MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF RAPID CITY, BLACK HILLS SPORTS, INC., AND FIRST INTERSTATE BANK FOR THE CONSTRUCTION OF RENOVATIONS AND IMPROVEMENTS AT FITZGERALD STADIUM.

This Agreement is made and entered into this ____ day of July, 2020, by and between the CITY OF RAPID CITY (the “City”), a South Dakota municipal corporation, located at 300 Sixth Street, Rapid City, South Dakota 57701, BLACK HILLS SPORTS, INC. (“Black Hills Sports”), a South Dakota non-profit corporation, located at 2700 Ploof Drive, Rapid City, South Dakota, 57702, and FIRST INTERSTATE BANK (“First Interstate”), a Montana banking corporation, located at 333 West Boulevard, Suite 100, Rapid City, South Dakota, 57701.

RECITALS

WHEREAS, the City solicited potential community projects to receive funding from the City’s Vision Account; and

WHEREAS, Black Hills Sports, which leases Fitzgerald Stadium (the “Stadium”) from the City, requested monies from the Vision Account be used to fund renovations and upgrades to the Stadium (the “Project”); and

WHEREAS, the primary user of the Stadium is Post 22, an American Legion baseball team; and

WHEREAS, the Stadium was built in the 1950’s and has not been significantly upgraded or renovated in many years; and

WHEREAS, the Project will improve accessibility, seating, concessions, ticketing, dugouts and field; and

WHEREAS, the Project proposal was divided into several phases and was estimated to cost approximately $5 million dollars; and

WHEREAS, the City formed a citizen committee to review and make funding recommendations regarding the proposed community projects which sought money from the Vision Account; and

WHEREAS, the City Council reviewed the citizen committee’s recommendations at its January 31, 2019 meeting and awarded the Project $2.3 million dollars in Vision funding over three years; and

WHEREAS, the City Council revisited the Project at its meeting on March 18, 2019 meeting and by adjusting the amount of money from the Vision Account and using money from the City’s Capital Improvement Plan (“CIP”) Fund the City Council allocated the full $5 million dollars to the Project; and
WHEREAS, due to the changes in the Project’s allocation, approximately $1,360,000 in funding will not be available until after construction of the Project is scheduled to be completed; and

WHEREAS, Black Hills Sports has been able to obtain a commitment to finance the balance of the Project’s construction costs so the renovations can be completed by the 2021 season; and

WHEREAS, several financial institutions are participating in the loan, with First Interstate serving as the primary lender and the financial institution the parties will be dealing with directly; and

WHEREAS, the financial institutions loaning Black Hills Sports the money to complete the Project are asking the City to commit to paying the balance of the funds the City has budgeted to pay for the Project after 2021 to partially repay the Project loan; and

WHEREAS, Black Hills Sports and the financial institutions understand that the City’s total financial commitment is $5 million dollars and is based on the payment schedule approved by the City Council at its March 18th meeting; and

WHEREAS, Black Hills Sports and the financial institutions involved agree and acknowledge that any gap between the amount financed and what the City is required to pay is the sole responsibility of Black Hills Sports; and

WHEREAS, without the gap loan funds, the City does not have sufficient funds to complete the Project as bid and will not be able to start construction; and

WHEREAS, the parties desire to memorialize their understanding and agreement of how the City funds and the private financing obtained by Black Hills Sports will be used to pay for the completion of this Project.

NOW THEREFORE, the parties hereby covenant and agree as follows:

1. The City will agree to expend up to a maximum of $5 million dollars to help fund the construction of the renovations and upgrades to Fitzgerald Stadium in a manner consistent with Black Hills Sport’s application for Vision funding. If the total cost of the Project exceeds this amount, the parties agree any additional costs will be the sole responsibility of Black Hills Sports. The City has agreed to fund the Project through use of both the City’s Vision and Capital Improvement’s Fund. The allocation of monies by year and fund are shown on Exhibit A, which is attached hereto and incorporated herein. Any funds not expended in the year identified may be carried over and expended in any subsequent year in addition to any amounts budgeted for payment in the subsequent year. The parties acknowledge the funds the City is committing to help construct this Project constitute only a portion of the total funds needed to complete the Project as designed and the City is under no legal obligation to provide any additional funds. In the event of a shortfall in the funds needed to complete the Project, the parties will either need to
make changes to the scope of the Project that decrease the total project costs, or Black Hills Sports will need to obtain additional funds to make up the difference in the total cost.

2. The City has received and awarded a bid to construct the Project on June 15, 2020. The total cost of the Project based on the bid exceeds the amount of money the City has budgeted for this Project as outlined in Exhibit A. The parties also desire to have the Project constructed in one phase and have it completed so that the renovated stadium is ready for use by the 2021 baseball season. In order for that to happen, Black Hills Sports has obtained a loan in the amount of $1,800,000 as a bridge loan to fund the balance of the construction costs and ensure the Project is completed on time. The loan they have obtained is a participation loan involving several financial institutions, but the primary institution that will be overseeing the loan is First Interstate. The parties understanding is agree that the City will use the monies budgeted for this Project through 2021 to pay the contractor for the work performed on the Project. The City has also expended monies for design and pre-construction expenses prior to awarding the bid that are also included in the $5 million dollars allocated for the Project. Since this amount will not be sufficient to pay the balance of the Project costs and get the Project closed out upon completion, the private financing obtained by Black Hills Sports will be used to pay for the balance of the construction costs in order to complete the Project in 2021. It is agreed by the intent of the parties that the money the City has budgeted for the Project in 2023 and 2024 will be is hereby assigned to First Interstate in order to help repay the gap loan obtained by Black Hills Sports. The parties’ intent is that the monies budgeted for the Project in 2023 and 2024 shall be paid directly to First Interstate as soon as such funds are available, unless this understanding is later modified by mutual written agreement of all the parties hereto. Based on the amounts identified in Exhibit A, the parties recognize there will be approximately $1,360,691 remaining to be paid from the City’s Vision and CIP Accounts to First Interstate in 2023 and 2024 to help pay off Black Hills Sports’ loan. Black Hills Sports and First Interstate acknowledge that since the City funds in 2023 and 2024 will be insufficient to repay the entire loan balance, so long as the City pays First Interstate the monies identified in Exhibit A, in the year they are budgeted, the remainder of any monies owed on the loan is the sole responsibility of Black Hills Sports.

3. The parties acknowledge the City’s pledge to pay and assignment of the funds identified in this Agreement as partial security for the loan is being relied upon by First Interstate in making the loan to Black Hills Sports. The parties further acknowledge that it is not the intent of the City to fully guarantee Black Hills Sport’s loan and that so long as the City makes the payments to First Interstate in 2023 and 2024 of the funds identified in Exhibit A, First Interstate will have no claim against the City for any breach, or default, of its loan agreements with Black Hills Sports. First Interstate further acknowledges that in the event of any breach or default by Black Hills Sports, the payment of any amounts due First Interstate pursuant to this Agreement cannot be accelerated and will remain payable in the years they are currently budgeted.

4. The Mayor and Finance Officer are authorized by the City Council to sign and execute any agreements and written instruments necessary and convenient to carry out the purposes of this Agreement. Any agreements or instruments executed pursuant to this authorization must be consistent with this MOU and the Mayor and Finance Officer are not authorized to allocate any additional funds, or pledge additional security, for the financing identified in this Agreement without the express authorization of the City Council.
5. The City will be solely responsible for designing and constructing the Project contemplated in this Agreement. The City agrees to include representatives of Black Hills Sports in the design and construction process and give due consideration to input from those representatives, but should the City and Black Hills Sports disagree about, and be unable to resolve, any issue relating to the design and construction of the Project, the determination of the City shall be final.

6. Due to the use of public funds in the construction of this Project, the parties acknowledge the selection of contractors for the construction of the improvements contemplated by this Agreement shall comply with all provisions of South Dakota law regarding the expenditure of public funds. These provisions are contained in Chapters 5-18A through 5-18D of the South Dakota Codified Laws.

7. Black Hills Sports acknowledges the City’s commitment to provide $5 million dollars towards the completion of this Project is good and sufficient consideration for the promises it has made herein. First Interstate acknowledges that the City’s agreement to assign the amounts budgeted for this Project in 2023 and 2024 to help repay the loan obtained by Black Hills Sports is good and sufficient consideration for the promises it has made herein. Black Hills Sports and First Interstate further acknowledge that absent the promises made herein, the City would not have agreed to provide these funds. The City acknowledges that Black Hills Sports’ commitment to obtain private financing and help pay for the construction of the improvements identified in its application constitutes sufficient good and valuable consideration for the promises it has made herein. The City further acknowledges that absent the promises it has made in this Agreement, Black Hills Sports and First Interstate would not have undertaken the financial obligations necessary to fund the Project described herein.

8. If any provisions or terms of this Agreement are held to be unconstitutional, invalid, or otherwise unenforceable by any court or tribunal having jurisdiction over the parties the remainder of this Agreement shall remain in full force. Any such determination of invalidity shall not affect any other provision of this Agreement if the remaining sections or provisions can be given effect without the invalid section or provision.

9. This Agreement shall be deemed to be prepared jointly by the parties hereto and neither shall be deemed to be its sole author. In the event of any claim of ambiguity, no provision shall thereby be construed against either party.

10. This Agreement is intended solely for the benefit of the parties hereto and shall not be enforceable by, or create any claim of right or right of action, in favor of any other party. The terms and conditions of this Agreement may be modified only in a written amendment that is duly executed by the parties hereto. Neither party may assign, directly or indirectly, all or part of its rights or obligations under this Agreement without the prior written consent of the other party. Subject to this restriction, this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors, assigns, and legal representatives.
11. Failure of a party to insist upon adherence to any term of this Agreement on any occasion shall not be considered a waiver or deprive that party of the right thereafter to insist upon adherence to that term, or any other term, of this Agreement.

12. The validity, interpretation, construction, and performance of this Agreement shall be governed by the laws of the State of South Dakota. Any action to interpret or enforce this Agreement shall be venued in the Seventh Judicial Circuit in Pennington County, South Dakota.

13. This Agreement constitutes the entire agreement of the parties regarding this matter. No other promises or consideration form a part of this Agreement. All prior discussions and negotiations are merged into this document or have been intentionally omitted.

    Dated this ___ day of July, 2020.

    

    CITY OF RAPID CITY

    

    ________________________________
    Steve Allender, Mayor

    ATTEST:

    

    ________________________________
    Pauline Sumption, Finance Officer

    

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BLACK HILLS SPORTS, INC.

____________________________________
Patt Hall, President of the Board

____________________________________
Lyle Tolsma, Secretary

State of South Dakota )
ss.
County of Pennington )

On this the _____ day of ________________, 2020 before me, the undersigned officer personally appeared Pat Hall, who acknowledged himself to be the President of Black Hills Sports, Inc., Board of Directors, and that as such, being duly authorized to do so, executed the foregoing instrument for the purposes herein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

________________________________
Notary Public, ________________

My Commission Expires:

(SEAL)

State of South Dakota )
ss.
County of Pennington )

On this the _____ day of ________________, 2020 before me, the undersigned officer personally appeared Lyle Tolsma, who acknowledged himself to be the Secretary of the Board of Black Hills Sports, Inc., and that as such, being duly authorized to do so, executed the foregoing instrument for the purposes herein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

________________________________
Notary Public, ________________

My Commission Expires:

(SEAL)
State of South Dakota )
ss.
County of Pennington )

On this the ____ day of _____________, 2020 before me, the undersigned officer personally appeared Tom Weaver Bradley Fischer, who acknowledged himself to be the Commercial Relationship Manager Vice President of Commercial Lending for First Interstate Bank, and that as such, being duly authorized to do so, executed the foregoing instrument for the purposes herein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

________________________________
Notary Public, ____________________

My Commission Expires:

(SEAL)