CITY OF WEST DES MOINES
CITY COUNCIL MEETING COMMUNICATION

DATE: **July 15, 2019**

ITEM: Resolution - Approval and Acceptance of Agreement Between the City of West Des Moines and Kum & Go, L.C. for the Naming Rights of the Community Rooms at the MidAmerican Energy RecPlex

FINANCIAL IMPACT: $250,000.00 to City, subject to terms of Agreement

SYNOPSIS: Representatives of the City and Kum & Go, L.C. (Kum & Go) have negotiated the attached Agreement in which Kum & Go will provide compensation of $250,000.00 to the City in exchange for receiving naming rights to the Community Rooms at the MidAmerican Energy RecPlex.

Specifically, the Agreement provides that:

Kum & Go will be the exclusive sponsor of the Community Rooms within the RecPlex, with the rooms to be referred to as the "Kum & Go Community Rooms;"

Kum & Go will pay the City $250,000.00 in five equal payments over the first five years of the Agreement, beginning June 30, 2019. The Agreement will terminate on December 31, 2045, unless extended by mutual agreement of the parties;

Kum & Go will provide the design and the City will pay for and maintain the central marquee sign(s) to be located at a prominent place interior to the RecPlex but exterior to and at the entrance of the Community Rooms. If a change or update to the signage is requested by Kum & Go, the replacement cost will be borne by Kum & Go.

OUTSTANDING ISSUES (if any): None.

RECOMMENDATION: Adopt Resolution Approving and Accepting the Agreement Between the City of West Des Moines and Kum & Go, L.C. for the Naming Rights of the Community Rooms at the MidAmerican Energy RecPlex.

Lead Staff Member: Tom Hadden, City Manager

STAFF REVIEWS

Department Director	
Appropriations/Finance	
Legal	
Agenda Acceptance	

PUBLICATION(S) (if applicable)

Published In	
Dates(s) Published	

SUBCOMMITTEE REVIEW (if applicable)

Committee	None		
Date Reviewed			
Recommendation			

RESOLUTION NO._____

RESOLUTION APPROVING AND ACCEPTING THE AGREEMENT BETWEEN THE CITY OF WEST DES MOINES, IOWA AND KUM & GO, L.C. FOR THE NAMING RIGHTS OF THE COMMUNITY ROOMS AT THE MIDAMERICAN ENERGY COMPANY RECPLEX

WHEREAS, the City of West Des Moines has undertaken the planning, design and proposed construction of a multi-recreational facility to be known as the MidAmerican Energy Company RecPlex; and

WHEREAS, representatives of Kum & Go, L.C. have negotiated an agreement with the City in which Kum & Go, L.C. will contribute $250,000.00 to the City in exchange for the naming rights to the Community Rooms at the MidAmercian Energy Company RecPlex; and

WHEREAS, to memorialize the intent of the City and Kum & Go, L.C., the parties have negotiated the attached Agreement setting forth the terms and conditions regarding naming of the Community Rooms.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF WEST DES MOINES, IOWA THAT:

1. The *Agreement Between the City of West Des Moines, Iowa and Kum & Go, L.C. for the Naming Right of the Community Rooms at the MidAmerican Energy Company RecPlex* is approved.

2. The Mayor is authorized to sign the Agreement and the City Clerk is directed to attest to the Mayor's signature.

PASSED AND ADOPTED this 15th day of July, 2019.

_____
Steven K. Gaer, Mayor

ATTEST:

_____
Ryan T. Jacobson
City Clerk

AGREEMENT BETWEEN THE CITY OF WEST DES MOINES, IOWA AND KUM & GO, L.C. FOR THE NAMING RIGHTS OF THE COMMUNITY ROOMS AT THE MIDAMERICAN ENERGY COMPANY RECPLEX

THIS NAMING RIGHTS AGREEMENT is made, executed and entered into on or as of the 22nd day of June, 2019, by and between the **CITY OF WEST DES MOINES**, an Iowa municipality, as owner of the **MIDAMERICAN ENERGY COMPANY RECPLEX** ("**RecPlex**"), and **KUM & GO, L.C.**, an Iowa limited liability company ("**Kum & Go**").

WITNESSETH:

RECITALS

WHEREAS, pursuant to this Agreement, Kum & Go is committing to make various material and substantial monetary contributions (the "**Kum & Go Contributions**") so as to help fund the construction of the MidAmerican Energy Company RecPlex facility; and

WHEREAS, RECPLEX desires to recognize the Kum & Go Contributions in a public and permanent manner by granting naming rights to the Community Rooms to Kum & Go.

NOW, THEREFORE, in consideration of the mutual promises and covenants herein contained, and for other good and valuable consideration, the receipt of which is hereby acknowledged, it is agreed as follows:

ARTICLE I
DEFINITIONS

Section 1.01 Incorporation of Recitals. The recitals set forth in the preamble of this Agreement are incorporated by this reference.

Section 1.02 Definitions. All capitalized terms used and not otherwise defined in this Agreement shall have the following meanings unless a different meaning clearly appears from the context:

"Agreement" refers to this Naming Rights Agreement.

"Naming Rights" means all naming rights, logo promotions, and other rights and benefits granted to Kum & Go under this Agreement.

"Community Rooms" means the community rooms of the MidAmerican Energy Company RecPlex facility to be constructed.

"Kum & Go Contributions" means the committed monetary contribution to be made by Kum & Go outlined in Section 2.03.

ARTICLE II
GENERAL TERMS

Section 2.01 Naming Rights. RECPLEX hereby grants to Kum & Go the exclusive right to name the Community Rooms the ***"Kum & Go Community Rooms"***. The Community Rooms will continue to be so named for a minimum period of 25 years or until Kum & Go, in its reasonable discretion, renames the Community Rooms in the manner provided in Section 4 of this Agreement.

Section 2.02 Term. This Agreement is effective and enforceable upon execution of the Agreement by the parties. The term of the Naming Rights shall commence immediately and shall run until December 31, 2045, unless extended by mutual agreement of the parties or until Termination occurs as defined in Article VIII.

Section 2.03 Consideration. Kum & Go, as and for its total consideration for the Naming Rights, will make the following monetary contributions to RECPLEX:

Contributing Entity	Amount	Contribution Date
Kum & Go	$50,000	June 30, 2019
Kum & Go	$50,000	April 30, 2020
Kum & Go	$50,000	April 30, 2021
Kum & Go	$50,000	April 30, 2022
Kum & Go	$50,000	April 30, 2023

ARTICLE III
USE OF NAME AND LOGO PROMOTIONS

Section 3.01 Use of Name. During the term of this Agreement, RECPLEX, when making reference to the Community Rooms, shall use the name **"Kum & Go Community Rooms"** and no other. Isolated inadvertent references to the contrary concerning the Community Rooms shall not be deemed a violation of this Section.

ARTICLE IV
GRANDSTAND STAGE SIGNS

Section 4.01 Primary Signage. RECPLEX shall, at its sole expense, design, construct, and install a permanent sign for placement and display as the central marquee sign(s) to be located at a prominent place interior to the RECPLEX but exterior to and at the entrance of the Community Rooms. The signage will be displayed during the term of this Agreement. An example of the contemplated signage is attached hereto as Exhibit A. If a change to the name of the banner is requested by Kum & Go, the replacement cost will be borne by Kum & Go.

Section 4.02 Consultation. RECPLEX will coordinate with Kum & Go regarding the construction and design of the items listed in this Article, which signage shall conform to Kum & Go's trademarks and brand identity as reasonably required by Kum & Go.

Section 4.03 Ownership. After installation, the signage referenced in this Article shall remain the property of RECPLEX. Said signage may be changed or updated according to current standards from time-to-time at Kum & Go's option and expense, subject to RECPLEX's written approval and consent.

Section 4.04 Maintenance. RECPLEX shall conduct all necessary routine, preventative and long-term repair and maintenance of the Community Rooms signage referenced in this Article after its installation to keep them in good condition and repair, reasonable wear and tear excepted. RECPLEX's repair and maintenance will include maintenance, repair and replacement of all structural components of said signage after installation.

Section 4.05 Kum & Go Replacement. Kum & Go shall have the right to change the name of the Community Rooms and / or replace signage referenced in this Article, subject to the following:

A. If Kum & Go desires to rename the Community Rooms, the new name shall be subject to the prior written approval of RECPLEX, which approval shall not be unreasonably withheld; provided, however, that the new name of the Community Rooms shall pertain solely to Kum & Go, Kyle & Sharon Krause, or a business owned and operated by Kyle or Sharon Krause.

B. In the event Kum & Go renames the Community Rooms or desires to replace the signage referenced in this Article after the initial installation, in pursuance of the terms of this Agreement, RECPLEX shall permit Kum & Go to enter upon the property to the extent reasonably necessary for inspection, replacement, improvement, removal or performance of any work necessary, provided Kum & Go shall first give reasonable advance notice to RECPLEX of any work proposed to be done and shall have received RECPLEX's written approval for the date and time the work is to be performed. Said work shall be done in such a manner and under such conditions so as to not interfere with the proper, safe and continuous use, operation and enjoyment of the MidAmerican RecPlex facility. If requested by RECPLEX, Kum & Go shall submit plans and specifications for any replacement sign work to RECPLEX for its acceptance and approval in the manner listed below.

C. Kum & Go will prepare, at its sole cost and expense, and submit to RECPLEX for its consideration, complete plans, drawings and specifications for the design, construction, and installation of any replacement of any of the signage referenced in this Article. Said plans, drawings and specifications shall include an architect's construction drawings and specifications in final form and a color rendering depicting said signage to be replaced. Any replacement sign shall be first subject to RECPLEX's consideration, review, and written approval,

which shall not be unreasonably withheld. The sign shall contain the Community Rooms' name and, if included, at Kum & Go's option, one (1) logo designated by Kum & Go. Upon final written approval of the signage by RECPLEX, Kum & Go shall, at its sole cost and expense, provide for the sign's construction and installation. Kum & Go shall have sole responsibility for the timely placement, supervision, inspection, permits, coordination and prosecution of all work in connection with the erection of said replacement signage. RECPLEX will provide its reasonable cooperation to facilitate the installation by making available free access to the intended location as may be required for all machinery and personnel, and electrical power and hook-up during the installation.

D. Before Kum & Go commences any work, Kum & Go shall require its contractors, agents, or employees to secure or be covered by insurance as may be necessary and required by RECPLEX in view of the work to be performed. Said insurance shall be of the kind, type and amount as is customary on similar construction projects and RECPLEX shall be named as an additional named insured on all such policies.

ARTICLE V
INTELLECTUAL PROPERTY RIGHTS

Section 5.01 Kum & Go Name. Notwithstanding the designation of the Community Rooms as the **"Kum & Go Community Rooms"** and/or the permitted use by RECPLEX and others of said name as provided for in this Agreement, nothing in this Agreement is intended, nor shall be construed, as otherwise affecting the exclusive ownership by Kum & Go, either under statutory or common law, and the rights of Kum & Go, to the Kum & Go name, and any logo, service mark, trademark, and copyright associated with the Kum & Go.

Section 5.02 Proprietary Rights. Except with respect to the Naming Rights referenced herein, RECPLEX shall have the sole ownership and control over all other sponsors, sponsorship signage, advertising, and marketing and merchandizing rights pertaining to the MidAmerican Energy Company RecPlex facility. Kum & Go acknowledges that the MidAmerican Energy Company RecPlex facility will contain signage other than that of Kum & Go's, but no Community Room or Rooms will contain signage of any other convenience store operator.

ARTICLE VI
REPRESENTATIONS AND WARRANTIES OF RECPLEX

RECPLEX hereby makes the following representations and warranties, to-wit:

Section 6.01 Authority. RECPLEX has the full right and legal authority to enter into and fully perform this Agreement in accordance with its terms.

Section 6.02 Due Organization. RECPLEX is a public municipality duly organized, validly existing and in good standing under the laws of the State of Iowa.

Section 6.03 Enforceability. This Agreement, when executed and delivered by RECPLEX, will be its legal, valid and binding obligation enforceable against RECPLEX in accordance with its terms, except to the extent that enforcement thereof may be limited by bankruptcy, insolvency or other similar laws affecting creditors' rights generally.

Section 6.04 Other Agreements. The execution and delivery of this Agreement, and the performance by RECPLEX of its obligations hereunder, do not and will not violate or cause a breach of any other agreements or obligations to which RECPLEX is a party or by which it is bound, and no approval or other action by any governmental authority or agency is required in connection herewith.

ARTICLE VII
SUCCESSORS INTERESTS

Section 7.01 Kum & Go Assignment. Neither this Agreement nor any of the rights or obligations of Kum & Go hereunder may be assigned, transferred or conveyed by operation of law or otherwise, by Kum & Go, nor shall this Agreement or rights or obligations of Kum & Go hereunder inure to the benefit of any trustee in bankruptcy, receiver, creditor, or trustee of Kum & Go's business or its properties whether by operation of law or otherwise, except (i) with the prior written consent of RECPLEX, which consent shall not be unreasonably withheld, and (ii) the delivery of a written document in which the assignee assumes all of the obligations of Kum & Go and Kum & Go acknowledges that it will continue to be bound to such obligations if not performed by the assignee. Subject to the foregoing, this Agreement shall be binding upon and shall inure to the benefit of all successors and assigns of the parties.

Section 7.02 Assignment by RECPLEX. RECPLEX may not assign, transfer, mortgage, pledge, grant a security interest in or otherwise encumber this Agreement for any reason without the consent of Kum & Go, including, but not limited to, assigning this Agreement for collateral purposes to RECPLEX's lenders.

ARTICLE VIII
TERMINATION, REFUND, DEFAULT AND REMEDIES

Section 8.01 Termination. Kum & Go shall have the sole right, but not the obligation, to terminate this Agreement, without further liability, upon thirty (30) days' written notice, to-wit:

A. The MidAmerican Energy Company RecPlex facility is no longer owned or operated by the City of West Des Moines.

B. Damage to or destruction of the MidAmerican Energy Company RecPlex facility or if the MidAmerican Energy Company RecPlex facility is closed for eighteen (18) months or longer.

C. If Kum & Go, at any time and for any reason, elects to de-identify the MidAmerican Energy Company RecPlex facility and terminate this Agreement.

D. RECPLEX is in default under the Agreement as provided below in Section 8.02.

Section 8.02 RECPLEX Event of Default. Any one or more of the following events shall constitute an "Event of Default" on the part of RECPLEX if not cured within the permitted grace period, if any (notwithstanding whether such occurrence shall be voluntary or involuntary or come about or be effected by operation of law or pursuant to or in compliance with any judgment, decree, or order of any court or any order, rule, or regulation of any administrative or governmental body), to wit:

A. Construction of the MidAmerican Energy Company RecPlex facility is not substantially complete and ready for use by January 1, 2021. The cure period referenced in subsection (C.) of this Section 8.02 shall not apply to a default under this subsection A.

B. RECPLEX shall sell or otherwise transfer the facility including, but not limited to foreclosure on by any party, or cease being a tenant of the facility.

C. If a material default shall be made by RECPLEX in the performance or observance of, or shall occur under, any warranty, representation, covenant, agreement, or other provision of this Agreement and RECPLEX fails to correct said default within ninety (90) days after Kum & Go gives written notice of said default to RECPLEX.

Section 8.03 Kum & Go Remedies upon RECPLEX Event of Default. Upon the occurrence of an Event of Default by RECPLEX, Kum & Go shall have the following non-exclusive and cumulative remedies, to-wit:

A. In the event of a default under Section 8.02(A), RECPLEX will reimburse to Kum & Go the total Contribution made to date within 30 days of written demand by Kum & Go.

B. Kum & Go may maintain an action for specific performance of this Agreement, it being acknowledged by RECPLEX that the nature of this Agreement is unique.

C. Kum & Go may exercise and all other rights and remedies available to it, at law or in equity.

Section 8.04 Termination by City. Unless otherwise provided in this Agreement, City may terminate this Agreement by delivering written notice to Kum & Go in the event that Kum & Go materially breaches any of its covenants or agreements hereunder, and for which the material breach remains uncured for sixty (60) days after Kum & Go's receipt of written notice from City.

Section 8.05 Rights and Remedies not Waived. No course of dealing between the parties in exercising any rights or remedies hereunder shall operate as a waiver of any rights or remedies

of either party and no single or partial exercise of any rights or remedies hereunder shall operate as a waiver or preclude the exercise of any other rights or remedies hereunder.

ARTICLE IX
ADDITIONAL TERMS

Section 9.01 Covenant Running with the Land and Recording. The parties hereto agree that the Naming Rights shall constitute a covenant running with the land which covenant may only be revoked by Kum & Go, or its successors and assigns, at their sole discretion. In addition, Kum & Go and its successors and assigns shall be entitled, at any time, to record a Memorandum of Covenant in the public records of Polk County, Iowa, as evidence of this Agreement and this Covenant.

Section 9.02 Notice. Any notice, demand or other communication required or permitted by this Agreement shall be given in writing and shall be deemed to have been given and received in all respects when personally delivered, when sent via prepaid overnight courier, when sent by facsimile transmission with confirmation of completion of the transmission, or three (3) days after deposited in the United States mail, certified mail, postage prepaid, return receipt requested, in each case addressed to the respective parties at their respective addresses (or facsimile numbers).

Section 9.03 Choice of Law. This Agreement shall be governed and construed in accordance with the laws and public policies of the State of Iowa, applicable to agreements made and to be performed in Iowa, without giving effect to its conflicts of laws principles or rules.

Section 9.04 Entire Agreement. This Agreement, including all exhibits and schedules (if any) attached hereto, constitutes the entire agreement between the parties and supersedes any and all prior agreements between them relating to the subject matter hereof, and may not be amended except in writing signed by the party to be bound.

Section 9.05 Authority. The undersigned represent and warrant that each has full authority to execute and deliver this Agreement on behalf of its respective entity.

Section 9.06 Binding Effect. This Agreement shall be binding upon and inure to the benefit of the representatives, heirs, estates, successors and assigns of the parties hereto.

Section 9.07 Construction. Words and phrases shall be construed as in the singular or plural number, and as masculine, feminine or neuter gender according to the definitions and the context.

Section 9.08 Section Headings. The headings at the beginning of any paragraph, or any subparagraph, in this Agreement are for convenience only and shall not be dispositive in interpreting or construing this Agreement.

Section 9.09 Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument.

Section 9.10 Facsimile Signature. The parties agree that for purposes of executing this Agreement and any other instruments to be executed in connection herewith, a facsimile signature shall be deemed as effective as an actual signature.

IN WITNESS WHEREOF, the parties hereto have caused this Naming Rights Agreement to be executed all on or as of the day and year first above written.

KUM & GO, L.C., an Iowa limited liability company

By:_____
Kyle J. Krause, CEO

CITY OF WEST DES MOINES

By:_____
Steven K. Gaer, Mayor

Attest:_____
City Clerk

Attachments:
Exhibit A – Visual Depiction of Kum & Go Community Rooms

EXHBIT "A"
VISUAL DEPICTION OF Kum & Go COMMUNITY ROOMS SIGNAGE