



City of Green Bay
Department of Parks, Recreation & Forestry

DESIGN, CONSTRUCTION & DEDICATION AGREEMENT
BAY BEACH AMUSEMENT PARK
PLAYGROUND INSTALLATION

This Agreement is made this _____ day of October, 2023, by THE CITY OF GREEN BAY, a Wisconsin municipal corporation (City), and the Friends of Bay Beach, (FOBB), a Wisconsin 501(c)(3) charitable organization.

RECITALS

- A. The City is the Owner of the property located at 1313 Bay Beach Road, Green Bay, WI 54301 and generally known as Bay Beach Amusement Park (Bay Beach). Bay Beach is a 75 acre municipal owned amusement park featuring parking lots, walkways, shelters and classic amusement rides located along the shoreline of the Bay of Green Bay.
- B. FOBB is a Wisconsin 501 (c)(3) charitable organization dedicated to preserving, promoting and expanding Bay Beach.
- C. The City and FOBB have identified the need for the installation of an all inclusive playground at Bay Beach Amusement Park.
- D. The Friends of Bay Beach have proposed to purchase and install the playground equipment along with hiring contractors to install the associated site work. Several contractors will need to be selected and engaged. Work shall include the following elements; erosion control, site grading, gravel base, concrete flatwork, concrete footings, fencing, site restoration, stormwater management, playground structure installation and rubberized playground safety surfacing. The contractors engaged by the FOBB will coordinate closely with the City of Green Bay as it relates to site access, construction scheduling and all necessary inspection requirements by the City within the sole discretion of the City. The City will enter into an Access Agreement with each contractor.
- E. The City will install all site control construction fencing, coordinate securing all necessary permits and will coordinate with the various contractors as necessary.
- F. The City is in the process of engineering the site work associated with the playground and walkway installation. The City has already hired an engineering consultant to engineer the required stormwater management facility. The stormwater management engineering is currently in process. The City will apply for the necessary permits to complete this work. The FOBB agree to install the playground, rubberized surfacing, stormwater management facility, walks and fencing per the final City supplied construction plans and specifications. The City agrees to allow the work to be completed for these purposes, and FOBB agree to do the work at FOBB's sole expense and requests that the City accept the dedication and assume maintenance responsibilities upon completion and final inspection of the Project.

G. The City is agreeable to accepting the dedication and assumption of maintenance of the completed Project subject to the acceptance of the construction by the City.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are acknowledged, the parties agree as follows:

I. PURPOSE

- A. Incorporation of Proceedings, Exhibits, and Recitals. All motions adopted, approvals granted, minutes documenting such motions and approvals, and plans and specifications submitted in conjunction with any and all approvals as granted by the City, including but not limited to adopted or approved plans or specifications on file with the City, along with all of the Recitals set forth above, shall be incorporated into this Agreement by reference, upon attachment, or upon consent by amendment if necessary if not referenced or attached at the time of execution of this Agreement.
- B. Implementation Schedule. TIME IS OF THE ESSENCE with regard to all dates and time periods set forth and/or incorporated herein. Any material modification or deviation from an approved schedule described in this Agreement shall occur only upon approval of the City, with any such approvals required to be in writing as an amendment to this Agreement, and which approvals shall not be unreasonably withheld. City shall cooperate and act promptly with respect to any and all permits or approvals necessary for completion of the Project. Notwithstanding the above, this Agreement shall not limit the discretion of the City, or any of its duly appointed and authorized governing bodies, boards or entities, in approving or rejecting any aspect of the Project or improvements contemplated on or about the Property.
- C. Entire Agreement. This writing including all Exhibits hereto, and the other documents and agreements referenced herein, constitutes the entire Agreement between the parties hereto in respect to the Project and all prior letters of intent or offers, if any, are hereby terminated. This Agreement shall be deemed to include and incorporate such minutes, approvals, plans, and specifications, as referenced in this Agreement, and in the event of a conflict between this Agreement and any action of the City granting approvals or conditions attendant with such approval, the terms of this Agreement shall be deemed controlling and the City will take the necessary action to amend any conflicting approvals or conditions.

II. FINANCING

- A. Budget. The total cost of the Project is approximately \$1,300,000.
- B. Sources. The Project and all improvements and work required therewith shall be paid for exclusively by FOBB. In the event of Project cost overruns, FOBB shall be solely responsible for timely paying and/or securing all additional funds necessary to complete the Project.

III. OBLIGATIONS OF THE PARTIES

- A. Concept Plan. No concept plan is required. The City has already selected the location of the playground.
- B. Contractor. FOBB shall provide construction contractor's name, address, valid Wisconsin contractor's license, approved bidder's proof, evidence of insurance, and proper classifications to the City prior to construction. The Access Agreements include indemnity and hold harmless provisions in favor of the City. The Access Agreements must be signed prior to the contractor commencing work at Bay Beach.

- C. Construction Documents. The FOBB will install the site work per the City supplied engineered construction documents. Any deviations to the plans will need to be reviewed with the City prior to the work being done to ensure that the proposed changes do not affect the State ride plan approval process. Construction Plans and Specifications are attached as Attachment A.
- D. Design and Construction. FOBB shall cause to be designed and prepared under engineer's seal and signature, and to be constructed, the Project as defined in the recitals. In the event the Project will disturb or otherwise affect any existing City features, such work must also include all associated grading, removal and replacement of storm water runoff drainage impacted by the construction, and re-grading affected roads, substantially the same as detailed on the plans approved by the City. The City shall review and, if appropriate, approve the plans and specifications for the improvements as prepared by the FOBB's engineer. Construction of the Project shall conform to City and State of Wisconsin specifications and requirements. FOBB shall cause work to be halted and remedial measures to be taken to the City's satisfaction should the work be out of compliance with the plans and specifications, and/or standard construction practices.
- E. Inspection. FOBB shall provide for the inspection of construction, including administration, testing, and inspection, or other supervision of construction, by a registered engineer hired by FOBB and approved by the City, which approval will not be unreasonably withheld, to ensure construction is in conformance with the plans and specifications. The City shall provide periodic inspection of the improvements during the construction period by its Department of Public Works, Parks Department, and/or Inspections Department and the State Ride Inspector to ensure that construction is in conformance with the plans and specifications. The City agrees to notify FOBB upon completion of inspection if it determines that any or all of the improvements as constructed are not in conformance with the plans and specifications.
- F. Change Orders. After consultation and agreement with the City, FOBB shall execute change orders and resolve contract claims relating to design and construction of the Project. FOBB shall assume financial commitments resulting from any change order or resolution of a contract claim from construction of the Project.
- G. Permits and Use. FOBB will obtain from the City and all other appropriate governmental bodies (and all other councils, boards, and parties having a right to control, permit, approve, or consent to the development and use of the Property) all approvals and consents necessary to disturb, develop and/or use the Property as set forth above.
- H. Improvement of Property. FOBB shall promptly complete the Project. Substantial work on the Project shall be completed no later than June 21, 2024. FOBB shall provide an engineer's certification to the City that the Project and all improvements have been constructed in accordance with the approved plans and specifications, and shall furnish to the City as-built plans of the improvements within thirty (30) days of final acceptance.
- I. Maintenance and Repair. FOBB shall at all times keep and maintain, or cause to be kept and maintained, the property in good condition and repair, in a safe, clean, and attractive condition, and free of all trash, litter, refuse, and waste, subject only to demolition and construction activities contemplated by this Agreement.
- J. Easements. The City shall grant to FOBB such easements as are reasonably necessary for construction of the Project, including temporary construction and access easements.
- K. Insurance. Ensuring that all necessary insurance has been procured is the responsibility of FOBB. FOBB and each of its separate contractors and subcontractors shall purchase and maintain such

insurance as will protect him/her, and indemnify and save harmless the City from any and all claims for General and Automobile Liability and Worker's Compensation/Employers' Liability, as applicable, including claims for damages resulting in bodily injury, including but not limited to death, and property damage and arising out of or resulting from FOBB, its contractors and subcontractors' direct or indirect operations under this Agreement, whether such operations be performed by himself/herself or by any subcontractor or anyone directly or indirectly employed by any of them.

This insurance shall be written for not less than any limit of liability specified herein, or required by law, whichever is the greater, notwithstanding that the policy may have lower limits of liability applying elsewhere in the policy, and shall include contractual liability insurance as applicable to the FOBB's obligations.

FOBB, its contractors, and subcontractors' insurance shall always be primary with respect to the City's responsibilities under this Agreement. The City of Green Bay shall be named as additional insured on the types of insurance listed in this section.

FOBB, its contractors, and subcontractors' insurance shall contain a provision that provides thirty (30) days written notice of cancellation or change to the City.

No insurance required under this Agreement shall be carried with an insurer not authorized to do business in Wisconsin by the Wisconsin State Insurance Department. The City reserves the right to disapprove any insurance company.

Before commencement of construction activities on the Property, FOBB shall deliver to the City certificates of insurance, copies of endorsements, and other evidence of insurance requested by the City, which FOBB, its contractors, and subcontractors' are required to purchase and maintain, or cause to be purchased or obtained, in the types and amounts of coverage listed below, each of which shall name the City as additional insured parties.

Types of Insurance

1. *General Liability:*

a. Commercial General Occurrence policy, edition 2006 or 2010 including:

- i. Premises and Operations
- ii. Products and Completed Operations
- iii. Advertising and Personal Injury
- iv. Explosion, Collapse and Underground Hazard coverage
- v. Contractual Insurance in writing under General Liability
- vi. Broad Form Property Damage
- vii. Coverage for Independent Contractors
- viii. Care, Custody and Control coverages for City-owned materials at worksite
- ix. Endorsement naming the City of Green Bay, its employees, agents and assigns as Additional Insureds as respects work performed by the Contractor/Subcontractor for the City/Owner.

b. Limits of Liability:

Bodily Injury/Property Damage Combined Single Limits:

Per Occurrence \$1,000,000

Products/Completed Operations Aggregate	\$2,000,000
Personal Injury/ Advertising Injury	\$1,000,000
Fire Damage Limit	\$50,000
Medical Payments Limit	\$5,000
General Aggregate	\$2,000,000

5. *Umbrella Coverage:*

The Contractor shall provide \$2,000,000 for bodily injury, personal injury and property damage per occurrence in excess of coverage carried for Employer's Liability, Commercial General Liability, and Automobile Liability

6. *Builder's Risk Insurance:*

Before commencing construction of any improvements on the Property and during any construction activities contemplated by this Agreement, FOBB shall obtain and keep in full force and effect an all builders risk insurance policy for all portions of the Property affected by the Project with coverage equal to the total amount of the construction contracts for all such construction activities. Nothing in this Agreement is intended to relieve FOBB of its obligation to perform under this Agreement and, in the event of loss, FOBB shall use the proceeds of such insurance to promptly reconstruct the damaged or lost improvements.

L. General Indemnity.

1. Protection Against Losses. FOBB shall indemnify, defend and hold harmless the City, and its officers, employees, agents, attorneys, and insurers, from any and all suits, actions, legal or administrative proceedings, liabilities, claims, losses, damages, judgments or awards, costs or expenses, including reasonable attorneys' fees, of whatsoever nature and by whomsoever asserted, whether asserted by a third party or by a party to this Agreement (hereinafter "Losses"), directly or indirectly, arising out of, resulting from or in any way connected with:
 - a) Any breach by FOBB of the terms of this Agreement;
 - b) Any non-compliance with laws, ordinances, rules or regulations applicable to FOBB's obligations under this Agreement; or
 - c) Any governmental, regulatory or other proceedings to the extent any such proceedings result from FOBB's failure to comply with its obligations under this Agreement or otherwise;
 - d) Any act, omission, fault, or negligence of FOBB or of anyone acting under its direction or control or on its behalf, including its invitees.
 - e) Any and all claims arising out of or resulting pursuant to the design or construction of the improvements, and/or the performance of the work specified in this Agreement.

In any and all claims against the City, its officers, agents and employees by any employee of the FOBB, its contractors, subcontractors, anyone directly or indirectly employed by any of

them, or anyone for whose acts any of them may be liable, the indemnification obligation under this section shall not be limited in any way by any limitation of the amount or type of damages, compensation or benefits payable for or for FOBB, its contractors or any subcontractor under Workers' Compensation Acts, disability benefit acts or other employee benefit acts.

2. Mutual Indemnification. Each party shall defend, indemnify, and hold harmless the other party, its officers and employees, against all liability, claims, damages, losses or expenses arising out of bodily injury to persons or damage to property caused by, or resulting from, the actions and/or inactions of the indemnifying party's and/or its employees', agents' or subcontractors' own negligent and/or intentional wrongful acts, omissions or performance or failure to perform its obligations and duties under the terms and conditions of this Agreement. No party is required to indemnify any other party for the negligent or intentional acts, errors or omissions of the other party or their employees or agents.
 3. Indemnification Procedures. FOBB shall promptly assume full and complete responsibility for the investigation, defense, compromise and settlement of any claim, suit or action arising out of or relating to the indemnified matters following written notice thereof from the City, which notice shall be given by the City within ten (10) days of their knowledge of such claim, suit or action. Failure to provide such timely notice shall not eliminate FOBB's indemnification obligations to the City. Notwithstanding the foregoing, in its sole discretion and at its expense, the City may participate in or defend or prosecute, through their own counsel(s), any claim suit or action for which either of them is entitled to indemnification by FOBB; provided, however, that if the City is advised in writing by its legal counsel that there is a conflict between the positions of FOBB and the City, as appropriate, in conducting the defense of such action or that there are legal defenses available to the City different from or in addition to those available to FOBB, then counsel for the City, at FOBB's expense, shall be entitled to conduct the defense only to the extent necessary to protect the interests of the City. FOBB shall not enter into any compromise or settlement without the prior written consent of the City, as appropriate, which consent shall not be unreasonably withheld. The absence of a complete and general release of all claims against the City shall be reasonable grounds for the City to refuse to provide written consent to a compromise or settlement. If FOBB does not assume the defense of such claim, suit or action, FOBB shall reimburse the City for the reasonable fees and expenses of counsel(s) retained by the City, and shall be bound by the results obtained by the City; provided, however, that no such claim, suit or action shall be settled without FOBB's prior written consent, which consent shall not be unreasonably withheld. The absence of a complete and general release of all claims against FOBB shall be reasonable grounds for FOBB to refuse to provide written consent to a compromise or settlement.
 4. This indemnity provision shall survive the expiration or termination of this Agreement. Nothing herein is intended or can be construed as requiring the City to assume any liability resulting from the design or construction of the improvements.
- M. Final Acceptance. The City shall accept the improvements for continuous maintenance upon satisfactory completion of construction as determined by the City and confirm acceptance of the same in writing by the City's Director of Public Works. Under no circumstances shall the City be obligated to accept for maintenance any or all of the improvements if it deems that such improvements have not been satisfactorily constructed, as determined in its sole discretion. FOBB shall obtain lien waivers for all work completed on the improvements prior to final acceptance by the City. The Parties acknowledge and agree that the Project and all improvements are temporary in nature, and nothing is intended to impose any continuing obligations on the City other than maintenance, and only for so long as the improvements are utilized for a playground purposes.

IV. REPRESENTATIONS, WARRANTIES, AND COVENANTS

FOBB represents and warrants to the City as follows:

- A. No Material Change in Documents. All contract documents and agreements have been furnished to the City and are true and correct and there has been no material change in any of the same.
- B. Payment. FOBB shall pay for all work performed or materials furnished for the Project when and as the same become due and payable. FOBB shall not suffer any construction or other involuntary lien to be imposed upon the Property, except for liens for claims to payment that are subject to a bona fide dispute, and, in that case, such liens shall be removed by FOBB posting bond or other security, paying one hundred and twenty percent (120%) of the lien claimed into court, escrowing funds or promptly taking other steps to remove the lien of record. FOBB shall pay all other obligations relating to the Project, including all creditors holding liens or other secured interests against the Property when and as the same become due.
- C. Certification of Facts. No statement of fact by FOBB contained in this Agreement and no statement of fact furnished or to be furnished by FOBB to the City pursuant to this Agreement contains or will contain any untrue statement of a material fact or omits or will omit to state a material fact necessary in order to make the statements herein or therein contained not misleading.
- D. No Litigation. There is no litigation or proceeding pending or threatened against or affecting FOBB that would adversely affect the Project, the ability of FOBB to complete the Project or the ability of FOBB to perform its obligations under this Agreement.
- E. No Default. No default, or event that with the giving of notice or lapse of time or both would be a default, exists under this Agreement, and FOBB is not in default (beyond any applicable period of grace) of any of its obligations under any other material agreement or instrument to which FOBB is a party or an obligor.
- F. Compliance with Laws and Codes. The Project, when completed, will conform and comply in all respects with all applicable laws, rules, regulations and ordinances, including without limitation, all building codes and ordinances of the City. FOBB will comply with, and will cause the Project to be in compliance with all applicable federal, state, local and other laws, rules, regulations and ordinances, including without limitation, all environmental laws, rules, regulations and ordinances.

V. DEFAULT

- A. Default. Either party shall have all rights and remedies available under law or equity with respect to any failure of the other party to perform their obligations under this Agreement, but only after providing the defaulting party with notice of such default and a failure by the defaulting party to commence attempts to cure such default within the thirty (30)-day notice period. If the defaulting party commences cure within the thirty (30)-day notice period and thereafter reasonably and continuously takes action to complete such cure, then the failure to perform shall not be an Event of Default.
- B. Remedies Upon Default. In the event of the occurrence of an Event of Default, the non-defaulting party may in its discretion:
 - 1. Termination. Terminate this Agreement;
 - 2. Damages. Sue for damages;

3. Specific Performance. Sue for specific performance;
 4. Other Remedies. Pursue any other remedies available to the parties at law or in equity.
- C. Limitation of Damages. The foregoing notwithstanding, none of the parties shall be liable to any other party for any incidental, consequential, indirect, punitive or exemplary damages. All claims and damages asserted against the City shall be subject to statutory protections of municipalities and their officials and employees, including the immunity and limitations set forth in §893.80 Wis. Stats.
- D. No Waiver. Any delay in instituting or prosecuting any actions or proceedings or otherwise asserting the rights granted in this Agreement, shall not operate as a waiver of such rights to, or deprive it of or limit such rights in any way, nor shall any waiver in fact made with respect to any specific default, be considered or treated as a waiver of any rights with respect to other defaults or with respect to the particular default except to the extent specifically waived in writing.
- E. Remedies Cumulative. Except as expressly provided otherwise in this Agreement, the rights and remedies of the parties to this Agreement, whether provided by law or by this Agreement, shall be cumulative, and the exercise by any party of any one or more of such remedies shall not preclude the exercise of it, at the same or different times, of any other such remedies for any other default or breach by any other party.

VI. TERMINATION

- A. Date of Termination. This Agreement shall terminate upon the earliest of the date:
1. This Agreement is terminated because of an Event of Default;
 2. The parties agree in writing to terminate this Agreement.
- B. Survival of Certain Provisions. Sections III.L., III.M., IV. F., V. C., VI. B., and VII. C. shall survive the termination of this Agreement.

VII. MISCELLANEOUS PROVISIONS

- A. Assignment. FOBB may not assign its rights under this Agreement without the express prior written consent of the City.
- B. Nondiscrimination. In the performance of work under this Agreement, neither party shall discriminate against any employee or applicant for employment nor shall the Property or any portion thereof be sold to, leased or used by any party in any manner to permit discrimination or restriction on the basis of the basis of race, color, national or ethnic origin, ancestry, age, religion or religious creed, disability or handicap, sex or gender (including pregnancy), gender identity and/or expression, sexual orientation, military or veteran status, genetic information, or any other characteristic protected under applicable federal, state or local law. Retaliation is also prohibited. The construction of the Property shall be in compliance with all effective laws, ordinances and regulations relating to discrimination on any of the foregoing grounds.
- C. No Personal Liability. Under no circumstances shall any trustee, officer, official, commissioner, director, member, partner or employee of the City or FOBB have any personal liability arising out of this Agreement, and no party shall not seek or claim any such personal liability.

- L. Severability. If any provision of this Agreement shall be determined to be unenforceable as applied in any particular case or in all cases because it conflicts with any other provision or provisions hereof or any constitution or statute or rule of public policy, or for any other reason, such circumstance shall not have the effect of rendering the provision in question inoperative or unenforceable in any other case or circumstance, or of rendering any other provision or provisions herein contained unenforceable to any extent whatever.
- M. Recording of Agreement. The City may record this Development Agreement or a Memorandum of this Agreement with the Register of Deeds for Brown County, Wisconsin. Upon request of the City, FOBB shall execute and deliver to the City any such Memorandum or any other document in connection with such recording.
- N. No Construction Against Drafter. This Agreement is a product of the negotiation and drafting of attorneys for the parties, and, as such, the rule of construing ambiguous contracts against the drafter shall not apply to this Agreement.
- O. Venue. The venue for any proceeding involving the negotiation, drafting, interpretation or enforcement of this Agreement shall be the circuit court for Brown County, Wisconsin, all other venues being inappropriate for any such proceeding.
- P. Signatures and Counterparts. Electronic, facsimile and photocopy signatures shall have the same effect as original signatures.

[Signature pages follow]

Signature page 1 of 2

IN WITNESS WHEREOF, the parties to this Agreement have caused this instrument to be signed by duly authorized representatives of City and FOBB as of the day and year first written above.

THE CITY OF GREEN BAY

By: _____
Eric Genrich, Mayor

By: _____
Celestine Jeffreys, Clerk

Signature page 2 of 2

THE CITY OF GREEN BAY and FRIENDS OF BAY BEACH

FRIENDS OF BAY BEACH

By: _____
Dave Charles, President

ACKNOWLEDGMENT

STATE OF WISCONSIN)
) SS
COUNTY OF BROWN)

Personally came before me this _____ day of _____ 2019, Dave Charles, President of the Friends of Bay Beach, a Wisconsin 501 (c)(3) charitable organization, to me known to be the person who executed the foregoing instrument and acknowledged the same.

* _____
Notary Public, _____ County, Wisconsin
My Commission Expires _____

EXHIBIT A