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**AMENDED AND RESTATED LICENSE AGREEMENT**

THIS AMENDED AND RESTATED LICENSE AGREEMENT (the “Agreement”) is made this \_\_\_ day of \_\_\_\_\_, 2021, by and between the City of Winona, a municipal corporation under the laws of the State of Minnesota (“Licensor” or “City”), and Nancy A. Hemker, a widow, 32588 County Road 12, Winona, MN 55987 (“Licensee”); (collectively the “Parties”).

WITNESSETH:

WHEREAS, Licensee is the owner of the real property located at 825 East Lake Boulevard in the City of Winona, Minnesota; which real property is legally described in Exhibit A, which is attached hereto and incorporated herein by reference (the “Licensee Property”); and

WHEREAS, adjacent to said Licensee Property is City-owned property used as a City park land (the “City Property”) with an active park trailhead and parking for said park; and

WHEREAS, the Licensee has constructed and desires to maintain an access driveway, retaining, stone staircase and parking lot (the “Improvements”) on a portion of the City Property located adjacent to the Licensee Property; a sketch/schematic of the Licensee Property showing the dimensions and location of the Licensee’s access driveway in relation to and upon the City Property is depicted in Exhibit B, which is attached hereto and incorporated herein by reference (the “Licensed Premises”); and

WHEREAS, the City previously granted a license for the encroachment of the Improvements on the City Property, dated March 4, 2013 and recorded with the Office of the Winona County Recorder on March 6, 2013 as Document No. A-571614 (the “Original License”); and

WHEREAS, the Parties desire to amend the provisions of the above-referenced Original License and agree that this Agreement shall govern from its effective date and replace and supersede the Original License in its entirety; and

WHEREAS, the Licensee has requested that the City permit the continued encroachment of the Improvements within the Licensed Premises on the City Property, and the City is willing to permit said continued encroachment as depicted in Exhibit B subject to the terms, covenants, and conditions contained herein.

NOW, THEREFORE, for valuable consideration, it is agreed by and between the parties as follows:

1. Grant of License and Description of Licensed Premises. In consideration of the terms, covenants, and conditions contained herein, the Licensor hereby grants to the Licensee a terminable, nonexclusive license to use the Licensed Premises for the purpose stated above herein, subject to the following conditions:
  - a. Licensee shall commence no work authorized by this License related to construction, repair or replacement of the Improvements until it has obtained all required approvals and permits as required by the City. Licensee shall submit plans and specifications for construction, repair or replacement of the Improvements to the City Engineer for approval. All Improvements shall comply with this Agreement and applicable law and City Code.
  - b. The access driveway shall be designed and constructed to serve any future development of the real property, which is situated to the south of the Licensee Property.
  - c. Licensee's Improvements remain subject and subordinate to the City's primary use of the City Property as a park and for access and use thereof by the general public. The City Property is part of the City Bluff Traverse Trail Project and State Legacy grant dollars allocated to this area, and as a result, the City may need to make improvements to the park land within the Licensed Premises and any such improvements may result in changes or alterations of the Licensee's Improvements. In such event, Licensee is responsible for the costs of removal of Licensee's Improvements in the event that the City determines that the same interfere with the City's intended use of the City Property.
  - d. The Improvements shall at all times be available for use by the general public to access the City Property.
  - e. Licensee shall incorporate an asphalt swale or curb in the curve of the access driveway to avoid erosion along its edge. Licensee shall submit plans for the same to the City Engineer for approval and shall complete construction of the same by no later than June 30, 2022. In the event that Licensee fails to timely complete the work to the satisfaction of the City Engineer, the City may undertake the work and charge the Licensee the cost for the work, which amount shall be paid by Licensee within 30 days of receipt of the City's invoice. Failure by Licensee to timely remit payment for the work to the City shall result in the unpaid charges being assessed to the Licensee Property and certified to the

County Auditor for collection in the same manner as property taxes on the Licensee Property.

- f. Licensee shall take all necessary precautions to protect and preserve any City improvements within the Licensed Premises or on City Property during any activities within or use of the Licensed Premises as contemplated in this Agreement.
- g. Licensee shall take all necessary precautions to avoid creating unsafe or unsanitary conditions within the Licensed Premises. During the term of this Agreement, Licensee shall remove all trash from the Licensed Premises and keep the Licensed Premises free from refuse or other debris. Licensee shall be responsible for snow and ice removal from the Licensed Premises.
- h. Licensee shall not hinder the natural free and clear passage of pedestrians or motorized or non-motorized vehicles within the Licensed Premises or the City Property.
- i. Licensee shall permit the public to utilize the parking stalls, which are identified by the City Parks and Recreation Department, or otherwise marked or indicated within the Licensed Premises, and shall, if requested by Licensor, sign those parking stalls as “reserved for public parking”.
- j. Licensee shall conduct any work authorized by this License in a manner so as to insure the least obstruction to and interference with present and continued use of the City Property for access by the public to the park.
- k. Licensee shall notify Gopher State One Call prior to conducting any excavation necessary to construct, maintain, repair or replace the Improvements and comply with the requirements thereof.
- l. Licensee shall maintain access to all properties and cross streets during the term of this License, including emergency vehicle access.
- m. Licensee shall remove daily all dirt or debris from sidewalks, trails, public and private roadway surfaces and curbs and gutters during any work authorized by this Agreement or subsequently approved by the City Engineer.
- n. During the term of this Agreement, Licensee shall, at Licensee’s sole cost and expense, be responsible for the operation, maintenance, repair and replacement of the Improvements as needed to keep the same in a safe and good working order, or as otherwise directed by the City Engineer. Such maintenance and repair shall include, but is not limited to, removal of dirt, debris, ice and snow from the pavement and the mowing of grass or removal of weeds from the area adjacent to the pavement. In the event that Licensee fails to provide maintenance and repair

of the Improvements as outlined in this Agreement, the Licensor may perform the work and shall invoice the Licensee for all costs incurred by Licensor in providing such maintenance. Invoices shall be due and payable within 30 days of the date of the invoice. Failure by Licensee to timely remit payment for the work to the City shall result in the unpaid charges being assessed to the Licensee Property and certified to the County Auditor for collection in the same manner as property taxes on the Licensee Property.

- o. Licensee shall not conduct any work outside the Licensed Premises specified in Exhibit B without the express prior written approval of the City.
- p. Licensee shall be responsible for either; 1) removing the Improvements and all associated costs, or 2) the cost of removal of the Improvements by the City, should the City or another authorized party need to conduct work in the Licensed Premise or City Property.

Subject to the foregoing, the Licensee shall have the right to maintain, repair and alter the Improvements. Any maintenance, repair, replacement or alteration to the Improvements licensed hereby shall not, except for minor changes relating to materials, expand the encroachment on the City Property. Alterations and/or replacement of the Improvements within the Licensed Premises shall require prior written approval by the Licensor and shall at all times comply with this Agreement and applicable law and City Code.

- 2. License Fee. Licensee shall pay a license fee of One and No/100ths (\$1.00) Dollar at the time of execution of this Agreement.
- 3. Term.
  - a. This Agreement shall terminate (a) upon the destruction, demolition or removal of the Improvements to be situated on the City Property as described above, or (b) upon the failure of the Licensee to comply with any material term or condition of this Agreement, or (c) upon the failure of the Licensee to timely pay any invoice for work performed by Licensor pursuant to this Agreement.
  - b. Notwithstanding the foregoing, this Agreement shall be for an indefinite term commencing on the date of the last signatory to this Agreement and continuing until terminated by the City by written notice to the Licensee. Such notice shall be given at least 90 days in advance of the effective date of such termination. Such notice shall be delivered to Licensee or its successor in interest (as their interests and addresses may appear on the tax rolls of the County in which the Licensee Property is located), either personally or by certified mail. If such service cannot be made, service may be posted on the building on the Licensee Property.

- c. This Agreement may also be terminated at any time by Licensee by written notice to the City. Such notice shall be given at least 90 days in advance of the effective date of such termination and shall be delivered either personally or by certified mail to the City Clerk at the City's main offices.
  - d. Before the effective date of any such termination of this Agreement under this Section, Licensee shall remove all of Licensee's Improvements from the Licensed Premises, at Licensee's sole cost and expense, and shall restore the Licensed Premises to its preexisting condition or better pursuant to the standards and requirements set forth in City Code, as amended, unless otherwise directed by the City in writing. In the event that Licensee fails to remove the Improvements from the Licensed Premises before the effective termination date of this Agreement, the City or its authorized agents or representatives may perform any work necessary to remove the Improvements from the Licensed Premises and restore the Licensed Premises to its preexisting condition, and Licensee shall reimburse City for all expenses reasonably incurred by the City in performing such work. If Licensee fails to so reimburse the City as required by this paragraph within 30 days of Licensee's receipt of a billing statement for such charges from the City, the unpaid charges shall constitute a lien against the Licensee Property from and after the date they were due and unpaid. The City may take any action it is authorized under law to take to recover such unpaid charges, including assessing and certifying such unpaid charges to the County Auditor for collection with property taxes on the Licensee Property.
4. Use of Licensed Premises. Subject to the other terms and provisions contained herein, the Licensee shall be permitted to use the Licensed Premises only for the specific purpose hereinabove stated; provided, however, that during the term of this Agreement, the Licensee shall comply with all applicable laws, regulations, conditions, and covenants affecting the Licensed Premises, whether federal, state, local, or contractual in addition to any such other requirements as applicable to the Licensee Property or the Licensed Premises. The Licensee shall not intentionally commit or allow to be committed any waste on, destruction of, or damage to, or nuisance on the Licensed Premises. Should the Licensee intentionally commit or allow to be committed any waste on or destruction to the Licensed Premises, the Licensee shall immediately restore the Licensed Premises to the original condition of the Licensed Premises at the inception of this Agreement or as altered in accordance with plans and specifications as submitted to, and approved by, the City Engineer of the Licensor, or his or her designated representative, or, alternatively, pay to the Licensor the cost of restoring the Licensed Premises to the condition herein stated, payment to be made within 30 days from the date of written notice given by Licensor to the Licensee of the amount of such costs.
5. Conditions of Licensed Premises "As Is" and Not Warranted. The Licensor does not warrant that the Licensed Premises is suitable for the purposes for which it is permitted to be used under this Agreement. The Licensor shall have no responsibility with regard to any failure of or damage to Licensee's Improvements within the Licensed Premises. Licensee understands and acknowledges that this License grants it only a terminable

license to use the Licensed Premises, and does not confer any permanent property rights with respect to the Licensed Premises upon Licensee.

6. Licensor's Right of Entry. The Licensee shall permit or allow the Licensor and the agents and employees of the Licensor to enter upon the Licensed Premises at all reasonable times for the purpose of inspecting them. The City may order the immediate cessation of any project or work that exceeds the scope of this License or otherwise poses a threat to the life, health, safety or welfare of the public. The City may order Licensee to correct any project or work or condition to comply with the scope of this License or other applicable standards, conditions, ordinances or laws. If the Improvements made by Licensee in the Licensed Premises fall into disrepair at any time during the term of this License, in the City Engineer's discretion, the City may order Licensee to conduct any repairs or perform any maintenance necessary to bring the Improvements into compliance. Any such an order by the City authorized by this Paragraph shall state the violation or condition, the terms of correcting the violation or condition and that failure to correct the violation or condition within the stated time limits shall be cause for immediate revocation of this Agreement. If the violation or condition is not corrected within the stated time limits, the City may immediately revoke this Agreement and/or pursue any and all remedies available to it as provided herein or in law or equity.
7. Alterations to Licensed Premises. The Licensee shall not be permitted to make any additional improvements or alterations to the Licensed Premises without the prior written consent of the Licensor, except, however, the Licensee shall, at Licensee's expense, make any additional improvements to the Licensed Premises that are needed to maintain the Licensed Premises in their original condition or their condition as altered pursuant to this Agreement, or their condition if such alteration has otherwise been approved in writing by the Licensor.
8. Covenants to Indemnify and Hold Harmless. Licensee shall indemnify, protect, save, hold harmless and insure City, and its respective officers, directors, employees and members and agents, 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 Licensee or its agents, employees, contractors, with respect to Licensee's use of the Licensed Premises. Licensee shall defend City against the foregoing, or litigation in connection with the foregoing, at Licensee's expense, with counsel reasonably acceptable to City. The indemnification provision of this Paragraph shall not apply to damages or other losses proximately caused by or resulting from the negligence or willful misconduct of the City. All indemnification obligations shall survive termination, expiration or cancellation of this License.
9. Waiver and Assumption of Risk. The Licensee knows, understands and acknowledges the risks and hazards associated with using the Licensed Premises for the purposes permitted herein and the Improvements thereon and hereby assumes any and all risks and hazards associated therewith. Licensee understands and acknowledges that the primary purposes of the Licensed Premises, notwithstanding this Agreement, are to accommodate

the free flow of pedestrians and motorized vehicles for park uses of the City Property and the same may require regular maintenance, repairs or other work. Licensee hereby irrevocably waives any and all claims against the Licensor or any of its officials, employees or agents for any bodily injury (including death), loss or property damage incurred by the Licensee as a result of using the Licensed Premises or any of Licensee's activities or Improvements, and hereby irrevocably releases and discharges the Licensor and any of its officials, employees or agents from any and all such claims of liability related to the Licensed Premises or the Improvements therein, or the Licensor's maintenance, repair or other work conducted within the Licensed Premises by the Licensee or Licensor or any other third party, except those resulting from the negligence or intentional misconduct of the Licensor.

10. Insurance. The Licensee shall at Licensee's expense maintain in effect bodily injury liability insurance and property damage insurance with limits not less than the maximum liability limits for a municipality as provided in Minnesota Statutes, Section 466.04 or the amount stated in the Licensee's insurance certificate, whichever is greater. The City of Winona shall be named as an additional insured. The Licensee's insurance policy and certificate shall not be cancelled or its conditions altered in any manner without Ten (10) days prior written notice to the City Clerk. Upon request, the Licensee shall deliver to the City Clerk certificates of all insurance required, signed by an authorized representative and stating that all provisions of the specified requirements are satisfied. If Licensee fails to maintain a policy of insurance as required by the City for the term of this License, the City may immediately revoke this Agreement and require the immediate removal by the Licensee of the Licensee's Improvements from the Licensed Premises at the Licensee's sole cost and expense, and the Licensee shall restore the Licensed Premises to its preexisting condition or better pursuant to the standards and requirements set forth in City Code.
11. Real Estate Taxes. The Licensee agrees to pay any and all real estate taxes which may be assessed against the Licensed Premises being licensed hereunder as such real estate taxes become due and payable.
12. Mechanic's Liens. The Licensee hereby covenants and agrees that the Licensee will not permit or allow any mechanic's or materialman's liens to be placed on the Licensor's interest in the Licensed Premises during the term hereof for labor performed or material supplied in connection with any work or improvements performed or caused to be performed by the Licensee. Notwithstanding the previous sentence, however, in the event any such lien shall be so placed on the Licensor's interest, the Licensee shall take all steps necessary to see that it is removed within thirty (30) days of its being filed; provided, however, that the Licensee may contest any such lien provided the Licensee first provides adequate security protecting the Licensor against such lien.
13. Attorneys' Fees. If any action at law or in equity shall be brought by Licensor on account of any breach of this Agreement by Licensee or for the recovery of the possession of the Licensed Premises, Licensor shall be entitled to recover from Licensee reasonable

attorney's fees, the amount of which shall be fixed by the Court and shall be made a part of any judgment or decree rendered.

14. General Terms.

- a. RECITALS. The recitals to this Agreement are made a part hereof and incorporated herein by reference.
- b. VOLUNTARY AND KNOWING ACTION. The Parties hereto, 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.
- c. AUTHORIZED SIGNATORIES. The Parties hereto 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 License Agreement.
- e. ASSIGNMENT OR TRANSFER. Licensee shall have no right to assign its interest in this Agreement without the prior written consent of Licensor, which consent may be granted in writing by the City Manager upon request.
- f. 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 Licensee.
- g. NO PARTNERSHIP, JOINT VENTURE, OR FIDUCIARY RELATIONSHIP CREATED HEREBY. Nothing contained in this Agreement shall be interpreted



as creating a partnership, joint venture, or relationship of principal and agent between the Licensor and the Licensee.

- h. **CUMULATIVE RIGHTS.** Except as otherwise expressly stated herein, no right or remedy herein conferred on or reserved to the Licensor or the Licensee is intended to be exclusive of any other right or remedy hereby provided by law, but each shall be cumulative in, and in addition to, every other right or remedy given herein or hereafter existing at law, in equity, or by statute.
- i. **RECORDS—AVAILABILITY AND RETENTION.** Pursuant to Minn. Stat. § 16C.05, subd. 5, Licensee agrees that the City, the State Auditor, or any of their duly authorized representatives at any time during normal business hours and as often as they may reasonably deem necessary, shall have access to and the right to examine, audit, excerpt, and transcribe any books, documents, papers, records, etc., which are pertinent to the accounting practices and procedures of Licensee and involve transactions relating to this Agreement. Licensee agrees to maintain these records for a period of six years from the date of termination of this Agreement.
- j. **COMPLIANCE WITH LAWS.** Licensee shall abide by all Federal, State and local laws, statutes, ordinances, rules and regulations now in effect or hereinafter adopted pertaining to this Agreement or to the facilities, improvements, personal property, programs and staff for which Licensee is responsible.
- 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





## **EXHIBIT A**

### **Legal Description of Licensee Property**

Licensee's real property located at 825 East Lake Boulevard in the City of Winona, Minnesota, is legally described as follows:

Commencing at a point 276 feet South of the Southwest corner of the Northeast Quarter of the Northeast Quarter (NE $\frac{1}{4}$  of NE $\frac{1}{4}$ ) of Section Thirty-five (35), Township One Hundred Seven (107) North, of Range Seven (7), West, Winona County, Minnesota, said point being on the center line of Lake Boulevard and on the North-South line between the Southeast Quarter (SE $\frac{1}{4}$ ) and the Southwest Quarter (SW $\frac{1}{4}$ ) of the Northeast Quarter (NE $\frac{1}{4}$ ) of said Section Thirty-five (35), thence continuing south along the above North-South line a distance of 148 feet, thence at an interior angle of 107 degrees 28 minutes Easterly a distance of 111.7 feet; thence North at right angles a distance of 140 feet more or less to the center line of Lake Boulevard; thence Westerly along the center line of Lake Boulevard a distance of 155 feet to the place of beginning, being located upon and forming a part of the Southeast Quarter of the Northeast Quarter (SE $\frac{1}{4}$  of NE $\frac{1}{4}$ ) of Section Thirty-five (35), Township One Hundred Seven (107) North, of Range Seven (7), West of the Fifth Principal Meridian..

**EXHIBIT B**

**Depiction of Licensed Premises and Improvements**

A Sketch/schematic showing the Licensee Property and Licensed Premises, including the specific dimensions and location of the Improvements is attached hereto.