

2009 USE AGREEMENT

BETWEEN CITY OF MADISON AND MID-WEST MANAGEMENT, INC.

This Use Agreement ("Agreement") is entered into as of the ____ day of, _____ 2009, by and between the City of Madison, a Wisconsin municipal corporation ("City") and Mid-West Management, Inc. a Wisconsin corporation ("Mid-West").

WITNESSETH:

WHEREAS, the City and Mid-West wish to work together in 2009 to provide Madison area visitors and residents with an Independence Day celebration at Elver Park (the "Event"); and

NOW, THEREFORE, in consideration of the mutual premises and covenants set forth herein, the parties agree as follows:

1. Permission to Use.

The City does hereby grant to Mid-West for the sole purpose of arranging and conducting a fireworks show and associated activities as further described in Section 3 herein, and for no other purposes, the exclusive use of those portions of Elver Park (the "Premises") as further described on Exhibit A attached hereto, from 4:00 p.m. to 11:00 p.m. Friday, July 3, 2009. This permission is personal to Mid-West and may not be assigned by Mid-West in whole or in part.

2. Management of the Event.

Except as hereinafter provided, Mid-West shall arrange, manage, and operate the Event. The City shall arrange, manage and operate all aspects of the Event relating to police and fire protection, enforcement of the National Fire Protection Association standards for the fireworks display, EMS coverage, traffic control and regulating and enforcing park rules. The City shall contract directly with a vendor for a fireworks display and Mid-West agrees to reimburse the City for the costs of the fireworks display. To the extent necessary for the performance of its duties, hereunder, Mid-West shall obtain all necessary permits and licenses as required by City ordinance or resolution, and shall abide by and comply with all ordinances, rules and permit requirements. The City agrees that it shall not be entitled to share in any proceeds derived by Mid-West in connection with Mid-West's operating of the Event.

3. Permitted Activities.

The following events and activities shall be the sole activities that Mid-West or its subcontractors and vendors may conduct on the Premises: to terminate no later than 10:30 p.m.; small concessions of food and merchandise by properly licensed vendors; and live radio broadcasts by Mid-West radio stations (the "Permitted Activities"). Any significant alteration or expansion of the Permitted Activities without the written approval of the Board of Park Commissioners shall be a breach of this Agreement. There shall be no rescheduling of the Event in the event of rain or other inclement weather.

4. Expenses.

The City Comptroller will determine the amount of expenses incurred by the City related to the Event, including expenses incurred because of the cancellation of the Event due to rain, inclement weather or any other cause. The Comptroller shall furnish Mid-West with an invoice detailing such expenses.

5. Reimbursement by Mid-West.

Within 30 days of receiving an invoice referenced in Section 4 above, Mid-West shall reimburse the City for the full costs of fire, parks and traffic services, city parks permits, fire permit fees, the full cost of the fireworks display and for up to \$12,209 of the cost of police services incurred because of the event or because of the cancellation of the Event. It is estimated that police costs will be approximately eighteen thousand five hundred dollars (\$18,500). Notwithstanding any other term or provision of this Agreement, if the Event is cancelled the cost of the fireworks display contract shall be reduced to \$6,000 as a labor and restocking fee to be paid to the fireworks display contractor. Therefore, it is agreed that Mid-West and the City will work diligently to minimize and contain the cost of this Event. In addition, Mid-West shall be subject to Elver Park's established rental, amenity and staffing charges for "day of the event" activities.

6. Insurance.

a. Mid-West shall insure, and will require each subcontractor and other subcontractor secured by Mid-West to insure against the following risks to the extent stated:

Commercial General Liability: Covering as insured Mid-West and subcontractors and naming the City as an additional insured, with no less than the following limits of

liability: bodily injury, death and property damage of \$5,000,000 in the aggregate. This policy shall also be endorsed for contractual liability in the same amount.

b. **Workers' Compensation:** Contractor and all subcontractors shall procure statutory Workers' Compensation insurance, as required by the State of Wisconsin, and Employers Liability with limits of at least \$100,000 Each Accident, \$100,000 Disease - Each Employee, and \$500,000 Disease - Policy Limit.

c. As evidence of the above listed coverages, Certificates of Insurance shall be forwarded to the City Risk Management Office, Room 406, City-County Building, Madison, WI 53703, no later than seven (7) calendar days prior to the Event.

7. Indemnification.

Mid-West shall be liable to and hereby agrees to indemnify, defend and hold harmless the City 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 officials, officers, 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 the acts or omissions of Mid-West and/or its officers, agents, employees, or subcontractors in the performance of this Agreement, whether caused by or contributed to by the negligent acts of the City, its officers, officials, agents and employees. The obligations under this Section 7 shall survive the expiration or termination of this Agreement.

8. Cancellation.

The City reserves the sole right to cancel the Event at any time if, in the City's judgment, the health or safety of Event attendees or City staff may be jeopardized by adverse weather conditions, such as wind, rain, lightning or severe weather watches or warnings.

9. Right of First Negotiation

Mid-West Management, Inc. shall have the first right to sponsor a fireworks display in Elver Park in 2010, on such terms and conditions as may be proposed by the City of Madison. In the event that Mid-West Management, Inc., does not accept said terms and conditions and does not enter into a contract to sponsor such a fireworks Event in Elver Park, before February 1, 2010, the City may seek other sponsorship for the event, without any consideration for the rights of Mid-West Management, Inc.

10. Nondiscrimination.

In the performance of services under this Agreement, Mid-West agrees not to discriminate against any employee or applicant for employment 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, political beliefs or student status. Mid-West 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, or national origin.

11. Nondiscrimination Based on Disability.

Contractor 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 an Assurance of Compliance with Sec. 39.05 is provided by the applicant or recipient, prior to the granting of the City financial assistance.

Contractor hereby makes the following assurances: Contractor assures and certifies that it will comply with section 39.05 of the Madison General Ordinances, "Nondiscrimination Based on Disability in City Facilities and City-Assisted Programs and Activities," and agrees to ensure that any subcontractor who performs any part of this agreement complies with sec. 39.05, where applicable. This includes but is not limited to assuring compliance by the Contractor and any subcontractor, with section 39.05(4) of the Madison General Ordinances, "Discriminatory Actions Prohibited."

Contractor may not, in providing any aid, benefit or service, directly or through contractual, licensing or other arrangements, violate the prohibitions in Section 39.05(4), listed below:

Discriminatory Actions Prohibited: Contractor assures that, in providing any aid, benefit, or service, it shall not, directly or through contractual, licensing, or other arrangements, on the basis of disability:

1. Deny a qualified person with a disability the opportunity to participate in or benefit from the aid, benefit, or service;
2. 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;
3. 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;

4. 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;
5. 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;
6. Deny a qualified person with a disability the opportunity to participate as a member of planning or advisory boards; or
7. 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.

Contractor 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).”

11. Amendment.

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 other change in any provision of this Agreement may only be made by a written amendment, signed by the duly authorized agent or agents who executed this Agreement.

12. No Third Party Rights.

The parties agree that nothing contained in this Agreement, nor any act by the City or Mid-West, shall be deemed or construed by either of the parties or by third persons to create any relationship of third-party beneficiary, principal or agent, or joint venture.

13. Law Applied.

This Agreement shall be deemed to have been made in the State of Wisconsin and the Agreement's validity, construction, breach and operation shall be governed by the laws of the State of Wisconsin.

14. Counterparts.

This Agreement may be executed in any number of counterparts, each of which shall constitute an original.

15. 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.

IN WITNESS WHEREOF the parties have executed this Agreement as of the date first above written.

CITY OF MADISON

By: _____
David J. Cieslewicz, Mayor

By: _____
Maribeth Witzel-Behl, Clerk

APPROVED:

APPROVED AS TO FORM:

Dean Brassler, Comptroller

Michael P. May, City Attorney

MID-WEST MANAGEMENT, INC.

By: _____
Tom Walker, President

EXHIBIT A



