

## LAKESIDE PARK ENHANCEMENT AGREEMENT

THIS LAKESIDE PARK ENHANCEMENT AGREEMENT ("Agreement") is entered into as of this 2nd day of October, 2020, by and between the City of Fond du Lac, Wisconsin, a Wisconsin Municipality ("City") and Lakeside Forward LLC ("LSF"), a Wisconsin Limited Liability Company. The City and LSF may be referred to jointly as the "Parties" and individually as a "Party."

### RECITALS

**WHEREAS**, City is a municipal corporation organized and existing under and pursuant to Chapter 62 of the Wisconsin Statutes and exercises all of the powers provided for therein;

**WHEREAS**, City is the owner of certain property located along the southern shore of Lake Winnebago, known as Lakeside Park;

**WHEREAS**, City and LSF desire to make certain improvements to Lakeside Park including but not limited to renovating an existing pavilion building, constructing a new amphitheater and skating rink on the area known as Oven Island, constructing a restaurant with exhibition space west of the Lakeside Park Lighthouse, and varied other improvements (as described in greater detail below, the "Projects");

**WHEREAS**, LSF is a Wisconsin Limited Liability Company whose sole purpose is to receive privately donated funds to enable LSF to work with the City to improve Lakeside Park and whose members are individuals or entities located in and around the City of Fond du Lac, desiring to aid the City financially, logistically, and operationally in enacting the Projects;

**WHEREAS**, LSF's members have business expertise necessary to create vibrant, successful Projects and private capital to supplement the public funding and services to be provided by the City;

**WHEREAS**, the Fond du Lac City Council already passed Resolution No. 8858 and Resolution No. 8859 at the February 12, 2020 meeting of the Fond du Lac City Council to study the feasibility of the Alternative Master Plan for Lakeside Park (the "AMP") and to adopt the Alternate Master Plan for Lakeside Park, respectively;

**WHEREAS**, although the City and LSF may enter into additional agreements, amended agreements, and/or more definitive agreements concerning the Projects in the future, both parties must have a basic binding framework in place to allow LSF to raise funds and to allow the parties to advance their plan to the next step.

**WHEREAS**, the City and LSF intend to use this Agreement to set forth their understanding of the development of the Projects and their respective rights and obligations in connection therewith.

**NOW THEREFORE, THE PARTIES THEREFORE AGREE AS FOLLOWS:**

## Article 1: Basic Provisions and Definitions

1. The foregoing Recitals are true and accurate and are incorporated into this Agreement as if fully set forth herein.
2. Term. This Agreement becomes effective upon the date all parties have signed (the "Effective Date") and shall continue until the parties' obligations are satisfied at the conclusion of the Ground Lease referenced herein, unless earlier terminated by the parties as permitted herein.
3. Projects. The "Projects" that are the subject of this Agreement are depicted in the AMP and consist of the following:
  - a. Amphitheater/Skating Rink. The "Amphitheater/Skating Rink" project means the design and construction of an amphitheater and skating rink as depicted on the AMP with adjacent amenities, service facilities and buildings, improved parking areas, restrooms, and support structures on the area of Lakeside Park commonly known as Oven Island.
  - b. Restaurant/Mixed Use. The "Restaurant/Mixed Use" project means the design and construction of a restaurant and mixed-use event space as depicted in the AMP directly to the west of the existing lighthouse. The mixed-use space shall include approximately 2,000 square feet of space to be designated as community space to be used by community groups.
  - c. Pavilion. The "Pavilion" project means the design and renovation of the existing pavilion as depicted in the AMP as thereafter revised in subsequent architectural documents approved by the City, located north of Promen Drive.
  - d. Walking Paths. The "Walking Paths" project means the design, improvement, and new construction of the walking path improvements designated on the AMP.
  - e. Site Improvements. The "Site Improvements" project means the design and new construction or improvement of all other aspects of the AMP including the design and new construction or improvement of promontories, bike paths, infrastructure, utilities, landscaping, boat docks, and parking areas not incorporated into the Amphitheater/Skating Rink, Restaurant/Mixed Use, or Pavilion, as shown on the AMP.
4. Principles and/or Goals that the AMP Management team will consider and if appropriate, pursue:
  - a. Lease of city property for the MPB should be limited to the footprint of the MPB plus 10' on each side. Plaza (outdoor seating) along the lake and parking lots should be owned by the city, and open to the public at all times. The restaurant may choose to serve those persons on the plaza who wish to have food out there.

- b. Design of the building, plaza, and parking lots should be delegated to the private sector partners. Construction of the plaza and parking lots as designed should be facilitated by the City. Construction of the white box MPB should be completed by the private sector partners, however areas of access for the community space and exhibit areas should be designated upfront as separate and connected space, with the same great views as the other parts of the building.
- c. Placement of the MPB and right of ways on Lighthouse Point area should be surveyed, taking into primary consideration a bare minimum removal of trees. The footprint should be drawn out for alternative locations to be considered, including placing the building on what is currently paved surface.
- d. Placement of the parking lot might be reconsidered to allow for scenic overlook of the lake, and drive- through or turnaround within the lot, perhaps to the west of the building.
- e. Design for the building and the plaza and the parking lots, in adherence to these principles, should be done by the donors, maximizing all sustainable practices as feasible, including solar, permeable surfaces, retention ponds, swales, native plants, green spaces, and mixed materials, for parking lots and surface, including for the amphitheater.

**Article 2: Completion of Feasibility Study, Plan Approval, and Other Party Responsibilities**

1. Feasibility Study

- a. The City has previously contracted with a third party by the name of Johnson Consulting to produce a feasibility study to determine, amongst other things, whether the design, location, construction, funding, and operation of the proposed Projects are feasible (hereinafter the "Feasibility Study"). The Feasibility Study is not yet complete but its completion is anticipated in October 2020. The City will deliver Johnson Consulting's written report stemming from the Feasibility Study (hereinafter the "Feasibility Study Report") to LSF on or before October 30, 2020 or as soon thereafter as reasonably possible.
- b. LSF shall have one hundred and twenty (120) days to inspect and review the Feasibility Study Report and any proposals provided by the AMP management team pursuant to Article 5 of this Agreement. LSF shall have, in its sole discretion, the unconditional right to:
  - i. Determine, in its reasonable judgment, that the Feasibility Study Report and any proposals provided by the AMP management team substantially comport to the AMP and agree to proceed with its delegated Projects substantially in accordance with the AMP.

- ii. Determine, in its reasonable judgment, that the Feasibility Study Report and/or any proposals provided by the AMP management team do not comport to the AMP, and respond to the City with a counterproposal, in which case the City shall have forty-five (45) days to agree to said counterproposal or terminate this Agreement; or
    - iii. Determine, in its reasonable judgment, that the Feasibility Study Report and/or any proposals provided by the AMP management team do not comport to the AMP and terminate this Agreement.
  - c. The City Manager shall have one hundred and twenty (120) days to inspect and review the Feasibility Study Report, this agreement, and any proposals provided by the AMP management team. The City manager must provide the same opportunity to the Advisory Park Board, Plan Commission, City Council and the public at large. If the City Manager reasonably and in good faith determines that the Projects are not feasible as a result of reviewing the Feasibility Study Report and any proposals provided by the AMP management team, or the City Manager determines that going forward with any or all of the Projects would negatively impact the mission and/or financial stability of the City, the City Manager may ask that the Council terminate this Agreement, and upon receiving such request, the Council may terminate this Agreement by resolution within one hundred and twenty days of the City Manager's receipt of the Feasibility Study Report.
- 2. **Park Maintenance.** Before, during, and after the completion of the Projects, the City shall continue its normal, ongoing park maintenance for all improvements and Projects, including the Walking Paths and Amphitheater/Skating Rink but excluding the Restaurant/Mixed Use Project, which shall be maintained by LSF, its lessee, its designee, or its assigns.

### **Article 3: Project Funding and Basic Responsibilities of City and LSF**

- 1. **Funding by LSF and Basic Duties of LSF.**
  - a. **Funding Schedule.** LSF will provide a minimum of \$5.2 million in donated funds (hereinafter the "Donated Funds") to be used by LSF for the design and construction the Projects that are designated as LSF's responsibility herein.
  - b. **Restaurant/Mixed Use** – LSF shall enter into the Ground Lease referenced in this Agreement for the land under the proposed Restaurant/Mixed use project. LSF shall fund 100% of the costs for the Restaurant/Mixed Use development. LSF shall directly contract with contractors and material suppliers for said construction, shall solely be responsible to complete said construction substantially in accordance with the AMP, and shall solely responsible for all costs of said construction. LSF shall specifically be responsible to build the Restaurant/Mixed Use building core and shell (a/k/a the "white box"); and LSF's operator/subtenant shall be responsible to construct the remaining buildout in accordance with the terms of this Agreement and in accordance with the terms of

a future sublease agreement between LSF and said operator/subtenant. Because LSF is funding 100% of the construction costs of the Restaurant/Mixed Use project, responsibility for completion of the Restaurant/Mixed Use project is delegated to LSF.

- c. Walking Paths. It is anticipated that additional Donated Funds will remain after the design, construction, tangential expenses associated with the Restaurant/Mixed Use project are paid. If and to the extent additional Donated Funds remain after the costs of the design, construction, tangential expenses associated with the Restaurant/Mixed Use project are paid (and retention of a suitable Reserve Fund for initial operations), remaining Donated Funds shall be expended by LSF to design, construct, and improve the Walking Paths as shown on the AMP. LSF shall directly contract with contractors and material suppliers for said construction if LSF Donated Funds are expected to cover 100% of the costs of the Walking Paths; in such case, responsibility for completion of the Walking Paths shall be delegated to LSF. If the remaining Donated Funds are insufficient to cover 100% of the costs of the Walking Paths, the City shall lead the Walking Paths Project in accordance with the AMP, and except for professional services, said public works shall be bid by the City in accordance with the public bidding law. If responsibility to construct the Walking Paths is delegated to the City in accordance herewith, LSF shall donate the remaining Donated Funds to the City to be used for said purpose.
- d. Amphitheater/Skating Rink – If and to the extent additional Donated Funds remain after the costs of the design, construction, tangential expenses associated with the Walking Paths project are paid, remaining Donated Funds shall be expended by LSF to design, construct, and improve the Amphitheater/Skating Rink project. LSF shall directly contract with contractors and material suppliers for said construction if LSF Donated Funds are expected to cover 100% of the costs of the Amphitheater/Skating Rink; in such case, responsibility for completion of the Amphitheater/Skating Rink shall be delegated to LSF. If the remaining Donated Funds are insufficient to cover 100% of the costs of the Amphitheater/Skating Rink, the City shall lead the Amphitheater/Skating Rink project in accordance with the AMP, and except for professional services, said public works shall be bid by the City in accordance with the public bidding law. If responsibility to construct the Amphitheatre/Skating Rink is delegated to the City in accordance herewith, LSF shall donate the remaining Donated Funds to the City to be used for said purpose.

## 2. Funding by City and Basic Duties of City.

- a. Funding Schedule. The City will provide a maximum as well as a minimum of \$5.2 million in appropriated funds to be used by the City for the design and construction of the Projects that are designated as the City's responsibility herein (hereinafter the "Appropriated Funds").
- b. The City anticipates that it will authorize Projects on an annual basis as part of its standard Capital Improvement Plan (CIP) review and approval process. The City reserves the right to adapt or adjust its Projects funding schedule in order to

comply with municipal debt constraints, unanticipated emergent priorities or changes in state or federal law.

- c. LSF and the City acknowledge the expectation that the City will authorize its annual funding in November of each year. Accordingly, each party acknowledges and agrees to coordinate funding needs for the coming year no later than June 30 of the preceding year.
  - d. Pavilion – The City shall fund 100% of the costs for the Pavilion renovation with public funds and said construction shall be substantially complete in 2021.
  - e. Walking Paths. If and to the extent sufficient Appropriated Funds remain, the City shall fund any portion of the Walking Paths project with public funds that cannot be funded by LSF as discussed in Article 3 Section 1, above. If responsibility for completion of the Walking Paths is delegated to the City, except for professional services, said public works shall be bid by the City in accordance with the public bidding law. If responsibility for the forgoing is delegated to the City, the City shall cause the Walking Paths to be designed, constructed, and improved substantially in conformance with the AMP.
  - f. Amphitheater/Skating Rink – If and to the extent sufficient Appropriated Funds remain, the City shall fund any portion of the Amphitheater/Skating Rink project with public funds that cannot be funded by LSF as discussed in Article 3 Section 1, above. If responsibility for completion of the Amphitheater/Skating Rink is delegated to the City, except for professional services, said public works shall be bid by the City in accordance with the public bidding law. If responsibility for the forgoing is delegated to the City, the City shall cause the Amphitheater/Skating Rink to be designed, constructed, and improved substantially in conformance with the AMP.
  - g. Site Improvements – If and to the extent sufficient Appropriated Funds remain, the City shall fund 100% of the costs for the additional Site Improvements with public funds and shall construct said site improvements substantially in accordance with the AMP.
  - h. Utility Infrastructure. The City shall fund 100% of any related utility infrastructure with public funds, which shall include the construction, installation, improvement, or extension of any public utilities reasonably necessary to accommodate the Projects as shown on the AMP, including, but not limited to, roads, electric service, natural gas service, water service, sewer service, storm sewer service, and/or cable/data service.
3. Relief for LSF if City Funding Not Approved. After LSF constructs and pays for the Restaurant/Mixed Use project as set forth above, LSF need not expend or commit any additional Donated Funds to the projects unless and until the City irrevocably approves and authorizes funding through its CIP review and approval process in an amount equal to or greater than LSF's expenditure on the Restaurant/Mixed Use project. LSF's additional financial commitment shall be limited to the excess of the City's total financial commitment to the projects (inclusive of the Pavilion), less LSF's spend on the

Restaurant/Mixed Use project. The purpose of this paragraph is to ensure that LSF and the City are obligated to a relatively equal extent, and to ensure that LSF need not commit all of its Donated Funds to the projects in the event the City is unable to secure required funding through the CIP process.

4. Project Deadlines. The City and LSF agree to work together and independently, as circumstances require, to complete all Projects as soon as reasonably possible. LSF acknowledges that time is of the essence, so the City shall have ample time to complete its own obligations under this Agreement and so any disruptions to Lakeside Park are kept to a minimum. The City and LSF agree to cooperate and work in partnership with each other to establish and implement a logical and efficient timeline. Each Party shall be responsible to complete all projects delegated to it within four (4) years of the Effective Date of this Agreement at the latest.

#### **Article 4: LSF Structure and Obligations**

1. Provide Authorized Representative
  - a. LSF shall appoint an authorized representative (the “LSF Authorized Representative”) to coordinate with the City Authorized Representative.
2. Facilitate LSF Funding
  - a. LSF shall solicit and collect pledges from LSF members and other community donors and community organizations.
  - b. LSF shall facilitate payment of draw requests for portions of Project delegated to LSF.
  - c. LSF will provide evidence of LSF Donated Funds within forty-five (45) days after the Execution Date of this Agreement.
3. LSF Board of Directors and Decision Making
  - a. LSF shall develop an Operating Agreement and therein shall establish a seven-member Board of Directors who shall have authority and responsibility for the governance of LSF.

#### **Article 5: Joint Obligations**

1. Good Faith. The City and LSF agree to work with each other in good faith at all times, keep each other informed of all material matters that arise in their implementation of this Agreement, and frequently and continuously share respective plan updates to ensure that the parties continue to work together to achieve their common goal to implement all Projects in a coordinated, seamless, cost-effective, and logical manner.

2. Additional Agreements. The City and LSF acknowledge that this Agreement is designed to incorporate only the bare essential terms of their respective relationship, so that the parties can immediately move forward, raise money, and plan for implementation in a binding fashion. However, the parties also agree and understand that this Agreement might have to be amended, altered, expanded, or modified as circumstances evolve. For example, the Feasibility Study Report may show that a particular aspect of the Project needs to be modified or eliminated. Subject to the parties' respective termination rights and related rights and obligations stated herein, the parties agree to work together in good faith on any necessary amendment, alteration, expansion, or modification to this Agreement as necessary.
3. Definitive Plan Review and Approval. The parties acknowledge that the project plan detail in the AMP in most cases will be further refined and detail will be added in the form of final construction plans. To the extent that LSF is delegated with primary construction responsibility on any particular Project, LSF shall present its final construction plans to the City, and the City administration shall review said plans and approve or disapprove said plans within thirty (30) days of receipt; however the City may not unreasonably withhold approval if said construction plans are substantially in accordance with the AMP and this Agreement.
4. No later than 45 days after the effective date of this agreement, LSF and the City will form a joint AMP management team to coordinate, verify or de-conflict project scopes, designs, plans, schedules, budgets and all other aspects of implementing the AMP. Each party agrees to share all details of the AMP implementation with the other, such as those areas listed in the previous sentence in order to facilitate ongoing and uninterrupted coordination and transparency of information and expenditures.
5. The City shall appoint an authorized representative (the "City Authorized Representative") to coordinate with the LSF Authorized Representative. The authorized representatives will co-chair the AMP management team, make appointments to it and have decision making authority within the bounds set for in this agreement and the policies and legal constraints of both parties.
6. No later than 90 days after the effective date of this agreement, the AMP management team co-chairs will apply the recommendations of the Feasibility Study Report described in Article 2 above to produce an ownership, management and tenancy proposal for the Restaurant/Mixed Use Space. Said proposal will include, at a minimum, provisions for a Ground Lease by the City to LSF, provisions for a sublease of the land and completed improvements by LSF to a third-party operator (the operator need not be identified within 90 days, however), and a proposal for LSF's disbursement of excess accrued revenues. Once approved by the City Council and the LSF Board, the various agreements and documents that result from the proposal will become incorporated into this agreement as amendments as appropriate.



## Article 6: Restaurant / Mixed Use Space

The following basic “Ground Lease,” “Operator,” and “Disbursement of Accrued Revenues” terms shall apply as a placeholder until the AMP management team votes to propose supplementary terms and/or alternate terms (in either case, these placeholder terms or said alternate terms would be subject to LSF’s and the City’s review and approval according to the processes set forth under Article 2, above).

### 1. Ground Lease.

- a. LSF and the City will enter into a ground lease for the land under the Restaurant/Mixed Use space, whereby the City will lease said land to LSF in exchange for \$1.00 per year (the “Ground Lease”). The term of said Ground Lease shall be as recommended in the Feasibility Study report or as otherwise agreed by the City and LSF. At the conclusion of the Ground Lease, ownership of all improvements to the real property (excepting the subtenants’ improvements) shall revert to the City at no cost to the City.
- b. After the AMP management team has proposed or approved initial conceptual drawings and/or site plans for the Restaurant/Mixed Use space, LSF shall obtain surveying services to determine the precise metes and bounds description of the parcel of land to be leased, to be based upon the required land shown in said conceptual drawings and/or site plans.

### 2. Operator.

LSF shall sublease the land and the LSF-funded improvements to a restaurant operator to be chosen in accordance with the ownership, management and tenancy proposal approved by the AMP management team.

### 3. Disbursements of Accrued Revenues.

- a. LSF shall receive the rental income and shall set aside a portion of the revenue which, in the LSF Board’s reasonable discretion, is necessary to enable the LSF to meet its recurring and reasonably foreseeable operating obligations (hereinafter the “Reserve Fund”).
- b. LSF shall periodically donate, disburse, or allocate the remaining, accrued revenues for future projects in Lakeside Park or any other park located in the City as directed by LSF’s Board of Directors and as approved by the City. Notwithstanding the forgoing, the City and LSF acknowledge that the primary target of any such distributions shall be the improvement of facilities located in Lakeside Park.
- c. In no event, shall any accrued revenues be distributed as profit to any donor or LSF Board member.

## Article 7: Insurance

1. LSF Insurance. LSF shall purchase and maintain adequate liability and property insurance and shall cause its construction manager, architect/engineer, and future tenant to purchase and maintain adequate liability, property, and workers' compensation insurance in reasonable amounts as recommended by LSF's insurance agent and as approved by the City (said approval may not unreasonably be withheld). All such insurance policies pertaining to the Projects shall name the City as an additional insured.

## Article 8: General Terms

1. Notices. Any and all notice and other communications required or permitted under this Agreement shall be deemed adequately given only if in writing delivered either in hand or by certified mail, return receipt requested. All notices and other communications shall be deemed to have been given for all purposes of this Agreement upon the date of receipt or refusal. All such notices shall be addressed to the parties at their respective addresses set forth below or at such other addresses as any of them may designate by notice to the other parties:

Notice to LSF shall be addressed to:

Attn: Tony Ahern

855 Morris Street

Fond du Lac, WI 54935

with copy to Atty. Andrew J. Rossmeissl, Herrling Clark Law Firm Ltd., 800 N. Lynndale Dr., Appleton, WI 54914

Notice to the City shall be addressed to:

City Clerk

160 South Macy Street

Fond du Lac WI 54935

2. Successor and Assigns. The agreements contained herein shall be binding upon and inure to the benefits of the permitted successors and assigns of the respective parties hereto.
3. Applicable Law. This Agreement shall be construed and enforced in accordance with the laws of the State of Wisconsin.
4. Severability. If for any reason any provision of this Agreement is determined to be invalid, or unenforceable in any circumstance, such invalidity or unenforceability shall not impair the effectiveness of the other provisions in this Agreement or, to the extent permissible, the effectiveness of such provision in other circumstances.
5. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original of this Agreement binding on the parties hereto.
6. Entire Agreement. This Agreement constitutes the entire agreement between the parties hereto with respect to the transactions contemplated herein and supersedes all prior understandings or agreements between the parties.

7. Titles. Titles of provisions of this Agreement are for descriptive purposes only and shall not control or alter the meanings of this Agreement as set forth in the text.
8. Further Assurances. The parties agree to execute and deliver such further instruments and do such further acts and things as may be required to carry out the intent and purposes of this Agreement.
9. Consent to Jurisdiction. Each party consents to the personal jurisdiction of the federal and state courts of the State of Wisconsin and each party agrees not to assert in any action brought in any such court that such action is brought in an inconvenient forum, or otherwise make any objection to venue or jurisdiction.
10. Amendments. No amendment or modification of this Agreement, including waiver of any provision, shall be effective unless reflected in a document and delivered by all parties hereto.
11. Remedies Cumulative. All rights, privileges, and remedies afforded the parties by this Agreement shall be cumulative and not exclusive, and the exercise of any one of such remedies shall not be deemed to be a waiver of any other right, remedy, or privilege provided for herein or available at law or equity.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first set forth above.

**Lakeside Forward LLC**

By: *Pony Shein*  
 Its: *Member*  
 Date: *10/5/20*

**City of Fond du Lac**

By: *[Signature]*  
 Joseph P. Moore  
 City Manager

Date: 10/02/2020

Attest: *[Signature]*  
 Margaret L. Hefter  
 City Clerk

Approved as to Form:

*[Signature]*  
 City Attorney