

**USAGE AGREEMENT BETWEEN
THE CITY OF WAUWATOSA,
THE WAUWATOSA BOARD OF PARKS AND
FORESTRY COMMISSIONERS AND
TOSA TONIGHT, INC., FOR THE
ROTARY PERFORMANCE PAVILION
AT HART PARK**

This Agreement is made between the WAUWATOSA BOARD OF PARKS AND FORESTRY COMMISSIONERS (“Parks Board”) and the CITY OF WAUWATOSA, a municipal corporation located in Milwaukee County, Wisconsin (collectively referred to as the “City”) and TOSA TONIGHT, INC., a Wisconsin not-for-profit corporation (“Tosa Tonight”), as of the ____ day of _____, ~~2019~~2023, as follows:

1. Purpose and Intent of Agreement. This Agreement is intended to provide for the use of the Rotary Performance Pavilion at Hart Park by Tosa Tonight. The Rotary Performance Pavilion (the “Pavilion”) shall include the stage facilities, dressing rooms and restroom behind the stage, seating area and vendor pads located between 68th and 70th Streets in Hart Park, but shall not include the Playground structures, splash pad, parking area, public sidewalks, art display spaces, and picnic shelter/restroom structure. Such excluded areas are and shall remain public spaces. During the term of this Agreement, it is the parties’ intent that Tosa Tonight shall be permitted to use the Pavilion to host performances on Wednesday evenings between May 1 and September 30, July 4th, and on other agreed-upon dates upon which the Pavilion is not otherwise reserved for use (the “Performance Season”), including the time necessary for “set up” and “take down” associated with the events. At all other times, the City shall manage and control the Pavilion. During the term of this Agreement, Tosa Tonight shall be provided with keys to access the dressing rooms and restroom at the Pavilion.

2. Status of Tosa Tonight. At the outset and throughout the term of this agreement, Tosa Tonight shall:

- A. Be incorporated and remain incorporated as a legal entity under Chapter 181, of the Wisconsin Statutes.
- B. Maintain a current registration with the State of Wisconsin Department of Financial Institutions, or successor office.
- C. Continue to maintain eligibility for Internal Revenue Service for certification establishing Tosa Tonight as a tax-exempt entity under Sec. 501(c)(3) of the Internal Revenue Code.
- D. Supply to the City written verification of Tosa Tonight’s compliance with this Article, within 30 days of the City’s request for such documentation.

3. Term of Agreement. Tosa Tonight shall be permitted to use the Pavilion pursuant to the terms provided herein for ~~five-ten~~ (510) years, commencing ~~January-June 17~~, 20230 through ~~December-June 631~~, 203324. This agreement shall be automatically renewable for subsequent ~~five-ten~~ (510) year terms unless a written, notice of intent not to renew is given to the other party at least six (6) months prior to renewal.

4. General Operations. Tosa Tonight shall designate a single contact, in writing or in a manner otherwise acceptable to the City, prior to March 1 each calendar year, who shall be responsible for management of Pavilion events hosted by Tosa Tonight during the upcoming Performance Season, including vendors, contractors, guests and any volunteers or support staff acting on behalf or at the direction of Tosa Tonight.

5. Operating Systems and Equipment. Tosa Tonight shall designate which, if any, moveable equipment, furniture, furnishings, lighting and apparatus presently located in the Pavilion constitute property of Tosa Tonight. Such equipment shall be described in an addendum to this Agreement. ~~During the Performance Season, Tosa Tonight shall be permitted to utilize both dressing rooms and the rear storage room a temporary storage container, no greater than 20 ft x 8 ft x 8 ft in size, of the stage facility for on-site storage of all Tosa Tonight property, provided a greater size container is approved by the Parks Board. Prior to occupancy of the dressing rooms the City shall install a ventilation system. The container shall be placed in a location at the Pavilion designated by the Parks Board. The Parks Board may require that such storage container be moved to another Pavilion location, if necessary, provided that not less than fourteen (14) days' notice is given to Tosa Tonight. In case of emergency, the City may, at its cost, move the storage container with its own personnel and equipment. The City of Wauwatosa will allow the temporary storage container to be stored, at no charge to Tosa Tonight, at the Department of Public Works Yard located at 11100 W. Walnut Road outside of the Performance Season. Should the City have a need for use of the dressing rooms on a temporary basis for a rental or maintenance of the stage facility Tosa Tonight will temporarily vacate the rooms at the request of the City.~~

6. Rent. Other than costs addressed elsewhere in this Agreement, Tosa Tonight shall pay no rental fees for use of the Pavilion as described above during the Performance Season for all Wednesday performances and the 4th of July. Should Tosa Tonight wish to utilize the Pavilion on other occasions it will be allowed to do so, without charge, if no other reservation has been made for the date/s.

7. Income. Any income generated by Tosa Tonight, including but not limited to sponsorship funds, concession income, advertising revenue, donations, grants and equipment revenue, in relation to or as a result of its events held at the Pavilion may be utilized by Tosa Tonight for its own operations.

8. Written Reports.

- A. Tosa Tonight shall provide to the Parks Board, on or before March 15 of each year during the term of this Agreement, an annual written report that details the programs and activities for the Pavilion from the preceding calendar year, and should include a projection regarding similar information for the next succeeding year.
- B. Tosa Tonight shall provide to the Parks Board, on or before March 31 of each year during the term of this Agreement, a tentative schedule of events for the upcoming year.

9. Maintenance and Alterations.

- A. Maintenance. The maintenance responsibilities following the Pavilion events for which Tosa Tonight has arranged, of the Pavilion shall be allocated as follows:

i. Tosa Tonight shall be responsible for cleaning the dressing rooms and restroom after their use by Tosa Tonight. Tosa Tonight shall be responsible for refuse pickup and placing the refuse containers street side for city pickup. The City shall provide a sufficient number of refuse containers for each Pavilion event.

ii. The City shall be responsible for maintenance repair, replacement and capital improvements of the Pavilion and all building structural or mechanical systems, including, but not limited to, the irrigation and electrical systems, including snow removal and sidewalk maintenance, pavement maintenance, restroom maintenance, landscaping, lawn care and street, park and security lights. City will be responsible for street side refuse container pickup following Pavilion events for which Tosa Tonight has arranged.

~~iii.~~ Tosa Tonight will make an annual contribution of at least \$1,000.00 to a segregated fund under Tosa Tonight's possession and control that would be drawn from for future contributions toward the cost of reasonable and necessary repairs and/or capital improvements to the Pavilion. It is expected that the City may from time to time make requests for Tosa Tonight to contribute to specific repairs or improvement work dependent upon available City funding for such needs. Tosa Tonight will consider such requests in good faith and in consideration of the availability of funds in the segregated account. The balance of this account shall be included with the annual report to the City.

B. Alterations. Tosa Tonight shall not make structural changes or alterations without first obtaining the written consent of the City.

10. Indemnification and Insurance. Tosa Tonight shall indemnify and hold harmless the City, its employees, elected officials, board members, and consultants from and against claims, damages, losses and expenses, including but not limited to reasonable attorneys' fees paid to outside legal counsel, arising out of or resulting from Tosa Tonight's use of the Pavilion during the Performance Season, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or injury to or destruction of tangible property including loss of use resulting therefrom, to the extent such claim, damage, loss or expense is not caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this paragraph.

A. In claims against any person or entity indemnified under this article by an employee of Tosa Tonight or its contractors, anyone directly or indirectly employed by Tosa Tonight or its contractors or anyone for whose acts Tosa Tonight or its contractors may be liable, the indemnification obligation under this article shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for Tosa Tonight or its contractors under workers' compensation acts, disability benefit acts or other employee benefit acts.

B. In addition to the Indemnification requirements above, Tosa Tonight or its contractors shall not commence operations pursuant to this agreement until Tosa Tonight has

obtained all insurance required below, naming the City of Wauwatosa as an additional insured, and has provided acceptable proof of such insurance to the City.

- i. Commercial General Liability coverage at least as broad as Insurance Services Office Forms #CG 00 01 07 98 and #CG 25 03 11 85, including coverage for Products Liability, Completed Operations, Contractual Liability, and Explosion, Collapse, Underground coverage with the following minimum limits:

a.	General aggregate limit per project	\$2,000,000
b.	Products–Completed Operations aggregate	2,000,000
c.	Personal and Advertising Injury limit	1,000,000
d.	Each Occurrence limit	1,000,000
e.	Fire Damage limit—any one fire	50,000
f.	Medical Expense limit—any one person	10,000

- ii. Automobile Liability coverage at least as broad as Insurance Services Office Form #CA 00 01 07 97, with minimum limits of \$1,000,000 combined single limit per accident for Bodily Injury and Property Damage, provided on a Symbol #1–Any Auto basis (required only if Tosa Tonight owns, leases or otherwise operates a motor vehicle in association with Pavilion events or on City property).

- iii. Umbrella Liability providing coverage at least as broad as the underlying Commercial General Liability, Automobile Liability and Employers Liability, with a minimum limit of \$2,000,000 each occurrence and \$2,000,000 aggregate, and a maximum self-insured retention of \$10,000.

- C. It shall be Tosa Tonight’s sole responsibility to obtain assurances of appropriate liability insurance from promoters and/or sponsors of events scheduled or held at the Pavilion or to provide at its own expense such insurance for a promoter or sponsor, and such other coverage as is necessary to insure other personal property located on the premises.

11. Operations. At times when it is hosting events at the Pavilion, Tosa Tonight shall operate the Pavilion as provided in this Agreement, subject to the following:

- A. Wherever applicable, Pavilion events are subject to the Special Events Permit requirements described in Chapter 7.50 of the Wauwatosa Municipal Code. Tosa Tonight is hereby made aware of this requirement and shall follow appropriate procedures for fulfillment of such permit requirements when applicable.
- B. Tosa Tonight shall be responsible for ensuring that intellectual property rights for all Tosa Tonight managed performances at the Pavilion are appropriately licensed as is necessary to protect the intellectual property of authors, publishers and others whose works are performed.

- C. Any dates booked by Tosa Tonight for performance dates prior to the scheduled termination date of this Agreement shall be honored by the City in the event this Agreement is terminated early without cause.
- D. The Parties recognize that the Pavilion is located within the boundaries of a flood control project and that conditions related to the area's use for that purpose may at times interfere with other uses of the Pavilion. Neither party shall have liability to the other for operational adjustments necessary due to such conditions.
- E. The Tosa Tonight concert series is open to the public and greatly benefits the Wauwatosa community. Protection of the public attending these events is of the utmost importance to the City and Tosa Tonight. The Wauwatosa Police Department will endeavor, whenever possible, to provide two police officers at each Tosa Tonight event as well as volunteer Reserve Officers. The Wauwatosa Police Department will provide one officer at no cost to Tosa Tonight while the second officer, if available and present at the event, will be billed to Tosa Tonight at the applicable overtime rate which will not exceed five hours per concert event. In the event police department staffing allows for a second officer to be present who is already on duty, no overtime rates will apply. There will be no cost to Tosa Tonight during events where police presence is provided for a coordinated event such as the 4th of July fireworks or Tosa's Night Out. Police Reserve Officers, when available, will also be provided at no cost to Tosa Tonight. The Wauwatosa Police Department reserves the right to modify these conditions based on required level of service.

12. Public Facility. In hosting events at the Pavilion, Tosa Tonight shall comply with all rules and regulations for operation of a public facility, including those rules applicable to other City parks and facilities, or such specific directives as issued by the Parks Board, the Common Council, or the Board of Public Works, as appropriate.

13. Notice. All communications or notices required or permitted under this Agreement shall be addressed to the following individuals or their successors unless and until any of such parties notifies the other in accordance with this paragraph of a change in contact name or address. Any provision requiring written notice may also be satisfied by providing notice via facsimile transmission or electronic mail to the other party, provided that receipt of the alternative form of notice is acknowledged by the receiving party.

If as to City:

Board or Parks and Forestry Commissioners
City of Wauwatosa
11100 West Walnut Road
Wauwatosa, Wisconsin 53226
ATTN: Parks and Forestry Superintendent
tparks@wauwatosa.net

With a copy to:

City of Wauwatosa
Wauwatosa ~~City Hall~~ Department of Public Works
11100 West Walnut Road

Wauwatosa, Wisconsin 53226
ATTN: Director of Public Works
dsimpson@wauwatosa.net
dpw@wauwatosa.net

If as to Tosa Tonight:

Tosa Tonight, Inc.
6650 West State Street, #D328
Wauwatosa, WI 53213
ATTN: ~~Pete Holtz~~President
pete.holtz3@gmail.com
contact@tosatonight.com

With a copy to:

[Joseph P. Duffey](#)
[Duffey Law Office, S.C.](#)
[933 N. Mayfair Road](#)
[Wauwatosa, WI 53226](#)
jduffey@duffeylaw.com
~~John P. Yentz, Esq.~~
~~DeWitt Law Firm~~
~~13845 Bishop's Drive, Suite 300~~
~~Brookfield, Wisconsin 53005~~
jpy@dewittllp.com

14. Early Termination. ~~Tosa Tonight and the City shall each have the right to terminate this agreement without cause upon not less than nine (9) months prior written notice to the other party. The City agrees not to exercise this "without cause" termination provision in such a manner as to cause the Agreement to terminate during the midst of an ongoing rental season (May—September).~~ In the event either party shows good cause for termination, the party seeking early termination must notify the other party in writing. Said notice shall provide the other party has the opportunity to correct any deficiency within ~~thirty-sixty~~(~~30~~60) calendar days of receiving written notice thereof. If such deficiency is not cured within those ~~sixtythirty~~ (~~63~~0) days, this Agreement may be terminated on ~~fifteen-thirty~~ (~~30~~15) day written notice by either party to the other.

15. Successors Bound. The Agreement shall be binding upon and inure to the benefit of the City, its successors and assigns, and shall be binding upon and inure to the benefit of Tosa Tonight, its successors and assigns; provided, however, any assignment of rights and obligations under this Agreement by Tosa Tonight shall be subject to the written consent of the City, which shall not be unreasonably withheld. Any sale or transfer of the Pavilion by the City shall be made subject to the terms of this agreement.

16. Miscellaneous Provisions.

- A. Nothing contained in this Agreement shall constitute or be construed to be or create a partnership or joint venture among the parties.

- B. This agreement cannot be changed or modified except in writing and signed by the duly authorized agents of the parties.
- C. Headings contained in this Agreement are for convenience of reference only and are not intended to define, limit or describe the scope or intent of any provisions of this Agreement.
- D. Notwithstanding any provision to the contrary, it is agreed that none of the obligations contained in the Agreement shall run to or be enforceable by any other party than the parties to this Agreement.
- E. This Agreement constitutes all of the agreements and understandings of whatsoever nature or kind existing between the parties with respect to the subject matter hereof. This Agreement supersedes and replaces the existing ~~Management Usage~~ Agreement between the City and Tosa Tonight, as of ~~January 1, 2020~~June 7th, 2023.
- F. If any term, covenant, condition or provisions of this Agreement shall be invalid or unenforceable, the remainder of this Agreement shall not be affected thereby, and each term, covenant, condition and provision shall be valid and be enforced to the fullest extent permitted by law.
- G. Failure of either party to insist upon the strict performance of the terms and provisions of this agreement, or any of them, shall not constitute or be construed as a waiver or relinquish of that party's right to thereafter enforce such term or provision, and that term or provision shall continue in full force and effect.
- H. The City shall reserve the right for the Wauwatosa Rotary Foundation or the Rotary Clubs who participated in raising the Pavilion's construction funds to utilize the Pavilion to conduct a total of up to four events each year for their own purposes, at no rental fee. Such events must each be scheduled no later than January 31 in the year of the event. After January 31 of each year, scheduling of events by the Foundation or the Rotary Clubs shall be permitted on an as-available basis, so long as such dates do not conflict with other events planned or being scheduled by Tosa Tonight or the City.

IN WITNESS WHEREOF, the parties hereto have executed or caused this Agreement to be executed by their officers thereunto duly authorized, all as of the day and year first written above.

SIGNATURES ON FOLLOWING PAGE

CITY OF WAUWATOSA

TOSA TONIGHT, INC.

By: _____
~~Kathy Ehley~~ Dennis McBride, Mayor

By: _____

By: _____
~~Carla A. Ledesma~~ Steven Braatz, City Clerk

By: _____

Approved as to form and execution:

By: _____
Alan R. Kesner, City Attorney

WAUWATOSA BOARD OF PARKS AND
FORESTRY COMMISSIONERS

By: _____
Tom Ertel, Chair