

AGREEMENT FOR USE OF LAND

This Agreement (the "Agreement") is made this ____ day of _____, 2021, by and between the CITY OF WINONA, MINNESOTA, a Minnesota municipal corporation, 207 Lafayette Street, Winona MN 55987 ("City"), and SCOTT B. BIRDSALL and DEBRA J. BIRDSALL, husband and wife, 292 Garvin Heights Road East, Winona MN 55897 ("Birdsall"); (collectively the "Parties").

WHEREAS, the City requires access to a City owned fire hydrant in order to create and maintain an ice park in the vicinity of the Sugar Loaf Overlook in the City of Winona (the "Project"); and

WHEREAS, Birdsall owns the real property legally described in Exhibit 1, which is attached hereto and incorporated herein by reference (the "Property"); and

WHEREAS, the City desires to access a City owned fire hydrant by laying a hose across the southeastern portion of the real property owned by Birdsall, a depiction of the affected property is shown in Exhibit 2, which is attached hereto and incorporated herein by reference (the "Premises"); and

WHEREAS, Birdsall agrees to allow, permit and license the City, its employees and approved volunteers, to access the City owned fire hydrant by laying a hose across the southeastern portion of the Property as depicted in Exhibit 2, all in accordance with the terms and conditions contained herein, for the purposes of undertaking, operating and maintaining the Project.

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

1. **Grant of License and Conditions.** Birdsall hereby grants to City a license to enter upon the Property and use the Property and Premises for the purposes stated above herein.
2. **Use of Premises.**
 - a. Subject to the other terms and provisions contained herein, the City shall be permitted to use the Property and Premises only for the specific purposes hereinabove stated; provided, however, that the City shall comply with all applicable laws, regulations, conditions, and covenants affecting the Premises, whether federal, state, local, or contractual.
 - b. The City shall not commit or allow to be committed any waste on, destruction of, or damage to, or nuisance on the Premises related to its use of the Property or operations thereon. The City shall keep the Premises in a sanitary condition, remove all trash from the Premises and keep the Premises free from refuse or other debris related to its use of the Property or operations thereon.

- c. The City shall have the right to use the Premises for the purposes contained herein.
 - d. The Parties agree that the times and dates on which access to the City owned fire hydrant is needed for the creation, operation and maintenance of the Project will be at the discretion of the City and may be made without notice to Birdsall. Periodic operation and maintenance may also be made on an as needed basis as determined by the City in its sole judgment and discretion. Notwithstanding the foregoing, the City shall communicate those dates and times to Birdsall in advance, if possible.
 - e. Within thirty (30) days following the date upon which the City closes the Project to public use, the City shall remove the hose and any other equipment or appurtenances used for creation, operation and maintenance of the Project from the Premises.
3. **Alterations to Premises.** The City shall not make any additional improvements or alterations to the Premises without the prior written consent of Birdsall, except, however, the City shall, at City's expense, make any additional improvements to the Premises that are needed to accommodate City's use, operations and maintenance for the purposes of the Project contained in this Agreement.
4. **Covenants to Indemnify and Hold Harmless.** The City shall indemnify and hold harmless Birdsall, their successors, assigns and heirs, from and against any and all claims and demands for, or litigation with respect to, all damages, including expenses, reasonable attorneys' fees, and costs of alternative dispute resolution, which may arise out of or be caused by the negligence or willful misconduct of the City or its agents, employees, or contractors, with respect to the City's use, operations or maintenance activities on the Premises. The indemnification provision of this Paragraph shall not apply to claims, damages or other losses proximately caused by or resulting from the negligence or willful misconduct of Birdsall and Birdsall shall indemnify and hold harmless the City for the same. All indemnification obligations shall survive termination, expiration or cancellation of this Agreement. Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against the City or Birdsall.
5. **Insurance.** The City shall at City's expense maintain in effect insurance (workers' compensation, liability) covering its liability for use of and operations and maintenance activities on the Premises. Birdsall shall, at their expense, otherwise insure the Property. The policy(ies) shall name Birdsall as an additional insured for purposes of this Agreement.
6. **Conditions of Premises "As Is" and Not Warranted.** The City acknowledges that it has inspected the Premises and accepts them in an "as is" condition. Birdsall does not warrant that the Premises is suitable for the purposes for which the same is permitted to be used under this Agreement by the City. Birdsall shall have no responsibility with regard to any failure of or damage the City sustains on the Premises, except related to the

negligence or willful misconduct of Birdsall. The City understands and acknowledges that this Agreement grants it only a terminable license to use the Premises for the purposes stated herein, and does not confer any property rights with respect to the Property upon the City.

7. **City's Right of Entry.** The City and the agents and employees of the CITY may enter upon the Premises at all times for the purposes stated herein.
8. **City Designee.** Chad Ubl, Assistant City Manager, shall serve as the liaison person to act as City's representative with respect to this Agreement. Said representative shall have the authority to transmit instructions, receive instructions, receive information, interpret and define City policies with respect to the Project and this Agreement. Such person shall be the primary contact person between City and Birdsall with respect to this Agreement. The City reserves the right to substitute the authorized contact person at any time and shall notify Birdsall thereof.
9. **Term and Termination.** The term of this Agreement ("Term") shall commence on November 15, 2021 and end on May 27, 2022.
10. **General Terms.**
 - a. **Voluntary and Knowing Action.** The Parties, by executing this Agreement, state that they have carefully read this Agreement and understand fully the contents thereof; that in executing this Agreement they voluntarily accept all terms described in this Agreement without duress, coercion, undue influence, or otherwise, and that they intend to be legally bound thereby.
 - b. **Recitals.** The recitals to this Agreement are made a part hereof and incorporated herein by reference.
 - c. **Authorized Signatories.** The Parties each represent and warrant to the other that (1) the persons signing this Agreement are authorized signatories for the entities represented, and (2) no further approvals, actions or ratifications are needed for the full enforceability of this Agreement against it; each party indemnifies and holds the other harmless against any breach of the foregoing representation and warranty.
 - d. **Notices.** All communications, demands, notices, or objections permitted or required to be given or served under this Agreement shall be in writing and shall be deemed to have been duly given or served if delivered in person to the other Party or its authorized agent or if deposited in the United States mail, postage prepaid, for mailing by certified or registered mail, return receipt requested, and addressed to the other Party to this Agreement, to the address set forth in this Agreement, or if to a Party not a party to this Agreement, to the address designated by a Party to this Agreement in the foregoing manner. Any Party may change its address by giving notice in writing, stating its new address, to any other Party as provided in the foregoing manner. Commencing on the 10th day after

the giving of such notice, such newly designated address shall be such address for the purpose of all communications, demands, notices, or objections permitted or required to be given or served under this Agreement.

- e. **Independent Contractor Status.** Birdsall, at all times and for all purposes hereunder, shall be an independent contractor and is not an employee of the City for any purpose. No statement contained in this Agreement shall be construed so as to find Birdsall to be an employee of the City, and Birdsall shall not be entitled to any of the rights, privileges, or benefits of employees of the City.
- f. **City Employee Status.** All employees of the City when using or undertaking operations or maintenance on the Premises are employees of the City and the City shall be solely responsible for the same for purposes of compensation, benefits and liability.
- g. **Assignment.** This Agreement may not be assigned by either Party without the written consent of the other Party. The provisions hereof shall inure to the benefit of and bind the successors and assigns of the respective Parties hereto.
- h. **Modifications/Amendment.** Any alterations, variations, modifications, amendments or waivers of the provisions of this Agreement shall only be valid when they have been reduced to writing, and signed by authorized representative of the City and Birdsall.
- i. **Force Majeure.** The Parties shall each be excused from performance under this Agreement while and to the extent that either of them are unable to perform, for any cause beyond its reasonable control. Such causes shall include, but not be restricted to fire, storm, flood, earthquake, explosion, war, total or partial failure of transportation or delivery facilities, raw materials or supplies, interruption of utilities or power, and any act of government or military authority. In the event either party is rendered unable wholly or in part by force majeure to carry out its obligations under this Agreement then the party affected by force majeure shall give written notice with explanation to the other party immediately.
- j. **Non-Discrimination.** The provisions of any applicable law or ordinance relating to civil rights and discrimination shall be considered part of this Agreement as if fully set forth herein.
- k. **Governing Law.** This Agreement shall be deemed to have been made and accepted in Winona County, Minnesota, and the laws of the State of Minnesota shall govern any interpretations or constructions of the Agreement without regard to its choice of law or conflict of laws principles.
- l. **Data Practices.** The PARTIES acknowledge that this Agreement is subject to the requirements of Minnesota's Government Data Practices Act, Minnesota Statutes, Section 13.01 *et seq.*

- m. **No Waiver.** Any Party's failure in any one or more instances to insist upon strict performance of any of the terms and conditions of this Agreement or to exercise any right herein conferred shall not be construed as a waiver or relinquishment of that right or of that Party's right to assert or rely upon the terms and conditions of this Agreement. Any express waiver of a term of this Agreement shall not be binding and effective unless made in writing and properly executed by the waiving Party.
- n. **Severability.** The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provision. Any invalid or unenforceable provision shall be deemed severed from this Agreement to the extent of its invalidity or unenforceability, and this Agreement shall be construed and enforced as if the Agreement did not contain that particular provision to the extent of its invalidity or unenforceability.
- o. **Entire Agreement.** These terms and conditions constitute the entire Agreement between the Parties regarding the subject matter hereof. All discussions and negotiations are deemed merged in this Agreement.
- p. **Headings and Captions.** Headings and captions contained in this Agreement are for convenience only and are not intended to alter any of the provisions of this Agreement and shall not be used for the interpretation of the validity of the Agreement or any provision hereof.
- q. **Survivability.** All covenants, indemnities, guarantees, releases, representations and warranties by any Party or Parties and any undischarged obligations of City and Birdsall arising prior to the expiration of this Contract (whether by completion or earlier termination), shall survive such expiration.

Remainder of page intentionally left blank.

IN WITNESS WHEREOF, the Parties have hereunto executed this document the day and year first above written.

By: _____
Scott B. Birdsall

Date: _____

By: _____
Debra J. Birdsall

Date: _____

STATE OF MINNESOTA)
) ss.
COUNTY OF WINONA)

The foregoing instrument was acknowledged before me, a notary public in and for the above named County and State, on _____, 2021, by Scott B. Birdsall and Debra J. Birdsall, husband and wife, who being by me duly sworn, did say that they executed the same as their free act and deed.

Notary Public

CITY OF WINONA

By: _____
Scott D. Sherman, Its Mayor

Date: _____

By: _____
Monica Hennessy Mohan, Its City Clerk

Date: _____

STATE OF MINNESOTA)
) ss.
COUNTY OF WINONA)

The foregoing instrument was acknowledged before me, a notary public in and for the above named County and State, on _____, 2021, by Scott D. Sherman and Monica Hennessy Mohan, respectively the Mayor and City Clerk, on behalf of the City of Winona, a municipal corporation of the State of Minnesota, Licensor.

Notary Public

EXHIBIT 1

LEGAL DESCRIPTION OF PROPERTY

That part of the Northeast Quarter of the Northeast Quarter (NE $\frac{1}{4}$ of NE $\frac{1}{4}$) of Section Thirty-four (34), Township One Hundred Seven (107) North, of Range Seven (7), West of the Fifth Principal Meridian, Winona County, Minnesota, described as follows: Commencing at the Southwest corner of said Northeast Quarter of the Northeast Quarter (NE $\frac{1}{4}$ of NE $\frac{1}{4}$); thence North 90 degrees East along the Southerly line of said Northeast Quarter (NE $\frac{1}{4}$) of the Northeast Quarter (NE $\frac{1}{4}$) a distance of 857.54 feet to the point of beginning of the land herein described; thence North 1 degree 30 minutes East a distance of 1270.8 feet; thence Easterly parallel with the Northerly line of said Northeast Quarter of the Northeast Quarter (NE $\frac{1}{4}$ of NE $\frac{1}{4}$) and distant 51.48 feet Southerly therefrom a distance of 427.46 feet to the Easterly line of said Northeast Quarter of the Northeast Quarter (NE $\frac{1}{4}$ of NE $\frac{1}{4}$); thence Southerly along the Easterly line of said Northeast Quarter of the Northeast Quarter (NE $\frac{1}{4}$ of NE $\frac{1}{4}$) to the Southeast corner of said Northeast Quarter of the Northeast Quarter (NE $\frac{1}{4}$ of NE $\frac{1}{4}$); thence Westerly along the Southerly line of said Northeast Quarter of the Northeast Quarter (NE $\frac{1}{4}$ of NE $\frac{1}{4}$) to the point of beginning; EXCEPTING from the foregoing so much as is included in the following described parcel: Commencing on the North line of Section Thirty-four (34), Township One Hundred Seven (107) North, of Range Seven (7), West of the Fifth Principal Meridian, Winona County, Minnesota, at a point which is 125 feet West of the Northeast corner of said Section; thence continuing West on said North line of said Section 346 feet; thence at right angles South 100 feet; thence at right angles East and parallel with said North line of said Section 346 feet; thence at right angles North 100 feet to the point of beginning.

EXHIBIT 2

DEPICTION OF PREMISES