

SECOND AMENDMENT TO
OPERATING AGREEMENT BETWEEN
CITY OF SHEBOYGAN
AND
POWER PUBS, LLC

This Second Amendment amends the Amended Operating Agreement (“Agreement”) between the City of Sheboygan (“City”), a Wisconsin municipal corporation with offices at 828 Center Avenue, Sheboygan, Wisconsin 53081, and Power Pubs, LLC (“Vendor”), a Wisconsin Limited Liability Company, with offices at 4792 N. Cramer Street, Whitefish Bay, Wisconsin 53211. The Agreement was originally executed on September 3, 2018 and amended on November 22, 2019.

The parties hereto are the parties to the Agreement and, for good and valuable consideration, mutually agree to the following amendments to the Agreement.

1. Subsection 3.C is amended to read as follows, “Except as specifically provided in this Agreement, Vendor shall provide these services at least six hours per day between 10:00 a.m. and 10:00 p.m., weather permitting, and three days per week beginning no later than June 1 and ending no later than October 15, subject to the provisions of subparagraph 3.P. The precise hours shall be determined by Vendor but shall in no case include hours between 10:00 p.m. and 10:00 a.m. Vendor is not required to provide these services on Independence Day.”
2. Subsection 3.E is amended to replace “Sheboygan Municipal Code § 10-177(c)” with “Wis. Stat. § 125.07(3)(a)10.”
3. Subsection 3.N. is repealed.
4. Section 4 is amended to read as follows, “This Agreement shall commence on the Effective Date (but no earlier than the date of publication of the common council resolution authorizing this agreement) and shall expire on December 31, 2024. Should the parties agree, in their sole discretion, that the biergarten has been a success and a benefit to the parties and the community, the parties agree to begin good faith negotiations on a replacement contract, to be completed by October 31, 2024. If the parties cannot agree on terms to a replacement contract by October 31, 2024, this Agreement shall remain in full force and effect until December 31, 2024.”

IN WITNESS WHEREOF, the Parties hereto have caused this Amendment to be executed by their proper officers on the day and year first above written.

CITY OF SHEBOYGAN

POWER PUBS, LLC

By: _____
Ryan Sorenson, Mayor

By: _____
John L. Powers, Sole Member

Attest: _____
Meredith DeBruin, City Clerk

AMENDMENT TO
OPERATING AGREEMENT BETWEEN
CITY OF SHEBOYGAN
AND
POWER PUBS, LLC

This Amendment amends the Operating Agreement between the City of Sheboygan ("City") and Power Pubs, LLC, a Wisconsin Limited Liability Company ("Vendor") ("Agreement"). The Agreement was originally executed on September 3, 2018. Except as specified herein, the Agreement remains unchanged and in full force and effect.

The parties hereto are the parties to the Agreement and, for good and valuable consideration, mutually agree to the following amendments to the Agreement:

1. Subsection 3(B) of the Agreement shall be amended to state, in full:
"Additional offerings. Vendor shall provide and offer for sale a light food menu. This menu shall include pretzels and snacks, and may also, but is not obligated to, include authentic bratwurst and other meat and sausage products, with a preference for those made in Sheboygan. If Vendor obtains and maintains the appropriate alcohol permits, Vendor may serve wine at the Premises."
2. Subsection 3(S) of the Agreement shall be amended to state, in full:
"Payment. For the use of the Premises and the right to provide the services set forth therein, in addition to the utility costs imposed under Subsection G and the security deposit under subsection R above, Vendor agrees to pay the City 12.5% of its Net Revenues (defined as Gross Revenues minus Sales Tax minus Actual Credit Card Processing Fee minus Tips) (the "City Fee"). For the avoidance of doubt, Gross Revenue shall not include any Glass Deposit that Vendor receives, and no deduction from Gross Revenue shall be made for the return of any Glass Deposit. In 2019, Vendor shall remit the City Fee no later than December 1, 2019. Vendor may, but is not required to, make voluntary payments toward the City Fee prior to December 1, 2019. For all years after 2019, Vendor shall make estimated payments in fourths due no later than July 1, August 15, and October 1 of each year, with estimated payments based on Net Revenue from the prior year. A final payment based on actual net revenue, and taking into account the estimated payments made, shall be made no later than December 1 of each year."
3. Paragraph 23 contains a definition of "Sales Reports." That definition shall be amended to state, in full: "Sales Reports shall contain: (1) quantities purchased, by SKU; (2) revenues generated, by SKU; (3) total gross revenue; (4) sales taxes; (5) credit card processing fee; (6) total Net Revenue; and (7) the City Fee."

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**OPERATING AGREEMENT BETWEEN:
CITY OF SHEBOYGAN
and
POWER PUBS, LLC**

This Operating Agreement ("Agreement") is made and entered into effective this 3rd day of Sept., 2018 (the "Effective Date"), by and between the CITY OF SHEBOYGAN ("the City"), a municipal corporation, and POWER PUBS, LLC ("Vendor"), a Wisconsin Limited Liability Company. Referenced together, the City and the Vendor are the parties ("Parties") to this Agreement.

WITNESSETH:

WHEREAS, the City is the owner of Kiwanis Park, located on Kiwanis Park Road in the City of Sheboygan, Sheboygan County, State of Wisconsin; and

WHEREAS, the City desires to contract with Vendor to establish and operate an authentic German biergarten concession in a specific area of Kiwanis Park in an effort to honor the strong German heritage in the city, provide a new and somewhat unique venue for its citizens, and increase traffic in an under-utilized portion of the park; and,

WHEREAS, Biergartens are defined for the purposes of this Agreement as vendor locations selling alcoholic beverages in glassware; and,

WHEREAS, the City was approached by a third party expressing an interest to establish such a concession and in response publically issued a Request For Proposals for same in an effort to make sure that all parties having an interest are given an opportunity to submit a proposal; and,

WHEREAS, Vendor has submitted a formal response to the City's request for proposals, and following review of said response, the City has determined that Vendor's proposal is in the best interest of the general public and the city of Sheboygan; and

WHEREAS, Vendor's proposal, was accepted by the City, and confirmed by the Public Works Committee, subject to the execution of this Operating Agreement.

NOW THEREFORE, in consideration of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby mutually acknowledged, the Parties hereby agree as follows:

1. Purpose. The purpose of this Agreement is to set forth the terms and conditions upon which the City will allow Vendor to use a portion of Area #8 of Sheboygan Kiwanis Park as depicted on Exhibit A attached hereto and incorporated herein by reference (the "Premises"), to establish and operate an authentic German Biergarten concession.
2. Grant and Description of Premises. City does hereby grant to Vendor permission and the exclusive right to establish and operate the concession in and occupy the Premises (including the main shelter and restroom, the Jaycee Pavilion, and the concession stand building) upon the terms and conditions set forth in this Agreement. Included in said permission is a grant to the Vendor of the exclusive right to operate a Biergarten for

retail sale to the public in Kiwanis Park.

3. Scope of Services. In entering into this Agreement, Vendor agrees to the following terms and conditions regarding the services being offered by Vendor at the Premises:
- A. Services to be provided. Vendor shall provide, establish, and provide complete operations for a seasonal authentic German Biergarten concession, including (but not limited to) the availability of (i) at least one authentic German beer at all times, (ii) at least one domestic beer, and (iii) soft drinks.
 - B. Additional offerings. Vendor shall provide and offer for sale a light food menu. This menu shall include pretzels and snacks, and may also, but is not obligated to, include authentic bratwurst and other meat and sausage products, with a preference for those made in Sheboygan.
 - C. Season. Beginning in 2019, Except as specifically provided in this Agreement, Vendor shall provide these services at least six hours per day between 10:00 a.m. and 10:00 p.m. (weather permitting) and five days per week beginning no later than June 1 and ending no later than October 15, subject to the provisions of subparagraph 3.P. The precise hours are to be determined by Vendor in Vendor's sole discretion, but shall in no case include hours between 10:00 p.m. and 10:00 a.m. During October, the services need only be provided on the weekend. Vendor is not required to provide these services on Independence Day.
 - D. Limitations. Vendor shall not engage in any other service or activity at the Premises without the prior written agreement of the City (including, for example, leasing out the Premises to third parties), and any such unauthorized service or activity will be considered a breach of the terms of this Agreement subject to the Default provisions of Section 26 of this Agreement. This paragraph shall not prevent the Vendor from leasing all or a portion of the Premises to organizations who have rented the remainder of Kiwanis Park for City-recognized Festivals, so long as in so doing the Vendor complies with all legal requirements related to its liquor licenses.
 - E. Permits and Licenses. Vendor agrees, at its own expense, to obtain and keep current all licenses and permits necessary for the operation of Vendor's business, and comply with all Federal, State and City statutes, ordinances, rules and regulations applicable to Vendor's business, including provide proper notification (pursuant to Sheboygan Municipal Code § 10-177(c)) to the Police Department at the beginning and end of each season and all other times when the Premises are to be open or closed to underage persons. Vendor agrees to obtain all inspections and permits by the Sheboygan County Health Department, Fire Department or any other governmental agency that are required to allow Vendor to operate the Biergarten and provide the services authorized under this Agreement. Vendor shall provide the City with proof of such compliance upon written request from the City. Failure to comply with this provision shall be a default under this Agreement. The Parties recognize the City controls the

issuance of one or more permits or licenses under this paragraph. For the avoidance of doubt, the City agrees that it will not act capriciously or arbitrarily when considering any permit or license application.

- F. Equipment. The City shall provide a lockable maintenance storage area in the main shelter, rest rooms and other features associated with the main shelter, including access to water and electrical service. Vendor shall provide all other equipment necessary to operate the facility, including, but not limited to, all furnishings, safety equipment, food preparation and serving equipment concessions, refrigerators, freezers, microwaves, cash registers, dishes, glassware, cleaning supplies, soap, and toilet paper and hand towels. Vendor may place an additional means of storage on the property in a location approved by the Parks Superintendent, or his/her designee. Vendor may, solely at Vendor's expense, install a security system in the Shelter or other structures on the Premises. Vendor may install or use other equipment with the written permission of the Parks Superintendent, or his/her designee. Vendor shall provide the Parks Superintendent, or designee, with a current list of all of the Vendor's equipment at the Premises.
- G. Utilities. The City shall supply water, electricity, sewer and trash removal/recycling services in the same manner as currently provided at the Premises, and will not reduce the scope or amount of said services. Vendor shall pay the sum of \$600 per month to the City for all such utilities and trash/recycling haul away. This amount shall be due to the City on a monthly basis and prorated as necessary, by the 5th of each month. Failure to pay this amount by the due date will result in a late penalty of \$50. Failure to pay this amount in full, plus any accrued penalties, by the 15th of each month will constitute a default under Section 27 of this Agreement. Vendor shall only be responsible for utilities during the months that the services under Section 3(A) and 3(B) are being offered in the Biergarten by Vendor at the Premises. Vendor agrees that it shall collect trash and recycling from separate garbage and recycling bins and take it to City dumpsters within Kiwanis Park. Vendor shall at no time commingle trash and recycling. The City shall haul trash and recycling from City dumpsters.
- H. Product. All items offered for sale by Vendor, including, but not limited to, food, alcoholic beverages, non-alcoholic beverages, snacks, and confections, shall be approved by the Parks Superintendent, or his/her designee whose consent shall not be unreasonably withheld, conditioned or delayed. Failure to grant or deny approval of such items within five (5) business days after Vendor's submission of such items, such items shall be deemed approved. All items for sale shall be individually listed on an inventory, a copy of which shall be filed with the City of Sheboygan.
- I. Equipment Safety. Vendor shall maintain all equipment, including safety equipment (fire extinguishers, first aid kits, etc.), in a safe working order at all times and store said equipment in a safe manner to prevent any unauthorized use or operation thereof.

- J. Storage. Vendor may store equipment necessary to provide the services set forth in Subsection A above consistent with Subsection E above. Vendor shall not store any items, on the Premises from November 1 through May 15 of each year except with express permission from the City, and in any event, may only do so consistent with Subsection E above.
- K. Maintenance by Vendor. Except for the City's obligation to maintain and repair the Premises as set forth in subparagraph 3.T., below, Vendor shall be responsible for maintaining the Premises in a clean, safe and attractive condition at all times, including keeping the grounds immediately adjacent to the Premises picked up of all paper and debris. Vendor shall keep the river frontage area free of debris. Every day during Vendor's operations the Vendor shall also be responsible for opening, closing and cleaning the restrooms at the Premises including providing, installing, and refilling paper products, soap, and other restroom supplies, and maintaining the restrooms in a clean and sanitary condition. Vendor agrees that should the City's Parks Division determine that the maintenance requirements of this Subsection are not being met, the Parks Division shall provide written notice to Vendor of such failure and allow Vendor five (5) days within which to cure such deficiency, and failing same, the Parks Division may perform or have performed additional cleaning or maintenance, and charge the actual costs of such work to Vendor, payable within thirty (30) days of the issuance of the invoice, or as a deduction from the Vendor's security deposit.
- L. Alterations to Premises. Except as otherwise provided in this Agreement, no modifications of any kind, or fixtures, additions or removals shall be made to the Premises without the written permission of the Parks Superintendent, or his/her designee which approval shall not be unreasonably withheld, conditioned or delayed. Any and all alterations shall comply with local building codes and ordinances.
- M. Signage. All signs and banners, including menu boards, shall be approved by the Parks Superintendent or designee and the City of Sheboygan Building Inspection Dept. Vendor shall post a readily observable sign at the Premises stating Vendor's name, and contact information as set forth below in Section 11, and a notice that Vendor and Vendor's activities are not affiliated with, nor in any way endorsed by the City.
- N. Fencing. The Parties agree that fencing shall be installed separating the Biergarten from the road and the other portions of Kiwanis Park, sufficient to clearly delineate the licensed area on Vendor's liquor license (which may also constitute the Premises), and to deter people from entering the Biergarten at locations other than the delineated entrances. As soon as practicable, 100 linear feet of permanent wooden post fencing shall be installed by the City separating the Biergarten from the road. Vendor shall pay a percentage of the cost of said installation to be calculated as equivalent to the percentage of the anticipated life of the fence represented by the remaining length of this Agreement. For

example, if the remaining length of the Agreement is 5 years and the anticipated fence life is 50 years, the Vendor would fund 5/50 or 10% of the fence cost. Fencing shall match existing fencing at the site. It is anticipated that any additional fencing installed during any extensions or renewal of the contract shall reflect the same percentage of cost. Temporary fencing shall be installed by the City at its cost in any areas not yet reached by permanent fencing.

- O. Blackout dates: Vendor shall not operate on the following dates ("Blackout Dates"), so as to avoid conflict/competition with long standing festivals in the park:

The third weekend (Saturday & Sunday) in July (Hmong Festival)
The first weekend (Friday-Saturday) in August (Jaycee Bratwurst Days)

Notwithstanding the above, Vendor may enter into an agreement with the organizers of the above festivals granting permission for Vendor to operate on the Blackout Dates. Said agreement shall be in writing, and a copy of same shall be placed on file with the City no less than 14 days prior to the Blackout Dates. Under no circumstance shall Vendor operate on these dates without a written agreement allowing for same between the concessionaire and the organizers of the affected festivals. The City is responsible for all trash collection and restroom cleaning and maintenance within Area 8 during the Blackout Dates, but only if Vendor conducts no operations during said Blackout Dates.

- P. Closing Date. Vendor may continue to operate at the Premises after October 15, but no later than permitted by the Park Division's building winterization schedule.

- Q. Surrender of Premises. Upon the expiration or earlier termination of this Agreement under Section 26, but no later than permitted by the Park Division's building winterization schedule, Vendor agrees to (i) vacate and surrender the portions of the Premises allocated to it by this Agreement, (ii) remove all personal property therefrom, and (iii) deliver possession of the same to City in as good condition as the Premises was in at the commencement of the Agreement, with the exception of normal wear and tear through careful use and with the exception of damage by fire or other casualty beyond the control of Vendor. Any damages to the Premises beyond normal wear and tear shall be the responsibility of Vendor, unless solely caused by the City or its employees or contractors or agents. For purpose of the previous sentence, Vendor shall not constitute an agent of the City. If these damages are not repaired by Vendor before surrender of the Premises to the City, the City shall cause the repairs to be made and deduct the cost thereof from the security deposit. Any balance still owing by Vendor after deduction from the security deposit shall be due within thirty (30) days of the City's invoice to Vendor. All improvements, equipment and other property of the City on the Premises shall remain the property of the City after the expiration or earlier termination of this Agreement. No fixtures, whether or not purchased by Vendor, shall be removed without the permission of the City. An inventory of City property and equipment will be performed

within one week after the Effective Date and prior to May 1 of each year during the term of this Agreement prior to Vendor's opening for the season of that year. For the avoidance of doubt, any equipment purchased by Vendor which does not constitute a fixture not permanently attached to or incorporated into the Premises shall remain property of Vendor, and may be removed by the Vendor; however, all property of Vendor remaining on the Premises thirty (30) days after surrender of the building will be considered abandoned by Vendor and shall become the property of the City. It is intended by the Parties that the sinks, hot water heater, building and landscape lighting, flagpoles, and crushed stone base within the Premises will become the property of the City upon the expiration or earlier termination of this Agreement.

- R. Security Deposit. Vendor shall pay to the City a security deposit in the amount of \$3,000 prior to January 15, 2019. Upon the surrender of the Premises, and after inspection by the City, which shall be conducted within ten (10) days after the expiration of this Agreement or earlier as may be agreed upon by the parties, the security deposit will promptly be refunded to Vendor, less any deductions for damage and other assessable costs under this Agreement. In cases where the damage and other assessable costs are greater than \$3,000, the City shall keep the entire security deposit and Vendor shall pay to the City the remaining balance within 30 days of the invoice from the City.
- S. Payment. For the use of the Premises and the right to provide the services set forth above therein, and utility costs imposed under Subsection G above, as well as the security deposit under subsection R above, Vendor agrees to pay the City 12.5% of its Net Revenues (defined as Gross Revenues minus Sales Tax.) (the "City Fee"). Vendor shall make estimated payments in fourths due no later than July 1, August 15, and October 1 of each year, with estimated payments based on Net Revenue from the prior year. A final payment based on actual net revenue, and taking into account the estimated payments made, shall be made no later than December 1 of each year.
- T. City Responsibilities. In addition to the City's other services to be provided and obligations to be performed under this Agreement, the City, at its sole cost and expense, shall provide and be responsible for the following:
1. Lawn Maintenance. The City shall be responsible for weeding, pruning, tree maintenance, and mulching all areas of Kiwanis Park, including Area 8, and is also responsible for grass cutting via riding mower as close as possible to fencing. Vendor shall edge around the fencing.
 2. River Bank Maintenance. The City shall clear weeds, invasive species, and downed tree branches in the area of the river bank. Natural vegetation shall remain.
 3. Maintenance. The City shall be responsible for repairs to and maintenance of the Premises and the improvements thereon that are not the obligation of Vendor or those repairs made necessary due to

damage caused by Vendor or Vendor's customer(s), in which case the City shall perform the repairs and bill Vendor. The City's obligations shall include, but are not limited to, repairs to the electrical, plumbing and sewer systems, plumbing and electrical fixtures, the exterior and interior doors, and roofs and walls of structures on the Premises.

4. The City shall allow music on the Premises provided such music complies with the City ordinances.

The City will complete those items of work set forth on Exhibit B attached hereto and made a part hereof before December 31, 2018. In the event that these items are not completed before Vendor starts operations, Vendor may terminate this Agreement, in which case neither party shall have any liability to the other. Vendor shall have thirty (30) days from the completion of the items of work set forth on Exhibit B to determine if the waste line is of sufficient size as to allow its operations. If the waste line is not of sufficient size as to allow its operations, Vendor may either increase the size of the waste line (at its expense) or terminate this Agreement (in which case neither party shall have any liability to the other party).

- U. Shelter Rental. The Vendor shall act as the agent for the City for rental of the park shelter within Area 8, and shall rent the shelter, collect revenue from said rents, and provide daily maintenance and upkeep of the shelter, pursuant to the City's park regulations and shelter fee schedule. All revenues collected shall be part of Vendor's gross revenue for the purposes of Subsection S above.

4. Term and Effective Date. This Agreement shall commence on the Effective Date (but no earlier than the date of publication of the common council resolution authorizing this agreement) and shall expire on December 31, 2023. Notwithstanding the foregoing expiration date, beginning in November 2021, the Parties agree to jointly evaluate the success of the Biergarten. If the Parties each agree, in their sole discretion, that the Biergarten has been a success and a benefit to the Parties and the community, the Parties agree to immediately begin good faith negotiations on a replacement contract, to be completed by March 31, 2022. If the Parties cannot agree on terms to a replacement contract, then this Agreement shall remain in full force and effect until December 31, 2023.
5. Entire Agreement. The entire agreement of the parties is contained herein and this Agreement supersedes any and all oral contracts and negotiations between the parties.
6. Status of Vendor. It is agreed that Vendor is an independent contractor and not an employee or representative (except as set forth in subparagraph 3.U. above in regard to Shelter Rental) of the City and that any persons who Vendor utilizes and provides for services under this Agreement are employees or agents of Vendor and are not employees of the City.
7. Assignability and Subcontracting. Vendor shall not assign or subcontract any interest or obligation under this Agreement without the City's prior written approval. All of the

services required hereunder shall be performed by Vendor and employees of Vendor. If Vendor is a corporation, partnership, limited partnership, limited liability company, limited liability partnership or other entity that is not an individual person, then an assignment prohibited within the meaning of this provision shall be deemed to include one or more sales or transfers, by operation of law or otherwise, or creation of new stock or ownership interests, by which an aggregate of 50% or more of Vendor's stock or ownership interests shall be vested in a party or parties who are not stockholders, partners, members or others who possess ownership interests in Vendor as of the date hereof.

8. No Real Estate. It is expressly understood and agreed that this Agreement is not a lease or a conveyance of realty, but merely a granting to Vendor the right to conduct certain activities and provide certain services on City property for the benefit and convenience of the public.
9. Access to Premises. City, by its representatives, shall have access to Premises at any reasonable time provided such entry shall not interfere with Vendor's conduct of business. In case of emergency, the circumstances of which to be solely determined by City, City shall enter the Premises with or without force, as necessary, without assuming any liability for such entry and without affecting Vendor's obligations under this Agreement.
10. Designated Representative. Vendor designates John Powers as Contract Agent with primary responsibility for the performance of this Agreement. In case the Contract Agent is replaced for any reason, or in the event of the death, disability, removal or resignation of the Contract Agent, Vendor will designate another Contract Agent within seven (7) calendar days by notifying the City as set forth below in Section 21, Notices. The City may accept another person as the Contract Agent, or may terminate this agreement under Section 26, at its option. The Contract Agent is not necessarily the person who serves as Agent with regard to the Liquor License; naming and replacement of the Agent with regard to Liquor License shall proceed pursuant to Chapter 125 of the Wisconsin Statutes.
11. Operating Agent. Vendor shall designate an Operating Agent of Vendor's activities at the Premises, who will be the person primarily responsible for the day-to-day operation of the Vendor's activities at the Premises. Vendor shall provide the name and contact information of this person to the Parks Superintendent, or his/her designee, within forty-eight (48) hours of commencing activities at the Premises under this Agreement, or within twenty-four (24) hours of any changes to the Operating Agent or the Operating Agent's contact information. The Operating Agent is not necessarily the person who serves as Agent with regard to the Liquor License; naming and replacement of the Agent with regard to Liquor License shall proceed pursuant to Chapter 125 of the Wisconsin Statutes.
12. Advertising. It is understood that in the operation and conduct of this Agreement, the City does not grant Vendor the right to sell or distribute any goods or services provided by the City, nor does the City grant Vendor the express right to use a City trade name, trademark, logotype, advertising, or other commercial symbol, except as otherwise

provided in this Agreement. In any commercial advertisement or announcement, Vendor may use the name of Kiwanis Park but any such advertisement or announcement must also indicate that Vendor's activities are not associated with or affiliated with the City.

13. Marketing. Vendor agrees to include and/or prominently display the City of Sheboygan logo in the premises and on any marketing materials. Marketing materials will be approved by the City, and Vendor shall use only City logos that are provided by an officially authorized representative of the City. The City agrees to display and promote marketing materials of Vendor on the Parks Website and other appropriate venues with the prior approval of the Vendor, the Parks Superintendent, and City Attorney.
14. Amendments. This Agreement shall be binding on the Parties, their respective heirs, devisees, and successors, and cannot be varied or waived by any oral representations or promise of any agent or other person of the Parties. Any change in any provision of this Agreement may only be made by a written amendment, approved by the Common Council and signed by the duly authorized agent or agents of the Vendor and the Parks Superintendent or his/her designee.
15. No Waiver. No failure to exercise, and no delay in exercising, any right, power or remedy hereunder on the part of the City or Vendor shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power or remedy preclude any other or further exercise thereof or the exercise of any other right, power or remedy. No express waiver shall affect any event or default other than the event or default specified in such waiver, and any such waiver, to be effective, must be in writing and shall be operative only for the time and to the extent expressly provided by the City or Vendor therein. A waiver of any covenant, term or condition contained herein shall not be construed as a waiver of any subsequent breach of the same covenant, term or condition.
16. Indemnification. Vendor shall be liable to and hereby agrees to indemnify, defend and hold harmless the City, and its officers, officials, agents, and employees (from and against all loss or expense (including liability costs and attorney's fees) by reason of any claim or suit, or of liability imposed by law upon the City or its officers, officials, agents or employees for damages because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons or on account of damages to property, including loss of use thereof, arising from, in connection with, caused by or resulting from Vendor's acts or omissions and/or acts or omissions of Vendor's Subcontractors in their performance of this Agreement, except to the extent such claims, suit, liability, damage, loss, costs or expenses are caused by the negligence of the City, its officers, officials, agents, or its employees or the person seeking indemnification.
17. Insurance.
 - A. Required Insurance. Vendor will insure, and will require each subcontractor to insure, as indicated, against the following risks to the extent stated below. Vendor shall not commence work under this Agreement, nor shall Vendor allow any subcontractor to commence work on its subcontract, until the insurance required below has been obtained and corresponding certificate(s) of insurance

have been approved by the City Purchasing Agent and City Attorney.

- 1) Commercial General Liability. During the life of this Agreement, Vendor shall procure and maintain Commercial General Liability Insurance, including, but not limited to, bodily injury, property damage, personal injury, products and completed operations in an amount not less than \$1,000,000 per occurrence and \$2,000,000 in the aggregate. This policy shall also provide contractual liability in the same amount. Vendor's coverage shall be primary and list the City, its officers, officials, agents and employees as additional insureds. Vendor shall require all subcontractors under this Agreement (if any) to procure and maintain insurance meeting the above criteria, applying on a primary basis and listing the City, its officers, officials, agents and employees as additional insureds.
 - 2) Automobile Liability. During the life of this Agreement, Vendor shall procure and maintain Business Automobile Liability Insurance covering owned, non-owned and hired automobiles with limits of not less than \$1,000,000 combined single limit per accident. Vendor shall require all subcontractors under this Agreement (if any) to procure and maintain insurance covering each subcontractor and meeting the above criteria.
 - 3) Worker's Compensation. During the life of this Agreement, Vendor shall procure and maintain statutory Workers' Compensation insurance as required by the State of Wisconsin. Vendor shall require all subcontractors under this Agreement (if any) to procure and maintain such insurance, covering each subcontractor.
 - 4) Umbrella Liability. During the term of this Agreement, Vendor shall procure and maintain Umbrella Liability coverage at least as broad as the underlying Commercial General Liability, Watercraft Liability (if required), Business Automobile Liability and Employers Liability with minimum limits of \$2,000,000 per occurrence and aggregate.
 - 5) Liquor Legal Liability. During the life of this agreement, Vendor shall procure and maintain Liquor Legal Liability coverage with a minimum limit of \$1,000,000.
- B. Acceptability of Insurers. The above-required insurance is to be placed with insurers who have an A.M. Best rating of no less than A- (A minus) and a Financial Category rating of no less than VII.
- C. Proof of Insurance, Approval. Vendor shall provide the City with certificate(s) of insurance showing the type, amount, class of operations covered, effective dates, and expiration dates of required policies prior to commencing work under this Agreement. Vendor shall provide the certificate(s) to the City's representative upon execution of the Agreement, or sooner, for approval by the City Purchasing Agent whose approval consent shall not be unreasonably

withheld, conditioned or delayed. Vendor shall provide copies of additional insured endorsements or insurance policies, if requested by the City Purchasing Agent.

- D. Notice of Change in Policy. The Vendor and/or Insurer shall give the City thirty (30) days advance written notice of cancellation, non-renewal or material changes to any of the above-required policies during the term of this Agreement.
- E. Insufficient Coverage. In the event of expiration, material change, or cancellation of insurance required by this Agreement, Vendor shall immediately cease use of the Premises and the provision of the services under this Agreement until such time as proof of the required insurance is provided to the City Purchasing Agent consistent with the requirements of this Section.
18. Non-Discrimination. In the performance of the services under this Agreement the Vendor agrees not to discriminate against any employee or applicant because of race, religion, marital status, age, color, sex, handicap, national origin or ancestry, income level or source of income, arrest record or conviction record, less than honorable discharge, physical appearance, sexual orientation, gender identity, political beliefs, or student status. Vendor further agrees not to discriminate against any subcontractor or person who offers to subcontract on this Agreement because of race, religion, color, age, disability, sex, or national origin.
19. Taxes and Assessments. Vendor agrees to timely pay all taxes, assessments, or other public charges levied or assessed by lawful authority (but reasonably preserving Vendor's right of appeal) against the personal property and services of Vendor on the Premises during the term of this Agreement.
20. Severability. It is mutually agreed that in case any provision of this Agreement is determined by any court of law to be unconstitutional, illegal or unenforceable, it is the intention of the parties that all other provisions of this Agreement remain in full force and effect.
21. Notices. All notices to be given under the terms of this Agreement shall be in writing and signed by the person serving the notice and shall be sent registered or certified mail, return receipt requested, postage prepaid, or hand delivered to the addresses of the parties listed below:

City: City Clerk's Office
City of Sheboygan
828 Center Avenue
Sheboygan, WI 53081

Vendor: Power Pubs, LLC
Attn. John L. Powers
4792 N. Cramer St.
Whitefish Bay, WI 53211

22. Third Party Rights. This Agreement is intended to be solely between the parties hereto. No part of this Agreement shall be construed to add, supplement, amend, abridge or repeal existing rights, benefits or privileges of any third party or parties, including but not limited to employees of either of the parties.
23. Audit and Retaining of Documents. Vendor agrees to provide certain financial reports relating to Vendor's gross revenues in the Premises and improvements made to the Premises including, but not limited to, Sales Reports, Report of Other Revenue, Sales Tax Records, and any other reports or documents reasonably requested which are related to Vendor's gross sales. Sales Reports shall contain: (1) quantities purchased, by SKU; (2) revenues generated, by SKU; (3) total gross revenue; (4) sales taxes; (5) total Net Revenue; and (6) the City Fee. The Report of Other Revenue shall detail: (1) the date of each shelter rental made under Section 3(U) and the rental fee collected for the shelter rental and (2) all other non-sales revenue from Vendor related to its activities on the Premises. Sales Tax Records shall refer to all documents which relate to: (1) operations at the Premises and (2) the calculation of sales tax. Sales Tax Records shall, at a minimum, include the sales tax returns filed by Vendor. Vendor will also retain daily cash register reports as a backup. Cash register reports shall provide sufficient detail as to the transactions during each day of operations as to allow the City to conduct an audit. Sales Reports, Report of Other Revenue, and Sales Tax Records shall be provided to the City at the same time the City Fee is remitted, as provided for under Section 3(S). Other reports or documents reasonably requested by the City shall be provided within seven (7) business days after Vendor receives the City's written request therefor, unless the parties agree in writing on a longer period. Documents relating to the performance of services under the terms of this Agreement shall be retained by Vendor for a period of four (4) years after completion of the year of operation, in order to be available for audit by the City or its designee. Thus, for example, records from the 2019 year of operation shall be retained until at least January 1, 2024. Any such audit shall be at the City's sole cost and expense. Vendor shall be responsible for payment of interest on amounts not remitted in accordance with this Agreement. The rate of interest shall be the statutory rate in effect at the time set forth in Wis. Stat. 74.47(1). That rate of interest is currently 1% (one percent) per month or fraction of a month. The interest rate shall apply to instances: (1) in which the Vendor remits less to the City as the City Fee than is shown on the Sales Reports and (2) in which the City identifies an understatement in the City Fee as reported on the Sales Report. In the event that the City identifies an understatement in the City Fee as reported on the Sales Report, Vendor shall also owe a penalty. The penalty shall be the maximum rate permitted at the time by Wis. Stat. 74.47(2). That penalty rate is currently 0.5% (five tenths of one percent).
24. Choice of Law and Forum Selection. This Agreement shall be governed by and construed, interpreted and enforced in accordance with the laws of the State of Wisconsin. The parties agree, for any claim or suit or other dispute relating to this Agreement that cannot be mutually resolved, the venue shall be Sheboygan County Circuit Court, and the parties agree to submit themselves to the jurisdiction of said court, to the exclusion of any other judicial district that may have jurisdiction over such a dispute according to any law.

25. Compliance with Applicable Laws. Vendor shall become familiar with, and shall at all times comply with and observe, all federal, state, and local laws, ordinances, and regulations which in any manner affect the services or conduct of Vendor and its agents and employees. Vendor's failure to comply with any such laws, ordinances or regulations shall be a default subject to Section 26 of this Agreement.
26. Default/Termination. In the event Vendor shall default in any of the covenants, agreements, commitments, or conditions herein contained, or fails to fully perform and carry out any term or condition of this Agreement to the satisfaction of the City, and any such default shall continue un-remedied for a period of thirty (30) days after Vendor's receipt of written notice detailing such default, the City may, at its option and in addition to all other rights and remedies which it may have at law or in equity against Vendor, including expressly the specific enforcement hereof, forthwith have the cumulative right to immediately terminate this Agreement and all rights of Vendor under this Agreement. A violation of federal, state, or local law or a violation which, by its nature cannot be remedied within ten (10) days shall not require the City to provide Vendor with ten (10) days to remedy their prior action.
27. Force Majeure. If either party hereto shall be delayed or hindered in or prevented from the performance of any act required hereunder by reason of strikes, lockouts, labor troubles, inability to procure material, failure of power, restrictive federal or state governmental laws or regulations, riots, insurrection, war or other reason of a like nature not the fault of the party delayed in performing work or doing acts required under this Agreement, the period for the performance of any such act shall be extended for a period equivalent to the period of such delay. Notwithstanding the foregoing, the provisions of this Section shall at no time operate to excuse Vendor from any obligations for payment of any payments required by the terms of this Agreement when the same are due, and all such accounts shall be paid when due.
28. Authority. Each person executing this Agreement on behalf of a party hereto represents and warrants to the other party that such person, that the execution and delivery of this Agreement has been duly authorized and the persons executing this Agreement have the full power, authority and right to do so, and that such execution is sufficient and legally binding on such party to enable this Agreement to be enforceable in accordance with its terms.
29. Alcoholic Beverage License Contingency. Vendor's obligations under this Agreement are contingent upon the City issuing to Vendor such alcoholic beverage licenses allowing Vendor to serve malt beverages on the Premises. If the City fails to issue such licenses to Vendor within sixty (60) days of receipt of a completed application, Vendor may terminate this Agreement and be fully reimbursed for any Security Deposit payments made. Upon such termination by Vendor, this Agreement shall be of no further force or effect.
30. Other Biergartens: During the term of this Agreement and any renewal or replacement thereof, the City shall not permit, directly or indirectly, any other Biergartens to open or operate within any public parks in the City of Sheboygan.

31. Neither Party the Drafter. Despite the possibility that one party or its representatives may have prepared the initial draft of this Agreement (or any provision thereof), or played a greater role in the preparation of subsequent drafts, the parties agree that neither of them shall be deemed the drafter of this Agreement.

[signature page to follow]

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their proper officers on the day and year first above written.

CITY OF SHEBOYGAN, WISCONSIN

POWER PUBS, LLC

BY:

Michael J. Vandersteen
Michael J. Vandersteen, Mayor

BY:

John L. Powers
John L. Powers, Sole Member

ATTEST:

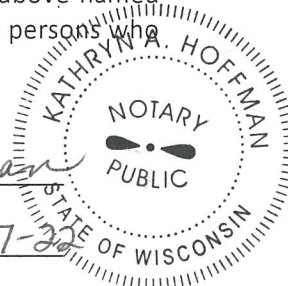
Meredith DeBruin
Meredith DeBruin, City Clerk

ACKNOWLEDGMENTS

STATE OF WISCONSIN)
) ss
SHEBOYGAN COUNTY)

Personally came before me this 27th day of August, 2018, the above-named Michael J. Vandersteen, Mayor, and Meredith DeBruin, City Clerk, to me known to be the persons who executed the foregoing instrument and acknowledged the same.

Kathryn A. Hoffman
Notary Public, State of Wisconsin
My Commission expires: 1-27-22



STATE OF WISCONSIN)
) ss
MILWAUKEE COUNTY)

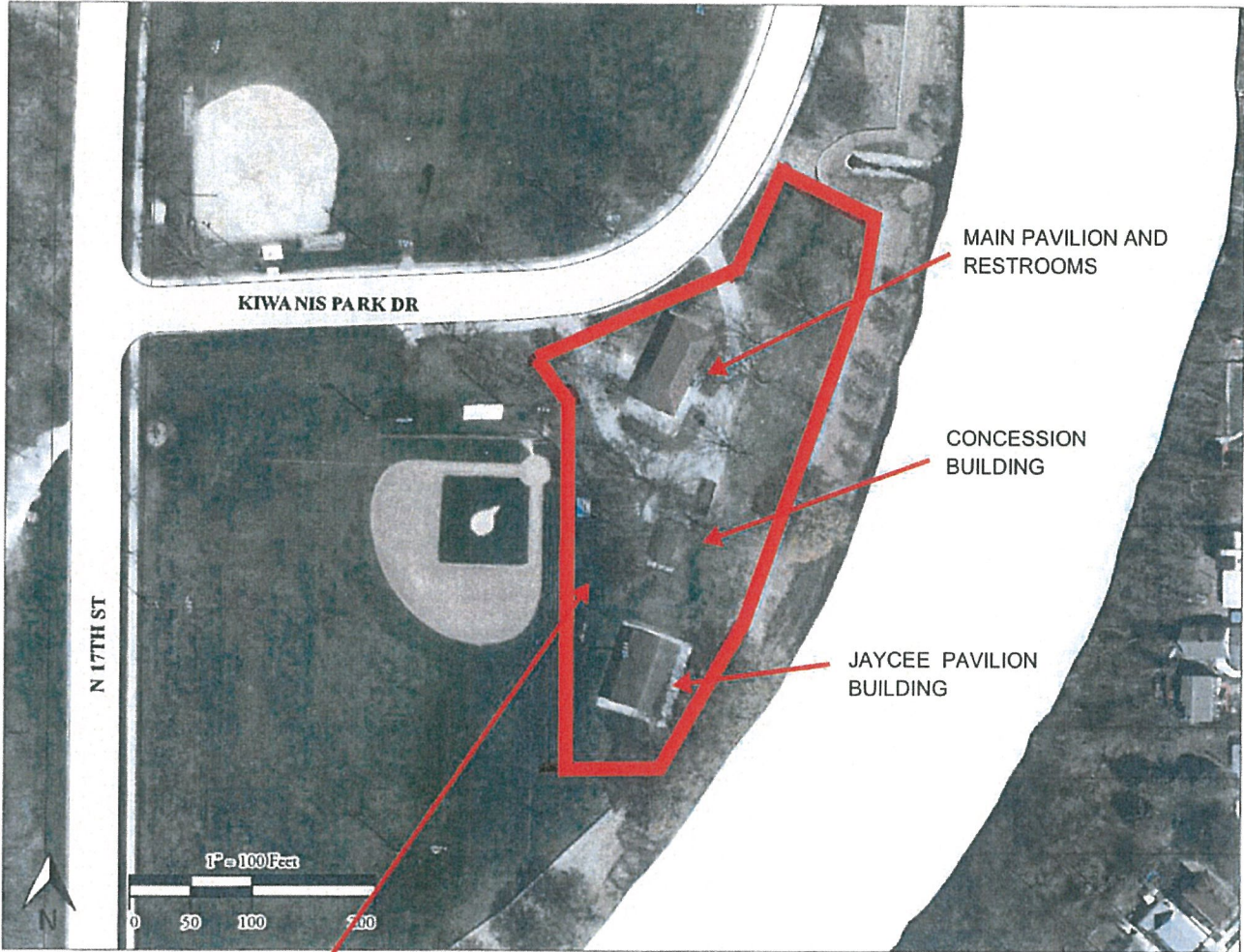
Personally came before me this 3rd day of Sept., 2018, the above-named John L. Powers, sole member of Power Pubs, LLC, a Wisconsin limited liability company to me known to be the person who executed the foregoing instrument and acknowledged the same.

Stephanie D. Oster
Notary Public, State of Wisconsin
My Commission expires: 8/1/22
S. Rotstein, Judge
BR 25 Milw. County

This document authorized by and in accordance with Res. No. 3-18-19

EXHIBIT A
SITE PLAN
KIWANIS PARK BIERGARTEN

Area 2



City of Sheboygan GIS // 7/24/2018 1:21 PM // kerlin

PREMISES - BIERGARTEN

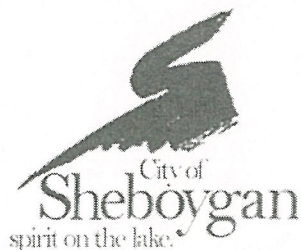


EXHIBIT B
WORK LETTER

CITY OF SHEBOYGAN
DEPARTMENTAL CORRESPONDENCE

TO: John Powers
Power Pubs, LLC

FROM: Joe Kerlin
Superintendent of Parks, City of Sheboygan

SUBJECT: City Maintenance related to Biergarten

DATE: August ___, 2018

Pursuant to Section 3(T) of the Operating Agreement between the City of Sheboygan and Power Pubs, LLC, in an effort to provide clear expectations for both the City and Power Pubs, this letter is specifically documenting the items which the City will accomplish before you start your operations.

1. **Current Electrical Issue:** During our inspection of the concession stand, which you will use for your Biergarten operations, it appeared that the wiring had been eaten by an animal of some kind. The City will replace the electrical service panel and damaged wiring with a level of service and wiring equal to the service and wiring provided prior to the animal apparently eating the wiring. The City will not increase the amperage of the electric service or the wiring above and beyond its previous service level.
2. **Sewer Line:** During our inspection of the Concession Building, a question arose about whether the waste drains are properly tied into the City's sewer system. The City will confirm that the Concession Building waste drains are properly tied into the sewer system and, in the event they are not, will make arrangements to ensure they are properly tied into the sewer system.
3. **Sizing of the Sewer Line:** During our inspection of the Concession Building, a question arose about whether the sewer line running from the Concession Building would be sufficiently sized for your intended purposes. The City will make commercially reasonable efforts to determine the size of the sewer line. The City will not increase the size of the sewer line.

PUBLIC WORKS

MUNICIPAL SERVICES BUILDING
2026 NEW JERSEY AVE.
SHEBOYGAN, WI
53081

920-459-3440 (Phone)
920-459-3443 (Fax)

www.sheboyganwi.gov

If you have any questions, please do not hesitate to contact me.