

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- A. Changes in Terms of Lease. If Mallards or League desire any changes in the terms and conditions of the lease, the changes shall be proposed at the time of providing the notice of renewal. The City may accept such changes, decline to accept such changes, or negotiate the changes. If Mallards, City, and League do not agree upon any changes in the terms and conditions of a renewal of this Agreement at least three (3) months before the renewal term begins, the Agreement will be renewed on the same terms and conditions of this Agreement.
- B. Change in Annual Game Rental Fee. If Mallards and League renew this Agreement, the annual Game Rental Fee set forth in Paragraph 8.a. of this Agreement for each renewal period shall be as follows:

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

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

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

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

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

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

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

“8. Fees, Revenue and Related Financial Matters.

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

2020: ~~\$65,238~~ \$1”

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

“b. Capital Improvements.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MADISON MALLARDS, LLC

Vern Stenman, President

Date

NORTHWOODS LEAGUE, INC.

Dick Radatz, Chairman

Date

CITY OF MADISON

Satya Rhodes-Conway, Mayor

Date

Maribeth Witzel-Behl, City Clerk

Date

Countersigned:

David P. Schmiedicke, Finance Director

Date

Eric Veum, Risk Manager

Date

Approved as to form:

Michael Haas, City Attorney

Date

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