

PAR 3 GOLF COURSE MANAGEMENT AGREEMENT

THIS AGREEMENT is made this _____ day of _____, 2019 between the City of Billings, a Montana municipal corporation herein after referred to as "City", and the Exchange City Golf Corporation, a Montana nonprofit corporation, of Billings, Yellowstone County, State of Montana, hereinafter referred to as "ECGC".

WHEREAS, the parties to this Agreement desire to enter into a contract that provides for ECGC's management of a City owned, 18 hole, Par 3 golf course which is located at 19 South 19th Street West, Billings, Montana 59102 ("the golf course").

In consideration of the mutual covenants and conditions set forth herein, the parties hereto agree as follows:

1. Management of Golf Course. During the term of this Agreement, ECGC shall provide all supervisory, administrative, and management services that are required or desirable for the proper maintenance and operation of the golf course. Notwithstanding the foregoing, with the prior written approval of the City, ECGC may contract with one or more third parties to perform any of such services. Additionally, with the prior written approval of the City, ECGC may negotiate and enter into loans for golf course purposes, but the terms of such loans shall not provide any recourse for payment other than in a manner that is allowed under this Agreement or otherwise approved by the City.

2. Contract Monitoring and Budget for Golf Course Operations. The management and operation of the golf course will be subject to an annual review by City Staff. Such review will include financial statements, maintenance performance, course usage and activities, capital improvements, facilities maintenance, and future programs. On or before the last Monday before Thanksgiving of each year, ECGC shall submit an annual budget to the City Council for approval, setting forth the anticipated expenditures for the operation of the golf course. The City Council shall review and consider approving the proposed budget on or before the last regularly scheduled meeting in December of each year.

3. Maintenance of Financial Records. ECGC shall maintain proper books of account and other records of the golf course's operations. From time to time in its discretion, the City may require an audit of such books of account and other records.

4. Fees and Hours of Operation. The City shall determine and set the green fees and other appropriate fees that ECGC charges. Additionally, the City shall determine the hours of operation for the golf course.

5. Insurance and Indemnification. ECGC shall carry workers compensation insurance in accordance with the applicable laws of the State of Montana. ECGC shall carry and charge as expense of operating the golf course, comprehensive general liability insurance with limits of at least \$750,000 for each claim and \$1,500,000 for each occurrence. ECGC shall name the City of Billings as an additional insured under its comprehensive general liability insurance policy. In the event that ECGC contracts with one or more third parties to perform services for the golf course, ECGC shall require that any such third party comply with the workers' compensation laws of the State of Montana and carry comprehensive general liability insurance limits of at least \$750,000 for each claim and \$1,500,000 for each occurrence. The comprehensive general liability insurance policy of any such third party shall name the City of Billings as an additional insured. ECGC shall, at all times, indemnify and hold the City harmless from and against all liability, loss, damages, costs and expenses, including

litigation expenses and reasonable attorneys' fees, which the City sustains or incurs as a result of the activities of ECGC or its agents or employees in the operation and management of the golf course.

6. Term. The term of this Agreement shall commence on its date of execution and shall terminate on December 31, 2023 and shall thereafter be renewable for like terms if both parties consent.

7. Expenses. Any item of expense that the City incurs and determines to be a direct or indirect result of the operation of the golf course shall be charged as an expense of operation of the golf course in an amount equal to the portion of such expense that is attributable to the operation of the golf course.

8. Proceeds from Golf Course Operations. The parties agree that the proceeds from the operation of the golf course shall be disbursed in the following order of priority:

- (a) expenses of operation;
- (b) debt retirement on any ECGC operating loans;
- (c) reserve for expenses of operation;
- (d) reserve for capital expenditures; and
- (e) discretionary distributions to the City of Billings and the Downtown Exchange Club of Billings in the ratio of 2 to 1 respectively.

Any discretionary distribution that the Downtown Exchange Club of Billings receives from ECGC shall be utilized for outdoor recreation projects within the City of Billings and/or for the development of such City-owned cemeteries, park properties, and recreation programs as the Downtown Exchange Club of Billings determines.

9. Termination. In the event that this Agreement is not renewed at the end of the term hereof, all debt that ECGC incurs toward the operation of the golf course shall be retired as provided in this Agreement or by such other means as the parties agree. Upon termination of this Agreement, any and all properties, including improvements, that ECGC owns shall be transferred to the City without any cost to the City.

10. Subcontracts. Any subcontracts for provision of services and/or equipment shall ensure that the City is indemnified, saved and held harmless from and against any and all claims of damage, loss, and cost (including its reasonable attorney fees) of any kind related to those matters described in this Agreement. ECGC expressly understands and agrees that it shall assume and be solely responsible for all legal and financial responsibilities related to the execution of a subcontract. ECGC agrees and understands that utilization of a subcontractor to provide any of the equipment or services in the contract shall in no way relieve it of the responsibility for providing the services as described and set forth herein. ECGC shall require any subcontractor it employs to pay wages, benefits, and expenses in accordance with §§18-2-403, and 18-2-422, MCA.

11. Bankruptcy. Upon filing for any bankruptcy or insolvency proceeding by or against ECGC, whether voluntary or involuntary, or upon the appointment of a receiver, trustee, or assignee for the benefit of creditors, ECGC must notify the City. Upon learning of the actions herein identified, the City reserves the right at its sole discretion to either cancel the contract or re-affirm the contract.

12. Default. If ECGC abandons or vacates the golf course prior to the expiration of the term hereof, or if ECGC fails to make payments as set forth herein and said payment is not made within 15 days after written notice is given to ECGC, or if ECGC fails to perform in accordance with any of the other terms and conditions contained herein, and such default is not cured within thirty (30) days after written notice is given to ECGC, then the City, at the City's option and without further notice or demand to ECGC, may enter into possession of the golf course and all improvements thereon and remove all persons there from and may either take possession of

all furniture, equipment, and other personal property of ECGC found on the golf course or remove such property or any part of it and store it at ECGC's expense. The City may then terminate this Agreement.

13. Governing Law and Venue. This Agreement shall be construed and enforced in accordance with the laws of the State of Montana. Venue for any suit between the parties arising out of this Agreement shall be the State of Montana Thirteenth Judicial District Court, Yellowstone County.

14. Cancellation of Insurance. No change or cancellation in insurance shall be made without thirty (30) days written notice to the City. Insurance coverage required in Agreement shall be in force throughout the contract term. Should ECGC fail to provide acceptable evidence of current insurance within ten (10) days of receipt of written notice at any time during the contract term, the City shall have the right to consider the contract breached, justifying the termination thereof.

15. Independent Contractor Status. The parties agree that ECGC is an independent contractor for purposes of the Agreement and is not to be considered an employee of the City for any purpose. Agents and employees of ECGC are not subject to the terms and provisions of the City's personnel policies handbook and may not be considered City employees for workers' compensation or any other purpose. ECGC is not authorized to represent the City or otherwise bind the City in any dealings between ECGC and any third parties.

ECGC shall comply with the applicable requirements of the Workers' Compensation Act, Title 39, Chapter 71, MCA. ECGC shall maintain workers' compensation coverage for all members and employees of ECGC's business, except for those members who are exempted as independent contractors under the provisions of §39-71-401, MCA.

ECGC shall furnish City with copies showing one of the following: (1) a binder for workers' compensation coverage by an insurer licensed and authorized to provide workers' compensation insurance in the State of Montana; or (2) proof of exemption from workers' compensation granted by law for independent contractors.

16. No Implied waivers. No provision in this document shall be construed, expressly or impliedly, as a waiver by the City of any existing or future right and/or remedy available by law in the event of any claim of default or breach of contract. Any waiver by the City of any breach of any one (1) or more of the covenants, conditions, terms and agreements herein contained shall not be construed to be a waiver of any subsequent or other breach of the same or of any other covenant, condition, term of agreement herein contained, nor shall failure on the part of the City to require exact, full or complete compliance with any of the covenants, conditions, terms or agreements herein contained be construed as in any manner changing the terms of this Agreement or stopping the City from enforcing the full provisions.

17. Non-Discrimination and Civil Rights Compliance. ECGC shall not conduct its business at the Golf Course or act in a manner which violates Title VI or Title VII of the Civil Rights Act of 1964, as amended, or Title 49 of the Montana Code Annotated. All hiring must be on the basis of merit and qualifications and there may not be discrimination on the basis of race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin by the persons performing the contract. ECGC shall maintain open hiring and employment practices and shall receive applications for employment in compliance with all requirements of applicable federal, state and local laws and regulations issued pursuant thereto relating to nondiscriminatory hiring and employment practices. ECGC shall serve its customers at the golf course without unlawful discrimination as to any person's age, sex, race, religion, color, national original or handicap.

18. Applicable Laws. In connection with the furnishing of supplies of performance of work under the contract, ECGC agrees to comply with the Fair Labor Standard Act, Equal Opportunity Employment Act, and all other applicable Federal and State laws, regulations and executive orders to the extent that the same may be applicable.

19. Maintenance and Repairs. ECGC will maintain the below ground level water and sewer lines to the point of services as provided by the utility during the term of the agreement. ECGC shall, to the satisfaction of the City, provide normal and routine daily maintenance of the courses and facilities, designed to keep golf course and equipment in a good state of repair, free from hazardous conditions and deterioration, thus providing for the comfort and safety of visitors and patrons. The standard to be used shall be consistent with Municipal Golf Course operation. The City may retain a golf consultant to evaluate the course. Course deficiencies will be reported in writing to the ECGC. ECGC will respond within 15 days and must take action to correct the deficiencies within 10 days of the response or the City may take action to correct the deficiencies at ECGC's expense.

20. Facilities. ECGC represents and acknowledges that it is receiving management and control of the golf course and the personal property on the premises in good order and sanitary condition at the outset of this Agreement.

ECGC assumes sole responsibility for maintenance and repair of all buildings and other improvements on the golf course and ECGC will maintain the golf course in good order and in sanitary and safe condition.

The City will require ECGC to make necessary repairs to meet all code and ADA (Americans with Disabilities Act) requirements and correct any obvious defects.

21. Capital Improvements. During the term of this Agreement, ECGC will finance and construct capital improvements as provided for and agreed upon as part of the management agreement. In planning and making capital improvements, ECGC will seek to attain standards comparable to those achieved at other public municipal golf courses.

22. Ownership of Capital Improvements. All capital improvements, alterations or additions shall be made at ECGC's sole expense and shall become the property of the City upon termination of this Agreement. ECGC will provide the City with as-built plans for any structural capital improvements or for any underground irrigation system that may be constructed or employed on the golf course.

23. Liens. ECGC shall not have the right to create or permit the creation of any lien attaching to any interest in the golf course as a result of any construction of capital improvements, alterations or additions.

24. Golf Course Uses Only. The golf course shall be used only and exclusively for golf course operations and such other purposes as are related, and for no other purposes whatsoever, unless approval is granted in writing by the City.

25. Food and Beverage. ECGC is hereby authorized to sell food and beverages, including alcoholic beverages, on the golf course, subject to Federal, State, and local laws and/or ordinances. ECGC shall ensure that all local and state health permit and inspections are adhered to, including any services contracted with an outside food/beverage provider. Food and Beverage Operations shall meet the following minimum standards: (1) Yellowstone County Health Department inspection rating of an A at all times during the term of this agreement and (2) At no time shall ECGC allow any condition to exist that would result in an immediate suspension or revocation or intent to suspend or revoke the operational health permit. In the event that ECGC's food and beverage products are reasonably and legally deemed by the City to be of an inappropriate or illegal quality for public sale and consumption, the City shall have the right to order the removal of or improvement in the quality of any such product kept or offered for sale. ECGC represents that it contracts food and beverage sales at the golf course to the Club Pro, and neither receives any revenue nor incurs any expenses directly related to food and beverage sales, but this does not excuse ECGC from complying with the standards set forth in this paragraph or from taking action to assure that the Club Pro or his agents and employees meets or exceeds these standards for all food and beverage sales at the golf course.

26. Accounts and Books. ECGC shall maintain a method of accounting in accordance with generally accepted accounting principles on an accrual and/or cash basis as agreed upon by the parties, which correctly and accurately reflects the financial position of ECGC in connection with the operation of the golf course. ECGC shall be required to provide the City access to information relating to the income and expenses incurred in the operation of the golf course.

27. Sanitation. No offensive matter or refuse or substance constituting an unnecessary, unreasonable, or unlawful fire hazard, or material detrimental to the public or environmental health shall be permitted to remain on the golf course and ECGC shall prevent any accumulation from occurring.

28. Destruction of the Golf Course. In the event the golf course or any portion thereof shall be totally or partially destroyed by risk covered by the insurance required, ECGC shall either restore the destroyed portion or terminate this Agreement. ECGC shall make the loss adjustment with the insurance company insuring the loss. If ECGC restores the golf course, ECGC shall receive payment of the proceeds of insurance. If this Agreement is terminated, the City shall receive the payment of proceeds. If the destruction is from a risk for which coverage is not required or provided under said policy of insurance, ECGC may elect to restore the destroyed portion of the golf course at its expense. Said insurance proceeds, if any, shall be held for the benefit of ECGC only in the event of an election by ECGC to restore the destroyed portion of the golf course and shall be disbursed in installments as construction progresses for payment of the costs of restoration.

If ECGC has failed to procure and maintain the required insurance coverage in the amounts specified and the proceeds of such insurance are insufficient to pay the actual costs of restoration, ECGC shall be responsible for the amount of the deficiency.

If ECGC elects to restore the destroyed portion of the golf course, the plans, specifications and construction cost estimates for the restoration shall be prepared by ECGC and forwarded to the City for approval prior to the performance of any work. The City's approval shall not be unreasonably withheld. All work shall be performed in accordance with the approved plans and specifications, unless changes are approved in advance by the City, and in accordance with all laws of the State of Montana pertaining to public works contracts as set forth in §18-2-401, MCA, et seq. and all applicable provisions of Paragraph 10 of this Agreement.

If the destroyed portion or portions of the golf course are restored, this Agreement shall continue in full force and effect. If the destroyed portion or portions of the golf course are not restored, this Agreement shall terminate.

29. Complete Agreement. This Agreement contains the entire agreement between the parties, and no statement, promise or inducement that either party or agent of either party makes which is not contained in this Agreement shall be valid or binding. This Agreement may not be enlarged, modified, or amended except in a writing that the parties sign.

30. Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective legal representatives, successors and assigns. Notwithstanding the foregoing, ECGC may not assign this Agreement without the prior written consent of the City.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on this ____ day of _____, 2019.

CITY OF BILLINGS, MONTANA

Exchange City Golf Corporation

By _____
**WILLIAM A. COLE,
MAYOR**

By _____

Print Name _____

Print Title _____

APPROVED AS TO FORM:

By _____
BRENT BROOKS, CITY Attorney