Permittee shall require all subcontractors under this Agreement (if any) to procure and maintain such insurance.
 - (e) Umbrella Liability. During the life of this Agreement, the Permittee shall procure and maintain Umbrella Liability coverage at least as broad as the underlying Commercial General Liability, Liquor Liability, Business Automobile Liability and Employers Liability with minimum limits of \$2,000,000 per occurrence and aggregate.
 - (f) Property Insurance. Permittee shall be solely responsible for carrying personal property insurance sufficient to cover loss of all personal property on the Premises. The City shall not be liable for any damage to or loss of property of Permittee or others located on the Premises or within Olbrich Park except to the extent such damage or loss was caused by the City's sole negligence or willful act.
- (2) 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.
 - (3) Proof of Insurance, Approval. The Permittee 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. Permittee 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 Permittee shall provide copies of additional insured endorsements or insurance policies, if requested by the City Risk Manager.

- (4) Notice of Change in Policy. The Permittee and/or Insurer shall give the City thirty (30) calendar days advance written notice of cancellation, non-renewal or material changes to any of the above-required policies during the term of this Agreement.
- (5) Insufficient Coverage. In the event of expiration, material change, or cancellation of insurance required by this Agreement, Permittee 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.
- (6) Risk Manager. All information required to be provided to the Risk Manager should be addressed as follows:

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

17. Non-Discrimination. In the performance of the services under this Agreement the Permittee 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. Permittee 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.
18. Nondiscrimination Based on Disability. Permittee shall comply with Section 39.05, Madison General Ordinances, "Nondiscrimination Based on Disability in City-Assisted Programs and Activities." Under Section 39.05(7) of the Madison General Ordinances, no City financial assistance shall be granted unless assurance of compliance with Section 39.05 is provided by Permittee prior to the granting of the City financial assistance. Under Section 39.05(3)(b)4, "City financial assistance" includes any arrangement by which the City provides or otherwise makes available assistance in the form of the lease of, and the permission to use, City property.

Permittee assures that, in providing any service at the Premises, it shall not, directly or through contractual, licensing, or other arrangements, on the basis of disability:

- a. Deny a qualified person with a disability the opportunity to participate in or benefit from the aid, benefit, or service;
- b. Afford a qualified person with a disability an opportunity to participate in or benefit from the aid, benefit, or service, or the City facility, that is not equal to that afforded others;

- c. Provide a qualified person with a disability with a City facility or an aid, benefit, or service that is not as effective as that provided to others;
- d. Provide different or separate City facilities, or aid, benefits, or services to persons with a disability or to any class of persons with disabilities unless such action is necessary to provide qualified persons with a disability with City facilities, aid, benefits, or services that are as effective as those provided to others;
- e. Aid or perpetuate discrimination against a qualified person with a disability by providing significant assistance to any agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the recipient's program;
- f. Deny a qualified person with a disability the opportunity to participate as a member of planning or advisory boards; or
- g. Otherwise limit a qualified person with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service from a recipient, or by others using City facilities.

Permittee shall post notices in an accessible format to applicants, beneficiaries, and other persons, describing the applicable provisions of Sec. 39.05 of the Madison General Ordinances, in the manner prescribed by section 711 of the Civil Rights Act of 1964 (42 USCA Sec 2000e-10).

- 19. Taxes and Assessments. Permittee agrees to timely pay all taxes, assessments, or other public charges levied or assessed by lawful authority (but reasonably preserving Permittee's right of appeal) against the personal property and services of Permittee on the Premises during the term of this Agreement.
- 20. 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.
- 21. 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

Permittee: Mike Bare
BKM Group, LLC

543 Harvest Lane
Verona, WI 53593
608-620-3001
Mike.bare83@gmail.com

22. 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.
23. Audit and Retaining of Documents. The Permittee agrees to provide a detailed summary report of all sales activities and a financial reconciliation of all amounts owed and paid to the City, which information shall be provided within fifteen (15) business days after the Permittee receives the City's written requests, unless the Parties agree in writing on a longer period. Records shall be retained by the Permittee for a period of three (3) years after completion of all work under this Agreement, in order to be available for audit by the City or its designee.
24. 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.
25. Compliance with Applicable Laws. The Permittee 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 Permittee and its agents and employees. The Permittee's failure to comply with any such laws, ordinances or regulations shall be a default subject to Section 26 of this Agreement.
26. Default/Termination.
- a. In the event Permittee 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 Permittee, 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 Permittee, including expressly the specific enforcement hereof, forthwith have the cumulative right to immediately terminate this Agreement and all rights of Permittee under this Agreement.
 - b. The City acknowledges that Permittee's performance under this Agreement is subject to Permittee's ability to obtain certain licenses, permits, consents and other approvals, and Permittee shall use its commercially reasonable efforts to obtain all

such licenses, permits, approvals, authorizations and consents. If, by March 31, 2017, Permittee has not received all licenses, permits, approvals, authorizations and consents (including, without limitation, a Parks Vending Permit, a Class B alcohol license, permission from the Parks Superintendent to serve alcohol and have it consumed by customers in the designated areas in Olbrich Park in compliance with City Ordinance 8.24(1)(ee), Dane County Food and Drink License, conditional use approval from the City of Madison Plan Commission, and Madison Urban Design Commission approval for material building upgrades and landscaping), the City and Permittee will discuss in good faith and determine a reasonable deferral of Permittee's investment and payment obligations under this Agreement until such time as Permittee is able to obtain all such licenses, permits, approvals, authorizations and consents. If, despite Permittee's commercially reasonable and continued efforts, it becomes clear that Permittee will be unable to obtain all required licenses, permits, approvals, authorizations and consents, Permittee may by written notice to the City terminate this Agreement, and in such case all rights and obligations of the Permittee under this Agreement shall cease (other than any liabilities arising from a breach by Permittee of this Agreement prior to the termination date).

27. Authority. Permittee represents that it has the authority to enter into this Agreement. If the Permittee is not an individual, the person signing on behalf of the Permittee represents and warrants that he or she has been duly authorized to bind the Permittee and sign this Agreement on the Permittee's behalf.
28. Counterparts; Electronic Delivery. This Agreement may be signed in counterparts, each of which shall be taken together as a whole to comprise a single document. Signatures on this Contract may be exchanged between the parties by facsimile, electronic scanned copy (.pdf) or similar technology and shall be as valid as original. Executed copies or counterparts of this Contract may be delivered by facsimile or email and upon receipt will be deemed original and binding upon the parties hereto, whether or not a hard copy is also delivered. Copies of this Contract, fully executed, shall be as valid as an original.

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.

FOR BKM GROUP, LLC

Michael Bare, Manager

Date

FOR THE CITY OF MADISON

Paul Soglin, 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 P. May, City Attorney

Date

Execution of this Agreement by City is authorized by Resolution Enactment No. RES _____ ID No. _____ adopted by the Common Council of the City of Madison on _____ and approved by the Board of Parks Commissioners at its meeting on _____.

EXHIBIT 1
Map of Premises



EXHIBIT 2
Improvements at Olbrich Beach House

Electricity and utility room:

- Install 200 amp feeder from the street.
- Upgrade circuit boxes/etc. in utility room.
- Add a wall between utility room and storage room so both Permittee and Co-Occupant have access to the electrical boxes.

Outside (front):

- Install new concrete/asphalt pads in front of the building to better support foot traffic to the bathrooms and service counter.
- Movable counters (that go inside at night) for service and food prep and pouring drinks.
- Taps on the front of the building coming from the cooler inside the storage room.
- Potentially install a sink outside for employee hand-washing.
- New or additional bike racks.
- Install security cameras

Outside (east and north fronts of building):

- Clean and paint.
- Restore or paint some of the original woodwork on the eave, install fachwerk on the wall to match.

Beer Garden:

- Remove sod.
- Install crushed stone path from the corner of the building to the beer garden seating area (light blue in the attached site plan).
- Install crushed stone over the beer garden seating area (light blue in the attached site plan).
- Poles with string lights and speakers for background music above beer garden.

Restrooms:

- ADA porta-potty outside, if necessary.
- New toilet partitions.
- Mirrors on the walls.
- Paint walls.
- Clean/polish floors.

Food Prep Room:

- Wall off to create a hallway that preserves men's bathroom entrance.
- Install four-hole sink for food prep and hand-washing that ties into plumbing for the shower.
- Install food prep counter.

Food Prep and Storage rooms:

- HVAC unit on roof or in storage room to heat/cool.
- Drop ceiling and lighting per health code.

Storage Room:

- Install cooler with tap lines going to the outside.
- Install racks for storage and a desk for office work.