

LAKEFRONT PORCH DONATION AND IMPROVEMENT AGREEMENT

Between the City of Madison and the Madison Parks Foundation

THIS DONATION AND IMPROVEMENT AGREEMENT, entered into by and between the City of Madison, a municipal corporation (“City”), and the Madison Parks Foundation, a 501(c)3 corporation (“Foundation”), is effective as of the date by which both parties have signed hereunder.

WITNESSETH:

WHEREAS, the Foundation is the City’s official non-profit fund raising collaborator as it relates to the City’s parks and open space system, pursuant to the terms of the Cooperative Agreement between the City and the Foundation that was entered into on January 24, 2013; and,

WHEREAS, the Madison Water Utility operates a subterranean well and reservoir on E. Wilson St. at 201 S. Hancock St. (Well #17, also known as Crowley Station), which facility has a large exposed concrete surface accessible at street level; and,

WHEREAS, in 2013, the Parks Division, the Water Utility, an informal group of residents, property owners and business interests (the “Friends of Crowley Station”), and a downtown neighborhood association, Capitol Neighborhoods, Inc. (“CNI”), entered into a Memorandum of Understanding (the “2013 MOU”) regarding the improvement, use and maintenance of Crowley Station as public open space. Under the 2013 MOU, the Friends of Crowley Station, through CNI, were authorized to make certain improvements to Crowley Station, and the Parks Division agreed to maintain and treat the surface as park space. Crowley Station has been maintained as a public open space since then, but remains an underutilized community asset; and,

WHEREAS, in 2020, community members began rethinking the possible uses of Crowley Station. In consultation with the Parks Division and the Water Utility, these interested community members have developed a vision to develop and transform the Crowley Station surface into a “Lakefront Porch”, which will broaden the range of activities and uses for the space. Sufficient private funding has been secured to advance the Lakefront Porch improvement project to Crowley Station (the “Project”); and,

WHEREAS, the Water Utility and the Parks Division have both agreed to the Lakefront Porch proposal and are supportive of the further development of the site; and,

WHEREAS, by a companion resolution (File No. **XXXXXX**), the Common Council will declare the surface of the Crowley Station facility to be a City park, to be managed as an asset of the Parks Division; and,

WHEREAS, the proposed Lakefront Porch improvement project will allow the City to create additional useable and programmable park and open space in the downtown, further activating and utilizing this underused asset and providing the neighborhood with a valuable amenity.

WHEREAS, the Foundation is willing to work with the Lakefront Porch community members to raise funds for the Lakefront Porch improvements to Crowley Station, and to manage the redevelopment project, on the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby mutually acknowledged, the Parties agree as follows:

1. Purpose. The purpose of this Lakefront Porch Donation and Improvement Agreement (the “Agreement”) is to set forth the manner in which the Foundation will make the Lakefront Porch improvements to Crowley Station (the “Improvements”) through the use of private donors. The actual construction and improvements to Crowley Station will be addressed by separate agreement (the “Construction Agreement”).
2. Term. This Agreement shall expire upon the satisfaction of all terms and conditions of this Agreement, or the written agreement of all Parties to this Agreement, whichever occurs first.
3. Obligations of the Parties. In addition to those obligations and responsibilities set forth elsewhere in this Agreement, the Parties’ obligations under this Agreement are as follows:
 - a. Foundation. The Foundation shall act work with interested parties to secure the donation of plans and construction of the Improvements, which Improvements shall be performed pursuant to the Contract for the Donation and Construction of the Public Improvements: Lakefront Porch Improvements to Crowley Station (the “Construction Agreement”). Foundation, shall secure donations of all funding and resources needed to make the Improvements needed for the Project, including providing any specialized employees, agents or contractors as necessary. Foundation shall work with donors and others to provide any tax related donation information and work with the City to ensure the success of the Project.
 - b. City. The City shall work with donors, as needed, on the preparation and approval of Project plans. Once the plans are approved and the Crowley Station improvement project scheduled, the City will coordinate with the Foundation on securing the Crowley Station surface for the duration of the project. Upon completion and acceptance of all improvements made, the City will assume responsibility for the Improvements, unless other agreements are made. The City shall provide staff assistance to the Foundation, and their agents, representatives, and contractors, if necessary, to ensure the successful completion of the Project. However, the City shall have no financial obligation regarding the Project.
4. Building Plans. Foundation and City shall work with donors on preparing plans and specifications for the Project (the “Plans”), which Plans shall guide and direct the Improvements to be made to Crowley Station. Prior to any work commencing at Crowley Station, the City shall approve the Plans, which, if authorized by the Council, may be done by the Parks Superintendent, in consultation with the City Engineer and the Water Utility Chief Engineer. These Plans shall be donated to the City and, once accepted by the City, shall become the property of the City, which the City may use in any manner it sees fit. It shall be the responsibility of the donors and the Foundation to determine a commercially reasonable value of the Crowley Station Plans, based upon actual or estimated costs, for tax reporting purposes. The anticipated Plans were approved by the Urban Design Committee on June 14, 2023 (Legistar File No. 78200).

5. Schedule and Site Closure; Coordination with Gardeners. Following acceptance of the Plans, the Parties shall work together to determine a work schedule for the Project. The Parties acknowledge and understand that Crowley Station's primary purpose is for use as a community drinking water well and reservoir and that the facility will be operational while improvements are made to the surface. Neither Foundation nor its Contractor shall interfere with the operations of the facility for its intended purpose without the prior written approval of the Water Utility. The Parties also recognize that the Crowley Station community gardeners have an existing lease to use the planting beds installed on the surface of Crowley Station and that it will be necessary to coordinate the Project with the gardeners. Once a schedule is determined, the City shall grant the Foundation the authority to control access to the Crowley Station surface, as needed, in order to make the Improvements. With full and complete knowledge, Foundation accepts Crowley Station in an "as is" condition. If additional portions of the Water Utility property are desired by Foundation or its Contractor for the Project, Foundation will need separate written approval from the Water Utility.
6. Improvements. Once Crowley Station is secured, the Foundation shall make the Improvements to Crowley Station as detailed in the Construction Agreement. The costs of these Improvements, which will be made in 2023-24, are expected to be funded by financial or in-kind donations of private parties working with the Foundation. The City shall not incur any of the costs of the Improvements unless separately agreed to and budgeted by the Common Council. All work shall be subject to City codes, permits and regulations and shall be covered by the Construction Agreement between the City and the Foundation. When the work is completed, the Foundation shall inform the City and the City shall inspect the Improvements. If the work is satisfactory, the City shall inform the Foundation of the same, after which the Foundation shall donate the Improvements to the City as provided for under Wis. Stat Sec. 62.15(1e). The City shall retain ownership of the Improvements and, in the absence of any other agreement to the contrary, shall be responsible for the Improvements thereafter.
7. Publicity. City agrees to allow Foundation and any major project donors to publicize and share information about the Project, including utilizing the City's logo on any documents or in any presentations about the Improvements.
8. Assignability and Subcontracting. Foundation shall not assign or subcontract any interest or obligation of this Agreement without City's prior written approval.
9. No Realty. It is expressly understood and agreed that this Agreement is not a lease or a conveyance of realty, but merely a granting to Foundation of the right to use and improve Crowley Station as set forth herein.
10. Access to City Property. This Agreement gives Foundation a limited right to control access to Crowley Station to make the Improvements. While Foundation may limit or restrict access to Crowley Station, or parts thereof, while the Improvements are being made, the City shall, at all times, maintain the right to access the Premises.

11. Notices. All notices required to be given under the terms of this Agreement shall be personally delivered or sent, postage prepaid, by depositing the same in United States mail addressed as follows:

City: Superintendent of Parks
City of Madison Parks Division
210 Martin Luther King, Jr. Blvd., Room 104
Madison, WI 53703

Foundation: Madison Parks Foundation
PO Box 259336
Madison, WI 53725

12. Non-Discrimination. In the performance of services under this Agreement, Foundation agrees not to discriminate against any employee or applicant for employment because of race, religion, marital status, age, color, sex, handicap, national origin or ancestry, income level or source of income, arrest record or conviction record, less than honorable discharge, physical appearance, sexual orientation, gender identity, political beliefs or student status. Foundation further agrees not to discriminate against any subcontractor or person who offers to subcontract on this contract because of race, religion, color, age, disability, sex, sexual orientation, gender identity or national origin.

13. Indemnification. Each party shall be responsible for its own acts, errors or omissions and for the acts, errors or omissions of its employees, officers, officials, agents, boards, committees and commissions, and shall be responsible for any losses, claims, and liabilities that are attributable to such acts, errors, or omissions including providing its own defense, arising out of this Agreement. In situations involving joint liability, each party shall only be responsible for such losses, claims, and liabilities that are attributable to its own acts, errors, or omissions and the acts, errors or omissions of its employees, officers, officials, agents, boards, committees and commissions. It is not the intent of either party to waive, limit or otherwise modify the protections and limitations of liability found in Wis. Stat. 893.80 or any other protections available to the parties by law. This paragraph shall survive the termination or expiration of this agreement.

14. Insurance.

- a. Required Coverage. Foundation shall not commence work under this Agreement, nor shall Foundation allow any Subcontractor to commence work on its Subcontract, until the insurance required below has been obtained and corresponding certificate(s) of insurance have been approved by the City Risk Manager.

- (1) Commercial General Liability. Foundation shall procure and maintain during the life of this Agreement, Commercial General Liability insurance including, but not limited to, bodily injury, property damage, personal injury, and products and completed operations (unless determined to be inapplicable by the Risk Manager) in an amount not less than \$1,000,000 per occurrence. This policy shall also provide contractual liability in the

same amount. Foundation's coverage shall be primary and noncontributory and list the City of Madison, their officers, officials, agents and employees as additional insureds. Foundation shall require all subcontractors under this Agreement (if any) to procure and maintain insurance meeting the above criteria, applying on a primary basis and listing the City of Madison, its officers, officials, agents and employees as additional insureds.

- (2) Umbrella Liability. Foundation shall procure and maintain Umbrella Liability coverage at least as broad as the underlying Commercial General Liability with minimum limits of \$2,000,000 per occurrence and aggregate.
 - (3) Property Insurance. Foundation, or any contractors or subcontractors, agents or representatives, shall be solely responsible for carrying personal property insurance sufficient to cover loss of their own respective personal property at Crowley Station. The City shall not be liable for any damage to or loss of property of Foundation, or their contractors and subcontractors, agents and representatives, or others located on Crowley Station except to the extent such damage or loss was caused by the City's sole negligence or willful act.
- b. Acceptability of Insurers. The above-required insurance is to be placed with insurers authorized to do business in the State of Wisconsin who have an A.M. Best rating of no less than A- (A minus) and a Financial Category rating of no less than VII.
 - c. Proof of Insurance, Approval. Foundation shall provide to the City certificate(s) of insurance showing the type, amount, class of operations covered, effective dates and dates of expiration of policies for approval by the City Risk Manager, prior to commencing work under this Agreement or the Construction Agreement. Foundation shall provide the certificate(s) to the City's representative at the time of signing the contract, or sooner. Foundation shall provide copies of additional insured endorsements or insurance policies, if requested by the City Risk Manager.
 - d. Notice to City of Changes in Coverage. Foundation shall give the City thirty (30) days advance written notice of cancellation, non-renewal or material changes to any of the above-required policies during the term of this Agreement.
 - e. Loss or Material Change in Coverage. In the event of cancellation or other material change of the insurance policies or coverage and protection as required under this Section, the City may, without notice of default, declare this Agreement terminated. Foundation shall have no right to control Crowley Station or make any improvements thereto unless all insurance policies required by this Agreement or the Construction Agreement are in full force and effect.

- f. Risk Manager. All information required to be provided to the Risk Manager should be addressed as follows:

City Finance Department
Attention: Risk Manager
210 Martin Luther King Jr. Blvd., Room 406
Madison, WI 53703-3345

15. Default/Termination.

- a. In the event Foundation shall default in any of the covenants, agreements, commitments, or conditions herein contained, and any such default shall continue unremedied for a period of seven (7) days after verbal notice thereof, the City may, at its option and in addition to all other rights and remedies which it may have at law or in equity against Foundation, forthwith have the cumulative right to immediately terminate this Agreement and all rights of Foundation under this Agreement.
- b. Notwithstanding Subsection a., either party to this Agreement may in its sole discretion and without any reason terminate this Agreement at any time by furnishing the other Party with thirty (30) days written notice of termination.
- c. If this Agreement is terminated and the Improvements are not complete, other than as provided for in the Construction Agreement, no action may be taken by any party hereto to enforce the donation or the completion of the Improvements.

16. Binding on Parties; Amendments. This Agreement shall be binding on the Parties hereto, and cannot be varied or waived by any oral representations or promise of any agent or other person of the Parties hereto unless the same is in writing and is signed by both the Parties or their authorized agents.

17. Status of Foundation. It is agreed that Foundation is an independent contractor and not an employee or representative of the City, and that any persons who Foundation utilizes and provides for services under this Agreement or the Construction Agreement are not employees of the City. In addition, it is agreed that by granting the Foundation the right to use and improve Crowley Station for the purposes set forth herein, that the City is not granting Foundation the right to sell or distribute any City goods or services nor is there a community of interest, as that term is defined at Wis. Stat. Sec. 135.02(1), between the City and Foundation arising from this Agreement. The Parties all acknowledge that this Agreement does not create a dealership under Wis. Stat. Ch. 135.

18. Third Party Rights. This Agreement is intended to be solely between the Parties hereto. No part of this Agreement shall be construed to add, supplement, amend, abridge or repeal existing rights, benefits or privileges of any third party or parties, including but not limited to employees of either of the Parties.

19. Joint Preparation. Each Party and its counsel have participated fully in the review and revision of this Agreement and acknowledge that the preparation of this Agreement has been their joint effort. The language agreed to expresses their mutual intent and the

resulting document shall not, solely as a matter of judicial construction, be construed more severely against one of the Parties than the other. The language in this Agreement shall be interpreted as to its fair meaning and not strictly for or against any party.

20. No Waiver. No failure to exercise, and no delay in exercising, any right, power or remedy hereunder on the part of the City or the Foundation shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power or remedy preclude any other or further exercise thereof or the exercise of any other right, power or remedy. No express waiver shall affect any event or default other than the event or default specified in such waiver, and any such waiver, to be effective, must be in writing and shall be operative only for the time and to the extent expressly provided by the City or Foundation therein. A waiver of any covenant, term or condition contained herein shall not be construed as a waiver of any subsequent breach of the same covenant, term or condition.
21. Severability. It is mutually agreed that in case any provision of this Agreement is determined by any court of law to be unconstitutional, illegal or unenforceable, it is the intention of the Parties that all other provisions of this Agreement remain in full force and effect.
22. Agreement Governed by Laws of Wisconsin. This Agreement shall be deemed executed in the City of Madison and in the State of Wisconsin and governed by the laws of the State of Wisconsin.
23. Compliance with Applicable Laws. Foundation and their contractors, subcontractors, volunteers, and vendors shall become familiar with, and shall at all times comply with and observe, all federal, state and local laws, ordinances and regulations which in any manner affect the services or conduct of Foundation and their agents, volunteers and employees in the performance of this Agreement.
24. Authority. The Parties represent that they have the authority to enter into this Agreement. The person signing on behalf of Foundation represents and warrants that they have been duly authorized to bind Foundation and sign this Agreement on Foundation's behalf.
25. Entire Agreement. The entire agreement of the Parties is contained herein and this Agreement supersedes any and all oral contracts and negotiations between the Parties.
26. Designated Project Coordinator. The Foundation shall appoint a Project Coordinator for the Project, said individual who shall act as the Foundation's representative during the day-to-day construction of the Improvements to Crowley Station. Notwithstanding anything to the contrary set forth elsewhere in this Agreement, the Project Coordinator shall direct and exercise full management, control and supervision over all aspects of the design, contracting and construction of the Improvements contemplated by this Agreement, subject only to the requirement that all such improvements shall be consistent with the Plans approved by the City. Foundation shall inform the Parks Division of the Project Manager within ten (10) days of execution of this Agreement, and may change the Project Manager by written notice to the Parks Division at any time prior to final acceptance of the Improvements by the City.

27. Counterparts; Electronic Delivery. This Agreement and any document executed in connection herewith may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute the same document. Signatures on this Agreement may be exchanged between the parties by facsimile, electronic scanned copy (.pdf) or similar technology and shall be as valid as original; and this Agreement may be converted into electronic format and signed or given effect with one or more electronic signature(s) if the electronic signature(s) meets all requirements of Wis. Stat. ch. 137 or other applicable Wisconsin or Federal law. Executed copies or counterparts of this Agreement may be delivered by facsimile or email and upon receipt will be deemed original and binding upon the parties hereto, whether or not a hard copy is also delivered. Copies of this Agreement, fully executed, shall be as valid as an original.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their respective authorized representatives or proper officers as of the last date set forth below.

FOR MADISON PARKS FOUNDATION, INC.

Ty Beck, President

Date

FOR THE CITY OF MADISON

Satya Rhodes-Conway, Mayor

Date

Maribeth Witzel-Behl, City Clerk

Date

Countersigned:

David P. Schmiedicke, Finance Director

Date

Approved as to form:

Michael R. Haas, City Attorney

Date

Execution of this Agreement by Madison is authorized by Resolution Enactment No. RES 23-_____, ID No. _____, approved by the Board of Parks Commissioners on _____, 2023, the Water Utility Board on _____, 2023, and adopted by the Common Council of the City of Madison on _____.