CITY OF WEST DES MOINES
CITY COUNCIL MEETING COMMUNICATION

ITEM: Approving 28E Agreement with the Community Foundation of Greater Des Moines to Facilitate Development of a Proposed Park/Arboretum Project at 2296 Grand Ave

DATE: December 18, 2023

FINANCIAL IMPACT: Agreement allows the Foundation to serve as custodian for funds raised which are designated towards the project, and allows the Foundation to disburse funds to pay contractors and other parties for costs related to the project. The Foundation will be reimbursed for its costs of administration of direct expenses including an administrative fee as defined in fund.

BACKGROUND: On June 19, 2023, the City Council approved purchasing 19.33 acres of property located adjacent to Fuller Road and Grand Avenue (locally known as the Nazarene Church Camp) from I2 Tech, LLC. The purpose of the purchase is to allow the eventual construction of a city park including an arboretum adjacent to the Jordan House property. An advisory committee, consisting of lead donors to the project as well as representatives of the City and the Community Foundation (West Des Moines) will be tasked with overseeing fundraising and determining the scope of the project.

Funds raised will be deposited with the Community Foundation, which will disburse those funds to contractors and others performing work on the project as recommendations for payments are received from the advisory committee.

OUTSTANDING ISSUES (if any): None

RECOMMENDATION: Adopt Resolution approving the 28E Agreement and authorize the Mayor to sign on behalf of the City.

Lead Staff Member: Tom Hadden, City Manager

STAFF REVIEWS

Department Director	Tom Hadden, City Manager
Appropriations/Finance	
Legal	
Agenda Acceptance	

PUBLICATION(S) (if applicable)

Published In	
Dates(s) Published	

SUBCOMMITTEE REVIEW (if applicable)

Committee			
Date Reviewed			
Recommendation			

RESOLUTION APPROVING AND AUTHORIZING THE EXECUTION OF A CHAPTER 28E AGREEMENT BY AND BETWEEN THE COMMUNITY FOUNDATION OF GREATER DES MOINES AND THE CITY OF WEST DES MOINES

WHEREAS, The City of West Des Moines owns property located at 2296 Grand Avenue and desires to create a city park and arboretum through contributions from donors; and

WHEREAS, The Community Foundation of Greater Des Moines desires to establish a component fund which may receive donations from donors for the support of the project; and

WHEREAS, The City desires to cooperate with the Community Foundation of Greater Des Moines as an organization that promotes charitable giving and connects donors and projects that improve quality of life, with respect to the Fund, its donations, administration and distribution, and the Fund's support of the Project, all for the ultimate benefit of the citizens of West Des Moines.

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

1. The 28E Agreement for the city park and arboretum project is hereby approved.

2. The Mayor is authorized to sign the 28E Agreement and the City Clerk is directed to attest to the Mayor's signature on the Agreement.

PASSED AND APPROVED this 18th day of December, 2023.

_____
Russ Trimble, Mayor

ATTEST:

_____
Ryan T. Jacobson
City Clerk

AGREEMENT FOR
WEST DES MOINES PARK (ARBORETUM) PROJECT
BETWEEN
CITY OF WEST DES MOINES
AND
COMMUNITY FOUNDATION OF GREATER DES MOINES

This Agreement made and entered into this ___ day of _____, 2023, by and between the City of West Des Moines, Iowa, hereinafter called the "CITY", whose address for the purpose of this Agreement is 4200 Mills Civic Parkway, West Des Moines, Iowa, 50265, and the Community Foundation of Greater Des Moines, an Iowa non-profit corporation hereinafter called the "FOUNDATION," whose address for the purpose of this Agreement is 1915 Grand Avenue, Des Moines, Iowa 50309.

WHEREAS, the CITY owns 2296 Grand Avenue, West Des Moines, Iowa (the "Property") and desires to create a city park and arboretum (the "Project") through contributions from donors; and

WHEREAS, the FOUNDATION desires to establish a component fund (the "Fund") which may receive donations from donors for the support of the Project; and

WHEREAS, Chapter 28E of the Iowa Code 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 exercise or capable of being exercise by the public agency; and

WHEREAS, pursuant to its authority under Chapter 28E, the CITY desires to cooperate with the FOUNDATION as an organization that promotes charitable giving and connects donors and projects that improve quality of life, with respect to the Fund, its donations, administration and distribution, and the Fund's support of the Project, all for the ultimate benefit of the citizens of West Des Moines,

NOW, THEREFORE, in consideration of the mutual covenants, promises, and agreements hereinafter set forth, the parties agree as follows:

I. THE PROJECT

1. The Project shall improve the Property to facilitate its intended future use as a public park and arboretum. The West Des Moines Community Foundation, an affiliate of the FOUNDATION, will establish the West Des Moines Arboretum Project Advisory Committee (the "Advisory Committee") committed to undertaking the Project, with input from the CITY , to improve the Property by serving as the Project Representative (the "Project Representative").

2. The Project has an estimated cost of $5M and will have construction phased in accordance with the amount of funds received in the Fund. The timing of construction will be coordinated between the Project Representative and the CITY.

II. THE FUND

1. The Fund shall be established as a component charitable fund of the FOUNDATION to be governed by the Fund Agreement set forth on Exhibit A, hereto.

2. The Fund shall accept pledges of donations from companies and individuals in support of the Project subject to the FOUNDATION's Gift Acceptance Policies. The Fund assets shall be used exclusively to support the Project until its completion, with any remaining Fund balance, if any, to be distributed to the CITY upon closure of the Fund.

3. The parties expressly agree that construction contracts will not be awarded for the Project unless there are adequate funds in the Fund to cover the costs of the lowest responsive, responsible bid amount.

4. The parties expressly agree that the FOUNDATION is under no obligation to secure donations or pledges to the project and the FOUNDATION is under no obligation to pay Project costs that exceed the amount available in the Fund.

III. OBLIGATIONS OF THE FOUNDATION

1. The FOUNDATION agrees to cause distributions from the Fund to pay third parties for costs related to the Project based on the recommendations of the Project Representative. For the avoidance of doubt, the FOUNDATION shall have no obligation in excess of the Fund assets.

2. The FOUNDATION agrees to establish and maintain records that accurately account for all financial activities associated with the Fund, including revenues and income received and expenses paid.

3. The FOUNDATION will be reimbursed from the Fund for all reasonable direct expenses incurred for its activities associated with its administration and management of the Fund including an administrative fee as defined in the Fund.

4. Upon reasonable advance notification and request in writing from the CITY, the FOUNDATION agrees to provide access to all of its records associated with the Fund to CITY auditing personnel, or to the audit firm chosen by the CITY for the purposes of an audit.

5. The FOUNDATION agrees to provide to the CITY within 30 days after the end of the completed Project a report on the status and financial position of the Fund. Unless the CITY objects to such report within 30 days after its receipt, the Fund shall be closed and the FOUNDATION shall pay the remaining Fund balance, if any, to the CITY designated for the Project.

6. The FOUNDATION agrees to obtain and maintain, during the term of this Agreement, the following insurance coverage:

A. Commercial General Liability insurance, written on an occurrence Basis, with minimum limits of $1 million coverage each occurrence; $2 million coverage in the aggregate.

B. Workers Compensation Insurance in accordance with statutory requirements of the state and Employers Liability Insurance with limits of not less than:

Bodily Injury by Accident	$500,000	Each Accident
Bodily Injury by Disease	$500,000	Policy Limit
Bodily Injury by Disease	$500,000	Each Employee

C. Comprehensive Automobile Liability covering owned, hired and non-owned vehicles and trailers in the minimum amount of $1 million per occurrence Bodily Injury and Property Damage combined single limits.

D. Umbrella Liability Insurance with a minimum combined single limit of $1 million each occurrence/aggregate where applicable to be excess of the coverages and limits required in A, B and C above.

II. OBLIGATIONS OF THE CITY.

1. The CITY agrees to appoint a member to the Advisory Committee to provide input to the Project.

2. The CITY agrees to use all funds received from this Fund exclusively for the Project.

3. The CITY agrees to accept ownership, management and control of the improvements to the Property facilitated by the Project and to maintain such improvements upon the Project's completion.

III. TERMINATION.

This Agreement shall terminate upon the FOUNDATION's final distribution of Fund assets and report to the CITY, except that the FOUNDATION shall be required to keep all records relating to the Fund, for a period of 3 years after the date that the Fund is closed.

IV. MISCELLANEOUS.

A. Chapter 28E Provisions.

No separate legal or administrative entity is created by this Agreement, and the arrangement contemplated hereunder is not intended to acquire, hold, or dispose of real or personal property or necessitate a separate budget. The City Manager of the CITY, or his designee, shall serve as the "administrator" of this Agreement as contemplated by Iowa Code §28E.6.

B. Mailing of Notices.

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 CITY:
City of West Des Moines
P.O. Box 65320
West Des Moines, IA 50265
Attention: City Clerk

If to the FOUNDATION:
Community Foundation of Greater Des Moines
1915 Grand Avenue
Des Moines, IA 50309
Attention: Chief Financial & Administrative Officer
Email: jones@desmoinesfoundation.org

All notices shall be deemed given on the day of mailing or emailing. Either of the parties 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.

C. Amendment.

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

D. Binding Nature of Agreement.

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

E. Waiver of Compliance.

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

F. 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.

G. 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.

H. 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 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.

I. 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.

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

CITY OF WEST DES MOINES

ATTEST:

Russ Trimble, Mayor

Ryan T. Jacobson, City Clerk

COMMUNITY FOUNDATION OF GREATER DES MOINES

_____

Kristine M. Knous, President

Exhibit A

COMMUNITY FOUNDATION OF GREATER DES MOINES
COMMUNITY BETTERMENT FISCAL SPONSORSHIP FUND AGREEMENT
WEST DES MOINES ARBORETUM PROJECT

THIS AGREEMENT is made by the Community Foundation of Greater Des Moines (the "Community Foundation") and the West Des Moines Community Foundation (the "Affiliate").

WHEREAS, the Community Foundation is an Iowa nonprofit corporation organized and operated as a "publicly supported community trust" within the meaning of Treasury Regulation §170A-9(f)(11), and is a publicly supported charity described in Sections 501(c)(3), 509(a)(1) and 170(b)(1)(A)(vi) of the Internal Revenue Code;

WHEREAS, the City of West Des Moines (the "City") owns 2296 Grand Avenue and desires to create a city park and arboretum (the "Project") through contributions from donors; and

WHEREAS, the Affiliate, a community foundation affiliated with the Community Foundation, desires to establish the West Des Moines Arboretum Project Advisory Committee (the "Advisory Committee") and to serve as the Project Representative (the "Project Representative").

WHEREAS, the Project Representative desires that the Community Foundation act as their fiscal sponsor during the period that the Project is active; and

WHEREAS, the Community Foundation desires to create a new component fund, to be established with an initial contribution to be held and administered pursuant to the provisions of this Agreement to support the Project;

1. **ESTABLISHMENT OF A CHARITABLE FUND**: A component charitable fund of the Community Foundation is hereby created and shall be known as the "West Des Moines Arboretum Project Fund" (the "Fund"). The Fund shall be a community betterment fiscal sponsorship fund and shall support the Project as defined in the Project's submitted documentation. The Project Representative must provide to the Community Foundation documents including project description, preliminary project timeline, preliminary project budget and advisory committee. The Project Representative shall notify the Community Foundation immediately of any change in the project description, the timeline, the budget or membership of the Advisory Committee. The very nature of fiscal sponsorship funds is that they are short-term, temporary funds and therefore will be reviewed for viability on an annual basis. The Fund will be listed in any Community Foundation published fund lists.

2. **CONTRIBUTIONS TO THE FUND**: By contributing to the Fund, each Fund donor irrevocably assigns, conveys, transfers and delivers to the Community Foundation all rights, titles and interests in any assets given as contributions to the Fund. The Fund Property shall be comprised of each contribution to the Fund and any income arising thereon, subject to the provisions of this Agreement.

   Project Representative will adhere to the Community Foundation's Donor-Initiated Fundraising Policy. All grant agreements, pledges, or other commitments with funding sources to support this Fund must be executed by the Community Foundation.

3. **FUND A COMPONENT PART OF THE COMMUNITY FOUNDATION**: The Community Foundation will maintain the Fund as a component part of the Community Foundation, subject to the terms of this Agreement and the City Agreement and governed by the Community Foundation's articles and bylaws and the Community Foundation's then-current policies and procedures. Control over the administration, investment and distribution of Fund Property shall be exercised exclusively by the Community Foundation, and no provision herein shall be administered or construed to constitute a material restriction or condition.

4. **Project Representative and Advisory Committee**: The Project Representative shall establish the Advisory Committee. The Advisory Committee will include at least one representative from the Affiliate, at least one representative from the City and up to five other representatives. Upon the occurrence of a vacancy on the Advisory Committee, a replacement will be named by the Advisory Committee.

   The Advisory Committee shall establish governance procedures and processes to be utilized during its existence and provide these to the Community Foundation for its approval. These shall include the approval process for contracts, expenses, communication and marketing.

   The Project Representative shall provide nonbinding advice to the Community Foundation regarding Fund distributions and shall have the authority, with the Community Foundation, to amend this Agreement as set forth in the section entitled Amendments.

5. **Distributions from the Fund**: Distributions from the Fund Property shall be requested in writing by the Project Representative for the sole purpose of the Project. Any requests to pay vendors must include the corresponding vendor invoice.

   Distributed funds are not to be used in any attempt to influence legislation within the meaning of Internal Revenue Code (IRC) Section 501(c)(3). Project Representative shall not use any portion of the funds to participate or intervene in any political campaign on behalf of or in opposition to any candidate for public office, to induce or encourage violations of law or public policy, to cause any private inurement or improper private benefit to occur, nor to take any other action inconsistent with IRC Section 501(c)(3).

6. **Variance Power**: In accordance with the Community Foundation's legal variance power, its Board of Directors has the power to modify any restriction or condition on the distribution of funds for any specified charitable purpose or to any specified charitable organization if, in the sole judgment of the governing body, the restriction or condition becomes in effect, unnecessary, incapable of fulfillment, or inconsistent with the charitable needs of the community.

   In addition, if any administrative provision outlined in this Agreement becomes impractical or impairs the effective administration of the Fund, the Community Foundation may modify such provision.

7. **Fund Investment**: The Fund Property shall be held and invested by the Community Foundation pursuant to its then-current investment policy. Due to the short-term nature of the Fund, the investment selection for the Fund Property shall be cash or cash equivalent.

   The Fund Property may be segregated by the Community Foundation or held with other Community Foundation assets as a single fund for joint investment and management without physical segregation allocating a proportionate share of income, gain and/or loss and fees to the Fund.

8. **Fund Administration and Reporting**: The Community Foundation shall assess a fee of 2% of incoming gifts plus a $250 annual fee until termination of the Fund for administering this Fund. The administrative fee will be deducted from the Fund Property quarterly and otherwise administered consistent with the Community Foundation's Donor-Initiated Fundraising Policy.

   All actions of the Community Foundation with respect to the Fund shall be taken either directly by its Board of Directors, or by its employees, subject to the oversight of the Community Foundation's Board of Directors. Nothing in this Agreement shall constitute the naming of the

Project Representative or the City as an agent or legal representative of the Community Foundation for any purpose whatsoever except as specifically and to the extent set forth herein.

The Community Foundation may retain attorneys, accountants, custodians, investment managers, consultants and such other agents whose services may be necessary for the administration of the Fund. Expenses of such agents, and all other reasonable direct expenses, shall be deducted from the Fund Property. Notice regarding extraordinary services, such as attorney, CPA, and/or consultant fees, will be provided to the City prior to being incurred.

The Community Foundation will furnish to the City periodic reports as set forth in the City Agreement.

IN WITNESS WHEREOF, this Agreement has been executed on behalf of the Community Foundation on the day and year written below.

BY: _____ DATE: _____

Robert Palmer, Chair, West Des Moines Community Foundation

BY: _____ DATE: _____

Community Foundation Officer

Staff:

Approved (initial & date) _____

Approved (initial & date) _____

I have received and understand the Fiscal Sponsorship Policy. _____

(initial)

I have received and understand the Donor-Initiated Fundraising Policy. _____

(initial)