

COMO REGIONAL PARK MINIATURE GOLF AGREEMENT
BETWEEN
THE CITY OF SAINT PAUL
AND
WHEEL FUN RENTALS

This management agreement (“Agreement”) is entered into this ___ day of April, 2018, by and between the City of Saint Paul, Minnesota (“City”), and Wheel Fun Rentals, LLC, dba Fun Time (“Manager”).

WHEREAS:

- A. City is the owner of public park land commonly known as Como Regional Park, which contains the Como Miniature Golf Course and designated surrounding areas at which City intends to offer miniature golf to the public;
- B. City issued a request for proposals dated October 30, 2017 to seek a qualified managing partner to provide those miniature golf on its behalf and Manager was selected as the successful proposer;

Now, therefore, City and Manager agree as follows:

- 1. **Managed Area.** City grants Manager the exclusive right to operate and manage Como Regional Park miniature golf course and to construct a combined ticketing and concessions facility at the entrance to the mini golf course, 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 October 31, 2022, unless earlier terminated pursuant to paragraph 17 of this Agreement.
 - B. **Renewal Term.** This Agreement may be renewed by mutual consent of the parties on the same terms for one additional five year term, provided that Manager has made the required investments described in 5.B and that Manager has met or exceeded the Performance Metrics, attached as Exhibit A.
- 3. **Use of Site.**
 - A. **Permitted Use.** The Manger may provide only mini golf and prepackaged food and beverages in Managed Area. Any other uses are not permitted without advanced written consent of City.
 - B. **Hours of Operation.** Hours of operation are to be no earlier than 10:00 a.m. to no later than 9:00 p.m., every day of the week and only between the dates of April 1 to October 31, annually.

- 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.
- D. City will provide Manager one (1) reserved parking space in the parking lot adjacent to the Managed Area.

4. **Payments.**

- A. Manager will pay the City 9% of all of its monthly gross revenues under \$40,000.00 and 10% of all of its monthly gross revenues of \$40,000.00 and over. Monthly gross revenues are defined as “all revenue generated in a given month by Manager under this Agreement, less sales tax.” If Manager offers its employees staff discounts on products or services offered by Manager under this Agreement, revenues from sales of such discounted products and services will not be included in Monthly Gross Revenue.
- B. The Manager will guarantee the City an annual minimum payment of \$10,000 each year, regardless of total gross revenues. If Manager’s aggregate payments have not totaled at least \$10,000 by October 31 annually, Manager must add the full amount of the shortfall to its October payment obligation, (due November 20).
- C. 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.
- D. 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.
- E. Annually, by December 31, Manager will provide full season (April 1 to October 31) Profit and Loss Statement to City.

5. **Improvement to Managed Area**

- A. City approval required. Manager will not make any improvements or alterations to the miniature golf course and 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.

- B. Investments. Manager will directly invest \$200,000.00 into the miniature golf course no later than June 15, 2020. As part of the \$200,000.00 investment, Manager will make an initial up-front investment of \$20,000.00 improvements into the Managed Area by May 15, 2018. Managed Area renovations and improvements may include, but are not limited to, miniature golf course concrete, artificial turf, carpet, signage, utilities (electric, gas, water, telephone, internet), lighting, fencing, foliage (e.g. plants, bushes, trees), real or artificial rocks, water features, fencing, buildings, and structures.
- C. City and Manager will cooperate in determining a plan for investments. The City reserves the right to approve or reject Manager proposed expenditures for investments.
- D. Annually, Manager will provide to the City an updated inventory of investment funded items.
- E. Upon expiration or termination of the Agreement, all investment funded items remain the property of the City.

6. **Books and records.**

- A. 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 has the obligation to maintain such books and records for a minimum of six years from the termination of this Agreement. Accounting records for the Como Regional Park Miniature Golf Course 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 premises within the Managed Area in neat and clean condition at all times. Manager is responsible for repairs to all structures within the Managed Area.

Twice annually, Manager will schedule with the City, a walk-through inspection of the miniature golf course facility to ensure neat and clean conditions. One of these inspections shall be before the facility opens for the year to establish the condition of the facility and one inspection shall be mid-year or near the end of the season to establish anything that needs repairs or maintenance.

Prior to the beginning of each summer season, Manager must have completed the following maintenance and repairs to the miniature golf facility:

- 1) All holes in the green carpets must be repaired and the carpet must match in color and fabric.
- 2) Any gaps in the carpet on any of the holes must be repaired to prevent balls becoming stuck.

- 3) Concrete repair must be completed to fix any cracks or gaps, and the surface of the course must be leveled to improve water runoff and prevent standing water.
- 4) Damage to wooden structures must be repaired and painted, as appropriate.
- 5) Landscaping, to include removal of dead shrubbery, must be performed.

Manager must use licensed vendors with the appropriate permits for any required maintenance or repairs.

Failure to complete the listed repairs or improvements will result in failure to open on time for the summer season. The City will accept no responsibility for claims for loss of profits or other damages if the season is delayed due to Manager's failure to complete the work in a timely manner.

- B. City Maintenance or Repair. If Manager fails to maintain or repair 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 miniature golf course and Managed Area caused by the action of Manager, its employees, agents, or invitees will be the sole responsibility of Manager.
- D. Trash, Recycling and Litter. Manager will secure trash and recycling service, at Manager's expense. Manager will maintain Managed Area and twenty (20) feet immediately outside Managed Area free of litter. Manager will secure all carts and dumpsters within Managed Area, except for service pick-up days.
- E. Infrastructure. The existing infrastructure of the City set forth on the schedule attached to this Agreement, as Exhibit C are part of the premises managed by Manager, will be accepted "as-is" and at the termination of the agreement, must be returned to the City in substantially the same condition as set forth in Exhibit C absent normal wear and tear, and alterations occasioned by routine maintenance and/or repair.
- F. Grounds Maintenance. The City will perform all grounds maintenance around the Licensed Area.

8. Manager Responsibilities.

- A. On-site Manager. Manager will provide a full-time on-site manager at Managed Area. Such manager shall be made know to City and will be on-site at the Managed Area for a minimum average of forty hours weekly. Manager shall notify City of any changes in staffing of the position.
- B. Price Approval. Manager agrees to meet with the City prior to preparing the annual products, services, and price list, and periodically thereafter in an effort to mutually develop products, services, and pricing that will best meet the interests of both parties.

- C. Prices Displayed. Manager shall at all times have in plain view at the miniature golf course and 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.
- D. Public Grounds. Manager understands that Como Regional Park and surrounding grounds are publicly owned and shall conduct the operation of the miniature golf course in the best interests of the City and to maximize opportunities for its use and enjoyment by the public.
- E. Equipment. Manager shall provide at its own expense an adequate supply of recreational equipment for the miniature golf course.
- F. Sufficient Staffing. Manager shall, at its sole expense, be responsible for staffing the Managed Area.
- G. Manager's Employees. Employees of Manager shall be identifiable, and such employees and their activities shall conform to all applicable laws and regulations, including Minnesota Rules parts 4626.0065 through 4626.0115.
- H. Utilities Charges. Manager is responsible for the payment of all utility charges at the Managed Area during the term of the Agreement. Manager must contact the utilities to ensure direct billing.
- I. Manager's Agreements. Manager shall provide City with a copy of all agreements or contracts between Manager and any party who will assist Manager in carrying out the terms of this Agreement.
- J. Accident and Incident Reports. Manager shall provide the City with electronic participant accident and incident report forms in any instance where accidents or incidents on or near the Managed Area are reported to or witnessed by Manager representatives. Completed reports must be provided to the City within two working (2) days following an accident or incident on or near the facility property, by U.S. mail, fax or a PDF scan attached to an e-mail.
- K. Facility Upgrades. Manager shall reimburse the City for costs of upgrades such as electrical work or any other utility work needed to operate at Como Regional Park miniature golf course within Managed Area.

9. Covenants and Undertakings.

- A. City Inspections. Annually, by December 31, City shall conduct a management contract compliance assessment and inspect the Managed Area, and inform Manager in writing of any conditions requiring attention as may be required to comply with the obligations under this Agreement. City's annual assessment of the Performance Metrics will be performed along with this compliance assessment.

- B. 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.
- C. Use of City Equipment. Manager may use any City equipment and materials currently located at miniature golf course and Managed Area, and may make any necessary repairs to such equipment and materials. At the expiration of this Agreement, any City equipment and materials used by Manager will remain the property of City and must be returned in good condition, allowing for normal use-related wear and tear.
- D. Seasonal Startup and Shutdown. Annually, on or about April 1, City will startup Managed Area, including turning on of water. Annually, on or about October 31, City will shut down Como Regional Park amenities and winterize plumbing for off-season.
- E. Inclement Weather; Emergency Closings. In the event of inclement weather or other emergency, with advance notice to City's Director of Parks and Recreation, or designee, Manager may close down the Managed Area, and remain closed until favorable weather conditions prevail or the emergency passes.

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.

- F. Signage. Manager will not place signage within or around the Managed Area without City's written approval. Signage must meet applicable code requirements.
 - G. Smoking. Manager will not permit smoking within the Managed Area.
 - H. Reciprocal Notification of Events. City will notify Manager, and Manager will notify City, each as soon as practicable after scheduling of an events that may reasonably be thought to affect the Managed Area and surrounding areas.
10. **Compliance with Laws.** Manager shall apply for, pay for and obtain all licenses, permits or other approvals, including but not limited to food licenses, or noise variances, needed to operate at Como Regional Park miniature golf course and Managed Area.
11. **Notices.** The City's representative for this agreement will be the Special Services Manager or his/her designee. Manager's representative for the purposes of this agreement will be Rodney Knight. 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

Wheel Fun Rentals, LLC, d/b/a Fun Time
Rodney Knight
3609 Heights Court
Saint Cloud, MN 56301

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 mail box, postage pre-paid, addressed to Saint Paul Parks and Recreation or to Manager at the above address.

12. 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.

13. 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.

14. Insurance.

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

1. 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.
2. 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: i) name the City of Saint Paul as "additional insured"; ii) be primary with respect to the city's liability insurance or self-insurance; and iii) not exclude explosion, collapse, or underground property damage.
3. 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.
4. 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.

5. Nothing in this agreement shall constitute a waiver by the City of any statutory limits or immunities.
 6. Waiver of Subrogation. The City waives its right of subrogation for damage to the premises, contents therein, loss of income, up to the amount of insurance proceeds collected. Manager waives its right of subrogation for damage to the premises, contents therein, loss of income, up to the amount of respective insurance proceeds collected.
 7. The parties shall notify their respective insurance companies, in writing, of the provisions of this paragraph, and if either cannot waive its subrogation rights, shall immediately notify the other party, in writing.
15. **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.
16. **Right of Entry.** At all times during the tem 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 during reasonable business hours or, in the event of an emergency, at any time for legitimate purpose.
17. **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.

18. 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:
- 1) Failure to Pay Utilities. In the event that Manager fails to direct pay utility bills and such failure results in the utilities being shut off.
 - 2) 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.
 - 3) 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.
 - 4) 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.
 - 5) 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.
 - 6) 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.
 - 7) 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 and as often as may be deemed expedient.

19. Amendments. No amendments to this Agreement shall be effective without being reduced to writing and executed by both parties.

20. Captions and Headings. The captions and headings used herein are intended only for the convenience of the reader and are not to be used in construing this Agreement.

21. 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.

22. 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.

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

WHEEL FUN RENTALS, LLC

Director of Parks and Recreation

Owner

Director of Financial Services

Approved as to form:

Assistant City Attorney

EXHIBIT A – Performance Metrics

Performance Metrics for Agreement Renewal. The performance metrics listed in this exhibit will be used to determine whether City will agree to renew its agreement with Manager under section 2.B. “Renewal Term” of the Agreement.

Timing and Manner of Review of Performance Metrics. The performance metrics listed on this exhibit will be reviewed and analyzed in conjunction with City’s annual review conducted under section 10.A. of the Agreement. Each review will examine the one-year period ending on the October 31 immediately preceding the review.

City will use only the final two years of the initial five-year term of this Agreement in calculating Manager’s average rating and determining whether to renew the Agreement for a second five-year term.

Annually, the City will use performance measures listed in this exhibit to assess the performance of Manager, as set forth in Agreement item 2.B.i.

Not meeting expectations in one or more of the four categories may result in termination or non-renewal of this Agreement.

Category 1: Customer Satisfaction

City will facilitate collection and tabulation of randomly conducted customer satisfaction surveys with at least 100 customers.

City and Manager will jointly develop a customer satisfaction survey by April 1, 2019, and update annually, as appropriate. Manager will facilitate customer satisfaction surveys annually throughout Term and Renewal Term. The customer satisfaction survey will use the following measures to determine whether to renew the Agreement for a second five-year term:

- **Exceeds customer satisfaction expectations**
- **Meets customer satisfaction expectations**
- **Does not meet customer satisfaction expectations**

Category 2: Payments and Financial Performance

Manager financial reports and payments shall be made to the City by the 20th of each month, as set forth in Agreement item 5.

- **Meets expectations** - All reports and payments made on time.
- **Does not meet expectations** - fewer than 100% of reports and payments made on time.

Category 3: Operational Assessment

City's will assess Manager's compliance with operational terms of the agreement in regards to scope of services, innovative services, commitment to community engagement, and investments into facility. City and Manager will jointly develop an assessment tool by April 1, 2019, and update annually, as appropriate.

- **Meets expectations** – Manager demonstrates compliance with all operational assessment items.
- **Does not meet expectations** – Manager demonstrates compliance with less than 80% of all operational assessment items.

Category 4: Annual License Contract Compliance Assessment and Site Review by City shall conduct a license contract compliance assessment and site review of Como Regional Park Miniature Golf Course and designated surrounding area, and inform Manager in writing of any conditions requiring attention as may be required to comply with the obligations under this Agreement. (Agreement item 9.A.)

- **Meets expectations** – Manager demonstrates compliance with all license agreement and site review items.
- **Does not meet expectations** – Manager demonstrates compliance with less than 80% of all license agreement and site review items.

EXHIBIT B – Managed Area



 = Managed Area

EXHIBIT C – City’s Infrastructure

Fencing and gates around miniature golf course.
Water, sewer and electrical utilities.