



Date July 13, 2020

**APPROVING AGREEMENT WITH CENTRAL IOWA WATER TRAILS, LLC  
REGARDING PROJECT OUTGRANT APPLICATION FOR PROPOSED  
IMPROVEMENTS TO PROSPECT PARK AS PART OF THE CENTRAL IOWA  
WATER TRAILS PROJECT**

**WHEREAS**, on May 3, 1982, by Roll Call No. 1844, the City agreed to lease approximately 262.30 acres of land along the Des Moines River from the United States of America as part of a Cost-Sharing Contract for recreation development in the Saylorville Floodway Corridor; and

**WHEREAS**, on July 27, 1998, by Roll Call No. 98-2404, the City entered into a Lease Agreement between the City of Des Moines, Iowa and the United States of America, Army Corps of Engineers for approximately 262.30 acres of land along the Des Moines River, which includes Prospect Park; and

**WHEREAS**, the Des Moines Area Metropolitan Planning Organization (DMAMPO) applied for and has been awarded a Better Utilizing Investments to Leverage Development (BUILD) Transportation Discretionary Grant for the Central Iowa Water Trail: Phase I Dam Mitigation and User Access Project; and

**WHEREAS**, the project is proceeding as a joint effort by the DMAMPO and Central Iowa Water Trails, LLC and includes mitigating the low-head dam at Scott Avenue to help facilitate a water recreational trail, and enhance three additional access points along the Des Moines River, including Prospect Park, Birdland Marina, and the Harriet Street Corridor; and

**WHEREAS**, the Central Iowa Water Trails, LLC has entered into a professional service agreement with ISG, Inc. to design improvements at Prospect Park, Birdland Marina, and the Harriet Street Corridor as part of BUILD Grant implementation; and

**WHEREAS**, in order to make improvements to Prospect Park, the City was required to submit a Real Estate Application, also known as an Outgrant, for the Army Corps of Engineers consideration, which application was approved by the City Council on June 22, 2020 by Roll Call No. 20-1039; and

**WHEREAS**, in addition to requiring specific authorization to submit the Real Estate Application, the Army Corps of Engineers requires the City to pay payment of administrative fees and consideration; and



**Roll Call Number**

**Agenda Item Number**

41

**Date** July 13, 2020

**WHEREAS**, the City Council finds that it is of mutual benefit to the citizens of Des Moines that such Project be pursued; and

**WHEREAS**, City staff and CIWT have negotiated an agreement in which CIWT will be solely responsible for all costs for the administrative fees and consideration, as determined by the Army Corps of Engineers, for the Real Estate Application and resulting transactional documents, if any, a copy of which is on file in the City Clerk's Office.

**NOW, THEREFORE, BE IT RESOLVED** by the City Council of the City of Des Moines, Iowa, that the above described Agreement Between the City of Des Moines and Central Iowa Trails, LLC For Proposed Improvements to Prospect Park is hereby approved and the Mayor is authorized and to sign on behalf of the City and the City Clerk is directed to attest to his signature.

(Council Communication Number 20-317)

Moved by \_\_\_\_\_ to adopt.

FORM APPROVED:

Ann DiDonato  
Assistant City Attorney

COUNCIL ACTION	YEAS	NAYS	PASS	ABSENT
COWNIE				
BOESEN				
GATTO				
GRAY				
MANDELBAUM				
VOSS				
WESTERGAARD				
TOTAL				

MOTION CARRIED

APPROVED

\_\_\_\_\_  
Mayor

**CERTIFICATE**

I, P. Kay Cmelik, City Clerk of said City hereby certify that at a meeting of the City Council of said City of Des Moines, held on the above date, among other proceedings the above was adopted.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal the day and year first above written.

\_\_\_\_\_  
City Clerk

**AGREEMENT**  
**Between**  
**The City of Des Moines**  
**and**  
**Central Iowa Water Trails, LLC**  
**For Proposed Improvements to Prospect Park**

**THIS AGREEMENT** made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2020, by and between the City of Des Moines, Iowa, (the “CITY”), and Central Iowa Water Trails, LLC, an Iowa limited liability company, 6900 Westown Parkway, West Des Moines, Iowa 50266 (“CIWT”) (collectively, “the parties”).

**WHEREAS**, CITY is a municipal corporation of the State of Iowa and CIWT operates as a regional public-private partnership for the purpose of implementing a recreational and dam safety plan for 150 miles of water trails throughout Central Iowa; and

**WHEREAS**, on May 3, 1982, by Roll Call No. 1844, the CITY agreed to lease approximately 262.30 acres of land along the Des Moines River from the United States of America as part of a Cost-Sharing Contract for recreation development in the Saylorville Floodway Corridor; and

**WHEREAS**, on July 27, 1998, by Roll Call No. 98-2404, the CITY entered into a Lease Agreement between the City of Des Moines, Iowa and the United States of America, Army Corps of Engineers for approximately 262.30 acres of land along the Des Moines River, which includes Prospect Park; and

**WHEREAS**, the Des Moines Area Metropolitan Planning Organization (DMAMPO) applied for and has been awarded a Better Utilizing Investments to Leverage Development (BUILD) Transportation Discretionary Grant for the Central Iowa Water Trail: Phase I Dam Mitigation and User Access Project; and

**WHEREAS**, the project is proceeding as a joint effort by the DMAMPO and CIWT and includes mitigating the low-head dam at Scott Avenue to help facilitate a water recreational trail, and enhance three additional access points along the Des Moines River, including Prospect Park, Birdland Marina, and the Harriet Street Corridor; and

**WHEREAS**, CIWT has entered into a professional service agreement with ISG, Inc. to design improvements at Prospect Park, Birdland Marina, and the Harriet Street Corridor as part of BUILD Grant implementation; and

**WHEREAS**, in order to make improvements to Prospect Park, the CITY must submit a Real Estate Application, also known as an Outgrant, for the Army Corps of Engineers consideration; and

**WHEREAS**, in addition to requiring specific authorization to submit the Real Estate Application, the Army Corps of Engineers requires the CITY to pay payment of administrative fees and consideration; and

**WHEREAS**, CIWT will be solely responsible for all costs for the administrative fees and consideration, as determined by the Army Corps of Engineers, for the Real Estate Application and resulting transactional documents, if any.

**WHEREAS**, the current conceptual proposal for improvements and additional amenities at Prospect Park, are shown on **Exhibit A**, which is attached hereto and by this reference incorporated into this Agreement (“PROJECT”); and

**WHEREAS**, the CITY and CIWT agree that it is of mutual benefit to the citizens of Des Moines that such PROJECT be pursued; and

**WHEREAS**, responsibilities for future funding for construction, maintenance, and operation of improvements proposed as part of this PROJECT have not been determined; and

**WHEREAS**, the CITY, and CIWT are entering into this Agreement to formalize their responsibilities with respect to the Real Estate Application for the PROJECT improvements at Prospect Park.

**NOW, THEREFORE**, the CITY and the CIWT do hereby agree as follows:

## **I. TERM**

This Agreement shall be effective upon its approval and execution by both parties and shall terminate upon the CIWT’s payment of administrative fees and consideration, as determined by the Army Corps of Engineers, as provided in Section III. The termination of this Agreement shall not relieve any party to this Agreement of any obligations or liability arising during the term of this Agreement.

## **II. FUNDING AND CIWT’S RESPONSIBILITIES**

- A. CIWT is responsible for funding the development and design of the PROJECT, including payment of all applicable fees and permits.
- B. ISG, Inc. is responsible for completing and submitting the Real Estate Application as the CITY’s agent. The CITY shall be the named applicant. The CITY shall not be responsible for any corrections, additional information, or resubmittal of such Application, if needed, which shall remain the responsibility of ISG, Inc.
- C. CIWT is responsible for paying the administrative fees and consideration required by the Army Corps of Engineers Real Estate Application, also known as an Outgrant.

- D. The parties agree that the CITY shall not be responsible for the payment of any costs or expenses associated with the preparation and submittal of the Real Estate Application or with development and design of the PROJECT.
- E. The parties agree that the CITY will not review or enter into any Army Corps of Engineers transactional documents until a design has been mutually agreed to between the parties, including review by all applicable departments, boards and commissions of the CITY and neighborhood public presentations, and all ongoing maintenance, and operational responsibilities have been determined and full payment has been received by the CITY from CIWT for the required administrative fees and consideration.
- F. Payments.
  - 1. Administrative Fees. CIWT shall reimburse the CITY the administrative fees established by the Army Corps of Engineers within thirty (30) calendar days of receipt of an invoice from the CITY for such fees. CIWT agrees to pay interest at a rate of 6% annually and to reimburse the CITY for all reasonable collection fees if payment is not received by the CITY within thirty (30) calendar days from CIWT's receipt of such invoice days.
  - 2. Transactional Documents. In the event that the Real Estate Application is approved, the CIWT shall pay to the CITY the consideration required by the Army Corps of Engineers prior to the CITY reviewing or executing transactional documents related to the Real Estate Application and Outgrant approval by the Army Corps of Engineers.

### **III. PROJECT IMPROVEMENTS DESIGN AND PAYMENTS TO CITY**

- A. The design of the PROJECT improvements shall be subject to the approval of the City Council of the CITY.

CITY acknowledges that the CIWT has secured the services of ISG, Inc. to provide design services, which includes completing and submitting the Real Estate Application.
- B. The CITY shall pay required administrative fees within 30 days of receiving the administrative fee letter from the Army Corps of Engineers and issue an invoice for reimbursement of such fees to CIWT.
- C. The CITY shall pay the consideration required by the Army Corps of Engineers only after the total required amount has been paid by CIWT to the CITY, the City Council has approved agreements which satisfy all terms of the Army Corps of Engineers Real Estate Application and transactional documents and the CITY is in agreement with and has approved the transactional documents.

- D. Agreement to and execution of any transactional document is at the sole discretion of the CITY. Nothing in this Agreement obligates the CITY to enter into any transactional documents which may result from approval of the Real Estate Application.

#### **IV. RESPONSIBILITY WITH RESPECT TO CONSTRUCTION, MAINTENANCE, REPAIR AND OPERATION OF PROJECT IMPROVEMENTS**

Responsibility for funding, performing construction, maintenance, repair and operation of PROJECT improvements will be addressed in separate agreements. The CITY is under no obligation to consider or execute transactional documents with the Army Corps of Engineers until those responsibilities have been determined and agreed to by all applicable parties.

#### **V. MISCELLANEOUS**

##### **A. Mailing of Notices and Invoices**

Except as otherwise specified, all Notices and invoices shall be deemed given on the day of mailing or sending via email. Except as otherwise specified, all notices, invoices, consents, approvals, requests and other communications (hereinafter referred to as "Notices") required or permitted under this Agreement shall be given in writing and mailed by certified mail, return receipt requested, addressed or by sending via email as follows:

If to the CITY:

City of Des Moines  
Parks and Recreation Department  
1551 Martin Luther King Drive  
Des Moines, IA 50317  
Attention: Ben Page, Parks and Recreation Director  
Email: [BRPage@dmgov.org](mailto:BRPage@dmgov.org)

If to CIWT:

Central Iowa Water Trails  
P.O. Box 8071  
Des Moines, IA 50301  
Attn: Maggie McClelland, Project Manager, Chief Executive Officer  
Email: [maggie@greatoutdoorsfoundation.org](mailto:maggie@greatoutdoorsfoundation.org)

All Notices shall be deemed given on the day of mailing or emailing. Either party to this Agreement may change its address for the receipt of Notices at any time by giving notice thereof to the other as herein provided. Any Notice given by a party

hereunder must be signed by an authorized representative of such party.

**B. Assignment**

The rights and liabilities of the parties under this Agreement may not be assigned without the prior written consent of the other party.

**C. Amendment**

This Agreement may not be amended, modified, or canceled except by a written agreement executed by each of the parties hereto.

**D. Binding Nature of Agreement**

This Agreement shall be binding upon the parties hereto and their respective successors and assigns.

**E. Waiver of Compliance**

No failure of either party to insist upon the strict performance of any covenant, agreement, term or condition of this Agreement or to exercise any right, term or remedy available upon a breach thereof shall constitute a waiver of any such breach or such covenant, agreement, term or condition. No waiver of any breach shall affect or alter this Agreement but each and every covenant, agreement, term or condition of this Agreement shall continue in full force and effect with respect to any other than existing or subsequent breach thereof.

**F. Breach**

In the event of a breach by any party of this Agreement, that breach shall not be considered to affect any remaining terms or conditions of this Agreement. If any terms or conditions of this Agreement are held to be invalid or illegal, those remaining terms or conditions shall not be construed to be affected.

**G. Invalidity or Unenforceability**

If any provision of this Agreement or the application thereof to any person or circumstance shall to any extent be determined to be invalid or unenforceable, the remainder of this Agreement or the application of such provision to persons or circumstances other than those as to which it is invalid or unenforceable shall not be affected thereby, and each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

**H. Entire Agreement**

This instrument including all exhibits attached hereto and incorporated herein by

reference, contains the entire agreement between the parties and all prior negotiations and agreements are merged herein. Neither party's agents have made any representations except those expressly set forth herein.

**I. Remedies and Governing Law**

The rights and remedies set forth herein are not exclusive and are in addition to any of the rights and remedies provided by law or equity. This Agreement and all actions arising hereunder shall be governed by, subject to and construed according to the laws of the State of Iowa. The parties agree, consent and submit to the personal jurisdiction of the Iowa District Court in and for Polk County, Iowa, for any action arising out of this Agreement. The parties agree that service of process at the address and in the manner specified above will be sufficient to put a party on notice and hereby waive any and all claims relative to such notice. The parties also agree that they will not commence any action because of any matter whatsoever arising out of or relating to the validity, construction, interpretation and enforcement of this Agreement in any court except the Iowa District Court in and for Polk County, Iowa, unless original jurisdiction can be had in the United States District Court for the Southern District of Iowa.

**J. Force Majeure**

In the event of forced delay in the performance by either party or obligations under this Agreement due to Acts of God or of the public enemy, strikes, lockouts, unusual delay in transportation, unavailability of materials, fire, floods, epidemics, adverse weather conditions, riots, insurrection, war, unavoidable casualties, or Judicial or governmental action, other than action by the CITY or CIWT, the time for performance of such obligations and for the satisfaction of the conditions precedent shall be extended for the period of the forced delays.

**K. Captions**

The headings of the Articles and Sections in this Agreement are for convenience only and shall not be used to construe or interpret the scope or intent of this Agreement or in any manner affect the same.

**L. Contract Language**

Words and phrases herein, including acknowledgment hereof, shall be construed as in the singular or plural number, and as masculine, feminine, or neuter gender according to the context.

**M. Indemnification**

Each party shall be solely authorized to supervise, direct and manage their own activities and the activities of their respective officers, officials, employee,



volunteers and agents hereunder. No party shall be required to defend, indemnify, or hold harmless any other party to this Agreement.

CIWT shall be required to purchase and maintain Crime Insurance.

Each party shall retain sole responsibility and liability for its own acts and omissions hereunder and for the acts and omissions of their respective officers, officials, employees, volunteers, and agents hereunder, and each party waives subrogation against the other for all claims, suits, damages, and demands, which are covered by any insurance, including but not limited to property, casualty and worker's compensation.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their proper officers, duly authorized therefore.

**CITY OF DES MOINES, IOWA**

\_\_\_\_\_  
T.M. Franklin Cownie, Mayor

STATE OF IOWA    )  
                          ) ss  
COUNTY OF POLK )

On this \_\_\_\_ day of \_\_\_\_\_, 2020, before me, the undersigned, a Notary Public in and for the State of Iowa, personally appeared T. M. Franklin Cownie and P.Kay Cmelik, to me personally known, who being by me duly sworn, did say that they are the Mayor and City Clerk, respectively, of the City of Des Moines, Iowa that the seal affixed signed on behalf of the corporation, by authority of its City Council as contained in the resolution adopted by the City Council, under Roll Call No.20- \_\_\_\_\_ and that T. M. Franklin Cownie and P.Kay Cmelik acknowledged the execution of the instrument to be the voluntary act and deed of the corporation by it voluntarily executed.

\_\_\_\_\_  
Notary Public for the State of Iowa

Form Approved:

ATTEST:

\_\_\_\_\_  
Ann DiDonato, Assistant City Attorney

\_\_\_\_\_  
P.Kay Cmelik, City Clerk

CENTRAL IOWA WATER TRAILS, LLC



Dan Houston, Chair, Central Iowa Water Trails LLC

STATE OF IOWA    )  
                          ) ss:  
COUNTY OF POLK )

On this 6<sup>th</sup> day of July, 2020, before me, the undersigned, a Notary Public in and for the State of Iowa, personally appeared Dan Houston, to me personally known, who being by me duly sworn, did say that he is the Chair of the CENTRAL IOWA WATER TRAILS, LLC, that such entity has no seal and that the instrument was signed on behalf of the Central Iowa Water Trails, LLC, by authority of its Board, on the 6<sup>th</sup> day of July, 2020, and that Dan Houston acknowledged the execution of the instrument to be the voluntary act and deed of the Board, by it and by she voluntarily executed.

  
\_\_\_\_\_  
Notary Public in the State of Iowa

# EXHIBIT A

## PROJECT IMPROVEMENTS

