

**MEMORANDUM OF AGREEMENT BETWEEN
THE CITY OF RAPID CITY**

and

Derby Advertising Inc. d.b.a. Canyon Lake Resort

This agreement is by and between the City of Rapid City, South Dakota, a municipal corporation (hereinafter referred to as City), and Derby Advertising Inc., d.b.a. Canyon Lake Resort, (hereinafter referred to as Derby), a for-profit business in Rapid City, South Dakota.

PREAMBLE

The subject of this agreement is a portion of a larger park area of approximately 77.80 acres known as Canyon Lake Park. The larger park area encompasses the area North and East of Canyon Lake along Rapid Creek, extending from Chapel Lane to Park Drive. The park is part of the Greenway and is within the Rapid Creek drainage area and flood hazard district.

The City Parks and Recreation Advisory Board has approved the use of an approximately three and one-half acre site as a recreational park for croquet, volleyball, and horseshoes ("Recreation Park") according to the proposal submitted by Derby. Among other responsibilities, Derby promises to raise money to underwrite costs of development, promotion, and agreed-upon maintenance within the Recreation Park.

The Recreation Park is designed for healthy outdoor recreational use. Improvements are intended to create a useful park area, provide for recreational pursuits, and offer healthy alternatives for youth and seniors, as well as revitalize an underutilized piece of parkland.

AGREEMENT

The City and Derby agree to cooperate in the development of a Recreation Park located in Canyon Lake Park, legally described as

Tract 1-2 & Lot A-B of Tract 3 in Sections 8 and 9, Township 1N, Range 7E of Pennington County, South Dakota.

The Recreation Park covers approximately three and one-half acres on the Southwest section of the larger park.

Both the City and Derby agree to the following regarding the approved Recreation Park plan:

1. Recreation Park Elements. Derby shall construct a maximum of two (2) croquet courts, with irrigation, two (2) sand volleyball courts, and four (4) horseshoe courts substantially in accordance with the Recreation Park plan submitted by Derby and approved by the City.
2. Use of Recreation Park. The Recreation Park shall be open to the public at times prescribed or scheduled by the Rapid City Department of Parks and Recreation. Leagues and tournaments may utilize the facilities.
3. Equipment. Derby agrees to provide adequate court equipment such as netting, posts, wickets, etc.. Derby agrees to rent recreational equipment such as balls, horseshoes, and croquet equipment to the public, in such accordance as the current paddleboat rentals. The City will not be responsible for any loss or damage of such rental equipment.
4. Construction. Derby agrees to provide the money, materials, and resources for construction of Recreation Park features. Derby will seek and obtain all necessary permits for activities associated with the park improvements. The City will provide preliminary design planning and will review final design and construction of Recreation Park improvements. Both parties will agree upon any substantial additions or modifications to the Recreation Park or to the plan submitted by Derby and approved by the City. All costs expected and unexpected will be paid by Derby unless other arrangements are made with the City. Any portion of the project paid for with tax revenue shall comply with applicable bid laws.
5. Derby's Maintenance Responsibilities. Derby agrees to provide routine maintenance of the improved courts, structures, and signage constructed by Derby as part of the Recreation Park. Derby will be responsible for irrigating and seeding all areas disturbed during park improvements from initial construction of the Recreation Park or any subsequent disruptions. On-going irrigation of the croquet courts will be the responsibility of Derby and/or his designee.

The parties agree to assess the routine maintenance needs of the Recreation Park on an on-going basis. Maintenance will be done in a timely fashion. Derby agrees to keep courts maintained at all times according to the plan of record, including weeds, undesirable plants, and litter. The parties agree to cooperate to address emergency situations resulting from vandalism or acts of nature that may require immediate attention and intervention.

6. City's Maintenance Responsibilities. The City will be responsible for maintaining areas of existing grass throughout the park, as necessary, including trees within the park area. The City will be responsible for maintaining public parking areas, paths from parking areas to the Recreation Park, and paths and areas outside the park. The City will provide police and fire protection within the park.

7. Specifications for Improvements. All improvements will be in accordance with any and all City, State, and Federal rules and regulations and shall adhere to Rapid City's Floodplain Development Policy. Construction of improvements shall follow the City of Rapid City Standard Specifications for Public Works Construction (2007 Edition), as currently revised. Derby will be responsible for seeking and obtaining any and all permits required for the improvements.

8. Ownership. All improvements which are constructed as part of this Agreement will be owned by the City of Rapid City, and Derby retains no ownership rights over the Recreation Park or any improvements. As such the City will have full authority over the type of use allowed in the Recreation Park and the opening and/or closing of the Recreation Park.

9. Communication. Derby shall keep the City informed of construction progress on the Recreation Park. If Derby retains a contractor/landscaper to supervise construction of any improvements, the contractor/landscaper shall keep the City informed of progress on construction.

10. Insurance. Derby will ensure that he or the Project contractor obtains liability insurance as required within the Standard Specifications adopted by the City for the Project construction. Any and all liability insurance policies obtained by Derby or by any contractor, subcontractor, or other entity involved with the Project construction shall name the City as an additional insured, and any entity securing liability insurance shall furnish to City evidence of the same by a certificate of insurance. Derby shall name the City an additional insured for the life of this agreement.

11. Indemnification. Derby agrees to defend, indemnify and save harmless the City from any and all claims, damages, costs, and expenses, including reasonable attorney fees, arising out of or in connection with the conduct by Derby, his designees, and/or his contractors.

12. Term of Agreement. This agreement will remain in effect for a period of five years from the date of signature. If the parties wish to renew the agreement, with or without alterations, they shall execute an addendum to this agreement setting forth the terms of the renewal agreement. If the parties do not agree upon the terms of any renewal of the agreement, this agreement shall expire five years from the date of signature.

13. Notice to Terminate. If, at any time, the City deems the Recreation Park a blight and/or not up to City standards for a park area, or deems Derby to be in default under this agreement, the City will provide Derby with notice of the defect/default and give Derby thirty (30) days to get the park into compliance. If the defect/default is not corrected within 30 days, the City may terminate this agreement, dismantle, take out, or shut down the Recreation Park, and/or exercise any rights it has under the law.

14. Cancellation. Upon substantial completion of the improvements, either party may cancel this agreement for nonperformance by providing 30-day written notice to the other party.

15. Independent Contractor. Nothing contained herein shall be construed as creating a partnership or joint venture between City and Derby, nor construed as making Derby anything other than an independent contractor of City. Derby shall have no right or power to act for City other than as contemplated in this agreement or otherwise expressly authorized by City.

16. Costs and Expenses. Each party shall pay all of its own costs and expenses incurred in connection with performance of its duties hereunder.

17. Waivers. No waiver of any breach of any of the terms or conditions of this Agreement shall be held to be a waiver of any other subsequent breach; nor shall any waiver be valid or binding unless the same shall be in writing and signed by the party alleged to have granted the waiver.

18. Consideration. The parties agree that the City's act of allowing Derby to access Canyon Lake Park and construct the Recreation Park within Canyon Lake Park constitutes sufficient good and valuable consideration for Derby's promises made within this Agreement and for the execution and performance of this Agreement.

19. Miscellaneous Provisions.

a. **GOVERNING LAW AND VENUE.** This Agreement shall be governed by and construed in accordance with the laws of the State of South Dakota without regard for its conflict of laws provisions. The parties agree to bring any suit at law or equity only in Seventh Judicial Circuit Court in Pennington County, South Dakota.

b. **TITLES AND CAPTIONS.** All section titles or captions contained in this Agreement are for convenience only and shall not be deemed part of the context nor affect the interpretation of this Agreement.

c. ENTIRE AGREEMENT. This Agreement contains the entire understanding between and among the parties and supersedes any prior understandings and agreements among them respecting the subject matter of this Agreement. Any amendments to this Agreement must be in writing and signed by the party against whom enforcement of that amendment is sought.

d. AGREEMENT BINDING. This Agreement shall be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

e. SEVERABILITY. If any provision of this Agreement, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Agreement, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

EFFECTIVE DATE: In witness where, the parties hereto have executed this agreement this _____ day of _____, 2013.

CITY OF RAPID CITY

DERBY ADVERTISING INC.
d.b.a. CANYON LAKE RESORT

Jeff Biegler
Director of Parks and Recreation

Mike Derby, President

