
MANAGEMENT AGREEMENT

BETWEEN

**CITY OF VIRGINIA BEACH, VIRGINIA, a municipal corporation of the Commonwealth
of Virginia**

(CITY)

AND

ESM VBSC, LLC, a Virginia limited liability company

(MANAGER)

Operation and Maintenance of the Virginia Beach Sports Center

_____, 2018

MANAGEMENT AGREEMENT

THIS MANAGEMENT AGREEMENT (“**Agreement**”) is made as of _____, 2018 (“**Effective Date**”), between the **CITY OF VIRGINIA BEACH**, a municipal corporation of the Commonwealth of Virginia (the “**City**”), as Owner, and **ESM VBSC, LLC**, a Virginia limited liability company (the “**Manager**”), as Manager.

RECITALS

A. City issued its unsolicited proposal (the “**Solicitation**”) under the Public-Private Education Facilities and Infrastructure Act of 2002 (the “**PPEA**”) seeking the design, construction, operation and maintenance of an indoor sports facility to be known as the Virginia Beach Sports Center (“**Center**”).

B. After reviewing all responses to the Solicitation for construction of the Center; conducting a public hearing as required by the PPEA; and posting for review as required by the PPEA, the City has entered into a contract for the construction of the Center (the “**MEB Contract**”) with MEB General Contractors, Inc. (“**MEB**”).

C. As contemplated by the Solicitation, the City desires that a private party will operate and maintain the Center on behalf of the City.

D. After a review of all responses to the Solicitation, the City has determined that Manager is best suited to operate and maintain the Center after it is constructed pursuant to the MEB Contract.

E. Manager is owned by Eastern Sports Management (“**ESM**”).

F. Manager and City have agreed that Manager will manage the creation and start-up of the operating business for the center and operate and maintain the Center upon completion of the Center as set forth herein.

NOW, THEREFORE, in consideration of the mutual covenants and promises contained in this Agreement, the City and Manager agree as follows:

ARTICLE I RULES OF CONSTRUCTION

Section 1.1. Rules of Construction. Except where the context otherwise requires, (i) singular words connote the plural number as well as the singular and vice versa, and (ii) pronouns inferring the masculine gender include the feminine and neuter genders, and vice versa. All references to particular articles or sections are references to articles or sections of this Agreement unless otherwise indicated. The headings in this Agreement are solely for convenience of reference and do not constitute a part of this Agreement or affect its meaning, construction, or effect.

**ARTICLE II
REPRESENTATIONS**

Section 2.1. Representations by the City. The City makes the following representations as the basis for its undertakings under this Agreement:

- (a) The City is a municipal corporation of the Commonwealth of Virginia.
- (b) This Agreement is authorized by a resolution adopted by the affirmative vote of a majority of the members of the Council present at a meeting at which a quorum was present and acting throughout.
- (c) The City is fee simple owner of the Center.
- (d) The City is authorized to enter into and to carry out its obligations under this Agreement.
- (e) The execution, delivery, and compliance by the City with this Agreement will not conflict with or constitute or result in a default under or violation of any indenture, mortgage, deed of trust, lien, lease, contract, note, order, judgment, decree, or other agreement, instrument, or restriction of any kind to which the City or any of its assets is subject.
- (f) No litigation, inquiry, or investigation of any kind in or by any judicial or administrative court or agency is pending or, to the City's knowledge, threatened against it with respect to its execution and delivery of this Agreement.

Section 2.2. Representations by Manager. Manager makes the following representations as the basis for its undertakings under this Agreement:

- (a) Manager has the power to enter into and to perform its obligations under this Agreement and by proper action has duly authorized the execution and delivery of this Agreement.
- (b) No litigation, inquiry, or investigation of any kind or by any judicial or administrative court or agency is pending or, to Manager's knowledge, threatened against it with respect to the execution and delivery of this Agreement or operation of the Center.
- (c) Manager is lawfully permitted to conduct business in the Commonwealth and enter into this Agreement.
- (d) Manager is a service provider (rather than the owner or tenant) for tax purposes and agrees that it will not claim any depreciation or amortization deductions, tax credits or rent deductions with respect to the City's ownership of the Center; provided that Manager may do so with respect to any personal property, equipment and related assets owned by Manager, located in the Center and used by Manager in the performance of his responsibilities under this Agreement.

ARTICLE III
USE, OPERATION, CITY APPROVALS, MARKETING AND LEASE

Section 3.1. Agreement. The City and Manager enter into this Agreement for Manager to manage as the sole operator of the Center on a daily basis in accordance with the policies, guidelines and procedures established herein.

Section 3.2. Use, Operation and Compliance with Laws. Throughout the Term of this Agreement, Manager or any successor permitted under this Agreement shall be permitted to operate and maintain the Center as an indoor sports center in compliance with the Agreement and all applicable laws, regulations in any way affecting the Center. Manager shall obtain and keep in force all governmental licenses and permits necessary for such use. Manager shall at all times comply with all federal, state, and City laws, statutes, laws, regulations, requirements, codes, and ordinances applicable to Manager's management of the Center. Except as provided for in Sections 3.3 and 3.7, below, Manager shall manage and organize all aspects of the Center and its operation, including, but not limited to, the various recreational and athletic programs and competitive events for individuals and teams, including, but not limited to, rentals, leagues, tournaments and events for basketball, volleyball, field hockey, futsal (indoor soccer), track and field, gymnastics, cheer, dance, wrestling, grappling, and other indoor sports and in general conformance with the Business Plan attached as **Exhibit A** ("**Business Plan**").

Section 3.3. City of Virginia Beach Convention and Visitors Bureau (VBCVB). The Parties intend for the City to establish an office for the VBCVB, a department of the City, in the Center. This office will occupy approximately 1,450 square foot portion of the Center (the "**CVB Offices**") and shall not be available to the Manager for events, rentals, etc. The City and VBCVB shall have an absolute right to use the CVB Offices and retain all rights to access of such space and any infrastructure (such as information technology) required for the operation of it. All reasonable and customary costs for utilities, consumables, and custodial for the CVB Offices shall be the responsibility of the Manager and to be paid from the operating accounts of the Center.

Section 3.4. City Approvals and Budget. Manager shall develop for City's prior approval an initial operating budget setting forth an estimate of operating revenues and expenses (expenses to include all licenses, taxes, insurance, repairs, improvements, etc. of the Center), which operating budget shall be detailed and shall contain an explanation of operating revenues and expenses, all budget assumptions to be attached as **Exhibit B** (the "**Operating Budget**"). Annually, thereafter, Manager shall deliver to the City for its prior approval, no later than forty five (45) days after the end of each calendar year (i.e. February 15th), an operating budget setting forth an estimate of operating revenues and expenses; a statement of cash flows for the Center; and projection of cash receipts and disbursements based upon the proposed expenditures and operating budgets in such detail required by City. The City shall have the right to approve (i) the annual Operating Budget for the Center; (ii) the disposition of real and personal property owned by the City; (iii) rates charged for the use of the Center and related programs, and (iv) the types of activities and uses in the Center. In addition, the City has the right to reduce or waive Center rental fees for events that provide significant economic activity for the community at City's discretion, and in such case, the calculation of the Incentive Fee shall be made with the amount of such waiver included in the gross revenue even though such amounts are not actually received. Manager shall also develop for the City's prior approval a pre-opening budget setting forth an estimate of expenses for the start-up

expenses of the Manager, including but not limited to furniture, fixtures, equipment, operating capital, operating reserves, and principal, interest and related finance charges (the “**Start-up Budget**”). The Start-up Budget will also include a schedule of when funds will be needed in the months prior to facility opening, and a list of the sources of the funds. The estimated, initial Manager’s Start-up Budget is as set forth on **Exhibit C**. Any furniture, fixtures, or equipment purchased pursuant to the Operating Budget or the Start-up Budget shall be the property of the Center. Upon submission of the Operating Budget by the Manager, the City shall review and provide its approval or it may recommend changes specifying in reasonable detail the reasons for such changes. The approval or recommended changes shall be provided to Manager within fifteen (15) days of receipt of the Operating Budget. If the City does not respond within the fifteen (15) days or the recommended changes are not accepted by the Manager, the Parties agree to work expeditiously to resolve any issues regarding the Operating Budget. If no Operating Budget approval has been reached, the Parties agree to use the immediately preceding Operating Budget as the budget for the period of time required to reach agreement upon the Operating Budget. City and Manager agree to work together in good faith to reach agreement on the budgets as soon as reasonably possible.

Section 3.5. Use of Operating Reserves. The Manager shall retain an operating reserve for the purpose of paying unanticipated operating costs (the “**Operating Reserve**”). The City will fund and hold the Operating Reserve account initially with \$750,000. The parties will review quarterly the funding level of the Operating Reserve and any withdrawal(s) from the Operating Reserve will be restored in a reasonable period of time depending on the nature and cause of the need to make such withdrawal(s). The City may require Manager to add additional funds to the Operating Reserve from the net income of the Center. At least five (5) days prior to expenditure of such Operating Reserve, the Manager shall notify in writing the City, through its VBCVB. Manager shall also maintain a working capital account (“**Working Capital**”) with an initial amount of \$400,000 at Substantial Completion. The City shall be provided the opportunity to review the intended Working Capital account on a quarterly basis. As the working account of Manager’s business, Manager will not need to obtain approval from the City for expenditures from this account. Any purchase of a single item between \$5,000 and \$10,000 from the Operating Reserve or otherwise shall be reported to the City quarterly.

Section 3.6. Capital Reserves and Expenditure Thereof. The City will maintain a capital reserve for the Center in such amounts as are appropriated by the City Council of the City. For purposes of this Agreement, “capital expenditure” shall mean an expenditure for a purchase of additional or replacement machinery or equipment or similar expense, the cost of which is in excess of \$10,000 and the depreciable life of which, according to generally accepted accounting principles, is in excess of one (1) year and any other item of expense that, according to generally accepted accounting principles, is in excess of \$10,000 and not properly deducted as a current expense on the books of the Center, but rather should be capitalized. The Manager may include in the Budget a request for certain capital expenditures. The City shall retain sole discretion to approve such capital expenditures, but the City will give reasonable consideration to any capital expenditure request from the Manager in light of competing financial considerations. Any Capital Expense in an amount less than \$10,000 required to be capitalized on the books of the Center in accordance with generally accepted accounting principles will be treated as an operating expense when calculating Quarterly Payments by Manager as defined below in Section 4.4.

Section 3.7. Booking Policy. In an effort to further the City's vision for the Center as an asset to attract sports participants, spectators, and their families to the City and, in turn, to provide a positive economic impact on the City, Manager agrees to work closely with the VBCVB to book tournaments and events that will maximize the economic impact on the City. Manager and the VBCVB will meet weekly to review marketing efforts of both Manager and the VBCVB and to schedule and reserve dates for committed and potential tournaments and events to include, but not limited to, the following:

(a) Operator may book any open dates inside nine (9) months. The City shall control all other dates. Within nine (9) months, the Manager may book rentals, leagues, tournaments or other events in its discretion for any open dates with the shared goal with the City of maximizing utilization of the Center in support of sports tourism. The City without Manager's consent may not overbook any date booked by Manager inside of nine months. Any non-sports events require approval from the City in advance of booking. Manager agrees to cooperate with the VBCVB to adjust any Monday to Thursday scheduled leagues or rental arrangements in order to accommodate any week-long tournaments or events. City shall review all booking proposals and bids with Manager prior to submitting bids or proposals to ensure Manager can successfully execute any requirements and obligations created for Manager in any such bids or proposals.

(b) Manager may enter into use agreements for Center utilization Monday through Thursday that have a term in excess of nine (9) months, provided that any such agreement will include language that will allow City to reclaim such time no later than nine (9) months from the event date. The general language of the Center use agreements will be reviewed and approved by the City and the City's bond counsel no less than nine (9) months prior to the Commencement Date.

(c) Manager will work with VBCVB to set a pricing strategy that is competitive in the market;

(d) Manager will work with VBCVB to create City-owned, operated and branded events;

(e) Manager will work collaboratively with other management/operating groups in adjacent facilities for multi-venue opportunities;

(f) Manager will work collaboratively on coordination of parking needs with adjacent facilities; and

(g) Manager will present other creative collaborative opportunities that meet the City's objectives.

(h) In the event that the Manager and City have created and established tournaments in the Center and a non-City owned event or tournament wishes to utilize the Center for the same date as the City owned tournament or event, the event to receive booking priority will be the event that will generate the greater economic impact using the City's current economic impact model. The City shall share the economic impact model with the Operator and any updates to such model. Any dispute as to the results of the economic impact methodology shall be elevated to the authorized representative of the Manager and the City's Deputy City Manager for resolution.

**ARTICLE IV
AGREEMENT TERM AND PAYMENT PROVISIONS**

Section 4.1. Term of Agreement; Delay. The Term of this Agreement shall commence upon Substantial Completion of the Center as defined in the MEB Contract (“**Commencement Date**”). Prior to the Commencement Date, Manager and City will finalize all exhibits to this Agreement. This Agreement shall remain in full force and effect for an initial term of ten (10) years (the “**Initial Term**”). Provided (a) Manager is not in default under this Agreement at the time of Manager’s exercise of an extension option and at the commencement of the Renewal Term (defined below), (b) City has not terminated the Agreement as provided herein and (c) no event has occurred which is or would be a default pursuant to this Agreement with the passage of time and/or failure to cure, Manager and the City shall have the option to renew this Agreement for two (2) additional terms of five (5) years, (the “**Renewal Term(s)**”), by giving City written notice at least one-hundred and eighty (180) days prior to the expiration of the Initial Term. If such notice is not timely given, this Agreement shall automatically terminate at the end of the Initial Term. The Renewal Term shall be on the same terms and conditions applicable to the Initial Term. The Initial Term and any Renewal Term(s) may be collectively referred to herein as the “**Term.**” Any occupancy of the Center by Manager prior to the Commencement Date shall be subject to this Agreement (including, without limitation, insurance and indemnity). If Substantial Completion does not occur and possession is delayed after November 1, 2020, this Agreement shall not be terminable, but delivery and commencement shall be delayed a reasonable period to permit Substantial Completion in accordance with the MEB Contract.

Section 4.2. Payment of Monthly Management Fee. Manager shall pay to Eastern Sports Management, LLC from the Center’s operating account an annual management fee equal to three-hundred and sixty thousand dollars (\$360,000.00) (the “**Management Fee**”) payable in monthly amounts of thirty-thousand dollars (\$30,000.00) beginning on the date of Substantial Completion and every month thereafter for the Initial Term and any Renewal Term, subject to an annual increase of the Consumer Price Index (CPI) or three percent (3%), whichever is lower, per year. During the pre-opening period from the Effective Date to the date of Substantial Completion, City will pay the Manager a Fee of fifteen thousand dollars (\$15,000.00) per month for the first twelve (12) months after the Effective Date and then twenty thousand dollars (\$20,000.00) per month thereafter until Substantial Completion. The Parties anticipate the Manager will pay the Fee during such pre-opening period to Eastern Sports Management, LLC.

Section 4.3. Payment of Monthly Incentive Fee. Manager shall pay to Eastern Sports Management, LLC from the Center’s operating account a monthly incentive fee (“**Incentive Fee**”) equal to six percent (6%) of Gross Revenues during the first two years after the Commencement Date. After the first two years after the Commencement Date, Manager shall pay to Eastern Sports Management, LLC from the Center’s operating account a monthly incentive fee equal to four percent (4%) of the first \$2,500,000 of the Gross Revenues, five percent (5%) of the next \$1,000,000 of Gross Revenues, six percent (6%) of the next \$1,000,000 of Gross Revenues, and seven percent (7%) of any Gross Revenues above \$4,500,000, and payable on a monthly basis. “**Gross Revenues**” shall mean money earned by the Center through the sale of goods, services, rents and other sources. To ensure the “Gross Revenues” includes all sales, the Manager shall have a single point-of-sale system to capture all sale transactions or multiple point-of-sale systems provided such multiple systems are compliant and auditable. If food trucks or other such vendors

are part of an event or tournament, the occupancy fee or other such fee shall be included in "Gross Revenues."

Section 4.4. Quarterly Payments By Manager. Manager shall pay to the City, a sum equivalent to the Gross Revenues less (i) operating expenses, (ii) Management Fee, (iii) Incentive Fee, (iv) additions to the operating reserves and (v) and management fees, any expenses with respect to the Start-up Budget, including any acquisition costs, including payments of principal and interest on equipment purchased, for any personal property, equipment and related assets purchased, leased or owned by Manager and used by Manager in the performance of his responsibilities under this Agreement. Such amounts shall be collectible as and payable to the City promptly, but no later than 30 days after the end of each quarter.

Section 4.5. Reports. Manager shall provide to the City on a quarterly basis a financial statement covering all income and expenses related to the Center during the preceding quarter, which is prepared in accordance with generally accepted accounting principles by an independent certified public accountant that is approved by the City and in a form as generally shown on **Exhibit D** ("**Quarterly Report**"), such approval not to be unreasonably withheld. In addition, Manager shall promptly provide upon the City's request, any additional information prepared by Manager regarding the income and expenses related to the Center that the City reasonably determines is necessary or appropriate.

Section 4.6. Quarterly Review by the City. The City will provide a quarterly review of the Manager's performance as operator of the Center. This quarterly review will include: facility utilization, cleanliness, maintenance, staffing levels, customer service, and communication, according to the standards set forth in this Agreement, Exhibits or Amendments. The review will include one of the following conclusions: 1. The Manager met expectations for the previous quarter; or 2. The Manager failed to meet expectations for the previous quarter.

Section 4.7. Annual Review by the City. The City will provide an annual review of the Manager's performance as operator of the Center. This annual review will include a summary of the preceding four quarterly reviews and an annual financial audit. The annual financial audit shall include the unamortized amount of any Start-up Costs. The review will include one of the following conclusions: 1. The Manager met expectations for the previous year; or 2. The Manager failed to meet expectations for the previous year.

ARTICLE V OPERATION AND MAINTENANCE; INSURANCE

Section 5.1. City Services. It shall be City's responsibility, at City's sole cost and expense and without reimbursement from Manager, to repair and replace, as necessary: (a) foundations and exterior roofs of the Center, (b) the stormwater management facilities serving the Center; and (c) electric, gas, water, and sewer facilities, as applicable, up to the edge of a utility easement or meter with Manager responsible from that point up to, and into, the Center. Except in an emergency, City shall use reasonable efforts to perform any repairs or replacements during the non-business hours of the Manager and in such a manner so as not to interfere with the normal operation of the Manager's business. Manager may, but shall not be obligated to, perform any of such repairs or replacements which are of an emergency nature or which are not completed by City

within a reasonable time after notification by Manager of the necessity therefor. In the event Manager performs any of such repairs or replacements, Manager shall be entitled to be reimbursed by City for the reasonable cost thereof, upon providing to City bills for the cost of any such repairs.

Section 5.2. Operation and Maintenance by Manager. Manager will operate and maintain the Center (including, but not limited to kitchen equipment, elevators, mechanical, electrical, and plumbing systems), in good repair, attractive appearance, and good operating condition (City Services as provided in Section 5.1 excepted) in accordance with the interior and exterior maintenance plans as set forth in on **Exhibit E** (“**Maintenance Plans**”) and shall pay the cost of such operation, maintenance, repair, and replacement, including, but not limited to, water, heat, air conditioning, light, electricity, repairs, replacements, interior security cameras, janitorial, cleaning and caretaking services (excluding utility installation and connection charges that the City will pay) all from the operating accounts of the Center. The City will not be required to make any repairs, renewals, or replacements of the Center of any nature whatsoever except as otherwise provided in herein. Any contractor for the maintenance of such systems shall be subject to the prior written consent of the City, which consent shall not be unreasonably withheld, conditioned or delayed. If Manager fails to start any maintenance, repairs, or replacement within 15 calendar days after written notice by the City or to promptly complete such maintenance, repairs, or replacement, then the City may provide such repairs or maintenance, and the City shall be reimbursed for such expenses from the operating accounts of the Center. The Manager shall maintain a maintenance log, and such maintenance log shall be subject to inspection by the City. In fulfilling the requirements of this Agreement, the Manager shall follow all manufacture schedules for maintenance of equipment and systems of the Center.

Section 5.3. Insufficient Funds. If Manager believes there may be the requirement to seek additional funding from the City in the following sixty (60) days, the Manager shall submit to the City a notice providing the facts and circumstances for such diminished operating accounts (the “**Low Funds Notice**”). The City may request a meeting with the Manager to discuss remedial actions to address operational accounts. If subsequently there are not sufficient funds to meet the operating expense requirements of the Center, Manager shall immediately notify the City (an “**Insufficient Funds Notification**”). In the event of an Insufficient Funds Notification, the City shall have the option to:

(i) provide Manager funds sufficient to meet the operating expense requirements of the Center. Should City elect to provide Manager funds, payment of the Incentive Fee shall be suspended until all funds provided by the City have been returned to the City by Manager; and

(ii) require from Manager a six (6) month plan to increase revenues or decrease expenses such that the operating expenses of the Center are met and any funds advance by the City are returned .

(iii) If Manager fails to meet the expenses of the Center after six (6) months from the receipt of the Insufficient Funds Notification, the City may deem such an occurrence an Event of Default as contemplated by Section 8.1

Section 5.4. Sponsorship and Signage. Manager shall have the right to sell sign and sponsorship packages for the Center, provided the sign or sponsorship packages relate only to the inside of the Center. The City consents to signage upon light poles. The City will have approval rights for all sign and sponsorship packages to ensure such are consistent with the City's desire that the Center be a family-oriented facility. To maintain flexibility for hosting events, there shall be no internally affixed signage promoting an athletic brand. Notwithstanding the City's consent, any signs installed by Manager shall comply with all applicable laws and regulations. Manager further agrees to maintain such signs, lettering, advertising matter or other thing as may be approved in good condition and repair at all times. Manager may sell naming and sponsorship rights for the entire Center with the advice and consent of the City provided any such arrangement is approved by the City and the City's bond counsel has provided an opinion that the naming and sponsorship rights will not adversely affect the tax exempt status of the municipal bonds issued for the Center. The City will include Manager in any discussion in which City is engaged for naming or sponsorship rights for the entire Center, as Manager shall be the party responsible for execution of any naming or sponsorship agreement. In any event, whether sold by City or Manager, sponsorship and naming revenue will be recognized as revenue of the Center by Manager. After deducting any direct expenses related to Manager's fulfillment of any naming or sponsorship agreements the net amount of any sponsorship or naming revenue will be paid by Manager to the City and applied to capital reserves until full-funded or refreshed, as the case may be. The direct expenses described in the preceding sentence shall not include any overhead or profit. If sold by the City, sponsorship and naming revenue will not be included in the calculation of the Incentive Payment.

Section 5.5. Alcohol. Manager may routinely serve alcoholic beverages on the Center, pursuant to an on-Center license from the Virginia Department of Alcohol Beverage Control ("ABC"). This paragraph shall not exclude any third-party vendor, from serving alcoholic beverages on the Center episodically, provided the following are met: (1) a banquet or any other appropriate license is obtained from ABC; (2) the manner and location in which the alcoholic beverages are to be served and consumed, comply with the standards required by the City for alcohol service and consumption at other City-owned properties; and (3) Manager provides the City with five (5) day prior notice when a third party will have alcoholic beverages on the Center.

Section 5.6. Ownership of Tournaments or Events. If a tournament or event is developed or otherwise created by the City, the City and the Manager jointly, or the Manager at the Center while working as the City's agent, the City shall have ownership of such tournament or event, and the City retains the right to limit the location of such tournament or event.

Section 5.7. Taxes, Other Governmental Charges, and Utility Charges. Manager shall pay when due all taxes and governmental charges of any kind whatsoever lawfully assessed, levied, or imposed against the City or Manager with respect to the Center, or any machinery, equipment, or other property installed in or on, or brought by Manager to, the Center. Manager shall pay when due all utility and other charges incurred in the operation, maintenance, use, and occupancy of the Center, and all assessments and charges lawfully made by any governmental body for public improvements to the Center. Manager may, however, upon ten business days' written notice from the Manager to the City of the Manager's intention to do so, at its sole expense and in its own name or in the name of the City (but only with the City's written consent), contest in good faith any such tax, assessment, utility or other charge, in which event it may permit the charge to remain unpaid during the period of the contest and any appeal unless, in the sole opinion of the

City, the action may subject the City to loss or forfeiture, in which event the charge shall be promptly satisfied or secured by posting with the City or an appropriate court of record, or appropriate department or agency, a bond in form and amount reasonably satisfactory to the City, in its sole discretion.

Section 5.8. Additional Rights of the Manager. Manager may from time-to-time, in its discretion and at its sole expense, install machinery, equipment, and furnishings at the Center. All machinery, equipment, and furnishings installed by Manager will remain the property of Manager and the City will not have any interest in them. Manager shall promptly pay all contractors and materialmen in full so as to avoid the possibility of any lien being asserted against the Center and if any such lien is asserted or filed, Manager shall take all action that is necessary to have such lien released within 30 calendar days after the Manager receives notice. Manager shall not make or cause to be made any alterations, additions, or improvements or install or cause to be installed any trade fixtures or equipment, floor covering, interior or exterior lighting, plumbing fixtures, or make any changes to the Center without the prior written consent and approval of the City, which approval and consent shall not be unreasonably withheld, conditioned or delayed. Manager shall present to the City plans and specifications for such work at the time such approval and consent is sought. The City, in its sole discretion, may request additional information from Manager about any proposed work, which Manager shall promptly provide to the City. Manager's contractor and any subcontractor shall be subject to the City's prior written approval. The City may, in its sole discretion, condition its approval on the contractor's or subcontractor's evidencing to the City that it maintains liability insurance in an amount satisfactory to the City. Notwithstanding the preceding, if machinery, equipment, or furnishings is to be paid for out of the operating accounts for the Center, the Center shall retain ownership of such machinery, equipment, or furnishings.

Section 5.9. Personnel Standards. The staff of the Manager shall have clothing that identifies such personnel as the employees of the Manager. The Manager shall provide staffing sufficient to maintain the orderly operations of the Center and the cleanliness of the Center. The City shall provide to Manager the same training opportunities made available to City employees, such as active shooter training, and Manager agrees to provide such training to its employees. The staff of the Manager that interact with patrons of the Center shall have a background check, which is an operating expense of the Center.

Section 5.10. Manager's Liability Insurance. During the Term of this Agreement, Manager at Manager's sole cost, shall obtain and maintain, with a reputable insurer reasonably acceptable to City, for the benefit of City and Manager as their respective interests may appear, commercial general liability insurance policy against any claim for damages which may result from the use or occupation or condition of the Center, in an amount of Two Million Dollars (\$2,000,000.00) for combined single limit for bodily injury and property damage and a Five Million Dollar (\$5,000,000.00) umbrella liability policy. Manager shall name City as an additional insured as its interests may appear under said insurance policies and the Manager shall furnish the City with copies of the certificates of insurance evidencing coverage under the said policies. In addition to the foregoing, Manager shall not cancel such coverage without thirty (30) day's prior notice to City. Additionally, the Manager shall maintain in force and effect a Fidelity Bond in the amount of \$10,000 to protect against thefts by employees.

Section 5.11. City's Insurance. The City shall maintain facility, fire, or premises insurance at the same levels as the City maintains for other City facilities utilized by the general public.

Section 5.12. Indemnification. It is understood and agreed that Manager hereby assumes the entire responsibility and liability for any and all damages to persons or property caused by or resulting from or arising out of any tortious act or omission on the part of Manager, its agents or employees under or in connection with this Agreement, or the performance or failure to perform any work or services required by this Agreement. Manager agrees to indemnify and hold harmless the City and its agents, volunteers, servants, employees, and officials from and against any and all claims, losses, or expenses, including reasonable attorney's fees and litigation expenses incurred and suffered by any indemnified party or entity as the result of claims or suits due to, arising out of or in connection with (a) any and all such damages, (b) the violation of any law by Manager, its agents or employees applicable to this Agreement, and (c) the performance of the work or services by Manager or those for who the Manager is legally liable. Upon written demand by the City, Manager shall assume and defend at Manager's sole expense any and all such suits or defense of claims provided herein and made against the City, its agents, servants, employees or officials. With the written approval of the City, Manager may pay for such expenses from the operating accounts of the Center.

Section 5.13. Advances by the City. If Manager fails to pay when due any amount which Manager is obligated to pay as provided in this Agreement following five (5) business days after written notice and opportunity to cure from City, the City, may (but will be under no obligation to) make the payment. If City makes any payment on behalf of Manager, Manager shall be obligated to reimburse the City within thirty (30) days.

If Manager fails to perform any act required of it under this Agreement, following thirty (30) days after City gives Manager notice specifying the breach, or if such breach cannot, with due diligence, be cured within thirty (30) days, if Manager does not commence to cure such default within said thirty (30) day period and thereafter prosecute the cure of such default as quickly as reasonably practicable, the City, may (but will be under no obligation to) perform the act. If City performs makes such act on behalf of Manager, Manager shall be obligated to reimburse the City for costs incurred by the City to perform such act within thirty (30) days.

Section 5.14. Liens. Manager shall have no right, authority, or power to bind the City, or any interest of the City in the Center, nor to render the Center liable for any lien or right of lien for the payment of any claim for labor, material, or for any charge or expense incurred to construct, maintain, repair, or to make alterations, additions, and improvements to the Center.

Section 5.15. Assignment. Manager may assign this Agreement at any time during the Term, with prior written notice be provided to the City, to an affiliate owned or controlled by John M. Wack. Jr., provided that said entity can meet all terms of this Agreement, including but not limited to, the provision of liability insurance. Any other assignment will require the prior written consent of City, which consent shall not be unreasonably withheld, conditioned, or delayed. Manager shall not encumber its interest in this Agreement, dissolve or alter the corporate structure of Manager except as permitted herein, without first obtaining the written consent of the City, which consent shall not be unreasonably withheld, conditioned, or delayed. Any assignment, transfer, or

encumbrance without the City's prior written consent shall be void and, in City's sole discretion and election, shall constitute a default. In the event of any assignment or transfer with the City's prior written consent, Manager shall remain liable to the City for full performance and payment of all of the obligations of Manager under this Agreement. Manager shall give the City an executed assumption agreement whereby the transferee or assignee shall (i) assume Manager's duties under this Agreement from and after such assumption or transfer, and (ii) pay and perform all obligations, covenants, and conditions of Manager under this Agreement. Manager shall promptly forward a complete and signed copy of such permitted assignment, or transfer to the City. No such assignment, or transfer shall constitute a novation or a release of any claim the City may then or thereafter have against the Manager.

Section 5.16. Audits. The City shall have the right to audit all books and records (in whatever form they may be kept, whether written, electronic or other) relating or pertaining to this Agreement (including any and all documents and other materials, in whatever form they may be kept, which support or underlie those books and records), kept by or under the control of Manager, including, but not limited to those kept by Manager, its employees, agents, assigns, and successors. Manager shall maintain such books and records, together with such supporting or underlying documents and materials, for the duration of this Agreement and for at least three years following the completion of this Agreement, including any and all renewals thereof. The books and records, together with the supporting or underlying documents and materials shall be made available, upon request, to the City, through its employees, agents, representatives, Managers or other designees, during normal business hours at Manager's office or place of business in Virginia Beach, Virginia. In the event that no such location is available, then the books and records, together with the supporting or underlying documents and records, shall be made available for audit at a time and location in Virginia Beach, Virginia, which is convenient for the City. This Section shall not be construed to limit, revoke, or abridge any other rights, powers, or obligations relating to audit which the City may have by state, city, or federal statute, ordinance, regulation, or agreement, whether those rights, powers, or obligations are express or implied.

ARTICLE VI DAMAGE, DESTRUCTION, OR CONDEMNATION

Section 6.1. Risk of Loss from Damage or Destruction. The City shall bear all risk of loss from damage or destruction to the Center other than damage caused by the Manager. Any damage caused by Manager shall be paid by the Manager, and the City consents to the use of the Center budget for such purpose. Any decision to rebuild or repair the Center in the event of damage or destruction shall be made by the City Council pursuant to a lawful appropriation of funds and/or authorization to issue municipal debt.

Section 6.2. Effective Date of Termination. If the City or Manager elects to terminate this Agreement under this Article VI in connection with a casualty, Manager shall pay Management and Incentive Fees properly apportioned up to the date of the casualty, and the City shall be responsible for any then-outstanding or unamortized amounts of the Start-up Costs within sixty (60) days of the date of such termination. After the effective date of the termination, the City and

Manager shall be discharged of all future obligations under this Agreement, except for those provisions that, by their terms, survive the expiration or earlier termination of the Agreement.

ARTICLE VII SPECIAL COVENANTS

Section 7.1. Manager's to be Sole Operator of Center. Except as otherwise provided in this Agreement, Manager will be the sole operator of the Center during the Term. The City and its employees or agents shall be permitted to enter the Center to (a) inspect the Center, (b) make such alterations, maintenance, or repairs therein as may be required under this Agreement or pursuant to any law, (c) show the Center in furtherance of the City's marketing of itself or the Center, (d) serve or post all notices required by law or permitted by this Agreement, (e) service City information technology infrastructure or (f) conduct any other reasonable City related business. The City shall exercise its rights under this Section at such times and in such a manner as to minimize the impact of any interference on operations of the Center. If the City makes an emergency entry into the Center when no authorized representative of Manager is present, the City shall provide notice to Manager as soon as reasonably possible after that entry and shall take reasonable steps to secure the Center until a representative of Manager arrives at the Center.

Section 7.2. Environmental Matters. Manager shall, at the Manager's sole cost and expense, comply with all applicable federal, state, and local environmental laws, statutes, rules, regulations, decisions, codes, orders, directives, requirements, and ordinances ("**Environmental Laws**") (including, without limitation, regulations regarding financial responsibility for, removal of, technical compliance of, and releases from, underground storage tanks) in effect during the Term, except for any conditions attributed to persons other than Manager or Manager's agents, employees, licensees, contractors, affiliates, successors, or assigns. Without limiting the foregoing, if the presence of any Hazardous Material on the Center caused or permitted by Manager results in any contamination of the Center, Manager shall promptly take all actions, at its sole expense, as are necessary to remediate the Center in accordance with Environmental Laws and, upon expiration or termination of this Agreement, as necessary for redevelopment of the Center provided that the City's approval of such actions shall first be obtained in writing, which approval shall not be unreasonably withheld or delayed so long as such actions would not potentially have any adverse, long-term or short-term effect on the Center. Manager does not assume responsibility under this Section 7.3, however, for any releases of Hazardous Material at, in, on or migrating from the Center that is the result of activities and operations of any person other than Manager or Manager's agents, employees, contractors, licensees, affiliates, successors, or assigns.

Manager shall immediately notify the City of any of the following: (i) any correspondence or communication from any federal, state, or City Governmental Authority regarding the application of Environmental Laws to the Center or Manager's operation of the Center; (ii) any correspondence, communication, or notification as are required by either the Federal or State Emergency Planning and Community Right to Know Acts; (iii) any change in Manager's operations in the Center that will change or has the potential to change Manager's obligations or liabilities under the Environmental Laws; and/or (iv) releases, discharges, or spills in any form, of any and all Hazardous Material in violation of the Environmental Laws.

“Hazardous Material” means any substance, material, or waste which is toxic, ignitable, reactive, or corrosive, and which is or becomes regulated by any City or state Governmental Authority or the United States Government. “Hazardous Material” includes, without limitation, any material or substance which is (i) defined as a “hazardous waste,” “extremely hazardous waste,” “restricted hazardous waste,” “hazardous substance,” or “hazardous material,” by any Environmental Law; (ii) oil and petroleum products and their by-products, (iii) asbestos, or asbestos-containing materials; (iv) designated as a “hazardous substance” pursuant to the Federal Water Pollution Control Act; (v) defined as a “hazardous waste” pursuant to the Federal Resource Conservation and Recovery Act; or (vi) defined as a “hazardous substance” pursuant to the Comprehensive Environmental Response, Compensation and Liability Act.

ARTICLE VIII EVENTS OF DEFAULT; REMEDIES

Section 8.1. Default by Manager. The occurrence of any one of the following events shall constitute an “Event of Default” under this Agreement:

(a) Failure by Manager to perform or comply with any provision of this Agreement, or any duly executed amendments thereto, and such failure is not cured within thirty (30) days after written notice from the City of such default. If, however, the failure cannot reasonably be cured within the thirty (30) day cure period, Manager shall not be in default under this Agreement if (1) Manager commences to cure the failure within the cure period, (2) diligently and in good faith continues to cure the failure to completion, and (3) provides written notice to the City of Manager’s actions to cure the failure, including Manager’s anticipated timeline for completion;

(b) Failure of the Manager to meet expectations as set forth in Sections 4.6 and 4.7 and noted in the Quarterly Review for two (2) successive quarters will put the Manager in a probationary status for the following four (4) successive quarters. If there is one failure of the Manager to meet expectations in the four (4) successive quarters after placement in probationary status, the Manager shall be in default, but the City has discretion to waive the default in this subsection b.;

(c) John Wack no longer owns or controls ESM or Manager; or

(d) Declaration of bankruptcy or insolvency by ESM or Manager.

Section 8.2. Default by City. The occurrence of the following event shall constitute an Event of Default under this Agreement:

Failure by City to perform or comply with any provision of this Agreement, or any duly executed amendments thereto, and such failure is not cured within thirty (30) days after written notice from the Manager of such default. If, however, the failure cannot reasonably be cured within the thirty (30) day cure period, City shall not be in default under this Agreement if (1) City commences to cure the failure within the cure period, (2) diligently and in good faith continues to cure the failure to completion, and (3) provides written notice to the Manager of City’s actions to cure the failure, including City’s anticipated timeline for completion.

Section 8.3. Remedies in the Event of Manager's Default. The City shall have any one or more of the following remedies after the occurrence of an Event of Default. These remedies are not exclusive. These remedies are in addition to any remedies allowed now or in the future by law, in equity, or otherwise:

(a) The City may terminate this Agreement by giving thirty (30) calendar days written notice of termination to Manager, in which event Manager shall promptly surrender the Center to the City. If Manager fails to promptly surrender the Center, then the City, without prejudice to any other remedy it has for possession of the Center or other damages, may re-enter and take possession of the Center and expel or remove the Manager and any other person or entity occupying the Center or any part, without being liable for any damages, whether caused by negligence of the City or otherwise. No act by the City other than giving notice of termination to the Manager shall terminate this Agreement.

(b) The City may re-enter and take possession of the Center without terminating this Agreement and without being liable for any damages. The City's action under this subparagraph (b) is not considered an acceptance of Manager's surrender of the Center unless the City notifies Manager in writing.

(c) Whether or not the City terminates this Agreement or Manager's right to possession of the Center on account of any Event of Default, the City shall have all rights and remedies at law or in equity, including, but not limited to, the right to re-enter the Center and, to the maximum extent provided by law, the City shall have the right to terminate any and all licenses, concessions, or other arrangements for possession entered into by Manager and affecting the Center. In the City's sole discretion, it may succeed to Manager's interest in such subleases, licenses, concessions, or arrangements and, Manager assigns and transfers to the City all of Manager's right, title and interest in and to any such licenses, concessions and other consensual arrangements.

(d) In the event that the City exercises its rights to terminate this Agreement or take possession of the Center as provided in this Section 8.3 or in any other section of this Agreement, the City shall be responsible for any then-outstanding or unamortized amounts of the Start-up Costs within sixty (60) days of the date of such termination or taking of possession of the Center. Upon payment in full of such costs, the City shall be the owner of such improvements.

Section 8.4. Remedies in the Event of City's Default. The Manager shall have any one or more of the following remedies after the occurrence of an Event of Default. These remedies are not exclusive. These remedies are in addition to any remedies allowed now or in the future by law, in equity, or otherwise:

If the City fails to cure the default as set forth in Section 8.2, the Manager may take such action as may be reasonably required to remedy such default and if the Manager is required to expend funds to cure such default, City shall promptly reimburse such amounts within thirty (30) days after Manager provides itemized written evidence confirming the costs incurred by Manager.

Section 8.5. Election of Remedies. Pursuit of any of these remedies does not constitute an irrevocable election of remedies or preclude pursuit of any other remedy in this Agreement or

by applicable law. Likewise, forbearance by the either party to enforce one or more of the remedies available to it on an Event of Default does not constitute a waiver of that default or of the right to exercise that remedy later or of any payment, damages, or other amounts due to the non-defaulting party.

Section 8.6. Termination for Convenience. The City may at any time, and for any reason, terminate this Agreement by written notice to Manager specifying the termination date, which shall be not less than sixty (60) days from the date such notice is mailed. Notice shall be given to Manager by certified mail/return receipt requested at the address set forth in this Agreement. In the event of such termination, Manager shall be paid such amount as shall compensate Contractor for the work satisfactorily completed, and accepted by the City, at the time of termination. Manager shall also be entitled to a liquidated amount equal to the following percentage of the Management Fee: if more than seven (7) and less than ten (10) years remain on the applicable term, four hundred thousand dollars (\$400,000) plus twenty percent (20%) of the amount of the Management Fee for the remaining term of the Agreement; if less than seven (7) years remain on the applicable term, twenty percent (20 %) of the amount of the Management Fee for the remaining term of the Agreement. Such amount shall be paid by the City after the City takes possession of the Center and control of all operating accounts. If the City terminates this Agreement pursuant to this Section 8.6, Manager shall withdraw its personnel and equipment, cease performance of any further work under this Agreement, and turn over to the City any work completed or in process for which payment has been made.

ARTICLE IX MISCELLANEOUS

Section 9.1. Successors and Assigns. This Agreement is binding upon, inures to the benefit of, and is enforceable by the parties and their respective successor and assigns.

Section 9.2. Severability and Construction. If any provision of this Agreement is held invalid by any court of competent jurisdiction, the holding will not invalidate any other provision. The City and Manager acknowledge that the parties and their counsel have reviewed and revised this Agreement and that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement or any exhibits or amendments hereto.

Section 9.3. Time of Essence. Time is of the essence as to all dates and times in this Agreement.

Section 9.4. Governing Law. This Agreement will be governed by the Constitution and laws of the Commonwealth.

Section 9.5. Counterparts. This Agreement may be simultaneously executed in several counterparts, each of which will be an original, and all of which taken together will constitute one and the same instrument.

Section 9.6. Notices. Unless otherwise provided in this Agreement, all demands, notices, approvals, consents, requests, opinions, and other communications under this Agreement must be in writing and will be deemed to have been given when (i) delivered in person, (ii) delivered by Federal Express or a comparable express courier service, or (iii) mailed by registered or certified mail, postage prepaid, addressed, as follows:

If to Manager: 2020 Landstown Centre Way
Virginia Beach, VA 23456
Attention: John M. Wack, Jr.

with a copy to: John F. McManus, Esquire
Hirschler Fleischer
725 Jackson Street, Suite 200
Fredericksburg, Virginia 22401

If to the City: City Manager
2401 Courthouse Drive
Virginia Beach, Virginia 23456

With copy to: Convention and Visitor's Bureau
2101 Parks Ave.
Virginia Beach, Virginia 23451

With a copy to: City Attorney
2401 Courthouse Drive
Virginia Beach, Virginia 23456

The City and Manager may, by written notice given under this Agreement, designate any additional or different addresses or persons to which subsequent demands, notices, approvals, consents, requests, or other communications are to be sent.

Section 9.7. Entire Agreement. This Agreement, including the attached exhibits, if any, set forth all the covenants, promises, agreements, conditions, and understandings between the City and Manager concerning the Center. There are no covenants, promises, agreements, conditions, or understandings, either written or oral, between the City and Manager other than as set forth in this Agreement.

Section 9.8. Force Majeure. If either party shall be delayed or hindered in or prevented from the performance of any required act by reason of strikes, lock-outs, labor troubles, inability to procure materials, failure of power, 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, then the performance of such act shall be excused for the period of the delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay.

Section 9.9. Captions. The captions and section numbers appearing in this Agreement are inserted only as a matter of convenience and in no way define, limit, construe, or describe the scope or intent of such paragraphs of this Agreement.

Section 9.10. Amendments. This Agreement may be amended only by an instrument in writing signed by both parties to this Agreement.

Section 9.11. Venue. The courts of the City shall be the exclusive venue for any legal action arising out of or related to this Agreement.

Section 9.12. Calculation of Time Periods. Unless otherwise specified, in computing any period of time described herein, the day of the act or event after which the designated period of time begins to run is not to be included and the last day of the period so computed is to be included, unless such last day is a Saturday, Sunday or legal holiday in the Commonwealth of Virginia, in which event the period shall run until the end of the next day which is neither a Saturday, Sunday, nor legal holiday. The last day of any period of time described herein shall be deemed to end at 5:00 p.m. ET or EST, as applicable.

Section 9.13. SWaM Certified-Small Business Participation. The Manager shall comply with the requirements of Exhibit F, attached hereto, setting forth requirements for SWaM Certified-Small Business Participation efforts that shall be undertaken in connection with any improvements or constructions undertaken by Manager at the Center during the term of this Agreement. The Manager shall be responsible for collecting and submitting to the City the Subcontractor Participation Plan and required documentation as described in Exhibit [] and for conducting the information session for subcontractors described in Exhibit[].

Section 9.14. Non-Appropriation. Notwithstanding any provision herein to the contrary, the City's obligations under this Agreement are subject to the appropriation of sufficient funds to perform such obligations and to the performance by City. If adequate funds are not appropriated by the City, the City shall not be subject to any claim for damages, penalty or expense of any kind whatsoever, or otherwise liable for such consequence in any respect.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed on their behalf by their duly authorized officers.

CITY OF VIRGINIA BEACH

By: _____
City Manager

Approved as to form:

City Attorney's Office

Printed Name:

Title:

ESM VBSC, LLC, a Virginia limited liability company

By: **EASTERN SPORTS MANAGEMENT, LLC**, a
Virginia limited liability company, Manager

[SEAL]

By: _____
John M. Wack, Jr., President

Exhibits:

- Exhibit A – Business Plan
- Exhibit B – Operating Budget
- Exhibit C - Manager's Start-up Costs
- Exhibit D – Maintenance Plans
- Exhibit E – Quarterly Report Form
- Exhibit F – SwaM Requirements