

## **LICENSE AGREEMENT**

License Agreement dated this 8<sup>th</sup> day of March, 2004, between the CITY OF PITTSFIELD, a municipal corporation of the Commonwealth of Massachusetts (the "City") located in Berkshire County and WAHCONAH PARK, INC., a Delaware corporation, its successors or assigns (the "Club").

In consideration of the mutual promises and undertakings set forth herein, the parties covenant and agree as follows:

**1. LICENSE TO USE WAHCONAH PARK FACILITY.** The City, subject to the conditions, limitations, and restrictions set forth herein, grants a license to the Club to use Wahconah Park ("the Park"), including locker rooms, office space, concessions, baseball field, and accessory facilities within the fenced area of Wahconah Park and the parking lot located adjacent to and south of the fenced area of Wahconah Park, all located at 105 Wahconah Street, Pittsfield, Massachusetts for the purposes and at the times described in Section 2.

**2. SCHEDULE OF USE.**

2.1 Regular Season Games. The Club may use the Park for the purposes of preparing for and playing its regularly scheduled games, as well as playoff games, if any, in a professional baseball league of which it may be a member during the regular baseball season of 2005. The Club agrees to play its regularly scheduled home games at the Park during the regular baseball season. The Club shall furnish a complete schedule of games to the City as soon as it is available. The Club shall assume full control and responsibility for all organization, personnel, equipment, and furnishings used by the Club and for all pre-game activities or other entertainment conducted at the Park.

2.2 Exhibition Games and Other Events. The Club may use the Park for the purpose of sponsoring exhibition games and other recreational, social, cultural, and educational events subject to the approval of the Board of Parks Commissioners of the City of Pittsfield ("Board") which approval shall not be unreasonably withheld.

2.3 Other Family and Community Activities. With the prior approval of the Club to include a mutually agreeable rental or revenue-sharing arrangement on a case-by-case basis for such event, consistent with Section 6.6, the Park may be used for other family and community activities on dates and at times when no event has been scheduled by the Club. Such approval of the Club cannot be unreasonably withheld. The City may use the Park for events of its choosing on all days and nights when the Club has not scheduled a baseball game or other events, subject to the approval of the Club. Such approval of the Club cannot be unreasonably withheld. However, it shall not be deemed unreasonable for the Club to withhold approval for other professional, semi-professional, or collegiate league baseball games. After May 15, 2005, the Club's regular season and

playoff games, exhibition games, and other events shall have priority over non-Club events.

## 2.4 Lights and Other Utilities

2.4.1 The Club may use the lighting system presently installed at the Park and shall make arrangements with Western Massachusetts Electric Company (“WMECO”) before May 15, 2005 for the supply of and payment for electric current.

2.4.2 Subsequent to May 15, 2005, the Club shall pay all utility usage bills or fees.

2.4.3 At the expiration or termination of this Agreement by either party for any reason, the Club shall turn the lighting system over to the City in the same physical condition as existed on the date of execution of this Agreement, ordinary wear and tear excepted.

**3. REQUIRED INVESTMENT.** The Club shall invest one and a half million dollars (\$1,500,000) in capital improvements and Facility Expenses, as defined in Section 6.7, in the Park prior to Opening Day 2005. However, after \$1,000,000 is expended on the Park and to the extent that \$1,500,000 has not been fully expended prior to Opening Day 2005, the Club may satisfy this requirement by placing the unexpended balance in escrow for the payment of future capital improvements and Facility Expenses. In the event that the Club does not meet this commitment, then this License Agreement shall be considered null and void. The Club shall provide the City with a financial statement by June 15, 2005 substantiating that the Club has paid for capital improvements and Facility Expenses equal to or exceeding \$1,500,000, as well as the dedicated escrow information, if required.

## 4. TERM OF LICENSE.

4.1 Original Term. The term of this Agreement shall be until October 31, 2005. The Term begins when both parties execute the License Agreement.

4.2 Annual Renewal. At the end of the Original Term, this Agreement shall be renewable annually. Such renewal is conditioned upon the Club meeting such conditions as are described in Section 4.2.1 through Section 4.2.4 (the “Annual Renewal Preconditions”). If the Club wishes to renew this Agreement for an additional term of one year, the Club must request a renewal by August 1, 2005. This request shall be in writing and directed to the City. The City’s approval must be in writing. Thereafter, the License is annually renewable provided that the Club requests an annual renewal by August 1<sup>st</sup> of each year. All Annual Renewals are always subject to the Annual Renewal Preconditions, as described below.

4.2.1 Provide Professional Baseball. The Club will have provided a professional baseball team that plays its home games at Wahconah Park, consistent with Section 7.

- 4.2.2 Meet Minimum Capital Improvements and Facility Expenses Formula. Invest sufficient money in the form of Facility Expenses, as described in Section 6.7, and capital improvements according to a formula which will be defined as being equal to the number of preceding years of the Term multiplied by \$100,000 plus \$100,000 (number of preceding years x \$100,000 + \$100,000). For the purpose of this calculation, the original Term of this License shall be deemed to be two years. Such Facility Expenses and capital improvements may be cumulatively calculated for the entire period of time that the Club has a License to use the Park.
- 4.2.3 Perform All Maintenance and Repairs. The Club shall have paid for all necessary maintenance and repair expenses in accordance with the provisions of Section 6, even if such expenses are in excess of the formula described in Section 4.2.2.
- 4.2.4 Family and Community Use. Allow the Park to be used for other family and community activities on dates and at times when no event has been scheduled by the Club, consistent with Section 2.3.

4.3 The Club shall pay a license fee of \$1.00 per year to the City of Pittsfield.

**5. REVENUES.** The Club shall be entitled to all revenues from ticket sales, advertising, broadcast rights, and concessions:

5.1 Ticket Revenues. The Club shall be entitled to all revenue from ticket sales for league scheduled games played at the Park and for any other activities organized and run by the Club at the Park.

5.2 Advertising. The Club reserves the right to install and display advertising at the Park, and, at its own expense, to install signs in the ground behind the outfield fence, which may be seen above the fence. All signs shall be installed in accordance with all applicable laws, ordinances, and regulations, shall be the property of the Club and shall be maintained in a safe condition by the Club.

5.3 Fence Advertising. The Club shall have the exclusive right to sell advertising space on the playing field side of the outfield fence. The Club shall at all times during the Term be responsible for the maintenance and upkeep of the fence advertising. The Club shall maintain each sign in good repair and in a manner that shall not injure the fence. The Club shall cover all signs that advertise alcoholic beverages within one week after the last regular or post-season game played at the Park.

5.4 Broadcasting Games. The Club may permit its games to be broadcast and telecast from the field, and to charge media promoters for the broadcast rights.

## 5.5 Concession.

5.5.1 Beginning May 15, 2005, the City grants an exclusive license to the Club to use the concession facilities at the Park for twelve months per year during the Term but ending coterminously with the Term (the "Concession Term"). The concession covers the entirety of the Park grounds and is an exclusive concession to serve all activities and must be open for all games played by the Club. The Club shall provide a concession manager, to be paid for from concession proceeds, and concession equipment for all activities in the Park during the Concession Term for the benefit of the City and the various organizations conducting activities in the Park. If the concessions are operated by other than Club agents, servants, and employees, the equipment must be returned in the condition it was in when supplied to the user, ordinary wear and tear excepted, and the Club shall not be responsible and liable for any loss, damage, or personal injury caused by the user, its agents, servants and employees, so long as such use was approved by the Board. The Club shall not be entitled to any concession revenue from high school sports and other youth athletic events.

5.5.2 No alcoholic beverages, as defined in Massachusetts General Laws, chapter 138, shall be sold or served at any of the following non-Club events: (1) the annual drum and bugle corps competition; (2) school sponsored events; and (3) such other events which involve youth groups or youth activities.

5.5.3 During the Concession Term, the Club shall maintain the concession stands at its own expense. Any alterations or changes which become fixtures to the concession stands are subject to the City's approval, and will become the property of the City at the end of the Term, without cost to the City. The Club shall be responsible to the City for the concession stands and turn them over in good order and repair, ordinary wear and tear excepted, at the expiration or termination of this Agreement.

5.5.4 The City shall have no responsibility or liability whatsoever on account of any loss or damage to property or personal injury sustained by and caused by the Club, its agents, servants, and employees, due to the Club's exercise of its rights under this concession license.

5.5.5 The concession is subject also to the following rules and regulations with which the Club must comply strictly:

5.5.5.1 All licenses required for the sale of alcoholic beverages shall be in accordance with federal, state, and local law, and the Club shall have obtained such liquor liability insurance coverage as set forth in Section 11.1.

5.5.5.2 The Club shall, at its own expense, have the Park premises cleaned of all garbage, trash, and empty bottles, including the stadium and parking area, no later than 5:00 p.m. on the day following any home game.

5.5.5.3 All persons handling food and drink in connection with the Club's concession operation shall at all times be clean and neat.

5.5.5.4 The Club shall have the right to sell food, drink and merchandise in the stands and on the grounds of the Park, provided such sales are conducted in conformance with applicable law.

5.5.5.5 The Club shall employ a sufficient number of employees to give reasonable service to the spectators in the Park for all activities, including traffic, parking, and security.

5.5.5.6 The Club shall not increase concession prices above their usual rate for other family and community activities and events.

5.5.5.7 The Club has the right to assign in whole or in part its concession rights subject to consent of the City, not to be unreasonably withheld. The Club intends to offer the patrons of Wahconah Park a selection of various food, beverage, and non-food items from a rotating contingent of restaurants and shops representing the "Best of the Berkshires", and approval of these vendors will be deemed to be automatic unless the City raises a reasonable objection to a specific vendor.

5.6 Park Name. Neither the Club nor the City shall rename the Park during the Term of this License.

**6. MAINTENANCE**. The Club shall be responsible for the maintenance of the Park as follows:

6.1 Maintenance and Repairs. The Club, at the Club's expense, shall be responsible for all maintenance costs, upkeep expenses, and non-structural repairs to the Park.

6.2 Compliance with Laws, Ordinances, and Regulations. In its use of the Park, the Club agrees to abide by all applicable laws, ordinances, and regulations now in force or hereafter adopted.

6.3 Structural Repairs. During the Term of the Agreement, the Club shall make all necessary structural repairs to the Park.

6.4 Admission of the City; Public Safety. The City and its designated agents, employees, and officials responsible for the Park, as well as the City police, shall be allowed access to the Park at all times to perform official City duties. The Club shall be responsible for furnishing security protection during games and other Club activities, at its own expense.

6.5 Field and Facility Maintenance. After May 15, 2005, the Club shall be responsible for the field and facility maintenance and shall return the field to the condition it was in at the end of the Term.

6.6 Maintenance for Other Family and Community Activities. After May 15, 2005, the Club shall be responsible for the field maintenance which may be necessary

when the Park is used for other family and community activities, as described in Section 2.3. When the Park is used for family and community activities, the users of the Park must recompense the Club for such field maintenance and Park use.

6.7 Facility Expenses. For purposes of this Agreement, the Club's monetary investments and expenses in performing its responsibilities under Section 6 shall be considered "Facility Expenses".

7. **FAILURE TO PROVIDE BASEBALL TEAM.** Failure on the part of the Club to use the Park to play regularly scheduled games in an organized professional baseball league for two consecutive seasons is a default of this Agreement, unless such failure is caused by force majeure or the league in which the Club has been playing or is scheduled to play becomes nonviable.

8. **TERMINATION.** Upon expiration or earlier termination of this License, all obligations of both parties hereunder shall cease and terminate, except any outstanding obligation to pay money and any liability that either party may have to the other for failure to comply with any of the terms of this Agreement.

9. **RESERVATION OF RIGHTS.** The City retains all rights and privileges concerning the Park except those specifically granted herein as exclusive rights and may use the Park or permit it to be used for any purpose whatsoever not inconsistent with the license to the Club.

10. **INDEMNIFICATION.** After May 15, 2005, the Club agrees to indemnify and hold the City harmless from and against all liability for injuries to persons or damage to property arising out of the Club's maintenance, operation, and use of the Park premises during activities organized and operated by the Club, except for any failure by the City to comply with all applicable laws, ordinances, and regulations or for the City's own negligence. The Club assumes all risk of loss, damage, or injury to the persons or property of any agent or employee of the Club by reason of the condition of the Park premises, and releases the City, its agents, employees, successors, and assigns from all claims for such loss, damage or injury sustained by such persons, unless directly caused by the negligence of the City, its agents, or employees. If it becomes necessary for the City to defend any action brought against it, or threatened to be brought against it, in each case arising from the instances listed above, the Club shall pay the City all costs and reasonable attorneys' fees incurred by the City in such defense only if the plaintiff prevails. The City reserves the right to order the Club to vacate the Park premises or to suspend use of the Park premises in the event an order pursuant to Massachusetts General Laws, Chapter 21E or other similar federal, state, or local law should so require.

11. **INSURANCE.**

11.1 By the Club. After May 15, 2005, the Club shall carry and maintain at the Club's sole cost and expense comprehensive general liability insurance and liquor liability insurance with an insurance company in good standing in the Commonwealth of Massachusetts with limits of general liability of at least Two Million (\$2,000,000.00)

Dollars and limits of liquor liability of at least Five Hundred Thousand (\$500,000.00) Dollars. Said insurance policies also shall specifically name the City as an additional insured. The Club shall annually, prior to the opening date of the season, provide the City with documentary evidence of the insurance policies in effect. In the event of cancellation or non-renewal of said insurance, the Club shall provide the City with notice of such cancellation or non-renewal of insurance at least twenty-one (21) days prior to the termination or cancellation of said insurance. Failure to maintain said insurance shall be a default of this Agreement, unless cured within 30 days notice of lapse.

11.2 By the City. The City shall carry and maintain 12 months per year, during the entire Term, at the City's sole cost and expense, comprehensive liability insurance and automobile liability insurance minimally conforming to the Certificate of Insurance attached hereto as **Appendix A**, as well as insurance covering the replacement cost of all structures and other property on the Park.

**12. RULES OF INTERPRETATION**. Unless otherwise required by the context in which any term appears:

12.1 Certain Terms. The words "herein", "hereof" and "hereunder" shall refer to this License Agreement as a whole and not to any particular section or portion of this License Agreement, and the words "include", "includes" or "including" shall mean "including, but not limited to".

12.2 Captions. The titles of the sections herein have been inserted as a matter of convenience of reference only, and shall not control or affect the meaning or construction of any of the terms or provisions hereof.

12.3 Representation. This License Agreement was negotiated and prepared by both parties with advice of counsel to the extent deemed necessary by each party; the parties have agreed to the wording of this License Agreement, and none of the provisions hereof shall be construed against one party on the ground that such party is the author of this License Agreement or any part thereof.

12.4 Exhibits. The exhibits hereto are incorporated in and are intended to be a part of this License Agreement; provided, however, that in the event of a conflict between the terms of any exhibit and the terms of this License Agreement with respect to the substantive obligations of any party, the terms of this License Agreement shall take precedence.

12.5 Good Faith. The parties shall act reasonably and in accordance with the principals of good faith and fair dealing in the performance of this License Agreement. Unless expressly provided otherwise in this License Agreement, (i) where this License Agreement requires the consent, approval or similar action by a party, such consent or approval shall not be unreasonably withheld or delayed, and (ii) wherever this License Agreement gives a party the right to determine, require, specify or take similar action with respect to a matter, such determination, requirement, specification or similar action shall be reasonable.

12.6 **Board Action.** Except for any provisions that require the “consent of the City”, all actions called for herein to be taken by the City shall be taken by the City acting through the Board.

12.7 **City Consent.** Any provision requiring the “consent of the City” shall require the consent of the Board and the Mayor of the City.

12.8 **Force Majeure.** Force majeure shall mean some unforeseen event, such as a natural disaster or other "Acts of God" beyond the control of that party, which prevents it from performing its obligations under the contract. However, force majeure is intended to excuse a party only if the failure to perform could not be avoided by the exercise of due care by that party.

13. **ASSIGNMENT.** The Club shall not assign this Agreement or any part thereof, except as provided in Section 5.5.5.7, without the prior consent of the City, which consent cannot be unreasonably withheld.

14. **ENTIRE AGREEMENT.** This Agreement together with attachments hereto contains a complete statement of the undertakings between the parties with respect to its subject matter, supersedes all prior agreements and undertakings. There are no representations not set forth in this Agreement that have been relied upon by the parties.

15. **COUNTERPARTS.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original.

16. **MODIFICATIONS.** This Agreement may be modified solely by mutual written consent of the parties.

17. **SEVERABILITY.** If any provision of this Agreement shall be deemed by any court having jurisdiction thereon to be invalid or unenforceable, the balance of this Agreement shall remain in effect; if any provision of this Agreement shall be deemed by any such court to be unenforceable because such provision is too broad in scope, such provision shall be construed to be limited in scope to the extent such court shall deem necessary to make it enforceable; and if any provision is deemed inapplicable by any such court to any person or circumstance, it shall nevertheless be construed to apply to all other persons and circumstances.

18. **GOVERNING LAWS; EFFECT.** This Agreement shall be governed by and construed in accordance with the substantive law of the Commonwealth of Massachusetts, without giving effect to the conflicts or choice of law provisions of Massachusetts or any other jurisdiction, and shall have the effect of a sealed instrument.

19. **NOTICE.** Any notice, approval, consent or other communication under this Agreement shall be in writing and shall be considered given when (1) delivered personally, or (2) mailed by registered or certified mail, return receipt requested or (3) transmitted by telecopy with a confirming copy sent by overnight mail or courier service to the parties at the addresses indicated below (or at such other address as a party may

specify by notice to the others pursuant hereto). Notice given by a party's counsel shall be considered notice given by that party.

If to the Club, to it at:

Jim Bouton  
P.O. Box 188  
36 Millard Road  
North Egremont, MA 01252

Donald B. Elitzer  
39 Alford Road  
Great Barrington, MA 01230

and upon the City by certified mail to:

Board of Park Commissioners  
874 North Street  
Pittsfield, MA 01201

and:


Office of the Mayor  
City of Pittsfield  
City Hall, 70 Allen Street  
Pittsfield, MA 01201

with a copy to:

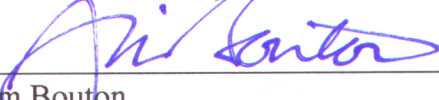
Office of the City Solicitor  
City of Pittsfield  
City Hall, 70 Allen Street  
Pittsfield, MA 01201

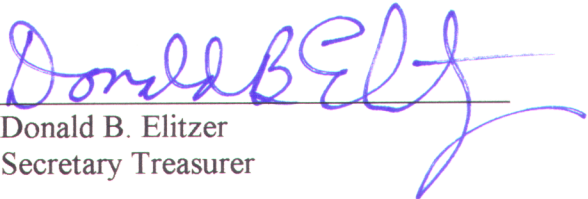
IN WITNESS WHEREOF, the City has caused this Agreement to be duly executed in its name and behalf and its seal duly affixed by its Mayor and the Chairman of the Board after a vote of said body; and the Club has caused this Agreement to be duly executed in its name and behalf and its seal duly affixed by its President as of the day first above written.

CITY OF PITTSFIELD

By:   
James M. Ruberto  
Mayor, City of Pittsfield

WAHCONAH PARK, INC.

By:   
Jim Bouton  
President

By:   
Donald B. Elitzer  
Secretary Treasurer

BOARD OF PARK COMMISSIONERS

By:   
Michael Filpi, Chairman