

## COMO LAKESIDE PAVILION MANAGEMENT AGREEMENT

This management agreement ("Agreement") is entered into this \_\_\_ day of March, 2018, by and between the City of Saint Paul, Minnesota ("City"), and O'REILLY CUSTOM 3, LLC, d/b/as Spring Café ("Manager").

### WHEREAS:

- A. City is the owner of public park land commonly known as Como Regional Park, which contains the Como Lakeside Pavilion and designated surrounding areas at which City intends to offer services and amenities to the public;
- B. City issued a request for proposals dated December 17, 2017 to seek a qualified manager to provide those services and amenities on its behalf;
- C. In response to City's request for proposals, Manager submitted a proposal, dated January 10, 2018, which met the City's specifications ;
- D. City and Manager now intend to enter into this Agreement to memorialize the terms and conditions upon which Manager will manage the Como Lakeside Pavilion and surrounding areas.

Now, therefore, City and Manager agree as follows:

### **I. Definitions.**

- 1.1. "Capital Investment Fund" or "CIF" means a dedicated fund managed by City into which Manager will make deposits as described in this Agreement.
- 1.2. "Grounds" means the area so marked on Exhibit A to this Agreement.
- 1.3. "Managed Area" means the area so marked on Exhibit A to this Agreement.
- 1.4. "Pavilion" means the area so marked on Exhibit A to this Agreement.
- 1.5. "Peak Season" begins the first weekend in May through the weekend following Labor Day, inclusive.
- 1.6. "Off-Peak Season" means the period outside of Peak Season.
- 1.7. "Performance Metrics" means the criteria for evaluation of Manager's performance, renewal of this Agreement and provision of an incentive rent credit, all as set forth on Exhibit B.

1.8. "Promenade" means the area so marked on Exhibit A to this Agreement.

**II. Term and Renewal.**

- 2.1. Initial Term. This Agreement will become effective beginning on April 1, 2018, and will continue through December 31, 2023, unless earlier terminated pursuant to § XIV.
- 2.2. Renewal Terms. By mutual assent of City and Manager, this Agreement may be renewed on the same terms for a five-year term beginning on January 1, 2024 ("Renewal Term").

City's determination whether to agree to the Renewal Term will be based on its analysis of the Performance Metrics, which will be conducted as described in Exhibit B.

**III. Grant of License.**

City grants Manager an exclusive license to operate and manage the Managed Area on the terms contained in this Agreement. The City is not granting a leasehold interest in the Managed Area.

**IV. Operation and Management of Managed Area.**

- 4.1. Pavilion hours of operation Beginning on April 1, 2018, Manager will staff the interior of the Pavilion and provide public food and beverage service for at least the following hours of operation:

	<u>Peak Season</u>	<u>Off-Peak Season</u>
Monday-Friday	11:00 am - 9:00 pm	None
Saturday/Sunday	9:00 am - 9:00 pm	9:00 am - 3:00 pm

4.1.1 Parties will work together in good faith to determine whether public access to the promenade in the morning prior to restaurant hours can be made available during the Peak Season.

- 4.2. Recreational equipment rental. Manager will provide recreational equipment rental services, such as water bikes and kayaks, from May through September during each year this Agreement is in effect. With City's approval, services may be provided through a contract between Manager and a third party. The services to be provided and hours of operation under this section will be submitted annually to City for its approval. If Manager contracts with a third party to provide such services, Manager

agrees to maintain on-site a fleet at least six canoes and six paddleboats that will be available to the public for rental in the event the third party fails, for any reason, to provide the services described in this section 4.2.

- 4.3. Room rental; community access to rooms. Manager will schedule, operate and staff the Pavilion for rentals and meetings and publish rates for the various areas. Manager will provide community access to designated meeting rooms at the Pavilion at a reduced rate from the published rate, and will track and report such community access to City as set forth in the Performance Metrics.
- 4.4. Catering; catered events. Manager will provide banquet catering services to be provided in conjunction with room rental for events such as weddings and other receptions. Manager may contract with a third party vendor approved by City to provide such catering services.
- 4.5. Outdoor vending. Manager has the exclusive right to provide outdoor food and beverage vending in the area marked "Outdoor Vending Area" on Exhibit A.
- 4.6. Concession window. Manager will provide food and beverage vending at the concession window of the Pavilion. The concession window's hours of operation will be proposed by Manager for City's review and discretionary approval annually. Approved concession window hours of operation may not be used as a substitute for the Pavilion interior minimum-hours requirements of sections 4.1 and 4.2, as applicable, unless otherwise agreed by the parties.
- 4.7. Souvenir sales. Manager may sell non-food, souvenir-type items at the Pavilion. Such items must be approved by City prior to being put on sale. City's approval will not be unreasonably withheld.
- 4.8. Liquor sales. Manager may, with the appropriate licenses, sell alcoholic beverages (wine, malt beverages, and other intoxicating liquor) to the public for consumption within the Pavilion and Promenade, and wine and malt beverages in the areas designated on Exhibit A, providing that such alcoholic beverages may be offered to the public only during hours in which full kitchen service offerings are also available and any service outside the Pavilion and the Promenade must end no later than sunset daily. Manager may use City's liquor license upon resolution of the Saint Paul City Council,

but must reimburse City for the cost of the license.

For any private or ticketed event at which liquor will be served, Manager will hire or cause to be hired an off-duty Saint Paul police officer to provide security during the period that liquor is being served. If City and Manager mutually agree, private security may be used in lieu of a Saint Paul police officer. Events held in the banquet room with fewer than 75 attendees are exempt from this requirement, provided, however, that City reserves the right to require Saint Paul police security for any event, of any size, at which liquor will be served, if City determines that the individual circumstances of the event justify such a requirement.

Manager will annually submit to City for its approval, which may not be unreasonably withheld, a description of Manager's intended liquor offerings and service areas for the coming year. Manager's liquor offerings will include at least one Minnesota-brewed malt beverage.

- 4.9. Farmers markets. With City's advance written approval, Manager may operate farmers markets and similar events on the Promenade.
- 4.10. Concerts; plays; related commission credit. Manager will schedule and control the Public performance schedule at the Promenade, and will schedule at least 100 events per year (such as concerts and plays). Manager is responsible for complying with all local ordinances relating to sound and notification. Prior to February 1 of each year, City may schedule up to 20 dates of the 100 to be scheduled by Manager for that year. Manager will work in good faith with the groups identified by the City for those 20 dates to meet their scheduling requests. City will promote bookings made by Manager and communicated to City before March 31st of each year as part of its Music in the Parks program. **For 2018, Manager has until May 1 to communicate bookings to the City.** If Manager successfully meets the 100-event booking requirement for a given calendar year during which this Agreement is in effect, Manager is entitled to a \$10,000 commission credit to be applied against its commission payment for September of that calendar year.
- 4.11. Other activities. Manager may provide other services within the Managed Area not specifically prohibited by this Agreement with City's advance consent, which may be withheld or subject to reasonable conditions.

## **V. Commission and Capital Investment Fund Payments to City.**

5.1. Definitions. The following terms used in this Article V have the meanings given in this section.

5.1.1. "Annual Minimum Payment" means, for Annual Minimum Periods during the initial term of this Agreement, \$100,000. For Annual Minimum Periods during the five-year renewal term of this Agreement permitted under section 2.2, "Annual Minimum Payment" means \$100,000, adjusted for inflation occurring between the beginning of the initial term of this Agreement and the beginning of the renewal term in question. Inflation adjustments will be made using the United States Department of Labor Bureau of Labor Statistics Consumer Price Index for All Urban Consumers-Minneapolis-St. Paul, MN-WI All Items for the most recent calendar year.

5.1.2. "Annual Minimum Period" means each of the 12 month periods from April 1<sup>st</sup> to March 31<sup>st</sup> during the term of this Agreement. For 2023, the Annual Minimum Payment will be reduced to \$75,000 to reflect the April 1 – December 31 operating date.

5.1.3. "Monthly Gross Revenue" or "MGR" means all revenue generated in a given month by Manager's and its subcontractors' activities under this Agreement, less sales tax, with the following exception: for revenue from ticketed live performance events, MGR includes only the month's aggregate revenue for such events net of direct, documented production expenses (such as lighting, sound, and security) and performer expenses (such as performer fee and hospitality). 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 MGR.

5.2. Payment due dates; documentary support for payment amounts.

Payments to be made under this Article V 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.

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 its request.

- 5.3. General payment structure. Commission and CIF payments to City will be made as described in sections 5.4 through 5.8. Over the term of this Agreement, in general, City will receive 10% of MGR on a monthly basis. Commission payments for the Peak Season will be payable to the City for use in its sole discretion. Commission payments for the Off-Peak Season will be invested into CIF. If the cumulative total of MGR exceeds \$1.5 million in the Annual Minimum Period, the commission percentage will increase to 11% for the remainder of that Annual Minimum Period. If MGR exceeds \$1.75 million in the Annual Minimum Period, the commission percentage will increase to 12% for the remainder of that Annual Minimum Period. MGR resulting from restaurant sales Monday through Friday in the Off Peak months, will be exempted from commission payments.
  
- 5.4 Annual Minimum Payments. The Manager will guarantee the City a total Annual Minimum Payment of \$100,000 each year pursuant to §5.1, regardless of performance, and will make \$20,000 in aggregate investments into the facility by June 1, 2018. No commission credits may be used to reduce commission payments to below the Annual Minimum Payment.
  - 5.4.1 Minimum payments. For each Annual Minimum Period, Manager's aggregate commission payment (which does not include CIF payments) to City must total at least the Annual Minimum Payment. If Manager's aggregate commission payments have not totaled at least the Annual Minimum Payment by the conclusion of an Annual Minimum Period, Manager must add the full amount of the shortfall to its March payment obligation (due April 20) for that Annual Minimum Period.
  
- 5.4. Commission credit incentives. Commission credits may be earned and applied as described in the Performance Metrics.
  
- 5.5. 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 Grounds, and Manager has the obligation to maintain such books and records for a minimum of six years and to produce such books and records within 10 days of City's written request. Manager will ensure that the books and records of the third party equipment rental service and any other subcontractors are made available for City inspection as if they were Manager's own books and records. All inspections contemplated in this section 5.9 will be without cost to City.

Accounting records for the Pavilion must be complete and accurate using standard and Generally Accepted Accounting Procedures.

City has the right, at its own expense, to audit the books and records of Manager covering Manager's operation of the Managed Area, at Manager's corporate or accounting offices. Manager agrees to reasonably cooperate with any such audit. If, as a result of the audit, City does not agree with any material determination or representation by Manager, City will promptly (no later than 30 days after completion of the audit) give written notice to Manager describing in reasonable detail the nature of the disagreement. If City and Manager reconcile their differences, the relevant determination or representation will be adjusted accordingly and become binding.

If City and Manager are unable to reconcile their differences in writing within 20 calendar days after City sends written notice of disagreement to Manager (the "Reconciliation Period"), the disputed matter will be submitted to independent auditors mutually acceptable to City and Manager for their final determination, which will be binding. The independent auditors may consider only the matter in dispute and will be instructed to act within 20 calendar days, or a longer period if City and Manager agree. If City and Manager are unable to agree upon independent auditors within seven calendar days after expiration of the Reconciliation Period, City and Manager will each select an independent auditor. The two selected auditors will select a third independent auditor, who will perform the audit and the final determination of the selected auditor will be binding. The City will pay the costs of the audit.

## **VI. Improvements to Pavilion.**

- 6.1. City approval required. Manager will not make any improvements or alterations to the Pavilion 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. Any structural improvements or alterations will require a separate agreement setting forth the city's requirements for construction projects.
- 6.2. Manager's initial investment. By June 1, 2018, Manager will complete the initial improvements described in §5.4 and will provide City with proof of the expenditure of at least \$20,000 on those improvements.
- 6.3. Capital Investment Fund. Manager and City will annually confer and agree on reasonable uses of the Capital Investment Fund to improve the Managed Grounds. Improvements paid for out of the Capital Investment Fund will

remain with the Managed Grounds and property of City after this Agreement terminates, unless otherwise agreed by City and Manager.

## **VII. Covenants and Undertakings.**

- 7.1. City inspections. Annually, by December 31, City shall conduct a management contract compliance assessment and inspect the Pavilion 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.
- 7.2. Accident reporting. City will provide Manager with City's electronic participant accident report forms, which must be completed by Manager's representatives, and delivered to City within 48 hours, in any instance in which an accident on the Managed Grounds is reported to or observed by Manager's representatives. Manager may deliver completed reports to City by U.S. mail, fax or a PDF scan attached to an email.
- 7.3. 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 except as may be provided elsewhere in this Agreement.
- 7.3. Use of City equipment. Manager may use any City equipment and materials currently located at the Pavilion, 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. An inventory of City equipment and materials at the Pavilion is attached as Exhibit D to this Agreement. Exhibit D will be updated annually to reflect changes in City equipment and materials located at the Pavilion.
- 7.4. City's use of Managed Area. The City is entitled to use the public space of the Managed Area for City functions, providing such functions do not create a scheduling conflict with other banquets or events. When such functions involve service of food or beverages for purchase, City will use Manager to provide it. City will contact Manager in advance of its proposed use of the Managed Area to confirm that no scheduling conflicts exist. City will not request or cause the cancellation of any rental already booked by Manager.

- 7.4.1. Traditional City uses to continue. City and Manager both intend for certain traditional uses of the Managed Area by the City to continue, including the annual Saint Paul Classic Bike Tour (traditionally occurring on or about the second Sunday in September) and the annual Spring Parks Cleanup (traditionally occurring on a Saturday in April).
- 7.5. Inclement weather; emergency closings. In the event of inclement weather or other emergency, only with the advance consent of City's Director of Parks and Recreation, Manager may close down the Pavilion and remain closed until favorable weather conditions prevail or the emergency passes, notwithstanding sections 4.1 and 4.2.
- 7.6. Signage. Manager will not place signage within or around the Pavilion without City's written approval. Signage must meet applicable code requirements. The Department of Parks and Recreation will authorize street signage abutting Lexington Parkway provided that it otherwise complies with City codes and regulations.
- 7.7. Smoking. Manager will not permit smoking in the Pavilion or the Promenade.
- 7.8. Food and beverage samples. The City has the right to allow the distribution of free outdoor samples of food or beverage products events, providing they are not the same kind of product being sold by Manager and the area used is restricted to the north and south parking lots and the area south of the south parking lot. The City also has the right to host City-sponsored events. The City will give Manager at least two weeks' notice of food and beverage sample distributions and four weeks' notice of events. Such distributions and events require the Manager's consent, which may not be unreasonably refused.
- 7.9. Reciprocal notification of morning events. City will notify Manager, and Manager will notify City, each as soon as practicable after scheduling of the event, of each outdoor morning event it schedules that may reasonably be thought to affect the Managed Grounds and surrounding areas.

### **VIII. Manager's Operation Obligations.**

- 8.1. On-site manager. Manager will provide a full time on-site manager of the

Pavilion. Such manager shall be made known to City and will be on-site at the Pavilion for a minimum average of forty hours weekly. Manager shall notify City of any changes in staffing of the position.

- 8.2. Scheduling of events; minimal disturbance. Manager may schedule events and meetings at the Pavilion or Promenade from 6:00a.m. to 12:00 midnight. No amplified music or sound may be used between the hours of 10:00 p.m. and 8:00 a.m. without the appropriate sound level variance. Care should be taken to schedule activities in such a manner as to minimize disturbance to neighboring residents.
- 8.3. Price approval. In order to minimize conflicts regarding banquet hall and room rental rates, catering rates, food and beverage, a la carte and menu rates and rental rates for the recreational equipment, Manager agrees to meet with the City prior to preparing the annual product and price list and periodically thereafter in an effort to mutually develop products and pricing that will best meet the interests of both parties.

If, as a result of the review, City does not agree with any pricing determination by Manager, City will promptly (no later than 30 days after completion of the review) give written notice to Manager describing in reasonable detail the nature of the disagreement. If City and Manager reconcile their differences, the relevant determination will be adjusted accordingly and become binding.

If City and Manager are unable to reconcile their differences in writing within 20 calendar days after City sends written notice of disagreement to Manager (the "Reconciliation Period"), the disputed pricing will be submitted to independent industry experts familiar with public facility venues mutually acceptable to City and Manager for their final determination, which will be binding. The independent industry experts may consider only the matter in dispute and will be instructed to act within 20 calendar days, or a longer period if City and Manager agree. If City and Manager are unable to agree upon independent industry experts within seven calendar days after expiration of the Reconciliation Period, City and Manager will each select an independent industry expert. The two selected industry experts will select a third independent industry expert, who will render a decision which will be binding. The City will pay for the costs of the review by the independent industry expert.

- 8.4. Prices displayed. Manager shall at all times have in plain view in the Pavilion a price list or printed schedule of prices of all available commodities and services. Manager shall make available an attractive menu including prices to groups or organizations for banquets, parties or

other events. All prices shall be competitively priced with establishments within the service area that have similar functions.

- 8.5. Public grounds. Manager understands that the Pavilion and surrounding grounds are publicly owned and shall conduct the operation of the Pavilion in the best interests of the City and to maximize opportunities for its use and enjoyment by the public.
- 8.6. Sufficient staffing. Manager shall, at its sole expense, be responsible for staffing the Pavilion.
- 8.7. 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.
- 8.8. Electrical utility charges. Manager shall pay electrical utility charges from meters 03583517 and 0220853 used in conjunction with the facility. The City will reimburse the cost of electricity used by the Como Lake aerator annually.
- 8.9. Costs of alarm system. Manager is responsible for the monitoring costs of the alarm system. Manager is also responsible for burglar alarm costs and false alarm charges which are the result of Manager's employees or their agents.
- 8.10. Manager's agreements. Manager shall provide City with a copy of all agreements or contracts between the Manager and any party who will assist Manager in carrying out the terms of this Agreement.
- 8.11. Compliance with laws. Manager shall comply with all federal, state and local laws, ordinances, regulations, and policies relevant to its operations under this Agreement.
- 8.12. Preexisting reservations. Manager will honor the six event reservations that were made prior to the effective date of this Agreement for events to occur during the term of this Agreement, and will work in good faith with the appropriate individuals to ensure that those events go on as scheduled. City will provide Manager with a schedule of such events and contact information for appropriate individuals affiliated with each event.

**IX. City's Specific Covenants.**

City will:

Provide Manager with the use of existing Pavilion equipment, in as is condition. The City, in cooperation with Manager, will compile and maintain an inventory of all equipment (including a notation of condition) being turned over to the care and custody and control of Manager.

Annually contract for one weed harvesting from Lake Como prior to July 15 of each year. The City shall apply for and obtain the necessary permit from the Minnesota Department of Natural Resources. If given the stated schedule, the weed level continues to adversely impact the water rental equipment; City will work with Manager to change the stated schedule.

Annually assist Manager in contacting the Ramsey County Sheriff to inspect water rental equipment in order to obtain the necessary inspection stickers for operation.

## **X. Maintenance and Repairs.**

101. Cleaning of Pavilion. Manager is responsible for daily cleaning of the Pavilion areas which it uses and manages. Manager shall at all times keep the building in a clean and sanitary condition and shall comply with all State and City health laws and local Health Department regulations. Such standards shall include monthly cleaning of all light fixtures and woodwork. Manager agrees to wash and clean inside windows annually, in May and outside windows once each year, at a time scheduled by Manager, who will give 30 days' notice to City. Manager will clean and wash down the building exterior a minimum of every three years.
102. Waste removal. Manager shall provide adequate trash and recycling removal from the Pavilion at its own costs. If Manager elects to have trash services provided by the City, City would use a 4 yard dumpster at \$29.97 per tip for 2015. Cost of services would increase annually at 5% to account for increases in trash fees, staff costs, fuel increase and truck rental increases.
103. Litter control; cleaning of Managed Area. Manager is responsible for cleaning and litter control within the Managed Area, except that when City uses any portion of the Managed Area for its own scheduled events it is responsible.
104. Cleaning of Promenade. Manager is responsible for cleaning the Promenade area and concession patio on a daily basis. Manager will power-wash the Promenade annually or as City deems necessary.
105. Cleaning and restocking of restrooms. Manager shall provide supplies for the second floor and lower level restrooms during Peak Season and perform the following services nightly to the restrooms: sweeping and mopping, washing and disinfecting sinks, urinal and toilets. Restock and replace paper

products as needed. During the non-peak season, Manager shall provide supplies for the second floor restroom and will perform the cleaning services for those dates when the Pavilion is open. The City will provide supplies and clean the lower level restrooms during the Off Peak season.

106. Landscape. The City shall be responsible for the landscape and upkeep of the landscape around the Pavilion.
107. Snow removal. The City is responsible for snow removal in the parking lots and around the Pavilion and paths around the lake, except that Manager is responsible for snow removal in the area immediately adjacent to the Pavilion entrance.
108. Mechanical and building maintenance. The City shall be responsible for maintaining all HVAC systems, the elevator, and sprinkler systems and water, gas and electric services. In the event repairs are needed which are not eligible for payment from the CIF, City and Manager will share the costs as follows:
  - Manager will be responsible for repairs up to \$1000.
  - For repair costs exceeding \$1000, City and Manager will each pay half of the total exceeding \$1,000, up to \$4,999.
  - The City will be responsible for any additional costs exceeding \$4,999.

## **XI. Insurance and Indemnification.**

11.1. Insurance required. Manager is required to carry, insurance of the kind and in the amounts shown below for the life of the contract. Insurance certificates should state that the City of Saint Paul, its officials, employees, agents and representatives are named as Additional Insureds for General Liability and Automobile Insurance.

### 11.1.1. General or Business Liability Insurance

\$1,500,000 per occurrence  
\$2,000,000 aggregate per project  
\$2,000,000 products/ completed operations total limit  
\$1,500,000 personal injury and advertising

Policy must include an "all services, products, or completed operations" endorsement.

### 11.1.2. Automobile Insurance

- a. Bodily Injury \$750,000 per person  
\$ 1,000,000 per accident
- b. Property damage not less than \$50,000 per accident

- i. Workers Compensation and Employer's Liability Insurance
  - 1. Worker's Compensation per Minnesota Statute Employer's Liability shall have minimum limits of \$500,000 per accident; \$500,000 per employee; \$500,000 per disease policy limit.
  - 2. If Manager is exempt from the requirement of carrying Workers Compensation it shall be required to provide City with a completed "Certificate of Compliance" (State of Minnesota form MN LIC 04) verifying their number of employees and the reason for their exemption.
  
- ii. Liquor Liability Insurance

\$2,000,000 per occurrence, 3,000,000 aggregate. Coverage to include: bodily injury, property damage, and loss of means of support.
  
- iii. General Insurance Requirements
  - 1. The policy is to be written on an occurrence basis or as acceptable to City. The Certificate of Insurance must indicate if the policy is issued on a claims-made or occurrence basis. Agent must state on the certificate if policy includes errors and omissions coverage.
  - 2. The Manager must not begin work under this Agreement until a Certificate of Insurance covering all of the insurance required is submitted and approved. Insurance must remain in place for the duration of the original contract and any extensions periods.
  - 3. The City reserves the right to review Manager's insurance policies at any time, to verify that City requirements have been met.
  - 4. Nothing shall preclude City from requiring Manager to purchase and provide evidence of additional insurance if City's Risk Manager determines it is necessary to protect the interests of the public.
  - 5. Satisfaction of policy and endorsement requirements for General Liability, Auto Insurance, and Liquor Liability, of "each occurrence" and "aggregate" limits, can be met with an umbrella or excess policy with the same minimum monetary limits written on an occurrence basis, providing it is written by the same insurance earner.
  
- c. Indemnification. Manager shall defend and indemnify City and its officers, agents, and employees from all claims, actions or suits of any character brought for or on account of any claimed or alleged injuries or damages received by any person or property, including City, resulting from any act or omission by

Manager or Manager's employees or agents in carrying out the terms of this Agreement.

## **XII. Administration.**

For the purpose of the administration of this Management Agreement, City's representative shall be the Special Services Manager of Parks and Recreation, and the Manager's representative shall be Matt O'Reilly, telephone: 612-227-7250, e-mail: moreilly2@me.com.

## **XIII. Casualty Loss to Pavilion.**

- 13.1. Limited damage to Pavilion. If all or part of the Pavilion 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.
- 13.2. Major damage to Pavilion. If all or a substantial part of the Pavilion 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, the Pavilion 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.
- 13.3. Abatement of Manager's payments. In the event of damage to the Pavilion 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 Pavilion untenable, the above payments shall be equitably apportioned.
- 13.4. Damage due to Manager's negligence. Notwithstanding the foregoing, if the damage is due to negligent actions or omissions of the Manager or its agents, it will be solely City's determination as to whether to repair or restore the Pavilion and whether to terminate this Agreement.

## **XIV. Termination; Remedies.**

- 14.1. Termination by mutual consent. This Agreement may be terminated at any

time by mutual consent of the Parties.

- 14.2. Termination for material breach. A party claiming a material breach by the other party may elect to terminate this Agreement by providing notice of such intent to terminate to the other party, stating the date upon which the termination will be effective. Other than the notice required in this section 14.2, no written notice is required for a party to terminate this Agreement for a claimed material breach unless failure to cure after notice is specifically listed as a component of the claimed material breach.
- 14.3. Material breach by Manager defined. The following events will be deemed to be material breaches by the Manager:
  - 14.3.1. Failure to make required initial investments and dock investments. Manager fails to comply strictly with sections 6.2 and 6.3 of this Agreement.
  - 14.3.2. Failure to pay. In the event that Manager fails to make any payment due City as required under this Agreement and the failure continues for a period of more than 30 days after receipt of written notice of such non-payment.
  - 14.3.3. 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.
  - 14.3.4. Failure to obtain or maintain license. In the event that Manager fails to obtain any permit or license required to perform under this Agreement, or such permits 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.
  - 14.3.5. 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 of such breach.
  - 14.3.6. Persistent or repeated breaches. Manager has a pattern of persistent and repeated breaches, whether or not such breaches have been cured.
  - 14.3.7. 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.

- 14.4. Material breach by City defined. The following events will be deemed to be material breaches by City:
  - 14.4.1. Breach without cure. In the event City breaches any obligation under this Agreement and such breach continues for a period of 45 days or more after receipt of written notice of such failure.
  - 14.4.2. Persistent or repeated breaches. City has a pattern of persistent and repeated breaches, whether or not such breaches have been cured.
- 14.5. 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.
- 14.6. 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.
- 14.7. 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.

## **XV. Nondiscrimination; Miscellaneous Provisions.**

- 15.1. Nondiscrimination. Manager will not discriminate against any employee or applicant for employment for work under this Agreement 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 applicants are employed and employees are treated during employment without regard to the same. This provision shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment advertising, layoff or termination; rates of pay or their forms of compensation; and selection for training, including apprenticeship.

Manager will not discriminate against any person in the use of a public accommodation 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 customers and visitors are treated during their use without regard to the same.

- 15.2. Notices. Any notice, statements, bills, or other communications required to be given under this Agreement will be deemed will be deemed to be duly delivered if in writing and delivered to the other Party personally, sent by facsimile with confirmed delivery sheet, sent by electronic mail with confirmation of receipt, or sent by certified mail address to the other return-receipt postage prepaid as follows:

AS TO CITY:                      Director of Parks and Recreation  
    City of Saint Paul  
    400 City Hall Annex  
    25 W. 4th Street  
    Saint Paul, MN 55102

AS TO MANAGER:              O'Reilly Custom 3, LLC  
    10664 184th Ave NW  
    Elk River, MN 55330-5801

or to such other subsequent address as the respective parties shall designate in writing. The time of giving such notice or communication shall be deemed to be the time when the same is actually delivered to the other party.

- 15.3. Assignment. This Agreement may not be assigned without the consent of the other party and any attempt to assign without such consent will render the Agreement void.
- 15.4. Records, Dissemination of Information. Until the expiration of six years after the furnishing of goods, supplies or services pursuant to this contract, upon written request, the Contractor shall make available the books, documents, records, and accounting procedures at its offices at all

reasonable times for inspection or audit by City, the State Auditor, or other duly authorized representative. Contractor agrees to abide strictly by the statutes, rules and regulations of the Minnesota Government Data Practices Act, Statute Ch. 13, as well as any other applicable state or federal statutes, rules or regulations.

- 15.5. Amendments. Any alterations, amendments, deletions, or waivers of the provisions of this Agreement shall be valid only when reduced to writing and duly signed by the parties.
- 15.6. Captions and Heading. 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.
- 15.7. Entire Agreement. This Agreement constitutes the full and complete agreement between the parties and supersedes any prior negotiations or agreements.

IN WITNESS WHEREOF, the Parties have caused this AGREEMENT to be executed and delivered as of the date appearing on the first page hereof.

O'REILLY CUSTOM 3, LLC,

CITY OF SAINT PAUL:

\_\_\_\_\_  
Name, Title

\_\_\_\_\_  
Mayor, City of Saint Paul

\_\_\_\_\_  
Name, Title

\_\_\_\_\_  
Director of Parks and Recreation

\_\_\_\_\_  
Financial Services Director

\_\_\_\_\_  
City Clerk

Approved as to form:

\_\_\_\_\_  
Assistant City Attorney



**O'REILLY CUSTOM 3, LLC**  
**Exhibit B**  
**Performance Metrics**

**Performance metrics for contract renewal.** The performance metrics listed on this exhibit will be used to determine whether the City will agree to renew its management agreement with Manager (“Agreement”) under section 2.2 of the Agreement.

**Community engagement performance metrics for commission credit.** The performance metrics listed on this exhibit under the heading “Community Engagement”, in addition to being used as part of City’s determination whether to renew its agreement with Manager, will be used to determine whether Manager has earned all, part, or none of an available commission credit for community engagement, as described below. The first available commission credit is for the Annual Minimum Period beginning ~~April 1, 2019~~ October 1, 2018, and annual commission credits are available for each remaining year during which the Agreement is in effect.

**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 7.1 of the Agreement. Each review will examine the one-year period ending on the **March 31st** immediately preceding the review.

City will use only the final three 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.

**The performance metrics are as follows:**

Category 1. Manager’s Reinvestment into Manager-Owned Equipment and Facilities – 10 points.

10 points – more than \$10,000  
7 points - \$8,000 to \$9,999  
5 points - \$6,000 to \$7,999  
3 points - \$4,000 to \$5,999  
0 points - \$3,999 or less

Category 2. Manager’s Reinvestment into City-Owned Facilities – 10 points.

10 points – more than \$10,000  
7 points - \$8,000 to \$9,999  
5 points - \$6,000 to \$7,999  
3 points - \$4,000 to \$5,999  
0 points - \$3,999 or less

Category 3. Gross Revenue – 20 points.

- 20 points – more than \$1,500,000
- 15 points - \$1,000,000 to \$1,499,999
- 10 points - \$750,000 to \$999,999
- 0 points – less than \$750,000

Category 4. Community Engagement – 25 points.

5 points – Form Community Input Committee and develop and execute survey in conjunction with Neighborhood district Councils and Parks and Recreation.

20 points – The Community Input Committee will use the survey and reviews (through methods such as spot inspections by the Committee or secret shoppers) to determine the rating. Factors that will influence the rating include:

- Community Engagement – 5 points
- Customer Service – 3 points
- Community access to community rooms with enhanced amenities – 2 points
- Provide meeting rooms with enhanced amenities – 2 points
- Interior and exterior appearance of facilities that are managed and maintained by Manager – 2 points
- Employee performance – 2 points
- Customer satisfaction – 2 points
- Marketing and promotion of facilities – 2 points
- Cleanliness – 2 points
- Responsiveness and quality of service – 2 points
- Provide additional activities to the community – 2 points
- Outreach to Small, Women, and Minority owned businesses (SWMBEs) – 2 points

Manager will keep records relating to the preceding metrics. The rating for those metrics will be made by a Community Input Committee based at least in part on a review of Manager’s records, and the committee’s rating will be subject to the review, approval, and mutual agreement of the Manager and City’s Director of parks and Recreation.

*Commission credit for community engagement:*

- The following scores in the community engagement category will entitle Manager to the following commission credit to be applied against its next scheduled commission payment or payments to City:

<u>Score</u>	<u>Credit</u>
--------------	---------------

21-25 points	\$5,000
16-20 points	\$4,000
11-15 points	\$3,000
6-10 points	\$2,500
5 or fewer points	\$0

- Unless City agrees otherwise, commission credits may be used only to reduce the amount of Manager's future payment obligations, not to make up for any payment arrearage or to be converted into a payment from City to Manager.

Category 5. Agreement Compliance and Commission/Capital Investment Fund Payments.

- 10 points – all payments made on time; no violations of Agreement
- 5 points – 75% of payments made on time; fewer than 3 violations of Agreement
- 0 points – fewer than 75% of payments made on time; 3 or more violations of Agreement

Category 6. Café and Food Services.

Food services areas available and open to the public in excess of the Non-peak hours stated in the agreement.

- 15 points – open to the public more than 750 additional hours per year
- 10 points – open to the public more than 500 additional hours per year
- 5 points – open to the public more than 300 additional hours per year

Commission credit for off-peak season operation:

- The following scores in the Café and Food Services\_category will entitle Manager to the following commission credit to be applied against its next scheduled commission payment or payments.

<u>Score</u>	<u>Credit</u>
15 points	\$5,000
10 points	\$4,000
5	\$3,000

Category 7. Health Code Compliance.

- 10 points – 0 critical violations unaddressed after annual re-inspection

5 points – 1 critical violation unaddressed after annual re-inspection

0 points – 2 or more critical violation unaddressed after annual re-inspection.

**City's Agreement renewal decision will be made as follows:**

- If Manager's average total annual rating during the term is 75 points or higher, City will agree to renew the Agreement.
- If manager's average total annual rating during the term is between 60 and 74 points, City may, at its option, agree to renew the Agreement upon the same or renegotiated terms, or issue a request for proposals to replace Manager.
- If Manager's average total annual rating during the term is less than 60 points, city will not agree to renew the Agreement, and will issue a request for proposals to replace Manager.

**EXHIBIT C**

**INVESTMENTS PROPOSAL BY O'REILLY CUSTOM 3**

## EXHIBIT D

### CITY OWNED EQUIPMENT AT COMO LAKESIDE PAVILION LIST

#### City Assets:

Stainless Racks - 26  
Coat Racks - 6  
Round Tables - 29  
Rectangular Folding Tables - 13  
Square Tables (wood covered) - 20  
Square High Top Tables (wood covered) - 2  
Table Carts - 3  
Folding Chairs (metal) - 38  
Podiums - 2  
Projection Screen - 1  
Benches - 262  
Speakers - 3  
Eight Channel Sound Board - 1  
Empty Sound box - 1  
Portable Light Board in Case - 1  
Step Ladders (red fiberglass) - 2  
Sheet Music Stands - 21  
Theater Lights - 12  
Gas/Oven/Stove - 1 (replaced City owned)  
Chest Freezer (white with glass tops) - 1  
Dance Floor Panels and Cart - 1 set  
Picnic Tables (Patio) - 5  
Theater Stage Light - 1  
Ice Maker - 1 (replaced City owned)  
Hood Vent (over dishwasher) - 1  
Hood Vent (over stove/oven) - 1  
Side-by-Side Cooler - 1  
Traulson Refrigerator - 1 (repl. City owned)  
Floor Safe - 1  
KOLPAK Walk-In Cooler (Prep Kitchen) - 1  
Stainless Racks - 26

Coat Racks - 6  
Round Tables - 20  
Rectangular Folding Tables - 13  
Square Tables (wood covered) - 20