

USE AGREEMENT FOR THE OLBRICH BEACH HOUSE FOR 2024-2031
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, 2024.

WITNESSETH:

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 has done so since 2017 pursuant to an existing Use Agreement between Permittee and the City that expires on December 31, 2023 (the “Original Agreement”);

WHEREAS, the Parties desire for Permittee to continue to provide such placemaking services following the expiration of the Original Agreement on the terms set forth in this 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 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. This Agreement also addresses the possibility that the Olbrich Beach House will be replaced during the term of this Agreement.

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 central storage room, kitchen, hallway between the men's bathroom and kitchen, the concrete pad on the western side of the building, the designated grounds adjacent to the western side of the building (provided that the grounds included in the Premises shall at no point be closer than 20 feet from the shoreline riprap so that park users have access to the shore and water without crossing the Premises), and the concrete pad 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. The term of this Agreement shall be from January 1, 2024 through December 31, 2031, subject to the terms of Section 27.c regarding the New Facility or Section 27.d.
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, with such operations having a patron capacity of up to 240 persons, or such lesser number as may be the maximum amount permitted by applicable law. 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 and possession of the Premises at all times during the term of this Agreement. 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. In addition, Permittee and its invitees shall have the non-exclusive right to use the bathrooms and other common areas of the Beach House, provided that alcoholic beverages shall not be possessed in such bathrooms or common areas.
4. Capital Improvements. The Parties agree that improvements, repairs and upgrades to the Premises ("Improvements") may be necessary or desirable in order to facilitate Permittee's offering of services at the Premises. Regarding these Improvements, the Parties agree as follows:
 - a. Carryover Investment Requirement. Under the Original Agreement, Permittee agreed to make Improvements to the Premises with values of no less than \$62,500 by December 31, 2023 (the "Minimum Required Improvements Amount"). The City and Permittee further acknowledge and agree that (i) Permittee was able and willing to make Improvements sufficient to meet the Minimum Required Improvements Amount, but (ii) the Parties were unable to identify significant additional Improvements that would be necessary or advisable in light of the potential replacement of the existing Olbrich Beach House. As of August 1, 2023, the Parties agree that Permittee made Improvements to the Premises with values of \$47,500 in the aggregate, which is \$15,000 short of the Minimum Required

Improvements Amount. The Parties agree that the Permittee shall be required to make \$15,000 in Improvements to the Premises (the “Carryover Investment Requirement”) as follows:

- (1) The Permittee may, but shall not be required to, continue to make Improvements to the Premises, and such Improvements shall be credited toward the Carryover Investment Requirement. Any Improvements made between August 1, 2023 and December 31, 2023 while the Original Agreement was in place shall be credited toward this amount.
 - (2) If the Olbrich Beach House is not reconstructed during the term of this Agreement, and the Parties cannot identify any significant additional Improvements as being necessary or advisable, Permittee shall be relieved of any further obligation to make Investments to satisfy the Carryover Investment Requirement, other than as set forth in Section 27.d.
 - (3) If the Olbrich Beach House is reconstructed during the term of this Agreement, the remaining Carryover Investment Requirement shall be added to Permittee’s New Facility Commitment as set forth on Exhibit 3, if applicable.
- b. Improvement Planning. The City and Permittee will conduct annual inspections of the facility to identify any planned Improvements and establish schedules for such work.
- c. 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.
- d. 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.

- e. Construction. 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.
 - f. 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.
 - g. 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.
 - h. 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 a.
 - i. 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 and shall provide these services, at a minimum, from Memorial Day weekend through Labor Day, weather permitting.
 - b. Co-Occupancy of Beach House; Change in Status. Permittee is expected to occupy the Olbrich Beach House with another party during the lifetime of this Agreement (the "Co-Occupant"), provided that Permittee shall have exclusive use of all areas

constituting the Premises. 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.

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 27.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, stormwater 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 27.a. If Permittee fails to pay these utility bills and the City terminates this Agreement, the Permittee will be invoiced for these unpaid utility bills, which amount shall be due within thirty (30) calendar days of the invoice.
- 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. with "last call" not later than 9:00 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. In addition, Permittee shall comply in all material respects with the terms of the Responsible Alcohol Consumption Action Plan attached hereto as Exhibit 2, as the same may be revised from time to time with the approval of the Board of Parks Commissioners (or its staff designees) and/or any conditions placed on the liquor license by the City of Madison Alcohol License Review Committee.

- h. Amplified Music Restriction. No amplified music requiring a PA2 permit shall be allowed. Acoustic and background amplified music at a PA1 permit sound level is allowed to provide background music at the Premises, provided that no amplified music will be played after 9:00 p.m. And provided further that during at least two days per week there shall be no amplified music played (which limitation the parties may revisit). PA1 permits have a sound limit of 75 decibels at 150 feet from the source.

- i. 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.
- j. 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.
- k. 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 and Co-Occupant shall be responsible for opening and closing the restrooms at the Premises as determined by Beach House operating hours, including installing and refilling paper products and soap, and maintaining the restrooms in a clean and sanitary condition. 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 27.a 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 27.a.

- l. Disposal of Fats, Oils and Grease. Permittee shall take measures to keep leftover fats, oils, grease and other food scraps ("FOG") from doing 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.

- m. Refuse. Permittee is responsible for refuse disposal and recycling of waste from the Premises, which shall include daily litter collection and removal from the Premises and the immediately surrounding area. 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, it being acknowledged and agreed that Permittee may place dumpsters in the Olbrich Park parking lot.
- n. 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.
- o. Signage. All signs and banners, including menu boards, shall be approved by the Parks Superintendent or designee and the Zoning Administrator, provided the City agrees that all such signs, banners and menu boards as are currently at the Premises are approved. 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 Sections 13 and 22.
- p. 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).
- q. Dates of Operation. The seasonal opening and closing dates of the Permittee's activities at the Premises shall be determined by Permittee, but such dates shall not occur outside the Park Division's building winterization schedule, unless arrangements for winterizing of the Premises have been made by Permittee.
- r. Surrender of Premises. Upon the termination of this Agreement under Section 27, or, in the event that this Agreement 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, or as a result of damage by fire, vandalism, natural disasters or other casualty beyond the control of Permittee, 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 shall charge Permittee for the cost thereof, which amount 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 17.c.

- s. 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 and the utility costs imposed under Subsection e 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 for each year shall be paid as follows: 1/3rd of the Use Fee is due by June 15 of such year, with the remaining 2/3rds of the Use Fee is due by November 15 of such year. In addition, the Parties acknowledge and agree that the Use Fee set forth below is determined based on Permittee obtaining an alcohol license that permits a capacity of 240 people and operation 7 days per week for up to 55 total hours per week, and that if such capacity and permitted operating hours is in the future increased or decreased in any material respect, the parties shall negotiate in good faith a reasonable adjustment to the Use Fee to account for anticipated increased or decreased revenue as a result of such capacity and/or operating hours adjustment.
- t. 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 permit fees:

Year	Vending Permit*	Use Fee	Capital Improvements**	Financial Benefit to City
2024	\$900	\$31,000		\$31,900
2025	\$900	\$32,000		\$32,900
2026	\$900	\$33,000		\$33,900
2027	\$900	\$34,000		\$34,900
2028	\$900	\$35,000		\$35,900
2029	\$900	\$36,000		\$36,900
2030	\$900	\$37,000		\$37,900
2031	\$900	\$38,000		\$38,900
Total	\$7,200	\$276,000	\$15,000	\$298,200

* Permit Fee may change over time.

** Carryover Investment Requirement, which amount may be added to Permittee’s New Facility Commitment if the Beach House is reconstructed.

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; provided, for avoidance of doubt, the Original Agreement shall remain in effect through December 31, 2023. 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 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. In addition, to the extent permitted by the City of Madison ordinances Section 38.04(3)(a) and Wisconsin Statutes Chapter 125.07(3)(a) and other applicable law, and subject to compliance therewith, Permittee shall permit public access for persons of all ages to the Premises during times that (a) Olbrich Park is open and (b) Permittee's operation is not open.
11. Annual Updates. Except as noted below, no later than February 15 following each year of services provided during the term of this Agreement, a representative of Permittee shall attend a meeting of the Board of Parks Commissioners to provide a summary of Permittee's operations for the prior year, plans for the upcoming year, concerns from residents of the adjacent neighborhoods and to answer questions from the Board.
12. 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 22.
13. 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.
14. 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 "The Biergarten at Olbrich Park" 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.
15. 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.

16. 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.

17. 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

18. 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.
19. 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).

20. 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.
21. 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.
22. 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
330 E. Lakeside St.
Madison, WI 53715

Permittee: Mike Bare
BKM Group, LLC
543 Harvest Lane
Verona, WI 53593
608-620-3001
Mike.bare83@gmail.com

23. 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.
24. 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.
25. 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.

26. 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 27.a of this Agreement.

27. Default/Termination; New Facility.

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 and retain 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 or retain 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).

c. If, during the term of this Agreement, the City approves plans to demolish the existing Olbrich Beach House and construct a replacement facility (the "New Facility"), this City may terminate this Agreement. The termination shall be effective at such time as the work relating to such demolition makes it impossible or impracticable for Permittee to continue its operations at the Premises, while also accounting for Permittee's obligation, under Sec. 5.r, to remove all personal property from the Premises. If such date is during Permittee's normal operating season, the use fee for such year shall be prorated accordingly based on the number of days in such season that Permittee is able to operate. Further, in the event of a termination of this Agreement under this subsection, (a) Permittee shall have a right of first option to conduct food and alcohol concessions at the New Facility, and (b) if Permittee exercises such option, the Parties shall negotiate in good faith a Use

Agreement for the New Facility based on the terms set forth on Exhibit 3 to this Agreement. For avoidance of doubt, the immediately preceding sentence shall survive termination of this Agreement under this Section 27.c.

- d. Permittee may terminate this Agreement prior to the end of the term set forth in Section 2 by providing written notice to the City at least one year prior to the intended termination date. In the event of termination under this Section 27.d, then in addition to the other amounts owed by Permittee to the City through the date of termination, Permittee shall also pay to the City any then-remaining Carryover Investment Requirement.
28. 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.
29. Counterparts; Electronic Delivery. This Agreement and any document executed in connection herewith may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute the same document. Signatures on this Agreement may be exchanged between the Parties by facsimile, electronic scanned copy (.pdf) or similar technology and shall be as valid as original; and this Agreement may be converted into electronic format and signed or given effect with one or more electronic signature(s) if the electronic signature(s) meets all requirements of Wis. Stat. ch. 137 or other applicable Wisconsin or Federal law. Executed copies or counterparts of this Agreement 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 Agreement, 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

Satya Rhodes-Conway, Mayor

Date

Maribeth Witzel-Behl, City Clerk

Date

Countersigned:

David P. Schmiedicke, Finance Director

Date

Approved as to form:

Michael Haas, City Attorney

Date

Execution of this Agreement by City is authorized by Resolution Enactment No. _____, 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

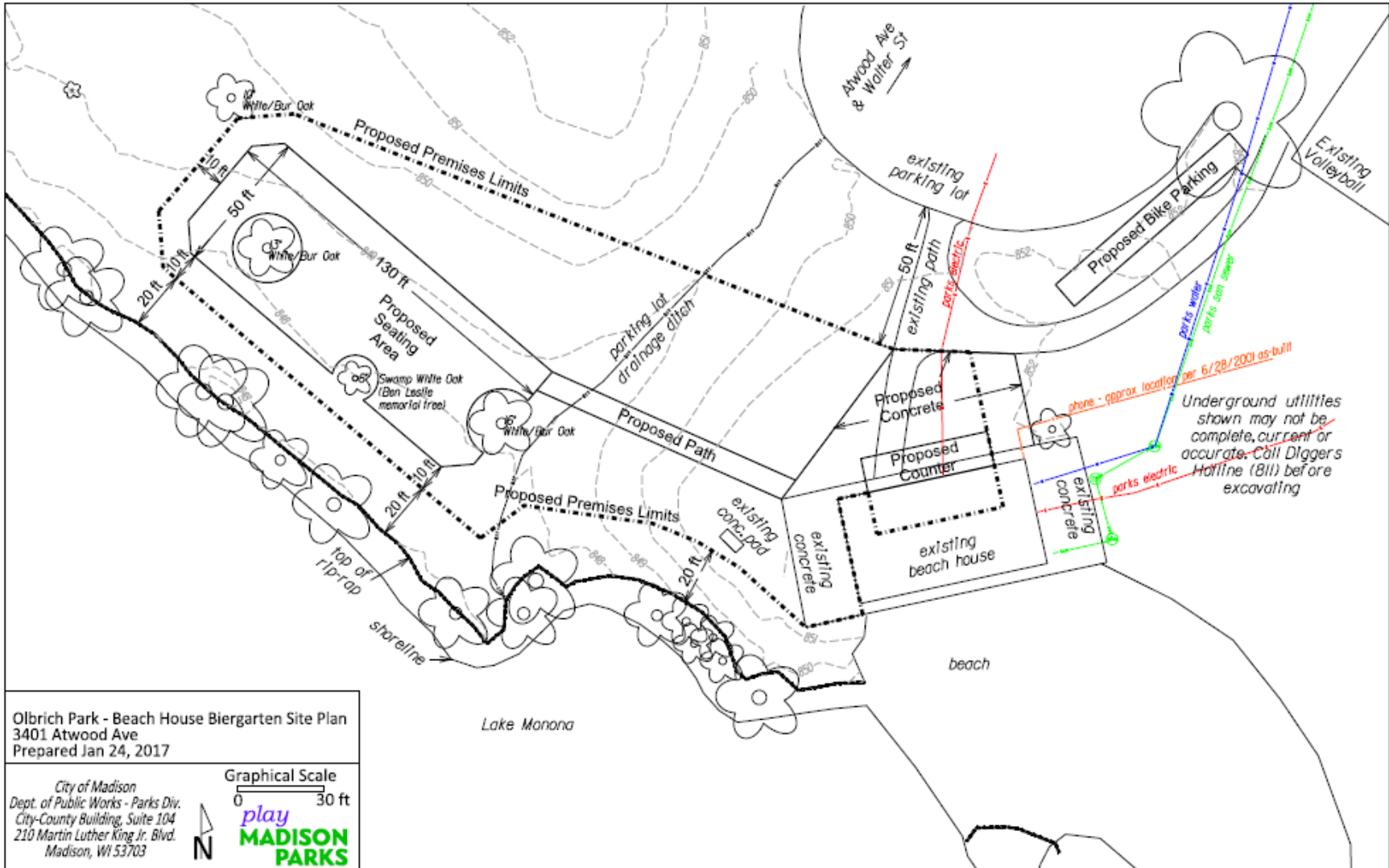


EXHIBIT 2

Olbrich Biergarten Responsible Alcohol Consumption Action Plan

BKM Group, LLC, as part of their management of the Olbrich Biergarten, will execute the following Responsible Alcohol Consumption Action Plan. This plan is based on similar plans maintained by other Madison Parks vendors, evidence-based responsible alcohol consumption policies, and is the result of working with Parks Division staff and incorporating feedback from the Madison Police Department, the Wisconsin Alcohol Policy Project and other sources.

General alcohol-related policies and practices for staff and operation:

1. All staff will receive mandatory training by Olbrich Biergarten management and/or external experts.
2. All servers must complete Serv-Safe alcohol and Serv-Safe food training and present their certification to be kept on file at the Biergarten by the Operating Manager.
3. All servers are 21 or older.
4. Employees must maintain a BAC below .04 while on duty.
5. We will have a licensed operator monitoring alcohol service at all times.
6. The on-duty manager is responsible for ensuring staff and patrons follow these policies and all applicable laws. This manager is authorized to respond to incidents, remove any individuals in violation of these rules or any applicable law, or contact law enforcement.
7. Service and consumption of alcohol will be allowed only in designated reusable containers we provide. Non-alcoholic beverages will be served in distinctly different containers we provide.
8. All patrons appearing to be age 35 or younger will be required to show ID to purchase alcohol.
9. We have a state ID book and ID scanner with computer hard drive or immediately accessible remote/cloud storage on hand to check IDs.
10. Servers will confiscate false IDs, report it to law enforcement, and will receive a stipend for finding false IDs.
11. We will contract with an outside vendor to conduct at least two unannounced alcohol age compliance checks each year.
12. No unaccompanied underage persons are allowed in the Biergarten.
13. No underage individual will be allowed to purchase alcohol at the Biergarten or consume alcohol in the Biergarten even if accompanied by a parent, guardian, or spouse. Our staff will monitor consumption within the Biergarten. If underage drinking is found, all individuals involved may be escorted out of the Biergarten and the manager may contact law enforcement.
14. We reserve the right to refuse alcohol to anyone we determine has had too much to drink or anyone who is visibly intoxicated and we will not serve them alcohol. These patrons will be assisted with finding a safe ride.
15. We reserve the right to refuse service to anyone found in violation of the rules at any time.
16. An incident record will be kept on file at all times and incident reports will be kept on record for at least 24 months.

17. We provide an attractive selection of food and affordable non-alcoholic beverages at a cost lower than alcoholic beverages.
18. We will install security cameras to monitor the premises in compliance with Madison Ordinance 38.05(13).

Olbrich Biergarten Rules:

The following rules will be posted prominently at the entrance to Olbrich Biergarten and on our website:

- Show respect for our neighbors, Lake Monona, and Olbrich Park.
- Outside alcohol is prohibited by law at Olbrich Park. All alcohol must stay within the Biergarten.
- Picnic baskets and deliveries of outside food are welcome. Outside catering services are prohibited. Seating area may be used by people who wish to picnic and chose not to purchase food or drink from the Biergarten.
- A parent, guardian or spouse over 21 must accompany individuals under 21 in the Biergarten.
- Individuals under 21 may not consume alcohol, even when accompanied by a parent or guardian.
- Grills are prohibited in or around the Biergarten.
- All tables at the Biergarten are shared. A limited number of tables may be reserved for a special event.
- All motor vehicles, motorcycles & motor scooters must remain in the paved parking lot.
- No smoking, e-cigs, or tobacco use in the Biergarten.
- No personal amplified sound is allowed in the Biergarten.
- “Last Call” at the Biergarten is 9:00pm and there will be no alcohol served after 9:30. Plan accordingly. You must return all Biergarten containers and be out of Olbrich Park when it closes at 10pm.

Offenses punishable by ARREST as determined by local law enforcement authorities:

- Underage drinking
- False identification (attempting to use fake IDs)
- Disorderly or unsafe conduct

EXHIBIT 3

Key Terms of Use Agreement for New Facility

- General terms of new Use Agreement to be based on (a) this Agreement and (b) the City's then-current contracting practices with its location partners generally.
- The term of the new Use Agreement would be for a minimum of 10 years in the New Facility, with at least one option to renew for an additional 5 years.
- Annual use fees would be generally commensurate with the use fees under this Agreement. If a revenue- or profit-based model is necessary, the calculation would be set to yield a total use fee that would be projected to be generally consistent with the use fees under this Agreement.
- Permittee would make a contribution to the construction of the New Facility equal to the following (the "New Facility Commitment")
 - 100% of any remaining Carryover Investment Requirement; plus
 - The greater of (a) \$200,000 or (b) 25% of average annual gross revenue over the then-preceding three years.
- In designing the New Facility, the City would collaborate with Permittee and consider in good faith its input in terms of design, layout, features, etc.
- If construction of the New Facility prevents or meaningfully impairs operation of Permittee between April 15 and October 15 of any operating year, the use fee for such year(s) would be prorated accordingly.