

## WINTERGARDEN AGREEMENT

THIS AGREEMENT is dated February 10, 2014 between **THE CITY OF EDMONTON** (the "City") and **EDMONTON ARENA CORP.** ("EAC").

WHEREAS:

- A. The Parties have executed a master agreement dated August 29, 2013 (the "Master Agreement") pursuant to which, among other terms, the City granted to EAC and its Affiliates certain Advertising and Commercial Rights in respect of the Wintergarden.
- B. The City is the owner of the Wintergarden.
- C. The City and EAC wish to set out the relationship which shall govern the operation, repair and maintenance of the Wintergarden.

NOW THEREFORE THIS AGREEMENT WITNESSETH THAT in consideration of the mutual covenants set forth in this agreement, the Parties agree as follows:

### 1. DEFINITIONS AND INTERPRETATIONS

Terms in this Agreement shall have the meanings assigned in the Master Agreement unless defined in this Agreement. As well, where used in this Agreement:

- (a) "5 Year Plan" means the 5 year capital plan for the Capital Maintenance Work developed by the Parties in accordance with the Protocol;
- (b) "35 Year Plan" means the 35 year capital replacement plan developed by the Parties in accordance with the Protocol;
- (c) "104 Avenue Lands" means that portion of 104 Avenue in Edmonton over which the Wintergarden is situated;
- (d) "Affiliate" means a corporation that directly or indirectly controls, is controlled by or is under common control with a party as the concept of control is used in the *Business Corporations Act* (Alberta), RSA 2000, c B-9, (as amended from time to time). In respect of a partnership or joint venture, "Affiliate" means a partnership or joint venture in which a party holds a majority of the partnership or joint venture interests;
- (e) "Agreement" means this agreement and the attached schedules, as amended from time to time;
- (f) "Capital Maintenance Work" means the repair and replacement work required to implement the 5 Year Plan and the 35 Year Plan consisting of the work associated with the City Wintergarden Costs and EAC Wintergarden Costs;
- (g) "Hockey Agreement" means an agreement between the City, or its assignee, and RSC (entered into pursuant to the Lease Indemnity Agreement) pursuant to which RSC is granted the right to play hockey in the Arena;

- (h) "LED Ribbon" means the LED ribbon boards on both of the eastern and western exposures of the Wintergarden that are attached to the exterior of the Wintergarden above the 104 Avenue Lands and, for greater certainty, the LED Ribbon does not include the exterior video board which faces south on the portion of the Wintergarden situated on the Wintergarden Landing;
- (i) "Operating Maintenance Work" means the day to day routine maintenance and repair work in relation to the Wintergarden;
- (j) "Party" means the City or EAC as the context so requires and "Parties" means both the City and EAC;
- (k) "Protocol" means the capital maintenance protocol for the Wintergarden set out in Schedule A;
- (l) "RSC Wintergarden Agreement" is defined in Section 2; and
- (m) "Wintergarden Landing" means the portion of the lands immediately south of 104 Ave on which the enclosed structure forming part of the Wintergarden contacts the ground.

2. **TERM**

- (a) The term of this Agreement commences on the Lease Commencement Date and ends on the date that the Lease Agreement (or any renewal thereof between the City and EAC) terminates. However, if RSC chooses, under section 2.2 of the Lease Indemnity Agreement, to negotiate and enter into a Hockey Agreement, then, concurrently with the negotiation and execution of the Hockey Agreement, the City shall negotiate with RSC (and EAC shall cause RSC to negotiate with the City), in good faith and acting reasonably, the terms of an agreement ("RSC Wintergarden Agreement") which shall grant to RSC the right to exercise the Advertising and Commercial Rights for the Wintergarden in conjunction with RSC's use of the Arena under the Hockey Agreement. Any obligation of RSC to pay operating costs under the RSC Wintergarden Agreement shall be consistent in principle with the Hockey Agreement. If the parties to the negotiations are unable to agree on all of the terms of the RSC Wintergarden Agreement within a period of 30 days following delivery of the written notice under Section 2.2(b) of the Lease Indemnity Agreement (or such other period as such parties may agree), then the dispute resolution provisions set out in Schedule C shall apply.
- (b) The Parties acknowledge that, under Article 31 of the Lease, the City has granted to EAC the first right to negotiate and the right of first refusal to lease the Arena following the expiration of the term of the Lease. Further, the City has granted to EAC, under Article 31 of the Lease, the first right to negotiate and the right of first refusal to purchase the "Premises" (as defined in the Lease and which includes the Arena) and the Wintergarden at expiry of the term of the Lease. For clarification, if the Lease is renewed pursuant to the first right to negotiate or the right of first refusal, this Agreement shall continue for the duration of the renewal. If EAC purchases the Wintergarden pursuant to Article 31 of the Lease, the Parties confirm that this Agreement shall terminate on the termination of the Lease.

3. **CAPITAL MAINTENANCE**

The principles set out in the Protocol apply to the Capital Maintenance Work. EAC shall have the primary responsibility for coordinating and conducting the Capital Maintenance Work.

4. **OPERATING MAINTENANCE WORK - SERVICE LEVELS**

- (a) EAC shall have the primary responsibility to coordinate, manage and arrange for the Operating Maintenance Work. During the first months of operation of the Wintergarden, the Parties agree to work together to address any operational or maintenance issues or service level requirements arising from the uniqueness of the design or the use of the Wintergarden.
- (b) The Wintergarden shall be maintained in accordance with the service levels ("Service Levels") set out in Schedule B, which may be amended from time to time by agreement of the Parties, acting reasonably.

5. **OPERATING COSTS, REPORTING**

- (a) The Parties acknowledge that the water and power utilities in the Wintergarden are separately metered from those utilities serving the Arena and the Corridor. However, the gas utility serving the Wintergarden is not separately metered. Accordingly, the Parties agree to allocate the costs of the gas utility based on usage. The Parties will act reasonably in determining the allocation of the gas costs and if there is a disagreement between the Parties regarding the allocation, then the dispute resolution provisions set out in Schedule C shall apply.
- (b) Semi-annually, EAC shall deliver to the City an itemized report of the Operating Costs for the Wintergarden incurred, together with a statement setting out the actual amount payable by the City pursuant to this Agreement for the period to which such statement relates.
- (c) At any time, on reasonable request, the City may have access to the records of Operating Costs for the Wintergarden.
- (d) In addition, the City may, on written notification to EAC within 12 months following receipt of a semi-annual report provided to the City pursuant to subsection (a), require EAC to obtain an independent audit verifying the accuracy of the information provided in that semi-annual report and provide the audit report to the City. The cost of an independent audit will be paid by the City unless the independent audit report reveals a discrepancy in the incurred Operating Costs for the Wintergarden that is equal to or greater than 3%, in which case EAC will be responsible for the full cost of the audit. This subsection shall survive termination of this Agreement for a period of 12 months.

6. **ACCESS, SECURITY**

- (a) EAC shall have the primary responsibility for coordinating the control of pedestrian ingress to and egress from the Wintergarden, from the Wintergarden Landing to the south entrance to the Arena and through the Corridor through the LRT Link and security services related thereto. The Parties shall, on a continuing basis, consult with each other to establish the protocols for ingress and egress, including, without limitation, the hours that the Wintergarden must be open to the public to allow access to the LRT.
- (b) Except for the segregated retail space located in the portion of the Wintergarden on the Wintergarden Landing, the City grants to EAC, its Affiliates and their servants, agents, employees, contractors, invitees and licensees, uninterrupted but non-exclusive access and egress to, across, from, over and under the Wintergarden and Wintergarden Landing (for no

additional consideration) for the purpose of exercising its rights and obligations under this Agreement.

- (c) After construction of the Wintergarden has been completed, the City shall not thereafter
  - (i) erect, construct or place or permit to be erected, constructed or placed in the Wintergarden any new and permanent wall, door, barrier or other obstacle not forming part of the original design of the Wintergarden; or
  - (ii) otherwise modify the structure of the Wintergarden;without the consent of EAC.
- (d) EAC may, on reasonable notice to and with the consent of the City, close the Wintergarden to pedestrian commuter traffic for special events occurring in the Wintergarden.

7. **GENERAL**

The City may at any time, on notice to EAC, enter the Wintergarden to ascertain the condition or state of repair and maintenance thereof or for verifying that EAC is complying with the provisions of this Agreement.

8. **WINTERGARDEN LED RIBBON**

The City agrees that the City Manager will work cooperatively with EAC to facilitate EAC's use of the LED Ribbon, provided that the City Manager's concerns with respect to traffic safety have been reasonably addressed.

9. **INDEMNITY**

- (a) EAC shall indemnify and save the City harmless from any and all liabilities, costs, damages, claims, suits, expenses or actions (the "Costs") arising out of:
  - (i) The negligent performance of any term or condition of this Agreement which is to be observed and performed by EAC or any breach, violation or non-performance thereof; and
  - (ii) any damage to any property or any injury to any persons or the death of any person occurring at the Wintergarden other than those caused by:
    - A. any breach, violation, non-performance or negligent performance of any term or condition of this Agreement by the City;
    - B. any negligent act or omission by the City or its agents, employees or contractors; or
    - C. any damage to property or injury or death to persons occurring at the Wintergarden occasioned by the City's exercise of its rights to the Wintergarden arising pursuant to Section 19.2 of the Master Agreement.

- (b) The City shall indemnify and save the EAC harmless from any and all Costs arising out of:
- (i) The negligent performance of any term or condition of this Agreement which is to be observed and performed by the City or any breach, violation or non-performance thereof; and
  - (ii) any damage to any property or any injury to any persons or the death of any person occurring at the Wintergarden arising from:
    - A. the City's exercise of its rights to use the Wintergarden arising pursuant to Section 19.2 of the Master Agreement; or
    - B. any negligent act or omission by the City or its agents, employees or contractors.
- (c) The obligations of the Parties under this Section shall survive the termination of this Agreement for a period of 24 months.

10. **INSURANCE**

Prior to the commencement of the operation of the Wintergarden, EAC shall, in addition to the insurance requirements set out in Section 21.7 of the Master Agreement, put in place such property and other insurance appropriate to operation of the Wintergarden, and in such amounts, as the Parties agree, acting reasonably.

11. **ADDRESSES FOR NOTICES**

Notice in writing or other correspondence required or permitted to be given to either Party pursuant to this Agreement shall be sufficiently given when transmitted electronically or by facsimile (addressed as if to be mailed in the manner hereafter provided) and transmitted to the following fax number(s), or when personally delivered or mailed by registered mail, postage prepaid, addressed:

to the City at:

The City of Edmonton  
3rd Floor, City Hall  
1 Sir Winston Churchill Square  
Edmonton, Alberta T5J 2R7  
Attention: City Manager

Fax: (780) 496-8220

to EAC at:

Edmonton Arena Corp.  
1702 Bell Tower  
10104 - 103 Avenue  
Edmonton, AB T5J 0H8  
Attention: Brad Gilewich

Fax: (780) 425-6160

or to any other address as may be designated in writing by EAC or the City. Notice given by registered mail shall conclusively be deemed to have been received on the 5th business day following the date on which such notice is mailed. In the event of a postal strike, notice may only be given by personal delivery or sent by fax.

## 12. GENERAL PROVISIONS

- (a) Schedules A, B and C are incorporated into and form part of this Agreement.
- (b) Time is of the essence of this Agreement and no extension or variation of this Agreement operates as a waiver of this provision. Whenever in this Agreement either Party is required to do something by a particular date, the time for the doing of the particular thing shall only be amended by written agreement of the Parties.
- (c) The relationship of the Parties under this Agreement is solely contractual. The Parties are not to be deemed or construed as being: (a) in partnership, (b) in a joint venture, (c) in a relationship of employment or principal and agent, under this Agreement, and any representation, claim or assertion to the contrary is hereby negated.
- (d) All contracts, whether of employment or otherwise, entered into by EAC with respect to this Agreement shall be made by EAC on its own behalf and not as agent of the City and the City shall have no liability for such contracts.
- (e) Should any provision of this Agreement be illegal or unenforceable for any reason whatsoever, it shall be considered separate and severable from the remaining provisions of this Agreement, which shall remain in force and be binding as though such provision had not been included.
- (f) This Agreement shall be construed and governed by the laws of the Province of Alberta and the laws of Canada applicable therein.
- (g) All references shall be read with such changes in number and gender as may be appropriate according to whether the reference is to a male or female person, or a corporation. The insertion of headings is for convenience of reference only and shall not be construed so as to affect the interpretation or construction of this Agreement.
- (h) The reference to any legislation in this Agreement shall be deemed to include all amendments thereto and all regulations thereunder and all statutes, including all amendments thereto and regulations thereunder, that may be substituted for that legislation.
- (i) The waiver of any covenant, condition or provision of this Agreement must be in writing. The failure of any Party at any time to require strict performance by the other Party of any covenant, condition or provision of this Agreement shall in no way affect such Party's right thereafter to enforce such covenant, condition or provision, nor shall the waiver by any Party of any breach of any covenant, condition or provision hereof be taken or held to be taken as a waiver of any future breach of any such covenant, condition or provision.
- (j) Notwithstanding any other provision contained in this Agreement, it is expressly understood and agreed between the City and EAC that the City is entering into this Agreement in its capacity as the owner of real property and not in its capacity as a regulatory, statutory or approving body pursuant to any law of the Province of Alberta. Nothing in this Agreement shall constitute the

granting by the City of any approval or permit as may be required pursuant to the Act any amendments thereto, and any other legislation in force in the Province of Alberta. The City, as far as it has the legal capacity to do so as a contracting party and as an owner of real property, shall be bound to comply with and carry out the terms and conditions stated in this Agreement; however, nothing in this Agreement shall restrict or fetter the discretion of the City, its municipal council, its officers, servants or agents, in the full exercise of its powers and duties as a municipal government, as a municipal council, or as a regulatory, statutory or approving body.


- (k) This Agreement shall not be modified, varied or amended except by the written agreement of the Parties. Notwithstanding any provision in the Master Agreement, in the event of a conflict between a term or condition of this Agreement and the Master Agreement, the terms and conditions of this Agreement will prevail to the extent of any such inconsistency.
- (l) EAC may assign this Agreement to an assignee of the Lease Agreement, on notice to but without the consent of the City, and such assignment by EAC shall not relieve EAC of its obligations under this Agreement. Any other assignment of this Agreement by EAC shall require the prior written consent of the City, which consent may be unreasonably withheld. This Agreement shall be binding upon the City and EAC and their respective successors in title, and permitted assigns.
- (m) The rights and licenses granted to EAC by the City under this Agreement shall not be deemed to constitute any interest in the Wintergarden Landing, the 104 Avenue lands or the Arena Lands and under no circumstances shall this Agreement be of the same force and effect as a covenant running with the land. EAC shall not have the right to protect its rights under this Agreement by registering a caveat against the title to any lands owned by the City.

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IN WITNESS WHEREOF the Parties have executed this Agreement.


**THE CITY OF EDMONTON**

Per: \_\_\_\_\_

  
As represented by Simon  
Farbrother City Manager

Approved by City Council  
January 23, 2013  
Item # 6.2

Legally Reviewed and  
Approved as to Form:

  
\_\_\_\_\_  
Law Branch

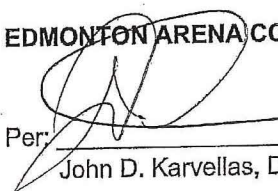
**ANNE JARMAN, Q.C.  
BARRISTER & SOLICITOR**

Approved as to Content:

  
\_\_\_\_\_

**EDMONTON ARENA CORP.**

Per: \_\_\_\_\_

  
John D. Karvellas, Director



## SCHEDULE A

### Capital Maintenance Protocol for Wintergarden

1. **Statement of Principle:** Under the Master Agreement, the City and EAC have agreed on the funding responsibilities for the City Wintergarden Costs and the EAC Wintergarden Costs. The Parties are committed to working together to complete all the Capital Maintenance Work in the most practical and cost efficient manner, considering all relevant factors, including: industry best practice, local experience, potential impact on sponsorship opportunities, requirements from the NHL or event promoters, information from equipment manufacturers on operating and maintenance requirements and whether a Party is undertaking complementary projects or has specialized expertise, the impact of the equipment failing unexpectedly and event programming requirements (the "Factors").
2. **Personnel:** The Director of Buildings and Facilities Maintenance Section for the City (or position of equivalent seniority if such position is replaced or changed) and Tom Cornwall on behalf of EAC and its Affiliates will be the day to day senior personnel (such representatives of the City and EAC are the "Personnel") responsible to implement this Agreement. Any change to the Personnel will be the subject of written notice to the other Party.
3. **Collaboration:** Both Parties intend to work collaboratively to identify potential efficiencies in all areas of the capital maintenance program including which Party can most effectively carry out the Capital Maintenance Work and the method upon which it should be carried out.
4. **35 Year Plan:** Concurrently with the development of a 35 year capital replacement plan under the Arena capital maintenance protocol between the Parties and as the design of the Wintergarden is finalized, the Parties will jointly develop a 35 Year Plan under this Agreement. Based on the Factors, the 35 Year Plan will be the starting point for the 5 Year Plan.
5. **5 Year Plan:** Concurrently with the development of a 5 year capital plan under the Arena capital maintenance protocol between the Parties, the Personnel will jointly develop a 5 year capital plan for the Capital Maintenance Work under this Agreement which will be reviewed and updated annually after consideration of the equipment performance, the results of the five-year condition assessment surveys, consideration of the Factors and current availability of funding. The rolling 5 Year Plan is intended to provide a forecast of anticipated expenditures and enable proper planning and management of cash flow and capital expenditures.
6. **Cost Approval:** When from time to time it is determined that the appropriate method to implement any item of Capital Maintenance Work is for a Party to attend to repairs which are the responsibility of the other Party, all costs related thereto must be approved by the Party who is responsible for the Capital Maintenance Work prior to it being carried out.
7. **Process:** Except for Capital Maintenance Work with an estimated cost of less than \$10,000 and emergencies, implementation of the Capital Maintenance Work that constitutes City Wintergarden Costs (and being undertaken by the City or by EAC on behalf of the City) shall take into consideration the Factors and shall follow the project management processes and contract administration as determined by a PMI — certified project manager following standard City procurement processes and approved by the Personnel.

8. **Additional Work:** In the event that either Party wishes to carry out work that does not constitute Capital Maintenance Work as identified in the 5 Year Plan or the 35 Year Plan and the Parties do not agree that such work should be added to the 35 Year Plan or 5 Year Plan, the sole financial funding source for that work would be the responsibility of that Party. Approval for carrying out any such additional work must be obtained from both Parties once funding is established and in advance of commencement of such work. In cases of emergency (being an unforeseen occurrence or condition requiring immediate action) or where one Party is unable, for budget reasons, to fund the required Capital Maintenance Work in the time required by the 5 Year Plan; the other Party shall be entitled, on written notice to the other Party, to elect to effect the necessary Capital Maintenance Work when funds become available for that purpose. Any such expenditure will bear interest at the Toronto Dominion Bank's most current prime rate plus two percent until repaid.
  
9. **Revisions:** This Protocol may be further revised from time to time by agreement between the Parties.

## SCHEDULE B

### Service Levels

Component	Type of Work	Frequency
Custodial	Floor cleaning	daily
	Litter pick up	daily
	Empty waste receptacles	daily
	Spot clean furniture & fixtures	daily
	Spot clean glass surfaces	daily
	Wipe down railings	daily
	Interior Window Cleaning	monthly
	Exterior Window Cleaning	quarterly
Carpentry	Doors And Hardware Maintenance	annual
	Exterior Carpentry Maintenance	annual
	Exterior Caulking Maintenance	annual
	Fire Rated Man Door Maintenance	annual
	Floor Maintenance	annual
	Interior Carpentry Maintenance	annual
Electrical	Automatic Door Maintenance	annual
	BMS System Verification	annual
	Building Electrical Maintenance	annual
	Software/Service Agreement - Card Access	annual
	CCTV Maintenance	annual
	CCTV Camera Licensing Fee	annual
	Server Replacement (Surveillance)	60 month
	Distribution Xfmr Maintenance	annual
	Electronic Security Maintenance	annual
	Emerg Lighting Maintenance	annual
	Molded Case Breaker Maintenance	24 month
	Motor Control Center Maintenance	24 month
	AV System Maintenance	annual
	AV Software Service Agreement	annual
	AV Server Replacement	60 month
Sub Panel Maintenance	24 month	
Mechanical	A/C Units Shut down	annual
	A/C Units Start up	annual
	Backflow Prevention Annual Test	annual
	Change Pre Filters	annual
	Elevator Maintenance	annual
	Escalator Maintenance	annual
	Gas Fired Heating Mntce	annual
	Plumbing System Mntce	annual
	Stationary Bldg Op Activities	annual
	Supply and Return Fan Mntce	annual
Painting	Finishes Maintenance Inspection	annual

## SCHEDULE C

### DISPUTE RESOLUTION

The following dispute resolution procedures shall apply to all disputes arising under this Agreement, unless specifically stated otherwise in this Agreement:

1. If a Party considers that a dispute has arisen under this Agreement that has not been resolved in accordance with the applicable provisions of this Agreement, that Party shall provide to the other Party a written notice of dispute, summarizing the issue(s) in dispute. Within 10 days of provision of the notice (or such earlier or later period as the Parties agree on a case by case basis), the City Manager or his or her designee(s) and a director of EAC or his or her designee(s) shall meet (if possible in face-to-face meetings) and shall, acting in good faith, attempt to resolve the dispute within a period of 40 days of provision of the notice (or such earlier or later period as the Parties agree on a case by case basis, giving consideration to the nature of the matter in dispute).
2. If the dispute is not resolved within the period specified in paragraph 1 of this Schedule, the matter shall be referred to arbitration. If the Parties cannot agree on a single arbitrator within the 10 days following the expiry of the period specified in paragraph 1 of this Schedule, then either Party shall forthwith nominate an arbitrator and notify the other Party in writing of such nomination and the other Party shall, within 10 days of receipt of such notice of nomination, nominate one arbitrator and the two arbitrators so nominated shall select a third arbitrator to act as chairman of the arbitration tribunal to act jointly with the previously named arbitrators. The Parties will act reasonably and in good faith to select arbitrators who are objective and who are suitably qualified by education or experience to deal with the matters in issue.
3. Any arbitration conducted pursuant to this Agreement shall take place in the City of Edmonton and except as modified by agreement of the Parties, the provisions of the *Arbitration Act* (Alberta) shall govern the arbitration process. The arbitrator or the arbitration panel, as the case may be, must render a decision on the matter in issue within 30 days of the appointment of the arbitrator or the arbitration panel or such other earlier or later date agreed to by the Parties.
4. The decision of the single arbitrator, or a majority of the arbitration panel, as the case may be, in respect of all matters of procedure and with respect to the matter in issue shall be final and binding on the Parties.
5. The costs of the arbitration shall be borne as between the Parties in the manner specified in the arbitrator's decision. In the absence of any direction by the arbitrator, each Party shall bear its own costs and the costs of the arbitrator(s) will be shared equally.