

# **City of Scottsbluff, Nebraska**

**Monday, March 29, 2021**

**Regular Meeting**

## **Item Reports2**

**Council to discuss and consider action on the License and Management Agreement with Kirk Bernhardt for the Use of Municipal Property for Softball League and authorize the Mayor to sign the Agreement.**

**Staff Contact: Rick Deeds, Park Superintendent**

## **License and Management Agreement for Use of Municipal Property for Softball League**

This License and Management Agreement (the “License”), dated for reference purposes only as of the \_\_\_ day of March, 2021, is entered into by and between the City of Scottsbluff, Nebraska, a Municipal Corporation (“Licensor”) and Kirk Bernhardt (“Licensee”).

### **RECITALS**

- A. Licensor owns the real estate known as Lacy Park (the “Premises”).
- B. The Premises includes several softball playing fields, a concession stand and associated improvements and structures.
- C. Licensee is interested in managing a community softball league, to include men’s and coed teams.
- D. Licensor recognizes the requirements associated with managing the Premises as a result of the COVID-19 situation and is not able to ensure that operation of the Premises during all practices and games follows the current applicable rules for safe operation.
- E. Licensee desires to utilize the Premises for an adult men’s and coed softball league (the “softball league”) and is willing to enter into this License in order to manage the softball league on the Premises in accordance with the License.
- F. Licensor desires to enter into this License whereby Licensee shall license and use the Premises for a softball league subject to the following terms.

NOW THEREFORE, Licensor and Licensee agree as follows:

1. Licensed Premises. Licensor desires to license to Licensee the Premises. Such area includes the ball field(s) and the improvements associated with the ball field(s), including, but not limited to, the bleachers, stands, restroom facilities, drinking fountain(s), and concession stand. Licensor licenses the Premises to Licensee, and Licensee licenses the Premises from Licensor, for the License Term, and Licensee agrees to pay the license fee, and to perform all of Licensee’s obligations described herein. The parties agree that Licensee shall have the non-exclusive right to use the Premises and such other portions of the Premises as is necessary for Licensee to access and use the Premises for a softball league. Licensee understands he will be given priority for use of the Premises, however, Lacy Park will remain open to the public and the park, shelters and fields may be used by the public when not needed for softball league games and tournaments.

- 1 -

2. Management. The parties acknowledge and agree that Licensee shall be solely responsible for the operation and management of the Premises during the License Term when the Premises are being utilized for organized softball league games and practices. Licensee shall be responsible for operating and managing the Premises in accordance with all applicable rules and regulations of any governmental entity with jurisdiction over the Premises, and all resolutions and ordinances of Licensor (the "Rules"), including the ban on possession and consumption of alcohol. Licensee represents and covenants to Licensor that Licensee is familiar with the Rules and that Licensee shall operate and manage the Premises in accordance with the Rules. Licensee shall ensure that all coaches or appropriate personnel utilizing the Premises shall conduct themselves and their teams in accordance with the Rules. Licensee agrees to provide training and education as appropriate to all team managers to ensure that the Rules are followed.

3. Term. The License shall be for a term of four (4) months commencing effective as of May 1, 2021. Either party shall have the right to terminate this License by providing the other party with no less than thirty (30) days prior written notice. Such notice shall specify the date that the License shall terminate. Notwithstanding the foregoing or any other provision herein, the parties acknowledge and agree that Licensor retains the right, at any time, to terminate this License by written notice to Licensee if such termination is required under the applicable Rules or any amendment, replacement, or supplement thereto, or in the event Licensor determines, in Licensor's discretion, that Licensee has failed to manage and operate the Premises in accordance with the Rules. Any such termination shall not relieve the Licensee of the obligations of Licensee hereunder that have occurred or accrued hereunder prior to the termination.

4. License Fee. The parties agree the License Fee for the term of this License shall be \$3,000.00, payable on or before June 1, 2021.

5. Acceptance of Premises. By taking possession of the Premises, Licensee accepts the Premises in its current condition. Licensee further agrees that Licensor has not provided Licensee with any warranty or representation as to the condition of the Premises and that Licensee has investigated the Premises and has determined to Licensee's satisfaction that the Premises is satisfactory for Licensee's proposed use. Licensee shall secure Licensor's permission prior to making any improvements or alterations of any nature to the Premises. Licensor reserves the right to withhold its consent in Licensor's sole discretion.

6. Quiet Enjoyment. Upon Licensee observing and performing all of the terms, covenants and conditions to be observed and performed by Licensee hereunder, Licensee shall have possession of the Premises for the entire term hereof, subject to all of the provisions of this License.

7. Maintenance. a. Licensee shall, during the term of this License, and at his sole expense, keep the Premises in good order and repair, reasonable wear and tear excepted. Licensee shall be responsible to maintain the Premises in accordance with the Rules so that the Premises may be utilized for the purposes set forth in this License. Such obligation shall include, but not be limited to, cleaning restroom facilities while players and fans are present and after softball league use so they are left as they were found. Licensee shall also ensure that the concession stand, if any, is only allowed open if all requirements set forth in the Rules are followed. Licensee shall ensure that the stands or bleachers or other facilities are only utilized in accordance with the applicable Rules and that any spectators are those permitted to be in attendance at the Premises in accordance with the Rules. Licensor shall be responsible for any mowing, irrigation, or application of fertilizer or weed control on the Premises in accordance with past practices of Licensor and as set forth below.

b. Licensor shall prepare four (4) fields on the Premises, two (2) times per week which is approximately thirty-six (36) times throughout the term. Licensor will mark the batter's box and foul lines to the outfield fence for scheduled games. Licensor will also fill, pack, rake and drag the infields prior to chalking to insure all low spots are filled in around the batter's box, area surrounding the bases and any other areas that do not represent a level playing surface. The Licensor will maintain proper moisture levels to minimize dust and erosion of the playing surface and to expedite the packing of the soil as desired, secure bases in a level position, and make a reasonable attempt to prepare the Premises during wet and rainy conditions. The decision on whether or not to play softball on the fields will be made by the Licensee and shall take place on the day of the scheduled game, but only after consultation with the Licensor. The Licensor will begin preparing the Premises at approximately 7:00 a.m. on the day of scheduled games and will not be responsible for poor field conditions caused by others after the completion of the preparation of the Premises for that day. Licensor will provide the materials for the operation and maintenance of the fields. However, the Licensee must keep the restrooms and concession stand clean, neat and orderly and only operated according to the Rules, if they are allowed to be operated. Licensee agrees to promptly notify Licensor of any maintenance or repair that is the responsibility of Licensor hereunder. Provided, however, Licensee shall be responsible for any of the same if they are caused by Licensee's misuse or damage to the Premises. If Licensee has a tournament, he must notify Licensee in advance, and Licensee must provide his own materials and machines to pull the drag mat, but may use the Licensor's chalk applicator, batter box template and mat drag and arrange to have the septic system pumped out.

8. Insurance. During the License Term, Licensee shall, at his own cost and expense, procure and continue in force such insurance policies as are required by Licensor. Such insurance shall, at a minimum include commercial general liability insurance with a combined policy limit of at least \$1,000,000. Licensor shall be named as an additional named insured on all such policies of

insurance. Each original policy or a certified copy thereof, or a satisfactory certificate of the insurer evidencing insurance carried with proof of payment of the premium, shall be deposited with Licensor prior to the commencement date of the term hereof.

9. Licensee's Indemnification. Licensee agrees to indemnify and hold Licensor harmless from and against any and all claims, damages, or causes of action and all liability, cost or expense specifically including court costs and all reasonable attorney fees to the extent the same arise out of or in any way connected with Licensee's or Licensee's agents' use of the Premises during the term hereof, whether the same are raised during the term hereof or after.

10. Assignment. Licensee shall not assign, sub-license, or otherwise transfer, by operation of law or otherwise, this License or any interest herein without the prior written consent of Licensor, which consent may be withheld in Licensor's sole discretion.

11. No Re-license. Licensor's consent to any assignment, encumbrance, sub-license, occupation, or other transfer shall not release Licensee from any of Licensee's obligations hereunder or be deemed to be a consent to any subsequent assignment, sub-license, or occupation unless Licensor agrees in writing. The collection or acceptance of rent or other payment by Licensor from any person other than Licensee shall not be deemed the acceptance of any assignee or sub-licensee as the Licensee hereunder or a release of Licensee from any obligation under this License.

12. Default. A Default shall occur upon the failure by Licensee to observe or perform any of the provisions of this License if such failure continues for a period of ten (10) days, or such other period if this License specifically provides a different period for a particular failure, after written notice by Licensor to Licensee of such failure. However, with respect to any failure which cannot reasonably be cured within ten (10) days, a Default shall not be considered to have occurred if Licensee commences to cure such failure within such ten (10) day period and continues to proceed diligently with the cure of such failure.

13. Remedies. On the occurrence of a Default, Licensor may at any time thereafter, with or without notice or demand and without limiting Licensor in the exercise of a right or remedy which Licensor may have by reason of such default or breach, exercise any rights or remedies Licensor may have at law or in equity, including, but not limited to, one or more of the following:

- A. declare the License at an end and terminated;
- B. sue for the rent due and to become due under the License;
- C. sue for any damages sustained by Licensor;

- D. cure any breaches of Licensee's obligations to pay utilities, provide insurance, or properly maintain the Premises.

14. Non-Exclusive Remedies. The remedies of Licensor set forth in Section 13 shall not be exclusive, but shall be cumulative and in addition to all rights and remedies now or hereafter provided or allowed by law or equity, including, but not limited to, the right of Licensor to seek and obtain an injunction and the right of Licensor to damages in addition to those specified herein.

15. Default by Licensor. Licensor shall not be liable to Licensee if Licensor is unable to fulfill any of its obligations under this License, if Licensor is prevented, delayed, or curtailed from so doing by reason of any cause beyond Licensor's reasonable control. Licensor shall not be in default unless Licensor fails to perform obligations required of Licensor within a reasonable time, but in no event later than thirty (30) days after written notice by Licensee to Licensor, specifying Licensor's failure to perform such obligation; provided, however, that if the nature of Licensor's obligation is such that more than thirty (30) days are required for performance, then Licensor shall not be in default if Licensor commences performance within such thirty (30) day period and thereafter diligently prosecutes its efforts to satisfy such obligation.

16. Entry by Licensor. Licensor and its agents and employees shall have the right to enter the Premises at all reasonable times and during normal business hours, to examine the same, to make such maintenance and repairs of the Premises and such maintenance, repairs, alterations, decorations, additions, and improvements to other portions of the Premises as Licensor requires.

17. Notices. Any notices required or permitted to be given under this License shall be in writing and may be delivered personally or by certified mail to the other party at the address set forth below. Any notice given by mail shall be deemed received two (2) business days following the date such notice is mailed as provided in this Section. Any notice given by electronic mail or personally delivered shall be effective upon receipt. Either party may change its address for purposes of this Section by giving the other party written notice of the new address in the manner set forth above.

- a. Licensor's Address: 2525 Circle Drive  
Scottsbluff, NE 69361
- b. Licensee's Address: 200123 Ridge Drive  
Gering, NE 69341

18. Applicable Laws. This License shall be governed by and construed in accordance with the laws of the State of Nebraska.

19. Modification. This License contains all of the terms and conditions agreed upon by the Licensor and Licensee with respect to the Premises. All prior negotiations, correspondence, and agreements are superseded by this License and any other contemporaneous documents. This License may not be modified or changed except by written instrument signed by Licensor and Licensee.

20. Relationship of Parties. Neither the method of computation of the License Fee nor any other provisions contained in this License nor any acts of the parties shall be deemed or construed by the parties or by any third person to create the relationship of principal and agent or of partnership or of joint venture or of any association between Licensor and Licensee, other than the relationship of Licensor and Licensee.

21. Waiver. The acceptance of the License Fee or other payments by Licensor, or the endorsement or statement on any check or any letter accompanying any check for the license fee or other payment shall not be deemed an accord or satisfaction or a waiver of any obligation of Licensee regardless of whether Licensor had knowledge of any breach of such obligation. Failure to insist on compliance with any of the terms, covenants, or conditions hereof shall not be deemed a waiver of such terms, covenants, or conditions, nor shall any waiver or relinquishment of any right or power hereunder, at any one time or more times, be deemed a waiver or relinquishment of such rights and powers at any other time or times or under any other circumstance(s).

22. Partial Invalidity. If any term or provision of this License or the application thereof to any person or circumstances shall to any extent be invalid or unenforceable, the remainder of this License or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable shall not be affected thereby, and each term and provision of this License shall be valid and enforced to the fullest extent permitted by law.

23. Interpretations. Any uncertainty or ambiguity existing herein shall not be interpreted against either party because such party prepared any portion of this License but shall be interpreted according to the application of rules of interpretation of contracts generally.

24. Memorandum of License. Licensee shall not be permitted to file a memorandum of the License or other documents in the real estate records of the County including the Premises.

25. Binding Effect. This License shall be binding upon and shall inure to the benefit of Licensor, Licensee, and their respective successors and assignees.

26. Counterparts. This License may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

[Execution Page Follows]

[Execution Page]

“LICENSEE”

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Kirk Bernhardt

“LICENSOR”

City of Scottsbluff, Nebraska,  
A Municipal Corporation,

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By: Jeanne McKerrigan, Mayor