

FUNDING AND DEVELOPMENT AGREEMENT

This Funding and Development Agreement (the "Agreement") is made and entered into this 14th day of December 2010, by and between the City of Billings, a Montana municipal corporation (the "City") and the Better Billings Foundation, a Montana nonprofit corporation (the "Foundation").

Recitals

A. The Foundation proposes to design a family aquatic center (the "Aquatic Project") and provide for the funding (by donation and/or borrowed funds) of the same on a site presently owned by the City known and named as Sahara Park.

B. On March 24, 2009, the City Council adopted two alternative Sahara Park Master Plans: Master Plan A and Master Plan B. Master Plan A approves the Aquatic Project Land (described below) as a site for the project and is subject to the contingencies that the Foundation (a) complete this Agreement by September 24, 2009 or after such extension as allowed by the City Council, and (b) demonstrate that it can fund the Aquatic Project (the "Funding Contingency").

C. The Foundation has obtained that certain Feasibility Study of Ballard*King and Associates (the "Study") and presented the same to the City Council. Following significant input from the Parks, Recreation and Public Lands staff, the Foundation has obtained that certain Aquatic Site Plan prepared by Aquatic Excellence (the "Design") and presented the same to the City Council. The Study and the Design are attached as Exhibit A.

D. The City has required that the adjacent Park Land (described below) be reserved for use as a neighborhood park rather than for use in the Aquatic Project.

E. If this Agreement is entered into on or before November 29, 2009 or after such extension as allowed by the City Council and the Funding Contingency is satisfied, the Foundation will construct the Aquatic Project using the Master Plan A design and will operate, manage and maintain the Aquatic Project in a manner similar to other aquatic centers and City parks operated, managed and maintained by the City.

F. The City and the Foundation desire to set forth their respective obligations in connection with the Aquatic Project pursuant to the terms and conditions of this Agreement.

Agreement

In consideration of the foregoing, and in consideration of the mutual promises hereinafter set forth, the parties mutually agree as follows:

1. **Site.** The City has adopted a Sahara Park Master Plan for the land described on the attached Exhibit B. The portion of such land to be used for the Aquatic Project is highlighted

and described more particularly on the attached Exhibit B containing approximately 6.7 acres. (the "Aquatic Project Land"). The portion of such land to be used for a neighborhood park is also highlighted and described more particularly on the attached Exhibit B (the "Park Land").

2. Subdivision Plat and Review. The Foundation shall, at its sole expense, complete, as required a subdivision plat. The subdivision plat shall create two lots and describe the Aquatic Project Land as one lot and the Park Land as one lot in a manner consistent with Section 1 and Exhibit B of this Agreement. The subdivision shall follow the state and local subdivision regulations in effect at the time the subdivision application process is started. The City, as owner and subdivider, or the Foundation, as subdivider, at the election of the City, shall complete the subdivision. Whether the City or the Foundation completes the subdivision, the Foundation shall reimburse the City for any expenses incurred by the City with respect to the completion of such subdivision. Expenses may include, but are not limited to, application and processing fees charged by the City, engineering expenses, and surveying expenses. If the Foundation acts as subdivider, the City shall complete all necessary consents, as owner, and take all other necessary actions to assist the Foundation in completing the subdivision described in this Section.

3. Transfer of Property. Pursuant to City Code Section 22-902, the City shall consider the sale or donation of the Aquatic Project Land to the Foundation and if such sale or donation is approved by the City Council, the City shall transfer the Aquatic project land in fee simple by warranty deed to the Foundation and retain the Park Land. The notice required by City Code Section 22-902(2) shall describe the proposed use as a family aquatic facility consistent with the Master Plan adopted by the City Council in Resolution No. 09-18799. The terms of such sale or donation shall also include a (a) condition subsequent in any sale agreement and deed that the Aquatic Project Land shall only be used for the construction and operation of a family aquatic center, and (b) reversion of the land and all improvements in fee simple to the City if the Aquatic Project Land is not continuously used in satisfaction of such condition subsequent.

If the City council approves a sale or donation of the Aquatic Project Land, until such time as ownership of the property is transferred by warranty deed, the City shall be responsible for all maintenance and control of the property including access by the public consistent with other City park land. When transfer of ownership to the Foundation is accomplished, the Foundation shall be solely responsible for all control, maintenance, and liability for the Aquatic Project Land.

If the City Council does not approve the sale or donation of the Aquatic Project Land, this Agreement is null and void. However, nothing prevents the parties from entering into a subsequent lease Agreement concerning this Aquatic Project Land.

4. Design and Specification. The Foundation agrees to contract with licensed design professionals necessary for the preparation of design and specifications for the Aquatic Project. The Foundation shall continuously consult with Park, Recreation and Public Lands staff and the final design, which shall be substantially similar to the Design, shall be reviewed by the City's Parks, Recreation and Cemetery Board and the Foundation shall consider any recommendations made by the City's Parks, Recreation and Cemetery Board. The Aquatic Project currently proposed to be constructed in phases described as Phase One and Phase two. This Agreement

describes and covers only Phase One. Should this Agreement be executed by the City and the Foundation, Phase Two is planned by the Foundation to include a teaching/exercise pool, climbing wall, expanded deck space and landscaping.

5. Aquatic Project Cost. The Foundation agrees to pay all costs incurred in connection with the design and construction of the Aquatic Project.

6. Satisfaction of Funding Contingency. Within three (3) years from the date of this Agreement, the Foundation shall satisfy the Funding Contingency for Phase One. The Funding Contingency for Phase One shall be deemed satisfied upon the Foundation providing written documentation to the City that it has sufficient cash (by donation and/or loan) and in-kind donations equal to the cost of the Aquatic Project which has been established by the Foundation as Four Million Dollars (\$4,000,000.00). Within ninety (90) days following satisfaction of the Funding Contingency, the Foundation shall begin of the construction of the Aquatic Project Phase One as a private owner. If the Funding Contingency is not satisfied, this Agreement shall terminate and become null and void.

7. Construction. The Foundation shall proceed as owner of the Aquatic Project and enter into contracts with licensed professionals, contractors and material providers as may be required for the construction of the Aquatic Project to Completion (as defined in Section 8 of this Agreement). Prior to the commencement of construction and unless waived in writing by the City, the Foundation shall obtain a payment and performance bond equal to the cost of the Aquatic Project. Such bonds shall name the City as the insured.

8. Final Completion. The Aquatic Project shall be complete upon the issuance of a certificate of occupancy (the "Completion"). The Completion shall occur within one (1) year from commencement of construction, unless extended by a writing subscribed to by both parties.

9. Operation, Management and Maintenance. The Foundation, or a single-member limited liability company owned solely by the Foundation, shall operate, manage and maintain the Aquatic Project in a manner similar to other aquatic centers and City parks operated, managed and maintained by the City, including, but not limited to, parking areas, sidewalks, fencing and storm water detention. The Aquatic Facility shall be open to the public for a minimum of ten (10) weeks each season. Operation, management and maintenance shall be conducted at the sole expense of the Foundation and the Foundation shall retain all proceeds from the operation of the Aquatic Project for use in furtherance of its tax-exempt purposes. The Foundation shall be responsible for payment of water and all other utilities serving the Aquatic facility. The Foundation shall have no responsibility to maintain the adjacent Park Land owned by the City. To secure ongoing performance of its obligations under this Agreement, prior to the start of construction, the Foundation shall establish and maintain one or more of the following at its option:

- A) An annually renewed Irrevocable Standby Letter of Credit in the amount of One Hundred Thousand Dollars (\$100,000.00) in the form as provided in the attached Exhibit C. In the event that all improvements (including buildings and accessory structures) and the Aquatic Project Land revert to the City pursuant to Section 4.

of this Agreement, an applicable sale agreement, deed or otherwise, the City shall in its sole and singular discretion be entitled and authorized to execute upon and present for payment this Irrevocable Standby letter of Credit up to and including the full amount in order to make repairs or other expenditures to the Aquatic Project. The necessity to execute upon this security shall be determined in the sole discretion of the City.

- B) Within five (5) years of the last signature date in this Agreement, an interest bearing escrow account in the amount of One Hundred Thousand Dollars (\$100,000.00) created by an escrow agreement. The terms of such escrow agreement shall allow the city to immediately access this money through a written demand to the Foundation without further action nor through litigation should a default in performance under this Agreement occur by the Foundation. The escrow agreement shall be reviewed and approved by the City Administrator or designee to insure the terms reflect immediate access.
- C) An annually renewed surety bond or similar performance bond instrument in the amount of One Hundred Thousand Dollars (\$100,000.00)

The necessity to execute upon any or all of these alternative performance security instruments shall be determined in the sole discretion of the City. The Foundation shall not object to, obstruct, impair, impede, prevent or institute any legal proceeding challenging the execution upon or payment of funds provided in the attached Irrevocable Standby Letter of Credit, or an escrow account and/or the surety performance bond.

10. No Joint Entity. This Agreement does not create a partnership, joint venture, joint enterprise, or other joint entity between the City and the Foundation.

11. Mediation and Arbitration. Prior to commencing any litigation concerning this Agreement the parties shall use their respective best efforts to resolve any controversy or claim arising out of or relating to this Agreement or breach thereof by non-binding mediation.

12. Compliance with Laws and Regulations. The Foundation agrees that it will comply with all local, state and federal laws and regulations applicable to the planning, contracting, construction, operation and maintenance and use of all government grants and donated funds concerning the Aquatic Project including but not limited to building codes and prevailing wage laws, if applicable, and will indemnify and defend and hold harmless the City from any failure to do so as provided in the indemnification in Section 13 of this Agreement.

13. Indemnification and Insurance. The Foundation shall indemnify, defend and hold harmless the City from and against any and all claims, liabilities, judgments, damages, lawsuits of any type, costs and expenses, including reasonable attorneys' fees, incurred by the City arising from the negligent or intentional acts or omissions of the Foundation while performing its obligations under this Agreement.

The City shall indemnify, defend and hold harmless the Foundation from and against any and all claims, liabilities, judgments, damages, lawsuits of any type, costs and expenses including reasonable attorneys' fees incurred by the Foundation arising from the negligent or intentional acts or omissions of the City while performing its obligations under this Agreement.

14. Choice of law and Jurisdiction. Any civil action arising from this Agreement shall be brought in the District court of the Thirteenth Judicial District of the State of Montana, Billings, Yellowstone County, Montana. The laws of the State of Montana shall govern the rights and obligations of the parties.

15. Duration, Default, Termination and Nonwaiver. This Agreement shall be automatically renewed each year on the original City Council approval date of December 14, 2009, unless either party gives ninety (90) days written notice that it desires to amend the Agreement. If the parties cannot agree on any amendments, this original Agreement shall remain in effect.

This Agreement shall be reviewed by the parties' representatives every ten (10) years on or near the anniversary date of December 14 for the purpose of determining if the Agreement should be amended to reflect current circumstances concerning the operation and maintenance of the Aquatic Facility.

If either party fails to comply with any condition of this Agreement at the time or in the manner provided for, the other party, at its option, may terminate this Agreement and be released from all obligations if the default is not cured within thirty (30) days after written notice is provided to the defaulting party. The notice shall specify the items to be cured. The non-defaulting party may bring suit for damages, specific performance or any other remedy provided by law. These remedies are cumulative and not exclusive and use of one does not preclude use of the others.

16. Amendment. This Agreement may be amended only in writing subscribed by both parties.

17. Notices and Demands. Any notice, demand, or other communication under this Agreement by either party to the other shall be sufficiently given or delivered only if it is dispatched by registered or certified mail, postage prepaid, return receipt requested, or delivered personally:

as to the City:

City of Billings, Montana
Attn: Mike Whitaker, Director of Parks, Recreation
& Cemetery Board *PUBLIC LANDS*
390 North 23rd Street
Billings, MT 59101

as to the Foundation:

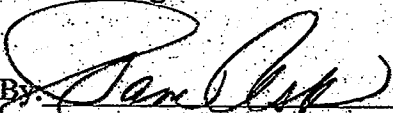
Better Billings Foundation
Attn: Chuck Barthuly
PO Box 50489
Billings, MT 59105

or at such other address with respect to any party as that party may, from time to time, designate in writing.

18. Entire Agreement. This Agreement contains all terms, conditions and agreements agreed upon by the parties to this Agreement relating to the subject of this Agreement and supersedes all prior agreements, negotiations, understandings or communications, whether written or oral.

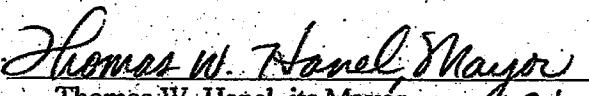
In testimony whereof, the parties have hereunto set their hands the date and year first above written.

Better Billings Foundation

By: 
Pam Ask, its Chairperson

Attest: 
Ken Woosley, its Secretary

City of Billings

By: 
Thomas W. Hanel, its Mayor 3/1/2010