

## **Public Facility Use Contract City of Waukesha – Carroll University**

This Public Facility Use Contract, referred to as the Contract is by and between the City of Waukesha, a Wisconsin municipal corporation, 201 Delafield Street, Waukesha, Wisconsin 53188-3646, referred to as the City; the City of Waukesha Parks, Recreation and Forestry Board, referred to as the Park Board; and Carroll University, 100 North East Avenue, Waukesha, Wisconsin 53186, referred to as Carroll. Together, the City, the Park Board, and Carroll are referred to as the Parties.

### **Recitals**

The City owns and maintains a baseball diamond and associated facilities in Frame Park, which is referred to as the Facility. Carroll has an intercollegiate baseball team that conducts its practices and plays its home games at the Facility. The City is undertaking improvements of the Facility, and Carroll is willing to contribute to the cost of the improvements, in consideration of it being granted continuing rights to use the Facility.

Now, therefore, in consideration of the mutual promises stated herein, the City, the Park Board, and Carroll agree and contract as follows:

- 1. Description of the Facility.** The Facility consists of the baseball field and all appurtenant facilities at Frame Park, and the adjoining areas within the yellow line on Exhibit A, which is incorporated into this Contract. The Facility also includes any improvements added within the yellow line after the execution of this Contract.
- 2. Carroll Rights to Use the Facility.** Carroll may use the Facility for practices, camps, and spring and fall games of its intercollegiate baseball team, and all activities ordinarily and customarily associated with practices, camps, and games of an intercollegiate baseball team, during the Term of this Contract, as scheduled according to the terms of this Contract, and subject to all of the terms and conditions of this Contract.
- 3. Term of Contract, Extension of Term.** The Term of this Contract commences on the date of its execution and terminates on December 31, 2030. If Carroll notifies the City of its desire to extend the Term by no later than July 31, 2030, and is not in material breach of this Contract at that time, then Carroll shall have the exclusive right to negotiate the terms of an extension, and the City shall not enter into negotiations with any other user for a contract for the use of the Facility. If those negotiations do not result in an extension of the Term by September 30, 2030, then this Contract shall expire on December 31, 2030 and the City may enter into negotiations for a use contract with any third party.
- 4. Reservation of Facility, Scheduling Priority.** The City Department of Parks, Recreation and Forestry administers and controls the Facility reservation and scheduling process. Carroll shall have first priority in scheduling its use of the Facility. As promptly as possible after Carroll's schedule for games is determined for a season, Carroll shall submit its schedule request for games, practices, and camps for that season to the City, and the City shall reserve the Facility for those dates and times for Carroll's use. Carroll's schedule requests shall be limited to the number of days and the length of daily use reasonably necessary, and customary and usual, for Carroll's intercollegiate baseball team for both its spring and fall seasons. Carroll shall participate in an annual facilities allocation meeting with the City, and shall cooperate in good faith in resolving schedule conflicts to the extent reasonably possible. The City shall have second priority in scheduling, subject to Carroll's reasonable schedule requests. All other parties shall be subordinate to Carroll and the City in scheduling. Once scheduling is complete, no party, including Carroll, can re-schedule to a date already reserved for another party, unless that other party consents in writing.

5. **Use Is Subject to Park Rules.** All uses of the Facility are subject to the Department of Parks, Recreation and Forestry's Athletic Facilities Policies and Procedures, to the extent they are applicable to the Facility. If any of the Policies and Procedures conflict with this Contract, then this Contract shall control. A copy of the Policies and Procedures is attached for reference as Exhibit B.
6. **Parking.** Carroll shall have the non-exclusive right to use parking lots in Frame Park as needed for its practices, camps, and games. Buses are not allowed in Frame Park parking lots, and bus parking is available on White Rock Avenue and Baxter Street.
7. **Facility Improvements.** The City shall construct the improvements to the Facility shown on the attached Exhibit C, at the City's sole expense. The design and specifications of the improvements shall be in the City's sole discretion, however, City agrees to cooperate with Carroll in good faith regarding suggestions to make the improvements better adapted to Carroll's use, and to incorporate such suggestions to the extent they can be done and are within the City's budget for the improvements. All construction shall use high-quality materials, be constructed in a good and workmanlike manner, and comply with all applicable codes. Construction of the improvements will commence promptly and be completed by no later than March 1, 2021, unless construction is delayed by circumstances beyond the City's control. The Parties' intent is that Carroll may schedule games commencing April 1, 2021.
8. **Carroll Construction Cost Contribution.** Carroll shall contribute a total of \$690,000 to the cost of construction of the improvements to the Facility, to be paid in equal annual installments as follows:
  - \$115,000 on or before October 31, 2021
  - \$115,000 on or before October 31, 2022
  - \$115,000 on or before October 31, 2023
  - \$115,000 on or before October 31, 2024
  - \$115,000 on or before October 31, 2025
  - \$115,000 on or before October 31, 2026
9. **Annual Capital Replacement Fund Contribution.** Carroll and the City shall each make a contribution of \$10,000 in each year during the term of this Contract and any extensions or renewals of the Term, beginning in 2021, to a fund to be held and administered by the City, the sole purpose of which shall be to fund the eventual replacement and repair of the artificial turf field surface and related expenses. The contribution shall be made no later than March 1 of each year. The City shall provide financial reports of the fund to Carroll annually and as requested.
10. **Regular Facility Maintenance and Repair.** The City shall keep and maintain the Facility in good repair, except for those responsibilities that are expressly delegated to Carroll in this Contract, at the City's sole expense. The City shall also be responsible for capital replacements at the City's sole expense, except for replacement and repair of the artificial turf field surface, to which Carroll will contribute to the expense pursuant to section 9. The City shall promptly undertake repair and restoration of the Facility after any casualty loss, at the City's sole expense.
11. **Carroll Responsibility for Damage.** Carroll shall be responsible for repairs or replacements required by the negligence, intentional acts or omissions, or theft by Carroll's employees, students, players, invitees, permittees, attendees, agents, volunteers, or guests, at Carroll's sole expense.
12. **Carroll Responsibility for Operating Expenses and Utilities.** Carroll shall be solely responsible for payment of all expenses incurred in connection with the operation of the its baseball team, and the City shall not

contribute to any such expenses. In addition, Carroll shall pay the cost of all electric, gas, water and sewer, and other utilities used at the Facility by all Carroll users at all times during the year, as determined by the City.

13. **Concessions.** Any sales of merchandise, food, beverages, raffles, etc., require a sales permit from the City Department of Parks, Recreation & Forestry. The location and layout of concession areas are subject to approval by the City.
14. **Advertising.** Signs, banners, and similar advertising and marketing materials will be allowed, in compliance with the City Department of Parks, Recreation and Forestry Athletic Advertising policy, and the approval of the Park Board, which shall not be withheld unreasonably.
15. **Broadcast Rights.** Carroll shall have the exclusive broadcast and rebroadcast rights, whether by radio or television or otherwise, for its teams' games played at the Facility, and the City shall have no right to any proceeds from such broadcast rights.
16. **Staffing.** Carroll shall provide sufficient trained staff necessary for the efficient operation of all collegiate baseball games and practices, and the City shall have no obligation to provide any staff for such events.
17. **Loss by Casualty and Property Casualty Insurance.**
  - a. If the Facility is materially damaged or rendered unusable by fire, wind, flood, vandalism, or other casualty covered by the City's property-casualty insurance, then City will promptly begin to repair, restore and rebuild the Facility to its former condition. If the casualty loss is due to a cause for which Carroll is bound to indemnify the City from losses under this Contract, then the City will begin repair, restoration and reconstruction promptly upon the City's receipt of indemnification funds. If the Facility is materially damaged or rendered unusable by fire, wind, flood, vandalism, or other casualty which is not caused by Carroll or its employees, owners, officers, directors, affiliates, teams, agents, fans or attendees, and the full cost of repair of such damage is not covered by the City's property-casualty insurance, and the City does not appropriate funds to cover the full cost of repair of such damage, then, upon written notice to the City, Carroll may terminate this Agreement without further obligation under this Agreement.
  - b. The City shall insure the Facility against damage and destruction by fire or other casualty, including extended coverage, to the replacement value of the fixtures, buildings and improvements within the Facility, subject to policy terms and limits, at its sole expense.
18. **Indemnification and Liability Insurance.**
  - a. **Indemnification.** During the Term of this Contract, including any extension or renewal terms, Carroll and the City shall indemnify and hold each other, and each other's respective officials, owners, officers, employees and agents, harmless from all liabilities, damages, fines, suits, claims, demands, actions, costs and expenses of any kind, including those asserted by third parties, and including actual attorney fees and court costs to the extent arising out of any of the following:
    - i. Any default in performance of any term, covenant or condition of this Contract by the indemnifying party;
    - ii. Any material breach of any representation or warranty by the indemnifying party;
    - iii. Any damage to the Facility to the extent arising out of the indemnifying party's or its employees' or agents' acts or omissions;

- iv. Any personal injury, including death, resulting at any time on, in or about the Facility to the extent arising out of the indemnifying party's or its employees' or agents' acts or omissions;
  - v. Any damages arising from the indemnifying party's infringement of intellectual property rights of a third party, false advertising, unfair trade practices or competition, defamation, or interference with contract; or
  - vi. Any judgements, judgement liens, or construction liens, asserted by creditors of the indemnifying party.
- b. **Liability Insurance.** Each Party shall maintain a policy of public liability insurance in force during the entire Term of this Contract, and all extensions and renewals of the Term, with limits of not less than \$1,000,000 per incident and \$5,000,000 aggregate per year, with endorsements naming the other Parties as additional insureds.
19. **No Nuisance Activities.** Carroll shall not conduct any activity at the Facility which constitutes a public nuisance. The Parties agree that the conduct of activities permitted under this Contract in a manner that complies with all applicable laws and ordinances shall not constitute a nuisance.
20. **Parties Are Independent Contractors.** Nothing in this Contract shall be construed to create any relationship among the Parties other than independent contractors. The Parties are not agents for one another, have no authority to bind the others to contracts, and have no vicarious liability for the others' acts or omissions.
21. **Not a Lease.** The Parties acknowledge and agree that this Contract is a facility-use contract and not a lease, and that neither party has any remedy under Chapter 704 of the Wisconsin Statutes.
22. **Date of Execution.** This Contract's date of execution, and the commencement of its Term, shall be the last date that any signatory signs his or her name to this Contract, below.
23. **Governmental Immunities and Notice Requirements Preserved.** Regardless of any provision in this Contract, nothing in this Contract shall be construed to be a waiver or modification of the governmental immunities granted, or notice requirements imposed, by Wis. Stats. §893.80 or any other law with respect to claims arising under tort law.
24. **Permits and Licenses.** Carroll shall be responsible, at Carroll's sole expense, for obtaining all permits and licenses required for any of its activities allowed by this Contract.
25. **Notices.** All notices required by this Contract, and all other communications between the Parties, must be in writing and addressed at the addresses given for each Party in the first paragraph of this Contract. Any Party can change its address for notices by notifying all Parties.
26. **Authorization to Execute.** The Parties warrant and represent to each other that they are duly authorized to execute this Contract and that the execution of this Contract is not prohibited by any applicable law, regulation or court order.
27. **Adequacy of Consideration.** The Parties acknowledge that the consideration expressed in this Contract is adequate and sufficient to make the obligations contained in this Contract binding upon the Parties.
28. **Costs of Enforcement.** The Parties agree that in the event legal action is necessary to enforce any term or condition of this Contract, then the breaching Party will pay the non-breaching Parties' costs incurred in such

legal action, including actual attorney fees. If a judgment is taken, then costs of enforcement will be added to the judgment.

**29. Severability.** If any term of this Contract is held unenforceable by a court having jurisdiction, then to the extent the unenforceable term can be severed from the remainder of this Contract without affecting the enforceability of the remainder of this Contract or substantially frustrating its purpose, it will be so severed, and the remainder of this Contract will remain in effect and enforceable.

**30. Governing Law and Jurisdiction.** This Contract will be construed and enforced according to the laws of Wisconsin. If a lawsuit arises out of this Contract, then it shall be filed in the state Circuit Court for Waukesha County, Wisconsin. The Parties consent to personal and subject-matter jurisdiction in Wisconsin and waive all jurisdictional defenses.

**City of Waukesha**

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Shawn N. Reilly, Mayor  
Date: \_\_\_\_\_

\_\_\_\_\_  
Gina L. Kozlik, City Clerk  
Date: \_\_\_\_\_

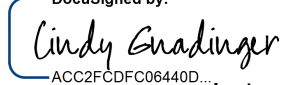
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Diane M. Gard, Interim Financial Director  
Date: \_\_\_\_\_

**Waukesha Parks, Recreation and Forestry Board**

\_\_\_\_\_  
John Schmitz, President  
Date: \_\_\_\_\_

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Joan E. Vehlow, Secretary  
Date: \_\_\_\_\_

**Carroll University**

DocuSigned by:  
  
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By (print name) Cindy Gnadinger  
Title: President  
Date: 7/15/2020

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By (print name) \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_