

**FIRST AMENDMENT TO AGREEMENT REGARDING USDOT BUILD GRANT  
TO THE DES MOINES AREA METROPOLITAN PLANNING ORGANIZATION**

**Between**

**The City of Des Moines, the Des Moines Area Metropolitan Planning Organization,  
Central Iowa Water Trails, LLC, and Polk County Conservation**

THIS FIRST AMENDMENT to Agreement Regarding USDOT BUILD Grant to the Des Moines Area Metropolitan Planning Organization between the City of Des Moines, the Des Moines Area Metropolitan Planning Organization, Central Iowa Water Trails, LLC, and Polk County Conservation (hereinafter “First Amendment”) is entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2022, by and between the City of Des Moines, Iowa (“City”), the Des Moines Area Metropolitan Planning Organization (“MPO”), Central Iowa Water Trails, LLC (“CIWT”), and Polk County Conservation (“PCC”) (collectively, “the Parties”).

It is agreed by and between the Parties that:

1. The above-referenced Agreement Regarding USDOT BUILD Grant to the Des Moines Area Metropolitan Planning Organization between the City of Des Moines, the Des Moines Area Metropolitan Planning Organization, Central Iowa Water Trails, LLC, and Polk County Conservation (herein referred to as “Agreement”), as authorized by the Des Moines City Council on September 13, 2021, by Roll Call No. 21-1446, is hereby amended in accordance with the terms set forth in this First Amendment.
2. The definition of, and all references to, the “BUILD Grant Agreement” in the Agreement are hereby revised to consist, collectively, of the original BUILD Grant Agreement executed on November 18, 2021 and all restatements thereof and amendments thereto, including but not limited to the First Amended and Restated Grant Agreement Under the Fiscal Year 2019 BUILD Transportation Grants Program executed on or around June 13, 2022 by the United States Department of Transportation, the Iowa Department of Transportation, and the MPO.
3. The first phase of the PROJECT is further described in Section 3.1 of the BUILD Grant Agreement, as amended, the cost of which is now estimated to be \$48 million, with the BUILD Grant to fund up to 80%, not to exceed \$25 million, thereof, and shall be referred to as “Phase 1”. The definition of, and all references to “PROJECT” shall refer to Phase I and the Prospect Park and Birdland Marina components described in Section 7.4 of the BUILD Grant Agreement.
4. The definition of, and all references to, “CONTRACTOR” or “GENERAL CONTRACTOR” in the Agreement are hereby revised to consist of one or more general contractor(s), individually and collectively, for the construction of the PROJECT or of portions, Components, or phases thereof, and all references to “CONTRACTOR” or “GENERAL CONTRACTOR” in the Agreement shall apply collectively to all such general contractor(s) unless explicitly stated otherwise.
5. The definition of, and all references to, the “FUNDING AND CONSTRUCTION AGREEMENT” shall refer to the Amended and Restated Subagreement #2, Agreement between Des Moines Area MPO, Polk County, Iowa, and Central Iowa Water Trails, LLC, Regarding

Construction and Funding of the Build Grant Project, dated \_\_\_\_\_, 2022, as the same may be amended or assigned from time to time.<sup>1</sup>

6. Section 1.1, is hereby deleted in its entirety and replaced with the following:

1. Access to CITY Property. By this Agreement and as described herein, the CITY is granting access to CITY property and infrastructure to the MPO, CONTRACTOR and its subcontractors, and Polk County, Polk County Conservation and CIWT and their respective contractors and consultants, and state and federal agencies for construction of the PROJECT on CITY owned and leased property and modifications to CITY infrastructure, as shown on Attachment 1, for CITY project construction (levee), construction of the PROJECT improvements as defined in APPROVED PLANS as defined in Section 3.7, and for CIWT's maintenance and administrative obligations as further described in Section 4 of this Agreement, and in the CITY- CIWT 28E Agreement. All such access shall be subject to a mutually acceptable path of ingress/egress, and the CITY agrees to provide access to those portions of CITY property and/or infrastructure which are needed for the construction of the PROJECT and, thereafter, the maintenance, operation, and administration of the PROJECT improvements and, with respect to CIWT and its contractors, employees, and agents, access necessary to perform its obligations under the CITY -CIWT 28E Agreement. Such access and PROJECT construction shall be limited to that which minimizes, as far as reasonably possible, conflict with and use of existing improvements on CITY property and the public's use of CITY park property. Except for the Lease Agreement between the CITY and the United States of America, Army Corps of Engineers, including approximately 262.30 acres of land along the Des Moines River and including Prospect Park and which was approved by the City Council of CITY on July 27, 1998 by Roll Call No. 98-2404, to the best of its current knowledge, City represents and warrants to the other parties hereto that there is no agreement that would prevent CITY from providing the access granted hereunder with respect to real estate covered by this Agreement that the CITY controls or leases, but does not own in fee. The access described in this Section for construction is effective, and limited in duration, as follows:

- a. Access to that portion of the PROJECT (being a portion of Phase 1) involving Scott Avenue Dam (In-Water) and Scott Avenue Dam (Uplands) is granted upon execution of this Agreement by all parties, through completion of Component 1: Scott Avenue Dam (In-Water) and Component 2: Scott Avenue Dam (Uplands) portions of the PROJECT and acceptance thereof by resolution of the Des Moines City Council.
- b. Access to that portion of the PROJECT (being a portion of Phase 1) involving Harriet Street Access is granted commencing on July 1, 2023, through completion of Component 3: Harriet Street Access portion of the PROJECT and acceptance thereof by resolution of the Des Moines City Council.
- c. Access to those portions of the PROJECT respectively involving Prospect Park and Birdland Marina is granted commencing January 1, 2027, through completion of the Prospect Park and Birdland Marina portions of the PROJECT and respective acceptance

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<sup>1</sup> Drafting Note: If A/R Funding and Construction Agreement not finalized/signed by the time this Agreement is signed, we can refer to the original term and include all amendments/assignments.

thereof by resolution of the Des Moines City Council. Earlier access can be requested to facilitate an expedited schedule, which earlier access is subject to advance written approval of the City Manager.

- d. No access to CITY property and infrastructure is granted apart from the above-stated access. In the event that an above-stated portion of the PROJECT does not commence in accordance with the Project's Estimated Schedule as set forth in the BUILD Grant Agreement, as may be amended, or is abandoned prior to or during construction, said access shall immediately terminate without notice required to be provided by CITY.

7. Section 1.4, "Limited CITY Funding", is hereby deleted in its entirety and replaced with the following:

4. Limited CITY Funding. The CITY funding contribution for the PROJECT will be paid to the CIWT as a contribution to the PROJECT as a portion of the non-federal match required by the BUILD Grant Agreement for a total of \$6,000,000.00 (Six Million Dollars), as follows, subject to City Council budget approvals and the following:

- \$2,000,000 by July 31, 2023, if the CONTRACTOR is on-site and construction of Component 1: Scott Avenue Dam (In-Water) of the PROJECT is underway on or before such date. Such component of the Project shall be deemed "underway" for purposes of this Section if earth-moving work has commenced.
- \$2,000,000 by July 31, 2024, if construction of Phase 1 has satisfactorily progressed by being on schedule and in compliance with PROJECT requirements imposed under this Agreement and the Build Grant Agreement with respect to such Phase 1.
- \$1,000,000 by July 31, 2025, if construction of Phase 1 is substantially complete, as defined under the applicable construction contract(s).
- \$1,000,000 by July 31, 2026 or the later date of acceptance of all of Component 1: Scott Avenue Dam (In-Water), Component 2: Scott Avenue Dam (uplands), and Component 3: Harriet Street Access, of the PROJECT as defined above and described in Section 3.18-3.19.

The foregoing funding obligations are subject to (1) applicable Iowa law and to the MPO and CIWT being in compliance with the terms of this Agreement, compliance with Iowa Code Chapters 26 and 573, and the BUILD Grant Agreement, (2) the MPO and CIWT remaining parties to the BUILD Grant Agreement and said Agreement remaining in effect (or, if then fully performed, in good standing) at the time that payment is due from the CITY, and (3) the respective PROJECT components being completed by MPO and CIWT and accepted by the Des Moines City Council no later than the respective latest dates stated above (i.e. February 1, 2028 for Components 1, 2 and 3 (being Phase 1); July 31, 2029 for the Prospect Park and Birdland Marina portions of the PROJECT). The MPO and CIWT and the CITY acknowledge and agree that all of the obligations of the CITY under this Agreement shall be subject to, and performed by the CITY in accordance with all applicable statutory, common law, or constitutional provisions and procedures consistent with the CITY's lawful authority.

Except as described in this section and in Section 1.5, the CITY is not required to provide any additional funds for construction of the PROJECT. In addition, except as provided in the CITY-CIWT 28E Agreement, the CITY is not required to provide other funds to the CIWT, PCC, or MPO or in support of the PROJECT for any other purpose, including, without limitation, new construction, maintenance, repair, reconstruction (including demolition), replacement, or capital improvement funding.

8. Section 1 is hereby further amended by adding new Section 1.15, “Tree Mitigation”, thereto as follows:

15. Tree Mitigation Requirements. In anticipation of construction proceeding in early 2022, CIWT was granted access to cut trees at Harriet Street and Prospect Park in order to comply with IDOT specifications and Threatened and Endangered species regulations. Due to the unanticipated delay in the PROJECT, the CITY proceeded with stump removal and restoration, and with payment required for tree mitigation in the amount of \$51,600 for removal of 46 trees and required replacement of 129 trees. CIWT shall be solely responsible for accomplishing tree mitigation and for making all related payments, in accordance with the Des Moines Municipal Code and all federal, State and local regulations and ordinances, for all other portions of the PROJECT other than those portions completed by CIWT and the CITY prior to July 1, 2022 as described in this Section. For the sake of clarity, other than amounts paid by CIWT as of the date of this Amendment, CIWT has no obligation to fund or reimburse any third party, including the CITY, for tree mitigation efforts, whether for labor, services, or other efforts, performed before July 1, 2022.

9. Section 3, “Construction”, subsection (6), is hereby deleted in its entirety and replaced with the following:

6. Subject to compliance with the BUILD Grant Agreement and with Iowa law including but not limited to Iowa Code Chapter 26, the PROJECT may be constructed by the CONTRACTOR in up to five separate construction contracts. References herein to “construction contract” shall refer and apply to all such contract(s) individually and collectively.

10. Section 3, “Construction”, subsection (9), is hereby deleted in its entirety and replaced with the following:

9. As required by Iowa DOT, the PROJECT will be constructed in accordance with the Iowa Department of Transportation Standard Specifications with applicable revisions plus applicable development, supplemental, special provisions and APPROVED PLANS.

11. Section 3, “Construction”, subsection (17), is hereby deleted in its entirety and replaced with the following:

17. The MPO shall arrange for a final inspection, for each construction contract, of the PROJECT Improvements and shall inform the CITY in writing of the date and time of each construction contract’s final inspection at least seven (7) business days prior to the

inspection. The MPO's engineer shall conduct the final inspection for each construction contract and develop a punch list of items for completion, if any. The City Engineer, or his designee, has the right to be present at the final inspection for each construction contract.

12. Section 3, "Construction", subsection (18), is hereby deleted in its entirety and replaced with the following:

18. Upon MPO's determination that each construction contract of the PROJECT has been completed, the MPO's engineer, a professional engineer licensed to practice in the State of Iowa, shall give written notice of the completion to the CITY, therein declaring and certifying that all PROJECT improvements included in the respective contract have been completed and constructed in substantial conformance with the APPROVED PLANS and approved changes as described in Section 3.12, shall provide the City Engineer with all inspection and testing reports which constituted the basis for such MPO's engineer's certification, and shall recommend final acceptance of the Landside PROJECT Improvements included in the respective contract by the CITY.

13. Section 3, "Construction", subsection (19), is hereby revised by adding the following subsection (4) thereto:

(4) review and written confirmation by the City Finance Director of documentation (including invoices, general contractor reporting and other relevant evidence of the donated asset(s) value), in form required by CITY and provided by CIWT to CITY no less than 30 days in advance of the anticipated date of City Council consideration of acceptance of ownership of the respective Landside PROJECT Improvements, setting forth capitalizable expenses of said Improvements.

14.. Except as expressly set forth in this Amendment, all other terms, provisions, and conditions originally set forth in the Agreement, including all Attachments and exhibits thereto, remain effective and binding upon the Parties.

IN WITNESS WHEREOF, the parties hereto have caused this First Amendment to the Agreement to be executed, effective as of the date first above written, by their proper officers, duly authorized, therefore.

**DES MOINES AREA METROPOLITAN PLANNING ORGANIZATION**

\_\_\_\_\_  
Bob Andeweg, Policy Committee Chairperson

STATE OF IOWA    )  
                          ) ss:  
COUNTY OF POLK )

On this \_\_\_\_\_ day of \_\_\_\_\_, 2022, before me, the undersigned, a Notary Public in and for the State of Iowa, personally appeared BOB ANDEWEG, to me personally known, who being by me duly sworn, did say that he is a MPO CHAIRPERSON of the DES MOINES AREA METROPOLITAN PLANNING ORGANIZATION, that the seal affixed to the foregoing instrument is the seal of the corporation; that the instrument was signed and sealed on behalf of the corporation, by authority of its Policy Committee, and BOB ANDEWEG acknowledged the execution of the instrument to be the voluntary act and deed of the corporation, by it and by his voluntarily executed.

\_\_\_\_\_  
Notary Public in the State of Iowa

**CENTRAL IOWA WATER TRAILS, LLC**

\_\_\_\_\_  
Dan Houston, Chair, Central Iowa Water Trails LLC

STATE OF IOWA    )  
                                  ) ss:  
COUNTY OF POLK )

On this \_\_\_\_\_ day of \_\_\_\_\_, 2022, before me, the undersigned, a Notary Public in and for the State of Iowa, personally appeared Dan Houston, to me personally known, who being by me duly sworn, did say that he is the Chair of the CENTRAL IOWA WATER TRAILS, LLC, that such entity has no seal and that the instrument was signed on behalf of the Central Iowa Water Trails, LLC, by authority of its Board, on the \_\_\_\_ day of \_\_\_\_\_, 2022, and that Dan Houston acknowledged the execution of the instrument to be the voluntary act and deed of the Board, by it and by she voluntarily executed.

\_\_\_\_\_  
Notary Public in the State of Iowa

**CITY OF DES MOINES, IOWA**

\_\_\_\_\_  
T. M. Franklin Cownie, Mayor

ATTEST:

APPROVED AS TO FORM:

\_\_\_\_\_  
Laura Baumgartner, City Clerk

/s/ Glenna K. Frank  
\_\_\_\_\_  
Glenna K. Frank, Assistant City Attorney

STATE OF IOWA    )  
                          ) ss:  
COUNTY OF POLK )

On this \_\_\_\_\_ day of \_\_\_\_\_, 2022, before me, the undersigned, a Notary Public, personally appeared T. M. Franklin Cownie and Laura Baumgartner, to me personally know, who, being by me duly sworn, did state that they are the MAYOR and CITY CLERK, respectively, of the City of Des Moines, Iowa; that the seal affixed to the foregoing instrument is the seal of the corporation, and that the instrument was signed and sealed on behalf of the corporation, by authority of its City Council as contained in the Resolution adopted under Roll Call No. \_\_\_\_\_ dated \_\_\_\_\_, and that T. M. Franklin Cownie and Laura Baumgartner acknowledged the execution of the instrument to be the voluntary act and deed of the municipal corporation, by it voluntarily executed.

\_\_\_\_\_  
Notary Public in the State of Iowa



**POLK COUNTY CONSERVATION**

\_\_\_\_\_  
Rich Leopold, Director, Polk County Conservation

STATE OF IOWA    )  
                          ) ss:  
COUNTY OF POLK )

On this            day of           , 2022, before me, the undersigned, a Notary Public in and for the State of Iowa, personally appeared Rich Leopold, to me, who being by me duly sworn, did say that he/she is the Director of POLK COUNTY CONSERVATION, that such entity has no seal and that the instrument was signed on behalf of the Polk County Conservation, by authority of its Board, on the            day of           , 2022, and that \_\_\_\_\_ acknowledged the execution of the instrument to be the voluntary act and deed of the Board, by it and by he/she voluntarily executed.

\_\_\_\_\_  
Notary Public in the State of Iowa