

**CITY OF LA VISTA
MAYOR AND CITY COUNCIL REPORT
DECEMBER 5, 2023 AGENDA**

Subject:	Type:	Submitted By:
AMEND – KENO OPERATOR AGREEMENT	◆ RESOLUTION ORDINANCE RECEIVE/FILE	KEVIN POKORNY DIRECTOR OF ADMINISTRATIVE SERVICES

SYNOPSIS

The resolution has been prepared to approve a fifth amendment to the current Keno Lottery Operator Agreement.

FISCAL IMPACT

Staff anticipates a minimal impact on the excess proceeds over City's Guaranteed Net Payout.

RECOMMENDATION

Approval.

BACKGROUND

The current Keno Lottery Operator Agreement has been in effect since 2008, with LVK Holdings LLC taking on the operation of the game pursuant to an assignment in 2016, expiring December 20, 2023. A proposed fifth amendment would extend the current Lottery Operator Agreement to December 31, 2025.

These changes are subject to the Nebraska State Department of Revenue, Gaming Division approval.

RESOLUTION NO. ____

A RESOLUTION OF THE CITY OF LA VISTA, NEBRASKA, APPROVING A FIFTH AMENDMENT TO THE CITY'S KENO LOTTERY OPERATOR AGREEMENT

WHEREAS, a proposed FIFTH AMENDMENT to the City's Keno Lottery Operator Agreement, as previously amended, is presented and incorporated into this resolution by reference ("Proposed Fifth Amendment").

NOW, THEREFORE, BE IT RESOLVED that the Proposed Fifth Amendment is approved, subject to any additions, subtractions or modifications the Mayor or City Administrator determines necessary or appropriate, ("Amendment").

BE IT FURTHER RESOLVED that the Mayor and City Clerk are authorized to execute the Amendment on behalf of the City, and the Mayor and City Administrator, or any designee of the Mayor or City Administrator, shall be authorized to take any action from time to time on behalf of the City as he or she determines necessary or appropriate to carry out the City's Lottery Operator Agreement, as amended by the Amendment.

PASSED AND APPROVED THIS 5TH DAY OF DECEMBER 2023.

CITY OF LA VISTA

Douglas Kindig, Mayor

ATTEST:

Pamela A. Buethe, MMC
City Clerk

LA VISTA LOTTERY OPERATOR AGREEMENT

FIFTH AMENDMENT

THIS FIFTH AMENDMENT TO LOTTERY OPERATOR AGREEMENT ("Amendment") is made and entered into by and among the City of La Vista, Sarpy County, Nebraska, a municipal corporation ("City"), LVK Holdings LLC, a Nebraska limited liability company, ("Contractor"), and EHPV Lottery Services LLC, a Nebraska limited liability company and owner of a controlling interest of the membership interests of Contractor ("Holding Company"), effective coextensive with the end of the Short Term Extension of Lottery Operator Agreement (described below) on December 20, 2023 (the "Effective Date").

WHEREAS, a majority of the vote by the registered voters of the City of La Vista in 1989 was cast in favor of authorizing the establishment of a municipal lottery; and

WHEREAS, the Mayor and City Council established a keno-type lottery ("La Vista Keno") and awarded successive contracts to operate said lottery, the current of which is the Lottery Operator Agreement between City and Contractor, as assignee effective May 1, 2016, pursuant to the Assignment and Assumption of the Lottery Operator Agreement between City and La Vista Keno, Inc. dated August 8, 2008, as amended by Amendment Nos. 1 through 4 and the Short Term Extension of Lottery Operator Agreement from September 30, 2023 to December 20, 2023, ("Lottery Operator Agreement" or "Agreement"); and

WHEREAS, EHPV Management Group Inc, EHPV Operating Group LLC, and EHPV Real Estate Group LLC and their respective subsidiaries (including without limitation Endgame LLC, a Nebraska limited liability company, wholly owned and controlled subsidiary of EHPV Real Estate Group LLC and sole owner of the Real Estate) are under common ownership and control with Contractor and Holding Company and together own, manage, operate, and control the Real Estate and other property, assets, rights, and activities connected with La Vista Keno and food, beverage and other operations conducted in conjunction with La Vista Keno or otherwise by Contractor and Holding Company; and

WHEREAS, the parties desire to extend the Agreement for an additional period, ending December 31, 2025, and make other changes to the Agreement as detailed below.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which the parties hereby acknowledge and agree, the parties hereto agree as follows:

- I. The Agreement is extended for an additional period, to end on December 31, 2025.

- II. The last three sentences of Paragraph 2 of the Agreement are deleted in their entirety and replaced with the following language:

The Contractor will provide the expertise, equipment, services, supplies, employees and location necessary to operate the keno-type lottery on behalf of the City. Each outside ticket used in the keno lottery will have the City's name clearly indicated thereon, as well as the ticket serial number issued by the keno system. No such ticket will be sold unless the name of the City and serial number are indicated thereon.

- III. That portion of Paragraph 5 of the Agreement that begins "All Gross Proceeds of the lottery . . ." and ends with ". . . without regard to the amount from time to time herein authorized for instant cash prize payout." Is stricken in its entirety.

- IV. Paragraph 9 of the Agreement is deleted in its entirety and replaced with the following language:

"a. Contractor Regular Compensation. The Contractor is entitled to an amount not to exceed twelve and one-quarter percent (12¼%) of the Gross Proceeds of the lottery (sometimes referred to herein as "Contractor Payout" or "Contractor 12¼%") as Contractor compensation from which amount Contractor shall pay and be fully responsible for the payment of all Expenses of the lottery and Contractor shall indemnify and save harmless City from all liability or loss in respect thereto. Contractor shall be entitled to said twelve and one-quarter percent (12¼%) during the continuation of this Agreement, as amended by this Amendment, subject to payment of all prizes and City's Guaranteed Net Payout pursuant to subparagraph 9(d) below, and for any month in which Contractor does not receive the full twelve and one-quarter percent (12¼%) due to payouts to players or to the City, Contractor may recover the amount by which said twelve and one-quarter percent (12¼%) was reduced in subsequent months out of excess remaining in the Accumulated Funds Account (described below), if any, after all prize payouts and City's Guaranteed Net Payout for the month have been paid. Any such recovery by Contractor only shall be made from excess remaining in the Accumulated Funds Account, if any, and Contractor's regular compensation over the life of this Agreement shall in no event exceed 12¼% of Gross Proceeds.

b. Contractor Payment of Expenses. From said amount of Contractor compensation, Contractor shall be solely responsible for the payment of all Expenses and operations of the lottery, including taxes (which includes federal wagering taxes imposed under Section 4401(a) of the Internal Revenue Code), insurance, rent, advertising, printing, manufacturing, supplies, equipment, fees, commissions, salaries, and all other such Expenses incurred in the operation of the lottery or otherwise related thereto; provided, however, the City and not the Contractor shall pay the two percent

(2%) lottery tax imposed by §9-648 of the Nebraska Revised Statutes ("State Lottery Tax"), and provided further, however, that if any applicable lottery or wagering tax shall materially change, either party shall have the right to request the other to discuss how said change shall be allocated under this Agreement, as amended by this Amendment.

- c. Pay Tables. Pursuant to Section 9-629 of the Nebraska Revised Statutes, no less than sixty-five percent (65%) of the Gross Proceeds of the lottery shall be used for the awarding of prizes. The Contractor may, in its discretion, adjust upward from sixty-five percent (65%) the amount of Gross Proceeds used for awarding prizes to the participants; provided that the Contractor provide the City Administrator written notice ten (10) days before any change in the prize pay tables. The Mayor or City Administrator shall have the right to reject any such change within said ten (10) day period, provided that no such rejection shall be given unreasonably.
- d. City's Guaranteed Percentage. The remainder of the Gross Proceeds of the keno lottery each month shall be paid to the City ("City Payout"), subject to potential retention of amounts in excess of the City's Guaranteed Net Payout (defined below) for the month, if any, in the Accumulated Funds Account pursuant to part (f) of this Paragraph 9. Notwithstanding anything in this Amendment or the Agreement to the contrary, in no event shall the Contractor pay to the City with respect to any calendar month, or portion thereof, an amount less than seven percent (7%) of the Gross Proceeds (sometimes referred to herein as "City's Guaranteed Net Payout", two percentage points of which is used to pay the State Lottery Tax), plus the amount of any unclaimed wins for such month. If the City Payout in any month is less than City's Guaranteed Net Payout, the Contractor shall pay the amount of such deficiency to City by the fifteenth (15th) day of the next month.
- e. Payments to City. The payment of proceeds and unclaimed wins to the City shall be made no later than fifteen (15) days following the last day of lottery operations for each month and shall be accompanied by the monthly financial report as required by this Agreement, as amended by this Amendment. Interest shall accrue on all payments due the City at the judgment interest rate established by state law from the first day of each month such payment is due until paid, if payment is not made on or before fifteen (15) days following the last day of the keno lottery operations for each month.
- f. Accumulated Funds Account. All Gross Proceeds of the lottery shall be maintained by the Contractor in a separate account at a federally insured financial institution ("Accumulated Funds Account"). The Accumulated Funds Account shall be held in an account in the name of the Contractor and with respect to which the City has such signature authority as is satisfactory to the City Administrator. All Gross Proceeds, if any, over and above the twelve and one-quarter percent (12¼%) Contractor Payout, the City's Guaranteed Net

Payout each month and amounts paid to winning players, shall be allowed to accumulate in the Accumulated Funds Account during the continuation of the keno lottery for use by Contractor to offer special games, payout schedules and pay tables from time to time in response to changing market conditions and with the objectives of increasing interest, play, Gross Proceeds and City and Contractor payouts. If at the end of any calendar month the balance in the Accumulated Funds Account exceeds the Maximum Accumulation specified in the following sentence after payment of prizes, City's Guaranteed Net Payout and Contractor's 12¼%, the Contractor shall pay the excess to the City as provided in paragraph 9(d). "Maximum Accumulation" for purposes of this paragraph shall mean \$100,000. Upon expiration or termination of the Lottery Operator Agreement, as amended, the balance in the Accumulated Funds Account shall be paid to the City."

- V. Exhibits D, E, F, G, and H to the Agreement, including any previous amendments or replacements to such Exhibits, are deleted in their entirety.
- VI. Paragraph 10 of the Agreement is amended by adding the following after the last sentence: "Further, failure of Contractor to achieve \$10,000,000 annual gross receipts from lottery operations with respect to a calendar year shall not constitute a breach of this Agreement (as amended by this Amendment) if, notwithstanding Contractor's best efforts, circumstances over which Contractor has no control in connection with increased competition from casino gambling at War Horse Casino, upon its opening or expansion in the vicinity of 63rd and Q Streets (the first phase of which is projected to open in the Summer 2024 with 800 slot machines), or the opening or expansion of other similar casino gambling in Douglas or Sarpy County, Nebraska, cause annual gross receipts from lottery operations for the year to be less than \$10,000,000. For purposes of this Agreement, as amended by this Amendment, gross receipts shall have the same meaning as Gross Proceeds."
- VII. Paragraph 13 of the Agreement is amended by adding the following language at the end:

"In the event of cessation of operation caused by fire, casualty, or equipment failures, beyond the control of the Contractor, which prevents the operation of a live ball draw, the Contractor is authorized to use a computerized random number generator type lottery for a period of twenty-four (24) hours. The Contractor will provide notice to the City Administrator in advance of such use, if possible, and if not possible, then as soon as possible thereafter, and will provide a further notice when the live ball draw is back in operation. The City Administrator may authorize the use of a computer random number generator beyond the initial 24 hours depending on the extent of the fire, casualty, or equipment failure and time needed for repairs."

- VIII. All terms and conditions of the Agreement shall be deemed modified to be consistent with the changes made by this Amendment.
- IX. Terms used in this Amendment shall have the meanings provided in the Agreement, unless otherwise expressly defined in this Amendment. Recitals are incorporated into this Amendment by reference
- X. Except as expressly modified by this Amendment, the Agreement shall continue and remain in full force and effect in accordance with the terms and conditions set forth therein.

IN WITNESS WHEREOF, the Contractor, City, and Holding Company have executed this Fifth Amendment effective as of the date first written above.

ATTEST: **LVK Holdings LLC**, a Nebraska limited liability company

Witness By: _____

Its: _____

Date: _____ Date: _____

ATTEST: **City of La Vista**, a Nebraska municipal corporation

City Clerk By: _____

Its: _____

Date: _____ Date: _____

ATTEST: **EHPV Lottery Services LLC**, a Nebraska limited liability company

Witness By: _____

Its: _____

Date: _____ Date: _____

Affiliated Entities Agreement

By signing below, (i) the undersigned each hereby represents and warrants that he or she is authorized to execute this Affiliated Entities Agreement on behalf of EHPV Management Group Inc, EHPV Operating Group LLC, or EHPV Real Estate Group LLC, as the case may be (each referred to as "company"), and (ii) the undersigned on behalf of said company hereby agrees to take any actions, including without limitation voting any membership or other interests of the company in any subsidiary, as necessary or appropriate to carry out the terms and conditions of the Lottery Operator Agreement, as amended by the Fifth Amendment, with respect to any real property or other assets, operations, activities, interests, or matters now or hereafter under the ownership, direction, or control of said company or any subsidiary of company that are connected with La Vista Keno operations or food, beverage or other operations conducted in conjunction with La Vista Keno or at or from the same premises.

ATTEST:

EHPV Management Group Inc., a
Colorado corporation authorized to do
business in Nebraska

Witness

By: _____

Its: _____

Date: _____

Date: _____

ATTEST:

EHPV Operating Group LLC, a
Nebraska limited liability company

Witness

By: _____

Its: _____

Date: _____

Date: _____

ATTEST:

EHPV Real Estate Group LLC, a
Nebraska limited liability company

Witness

By: _____

Its: _____

Date: _____

Date: _____