

**FACILITY USE AGREEMENT
BETWEEN
THE CITY OF SALEM
AND
SALEM ON ICE, LLC**

This Facility Use Agreement (hereinafter “Agreement”) is made and entered into by and between the City of Salem, an Oregon municipal corporation (hereinafter the “City”), and Salem on Ice, LLC, a Oregon Limited Liability Corporation, (hereinafter the “PROVIDER”), collectively referred to herein as the “Parties,” for the use of a portion of Riverfront Park (hereinafter the “PREMISES”) for a seasonal ice skating rink (hereinafter the “FACILITY”).

RECITALS

1. The CITY is a public body that owns the PREMISES, certain real property located at 200 Water Street NE, known as Riverfront Park and described in Exhibit A; and
2. The PROVIDER is a for-profit organization engaged in providing seasonal ice rink facilities and desires to operate the FACILITY in Salem to be enjoyed by residents and visitors in the area; and
3. The PROVIDER desires to use the PREMISES to operate an ice skating rink and to store, with appropriate screening, certain equipment necessary to operate a temporary ice skating rink; and
4. The Parties desire to enter into an Agreement in which the CITY and the PROVIDER agree to terms regarding permits, fees, obligations, and other provisions for the FACILITY; and
5. The Parties find that the performance of this Agreement will benefit the public and is in the best interest of the CITY and the PROVIDER.

AGREEMENT

NOW THEREFORE, in consideration of the mutual promises, benefits, and covenants set forth herein, the Parties hereby agree as follows:

A. OBLIGATIONS:

1. The CITY shall grant the PROVIDER a permit to be a Vendor in a City Park to operate the FACILITY and shall reserve the area identified as the PREMISES through the Facility Use Permit & Agreement process and per the provisions contained in this Agreement, SRC 94.200, and other CITY procedures and policies.
2. The CITY shall maintain Riverfront Park, mow and aerate the turf, and maintain restroom facilities, according to the City's routine maintenance schedule, which is subject to change without notice.
3. The CITY will collaborate with the PROVIDER and, to the degree possible, conduct maintenance activities in a manner that supports the FACILITY.
4. In lieu of a park rental fee, the CITY shall charge the PROVIDER Public Works fees including a permit application/processing fee of \$51 and a Vendor in a City Park permit for \$52 per month. If the operation of FACILITY includes amplified sound, a sound permit will be required. Amplified sound is not allowed before 7 a.m. or after 10 p.m. unless otherwise approved by the City.
5. The PROVIDER shall obtain the necessary permits from City of Salem, including Planning, Building and Safety, Community Enforcement, and Fire, as well as from Marion County Health Department, and shall maintain the FACILITY in a safe condition during the period the PROVIDER is operating the FACILITY.
6. The PROVIDER may place temporary signage or other markers related to activities conducted at the FACILITY during the period and must obtain all necessary permits or approvals required for placement.
7. The PROVIDER assumes responsibility for the installation of a temporary electrical service with a separate meter to support the FACILITY and assumes responsibility for all associated fees and charges for electricity use.

The CITY will provide water to the FACILITY free of charge.

8. The PROVIDER shall not have any lighting facing the river and shall not have red or green lights that may interfere with navigation on the Willamette River.
9. The PROVIDER shall not display any advertising or sponsorships on the exterior of the FACILITY.
10. The PROVIDER shall not begin installation of the FACILITY before November 1 of any year of operation. The FACILITY and installation shall be completed no later than November 15 of any year of operation. The FACILITY must be removed no earlier than January 15 of any year of operation, but must be removed by February 5 of any year of operation unless otherwise approved in advance by the City.
11. The PROVIDER may only conduct business between the hours of 5 a.m. to 12 a.m., seven days a week, unless otherwise approved in advance by the City.
12. The PROVIDER shall not allow smoking, vaping, or drug use on the PREMISES. Alcohol is also prohibited unless approved under separate permit.
13. The PROVIDER shall restore the PREMISES to the condition as it existed prior to the PROVIDER's use of the PREMISES, including removal of all equipment and restoration of any damage to the irrigation system or other property.
14. The PROVIDER shall provide a report to the City within 90 days of the date the FACILITY was removed summarizing revenue received, expenses, and number of customers/participants in attendance by month, or partial month, during the period the FACILITY was operated.
15. The City shall provide a report to the PROVIDER within 90 days of the date the FACILITY was removed regarding any costs for restoration of the turf and any other expenses incurred as a result of operating the FACILITY on the PREMISES.

B. OWNERSHIP OF FIXTURES AND IMPROVEMENTS:

1. All improvements to be made by the PROVIDER to the PREMISES must be approved in advance by the CITY. Any improvements to the PREMISES by the PROVIDER not approved in advance by the CITY may be removed by the CITY at its sole discretion.
2. Any temporary improvements made to the PREMISES by the PROVIDER shall be considered the property of the PROVIDER while the improvement remains on the PREMISES. Any such improvement may become the property of the CITY if any of the following conditions are met:

- a. The improvement cannot be removed by the PROVIDER without causing substantial damage to the PREMISES, as determined in advance by the CITY at its sole discretion; or
 - b. The improvement is not removed by the PROVIDER within fourteen (14) calendar days after the date the Facility was removed; or
 - c. The improvement is not removed by the PROVIDER within fourteen (14) calendar days after the termination of this Agreement.
3. Any fixtures installed or improvements made to the PREMISES by the PROVIDER during the term of this Agreement that the PROVIDER cannot remove per the terms in Subsection B.2 above shall become and remain the property of the CITY without further consideration.

C. GENERAL CONDITIONS:

1. The PROVIDER is an independent organization and is not an employee, officer, volunteer, or agent of the CITY for any purpose whatsoever.
2. The PROVIDER is not entitled to, and expressly waives any and all claims to CITY benefits, including but not limited to: health insurance, disability insurance, paid leave, and retirement.
3. The PROVIDER shall not assign, transfer, encumber, subcontract, or sublet any interest in this Agreement.
4. In the event that any provision of this Agreement is found by a court of competent jurisdiction to be unenforceable, such provision shall not affect the other provisions, but such unenforceable provision shall be deemed modified to the extent necessary to render it enforceable, preserving to the fullest extent permitted the intentions of the PROVIDER and the CITY as set forth in this Agreement.
5. The following laws of the State of Oregon are hereby incorporated by reference into this Agreement: *Oregon Revised Statutes* (ORS) 279B.220, ORS 279B.225, ORS 279B.230, and ORS 279B.235.
6. The PROVIDER agrees that no person shall, on the grounds of race, religion, color, sex, marital status, domestic partnership, familial status, national origin, age, mental

or physical disability, sexual orientation, gender identity, or source of income, suffer discrimination in the performance of this Agreement when employed by the PROVIDER.

7. The PROVIDER agrees to comply with all applicable requirements of federal and state civil rights and rehabilitation statutes, rules, and regulations. Further, the PROVIDER agrees not to discriminate against minority-owned, women-owned or emerging small businesses or business enterprises owned or controlled by or that employ a disabled veteran in awarding subcontracts as required by ORS 279A.110.
8. The PROVIDER shall abide by all applicable regulations, laws, and ordinances of the CITY, the State of Oregon, Marion County, and any federal agency in fulfillment of its obligations under this Agreement.
9. All subject employers working under this Agreement are either employers that will comply with ORS 656.017 or employers that are exempt under ORS 656.126.
10. This Agreement sets forth the entire understanding between the Parties with respect to the subject matter hereof. All previous written and oral Agreements, promises, representations, negotiations, and course of dealings are hereby superseded and terminated. No evidence of any oral waiver or modification of this Agreement shall be offered or considered in any proceeding to determine or enforce the provisions of this Agreement.
11. Subject to the limitations and conditions set forth in the Oregon Constitution and the Oregon Tort Claims Act, the CITY agrees to indemnify, defend, save, and hold harmless the PROVIDER from and against any and all damages, expenses, and costs of any kind or nature whatsoever sustained or incurred as a result of any act or omission arising out of, relating to, or connected with the performance of this Agreement by the CITY, its officers, employees, volunteers, or agents.
12. This Agreement shall be governed by the laws of the State of Oregon without regard to conflict of laws principles. Exclusive venue for litigation of any action arising under this Agreement shall be in the State of Oregon Circuit Court for Marion County unless exclusive jurisdiction is in federal court, in which case exclusive venue shall be in the federal district court for the District of Oregon. Each party expressly waives any and all rights to maintain an action under this Agreement in any other venue and expressly consents that, upon motion of the other party, any case may be dismissed or its venue transferred, as appropriate, so as to effectuate this choice of venue.
13. Neither party to this Agreement shall hold the other responsible for any damages or delay in performance caused by acts of God, strikes, lockouts, accidents, or other events beyond the control of the other or the other's officers, employees, or agents.

14. The PROVIDER shall indemnify, defend, save, and hold harmless the CITY, its officers, agents, volunteers, and employees from and against any and all liability, claims, damages, losses, demands, expenses, and costs of any kind or nature whatsoever, including appeals and attorneys' fees, sustained or incurred as a result of any act or omission arising out of, relating to, or connected with the performance of this Agreement by the PROVIDER, its officers, employees, contractors, volunteers, or agents, or the activities of any person for whose actions the PROVIDER is legally responsible.
15. The failure of either party hereto to insist upon strict performance of any of the terms and conditions of this Agreement, or to exercise any option herein conferred in any one or more instances, shall not be construed to be a waiver or relinquishment of such, or any such other terms, conditions, covenants, or Agreements but the same shall be and remain in full force and effect.
16. The PROVIDER acknowledges that information submitted to the CITY is open to public inspection under the Oregon Public Records Law, ORS 192.410-192.505. The PROVIDER is responsible for becoming familiar with and understanding the provisions of the Oregon Public Records Law.
17. The PROVIDER acknowledges the permit to install a temporary ice rink on the PREMISES does not provide exclusive use of the Park and does not prohibit public use of open park areas.

D. MISCELLANEOUS:

1. The PROVIDER is responsible for becoming familiar with, and abiding by, the CITY's Park Operating Policy provisions as set forth in *Salem Revised Code* 94.200.
2. The PROVIDER is responsible for collecting, removing, and disposing of all garbage and litter generated during the period the PROVIDER has reserved the PREMISES. If the PROVIDER fails to collect, remove, and dispose of garbage and litter, the CITY may cancel any Facility Use Permit & Agreement and terminate this Agreement. If the PROVIDER fails to collect, remove, and dispose of all garbage and litter, the CITY may charge the PROVIDER for the cost of cleanup and may revoke the PROVIDER's Facility Use Permit and Agreement.
3. PROVIDER is responsible for providing adequate supervision of the FACILITY so that patrons are protected against injury and harassment, public and private property is protected against damage or loss, and the public peace is not disrupted.

4. The PROVIDER shall be responsible for determining if portable restrooms are required during the period PROVIDER has reserved the PREMISES. The PROVIDER must obtain permission from the CITY in advance before PROVIDER places portable restrooms on PREMISES. If the PROVIDER determines portable restrooms are required, the PROVIDER shall be responsible for the following:
 - a. Contracting with and paying a service provider;
 - b. Placing portable restrooms at location(s) approved in advance by the CITY;
 - c. Ensuring portable restrooms are properly anchored to reduce the risk of vandalism;
 - d. Ensuring portable restrooms are pumped, cleaned, and supplied as required;
 - e. Ensuring sufficient ADA portable restrooms are provided; and
 - f. Having portable restrooms removed when no longer required.

The PROVIDER shall be responsible for any damage to the CITY property caused by improper use, vandalism, or inadequate maintenance of portable restrooms. If the PROVIDER fails to correct any damages to the CITY's property caused by improper use, vandalism, or inadequate maintenance of portable restrooms placed by the PROVIDER, the CITY may charge the PROVIDER for the cost to correct the damages and may revoke the PROVIDER's Facility Use Permit and Agreement.

5. The CITY shall not be responsible for any lost, stolen, or damaged equipment owned by the PROVIDER and located at the PREMISES.
6. The City reserves the right to suspend operation of the FACILITY when in the opinion of the City Manager, Chief of Police, Fire Chief or Director of Public Works or their designees, conditions at the FACILITY are such that the public's safety is in danger, private or public property is not being adequately protected, park rules are being violated, or the public peace is disrupted. Suspension of operations will continue until such time as the offending conditions are remedied.

E. INSURANCE:

The PROVIDER shall obtain and maintain in effect during the term of this Agreement a policy or policies of liability insurance, including commercial general liability or comprehensive general liability insurance, with combined single limits, or the equivalent of \$2,000,000 (two million dollars) for each occurrence for bodily injury, death, or property damage unless otherwise approved in writing by the CITY's Risk Manager. Such insurance shall be per occurrence and not on a "claims made" form. Such insurance shall also include contractual liability coverage for the indemnity provision set forth in this Agreement. Such insurance shall cover as additional insured the CITY, its officers, employees, agents, and volunteers. As evidence of the insurance coverage required by this Agreement, the PROVIDER shall furnish an endorsement listing the CITY as an additional insured prior to the Effective Date of this Agreement, subject to approval by the CITY's Risk Manager, which approval shall not be unreasonably withheld. The PROVIDER shall be financially responsible for all pertinent deductibles, self-insured retention, and/or self-insurance. Such insurance shall be issued by a carrier that is authorized to conduct business as an insurance company in the State of Oregon and shall not be canceled or altered without a minimum of thirty (30) days' prior written notice to the CITY.

F. NOTICE

Whenever notice is required or permitted to be given under this Agreement, such notice shall be given in writing to the other party by personal delivery; by sending via a reputable commercial overnight courier; or by mailing using registered or certified United States mail, return receipt requested and postage prepaid, at the addresses set forth below:

If to the CITY: Public Works Department
 City of Salem
 Attn: Becky George, Recreation Services
 555 Liberty Street SE, Room #325
 Salem, OR 97301-3503

If to the PROVIDER:

Notice delivered by personal delivery shall be deemed to be given upon actual receipt.
Notice sent by overnight courier shall be deemed to be given five (5) days after dispatch.
Notice sent by United States mail shall be deemed to be given five (5) days after mailing.

G. TERMS AND TERMINATION:

1. Unless sooner terminated as provided herein, this Agreement shall be effective on the latest date of signature (the "Effective Date") and will remain in effect through and including June 30, 2018.
2. The agreement may be extended by mutual agreement through an annual renewal for up to four additional one-year periods. Upon completion of the first year, and review of the PROVIDER's annual report containing financial data as well as a report by the City summarizing costs incurred as a result of the facility on the PREMISES, the parties will negotiate an amendment to address profit sharing.
3. This Agreement may be terminated by mutual written correspondence by the Parties at any time.
4. Either party may terminate this Agreement for cause by providing the other party with not less than fourteen (14) days prior written notice of the alleged breach and providing the breaching party with the opportunity to cure. If the alleged breach is not cured within fourteen (14) days after receiving written notice, the non-breaching party may terminate this Agreement. Such termination is in addition to and not in lieu of any other remedy at law or equity.
5. This Agreement shall remain in effect until replaced, renewed, or terminated.
6. After November 1, 2017, the CITY may terminate the Agreement for any reason and at its sole discretion with sixty (60) days prior written notice to the PROVIDER.
7. The PROVIDER shall notify the CITY prior to the PROVIDER disbanding or otherwise ceasing operation. The Agreement will be terminated upon the date the CITY receives this notice from the PROVIDER.

H. MODIFICATIONS:

This Agreement may be amended or modified only by written instrument executed with the same formalities as this Agreement.

I. SIGNATURES:

The Parties, by their signatures, acknowledge having read this Agreement, understand it, and agree to be bound by its terms and conditions. The individual signing this Agreement on behalf of his or her respective party hereby certifies that such signature has been authorized by his or her party and that the individual has the authority to act on behalf of and to bind his or her party.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed in their respective names by their authorized representatives as of the dates set forth below:

SALEM ON ICE, LLC
(PROVIDER)

CITY OF SALEM, OREGON
(CITY)

Troy Acor, Member
Salem On Ice, LLC

Steven D. Powers
City Manager

Date: _____

Date: _____

APPROVED

Peter Fernandez, PE
Public Works Director

Date