



Roll Call Number

21-1445

Agenda Item Number

50 A

Date September 13, 2021

APPROVING 28E AGREEMENT BETWEEN CENTRAL IOWA WATER TRAILS, LLC AND CITY OF DES MOINES FOR THE OPERATION AND MAINTENANCE OF THE CITY OF DES MOINES REGIONAL WATER TRAIL ACCESS POINTS AND DOWNTOWN WATER TRAIL LOCATIONS

WHEREAS, Central Iowa Water Trails, LLC (CIWT) is an Iowa limited liability company that desires to implement a recreational and dam safety plan for 150 miles of water trails throughout Central Iowa (“Central Iowa Water Trails System”); and

WHEREAS, the following seven proposed improvements (“Water Trail Improvements”) are regional access points located within the corporate city limits of the City of Des Moines, Iowa, as described in the 2018 MPO/ISG Phase I Regional Engineering Studies for Des Moines River, Raccoon River, and Fourmile + Mud Creek:

DES MOINES RIVER IMPROVEMENTS - river access improvements at River Place, Prospect Park, Birdland Marina, and Harriet Street.

RACCOON RIVER IMPROVEMENTS— river access improvements at 63rd Street.

FOURMILE CREEK river access improvements at Sargent Park and Fourmile Community Recreation Center; and

WHEREAS, there are three dam modification sites located in Des Moines, including Center Street, Fleur Drive and Scott Avenue, as presented in 2018 Downtown Des Moines Water Trails Engineering Study; and

WHEREAS, the improvement of public amenities and public spaces requires the City and CIWT to coordinate planning, construction, operation and maintenance for landside and in-water improvements, and CIWT and City desire to into a 28E Agreement regarding the operation and maintenance of the Water Trail Improvements, including the funding thereof; and

WHEREAS, on May 24, 2021 by Roll Call No. 21-0802, the City Council authorized notification to CIWT of the City’s intent to participate in the Central Iowa Water Trails System, subject to agreement terms being finalized, and referred the issue to the City Manager to address the cost cap issue in the 28E Agreement and review the operational revenue assumptions; and

WHEREAS, the outstanding items previously noted in the draft 28E Agreement have been resolved and are further described in the attached Council Communication and the proposed 28E Agreement on file in the office of the City Clerk; and



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WHEREAS, as stated in the 28E Agreement, annual contributions from participating communities are required for the support of the operating budget of CIWT, with participating communities to provide up to 70% of the funding and CIWT to provide through private contributions the remaining 30%, and the City's annual contribution is \$141,876 for FY2022 and subject to annual calculation thereafter based on the number and type of access points, drainage area and population, with an annual cap of the lesser of \$185,000.00 or 16% of the CIWT budget and subject to the City's ability to withhold annual funding in the event that CIWT fails to reimburse City for maintenance costs related to specified improvements; and

WHEREAS, additional terms of the 28E Agreement include duration of said Agreement until December 31, 2050, subject to earlier termination options; the requirement that the City perform routine maintenance of landside improvements owned and/or under the control and management of the City; indemnification and insurance requirements of CIWT, and of the City to indemnify CIWT for the City's responsibilities regarding funding and maintenance of landside improvements; and conditions to allow the City Manager to approve assignment by CIWT to third parties of CIWT's rights and obligations under the Agreement; and

WHEREAS, Iowa Code Chapter 28E allows any public agency in Iowa, including municipalities, to enter into agreements with public or private agencies for joint or cooperative action with respect to any power, privilege or authority exercised or capable of being exercised by the public agency.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Des Moines, Iowa, that the above described 28E Agreement Between the Central Iowa Water Trails, LLC and City of Des Moines for the Operation and Maintenance of the City of Des Moines Regional Water Trail Access Points and Downtown Water Trail Locations, in form on file with the City Clerk, is hereby approved; the Mayor is authorized and directed to sign on behalf of the City; and the City Clerk is directed to attest to his signature and file the executed 28E Agreement with the Secretary of State.

BE IT FURTHER RESOLVED that the City Manager or his designee is authorized and directed to jointly administer the terms of the 28E Agreement with the Central Iowa Water Trails, LLC or designee.

BE IT FURTHER RESOLVED that the City Manager is authorized as described within the 28E Agreement to authorize the use of the City's intellectual property, and has authority to negotiate and execute a written license for use of the City's trail signage logos and design and/or derivations thereof for Water Trails signage, subject to approval as to form by the City Legal Department and subject to the City Manager's determination of appropriateness regarding the best interests of the City.



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BE IT FURTHER RESOLVED that the City Manager, on behalf of the City, is authorized to provide written consent, including appropriate terms, for the total or partial assignment of CIWT's responsibilities and liabilities under the 28E Agreement, in accordance with the conditions of the 28E Agreement and subject to the approval as to form by the Legal Department.

BE IT FURTHER RESOLVED that the City Manager or his designee is authorized and directed to approve payment of the City's annual contribution to CIWT as described in the 28E Agreement and the Finance Department is authorized to make such payment.

(City Council Communication Number 21-398 attached)

Moved by Gatto to adopt.

FORM APPROVED: /s/ Ann DiDonato (by GKF)
Ann DiDonato
Assistant City Attorney

Table with 5 columns: COUNCIL ACTION, YEAS, NAYS, PASS, ABSENT. Rows include COWNIE, BOESEN, GATTO, GRAY, MANDELBAUM, VOSS, WESTERGAARD, and TOTAL.

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.

MOTION CARRIED

APPROVED

Handwritten signature of J. M. Franklin Cownie, Mayor

Handwritten signature of P. Kay Cmelik, City Clerk

City Clerk

28E AGREEMENT
Between
Central Iowa Water Trails, LLC
And
CITY OF DES MOINES
For the Operation and Maintenance of the
CITY OF DES MOINES REGIONAL WATER TRAIL ACCESS POINTS AND
DOWNTOWN WATER TRAIL LOCATIONS

THIS AGREEMENT made and entered into this 13th day of Sept, 2021, by and between the Central Iowa Water Trails (“NONPROFIT CORPORATION”), and the City of Des Moines, Iowa (“CITY”).

WHEREAS, the NONPROFIT CORPORATION is an Iowa non-profit corporation, incorporated under Iowa Code Chapter 504, located at 501 SW 7th Street, Des Moines, IA 50309; and

WHEREAS, CITY is a municipal corporation of the State of Iowa and owns and maintains properties on the Des Moines and Raccoon riverfronts in downtown Des Moines; and

WHEREAS, Central Iowa Water Trails, LLC (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 (“**Central Iowa Water Trails System**”); and

WHEREAS, the following seven Water Trail Improvements are regional access points located within the corporate city limits of the City of Des Moines, Iowa, as described in the 2018 MPO/ISG Phase I Regional Engineering Studies for Des Moines River, Raccoon River, and Fourmile + Mud Creek:

DES MOINES RIVER IMPROVEMENTS - river access improvements at River Place, Prospect Park, Birdland Marina, and Harriet Street.

RACCOON RIVER IMPROVEMENTS— river access improvements at 63rd Street.

FOURMILE CREEK river access improvements at Sargent Park and Fourmile Community Recreation Center; and

WHEREAS, there are three dam mitigation sites located in Des Moines, including Center Street, Fleur Drive and Scott Avenue, as presented in 2018 Downtown Des Moines Water Trails Engineering Study; and

WHEREAS, the seven regional access points listed above and the three dam mitigation sites are collectively “**the CITY WATER TRAIL IMPROVEMENTS**”; and

WHEREAS, Prospect Park, located within the City of Des Moines, Iowa, includes approximately 262.30 acres of real property along the Des Moines River owned by the United States of America under the primary jurisdiction of the Department of the Army which is leased by the CITY for park and recreational purposes under a lease with a termination date of April 15, 2036 (“**the Lease**”); and

WHEREAS, River Place, located at 2309 Euclid Avenue within the City of Des Moines, Iowa, is owned by Polk County and not under the control or operation of the CITY; and

WHEREAS, Fourmile Community Recreation Center access is located on land owned by Polk County and not under the control or operation of the CITY. This access is located adjacent to the city-owned Fourmile Community Recreation Center; and

WHEREAS, with the exception of the Des Moines and Raccoon Rivers (“**the Rivers**”), actual waterways, Fourmile Community Recreation Center access, and River Place, the area of the above described CITY WATER TRAIL IMPROVEMENTS are owned by the CITY and are under the management control, control, and operation of the CITY and the area of the Prospect Park improvements is under the control and management of the CITY, subject to the terms of the Lease; and

WHEREAS, following construction and completion of the CITY WATER TRAIL IMPROVEMENTS, the CITY will maintain the landside improvements and area owned and/or under control and management of the CITY consistent with principles outlined in this Agreement; and

WHEREAS, NON-PROFIT CORPORATION will operate and maintain the in-water structural elements and improvements located generally within the Rivers and waterways consistent with principles outlined in this Agreement and safety, course directional, decorative and artistic signage relating to the Water Trails; and

WHEREAS, the improvement of public amenities and public spaces requires the CITY and NONPROFIT CORPORATION to coordinate planning, construction, operation and maintenance for riverfront and in-water improvements and NONPROFIT CORPORATION and CITY are entering into this Agreement to formalize their understanding with respect to the operation and maintenance of the WATER TRAIL IMPROVEMENTS, including the funding thereof; and

WHEREAS, Iowa Code Chapter 28E allows any public agency in Iowa, including municipalities, to enter into agreements with public or private agencies for joint or cooperative action with respect to any power, privilege or authority exercised or capable of being exercised by the public agency.

NOW, THEREFORE, the NONPROFIT CORPORATION and the CITY do hereby agree as follows:

I. DEFINITIONS

For purposes of this Agreement the term:

- A. “Water Trail” means the CIWT project area consisting of a point-to-point travel system on the recreational corridor of the Des Moines River and Raccoon River and their respective watersheds that include other connected routes that provides access points to users and related recreational opportunities, as shown in **Exhibit A**.
- B. “Water Trail Improvement” means an Improvement that provides improved access, portage, camping, retail and other recreational uses connected to and/or directly providing support services to the Water Trail.
- C. “Project Area” means the recreational corridor encompassing the Des Moines River and Raccoon River and their respective watersheds shown in Exhibit A.
- D. “Improvement” or “Project Improvement” means horizontal and vertical infrastructure on land and within the Rivers directly associated with a Water Trail Improvement.
- E. “Downtown Water Trails Improvements” means the following Water Trail Improvements located near the confluence of the Des Moines and Raccoon Rivers in the City of Des Moines: at Birdland Marina, Center Street, Scott Avenue, Harriet and Fleur Drive.
- F. “Endowment” means the ICON Regional Fund or any other designated fund by the NONPROFIT CORPORATION. ENDOWMENT will be held with the Great Outdoors Foundation for use by NONPROFIT CORPORATION and will be funded by fifty percent (50%) of net revenues of the DOWNTOWN WATER TRAIL IMPROVEMENTS. Disbursements will be made to Municipalities and Counties that fund the NONPROFIT CORPORATION as provided in Exhibit E.

II. PURPOSE, SCOPE AND TERM

- A. Pursuant to Chapter 28E, Code of Iowa, the parties agree that the purpose of this Agreement is to establish the terms and conditions of the relationship among NONPROFIT CORPORATION and CITY for the operation and maintenance, including the funding, for Water Trail Improvements as described in Article III herein.
- B. No separate entity is created hereby.
- C. The parties agree that the City Manager and the executive director of the NONPROFIT CORPORATION shall be designated as the administrators of this Agreement as provided by Iowa Code § 28E.6.

- D. No joint property shall be acquired, held or disposed of hereunder. Except as otherwise explicitly provided herein, each party shall at all times hold and own its respective real and personal property. NONPROFIT CORPORATION joins herein to provide funding and support for Water Trails within the area shown in Exhibit A. The CITY and NONPROFIT CORPORATION each agree to fund and budget for their respective obligations and duties under this Agreement.
- E. Pursuant to Iowa Code § 28E.5, the parties agree that this Agreement shall be in effect until December 31, 2050 and to be effective after its approval by their respective governing bodies and upon execution by the parties and its filing with the Iowa Secretary of State. This Agreement may be terminated according to Article VI, Section P. 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.
- F. The parties agree that, except as noted below, all landside water trail project improvements on CITY owned land and/or land under control and management of the CITY and including docks providing access to the water, will be owned by the CITY subject to acceptance by the City Council pursuant to a separate agreement between the parties. NONPROFIT CORPORATION warrants that all such improvements are for recreational purposes designed, constructed or reconstructed, in accordance with generally recognized engineering or safety standards or design theories in existence at the time of the construction or reconstruction.
- G. NONPROFIT CORPORATION will own, operate, maintain, repair and reconstruct as required, all in-water improvements including associated items required for the in-water operation such as controls and power for mechanical items, excluding docks and walkways providing access to the waterway, and including safety and course directional signage relating to the Water Trails.
- H. The CITY acknowledges that the NONPROFIT CORPORATION is soliciting private funds to partially finance the Downtown Water Trails Improvements. NONPROFIT CORPORATION may propose the award of naming rights for certain improvements as an incentive for significant private donations. No naming rights or donor recognition rights to any improvements constructed on CITY property are granted under this Agreement, including without limitation, Downtown Water Trail improvements and Water Trail Improvements. Naming and donor recognition rights, if granted by the CITY, shall be limited in duration to no more than 20 years and shall be provided in a separate agreement approved by the Des Moines City Council and in accordance with the City's Policy For Naming of Streets, Facilities, and Parkland in the City of Des Moines.
- I. NONPROFIT CORPORATION is solely responsible for any public art, including signage which is artistic in nature and not regulatory signage in compliance with

Iowa Department of Natural Resources regulations, to be placed on CITY owned land and/or property under control and management of the CITY and NONPROFIT CORPORATION is required to go through the established Greater Des Moines Public Art Foundation process and such art installation must be approved by, and installed in conformance with the recommendations of, the Greater Des Moines Public Art Foundation pursuant to the March 19, 2004 Agreement between the City of Des Moines and the Greater Des Moines Foundation, and all current amendments thereto. In addition, such art may not be installed or displayed on CITY property without approval by the City Council of a license for such placement and display, including, without limitation, insurance and indemnification in favor of the CITY, appropriate maintenance by the Licensee, and waiver of all appropriate artist's rights to allow the CITY to provide for the public welfare, health, and safety.

- J. All CITY park rules and ordinances apply to the CITY owned land and/or property under control and management of the CITY. Such rules are at the sole discretion and authority of the Parks and Recreation Board and CITY Council, as such may be amended from time to time.
- K. No construction on CITY real property shall occur by NONPROFIT CORPORATION, its contractors, agents or assigns, except pursuant to a written agreement approved by the CITY Council meeting the CITY's standard requirements for construction on CITY property, including, without limitation, insurance, indemnification, bonding, U. S. Army Corps of Engineer approvals, plans and design approval, and all necessary CITY Boards and commissions review and approvals.
- L. NONPROFIT CORPORATION shall have no right to use the CITY's intellectual property (trademark and copyright), including the CITY name, logo, and CITY trail signage, in any media for any purpose, including marketing/promotional and fundraising purposes, without the prior written consent of the CITY Manager. The NONPROFIT CORPORATION agrees not to alter in any manner the names or logos approved by the City Manager. The City Manager shall have the authority to grant a written license for use of the City's trail signage logos and designs, or derivations thereof, for use by the NONPROFIT CORPORATION for Water Trails signage.

III. FUNDING AND NONPROFIT CORPORATION'S RESPONSIBILITIES

- A. The Parties agree that up to seventy percent (70%) of the administrative and operations costs for the NONPROFIT CORPORATION shall be covered by all municipalities and counties participating in the Water Trail Project who are party to a 28E Agreement with NONPROFIT CORPORATION (“**the Municipalities and Counties**”) and the remaining thirty percent (30%) is the responsibility of the NONPROFIT CORPORATION to raise through private fundraising. Annual

budget increases or decreases for the NONPROFIT CORPORATION shall be divided according to the same percentages.

B.

i. CITY's portion of the administrative and operations for the NONPROFIT CORPORATION ("CITY's portion") shall be determined through a funding formulation of three (3) weighted factors of total drainage area for twenty-five percent (25%), total population of CITY for fifty percent (50%) and number of regional access points within the CITY for twenty-five percent (25%). The access points shall be weighted in three categories with the Des Moines and Raccoon Rivers equaling 1; Beaver Creek, North River, Middle River and Skunk River equaling .75; and Four Mile Creek, Mud Creek and Walnut Creek equaling .5. The overall administrative and operations for the NONPROFIT CORPORATION may be decreased pro rata through additional revenues from municipalities, counties and nonprofit entities without one or more of the weighted factors.

ii. The CITY's portion has been calculated to be \$141,876, based on the assumed participation of all jurisdictions and is the guaranteed amount for the first year (FY2022).

iii. Notwithstanding the foregoing, the CITY's portion of the administrative and operations for the NONPROFIT CORPORATION is capped at \$185,000 or 16% of the annual NONPROFIT CORPORATION budget, whichever is less, for the term of this Agreement.

iv. CITY shall not be obligated to pay any or all of CITY's portion in any fiscal year(s) in which NONPROFIT CORPORATION fails to provide full reimbursement to CITY for the operation and maintenance costs of the DOWNTOWN WATER TRAIL IMPROVEMENTS as described in Section III.C.

C. A portion of revenues generated by the NONPROFIT CORPORATION's, or its concessionaire or subcontractor, for operation of the Downtown Water Trails Improvements shall be provided to the CITY annually to reimburse the CITY in full for its maintenance costs per Article IV, Section A of this Agreement. Any revenues generated above the operation and maintenance costs of **the DOWNTOWN WATER TRAIL IMPROVEMENTS** shall be divided with fifty percent (50%) going towards the ENDOWMENT, twenty-five percent (25%) going towards the ICON Nonprofit Operating Fund, and twenty-five percent (25%) going towards the Downtown Replacement & Maintenance Fund. In the event that such revenues are not sufficient to reimburse the CITY for such maintenance costs, NON-PROFIT CORPORATION shall make up such difference from funds of the ENDOWMENT and non-ENDOWMENT funds not allocated to the Municipalities and Counties as provided in Exhibit E. Failure by NONPROFIT CORPORATION to provide full reimbursement for such maintenance costs in any fiscal year(s) constitutes a default(s) of this Agreement, for which City, at its sole discretion, may give notice under Section VI.G or may

withhold CITY's portion pursuant to Section III.B(iii). Revenues shall be defined as: All cash and credit revenue received or receivable by the operator of the Downtown Water Trails Improvements arising from sales from the operation of concessions, sales and rentals, less the amount of sales tax which is required by law, but with no reduction for any bad debts owed concessionaire or operator resulting from charge sales or credit transactions.

NONPROFIT CORPORATION will be required to enter into concession agreements with the CITY for all operations on CITY property or using CITY facilities by NONPROFIT CORPORATION or its subcontractors, which agreement shall require the approval of the Des Moines City Council.

NONPROFIT CORPORATION and its concessionaires and subcontractors have no right to offer for sale food, beverages, or alcoholic beverages, or other items in Birdland Park, including Birdland Marina, prior to the termination or expiration of the Concession Agreement for the Birdland Marina with Less Than Trinity, LLC d/b/a Captain Roy's, which will expire on December 31, 2042 if both 5-year extensions are approved after the initial term expires on December 31, 2032, unless terminated earlier. Upon the termination or expiration of said Concession Agreement, CITY intends to solicit request for proposals for similar concession services; NONPROFIT CORPORATION may submit a response to such request for proposals at the discretion of NONPROFIT CORPORATION.

D. CITY shall be responsible for the costs of maintenance and repair for Water Trail Improvements owned by the CITY, excluding the Downtown Water Trails Improvements. CITY is not responsible for the costs of any rebuilding or replacement of any Water Trail Improvements, including the Downtown Water Trail Improvements. CITY is not responsible for placement, replacing, maintaining or repairing any safety, course directional, decorative and artistic signage related to Water Trails and Water Trail Improvements.

E. NONPROFIT CORPORATION shall:

- i. Ensure network of Water Trails Project is seamless and cohesive including: design standards, signage, public art, maintenance, operations, vendors/outfitters, safety;
- ii. Oversee public education and notification system for water trails, which includes being responsible for establishing and maintaining a water safety notification system relating to river depth, flow quantity, condition of improvements, and providing effective communication to the public health and safety warnings and potential hazards.
- iii. Oversee Water Trails network marketing strategy;

- iv. Coordinate regional Water Trails events. NONPROFIT CORPORATION agrees to pay CITY all applicable CITY fees for such events;
- v. Act as a single point of contact to the Iowa Department of Natural Resources, including required agreements, and develop a notification system to all jurisdictions and the public within the Water Trails shown in Exhibit A;
- vi. Conduct an annual independent audit, prepared by a certified public accountant, and provide such final audit to the CITY Manager within one hundred (100) days after the close of each fiscal year (November 1-October 31). Such audit shall include all revenue and expenses of the NONPROFIT CORPORATION and its concessionaires or subcontractors, construction and capital repairs, improvements, and maintenance of Water Trail Improvements, landside and in-water, value of improvements constructed, safety/incident reports, type and number of events, public education provided, scholarships provided for educational offerings, recreational uses and rentals, and event attendance, and economic impact on the central Iowa economy for each year that this Agreement is in effect. NONPROFIT CORPORATION agrees that the CITY shall, at the CITY's own expense and until one (1) year after termination of this Agreement, have the right to perform whatever audit or check the CITY may require, including a financial audit including all revenues and expenditures of NONPROFIT CORPORATION and a check for compliance with this Agreement.
- vii. Be responsible for providing on route Water Trails maintenance for in water and landside improvements, including safety, course directional, decorative and artistic signage, for which NONPROFIT CORPORATION is responsible, including procuring and paying for the services of a competent contractor to provide in Water Trails improvements maintenance in a manner to assure the safety of Water Trail users and the general public and which will adequately maintain such improvements and in a manner that will not damage the Downtown Water Trail improvements and other improvements or infrastructure within the waters or on CITY property or private property. Such administration of the contract shall include obtaining evidence of appropriate training and experience, and general liability and property damage insurance in an amount and of coverage type acceptable to the CITY Risk Manager, as described in Article VI, Section N.
- viii. Conduct inspections as listed in Exhibit B and perform in-water improvements maintenance at its sole cost as outlined in Exhibit B. NONPROFIT may contract for these responsibilities with a contractor or organization approved by the CITY.
- ix. Approve an annual operating budget, collect revenue and allocate regional funds according to Article III.

IV. RESPONSIBILITY WITH RESPECT TO MAINTENANCE AND REPAIR OF WATER TRAIL PROJECT IMPROVEMENTS

- A. i. CITY shall perform routine maintenance of only the landside improvements and area of the Water Trail Improvements owned and/or under control and management of CITY, with the exception of the Downtown Water Trails Improvements, at its sole cost outlined in the Maintenance and Repair of Water Trail Project Improvement and attached as Exhibit B.
 - ii. The CITY shall perform routine maintenance of only the landside improvements and area of Downtown Water Trails Improvements as funded by the NONPROFIT CORPORATION. In addition to the remedies set forth in Section III.B(iii) and III.C, the CITY has sole discretion to reduce maintenance, limit hours of operation, close facilities, or take other appropriate actions associated with the Downtown Water Trail Improvements in the event that, in the CITY's sole determination, sufficient revenues, ENDOWMENT or other fund sources, or funding is not provided by the NONPROFIT CORPORATION.
 - iii. The CITY agrees to remove trees in the Rivers within the City of Des Moines city limits in conformance with the CITY's standard procedures and practices. NONPROFIT CORPORATION may request the CITY to provide additional tree removal services within the Rivers with the provision of such additional services being subject to the good faith negotiation of an agreement for same.
- B.** NONPROFIT CORPORATION shall consider including elements in Water Trail Improvements that are outlined in the Central Iowa Water Trails Inclusion Design Tool and attached as **Exhibit C** and including active engagement and expertise in educational opportunities with water trail project improvements.
- C.** The CITY shall notify the NONPROFIT CORPORATION in writing when there is a desire to eliminate land side Improvements directly and solely associated with Water Trails or Water Trail Improvements thirty (30) days prior to said actions being taken.
- D.** As part of this Agreement, the CITY is not committing to costs of any rebuilding or replacement of any Water Trail Improvements, including the Downtown Water Trail Improvements and any safety, course directional, decorative or artistic signage. The CITY is also obligated to accomplish or fund future capital projects, incomplete phased work, or other similar, potential improvements.

V. EMERGENCY RESPONSE

- A.** It is the intention of the Parties that this Agreement does not supplant or replace existing emergency response agreements including the Statewide Mutual Aid Compact and any local mutual aid agreements for fire services, law enforcement, emergency medical, health and medical services, and search and rescue.

- B. Each respective City or County is responsible for initial emergency response within their jurisdiction.

VI. MISCELLANEOUS

A. Mailing of Notices

Except as otherwise specified, all Notices shall be deemed given on the day of mailing or sending via email. Except as otherwise specified, all notices, 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 as follows:

If to the NONPROFIT CORPORATION:
501 SW 7th Street, Suite G, Des Moines, IA 50309
ATTN: Maggie McClelland, Project Manager, 515-452-0039
maggie@greatoutdoorsfoundation.org

If to CITY:
400 Robert D. Ray Drive
Des Moines, Iowa
ATTN: City Manager, (515) 283-4141, CityManager@dmgov.org

All notices shall be deemed given on the day of mailing. 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. Intentionally Deleted.

C. Amendment

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

D. Publicity.

It is the intent of the Parties that the City Water Trail Improvements shall be and become an integral part of the Central Iowa Water Trails System. As such, the CITY will include in any press releases specifically naming and concerning the City Water Trail Improvements, the words, "This [water trail project DESCRIPTION OR NAME] was built in cooperation with the Central Iowa Water Trails System." This requirement shall terminate on the earlier of December 31, 2024, the termination of Central Iowa Trails, LLC, dissolution or

termination of NONPROFIT CORPORATION, or un-remedied breach or default of this Agreement by NONPROFIT CORPORATION.

E. Binding Nature of Agreement

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

F. 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.

G. Breach and Default

In the event that either party determines the other party has defaulted in the performance of its obligations hereunder, the aggrieved party may declare that default has occurred and give notice to the defaulting party. Notice of default shall be given in writing, shall specify the nature of the default and the provision of the Agreement involved, and shall specify what actions are required by the defaulting party to correct the default. The defaulting party shall have thirty (30) days from the date of its receipt of notice or default to correct the default. If at the end of said thirty (30) day period the default is not, in the opinion of the aggrieved party, being corrected, the party may thereupon file suit for breach of contract and seek specific performance and damages.

In the event of a breach or default by any party of this Agreement, that breach or default 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.

H. 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.

I. 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.

J. 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.

K. 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, 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.

L. 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.

M. 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.

N. Indemnification and Insurance

The NONPROFIT CORPORATION shall purchase and maintain insurance in accordance with the insurance requirements set forth in **Exhibit D** throughout the duration of this Agreement. NONPROFIT CORPORATION shall not commit any act which shall invalidate any policy of insurance. NONPROFIT CORPORATION shall defend, indemnify, and hold harmless CITY in accordance with the indemnification requirements set forth in Exhibit D.

To the fullest extent permitted by law, CITY agrees to defend, pay on behalf of, indemnify, and hold harmless NONPROFIT CORPORATION against any and all claims, demands, suits, damages or losses, together with any and all outlay and expense connected therewith including, but not limited to, attorneys' fees and court costs that may be asserted or claimed against, recovered from or suffered by NONPROFIT CORPORATION by reason of any injury or loss including, but not limited to, personal injury, bodily injury including death, property damage including loss of use thereof, and economic damages that arise out of or are in any way connected or associated with CITY's responsibilities regarding funding and maintenance of landside improvements this Agreement, subject to NONPROFIT CORPORATION's compliance with its responsibilities under this Agreement relating to such CITY responsibilities.

O. Integration

This Agreement represents the entire integrated agreement between the NONPROFIT and the CITY, and supersedes all prior negotiations, representations or agreements, either written or oral. There will be additional agreements and amendments required to develop, construct, operate and maintain improvements not yet in place at the time of this Agreement.

P. Termination

- i. This Agreement may be terminated by either party as provided in this paragraph. Any such termination may be accomplished only by delivery of notice to the other party not later than July 1 of any given year after the year ending December 31, 2022 and shall be effective on January 1 occurring twelve (12) months after the January 1 following the giving of the required notice. The foregoing does not limit the CITY's right to terminate prior to December 31, 2022, in the event of an un-remedied breach or default pursuant to Article VI, Section G or subsection iii of this Section.
- ii. Following termination of this Agreement, the CITY shall provide two (2) years of their final year's proportion of NONPROFIT CORPORATION's budget according to Article III, Section B due no later than two (2) years following termination.

iii. Notwithstanding the foregoing in this Section, in the event the NONPROFIT CORPORATION is dissolved or otherwise ceases to exist or function or if NONPROFIT CORPORATION declares or is adjudicated insolvent or bankrupt pursuant to the provisions of any state or federal insolvency or bankruptcy act, or if a receiver or trustee of the property of the NONPROFIT CORPORATION shall be appointed by reason of such insolvency or bankruptcy or inability to pay its debts, or if any assignment should be made of the NONPROFIT CORPORATIONS property for the benefit of creditors, then this Agreement shall immediately terminate upon notice per Section VI above. Upon such termination, all revenues derived by NONPROFIT CORPORATION from the operation of the CITY WATER TRAIL IMPROVEMENTS under this Agreement and 50% of the ENDOWMENT funds which are not needed to cover the NONPROFIT CORPORATION's obligations incurred in performing its duties under this Agreement, shall be promptly returned and contributed to the CITY. In addition, upon such termination, NONPROFIT CORPORATION agrees to transfer ownership, without consideration or payment, to the CITY or to such other organization or entity as approved and identified in writing by the CITY, at CITY's sole discretion, of any Water Trail Improvements owned by NONPROFIT CORPORATION within the City of Des Moines city limits and/or any intellectual property related to the Water Trail (logos, sign design, maps, etc), or in the alternative, a perpetual, royalty free, unlimited license for use of such intellectual property, as requested by the CITY.

Q. Assignment and Prohibition Against Transfer. The rights and liabilities of the parties under this Agreement may not be assigned by one party without the prior written consent of the other parties to this Agreement. NONPROFIT CORPORATION covenants and agrees that it has not and will not, without the prior written approval of CITY, by written consent of its City Manager, make or create, or suffer to be made or created, any total or partial assignment of its interest or rights under this Agreement, CITY shall be entitled to require as a condition to any such assignment:

- i. Any proposed assignee shall be a public or private non-profit entity and have the qualifications and financial responsibility, as determined by CITY, necessary and adequate to fulfill the agreements and obligations undertaken in this Agreement by NONPROFIT CORPORATION.
- ii. Any proposed assignee by an instrument in writing satisfactory to CITY, shall, for itself and its successors and assigns, and expressly for the benefit of CITY, expressly assume all of the agreements and obligations of NONPROFIT CORPORATION under this Agreement and agree to be subject to all the terms, conditions, covenants and restrictions to which NONPROFIT CORPORATION is subject.

iii. All instruments and other legal documents involved in effecting assignment or sublease be submitted to CITY for prior review and approval by City Manager of CITY.

Provided, that in the absence of specific written agreement by CITY to the contrary, no such approved assignment shall be deemed to relieve NONPROFIT CORPORATION from any of its obligations with respect to any of its obligations under this Agreement.

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

CITY OF DES MOINES

T. M. Franklin Cownie
T. M. Franklin Cownie, Mayor

ATTEST:

P. Kay Cmelik
P. Kay Cmelik, City Clerk

STATE OF IOWA)
) ss:
COUNTY OF POLK)

On this day of September 13, 2021, before me, the undersigned, a Notary Public, personally appeared T. M. FRANKLIN COWNIE and P. KAY CMELIK, to me personally know, who, being by me duly sworn, did state that they are the MAYOR and CITY CLERK, respectively, of the City of Des Moines, Iowa; that the seal affixed to the foregoing instrument is the seal of the corporation, and that the instrument was signed and sealed on behalf of the corporation, by authority of its City Council as contained in the Resolution adopted under Roll Call No. 21- 1445 dated September 13, 2021 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 municipal corporation, by it voluntarily executed.


Sandi L. Deery
Notary Public in the State of Iowa

APPROVED AS TO FORM:

/s/ Ann DiDonato (by GKF)
Ann DiDonato, Assistant City Attorney




NONPROFIT CORPORATION


_____, President

STATE OF IOWA)
) ss:
COUNTY OF POLK)

On this 17 day of September, 2021, 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 she is the President of the _____, that the seal affixed to the foregoing instrument is the seal of the corporation; that the instrument was signed and sealed on behalf of the corporation, by authority of its Board of Directors, and he acknowledged the execution of the instrument to be the voluntary act and deed of the corporation, by it and by him voluntarily executed.



Notary Public in the State of Iowa

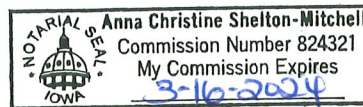


Exhibit A

Water Trails Area Map

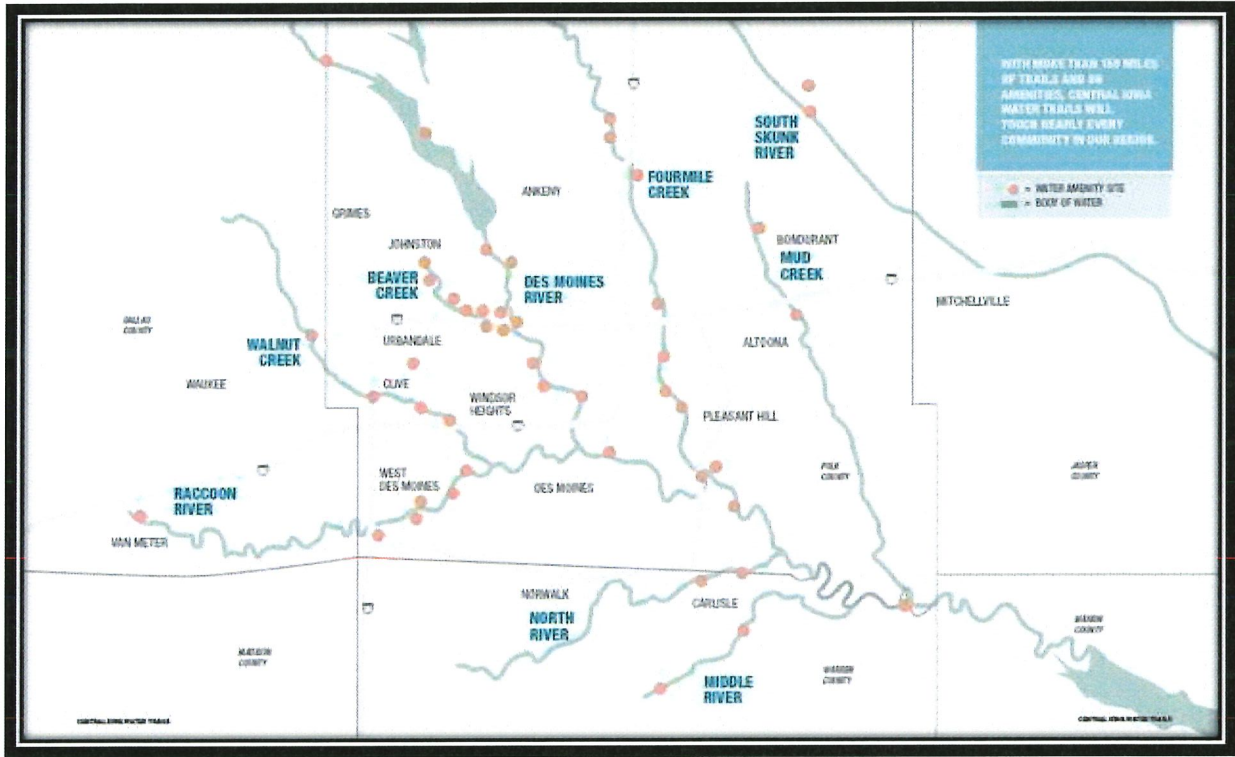


Exhibit B

CENTRAL IOWA WATER TRAILS MAINTENANCE AND REPAIR OF PROJECT IMPROVEMENTS

The Central Iowa Water Trails Operations and Maintenance Committee recommend the following Best Practices for the Central Iowa Water Trail Governance Committee. Several elements previously provided by the consultant have been intentionally omitted as they either extend beyond the water trail scope of service area, have national standards in place or are relevant to only a few water trail locations. It is important to note that these best practices are for the 81 regional water trail access sites only. There still needs to be specific operations and maintenance plans for the five downtown (Birdland, Center Street, Scott Street, Fleur Drive and Harriett Street) Des Moines locations, based on their final design and service options to water trail users, offer operations support from private vendors and other downtown amenities for potential cost-share savings. Implementation of these standards shall not impose inequity within any jurisdiction on their respective maintenance standards within their park/facility operations serving their residents.

The committee feels that elements directly related to a positive water trail experience (parking lot, trail access, trail launch, signage, custodial care and waterway safety) should be the key elements addressed by this committee. Auxiliary amenities such as playgrounds or shelters, while they may enhance the participants experience and some communities may have water trail accesses in existing parks with these amenities, are not critical to a successful water trail network or the paddler, angler or waders experience on the water trails.

Hardscape

Hardscape areas such as parking lots, pathways and water access points (boat launch and/or pedestrian access) shall be inspected by NONPROFIT CORPORATION at least annually for maintenance repair needs (heaving, cracking, striping, etc.). This inspection should include the evaluation of site signage and site amenities (parking curbs, trash receptacles, striping and seating areas). Any hard surface walking path with more than a ½" separation should be repaired and/or replaced. Inspections should include the sweeping of debris, glass, etc. in the parking lot and along the pathway if needed in the spring (March).

Landscape

Landscape area inspections shall vary based on the type and location of the area. Rain gardens and bio-cells should be inspected by NONPROFIT CORPORATION at least monthly during the spring, summer and fall for weeding and trash collection. Pathways and water access points should be inspected annually for hangers and understory invasive growth.

In Water Improvements Maintenance

NONPROFIT CORPORATION shall provide weekly inspections, when the Water Trails are open, of in water and landside improvements, including safety, course directional, decorative and artistic signage. NONPROFIT CORPORATION shall provide on route Water Trails maintenance for in water and landside improvements, including safety, course directional,

decorative and artistic signage, for which NONPROFIT CORPORATION is responsible to assure the safety of Water Trail users and the general public and which will adequately maintain such improvements to be in a safe and good condition and working order and in a manner that will not damage the Downtown Water Trail improvements and other improvements or infrastructure within the waters or on CITY property or private property while performing such maintenance. Establish and maintain a water safety notification system relating to water quality, river depth, flow quantity, condition of improvements, and providing effective communication to the public health and safety warnings and potential hazards.

Water Trails/Flooding

Each water trail route signage shall be inspected by NONPROFIT CORPORATION twice annually for missing or damaged signs; shall ensure brush, tree branches or other obstructions don't impede visibility and shall send inspection reports to the Iowa Department of Natural Resources water trails coordinator and each respective managing jurisdiction.

Each water trail route should be inspected by NONPROFIT CORPORATION annually and after any significant rain event that goes outside the riverbanks. After major rain events, inspections of the water trails should be inspected after the river/stream levels go back into their banks. If possible, hazards such as entrapments or entanglements should be removed from the water trail. If hazards cannot be removed, a warning notice should be posted at the water trailhead. On route water trails maintenance will be operated by a contract held with the centralized governing entity.

Storms

In the event of a major storm (high winds, severe rains, tornado), each location should be inspected by NONPROFIT CORPORATION for damage and debris from the parking lots (drain covers) to the water access point and including the water trail. If possible, hazards such as entrapments or entanglements should be removed from the water trail. If hazards cannot be removed, a warning notice should be posted at the water trailhead. Sweeping the parking lot or access trail of storm debris may be required.

Turf Maintenance

Turf maintenance shall be managed by each individual entity as ground cover at various trail locations will vary from turf grass, to natives to hardscape surfaces. However, each entity should provide a minimum 3' shoulder clearance along the edge of the trail leading to the water access point.

Tree and Shrub Maintenance

Annually, tree and shrub maintenance should be inspected by NONPROFIT CORPORATION and addressed accordingly along the parking lot and trail access points to ensure safety of the water trail users from hangers or damaged/diseased trees.

Litter Control

Trash receptacles shall be placed at each parking lot and shall be checked in accordance with each individual agency's standards based on use and need.

Vandalism and Graffiti Removal

Initiate repairs immediately upon discovery. Document and photograph damage. If hate or gang related, please submit to your local law enforcement agency.

Lighting Security/Area

NONPROFIT CORPORATION will inspect bi-annually. CITY should perform repairs/bulb replacement within 72 hours of discovery.

Exhibit C

Central Iowa Water Trails Inclusion Design Tool

Central Iowa Water Trails has the overarching goals of safety, economic development, workforce, environmental conservation and recreation. Through a series of conversations, exploration and use of the 4Equity Tool, this Inclusion Design Tool was developed to provide an opportunity to consider the design and development of core elements to ensure our region creates the vibrant, enduring and inclusive experience for all. Leadership of the Central Iowa Water Trails encourages regional sites to consider the following elements:

1) **Considerations for restroom facilities.**

- Design with single stall, individual door access.
- Consider outdoor handwashing stations.
- Use the basic label of “RESTROOM” avoid when possible family, gender specific, companion, etc. for clarity.
- Size of restroom stall should be able to accommodate an individuals’ wheelchair as well as their support person.
- Provide changing tables that are not only for infants but large enough to accommodate older youth and adults with special needs.

2) **Accessibility should focus on driving engagement.**

- Wheelchairs and strollers, as well as individuals with visual impairment, should be considered when developing each site and engagement opportunity.
- Creating the ability for individuals to get to the water is ideal but being able to *engage* at the site should be the ultimate goal.
- Consider the multi-modes of transportation used to access the site from those walking to biking, from those driving to riding public transportation.
- Maintain an element of engagement that doesn’t include a fee to participate and be sure that it is well communicated to avoid assumptions. Accessibility doesn’t only mean access... it also means understanding that’s its possible to use it.

3) **Signage is critical and should use visuals.**

- Consider elements for those who are visually impaired.
- Consider opportunities to use more imagery and less words.
- Engage an artist in highlighting elements that are for use and safety of the space and within any features.
- Be sure that “no cost to participate” opportunities are clear and obvious.

4) **Safety means security and acceptance at each location.**

- Visual signage should be displayed and created with a goal to evoke feelings of safety but in location and in acceptance to be at the location.
- Lighting is a critical element to indicate safety at these sites.
- Provide access to contact emergency services perhaps through a phone with clear, pictorial instructions.

- Post the site location clearly for people to reference.
- How is the elements of safety of the water being inspired? Where can messages be reinforced about keeping the water clean and safe?
- Are there unwritten norms that exist that could be communicated based on the primary activity at the site? For those who are not well versed in canoe etiquette for example, how can a visitor to the site learn more about what to do and how to do it?
- Provide clear information as to the level of expertise or experience needed to fully participate in an element- entry, medium or high-level of skill.

5) **Decisions should be made using cultural and contextual considerations.**

- Be aware of the historical context of the site being considered and find ways to recognize and honor the land and those who have called the place home.
- Are there elements to be aware of, lift up, highlight or celebrate in its design and activation?

Exhibit D

CITY OF DES MOINES, IOWA NONPROFIT CORPORATIONS

INSURANCE & INDEMNIFICATION REQUIREMENTS

For the purposes of this Attachment and all provisions included herein, the term “NONPROFIT CORPORATION” shall mean “Central Iowa Water Trails, LLC.” and includes the NONPROFIT CORPORATION, its officers, agents, employees, subcontractors and others under the control of the NONPROFIT CORPORATION. The term “CITY” shall mean the City of Des Moines, Iowa, including its elected and appointed officials, employees, agents, volunteers, boards, commissions and others working on its behalf.

1. GENERAL

The NONPROFIT CORPORATION shall purchase and maintain insurance to protect the NONPROFIT CORPORATION and CITY throughout the duration of the Agreement. Said insurance shall be provided by insurance companies “admitted” or “nonadmitted” to do business in the State of Iowa having no less than an A. M. Best Rating of “B+.” All policies shall be written on an occurrence basis and in form and amounts satisfactory to the CITY. Certificates of Insurance confirming adequate insurance coverage shall be submitted to the CITY prior to Agreement execution or commencement of work and/or services.

2. INSURANCE REQUIREMENTS

- A. COMMERCIAL GENERAL LIABILITY INSURANCE: NONPROFIT CORPORATION shall procure and maintain Commercial General Liability insurance on an occurrence basis with limits of liability not less than \$5,000,000 per occurrence and aggregate combined single limit covering Personal Injury, Bodily Injury and Property Damage. Coverage shall include: (a) Contractual Liability, (b) Premises and Operations, (c) Products and Completed Operations, (d) Independent Contractors Coverage, (e) Personal and Advertising Injury and (f) Explosion, Collapse and Underground- XCU (when applicable). *Waiver of Subrogation in favor of the CITY is required as per paragraph 2.J. below.*

Coverage shall be no less comprehensive and no more restrictive than the coverage provided by ISO standard Commercial General Liability Policy form ISO CG 0001 including standard exclusions or a non-ISO equivalent form.

- B. AUTOMOBILE LIABILITY INSURANCE: Automobile Liability Insurance with limits of liability of not less than \$1,000,000 per occurrence combined single limit covering Bodily Injury and Property Damage. Coverage shall include all owned, non-owned, and hired vehicles. If the NONPROFIT CORPORATION’S business does not own any vehicles, coverage is required on non-owned and hired vehicles. Policy shall include

Contractual Liability coverage. *Waiver of Subrogation in favor of the CITY is required as per paragraph 2.J. below.*

- C. UMBRELLA/EXCESS LIABILITY INSURANCE: The General Liability and Automobile Liability Insurance requirements above may be satisfied with a combination of primary and Umbrella or Excess Liability Insurance. If the Umbrella or Excess Insurance policy does not follow the form of the primary policies, it shall include the same endorsements as required of the primary policies. *Waiver of Subrogation in favor of the CITY is required as per paragraph 2.J. below.*
- D. WORKER'S COMPENSATION & EMPLOYER'S LIABILITY INSURANCE: As required by State of Iowa Workers' Compensation Law, the NONPROFIT CORPORATION shall procure and maintain Worker's Compensation Insurance, including Employer's Liability Coverage. The Workers' Compensation Insurance shall be written with State of Iowa statutory limits. If, by Iowa Code Section 85.1A, the NONPROFIT CORPORATION is not required to purchase Workers' Compensation Insurance, the NONPROFIT CORPORATION shall have a copy of the State's Nonelection of Workers' Compensation or Employers' Liability Coverage form on file with the Iowa Workers' Compensation Insurance Commissioner, as required by Iowa Code Section 87.22. *Waiver of Subrogation in favor of the CITY is required as per paragraph 2.J. below.*
- E. CRIME INSURANCE: NONPROFIT CORPORATION shall procure and maintain Crime Insurance on a discovery basis covering Employee Dishonesty for each loss at a limit of not less than \$500,000 and with a deductible of not more than \$5,000. Those employees of the NONPROFIT CORPORATION who have access to or are responsible for the funds generated under this Agreement shall be covered by this insurance. In addition, the insurance shall include coverage for theft, disappearance and destruction for loss inside premises and for loss outside of premises. This insurance shall cover any losses attributable to NONPROFIT CORPORATION's employees acting alone or in collusion with others who are not employees of the NONPROFIT CORPORATION. The cost of such Crime Insurance shall be at the sole expense of the NONPROFIT CORPORATION.
- F. DIRECTORS & OFFICERS LIABILITY INSURANCE: The NONPROFIT CORPORATION shall procure and maintain Directors and Officers Liability Insurance with limits of liability of not less than \$1,000,000 per loss and \$1,000,000 aggregate per policy period for all losses.
- G. ADDITIONAL INSURED ENDORSEMENT: The General Liability Insurance policy shall include standard ISO endorsements CG 20 26 07 04 and CG 20 37 07 04 or their non-ISO equivalents. The NONPROFIT CORPORATION's insurance shall be primary to that of the City and noncontributory to any other insurance or similar coverage available to the CITY whether the other available coverage is primary, contributing or excess.

- H. GOVERNMENTAL IMMUNITY ENDORSEMENT: The General Liability Insurance policy shall include the CITY Governmental Immunities Endorsement language as provided below. Standard ISO or insurance carrier “Waiver of Immunity” endorsements are not acceptable.

CITY OF DES MOINES, IOWA

GOVERNMENTAL IMMUNITIES ENDORSEMENT

1. Nonwaiver of Government Immunity. The insurance carrier expressly agrees and states that the purchase of this policy and the including of the City of Des Moines, Iowa as Additional Insured does not waive any of the defenses of governmental immunity available to the City of Des Moines, Iowa under Code of Iowa Section 670.4 as it now exists and as it may be amended from time to time.
 2. Claims Coverage. The insurance carrier further agrees that this policy of insurance shall cover only those claims not subject to the defense of governmental immunity under the Code of Iowa Section 670.4 as it now exists and as it may be amended from time to time. Those claims not subject to Code of Iowa Section 670.4 shall be covered by the terms and conditions of this insurance policy.
 3. Assertion of Government Immunity. The City of Des Moines, Iowa shall be responsible for asserting any defense of governmental immunity, and may do so at any time and shall do so upon the timely written request of the insurance carrier. Nothing contained in this endorsement shall prevent the carrier from asserting the defense of governmental immunity on behalf of the City of Des Moines, Iowa.
 4. Non-Denial of Coverage. The insurance carrier shall not deny coverage under this policy and the insurance carrier shall not deny any of the rights and benefits accruing to the City of Des Moines, Iowa under this policy for reasons of governmental immunity unless and until a court of competent jurisdiction has ruled in favor of the defense(s) of governmental immunity asserted by the City of Des Moines, Iowa.
 5. No Other Change in Policy. The insurance carrier and the City of Des Moines, Iowa agree that the above preservation of governmental immunities shall not otherwise change or alter the coverage available under the policy.
- I. CANCELLATION & NONRENEWAL NOTIFICATION ENDORSEMENT: The General Liability and Crime Insurance policies shall be endorsed to provide the CITY with no less than thirty (30) days Advance Written Notice of Cancellation, forty-five (45) days Advance Written Notification for Nonrenewal and ten (10) days Written Notification of Cancellation due to non-payment of premium. ***Written notifications shall be sent to: Risk Management, 400 Robert D Ray Drive, Des Moines, Iowa 50309.***

J. WAIVER OF SUBROGATION: To the fullest extent permitted by law, NONPROFIT CORPORATION hereby releases the CITY from and against any and all liability or responsibility to the NONPROFIT CORPORATION or anyone claiming through or under the NONPROFIT CORPORATION by way of subrogation, or otherwise, for any loss without regard to the fault of the CITY or the type of loss involved including loss due to occupational injury. This provision shall be applicable and in full force and effect only with respect to loss or damage occurring during the time of this Agreement. The NONPROFIT CORPORATION's policies of insurance shall contain either a policy provision or endorsement affirming the above stated release in favor of the CITY, including its elected and appointed officials, agents, employees and volunteers and others working on its behalf.

K. PROOF OF INSURANCE: The Consultant shall provide to the CITY Certificates of Insurance evidencing all insurance coverage as required in paragraphs A through J above utilizing the latest version of the ACORD form. The Certificate(s) of Insurance shall specify the Title of the Agreement under "Description of Operations/Locations/Vehicle/Special Items". A Copy of the (1) Additional Insured Endorsements, (2) Governmental Immunities Endorsement and (3) Cancellation and Nonrenewal Notification Endorsement shall be submitted with the Certificates of Insurance. *Mail Certificates of Insurance to: Risk Management, 400 Robert D Ray Drive, Des Moines, Iowa 50309.*

L. AGENTS AND SUBCONTRACTORS: The NONPROFIT CORPORATION shall require that any of its agents and subcontractors who perform work and/or services on behalf of the NONPROFIT CORPORATION purchase and maintain the types of insurance customary for the services being provided.

3. INDEMNIFICATION REQUIREMENTS

To the fullest extent permitted by law, NONPROFIT CORPORATION agrees to defend, pay on behalf of, indemnify, and hold harmless the CITY against any and all claims, demands, suits, damages or losses, together with any and all outlay and expense connected therewith including, but not limited to, attorneys' fees and court costs that may be asserted or claimed against, recovered from or suffered by the CITY by reason of any injury or loss including, but not limited to, personal injury, bodily injury including death, property damage including loss of use thereof, and economic damages that arise out of or are in any way connected or associated with NONPROFIT CORPORATION's work or services under this Agreement, including that of its officers, agents, employees, subcontractors and others under the control of NONPROFIT CORPORATION.

NONPROFIT CORPORATION's obligation to indemnify the CITY contained in this Agreement is not limited by the amount or type of damages, compensation or benefits payable under any workers' compensation acts, disability benefit acts, or other employee benefits acts.

The CITY shall not be liable or in any way responsible for any injury, damage, liability, claim, loss or expense incurred by NONPROFIT CORPORATION arising out of or in any way connected or associated with NONPROFIT CORPORATION's work or services, including its officers, agents, employees, subcontractors and others working under the control of NONPROFIT CORPORATION, except to the extent caused by or resulting from the negligent act or omission of the CITY or the CITY'S employees, consultants, agents or others for whom the CITY is responsible.

NONPROFIT CORPORATION expressly assumes responsibility for any and all damage caused to CITY property arising out of or in any way connected or associated with NONPROFIT CORPORATION's work or services under this Agreement, including its officers, agents, employees, subcontractors and others working under the control of NONPROFIT CORPORATION.

NONPROFIT CORPORATION shall ensure that its activities on CITY property will be performed and supervised by adequately trained and qualified personnel and NONPROFIT CORPORATION will observe all applicable safety rules.

EXHIBIT E

[Add or Insert Exhibit Graph]

DOWNTOWN SITES OPERATIONS FUND (DSOF)	ICON NONPROFIT OPERATING FUND	ICON RESERVE FUND	ICON REGIONAL FUND	DOWNTOWN REPLACEMENT & MAINTENANCE FUND	MEC REGIONAL ENDOWMENT	DOWNTOWN CAPITAL PROJECT FUND
<ul style="list-style-type: none"> • Funds from outfitter and concessionaire operations of five downtown Des Moines sites • Revenues will first be dispersed to City of Des Moines for reimbursement of maintenance expenses • Pro forma net revenues then allocated as follow: <ul style="list-style-type: none"> • Replenishment of Reserves Fund, if utilized • 50% to ICON Regional Fund • 25% to ICON Nonprofit Operating Fund • 25% to Downtown Replacement & Maintenance Fund 	<ul style="list-style-type: none"> • Budget funded 70% jurisdictions support, 30% private fundraising • Used for annual operating expenses of regional nonprofit • Funded by 25% of DSOF net revenues 	<ul style="list-style-type: none"> • \$1 million • Restricted for emergency fund to be drawn down if shortage from pro forma or fundraising • If utilized, replenished by DSOF net revenues first 	<ul style="list-style-type: none"> • Recommendations from ICON Board • Approved by GOF Board • Dispersed to Municipalities and Counties for projects as outlined by matrix needs and board priorities • Funded by 50% of DSOF net revenues 	<ul style="list-style-type: none"> • Goal amount prescribed by replacement costs of downtown features • Recommended by ICON Board • Approved by GOF Board • Funded by 25% of DSOF net revenues 	<ul style="list-style-type: none"> • Grants generated by earnings • Used for capital improvements or extraordinary maintenance • Applications reviewed and scored by ICON Exec Committee • Initial \$5 million donor-funded and advised • Additional future fundraising to grow Endowment 	<ul style="list-style-type: none"> • \$27.5 million capital campaign funds • Restricted for Downtown projects • Will be closed when construction is complete
<p>Held by ICON</p> <p>Governed by ICON Board</p>	<p>Held by ICON</p> <p>Governed by ICON Board</p>	<p>Held by ICON</p> <p>Governed ICON Board</p>	<p>Held by GOF</p> <p>Governed by GOF Board</p>	<p>Held by GOF</p> <p>Governed by GOF Board</p>	<p>Held by GOF</p> <p>Governed by Donor Committee</p>	<p>Held by GOF</p> <p>Governed by GOF ICON Investments Selection Committee</p>

EXHIBIT E