

LEASE AND OPERATING AGREEMENT

This Lease and Operating Agreement (“**Agreement**”) is made and entered into effective as of January 1, 2023 (the “**Effective Date**”) by and between the **City of Cincinnati**, an Ohio municipal corporation, the address of which is 801 Plum Street, Cincinnati, OH 45202 (the “**City**”, as lessor), and **Great Parks of Hamilton County** (f/k/a Hamilton County Park District), a political subdivision of the State of Ohio created under Ohio Revised Code Section 1545 (*Park Districts*), the address of which is 10245 Winton Road, Cincinnati, OH 45231 (“**Operator**”, as lessee).

Recitals:

A. The City owns Fernbank Park on Thornton Avenue in Cincinnati, consisting of approximately 58 acres and various improvements thereon located along the Ohio River, as shown on Exhibit A (Site Map) hereto (the “**Property**”; also referred to herein as the “**Park**”), which is controlled by the Board of Park Commissioners for the City of Cincinnati (the “**Park Board**”).

B. The City has leased the Property to Operator, and Operator has operated the Property as a public park, pursuant to separate lease agreements dated April 18, 2003, and January 1, 2018, the term of the latter Lease expires on December 31, 2022 (the “**Prior Lease**”).

C. The parties desire to enter into a new agreement that is in general accordance with the Prior Lease, for an additional five (5) year period, ending December 31, 2027.

D. The City is leasing the Property to Operator at a base rent of \$0.00 because of the considerable expenses that will be incurred by Operator in operating the Property, at no cost to the City, for the benefit of the people of the City. There is no City funding being provided to Operator under this Agreement.

E. The City has determined that eliminating competitive bidding with respect to the City’s lease of the Property is in the best interest of the public because the City has determined that Operator, being a governmental entity with experience in managing public parks, is the most qualified and suitable operator of the Property.

F. The Park Board approved this Agreement at its meeting on _____, 2022.

G. City Planning Commission approved this Agreement at its meeting on December 2, 2022.

H. Cincinnati City Council approved this Agreement by Ordinance No. ____-2022, passed on _____, 2022.

NOW THEREFORE, the parties hereby agree as follows:

1. LEASE OF PROPERTY.

(A) Grant. On the terms and conditions set forth herein, the City does hereby lease the Property to Operator, and Operator does hereby lease the Property from the City, for the Term established under section 2 below. The City leases the Property to Operator subject to any and all easements, covenants, restrictions and other matters of record, matters that would be disclosed upon an ordinary inspection or survey of the Property, and any and all rights expressly reserved under this Agreement for the benefit of the City, utility companies, and other third parties. The City has not made any representations or warranties concerning the condition or characteristics of the Property or the suitability or fitness of the Property for the Permitted Use, and Operator is not relying upon any such representations or warranties from the City. On

the Commencement Date (as defined in section 2 below), Operator shall accept the Property in “as is” condition. During the Term, Operator shall not grant any easements or otherwise encumber the title to the Property without the City’s prior written consent.

(B) City’s Right to Inspect Property & Use Lodge. The City hereby reserves the right for its employees and agents to enter upon the Property from time to time for any proper purpose, provided, however, that in exercising such rights, (i) the City shall not unreasonably disrupt Operator’s use of the Property for the Permitted Use, and (ii) except in emergencies, the City shall give Operator reasonable written notice prior to entering the Property. The Park Board shall have the right to use the lodge at the Property from time to time (not exceeding once per month), at no charge, and upon no less than 30 days prior notice to Operator, provided Operator shall not have previously rented out the lodge to someone else on the designated date/time.

(C) Access by Utility Companies. Operator shall ensure continuous access to the Property (24 hours/day, 7 days/week, 52 weeks/year) by any and all utility companies that have existing utility facilities within the Property for the maintenance, repair and replacement thereof, and Operator shall not undertake any action or construct any improvements within the Property that may interfere with any such utility company’s rights without having first obtained such utility company’s consent. If Operator, its employees, agents, contractors, subcontractors, licensees or invitees cause damage to such utility companies’ facilities, Operator shall promptly reimburse the affected utility company for the cost of repairing such damage. The City and the Park Board shall ensure that Operator is notified of any work to be performed on the Property by City-owned or City-managed utility companies so that Great Parks can ensure the safety and security of the work site; *provided*, however, the City and the Park Board shall not be required to provide advance notice to Operator in case of an emergency that poses an immediate threat to the operations of the City-owned or City-managed public utility facilities. In case of an emergency, the City and the Park Board shall use best efforts to notify Operator of its entry upon the Property as soon as possible following the emergency event. In the event that the operation, maintenance, repair, construction, reconstruction or replacement of existing City-owned or City-managed public utility facilities requires the cutting, clearing, trimming, or removal of any trees, shrubs, overhanging branches, and/or other vegetation, the City and the Park Board shall notify the Operator in advance of such entry upon the Property to review the scope of such vegetative clearance to determine if any of Operator’s donor-funded, legacy plantings will be impacted; *provided*, however, the City and the Park Board shall not be required to provide advance notice to Operator in case of an emergency that poses an immediate threat to the operations of the City-owned or City-managed public utility facilities. In case of an emergency, the City and the Park Board shall use best efforts to notify Operator of its entry upon the Property for vegetative clearance as soon as possible following the emergency event. The City shall cause all vegetative clearance performed by City-owned or City-managed public utility operators to be conducted and completed to the satisfaction of Operator as set forth by standards and specifications established by Operator. The City shall, at its own cost, minimize damage to the Property related to vegetative clearance, and shall promptly repair and restore any and all damage to the Property and existing improvements thereon related to vegetative clearance to the satisfaction of Operator. The City agrees to compensate Operator for damage to, or removal of, Operator’s donor-funded, legacy trees/ vegetation caused by the City, its employees, agents, or contractors upon receipt of an appraisal performed by a certified arborist, identifying the impacted plantings and evidencing the amount due

2. TERM (5 years). The term (“**Term**”) of this Agreement shall commence on the Effective Date (also referred to herein as the “**Commencement Date**”), and, unless extended or sooner terminated in accordance with the provisions of this Agreement, shall continue for a term of five (5) years, expiring on **December 31, 2027**. The Term of this Agreement may be extended for successive renewal periods of five (5) years each upon the mutual written agreement of Operator, the City Manager and the Park Board (no additional approval of Cincinnati City Council being required).

3. PERMITTED USE; OPERATING STANDARDS; REPORTS.

(A) Permitted Use. Operator shall use the Property solely for the operation of a public park (the “**Permitted Use**”) and for no other purpose.

(B) Operating Standards. Operator shall operate the Park in accordance with ORC Section 1545 and in a manner comparable to other parks managed by Operator and the Park Board and shall render the usual and customary services incidental thereto in a professional businesslike and efficient manner. Operator shall not enforce its motor vehicle permit at the Park (i.e., Operator shall not require visitors to the Park to pay a permit fee). Operator shall have the right, however, to charge reasonable fees for special uses, permits, programs and reserved areas as may be appropriate and as consistent with Operator's normal operations. Operator shall be responsible for the operation, maintenance, safety, security and park law enforcement of the Property, at no cost to the City or Park Board, in accordance with Operator's Code of By-Laws and in compliance with all applicable federal, state and local laws, codes, ordinances and other governmental requirements. Operator shall refer to the Park as "Fernbank Park" or such other name as may be designated by the Park Board from time to time.

(C) Reports. Operator shall submit an annual operating report to the Director of the Park Board by **March 31** of each year during the Term of this Agreement (the "**Annual Report**"), documenting (i) the major events and activities occurring at the Park during the calendar year then just ended, (ii) the estimated park attendance, (iii) expenditures incurred for park maintenance, repairs, and capital costs, and (iv) income received from shelter and lodge rentals and any other income generated from the operation of the Park.

4. RENT. \$0.00/year

5. REAL ESTATE TAXES. The parties acknowledge that the Property is exempt from real property taxes.

6. MAINTENANCE AND REPAIRS. During the Term of this Agreement, Operator shall assume all responsibility for the maintenance and repair of the Property and shall maintain the same in a continuous state of good and safe condition and repair, whether such maintenance or repairs are routine or non-routine. Except as otherwise expressly provided in this Agreement, the City shall not have any maintenance or repair obligations or any obligation to provide services for the benefit of the Property under this Agreement. The foregoing notwithstanding, Operator shall not be responsible for maintaining or repairing the public sewer facilities located on the Property (which the parties acknowledge shall remain the responsibility of the Metropolitan Sewer District of Greater Cincinnati).

7. ALTERATIONS; SIGNS; NO LIENS.

(A) Alterations. Operator shall not make any material alterations, additions or other changes to the Property without the prior written consent of the Park Board, which approval shall not be unreasonably withheld or delayed provided the proposed alterations, additions or changes are consistent with the Permitted Use and will not diminish the fair market value or aesthetic appeal of the Property. Operator shall have the right to make all minor and cosmetic-type alterations to the Property without having to obtain the City's prior consent. All alterations made by Operator shall be made in a good and workmanlike manner, in compliance with all applicable legal requirements, shall not diminish the fair market value of the Property, and shall be consistent with the quality, design, functionality, and aesthetic appeal of the Property. Once installed, Operator shall not remove such alterations (unless such removal shall have been consented to in writing by the City), and Operator shall surrender the same to the City at the end of the Term.

(B) Signs. Operator shall maintain the existing directional, informational, advertising and other outdoor signs at the Property and shall ensure that the same comply with all applicable zoning and other legal requirements. Operator shall, at its expense, keep all signs in good condition and repair. The foregoing notwithstanding, in the event the Park Board determines that the content of any signs is inappropriate given the use of the Property by children or would otherwise reflect negatively upon the City, the City shall notify Operator of such objection in writing, whereupon Operator shall promptly either address such objection to the Park Board's satisfaction or remove the objectionable sign(s).

(C) No Liens. If any mechanics' lien or other similar lien is filed against the Property as a result of labor or material furnished at Operator's request, Operator shall cause the lien to be released or bonded off within forty-five (45) days following the filing of such lien.

8. INSURANCE; INDEMNITY.

(A) Insurance. Throughout the Term, Operator shall maintain, or shall cause to be maintained, the following insurance:

(i) special peril (formerly known as "all-risk") full replacement cost insurance on the buildings on the Property, naming the City and Operator as their respective interests may appear;

(ii) property insurance on all personal property of Operator from time to time located at the Property in such amount as Operator shall from time to time determine to be commercially reasonable;

(iii) Commercial General Liability insurance covering claims for bodily injury, personal injury or death, and property damage occurring at the Property in an amount not less than \$2,000,000 per occurrence, combined single limit/\$4,000,000 aggregate, or such additional amount as the City or its insurance or risk advisors may determine from time to time to be customary for comparable facilities in the Cincinnati area, naming the City as an additional insured;

(iv) Automobile Liability Insurance in the amount of not less than \$1,000,000 per occurrence, naming the City as an additional insured; and

(v) Workers Compensation insurance as required by law.

Operator shall be permitted to satisfy the above-specified liability insurance coverages through a combination of primary and umbrella and/or excess liability policies.

(B) Policy Requirements. Operator shall be permitted to satisfy the insurance requirements set forth above through primary and umbrella and/or excess liability policies under a self-insurance program authorized pursuant to ORC Section 2744.08 or a joint self-insurance pool authorized pursuant to ORC Section 2744.081 operated by or on behalf of Operator or written in standard form by insurance companies authorized to do business in Ohio and having an A.M. Best rating of A VII or better, provided that the insurance/coverage (i) may not be canceled or modified without at least thirty (30) days prior written notice to the City, and (ii) is primary with respect to insurance maintained by the City. On the Commencement Date and thereafter on an annual basis, Operator shall provide the Park Board with a certificate of insurance evidencing the insurance required to be maintained by Operator hereunder.

(C) Handling of Claims. The City assumes no responsibility for any acts, errors or omissions of Operator or any employee, agent, representative or any other person acting or purporting to act for or on behalf of Operator; and similarly, Operator assumes no responsibility for any acts, errors or omissions of the City or any employee, agent, representative or any other person acting or purporting to act for or on behalf of the City. In the event of third-party claims filed against either party pertaining to the Property, each party shall handle its own claims in accordance with its internal policies and procedures. (The parties acknowledge that, as governmental entities, the parties are not legally permitted under Ohio law to contractually agree to indemnify each other.)

9. CASUALTY. If the Property is damaged or destroyed by fire or other casualty, then, unless otherwise agreed by the parties in writing, Operator shall repair and restore the Property, as expeditiously as possible, and to the extent practicable, to substantially the same condition in which the Property was in immediately prior to such occurrence. The City and Operator shall jointly participate in filing claims and taking such other actions pertaining to the payment of proceeds resulting from such occurrence. Operator shall handle all construction in accordance with plans and specifications approved by the City. Operator shall not be relieved of any obligations, financial or otherwise, under this Agreement during any period in which the Property is being repaired or restored.

10. DEFAULT; REMEDIES.

(A) Default. If either party fails to perform or observe any of the covenants, terms or conditions contained in this Agreement, and such failure to perform continues for longer than sixty (60) days after the defaulting party receives written notice thereof from the non-defaulting party; provided, however, that if such failure is not reasonably susceptible of being cured within such sixty (60) day period, an event of default shall not be deemed to have occurred if defaulting party commences to cure such failure within such sixty (60) day period and thereafter diligently pursues such cure to completion and, in fact, cures such failure within one hundred twenty (120) days after the defaulting party receives written notice of the default from the non-defaulting party. The foregoing notwithstanding, if the failure creates a dangerous condition or otherwise constitutes an emergency as determined by the non-defaulting party, an event of default shall be deemed to have occurred if defaulting party fails to take corrective action immediately upon discovering such dangerous condition or emergency.

(B) Remedies. Upon the occurrence of an event of default that continues beyond the applicable notice and cure period provided for under paragraph (A) above, the non-defaulting party shall be entitled to: (i) terminate this Agreement by giving the defaulting party written notice thereof, (ii) take such actions in the way of "self help" as the non-defaulting party determines to be reasonably necessary or appropriate to cure or lessen the impact of such default, and (iii) exercise any and all other rights and remedies under this Agreement or available at law or in equity. The failure of either party to insist upon the strict performance of any covenant or duty or to pursue any remedy under this Agreement shall not constitute a waiver of the breach of such covenant or of such remedy.

11. ASSIGNMENT AND SUBLETTING. Operator shall not assign its interests under this Agreement, or sublet all or any portion of the Property, without the prior written consent of the City. Operator acknowledges that the City is entering into this Agreement because of the City's confidence that Operator has the financial resources, experience, and community support that are necessary to carry out the operation of the Property and that therefore the City shall not be expected to consent to a proposed assignment or sublease to any individual or entity in which the City does not have similar confidence. No assignment or sublease by Operator of its rights or obligations under this Agreement to a third party shall relieve Operator from any liability to the City under this Agreement.

12. ESTOPPEL CERTIFICATES. Within fifteen (15) days after written request from the other party (or, with respect to certificates from the City of Cincinnati, within such longer period of time as may be reasonably needed in order to obtain all required governmental authorizations and signatures), each party shall execute and deliver to the requesting party an estoppel certificate: (i) certifying that this Agreement is unmodified and in full force and effect (or if there have been modifications, that the same is in full force and effect as modified and stating the modifications), (ii) stating, to the best of such party's knowledge, whether or not the requesting party is in default under this Agreement, and, if so, specifying the nature of such default, and (iii) covering such other matters pertaining to this Agreement as the requesting party may reasonably request.

13. SURRENDER; HOLDOVER.

(A) Surrender. On the last day of the Term of this Agreement, Operator shall surrender the Property to the City in good condition and repair and free and clear of all liens and other encumbrances created by Operator (if any). On or before the last day of the Term, Operator shall remove all of Operator's personal property, and any property not so removed shall be deemed abandoned. Operator shall not remove any signs, trade fixtures, ordinary fixtures or affixed equipment used in connection with the Property unless the City approves of such removal in writing. Operator shall promptly repair any and all damage to the Property caused by its removal of any items under this paragraph.

(B) Holdover. If Operator fails to surrender possession of the Property to the City at the end of the Term, such holdover shall be deemed as creating a tenancy-at-will on all of the same terms and conditions as set forth herein (except for the duration of the Term), terminable by either party at any time by giving written notice thereof to the other party.

(C) Documents to be Delivered to City. At the end of the Term, Operator shall deliver to the City originals of all operating manuals, warranty information, books and records, contracts with third parties, and {00373883-4}

all other written materials and documents that are in Operator's possession or under Operator's control and that are reasonably needed in order for there to be a seamless transition with respect to the operation of the Property.

14. NOTICES. All notices required to be given to any party under this Agreement shall be in writing and (i) personally delivered, (ii) deposited in the United States mail, first class, postage prepaid, or (iii) delivered by a reputable courier service (e.g., Federal Express), to the parties at the following addresses or such other address as either party may specify from time to time by notice to the other. Notices shall be deemed given upon receipt.

To the City:

Director, Cincinnati Parks
950 Eden Park Drive
Cincinnati, OH 45202

To Operator:

CEO, Great Parks of Hamilton County
10245 Winton Road
Cincinnati, OH 45231
Attention: Chief Executive Officer

If Operator sends a notice to the City alleging that the City is in breach of this Agreement, Operator shall simultaneously send a copy of such notice by U.S. certified mail to: City Solicitor, City of Cincinnati, 801 Plum Street, Room 214, Cincinnati, OH 45202.

15. GENERAL PROVISIONS.

(A) Entire Agreement. This Agreement (including the exhibits hereto and the other agreements referred to herein, if any) contains the entire agreement between the parties with respect to the subject matter hereof and supersedes any and all prior discussions, negotiations, representations or agreements, written or oral, between them respecting the subject matter hereof.

(B) Amendments. This Agreement may be amended only by a written amendment signed by both parties.

(C) Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the City of Cincinnati and the State of Ohio. All actions regarding this Agreement shall be brought in the Hamilton County Court of Common Pleas, and Operator agrees that venue in such court is proper. The parties hereby waive trial by jury with respect to any and all disputes arising under this Agreement.

(D) Binding Effect. This Agreement shall be binding upon and shall inure to the benefit of and be enforceable by and against the parties and their respective successors and permitted assigns.

(E) Captions. The captions of the various sections and paragraphs of this Agreement are not part of the context hereof and are only guides to assist in locating such sections and paragraphs and shall be ignored in construing this Agreement.

(F) Severability. If any part of this Agreement is held to be void, illegal or unenforceable by a court of law, such part shall be deemed severed from this Agreement, and the balance of this Agreement shall remain in full force and effect.

(G) No Recording. This Agreement shall not be recorded in the Hamilton County Recorder's office. At the request of either party, the parties shall execute a memorandum of Agreement for recording purposes.

(H) Time. Time is of the essence with respect to the performance by the parties of their respective obligations under this Agreement.

(I) No Third-Party Beneficiaries. The parties hereby agree that no third-party beneficiary rights are intended to be created by this Agreement.

(J) No Brokers. The City and Operator represent to each other that they have not dealt with a real estate broker, salesperson or other person who might claim entitlement to a fee or other compensation as a result of the parties' execution of this Agreement.

(K) Official Capacity. All representations, warranties, covenants, agreements and obligations of the City and the Operator under this Agreement shall be effective to the extent authorized and permitted by applicable law. None of those representations, warranties, covenants, agreements or obligations shall be deemed to be a representation, warranty, covenant, agreement or obligation of any present or future member, officer, agent or employee of the City or the Operator in other than his or her official capacity. No official executing or approving the City's or the Operator's participation in this Agreement shall be personally liable under this Agreement.

(L) Representation as to Authority. The City and Operator each represents to the other that it has the power and authority to enter into and perform its obligations under this Agreement without the consent of anyone who is not a party to this Agreement, and that the execution and performance of this Agreement have been duly authorized by all necessary actions on the part of the performing party.

(M) Appropriation of Funds. Notwithstanding anything in this Agreement, the City, the Park Board, or Operator's performance of their respective obligations under the Agreement that require the expenditure of money is subject to the appropriation of funds for such purposes by their respective legislative authorities and governing boards. No party shall be in breach of this Agreement if for any reason their legislative authorities or governing boards do not pass any and all ordinances or resolutions as may be necessary for the respective parties to carry out the terms of this Agreement, but in the event such ordinances or resolutions are not passed, the remaining parties may terminate this Agreement with sixty (60) days' notice to the other parties.

(N) Exhibits. The following exhibits are attached hereto and made a part hereof:

Exhibit A - *Site Map*

This Agreement is executed by the parties on the dates indicated below their respective signatures, effective as of the Effective Date.

CITY OF CINCINNATI

GREAT PARKS OF HAMILTON COUNTY

By: _____
Sheryl M.M. Long, City Manager

By: _____
Todd Palmeto, Chief Executive Officer

Date: _____, 2022

Date: _____, 2022

Recommended By:

Jason Barron
Director, Cincinnati Park Board

Approved as to Form:

Assistant City Solicitor

Certified Date: _____

Fund/Code: _____

Amount: _____

By: _____

Karen Alder, City Finance Director

EXHIBIT A
to Lease and Operating Agreement

SITE MAP

