

THE STATE OF TEXAS §
 §
COUNTY OF FORT BEND §

**DONATION AGREEMENT
REGARDING BATES M. ALLEN PARK**

THIS DONATION AGREEMENT REGARDING BATES M. ALLEN PARK (“Agreement”) is made and entered into by and between FORT BEND COUNTY, a body corporate and politic under the laws of the State of Texas, hereinafter referred to as “County,” and YOUNG MEN’S CHRISTIAN ASSOCIATION OF THE GREATER HOUSTON AREA, a Texas non-profit corporation, hereinafter referred to as “YMCA”, effective as of the date executed by County as set forth below.

RECITALS

WHEREAS, Commissioners Court may accept a gift, grant, donation, bequest, or devise of money or other property on behalf of the county for the purpose of performing a function conferred by law on the county or a county officer as permitted by Texas Local Government Code §81.032; and,

WHEREAS, the YMCA is a 501(c) non-profit organization that offers programs, services and initiatives focused on the unique needs of the communities it engages; and

WHEREAS, the YMCA has a national reputation and demonstrated history of developing camps; and

WHEREAS, YMCA desires to seek donations of funds to donate to County from time to time sufficient to pay all expenses, costs and fees required for the design and construction of one or more improvements to Bates M. Allen Park (the “Park”), a County-owned park, on the condition that County grant a license to YMCA for use of the improvements after they are completed;

WHEREAS, simultaneously with the execution and delivery of this Agreement, the parties hereto are executing and delivering that certain Irrevocable License Agreement Regarding Bates M. Allen Park (the “License Agreement”); and

WHEREAS, County finds that this Agreement serves a public purpose.

NOW THEREFORE, for and in good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto agree as follows:

Section One: The Project

1.01 County agrees to accept from YMCA all funds necessary, hereinafter referred to as “the Donation,” for certain improvements requested by YMCA to be constructed by County

upon the area within the Park designated in Exhibit A attached hereto and made a part hereof (the "Property") (provided that the proposed canoe Launch/dock will be located outside of the Property). County shall have final approval authority over any improvements designed and constructed within the Property.

- 1.02 The proposed improvements presently consist of the following: enclosed structure/pavilion, outdoor amphitheater, canoe launch/dock, elevated as well as improved nature trails and wildlife observation decks and recreation areas; and any infrastructure needed by these improvements, all of the foregoing being hereinafter referred to as "the Project." The Project may be modified at any time by mutual agreement of the parties provided that at all times it consists of improvements suitable for recreational and nature-based youth and adult programs.
- 1.03 The foregoing description of the Project is intended to represent only a general illustration of the scope of work that may be funded by the YMCA and the parties agree that design and construction drawings will govern the actual scope of work and implementation of the Project. The Project may be modified, changed or terminated only in accordance with the terms of this Agreement.
- 1.04 Unless otherwise agreed by the parties as provided herein, each phase of the Project shall be deemed completed for the purposes of this Agreement when all construction has been completed, and all third-party vendors, including subcontractors, have been paid in full. Determination of completion shall be by mutual determination by YMCA and County. County shall provide timely written notice to YMCA of the completion of each phase of the Project, and within thirty (30) days after completion of such phase, County shall provide to YMCA a reasonable written accounting of funds spent on it. On receipt of such accounting from County, YMCA shall be entitled to the return of any portion of the Donation not used for the Project. All Project improvements shall be the property of the County.
- 1.05 Upon receipt of donations for the Project, the County and YMCA shall jointly determine the specific improvements in a given phase and sequence of construction for the anticipated phases in the Project. The essence of this Agreement is the cooperation of the parties to design and construct each phase of the Project in a manner that is cost-effective and efficient for the parties. No reasonable request shall be denied by either party.

Section Two: Obligation of the YMCA Prior to Construction of Project Phases

- 2.01 Except as otherwise provided herein, YMCA agrees to donate to the County, to the extent received from contributions raised for the purpose, funding sufficient to complete a phase of the Project based on the budget therefor agreed to by the parties before construction of such phase ("Covered Costs"). The content of each Phase may be adjusted from time to time in writing as agreed by County and YMCA. Covered Costs shall include, but are not limited to, design fees and costs and all fees and costs of construction, including required permits. Internal or overhead costs of the County shall not be included in Covered Costs.

- 2.02 Each phase of the Project shall be funded by YMCA in the form of, and only to the extent of, either cash donations or in-kind donations from contributors. In-kind donations will be subject to pre-approval by the County in writing before acceptance as a part of the Project. The Project shall be designed and constructed on a phase-by-phase basis as funds become available with a proposed completion date of December 31, 2020. Additional phases of the Project, and additional improvements for a phase of the Project, shall be mutually agreed upon by the parties as funding permits.
- 2.03 It is understood that the Donation by YMCA is contingent upon receipt by YMCA of actual public/private sector contributions for the Project (not merely pledges) solicited by YMCA.
- 2.04 Should funds not be available to complete a particular sequenced phase, YMCA and County shall mutually agree to delay, modify, suspend or terminate such phase of the Project. In the event it is mutually agreed to terminate a phase (or the entire Project prior to commencement of the first phase thereof), any unused or unencumbered funds in possession of the County shall be returned to YMCA, subject to the provisions of Section 3.04 herein. YMCA shall not be entitled to any interest earned on the Donation held by County for the Project.
- 2.05 County is under no obligation to commence any phase of the Project until and unless YMCA provides all estimated Covered Costs associated with that phase, as estimated in a written cost estimate approved by both parties.

Section Three: Obligations of the County Upon Receipt of Donated Funds

- 3.01 Upon receipt of the estimated Covered Costs from the YMCA for a phase, the County will initiate such phase through its normal and customary processes and practices. The County shall complete construction of such phase in a good and workmanlike manner and substantially in accordance with the plans and specifications therefor. All contracts relating to the Project shall be procured by the County in accordance with County policy and state law and issued in the name of the County as owner. YMCA shall have no rights under any contract relating to the Project other than this Agreement and the License Agreement; however, the YMCA shall have input on the procurement process prior to the release to the public. YMCA shall not be considered a third-party beneficiary of any contract relating to the Project. County shall control the construction of the Project at all times. YMCA shall have no authority over construction of the various phases of the Project, but shall have input as to ultimate design and overall theme compliance.
- 3.02 In the event the estimated Covered Costs for a Project phase are less than the actual Covered Costs of such phase, County will provide YMCA with documentation evidencing the actual Covered Costs of the phase, and YMCA shall either provide the additional funding required to complete the Project or modify the phase to conform to the actual costs. If YMCA chooses to raise additional funds necessary to complete the phase, County may suspend the phase until YMCA provides the additional funds to County. The County shall seek approval from the YMCA prior to the authorization of any cost overruns for any improvements for a phase of the Project.

- 3.03 If YMCA is unable or unwilling to raise the additional funds described in Section 2.02 required to complete any phase of the Project, the County may, in cooperation with YMCA, choose to:
- A. Terminate further development of the Project if the sufficient funds are not raised as outlined in section 2.02.
 - B. Modify the scope of work of the phase so that the previous estimate of Covered Costs is sufficient to fund the completion of that phase; or
 - C. Agree to provide the additional funding required to complete the phase from the County's own sources of funding.
- 3.04 In the event the County and YMCA elect to terminate the further development of a phase of the Project as provided in Section 3.03 herein, this Agreement shall terminate effective the date the parties agree upon such termination, and the parties shall have no further obligations regarding uncompleted phases of the Project. However, County shall retain any portion of the Donation used to fund Covered Costs incurred up to the date of termination and shall return the Project site to a reasonable, usable state (if applicable). Any portion of the Donation remaining at the time of termination and after returning the Project to a reasonable, usable state shall be promptly returned to YMCA.
- 3.05 If County elects to use its own funding sources to complete a phase of the Project as planned, YMCA shall have the continuing obligation to pay for any Covered Costs paid for by County, but only out of contributions thereafter received for construction of the Project. However, County is under no obligation under the terms of this Agreement to provide any funds for the Project. County may, subject to availability of County personnel, provide in-kind services for the Project.

Section Four: Indemnification

YMCA AGREES TO AND SHALL INDEMNIFY, SAVE AND HOLD HARMLESS AND DEFEND THE COUNTY, ITS OFFICIALS, AGENTS AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, LOSSES, DAMAGES, CAUSES OF ACTION, SUITS AND LIABILITY OF EVERY KIND, INCLUDING BUT NOT LIMITED TO ATTORNEY'S FEES (WHETHER 1ST PARTY OR 3RD PARTY) AND RELATED COSTS, FOR PERSONAL INJURY DEATH OR PROPERTY DAMAGE, DESTRUCTION OR LOSS ARISING OUT OF THE PERFORMANCE OF YMCA'S RESPONSIBILITIES UNDER THIS AGREEMENT, WHERE SUCH PERSONAL INJURY, DEATH OR PROPERTY DAMAGE, DESTRUCTION OR LOSS IS CAUSED BY YMCA'S SOLE NEGLIGENCE OR ITS SOLE INTENTIONAL MISCONDUCT OR WHERE SUCH PERSONAL INJURY, DEATH, OR PROPERTY DAMAGE, DESTRUCTION, OR LOSS IS CAUSED BY THE NEGLIGENCE OR INTENTIONAL MISCONDUCT OF YMCA, IN WHICH CASE YMCA SHALL ONLY BE OBLIGATED TO INDEMNIFY, SAVE, AND HOLD HARMLESS AND DEFEND FOR THE PERCENTAGE OF COMPARATIVE FAULT ASSIGNED TO YMCA. Notwithstanding the foregoing or anything else in this Agreement, however, it is recognized that YMCA is an entity that is entitled to limited liability pursuant to The Charitable Immunity and Liability Act of 1987, as amended (as codified in Chapter 84 of the Texas Civil Practice and Remedies Code)(as such statute may be modified, re-enacted, re-codified, or replaced in the future, the "Charitable

Immunity Act”). Notwithstanding anything in this Section 5.01 or elsewhere in this Agreement to the contrary, in no event shall YMCA be required to assume or indemnify County for, or defend County against, liability to any extent to which YMCA would be protected from such liability pursuant to the provisions of the Charitable Immunity Act if such claim were brought directly against YMCA.

Section Five: Miscellaneous Provisions

5.01 Notices. All notices, consents, approvals, demands, requests or other communications provided for or permitted to be given under any of the provisions of this Agreement shall be in writing and shall be deemed to have been duly given or served when delivered by hand delivery or when deposited in the U.S. mail by registered or certified mail, return receipt requested, postage prepaid, and addressed as follows:

To County:

Fort Bend County
301 Jackson, 7th Floor
Richmond, Texas 77469
Attn: County Judge
Phone (281) 341-8608
Fax: (281) 341-8609

To YMCA:

YMCA of Greater Houston
2600 North Loop West, Suite 300
Houston, Texas 77092
Attn: Charlie Myer
Phone: (281)627-5992

With a copy to:

Fort Bend County Parks Department
9555A Highway 6
Missouri City, Texas 77459
Attn: Parks Director
Phone: (281) 835-9419
Fax: (281) 416-0682

With a copy to:

Clark Baker
2600 North Loop West, Suite 300
Houston, Texas 77092

And with a copy to:

Baker Botts L.L.P.
910 Louisiana Street
Houston, Texas 77002
Attn: Robert P. Wright
Phone: (713) 229-1237
Facsimile: (713) 229-7737

5.02 This Agreement supersedes all prior agreements, written or oral (other than the License Agreement), between YMCA and County regarding the Project and shall, together with the License Agreement, constitute the entire Agreement and understanding between the parties with respect to the subject matter hereof. This Agreement and each of its provisions shall be binding upon the parties and may not be waived, modified, amended or altered except by a duly authorized writing signed by YMCA and County.

5.03 The captions of paragraphs in this Agreement are for convenience only and shall not be considered or referred to in resolving questions of interpretation or construction.

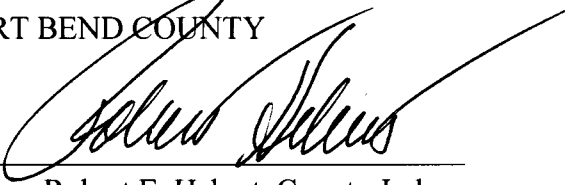
- 5.04 This Agreement and all of the rights and obligations of the parties hereto and all of the terms and conditions hereof shall be construed, interpreted and applied in accordance with and governed by and enforced under the laws of the State of Texas. This Agreement is performable within Fort Bend County. Venue for any dispute arising out the Agreement shall be Fort Bend County, Texas.
- 5.05 No delay or omission by either of the parties hereto in exercising any right or power accruing upon the non-compliance or failure of performance by the other party hereto of any of the provisions of this Agreement shall impair any such right or power or be construed to be a waiver thereof. A waiver by either of the parties hereto of any of the covenants, conditions or agreements hereof to be performed by the other party hereto shall not be construed to be a waiver of any subsequent breach thereof or of any other covenant, condition or agreement herein contained.
- 5.06 In case any provision hereof shall, for any reason, be held invalid or unenforceable in any respect, such invalidity or unenforceability shall not affect any other provision hereof, and this Agreement shall be construed as if such invalid or unenforceable provision had not been included.
- 5.07 All documents relating to the Project shall be the property of County. YMCA shall have no ownership rights to any such documents. However, YMCA shall have the right to such copies of the documents as it shall request and pay the reasonable cost of, it being understood that YMCA may have occasion to provide such documents to third party contractors, consultants and providers from time to time.

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Section Six Execution

IN TESTIMONY AND WITNESS OF WHICH this Agreement has been executed in duplicate originals as follows:

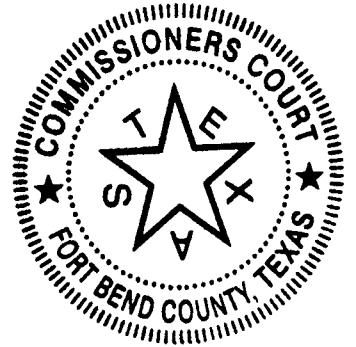
FORT BEND COUNTY

By 
Robert E. Hebert, County Judge


Date: December 18, 2012

ATTEST:


Dianne Wilson, County Clerk



YMCA OF THE GREATER HOUSTON AREA

By 
Clark Baker, President/CEO

Date: 12/5/2012, 2012

Attachment:

Exhibit A Map/drawing of the Property

EXHIBIT A

