CITY OF WEST DES MOINES
CITY COUNCIL MEETING COMMUNICATION

DATE: **August 19, 2019**

ITEM: Resolution - Approval and Acceptance of Agreement Between the City of West Des Moines and Richard Hurd Regarding the Construction and Naming of the City Campus Amphitheater and Revoking Approval of the Previous Agreement

FINANCIAL IMPACT: $850,000 contribution to City

SYNOPSIS: Representatives of the City and Richard Hurd have negotiated the attached Agreement in which Hurd will provide in-kind funding of $850,000 for the construction of the City Campus Amphitheater. In recognition of the donation, the City will grant the Hurd family naming rights to the facility, which will be known as the Jamie Hurd Amphitheater in honor of Richard and Linda Hurd's daughter.

Plans for construction of the Amphitheater have been prepared by the City in three divisions, with the labor and materials in Division 1 to be provided by Hurd. The schedule and coordination of construction will be overseen by the City, with ownership of all labor and materials provided by Hurd to be conveyed to the City at the conclusion of construction.

Subsequent to its approval on August 5 by the City Council, Richard Hurd proposed changes which are contained in this Agreement. The attached Resolution approves this Agreement and rescinds the previous Agreement approved August 5.

OUTSTANDING ISSUES (if any): None.

RECOMMENDATION: Adopt Resolution Approving and Accepting the Agreement Between the City of West Des Moines and Richard Hurd Regarding the Construction and Naming of the City Campus Amphitheater and Revoking Approval of the Previous Agreement

Lead Staff Member: Sally Ortgies, Director of Parks and Recreation

STAFF REVIEWS

Department Director	
Appropriations/Finance	
Legal	RJS
Agenda Acceptance	RTJ

PUBLICATION(S) (if applicable)

Published In	
Dates(s) Published	

SUBCOMMITTEE REVIEW (if applicable)

Committee			
Date Reviewed			
Recommendation	Yes	No	Split

RESOLUTION NO._____

RESOLUTION APPROVING AND ACCEPTING THE AGREEMENT BETWEEN THE CITY OF WEST DES MOINES AND RICHARD HURD REGARDING THE CONSTRUCTION AND NAMING OF THE CITY CAMPUS AMPHITHEATER AND REVOKING APPROVAL OF THE PREVIOUS AGREEMENT

WHEREAS, the City of West Des Moines has undertaken the planning and proposed construction of an amphitheater to be located on the City Campus; and

WHEREAS, Richard Hurd has offered an in-kind donation of labor and materials valued at $850,000 for the construction of a portion of the amphitheater; and

WHEREAS, in recognition of the donation, the City will grant Hurd naming rights to the facility, which will be known as the "Jamie Hurd Amphitheater"; and

WHEREAS, to memorialize the intent of the City and Hurd, the parties have negotiated an agreement setting forth the terms and conditions for the construction of the amphitheater and the donation of the labor and materials; and

WHEREAS, the previous proposed agreement between the parties regarding the construction and naming of the amphitheater approved on August 5, 2019 by the City Council but not approved by Hurd is hereby rescinded in its entirety and shall have no force or effect whatsoever.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF WEST DES MOINES, IOWA THAT:

1. The *Agreement Between the City of West Des Moines and Richard Hurd Regarding the Construction and Naming of the City Campus Amphitheater* is approved.

2. The Mayor is authorized to sign the Agreement and the City Clerk is directed to attest to the Mayor's signature.

3. The previous Agreement Between the City of West Des Moines and Richard Hurd Regarding the Construction and Naming of the City Campus Amphitheater approved by the City Council on August 5, 2019 is rescinded in its entirety and shall be of no force or effect whatsoever.

PASSED AND ADOPTED this 19th day of August, 2019.

_____
Steven K. Gaer, Mayor

ATTEST:

_____
Ryan T. Jacobson
City Clerk

AGREEMENT BETWEEN THE CITY OF WEST DES MOINES AND RICHARD HURD REGARDING THE CONSTRUCTION AND NAMING OF THE CITY CAMPUS AMPHITHEATER

This Agreement (this "Agreement") is made on the ___ day of August, 2019 by and between Richard Hurd, an individual ("Hurd" or "Donor"), and the City of West Des Moines, a municipal corporation organized under the laws of the State of Iowa (the "City").

The parties acknowledge that the City is constructing an amphitheater (the "Amphitheater") to be located on the West Des Moines City Campus (the "Project" or "Property"). The parties further acknowledge that Hurd has agreed to provide an in-kind donation of labor and materials for the construction of a portion of the amphitheater and, in consideration for the donation of the labor and materials, the City has agreed to grant Hurd naming rights for the amphitheater to be "Jamie Hurd Amphitheater".

The purpose of this Agreement is to set forth the terms and obligations of the parties regarding the donation to be made by Hurd to the City and the granting of naming rights to be provided by the City to Hurd.

ARTICLE I

A. RIGHTS AND OBLIGATIONS OF HURD.

1. Hurd shall provide an in-kind donation consisting of construction services, labor and materials (the "In-kind Donation") for the construction of a portion of the Amphitheater (the "Hurd Work"). Hurd and the City hereby agree that the value of the In-kind Donation shall be $850,000.

2. Hurd agrees that the scope of the Hurd Work is the "Division 1" work described in the construction plans and specifications ("Construction Documents") attached as Attachment A and made part of this Agreement. Hurd agrees to perform the Hurd Work according to and in conformance with the construction schedule and the Construction Documents. No substantial change or deviation from the Construction Documents shall be allowed unless authorized by the amphitheater project architect and approved by the City.

3. Hurd shall ensure that the site has all debris and excess material related to the Hurd Work removed upon completion of the Hurd Work. The Hurd Work shall be deemed to be complete when the City accepts that it has been fully implemented according to the Construction Documents.

4. Hurd shall maintain all applicable licenses, permits, and other authorizations necessary for or related to the Hurd Work. Any and all fees for all licenses, permits and other similar authorizations imposed by or under the control of the City for the Hurd Work shall be waived.

5. Hurd shall provide and make available all records relating to the Hurd Work which are in Hurd's possession or control to any governmental authority for inspection upon written request or by operation of law.

6. Hurd shall have the right to review and approve all signage relating to the Amphitheater, including the signage identifying the Amphitheater as the "Jamie Hurd Amphitheater." Such approval shall not be unreasonably withheld.

7. Hurd shall convey by quitclaim deed to the City all right, title and interest in the materials, construction and services relating to the Hurd Work at the conclusion of the Project.

8. Hurd shall provide the City, at no cost, a license to use the name "Jamie Hurd Amphitheater" during the period the Property is used as an amphitheater. The license shall entitle the City to use the name "Jamie Hurd Amphitheater" on all material, documents or content related to or in conjunction with the Amphitheater. The Amphitheater shall only be known as the "Jamie Hurd Amphitheater" while it is used as an amphitheater.

9. The Hurd Family, as defined below, shall have the right to review and approve any change of use of the Amphitheater from its initial use as a venue for community events and entertainment and shall have the right to approve removal of the Amphitheater from the Property. The right of review and approval under this subsection, which shall not be unreasonably withheld, shall be granted to Richard Hurd, Linda Hurd, Richie Hurd, Daniel Hurd and Kristen Hurd (collectively the "Hurd Family") and shall terminate upon the death of the last of these individuals.

10. Hurd shall abide by all other terms and conditions set forth in this Agreement.

ARTICLE II

A. RIGHTS AND OBLIGATIONS OF THE CITY.

1. The City shall develop, at its sole cost, all documents required for the design and construction of the Amphitheater, including the construction schedule and Construction Documents. Hurd and the City shall mutually agree to the construction schedule relating to the Hurd Work. Such approval shall not be unreasonably withheld.

2. The City shall provide Hurd construction administrative assistance regarding performing the Hurd Work in compliance with federal, state, local and city regulations and procedures.

3. The City shall grant Hurd a temporary, non-exclusive license to access and work on the Property to complete the Hurd Work.

4. The City shall grant Hurd the exclusive right to designate the name of the Amphitheater, which shall be known as the "Jamie Hurd Amphitheater." The City shall maintain the sole right to grant event sponsorship rights to third parties and shall maintain the sole right to grant additional naming rights to third parties with the approval of Hurd, which shall not be unreasonably withheld, for sub-components of the Amphitheater (i.e., stage, seating, etc.).

5. The City shall include Hurd and his family in a groundbreaking ceremony and/or dedication of the Jamie Hurd Amphitheater.

6. The City shall provide appropriate written acknowledgement of Hurd's donation upon completion of the Hurd Work and acceptance by the City.

7. The City shall be responsible for the completion of "Division 2", "Division 3" and all other work (excluding only the Hurd Work) relating to the construction of the Amphitheater according to the construction schedule and the Construction Documents.

8. The City shall have the sole right and responsibility to program, operate and maintain the Amphitheater.

9. The City shall abide by all other terms and conditions set forth in this Agreement.

ARTICLE III

A. SPECIAL CONDITIONS.

1. Dispute Resolution. In the event of a delay or other circumstance attributable to or caused by the actions of the contractors, material suppliers or others performing the Hurd Work and which substantially affect the ability of the City to maintain the construction schedule, the City shall have the right to provide assistance to or suspend the work of the contractor in order to mitigate the effect of the delay.

2. Term. The name of the Amphitheater shall be the "Jamie Hurd Amphitheater" for the life of the physical amphitheater structure to be constructed on the Property unless the name is removed by mutual agreement of the parties, their heirs, successors or assigns. Each other provision of this Agreement shall terminate upon each provision's completion or fulfillment, except for Article I(A)(4), A(9), A(10), , Article II(A)(4), A(-87), A(9) and Article III(B)(6), which shall survive termination of this Agreement.

B. GENERAL CONDITIONS.

1. Performance. The Hurd Work shall be performed in a workmanlike manner and shall be performed at such time or times and in such a manner that shall not unreasonably interrupt or interfere with the normal use of adjacent property of the City or the West Des Moines Community School District, except as provided in the Construction

Documents. Ingress and egress to the Project and storage and use of equipment and materials shall be undertaken in accordance with the City's policy and regulation and the Construction Documents.

2. Title and Ownership. Full and complete title, ownership and use of the Property, including the completed Amphitheater, are reserved to the City, its successors or assigns, subject to the right, permission and authority expressly granted herein. The City maintains the sole discretion and authority to further develop, expand or change all or part of the Amphitheater and the area within and surrounding the Amphitheater, or to alter, reduce or remove all or part of the Amphitheater and the area within and surrounding the Amphitheater subject to Section IA(9) above.

3. Assignment. The parties shall not assign, transfer, mortgage, pledge or sublease this Agreement or any of its rights and privileges hereunder without first securing the written consent of each other party hereto for each assignment, transfer, mortgage, pledge or sublease. Any purported assignment, transfer, mortgage, pledge or sublease made without such written consent shall be null and void.

4. Compliance and Consultation. Hurd shall follow and comply with the Construction Documents and meet the specifications contained therein. The City shall have representatives present during the construction to consult with representatives of Hurd on implementing the plans and meeting the specifications.

5. Insurance. Hurd shall cause each contractor performing the Hurd Work to provide and maintain at all times during the process of the Hurd Work and furnish the City with proof of coverage on:

   a. Builder's risk insurance, written on the "Builder's Risk–Completed Value Basis," in an amount equal to the full replacement cost of the Hurd Work then completed, and with coverage available in non-reporting form on the "all risk" form of policy.

   b. Comprehensive general liability insurance (including operations, contingent liability, operations of subcontractors, completed operations, and contractual liability insurance) with limits against bodily injury and property damage of at least $1,000,000 for each occurrence. The City shall be named as an additional insured for the City's liability or loss arising out of or in any way associated with the Hurd Work and to the extent arising out of any act, error, or omission of Hurd, its employees, contractors, subcontractors, agents or anyone else for whose acts Hurd may be held responsible (with coverage to the City at least as broad as that which is provided to Hurd and not lessened or avoided by endorsement). The policy shall contain a "severability of interests" clause and provide primary insurance over any other insurance maintained by the City.

   c. Workers' compensation insurance with at least statutory coverage.

   Hurd agrees to notify the City immediately in the case of damage exceeding $25,000 in amount to, or destruction of, the Hurd Work or any portion thereof resulting from

fire or other casualty. Net proceeds of any such insurance shall be paid directly to Hurd (as applicable to the specific policy), and Hurd, as applicable, shall forthwith repair, reconstruct, and restore the Hurd Work to substantially the same or an improved condition or value as existed prior to the event causing such damage and, to the extent necessary to accomplish such repair, reconstruction and restoration, Hurd shall apply the net proceeds of any insurance relating to such damage received by Hurd to the payment or reimbursement of the costs thereof.

Hurd agrees to complete the repair, reconstruction, and restoration of the Hurd Work, whether or not the net proceeds of insurance received by Hurd for such purposes are sufficient.

6. Hold Harmless. Each party shall indemnify and hold the other party harmless from and against any and all claims, demands, causes of action, liability, loss, damage, or injury ("claims"), both to person and property, arising out of or related to this Agreement, to the extent such claims are attributable to the negligent or willful misconduct of the indemnitor; provided, indemnitee gives the indemnitor prompt notice of any such claims and all necessary information and assistance so that indemnitor, at its option, may defend or settle such claims and indemnitee does not take any adverse position in connection with such claims. In the event that any such liability, loss, damage or injury is caused by the joint or concurrent negligence of both parties, the loss, expense or claim shall be borne by each party in proportion to its negligence.

7. Event of Default.

Events of Default Defined. The following shall be "Events of Default" under this Agreement and the term "Event of Default" shall mean, whenever it is used in this Agreement, any one or more of the following events during the term of this Agreement:

a. Failure by Hurd to cause the Hurd Work to be completed or failure by the City to cause the construction of the Project to be completed pursuant to the terms and conditions of this Agreement;

b. Failure by Hurd or the City to comply with the terms and conditions of this Agreement, as applicable; or

c. Any representation or warranty made by Hurd or the City in this Agreement or in any written statement or certificate furnished by Hurd or the City pursuant to this Agreement which proves to have been incorrect, incomplete or misleading in any material respect on or as of the date of the issuance or making thereof.

Remedies on Default. Whenever Hurd commits an Event of Default, the City may take any one or more of the following actions after the giving of thirty (30) days' written notice to Hurd of the Event of Default and the Event of Default has not been cured within said thirty (30) days, or, if the Event of Default cannot reasonably be cured

within thirty (30) days, Hurd does not provide assurances reasonably satisfactory to the City that the Event of Default will be cured as soon as reasonably possible:

a. The City may suspend its performance under this Agreement until it receives assurances from Hurd, deemed adequate by the City, that Hurd will cure the default and continue its performance under this Agreement; or

b. The City may terminate this Agreement.

Whenever the City commits an Event of Default, Hurd may, after the giving of thirty (30) days' written notice to the City of the Event of Default and the Event of Default has not been cured within said thirty (30) days or, if the Event of Default cannot reasonably be cured within thirty (30) days, the City's failure to commence cure of such Event of Default within said thirty (30) days, the City does not provide assurances reasonably satisfactory to Hurd that the Event of Default will be cured as soon as reasonably possible, Hurd may terminate this Agreement and the Hurd work and/or pursue any right or remedy available at law or in equity.

If the City defaults in the initial construction of the Amphitheater, the City shall surrender its right to use the name "Jamie Hurd Amphitheater" and will fully reimburse Hurd or Hurd's contractors for the actual cost of all work performed.

No Remedy Exclusive. Except as otherwise expressly provided in this Agreement, no remedy herein conferred upon or reserved to either party hereto is intended to be exclusive of any other available remedy or remedies, but each and every remedy shall be cumulative and shall be in addition to every other remedy given under this Agreement or now or hereafter existing at law or in equity or by statute. Except as otherwise expressly provided in this Agreement, no delay or omission to exercise any right or power accruing upon any default shall impair any such right or power or shall be construed to be a waiver thereof, but any such right and power may be exercised from time to time and as often as may be deemed expedient.

8. Force Majeure. Neither party shall be liable in damages or have the right to terminate this Agreement for any delay or default in performing hereunder if such delay or default is caused by conditions beyond its control including, but not limited to acts of God, government restrictions (including the denial or cancellation of any export or other necessary license), wars, insurrections and/or any other cause beyond the reasonable control of the party whose performance is affected.

9. Liens. Hurd shall not permit any notice of lien or charge to attach to the improvements, the premises upon which the services are being performed or against any funds held by the City or an asset of the City. If any lien does so attach, Hurd shall promptly procure its discharge and hold the City harmless from any claims, losses, costs, damages or expenses (including attorney's fees) incidental thereto.

C. MISCELLANEOUS CONDITIONS.

1. Parties to the Agreement. Any and all references in this Agreement to Hurd and/or the City include, but are not limited to, each party's officials, employees, contractors and sub-contractors, agents, heirs or successors and assigns, and shall be read in accord with the context in which the reference is made.

2. Amendments. Either party may request changes to this Agreement. Any changes, modifications, revisions or amendments to the Agreement which are mutually agreed upon by and between the parties shall be incorporated by written instrument, and effective when executed and signed by all parties to this Agreement.

3. Assignment. Neither party may assign or transfer the responsibilities or agreement made herein without the prior written consent of the non-assigning party, which approval shall not be unreasonably withheld.

4. No Third-Party Beneficiaries. Except as expressly contemplated hereunder with respect to Hurd, no rights or privileges of any party hereto shall inure to the benefit of any landowner, contractor, subcontractor, material supplier, or any other person or entity, and no such contractor, landowner, subcontractor, material supplier, or any other person or entity shall be deemed to be a third-party beneficiary of any of the provisions contained in this Agreement.

5. Governing Law. This Agreement shall be construed in accordance with the laws of the State of Iowa.

6. Notices. All notices and communication with reference to the Agreement shall be delivered by or to the parties listed below:

Hurd	The City
Richard Hurd Hurd Real Estate Services 2000 Fuller Road West Des Moines, IA 50265 (515) 222-1102 richard.hurd@hurdrealty.com	Sally Ortgies, Director West Des Moines Parks & Recreation P.O. Box 65320 West Des Moines, IA 50265 (515) 222-3444 sally.ortgies@wdm.iowa.gov

7. Severability. If any provision of this Agreement is found to be invalid or unenforceable for any reason, the remaining provisions shall continue to be valid and enforceable, and either party may renegotiate the terms affected by the severance.

8. Entirety of Agreement. This Agreement constitutes the entire agreement between the parties relating to this Project and supersedes all prior or simultaneous representations, discussions, negotiations, agreements or memorandums, whether written or oral.

9. Approval of Agreement. This Agreement shall have no force or effect whatsoever until approved by the City Council of the City.

RICHARD HURD, Donor

_____
Richard Hurd

STATE OF IOWA)
) SS
COUNTY OF POLK)

This record was acknowledged before me by Richard Hurd on the ___ day of August, 2019.

_____
Notary Public

CITY OF WEST DES MOINES, IOWA

_____
Steven K. Gaer, Mayor

ATTEST:

_____
Ryan Jacobson, City Clerk

STATE OF IOWA)
) SS
COUNTY OF POLK)

On this _____ day of _____, 2019, before me a Notary Public in and for said State, personally appeared Steven K. Gaer and Ryan T. Jacobson, to me personally known, who being duly sworn, did say that they are the Mayor and City Clerk, respectively, of the City of West Des Moines, Iowa, a municipality created and existing under the laws of the State of Iowa, and that the seal affixed to the foregoing instrument is the seal of said municipality, and that said instrument was signed on behalf of the municipality by authority of its city council as contained in Resolution _____ on August 19, 2019 and said mayor and city clerk acknowledged said instrument to be the free act and deed of said municipality by it voluntarily executed.

_____
Notary Public