

PARK AND RECREATION CONCESSION AGREEMENT BETWEEN
THE CITY OF SAINT PAUL
AND
WHENEVER WATER SPORTS

This management agreement ("Agreement") is entered into this__ day of January 2024, by and between the City of Saint Paul, Minnesota ("City"), and Whenever Water Sports, LLC ("Manager").

WHEREAS:

- A. City is the owner of public park lands located at 1400 Phalen Drive Saint Paul, MN 55106 commonly known as Phalen Beach at which City intends to offer watercraft concessions to the public; and
- B. City has identified Manager as a qualified managing partner to provide those concessions on its behalf;

Now, therefore, City and Manager agree as follows:

1. **Managed Area.** City grants Manager the right to operate and manage a 12-compartment watercraft rental kiosk at Phalen Beach, on the terms contained in this Agreement. The area subject to this Agreement ("Managed Area") is shown on the attached Exhibit A. The City is not granting a leasehold interest in the Managed Area.

2. **Term and Renewal.**

- A. **Initial Term.** The term of this Agreement shall begin upon the date of execution of this Agreement and end on November 1, 2026, unless earlier terminated pursuant to paragraph 18 of this Agreement.

3. **Use of Site.**

- A. **Permitted Use.** The Manger may provide only watercraft rentals in Managed Area. Any other uses are not permitted without advanced written consent of City.
- B. **Hours of Operation.** Hours of rental operation are to be no earlier than 8:00 a.m. to no later than 7:00 p.m., every day of the week.
 - i) Manager and City will coordinate closures due to weather.
 - ii) Special events organized by City will be communicated to Manager no less than 14 days in advance. When advantageous to the event, Manager will operate during the event. If City requires it, Manager will suspend operations during events.
- C. **Compliance with law.** Manager shall comply with all laws, rules and regulations related to its operation of the Managed Area and is responsible for obtaining any licenses or permits required to operate.

4. **Payments.**

- A. **Commission.** Manager will pay the City 10% of all of its monthly gross revenues. Monthly gross revenues are defined as "all revenue generated in a given month by Manager under this

Agreement, less sales tax."

- B. **Payment Due Dates.** Payments are due on or before the twentieth day of the month immediately following the month for which the payment obligation was incurred. For example, the payment for May of a given year is due on or before June 20 of that year.
- C. **Financial Records.** Along with each month's payment, Manager must provide a financial statement (in Microsoft Excel or compatible format) showing its gross receipts and expenses for the month. Manager must maintain orderly records of its cash register receipts, invoices and all other sales records, which must be made available for City review upon request.

5. Installation of Kiosk

- A. **Installation.** Manager will supply vending kiosk and all watercraft and equipment required for operation. Installation of kiosk will be coordinated with City no less than one week in advance.
- B. **Alterations.** Manager will not make any improvements or alterations to the Managed Area without City's written approval. Manager will supply City with any information it reasonably requires in order to determine whether to consent to proposed improvements or alterations. All work done must be performed by licensed and bonded contractors, and with the appropriate permits and inspections required.
- C. **Removal.** Upon termination of this agreement, Manager will remove kiosk and any other private property from Managed Area.

- 6. **City Inspection of Books and Records.** Pursuant to Minnesota Statutes section 16C.05, subdivision 5, City has the right to inspect all books and records pertaining to Manager's operation of the Managed Area, and Manager have the obligation to maintain such books and records for a minimum of six years from the termination of this Agreement. Accounting records for concession operations must be complete and accurate using standard and Generally Accepted Accounting Procedures.

7. Maintenance and Repairs.

- A. **Managed Area.** Manager shall be responsible for keeping the Managed Area in neat and clean condition at all times. Manager is responsible for providing and maintaining necessary equipment for operation.

Failure to maintain the Managed Area and equipment may result in closure by City. The City will accept no responsibility for claims for loss of profits or other damages to Managed Area and equipment.

- B. **City Maintenance or Repair.** If Manager fails to maintain the premises within the Managed Area, City may elect to perform such maintenance and repair and bill Manager for the costs.
- C. **Damages.** Any damages to the Managed Area caused by the action of Manager, its employees, agents, or invitees will be the sole responsibility of Manager.
- D. **Trash, Recycling and Compostable Material.** Manager will us trash, recycling, and

compostable material containers and dumpsters provided by City. Manager shall empty and otherwise maintain containers within Managed Area and adjacent customer seating areas. Manager will secure all containers and dumpsters within facilities.

- E. **Grounds Maintenance.** The City will perform all grounds maintenance around the Managed Area.

8. Manager Responsibilities.

- A. **Local Agent.** Manager will provide a local agent to maintain and monitor Managed Area. Such agent shall be made know to City and will be on-site at the Managed Area at minimum once per week. Additional visits to the site may be required by City or the public, and Manager will work in good faith to meet those needs.
- B. **Prices Displayed.** Manager shall at all times have in plain view at the Managed Area a price list or printed schedule of prices of all available commodities and services. All prices shall be competitively priced with establishments within the service area that have similar functions.
- C. **Public Grounds.** Manager understands that Phalen Beach and surrounding grounds are publicly owned and shall conduct the operation in the best interests of the City and to maximize opportunities for its use and enjoyment by the public.
- D. **Equipment and Supplies.** Manager shall provide, at its own expense, an adequate amount of equipment and supplies for operation at all times. Life jackets and first aid kits will be available for all watercraft renters.
- E. **Customer Service.** Manager shall make visible in Managed Area a customer service phone number and respond to inquiries and issues of customers directly.
- F. **Remote Access.** Manager shall maintain remote access to vending kiosk and security camera. Manager will provide access to City upon request.
- G. **Participant Waiver.** Manager shall provide a copy of its participant waiver to City, and require a digitally signed waiver from all watercraft renters.
- H. **City Training.** Manager will provide onsite kiosk operation training to City staff at the time of installation.
- I. **Off-Season Storage.** Manager will be responsible for storing all equipment when not in use and in the off-season. City may annually agree in writing to allow for equipment storage in the Phalen Beachhouse between operating seasons.

9. Covenants and Undertakings.

- A. **Park Rules and Regulations.** Manager will comply with and use its best efforts to cause its customers to comply with, all park rules and regulations.
- B. **Inclement Weather; Emergency Closings.** In cases of emergency or disaster or other natural

acts, Manager will vacate Managed Area if required and otherwise cooperate with directives from the City's Director of Parks and Recreation, Fire Chief, Police Chief or other City official delegated such power due to the emergency. Manager will make no claim against the City for lost revenues or added expenses due to such event.

C. **Signage.** Manager will not place signage within or around the Managed Area without City's written approval. Signage must meet applicable code requirements.

10. **Notices.** The City's representative for this agreement will be the Special Services Manager or his/her designee. Any notices or correspondence on this agreement shall be sent to:

Saint Paul Parks and Recreation 400 City Hall Annex
25 W. 4th Street
Saint Paul, MN 55102
Attn: Special Services Manager

Whenever Water Sports
1381 North Street
Suffield, CT, 06078
Attn: Mike Ulitsch and Aran Gillette
wheneverwatersports@gmail.com

All notices shall be deemed to have been given when served personally on City or Manager or by mail upon deposit in a United States mailbox, postage pre-paid, addressed to Saint Paul Parks and Recreation or to Manager at the above address.

11. **Independent Contractor.** It is agreed by the parties that, at all times and for all purposes within the scope of this Agreement, the relationship of the Manager to the City is that of independent contractor and not that of employee. No statement contained in the Agreement shall be construed so as to find such an employer-employee relationship between the parties, nor are they joint partners. No employee of the Manager is entitled to any benefits of that of a City employee nor shall any employee of the Manager be construed as taking specific direction from a City staff member.

12. **Indemnification.** Manager agrees to defend and indemnify the City and all its agents, officers and employees thereof from all claims, demands, actions, judgments, suits or cause of action of any nature or character, arising out of Manager's use of the premises.

13. **Insurance.**

A. Manager will provide the following insurance during the term of the agreement:

- i) Manager shall be responsible for the self-insurance of, or for the acquisition of Commercial Property insurance on its own personal property and the property of anyone using the facility.
- ii) Comprehensive general liability insurance including blanket contractual liability coverage and personal injury liability coverage with a combined single limit of not less than \$1,500,000 per occurrence, or \$2,000,000 per occurrence shall be purchased by Manager. Such insurance must:
 - 1) name the City of Saint Paul as "additional insured";
 - 2) be primary with respect to the city's

liability insurance or self-insurance; and 3) not exclude explosion, collapse, or underground property damage.

- iii) Worker's Compensation insurance with not less than the statutory minimum limits, and employer's liability insurance with minimum limits of at least \$100,000 per accident.
- iv) Manager shall supply to the City current insurance certificates for policies required in this agreement. The certificates shall certify whether or not Manager has errors and omissions insurance coverage.
- v) Nothing in this agreement shall constitute a waiver by the City of any statutory limits or immunities.

14. **Non-Discrimination.** Manager will not discriminate against any participant or customer in the use or access to Managed Area because of race, creed, religion, color, sex, sexual or affectional orientation, national origin, ancestry, familial status, age, disability, marital status, or status with regard to public assistance and will take affirmative steps to ensure that participants are treated without the same during their participation in programs or use of the facility. RRK shall ensure that all applicants are hired and all employees treated during employment without regard the same.

15. **Right of Entry.** At all times during the term of this agreement, the City retains ownership of the Managed Area and shall have the right, by itself, its agents and employees, to enter into and upon the Premises at any time.

16. Casualty Loss to Managed Area.

- A. **Limited Damage to Managed Area.** If all or part of Managed Area is rendered unsuitable for its anticipated use by damage from fire or other casualty which in the reasonable opinion of an architect selected by City and approved by Manager, can be substantially repaired under applicable laws and governmental regulations within 120 days from the date of such casualty (employing normal construction methods without overtime or other premium) City shall at its own expense, repair such damage.
- B. **Major Damage to Managed Area.** If all or a substantial part of Managed Area is rendered unsuitable for its anticipated use by damage from fire or other casualty to such a material extent that in the reasonable opinion of an architect acceptable to City and Manager, Managed Area cannot be substantially repaired under applicable laws and governmental regulations within 120 days from the date of such casualty (employing normal construction methods without overtime or other premium), then City may elect to terminate this Agreement as of the date of such casualty by written notice delivered to Manager not more than 60 days after the date of such casualty.
- C. **Abatement of Manager's Payments.** In the event of damage to Managed Area rendering it unusable, the fees payable by Manager to City hereunder shall abate as of the date of the occurrence. In the case of damage which does not render the entire Managed Area untenable, the above payments shall be equitably apportioned.
- D. **Damage Due to Manager's Negligence.** Notwithstanding the foregoing, if the damage is due to

negligent actions or omissions of Manager or its agents, it will be solely City's determination as to whether to repair or restore Managed Area and whether to terminate this Agreement.

17. Termination; Remedies.

- A. Parties may mutually agree to terminate this Agreement at any time.
- B. If a party is claiming a material breach by the other party it may elect to terminate this Agreement by providing notice of such intent to terminate to the other party, stating the basis for the breach, and the amount of time the party has to cure. Failure to cure within the stated time will result in termination the day following the final cure date.
- C. Any of the following listed events will be considered a material breach by Manager for the purposes of termination:
 - i) **Failure to Obtain or Maintain License.** In the event Manager fails to obtain any permit or license required to perform under this Agreement, or such permit or licenses are suspended or revoked, or allowed to expire and such failure continues for a period of 15 days after receipt of written notice of such failure.
 - ii) **Failure to Pay.** In the event Manager fails to make any payment due to City as required under this Agreement and the failure continues for a period of more than 15 days after written notice of such non-payment.
 - iii) **Lapse in Insurance.** In the event Manager fails to continuously maintain proper insurance as required by the Agreement and the lapse continues for a period of five days after receipt of written notice of such failure by the insurer.
 - iv) **Bankruptcy.** In the event that Manager files a voluntary petition in bankruptcy, insolvency or a petition for reorganization, or a receiver is appointed for a substantial portion of Manager's property, or an order or decree of bankruptcy, insolvency, or reorganization is issued.
 - v) **Breach Without Cure.** Manager breaches any obligation under this Agreement and such breach continues for a period of 45 days or more after receipt of written notice off such breach.
 - vi) **Persistent or Repeated Breaches.** Manager has a pattern of persistent and repeated breaches, whether or not such breaches have been cured
- D. At the termination of this agreement the premises shall be surrendered peacefully and returned to the City in the same condition as received, reasonable wear and tear notwithstanding.
- E. **No Waiver Implied.** In the event any provision contained in this Agreement should be breached by either party and said breach thereafter waived by the other party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other breach hereunder.
- F. **Remedies Cumulative.** No remedy herein conferred upon or reserved to either party under this Agreement is intended to be exclusive of any other available remedy or remedies, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given

under this Agreement or now or hereafter existing at law or in equity or by statute. No delay or omission to exercise any right or power accruing upon any default shall impair any right or power or shall be construed to be a waiver thereof, but any such right and power may be exercised from time to time as often as may be deemed expedient.

18. **Amendments.** No amendments to this Agreement shall be effective without being reduced to writing and executed by both parties.
19. **Assignment.** This Agreement may not be assigned without the written consent of the other party, and any attempt to assign without such approval will render the Agreement void.
20. **Minnesota Law; Severability; Venue.** This Agreement shall be construed under the laws of the State of Minnesota; and if any provision or portion thereof, or the application thereof to any person or circumstances shall, to any extent, be invalid or unenforceable, the remainder of this Agreement shall not be affected thereby, and each provision of this Agreement shall be valid and enforceable to the fullest extent provided by law. Any litigation arising out of or relating to this Agreement will be venued in the State of Minnesota Second Judicial District Court, Ramsey County.
21. **Counterparts.** The parties may sign this Agreement in counterparts, each of which constitutes an original, but all of which together constitute one instrument.
22. **Electronic Signatures.** The parties agree that the electronic signature of a party to this Agreement shall be as valid as an original signature of such party and shall be effective to bind such party to this Agreement. The parties further agree that any document (including this Agreement and any attachments or exhibits to this Agreement) containing, or to which there is affixed, an electronic signature shall be deemed (i) to be “written” or “in writing,” (ii) to have been signed and (iii) to constitute a record established and maintained in the ordinary course of business and an original written record when printed from electronic files. For purposes hereof, “electronic signature” also means a manually signed original signature that is then transmitted by any electronic means, including without limitation a faxed version of an original signature or an electronically scanned and transmitted version (e.g., via PDF) of an original signature. Any party’s failure to produce the original signature of any electronically transmitted signature shall not affect the enforceability of this Agreement.
23. **Entire Agreement.** It is understood and agreed that this entire Agreement supersedes all oral agreements and negotiations between the parties relating to the subject matters herein.

IN WITNESS WHEREOF, the parties have set their hands the date first written above.

CITY OF SAINT PAUL

Whenever Water Sports, LLC

Mayor

Owner

City Clerk

Director of Parks and Recreation

Director of Financial Services

Approved as to form:

Assistant City Attorney

EXHIBIT A - Managed Area

