

**USE AGREEMENT BETWEEN CITY OF RAPID CITY
AND RAPID CITY BMX, INC.**

For and in consideration of the mutual promises and agreements contained herein, the CITY OF RAPID CITY (“the City”), a South Dakota municipal corporation, of 300 Sixth Street, Rapid City agrees to allow Rapid City BMX, Inc. (“User”), a South Dakota corporation organized under the laws of the State of South Dakota, to use a specified area to operate a youth BMX program, subject to the following terms and conditions:

1. Consideration. The City hereby allows User the use of the below-described premises (“Premises”) for the sum of One Dollar (\$1.00) and other good and valuable consideration, including but not limited to, maintenance of general grounds, administration of a youth BMX program open to the citizens of the City, and payment of all utility bills. Said sum is payable to the City of Rapid City on or before the first day of January of each succeeding year.

2. Term and Renewal. The term of this Agreement is **from January 1, 2022 (“Effective Date”) to December 31, 2025**. Any future agreements between the parties related to the Premises shall be under the terms and conditions mutually agreed to by the parties at that time.

3. Premises. The Premises agreed for use by the City to User are legally described as follows:

A portion of Robbinsdale Park, Less Lot 1, Section 07, Township 1N, Range 08E, located in Robbinsdale Park, Rapid City, Pennington County, South Dakota.

See Attachment A (map with boundaries of the Premises clearly distinguished).

4. Use of Premises by User. User shall have priority use of the Premises from 03/01/22 to 10/31/22, 03/01/23 to 10/31/23, 03/01/24 to 10/31/24, 03/01/25 to 10/31/25 (“Priority Use Season”) for the purpose of operating a youth BMX program. “Priority Use” means that User may occupy the Premises between those dates to the degree necessary to operate a youth BMX program, subject to Section 5. Priority Use does not mean exclusive use, and this Agreement does not grant User any exclusive rights to occupy all or a portion of the Premises. Instead, use of the Premises by User, by the City, and by the public is governed by the terms of this Agreement. Use by Others shall be permitted in accordance with Section 5.

Use of Premises by User outside of the Priority Use Season shall be scheduled in advance with the Parks and Recreation Department.

5. Use of Premises by Others. The parties understand and acknowledge that all of the Premises are designated for outdoor public recreation through the Land and Water Conservation Fund (LWCF). Therefore, the parties agree that during the off-season, the Premises shall be available for use by the public. The off-season is defined as any time other than the Priority Use season described in Section 4. During the off-season, the Premises shall not be locked, barricaded, or otherwise made inaccessible to the public, except during times

when the park is closed in accordance with City ordinance. User may reserve the Premises with the Department during the off-season for its use on a limited basis, only when it is necessary for a special event, tournament, or similar situation, and the Department may decline to reserve the Premises for User.

In order to preserve and maintain the (“Track”) as BMX Track, the City may impose reasonable limits on the type and extent of use of the Track during the off-season and types of users, such as to limit the use of the Track to “BMX riders only.”

During the Priority Use Season, User shall allow members of the public to use the Premises (on a first-come, first-served basis) if the Premises are not in bona fide use by the User, and User and the City may require that such use by others shall be consistent with the normal usage of said Premises. This use is in addition to any assignment of the Premises, which is addressed in Section 14. A bona fide use is a scheduled practice or race and the 30 minutes before and after such practice or race. A bona fide use also includes scheduled maintenance of the Premises. During the Priority Use Season, User shall keep the Premises unlocked. User shall post a practice, race, and maintenance schedule at the track, so that members of the public are notified of such bona fide uses. During the Priority Use Season, if member(s) of the public desire(s) to use Track for a use that is consistent with the use of the Track to operate a youth BMX program, the member(s) may request to use the Track on a specific date or dates by contacting User at least 48 hours in advance. If the Track are not going to be in bona fide use by User, is not already reserved by member(s) of the public, the requested use of the Track is consistent with the use of the Track to operate a youth BMX program and any reasonable limits imposed by User and the City for the preservation and maintenance of the Track, User must unlock or otherwise make the Track accessible to the member(s) of the public.

6. Surrender of Premises. User agrees to surrender the Premises, or a part thereof, in the event it is necessary for expansion or utilization of public park facilities or for any other purpose which the City believes is necessary or important and the City makes such written demand. If such a written demand is made, then User understands that this Agreement shall be terminated and such termination shall not be considered a breach by the City or User of the terms of this Agreement. User further agrees to abandon the Premises, or a part thereof, in the event such a demand is made by the United States government or the State of South Dakota, or if User or the City is ordered to do so by an order of any Court. If such a demand or order is made, then User understands that this Agreement shall be terminated and such termination shall not be considered a breach by the City or User of the terms of this Agreement.

7. Use by the City. User agrees that the City may use the Premises when the same is not required for use by User, and such use by the City shall be consistent with the normal usage of the Premises. For purposes of this Section, City use shall mean organized activities conducted by or sponsored by the City. If the City uses the Premises under this Section, it agrees to leave the Premises in substantially the same condition, reasonable wear and tear excepted.

8. Contacts. Anything required by the Agreement to be delivered to User in writing shall be delivered to the following contact for Rapid City BMX: Phil Hawki, President, 626 E. Fairmont Blvd., Rapid City, SD 57701. User has a continuing obligation to ensure that the Rapid

City Director of Parks and Recreation (“Director”) has accurate contact information for User and to notify the Director of any changes to the contact information herein.

Unless otherwise specified in this Agreement, the contact for the City will be: Director of Parks and Recreation, 515 West Boulevard, Rapid City, SD 57701, (605) 394-4175.

9. Maintenance. User agrees to maintain said Premises under the authority of the Director of Parks and Recreation or his/her designee as detailed herein.

9. A. User Responsibilities.

i. Property Damage. User agrees to maintain said Premises under the authority of the Director of Parks and Recreation or his/her designee. User agrees to repair or replace any property on the Premises damaged, either willfully or accidentally, by its agents, members, or invitees. So long as User repairs or replaces property on the Premises damaged while the Premises is used and controlled by others, User is entitled to recover costs for damages or improper maintenance that occurs while the Premises is used and controlled by others. Alternatively, User may require others to repair damages occurring while the Premises is used and controlled by others.

ii. Trash and Recycling. User agrees to be responsible for policing the Premises and picking up and making ready for City collection of all trash, recyclables, debris, and waste material, resulting from its use of the Premises by itself or any spectators in attendance at the Premises. User also agrees to place all collected trash, recyclables, debris, and waste in a designated location for removal by the City. User agrees that it will not place yard waste or building materials in City trash receptacles. User agrees to promote and encourage recycling throughout the Premises.

To avoid the public’s misuse of trash and recycling receptacles during the off-season, User agrees to move all trash and recycling receptacles to an area of the Premises that is inaccessible to the public, as approved by the Parks and Recreation Department, immediately after the end of the season.

iii. Race Days. User is responsible for its own preparation of the track prior to all scheduled races.

iv. Grass and Weeds. User shall mow any grass areas within the Premises on a substantially weekly basis from May 1 to October 31. User shall control weeds and grass inside and outside of fence lines through string trimming or chemical vegetation control methods. This obligation includes the fence, fence lines, and the outside the fence. If the Premises include other exterior fences around a portion or all of the Premises, User shall control grass/weeds in such fence lines and six feet outside of the fence. The area to be maintained within the Premises is defined with a boundary on the map shown in Attachment A. The obligations in

this Section do not apply if the City is maintaining the Premises pursuant to Section 9.B.i.

If User fails to mow the grass or control weeds and grass within the required by this Section, the Parks Division Manager may mow the areas and charge User at the rate of One Hundred and Twenty-Five Dollars (\$125.00) per hour for each person and machine used, provided that the Parks Division Manager: (1) determines the need for mowing; (2) gives User three (3) days' notice of his/her intent to do so if User fails to mow; and (3) determines he/she has the available manpower and equipment to perform the mowing. Should the Parks Division Manager not have the available personnel and equipment, he/she can arrange for a private contractor to mow at the expense of User.

v. Notification to the City. User agrees to promptly notify the City in writing if it observes any needed maintenance to sidewalks, parking areas, trees or other items that the City is obligated to maintain under Section 9.B or any items other than those that User is obligated to maintain. User may provide the written notification by email to the Parks Division Manager. At the time of this Agreement, the email address for the Parks Division Manager is scott.anderson@rcgov.org.

vi. Irrigation System. No modification to the irrigation system will be allowed without prior notification to the Parks Division Manager and will be at the expense of the User.

The City will provide User with a radio for remote operation of the irrigation system, which User shall use for the day-to-day maintenance, repair, and monitoring of the irrigation system. If the User would like a radio, User should contact the Parks Department. The radio shall be returned to the City at the time of system winterization. If the radio is lost, stolen, broken, or is rendered unusable, User shall pay \$1500 for the replacement radio.

In lieu of User being charged for water usage for irrigation of the Premises, each irrigation system shall be connected to the City's central control irrigation system. Connection to the central control irrigation system will be performed by the Rapid City Parks Maintenance Division. All maintenance and changes to a specific watering program shall be performed by the Parks and Recreation Department maintenance personnel, and User may request modifications through email to the Parks Division Manager. At the time of execution of this Agreement, the email address for the Parks Division Manager is scott.anderson@rcgov.org. (The Parks Division Manager can also be reached by phone at the Parks Department Office at 605-394-4175.)

vii. Structures and Buildings. User is responsible for all maintenance and repair of structures and buildings on the Premises. This responsibility includes, but is not limited to, painting and staining the structures and buildings and maintaining/repairing siding, fascia, soffits, windows, doors and plugged stools or

drains. User is responsible for operation and maintenance of the track lighting to include replacing broken or burnt out light bulbs and adjusting light fixtures and bulbs for appropriate lighting on the track.

viii. Winterization. User shall ensure that all building systems, such as plumbing, electrical, and heating and cooling systems, are operational through the season to ensure proper winterization at the end of the season. User shall have all systems in working order on the winterization date to ensure proper winterization. User shall report any modifications to the building systems to the Parks Division Manager prior to the end of the season to ensure proper operation and winterization.

ix. Advertising. User will indemnify, defend, and hold harmless the City of Rapid City, its common council, officers, employees, and agents against all claims, expenses, and losses resulting from the publication and contents of any advertisement, including but not limited to, claims for libel, violation of privacy, copyright infringements, plagiarism, or advertising errors or omissions. The City is not responsible for any loss, damage or theft to advertising.

x. Compliance with Copyrights. User will not perform publicly any copyrighted content, including but limited to live music or broadcast music (from recordings, radio, television, or via streaming services) without the proper authorization from the copyright holder. User will abide by all copyright laws in conjunction with User's use of the Premises. User will indemnify, defend, and hold harmless the City of Rapid City, its common council, officers, employees, and agents against all claims, expenses and losses resulting from any copyright infringements by User that occurred on City property.

9.B. City Responsibilities.

i. Maintenance of track. During the off season, the City will maintain the track specified for the use by others in Section 5.

ii. Trash and Recycling. The City will provide 95-gallon trash and recycling receptacles for use at the Premises and will remove trash and recycling on a regular schedule.

iii. Unique or Unusual Maintenance. The City, at its own expense, agrees to provide unique or unusual maintenance and routine maintenance to the infrastructure, including but not limited to, repair of broken water mains, sewer infrastructure, storm sewer infrastructure, circuit breakers and switches for track lighting repairs, and surface maintenance of parking lots.

iv. Irrigation. The City shall provide water to the Premises for the purpose of irrigating the Premises. The City specifically reserves the right to restrict water usage under this Agreement if water restrictions are placed on other water users

within the City. Not prior to April 20 of each year, the City will provide charge up and run through of the automatic irrigation systems to check for proper operation. An employee from the Parks and Recreation Department will contact User to schedule a mutually agreeable startup date. User shall provide the Department with an accurate list of contacts prior to April 1 to ensure City's efficient access to the Premises and its facilities. The City is responsible for the maintenance and repair of irrigation elements, to the extent applicable: curb stops, backflow prevention devices, backflow enclosures, main line piping's, electric control valves and wiring, controllers, lateral line piping, and sprinkler heads. User shall notify Parks Maintenance Supervisor by email if any of these irrigation elements are malfunctioning or broken.

v. Winterization. On or about October 1st of each year, the City shall winterize the irrigation systems and the buildings/structures on the Premises. An employee from the Parks and Recreation Department shall contact User to schedule a mutually agreeable winterization date. User shall provide the Parks and Recreation Department with an accurate list of contacts prior to September 15 to ensure the City's efficient access to the Premises and its facilities. User shall have all systems in working order on the winterization date to ensure proper winterization.

vi. Trees. The City will provide maintenance to all trees on Premises, including hazardous tree removal, broken limb removal and corrective pruning. No tree shall be planted or removed without prior approval from the Parks Division.

vii. Structures and Buildings. The City is responsible for all maintenance and repair of plumbing systems, flush valves, drinking fountains, water heaters, electrical circuits, circuit breakers, and switches.

10. Changes to the Premises. No construction or installation of any improvements to the Premises shall occur until the Director of Parks and Recreation or his/her designee has given written approval to the proposed construction. User shall promptly notify the Director of its intentions to construct or install any improvements upon the Premises, and User agrees that it will not perform any such construction unless and until it receives written approval from the Director. Under no circumstances may User construct an enclosed structure on the Premises that prevents part or all of the Premises from use for outdoor public recreation. With prior written approval of the plans by the Director of Parks and Recreation or his/her designee, User may construct accessory and customarily incidental improvements to the Premises. Any construction or installation of any improvements shall be in conformity with the municipal codes of the City, including any construction within the floodplain or floodway. The parties agree that any permanent improvements or fixtures constructed by User on the Premises are the property of the City.

11. Land and Water Conservation Fund. The parties agree that the Premises are to be operated and maintained for public outdoor recreation purposes, in compliance with applicable provisions of the Land and Water Conservation Fund acts, regulations, and guidelines. The City

shall place signs on the Premises that indicate that it was improved through the Land and Water Conservation Act and that the area is publicly owned and operated as a public outdoor recreation facility. User agrees to include the same language identifying the area as publicly owned and operated as a public outdoor recreation facility in all signage, literature, and advertising. Inclusion of this language on all signage, literature, and advertising is intended to eliminate the perception the area is private.

12. Fees Charged to the Public. User agrees that all fees charged by User to the public for entrance, use, or access to the Premises shall be competitive with fees charged by similar private facilities. The City shall have the right to request information related to fees charged by User to the public for access or use of the facilities and to request information from User that supports the competitiveness of any such fees with similar private facilities. Upon receipt of such a request, User shall timely provide the requested information. If the City determines that the fees are not in compliance with this Section and/or the requirements of the LWCF guidelines, then User shall adjust its fees in accordance with the City's direction.

13. Non-Discrimination. The parties agree that User shall comply with all civil rights and accessibility legislation, including Title VI of the Civil Rights Act of 1984, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act, and User shall not on the grounds of race, color, sex, creed, religion, ancestry, national origin or disability discriminate or permit discrimination against any person or group of persons in any manner prohibited by local, state, or federal laws. By signing this Agreement, User certifies that it complies, and will continue to comply, with this nondiscrimination requirement.

The parties agree that signs posted in visible public areas on the Premises will indicate that use of the Premises complies with these nondiscrimination requirements. The parties agree that any statements in literature, advertising, and public information by User or the City about the Premises will state compliance with these nondiscrimination requirements.

14. Assignment. This Agreement shall not be assigned by User except on written consent and approval of the City. The fee(s) or payment(s) charged by User for any assignment shall be limited in value to the cost to User for utilities and maintenance, as applicable, of the Premises.

Requests for City approval of an assignment of this Agreement shall be submitted to the Director of Parks and Recreation no less than sixty (60) days before the assignment is intended to be effective. All such requests for approval shall include a copy of the proposed assignment and all relevant information, including any payment made as part of the proposed assignment. The City reserves the right to withhold consent for any such assignment, or to negotiate further with User and with intended assignee with regard to rights to the Premises, or to enter into a separate agreement with assignee and/or User with regard to the intended assignment of all or a portion of the Premises.

15. Expense. The City shall assume no expenses as a result of this Agreement or any of the operations of User except for those expenses generated as a result of City's responsibilities specifically discussed in this Agreement. User agrees to pay its own administration expenses,

including but not limited to, lights and electricity, grounds crew, office supplies, miscellaneous equipment, and secretarial fees. User agrees that the electric utilities will be metered in the name of and billed directly to User and that all expenses incurred by it shall be paid within thirty (30) days of due date. If User obtains gas utilities, User agrees that the gas utilities will be metered in the name of and billed directly to User and that all expenses incurred by it shall be paid within thirty (30) days of due date.

Unless otherwise agreed to by the City, User agrees to provide all funds and resources for use and maintenance of the Premises discussed in this Agreement. All costs expected and unexpected will be paid by User unless other arrangements are made with the City. If User makes any improvements to the Premises that are paid for with public funds, User shall comply with applicable bid laws.

16. Termination of Agreement. The City reserves the right to periodically review the performance of User to evaluate compliance with the terms of this Agreement. Either party may terminate the Agreement for breach of this Agreement upon thirty (30) days written notice to the breaching party. If the breaching party does not cure the breach prior to the date of termination, then the other party may terminate the Agreement. If the breaching party attempts to diligently cure the breach, to the extent such breach cannot be reasonably cured within thirty (30) days, the other party may grant additional time to cure as it deems appropriate, but is under no obligation to do so.

If User shall dissolve, become insolvent or otherwise unable to fulfill the terms of this Agreement, or abandon the use of the Premises, this Agreement shall terminate and User shall have no further rights hereunder. Discontinuation of use of all or part of the Premises for maintenance, repair or rehabilitation purposes of the Premises shall not be deemed abandonment. If User changes the character of its operation significantly from that of a nonprofit corporation, this Agreement shall terminate and User shall have no further rights hereunder.

17. Liability. User agrees that the City shall be held harmless from any and all liability arising from any operation or use under this Agreement of the described Premises by User or its agents or employees or any other person using the Premises. User further agrees to indemnify and defend the City against any and all claims arising from the operation or use under this Agreement of the described Premises by it and its agents, employees, assignees, invitees or any other person using the Premises. The parties agree that User may enter into separate agreements with other users of the Premises to hold harmless User and its directors, members, employees, and agents from claims arising from the use of others as discussed in this Agreement.

User agrees to purchase and maintain bodily injury and property damage insurance for each occurrence of injury or damage in the minimum amount of One Million Dollars (\$1,000,000) for each occurrence of injury or damage and an aggregate limit of not less than Two Million Dollars (\$2,000,000). The City shall be named an additional insured in said policy or policies and the User shall furnish to the City evidence of insurance by a certificate of insurance of required coverage. The parties agree that the City may adjust these insurance requirements on an annual basis and will provide written notice to User of any additional requirements for insurance required by this Section.

18. Public Accounting. If the City makes a written request for a public accounting of User's financial transactions for an operating year that falls within the term of this Agreement, Lessee agrees to provide the Director of Parks and Recreation with a public accounting of its financial transactions. User agrees to provide the public accounting within 60 days of the City's written request. Such accounting shall be in the form of a report of income and expenses and a balance sheet of User's assets and liabilities for the requested operating year.

19. Concession, Advertising, and Naming Rights. User shall have the right to operate concessions for the sale of beverages, food, programs, and other items usually sold in the public parks. User shall have the right to sell advertising space on the inside of the Premises boundaries, and all revenue derived from concessions and advertising shall belong to User. User also agrees to be responsible for cleaning and maintaining the concession area, including restrooms.

User shall have the right to sell advertising space on the inside of the Premises boundaries (to face inward towards the Premises), and all revenue derived from advertising shall belong to User. User agrees to maintain and repair any physical advertising on the inside of the Premises. User agrees to reimburse the City for any costs associated with removing such advertising if it is in a state of disrepair, if this Agreement has been terminated for any reason, or if the Agreement term has ended and the Agreement is not renewed.

20. City Authority. All matters pertaining to the terms of this Agreement shall be subject to the powers of the City Council and its designated authorized agents consistent with the laws of the State of South Dakota. The City Council appoints and delegates the Director of Parks and Recreation as the primary contact point for the City with User in administering and fulfilling the terms of this Agreement.

21. Relationship between the Parties. This Agreement does not create any employee/employer relationship between the City of Rapid City and User, its agents or employees. Nothing contained in this Agreement is intended to create a partnership or joint venture between User and the City, and no agent of User shall be the agent of the City. User covenants that it will not take any action in the name of, or by holding itself out as the agent of, the City of Rapid City.

22. Integration. The parties agree that this Agreement, along with any attachments, constitutes the entire understanding between the parties and supersedes all prior negotiations, agreements, and understandings, whether oral or written.

23. Savings Clause. Should any portions of this Agreement be declared void, the remainder of the Agreement shall remain in full force and effect.

24. Choice of Law. This Agreement shall be governed by the laws of the State of South Dakota and any action to enforce the terms of this Agreement shall be venued in the 7th Judicial Circuit, Pennington County, South Dakota.

25. Waivers. The failure by one party to require performance of any provision of this Agreement shall not affect that party's right to require performance at any time thereafter, nor shall a waiver of any breach or default of this Agreement constitute a waiver of any subsequent breach or default or a waiver of the provision itself.

26. Amendments. This Agreement may only be amended by a written document duly executed by both parties.

27. Headings. The headings and numbering of the different sections of this Agreement are inserted for convenience only and are not to control or affect the meaning, construction or effect of any provision.

Dated this _____ day of _____, 2021.

CITY OF RAPID CITY

Steve Allender, Mayor

ATTEST:

Finance Director
(SEAL)

State of South Dakota)
 ss.
County of Pennington)

On this the _____ day of _____, 2021, before me, the undersigned officer, personally appeared Steve Allender and Pauline Sumption, who acknowledged themselves to be the Mayor and Finance Director, respectively, of the City of Rapid City, a municipal corporation, and that they as such Mayor and Finance Director, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of the City of Rapid City by themselves as Mayor and Finance Director.

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

Notary Public, South Dakota
My Commission Expires: _____

(SEAL)

Dated this ____ day of _____, 2021.

RAPID CITY BMX, INC.

By: _____

Its: _____

State of South Dakota)

ss.

County of Pennington)

On this the ____ day of _____, 2021, before me, the undersigned officer, personally appeared _____, who acknowledged himself/herself to be the _____ of _____, and that he/she, as such _____, being authorized so to do, executed the foregoing instrument for the purposes therein contained.

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

Notary Public, South Dakota

My Commission Expires: _____

(SEAL)

Attachment A
Rapid City BMX Track

