

CHARITABLE GIFT AND COTTONWOOD PARK DEVELOPMENT AGREEMENT

This Charitable Gift and Park Development Agreement (the "Agreement") is entered into effective the 31st day of October, 2002, by and between WESTWARD HO, INC., a Montana corporation located at 32 Heatherwood Lane, Billings, Montana, 59102 (hereafter "Transferor"); the CITY OF BILLINGS, a municipal corporation of the State of Montana (hereafter "City"); and YELLOWSTONE COUNTY, a county subdivision of the State of Montana (hereafter "County"); and BILLINGS ELEMENTARY SCHOOL DISTRICT NO. 2 ("School District").

WHEREAS, Transferor is the lawful owner of approximately 38.16 acres of land located in Yellowstone County described more specifically as follows:

See Exhibit A attached hereto (hereafter the "Property").

WHEREAS, the County is the lawful owner of four parcels totaling approximately 1.84 acres that together constitute an undeveloped county park known as Yellowstone Meadows Park, said park being bordered to the north, west, and south by the Property and to the east by 54th Street West; and

WHEREAS, the City and the County have an interest in providing for the recreational needs of their residents, and the stated policy of the City and the County, as expressed in the West Billings Neighborhood Plan adopted May 2001, is to acquire one or more large parcels of land for development of a multifunctional community park in the West Billings area; and

WHEREAS, the Property owned by the Transferor would provide a site suitable for a multifunctional community park; and

WHEREAS, the Transferor and its shareholders wish to make a charitable contribution of the Property to the City to benefit the residents of the City and the County; and

WHEREAS, the City has the legal authority to accept this contribution pursuant to M.C.A. § 7-8-103 (2001); and

WHEREAS, the Transferor and the City, in cooperation with the County, desire to see the Property developed as a large multifunctional community park as soon as reasonably possible; and

WHEREAS, the City, in cooperation with the County, is committed to obtaining and expending the funds that will be necessary to develop and maintain the Property as a park in the coming years; and

WHEREAS, upon transfer of the Property to the City, it is the City's intent to annex the Property and raise funds to develop and maintain the park,

NOW THEREFORE, in consideration of the mutual covenants and agreements herein contained, the parties agree as follows:

1. **CONVEYANCE OF PROPERTY.** Upon the City's timely performance of the conditions described below, Transferor agrees to convey the Property to the City for use as a large multifunctional community park. Transferor shall convey the Property, including all fences, corrals, and other appurtenances, to the City by quitclaim deed containing restrictions on its face as described in Paragraph 13 hereof and substantially similar to Exhibit B attached hereto. The parties acknowledge that Transferor is transferring the Property "as is" and without any warranties or promises other than those expressly stated in this Agreement. Transferor does not own shares in any ditch company.

2. **CLOSING DATE.** The date of closing and delivery of the quitclaim deed referenced above shall be November 15, 2002 or such earlier date as may be mutually agreed to by the parties. Closing shall occur in the offices of Dietrich & Cole, LLP, 401 North 31st Street, Suite 1650, Billings, Montana unless otherwise agreed by the parties.

3. **TITLE INSURANCE AND CONTINGENCY.** The City, at the City's expense, may obtain a title report or purchase a title insurance policy insuring its interest in the Property. This Agreement is contingent on the City's receipt and approval of the title report or a preliminary title commitment to be obtained from a title company selected by the City. This contingency shall be deemed waived, and this Agreement shall continue in effect and shall be binding upon all parties, unless, within sixty (60) days of the date of this Agreement, the City notifies the Transferor that it wishes to terminate this Agreement because of a defect in the Transferor's title.

4. **INSPECTION CONTINGENCY.** Except as otherwise provided herein, the City, at the City's expense, may conduct reasonable inspections, surveys, or testing of the Property prior to closing. However, the City may not conduct any Phase II environmental examination or other testing involving earth-moving or other invasive procedures without first obtaining oral or written approval from an officer of Transferor. The City's obligation to accept the Property shall be contingent upon its approval of any such inspections or testing permitted under this paragraph. This contingency shall be deemed waived, and this Agreement shall continue in effect and shall be binding upon all parties, unless, within sixty (60) days of the date of this Agreement, the City notifies the Transferor that it wishes to terminate this Agreement as a result of any inspection, survey, or testing conducted pursuant to this paragraph.

5. **POSSESSION OF PROPERTY.** Transferor shall deliver possession of the Property to the City on the date of closing. Between the date of this Agreement and the date of closing, the City and the County shall be entitled to reasonable access to the Property for the purpose of inspecting the Property and satisfying their obligations under this Agreement.

6. **PAYMENT OF TAXES.** The Transferor agrees to pay all property taxes and special improvement assessments that may be owing on the Property through the date of closing.

7. **TAX DEDUCTIBILITY OF GIFT.** The parties acknowledge that it is the intent of Transferor to obtain a charitable deduction for the value of the Property conveyed to the City pursuant to Internal Revenue Code § 170(c)(1) and that this contribution is being made exclusively for public purposes. The terms of this Agreement and Transferor's obligations hereunder are contingent upon Transferor's investigation and approval of the tax consequences of the contemplated contribution. If, after consulting with its accountants, attorneys and other advisers, Transferor determines in its sole and unreviewable discretion that the tax consequences are unacceptable, it may terminate this Agreement without further obligation to any party at any time before closing by giving written notice to the other parties. Once the Property has been transferred to the City and the contribution completed, this Agreement and any other documents incident to Transferor's contribution shall be interpreted so as to assure, and not defeat, Transferor's right to obtain the charitable deduction described above. If any provision of this Agreement shall be determined to be inconsistent with Transferor obtaining a charitable deduction for all or a substantial portion of its contribution, that provision shall be deemed void and the remainder of this Agreement shall be construed so as to effectuate Transferor's intent to the greatest extent possible consistent with this paragraph.

8. **APPRAISAL.** Transferor will obtain one or more qualified appraisals of the Property to provide a basis for the charitable deduction described above. The City shall cooperate with Transferor and the appraiser by acknowledging the appraisal in accordance with government regulations. In consideration of the benefit being conveyed to the City hereby, the City agrees to pay the cost of the qualified appraisal, up to but not to exceed the total sum of three thousand dollars (\$3,000), to be paid directly to the qualified appraiser. If the Property is not transferred to the City for any reason, the City shall have no obligation to pay for the cost of the appraisal, and such costs shall be borne entirely by Transferor.

9. **EXISTING LEASE.** The parties acknowledge that the Property is currently being leased by Transferor to Norm Ellertson and Joe Blades on a year-to-year basis. Effective as of the date of closing, the Transferor hereby assigns all of its rights and the City hereby assumes all of Transferor's obligations under the lease through the end of the existing term of the lease. After the lease expires the City may renew, terminate, or alter the terms of the lease.

10. **ANNEXATION.** As soon as reasonably possible after closing and transfer of the Property to the City, the City shall take whatever steps are necessary to annex the Property. The parties acknowledge that this may require that the City rezone parts of the Property. Nothing in this paragraph shall prevent the Transferor from seeking a zone change of all or part of the Property or from petitioning the City for annexation after this Agreement is signed and before closing.

11. **TRANSFER OF YELLOWSTONE MEADOWS PARK.** The parties hereby acknowledge that the interests of the residents of the City and the County will be best served if the Property is combined with Yellowstone Meadows Park to create a single, multifunctional community park (hereafter "the Park"). Therefore the County agrees to convey to the City pursuant to M.C.A. § 7-8-102(1) (2001), and the City hereby agrees to accept from the County, the real property known generally as Yellowstone Meadows Park, having the following legal description as provided in Exhibit C.

The County shall complete the transfer of Yellowstone Meadows Park to the City without charge and contemporaneously with Transferor's conveyance of the Property to the City. The County shall have no obligation to transfer Yellowstone Meadows Park to the City unless Transferor conveys the Property to the City. The County shall fully and forever transfer Yellowstone Meadows Park to the City by means of a quitclaim deed substantially similar to the attached Exhibit D. The property heretofore known as Yellowstone Meadows Park shall be conveyed to the City on the condition that it will be used and maintained by the City solely for the purpose of a public park in accordance with M.C.A. § 7-8-102(2) (2001).

12. **NAME.** The name of the Park shall be Cottonwood Park. The City shall take whatever steps are necessary to record this name on all plats, maps, directories and other official documents.

13. **DEED RESTRICTION.** The deed or instrument used to convey the Property or any portion thereof, shall contain the following notice and restrictive covenants which shall run with the land:

The property conveyed pursuant to this deed or instrument is subject to various covenants and restrictions described in a Charitable Gift and Park Development Agreement ("Agreement") by which Westward Ho, Inc., a Montana corporation, agreed to donate to the City of Billings approximately 38.16 acres of real estate to be developed and maintained as a multifunctional community park, public school, and/or public library. A copy of the Agreement has been filed with the Yellowstone County Clerk and Recorder. It is expressly understood and agreed by and between the parties hereto that the property herein described is subject to the terms of the Agreement and shall be forever maintained as a public park, school, or library in accordance with the terms of the Agreement. In the event that any portion of the property is used as either a public school or a public library but such use is discontinued for a period of five (5) years, that portion of the property shall revert to the City of Billings for use as a public park and associated uses. Should a portion of the property used as a public school revert to the City of Billings through the operation of this paragraph, said property and attached improvements shall revert "as is" and the School District shall not be liable for any costs, expenses or charges whatsoever for its discontinued use of the public school, nor shall it have any duty to remediate, demolish or otherwise participate in the preparation of the designated property for any change in use.

14. **PUBLIC PURPOSE.** Pursuant to M.C.A. § 7-8-103(2)(b) (2001), the parties hereby covenant and agree that the Property is gifted, hereby, to the City for use exclusively and perpetually as a multifunctional community park, public school, and/or public library. Except as otherwise provided in this Agreement, the design, construction, use, maintenance and governance of the Park shall be determined by the City, subject to the following restrictions:

a. **Affirmative Covenants.**

i. Except to the extent this Agreement permits a portion of the Property to be used for another public purpose, the Property shall continuously and perpetually be used

as a public park. If otherwise permitted by law to do so, the City may, in its discretion, limit public access to the Property until such time as it has constructed adequate infrastructure, roads, fences, gates and amenities to adequately serve the public and protect the Property.

ii. The City shall, over time, develop the Property to serve as a multifunctional community park typical of those found in the City, including Pioneer Park, Rose Park, and Veteran's Park.

iii. The Park shall include amenities typically associated with a community park as outlined in the Parks 2020 master plan. The Park shall include, at a minimum, such typical amenities as non-native playground grass, an abundance of trees, children's playground equipment, restroom facilities, picnic tables, open areas for diverse activities, and at least one large covered picnic shelter. Although it is not the parties' intent that the Property should permanently remain in its "natural" state, nothing in this paragraph shall be interpreted to prohibit the City from developing or preserving portions of the Property to include pathways, wetlands, or other "natural areas," especially in the short term as other parts of the Park are constructed.

iv. The Transferor desires that park improvements include amenities with recreation and conservation value. Transferor anticipates that park improvements will be made with consideration for habitat conservation and responsible and sustainable development.

v. It is the Transferor's desire, but not a requirement, that the Park also be developed to include a pond or other water features, one or more tennis courts, a fenced dog run, and a swimming pool or other aquatic facilities.

b. **Negative Covenants.**

i. No mining, industrial, or private commercial activities shall be permitted on the Property, provided, however, that nothing in this paragraph shall be interpreted to prohibit the occasional sale of food, beverages, concessions, or products in a fashion that is typical of other parks currently owned by the City.

ii. Except as specifically permitted under this Agreement, public uses of the Property other than for park and recreational purposes are prohibited. Prohibited public uses include, but are not limited to: police station, fire station, or other public safety facilities; solid waste processing; waste water treatment; vehicle or equipment storage or maintenance (except as necessary for park operation and maintenance).

iii. No communication towers may be constructed on the Property.

iv. Baseball diamonds, soccer fields, and other sporting facilities may be constructed on the Property. However, any such facilities shall be complementary to, and not materially interfere with, the primary use of the Property as a multifunctional

community park suitable for casual play, picnicking, concerts, strolling, a variety of community events, and the like. The majority of the Property shall be developed to accommodate such activities and shall not be developed as a “sports complex.”

15. **PARK MASTER PLAN.** Transferor has obtained a conceptual land use plan attached hereto as Exhibit E and titled “Cottonwood Park Master Plan” that is consistent with the provisions of Paragraph 14. Said plan shall be reviewed by the Billings Parks-Recreation & Public Lands Department staff and the Parks, Recreation, and Cemetery Advisory Board and then submitted to the Billings City Council for review, comment, amendment, and approval as required by the Park Master Plan policy of the City of Billings. The Cottonwood Park Master Plan, once adopted and as thereafter amended, shall become part of this Agreement and shall govern future development of the Park by all parties involved. Provided, however, that any future amendments to the Park Master Plan will not act to create an inconsistency with Paragraph 14.

16. **ELEMENTARY SCHOOL DISTRICT NO. 2 OPTION TO PURCHASE.** It is the parties’ intent that up to ten (10) acres of the Property may be used for a public school. To that end the parties agree as follows:

a. **Option to Purchase.** Contingent upon the Transferor’s transfer of the Property to the City, the City hereby grants to Billings Elementary School District No. 2 (“School District”) a legally enforceable option to purchase up to, but not exceeding, ten (10) contiguous acres of the Property (the “Designated Property”) at Fair Market Value. Although the Designated Property has not been formally surveyed for location within the Property, its proposed location has been identified in the conceptual land use plan (Exhibit E) and is generally acceptable to the City and the School District. The City and the School District agree that the Designated Property shall not be materially relocated from the proposed site identified in Exhibit E unless the City and the School District later determine that there is a mutually acceptable alternative school site location. The option shall have a term of five (5) years from the effective date of this Agreement. The City shall not charge the School District to maintain the option. To exercise this option, the School District must provide the City with written notice prior to the expiration of its term and the transaction must close prior to six (6) months following that expiration. If the School District exercises this option it may only use the Designated Property for the construction and operation of a public school in accordance with the deed restriction described in Paragraph 13.

b. **Funds Obtained from School District.** If the School District exercises the option described above, all funds collected by the City from the sale of the Designated Property shall be deposited by the City in an interest-bearing account and shall be expended in accordance with Paragraph 19 below.

c. **Terms of Conveyance of Designated Property and Title Insurance.** Upon closing of the sale of the Designated Property to the School District by the City as provided for herein, the City shall convey the Designated Property to the School District by standard Montana warranty deed, free and clear of all liens, encumbrances and

charges except the usual exceptions concerning taxes, easement and rights of way, reservations and exceptions in patents from the United States or the State of Montana, and building, use, zoning, sanitary and environmental restrictions and the deed restriction required by Paragraph 13 hereof. Further at closing or within a reasonable time thereafter, the City shall, at its expense, provide the School District with a standard purchaser's title insurance policy dated as of the date of closing and consistent with the requirements of the warranty deed as set forth above.

d. **Time Frame Within Which to Build Public School.** No term or condition within this agreement is intended to place a time frame within which the School District is required to build a public school upon the Designated Property. However, if the Public School is not built upon the Designated Property within ten (10) years following the School District's exercise of its option hereunder, the School District must sell to the City and the City shall repurchase the Designated Property pursuant to the terms set out in Paragraph 17 hereafter. Further, after exercise by the School District of its option to purchase, but prior to the time the School District begins construction of a public school on the Designated Property, the School District agrees that the City may use the Designated Property as part of the Park and during any such period, the Designated Property shall be subject to the requirements of this Agreement.

17. **CITY'S OBLIGATION TO REPURCHASE IF SCHOOL DISTRICT ELECTS NOT TO BUILD SCHOOL.** If the School District exercises the option to purchase the Designated Property but it either elects, within the ten (10) year period, not to build a public school (at which time it shall notify the City of its decision in writing), or does not commence substantial construction of a public school within the ten (10) year period, then the School District must sell and the City shall buy the Designated Property back from the School District for the original purchase price paid by the School District. The City shall pay the repurchase price to the School District within six (6) months of when it becomes obligated to repurchase the Designated Property. Upon repurchase by the City of the Designated Property, it shall become part of the Park and shall be subject to the requirements of this Agreement.

18. **CITY LIBRARY.** If School District fails to exercise its option to purchase the Designated Property, or if that property reverts to the City, the City may elect, within fifteen (15) years of the date of this Agreement or five (5) years after the Designated Property reverts to the City, whichever is later, to utilize all or a portion of the Designated Property as a public library. Within six (6) months of making such election, the City shall transfer responsibility for that portion of the Designated Property to the City Library Department and deposit in an interest-bearing account an amount equal to the Fair Market Value of the parcel that is the subject of the City's election. The funds deposited in the account shall be subject to the restrictions described in Paragraph 19.

19. **EXPENDITURE OF PROCEEDS FROM PARTIAL SALE/TRANSFER.** All funds and accumulated interest collected by the City from the sale or transfer of any portion of the Property shall be deposited by the City in an interest-bearing account and recorded so as to permit an accurate tally of such funds to be made at any time. It is the parties' intent that all funds and accumulated interest obtained as a result of the sale or transfer of a portion of the

Property pursuant to this Agreement be used for the prompt development and construction of the Park. The City therefore agrees that all or substantially all of any proceeds from the sale or transfer of a portion of the Property and accumulated interest shall be expended for the development and physical construction, but not maintenance, of the Park. The City agrees to use these funds only to pay City expenses that are directly associated with the physical design, construction, or maintenance of the Park, specifically excluding overhead expenses such as office rent, salaries for clerical staff or administrators, and similar expenses. When public sewer and water is brought to the exterior boundaries of the Park, the City agrees not to access the funds for hook-up fees or other assessments typically charged to private landowners for such services. All funds and accumulated interest described above shall be expended within two (2) years of the commencement of construction of the school referenced in Paragraph 16 above or earlier if adequate development of nearby areas occurs to support the creation of maintenance districts reasonably able to support the maintenance costs of proposed improvements within a reasonable period after their installation. Provided, however, that the City may hold the proceeds of a sale to the School District until such time as the City no longer has a potential obligation to repurchase the property under Paragraphs 16(d) and 17 hereof.

20. **DETERMINATION OF FAIR MARKET VALUE.** As used herein, Fair Market Value shall be established by an independent certified appraiser hired by the City. If the purchaser in any transaction does not agree with the appraiser selected by the City, each shall then separately engage an independent certified appraiser to appraise the Designated Property. If the variance in the appraisal amount between those two (2) appraisers is less than ten percent (10%), the parties agree that the Fair Market Value of the Designated Property shall be the average of the two appraisal figures. If the variance between those two (2) appraisals is 10% or greater, the two appraisers shall engage the services of a third independent certified appraiser, which cost shall be shared equally by the City and purchaser, and the average of the three appraisals shall be used to establish Fair Market Value.

21. **PARK IMPROVEMENTS – CITY ACTIVITIES.** The parties acknowledge that the City’s commitment to develop and maintain the Property as a multifunctional community park is a material part of this Agreement. The City therefore agrees to the following obligations until such time as construction of the Park has been substantially completed and a permanent mechanism has been established to fund the continuing maintenance of the Park:

- a. **Funding Sources Generally.** The City will actively pursue funding sources to finance the construction and maintenance of the Park within a reasonable timeframe. Such funding sources may include, but are not limited to, special improvement district revenue, the City’s general fund and capital improvement budget, federal and state grants, flood mitigation funds, contributions from existing or future development, and private donations.
- b. **Capital Improvement Planning.** City staff will annually prepare development proposals for capital improvements to the Park to be considered for inclusion in the City’s Capital Improvement Program. Staff will develop proposals that are consistent with the orderly development of the Park and designed to maximize the value of available

funding opportunities. This obligation will continue until the Park is developed in accordance with the adopted Cottonwood Park Master Plan.

c. **Annexation of Nearby Property.** The parties hereby acknowledge that subdivisions located near the Park will be uniquely benefited as a result of the Transferor's gift and will impose disproportionate burdens upon the Park. In accordance with standards set out for community parks in the Parks 2020 Plan, the parties agree that a radius of approximately one and one-half (1 ½) miles from the exterior boundaries of the Property reasonably defines the area that will be uniquely benefited by the Park (hereafter "Benefited Area"). When any person or developer submits an application for annexation of property located in whole or in part in the Benefited Area, the City will make reasonable efforts, to the extent permitted by law and as may be negotiated on an individual basis in the discretion of the City, to obtain a contribution from such person or developer to fund the development and/or maintenance of the Park as a condition of annexation.

d. **Dedication of Cash-in-Lieu Funds.** The City anticipates that it will receive cash donations for park development purposes pursuant to M.C.A. § 76-3-621(1) (2001) as new subdivisions are approved in the Benefited Area. The City acknowledges that land within the Benefited Area is in reasonably close proximity to the Park in accordance with M.C.A. § 76-3-621(5)(b)(i) (2001). The parties agree that all cash donations obtained pursuant to M.C.A. § 76-3-621(1) from new city subdivisions located in whole or in part in the Benefited Area shall be used for the development and construction of the Park as permitted by law and to the greatest extent possible after giving due weight and consideration to any expressed preference of the subdivider and landowners in the Benefited Area.

e. **Waivers of Protest of Improvement Districts.** Consistent with existing City practice, the City hereby agrees that it will require that the developers of any city subdivision within the Benefited Area waive, on behalf of themselves and subsequent transferees, their right to protest creation of park construction and maintenance districts until such time as this funding mechanism is replaced with a more systematic and stable funding source. It is the City's intention to create one or more special improvement districts that include the Park and nearby property to fund the construction and maintenance of the Park as the City reasonably determines that development in the vicinity of the Park justifies creation of such districts. The City will include language in subdivision improvement agreements notifying landowners in the Benefited Area of the City's intention to create the improvement districts described above.

22. **FUNDING PARK IMPROVEMENTS – COUNTY.** The Park is intended to and will likely benefit residents of the County who are not residents of the City. The County desires to contribute to the development and maintenance of the Park, but there may be legal barriers that would prevent it from doing so. The County will consider the following actions to assist in the construction and maintenance of the Park. The County does not guarantee that it will enact any of the actions considered.

a. **Dedication of Cash-in-Lieu Funds.** The County anticipates that it will receive cash donations for park development purposes pursuant to M.C.A. § 76-3-621(1) (2001) as new county subdivisions are approved in the Benefited Area. The County acknowledges that land within the Benefited Area is in reasonably close proximity to the Park in accordance with M.C.A. § 76-3-621(5)(b)(i) (2001). The County agrees to maintain a separate accounting of all funds obtained pursuant to M.C.A. § 76-3-621(1) (2001) from new county subdivisions located in whole or in part in the Benefited Area, and the County shall contribute such funds for the development and construction of the Park as permitted by law and to the greatest extent possible after giving due weight and consideration to any expressed preference of the subdivider and landowners in the Benefited Area. If a county subdivision lies only partially in the Benefited Area, the funds dedicated to the Park shall be in proportion to the amount of that subdivision that lies within the Benefited Area.

b. **Waivers of Protest of Improvement Districts.** The County will require that the developers of any county subdivision approved after the date of this Agreement within the Benefited Area agree to waive, on behalf of themselves and subsequent transferees, their right to protest creation of any park construction or maintenance district in the Benefited Area.

c. **Sale of Undeveloped County Park Land in Benefited Area.** The County acknowledges that the parcel of undeveloped county parkland known as Byron Nelson Park (54th Street and Bobby Jones Boulevard) is located in close proximity to the Property. Although Byron Nelson Park was dedicated to the public many years ago, it has never been developed as a park, and there is some question whether it will be improved as a park in the foreseeable future. Many County residents who would benefit from Byron Nelson Park would also benefit from the development of the Park contemplated by this Agreement. The County therefore agrees that if the property known as Byron Nelson Park is hereafter sold, the County, after consultation with homeowners in the area, will investigate whether the proceeds of the sale, or a portion thereof, should be utilized to improve, maintain, or otherwise invested to promote the construction, development and maintenance of the Park contemplated in this Agreement.

23. **CITY'S OBLIGATION IF BYRON NELSON PARK IS ANNEXED.** The City acknowledges that the parcel of undeveloped county parkland known as Byron Nelson Park (54th Street and Bobby Jones Boulevard) is located in close proximity to the Property. Although Byron Nelson Park was dedicated to the public many years ago, it has never been developed as a park, and there is some question whether it will be improved as a park in the foreseeable future. Many City residents who would benefit from Byron Nelson Park would also benefit from the development of the Park contemplated by this Agreement. The City therefore agrees that if the property known as Byron Nelson Park is hereafter annexed into the City and later sold, the City, after consultation with homeowners in the area, will investigate whether the proceeds of the sale, or a portion thereof, should be utilized to improve, maintain, or otherwise invested to promote the construction, development and maintenance of the Park contemplated in this Agreement.

24. **ENFORCEMENT.** In the event that a dispute arises from or related to this Agreement, the parties agree that they shall attempt to resolve such dispute by non-binding mediation in a spirit consistent with the community purpose that gave rise to this Agreement. If mediation is unsuccessful, any action brought to interpret or enforce this Agreement shall be brought in Yellowstone County. In the event that the City or the County materially breaches their respective obligations under this Agreement, Transferor or its assignee shall be entitled to obtain specific performance of this Agreement. Transferor may assign its right to enforce this Agreement to any person, group of persons, organization, or corporation. In the event that Transferor has been dissolved or has otherwise ceased to exist under the laws of the State of Montana and has not assigned its right to enforce this Agreement to another person or entity, this Agreement may also be enforced by the Montana Community Foundation, 101 N. Last Chance Gulch, Suite 211, Helena, Montana 59601, its successors or assigns.

Subject to the City's right to notice and opportunity to cure as described below, if the City materially breaches this Agreement, Transferor or its assignee may, in their discretion and in the alternative to specific performance, obtain an order from a court of competent jurisdiction directing the City to transfer the Property and any improvements built thereon to the Montana Community Foundation, 101 N. Last Chance Gulch, Suite 211, Helena, Montana 59601, its successors or assigns. Provided, however, that any organization to which the Property is transferred shall be a Montana non-profit corporation exempt from federal income taxes as a charitable organization under Section 501 of the Internal Revenue Code or comparable provision of federal law. Before Transferor or its assignee may apply for an order to transfer the Property pursuant to this paragraph, Transferor or its assignee shall provide written notice to the Billings City Attorney of its intent to seek such an order and shall provide the City with a reasonable opportunity to cure the alleged material breach of this Agreement. In all instances, the establishment of the fact that compliance with a term of this agreement is prevented by state or federal law shall be an absolute defense to an allegation of breach.

25. **ANNUAL REPORT.** Once each year, but only until such time as the Park has been substantially constructed in accordance with the Cottonwood Park Master Plan, on or about December 31 or at such other time as may be agreed upon by Transferor and the City, the City shall deliver to Transferor or its successor or assignee a brief report describing the status of the City's efforts to develop and maintain the Park. It is anticipated that any such report will include a summary of the funds that have been raised to develop the Park, the status of the School District's efforts to acquire or build on the Designated Property, a summary of the City's plans to develop and maintain the Park in the coming year, and any other information material to the development of the Park or the performance of this Agreement.

26. **AMENDMENT.** The provisions of this Agreement may be waived, altered, amended, or repealed only on the written consent of all interested parties hereto or, if Transferor has assigned its rights under this Agreement, on the written consent of Transferor's assignee. In no event may any amendment or alteration of this Agreement destroy or otherwise impair Transferor's right to obtain a charitable tax deduction in accordance with Paragraph 7 of this Agreement.

27. **SURVIVAL OF AGREEMENT AND COVENANTS.** This Agreement and all representations, covenants, and agreements contained herein shall remain in effect and survive the closing and execution and delivery of the deeds described above. The covenants and agreements contained in this Agreement are appurtenant to the real property that is the subject of this Agreement and shall run with the land pursuant to M.C.A. §§ 70-17-201 through 206. The parties shall cooperate to file a copy of this Agreement with the Yellowstone County Clerk and Recorder.

28. **SEVERABILITY.** It is intended that each paragraph and provision of this Agreement be viewed as separate and divisible, and in the event that any paragraph or provision shall be held to be invalid, the remaining paragraphs and provisions shall continue in full force and effect so as to give effect to the parties' original intent to the greatest extent possible.

29. **BINDING EFFECT.** This Agreement shall be binding upon and inure to the benefit of the respective parties, their successors and assigns.

30. **MERGER PROVISION.** This Agreement represents the entire agreement of the parties with respect to the subject matter hereof and supercedes any prior agreements or negotiations, whether oral or written.

31. **FURTHER ASSURANCE AND COOPERATION.** The parties agree to execute such further documents and take such further actions as may be necessary or convenient to the furtherance of the matters contemplated by this Agreement. The parties shall cooperate with each other to assure timely satisfaction of any condition to closing.

32. **ATTORNEY FEES.** In the event that any party commences litigation to enforce the terms and conditions of this Agreement, the prevailing party shall be entitled to collect its costs of litigation from the non-prevailing party, which shall include, but not be limited to, reasonable attorney fees.

33. **CONSTRUCTION.** The parties have participated jointly in the negotiations and drafting of this Agreement. In the event an ambiguity or question of intent arises, this Agreement shall be construed as if drafted jointly by the parties, and no presumption or burden of proof shall give rise favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement.

34. **COUNTERPARTS.** A copy of this Agreement may be executed by each party separately, and when each has executed a copy thereof, such copies, taken together, shall be deemed to be a fully complete contract between the parties.

TRANSFEROR:

WESTWARD HO, INC.

Date: 12

By: Donald F. Forbes
DONALD F. FORBES, President

CITY:

CITY OF BILLINGS

Date: 10/28/02

By: Charles F. Tooley
CHARLES TOOLEY, Mayor

COUNTY:

COUNTY OF YELLOWSTONE

Date: 10/29/02

By: J. E. Reno
JAMES E. RENO, Chairman,
Yellowstone County Commissioners

SCHOOL DISTRICT:

Date: 10/29/02

By: Stephanie J. Schmitz
STEPHANIE J. SCHMITZ, Chairman,
Billings Elementary School District
No. 2

APPROVED AS TO FORM:

CITY:

CITY OF BILLINGS

Date: 10-30-02

By: Brent Brooks
BRENT BROOKS, City Attorney

COUNTY:

COUNTY OF YELLOWSTONE

Date: Dec 5, 2002

By: Mark A English
MARK ENGLISH, Deputy County
Attorney

STATE OF MONTANA)
) :ss.
County of Yellowstone)

This instrument was acknowledged before me on the 3rd day of December, 2002, by Donald F. Forbes as President of Westward Ho, Inc.

William A Cole
[signature]

William A. Cole
[typed/printed name]

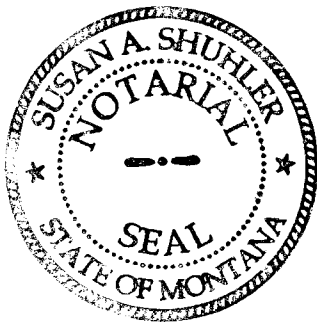
Notary Public for the State of Montana

Residing at: Yellowstone County, Montana

My Commission Expires: October 1, 2003

STATE OF MONTANA)
) :ss.
County of Yellowstone)

This instrument was acknowledged before me on the 28th day of October, 2002, by Charles Tooley as Mayor of the City of Billings.



Susan A Shuhler
[signature]

Susan A. Shuhler
[typed/printed name]

Notary Public for the State of Montana

Residing at: Bridger, Montana

My Commission Expires: 3/28/, 2005

STATE OF MONTANA)
 :SS.
County of Yellowstone)

This instrument was acknowledged before me on the 29 day of October, 2002, by James E. Reno as Chairman of the Yellowstone County Commissioners.

Jami Robson
[signature]
Jami Robson
[typed/printed name]
Notary Public for the State of Montana
Residing at: Billings, Montana
My Commission Expires: January 14, 2006

STATE OF MONTANA)
 :SS.
County of Yellowstone)

This instrument was acknowledged before me on the 29 day of October, 2002, by Stephanie J. Schmitz as Chairman of the Billings Elementary School District No. 2.

Sherrill G. Sullins
[signature]
SHERRILL G. SULLINS
[typed/printed name]
Notary Public for the State of Montana
Residing at: BILLINGS, Montana
My Commission Expires: 06-30, 2003

STATE OF MONTANA)
 :SS.
County of Yellowstone)

This instrument was acknowledged before me on the 30 day of Oct, 2002, by Brent Brooks, as City Attorney of the City of Billings.

Laura C. Reyes
[signature]

Laura C. Reyes

[typed/printed name]
Notary Public for the State of Montana
Residing at: Billings, Montana
My Commission Expires: 2-2, 2004

STATE OF MONTANA)
 :SS.
County of Yellowstone)

This instrument was acknowledged before me on the 5th day of Dec., 2002, by Mark English, Deputy County Attorney of the County of Yellowstone.

Jami Robson
[signature]

Jami Robson

[typed/printed name]
Notary Public for the State of Montana
Residing at: Billings, Montana
My Commission Expires: January 14, 2006

EXHIBITS

- A. Legal description of Property
- B. Quitclaim Deed from Westward Ho, Inc. to City
- C. Legal Description of Yellowstone Meadows Park
- D. Quitclaim Deed from County to City
- E. Cottonwood Park Master Plan

EXHIBIT A

LEGAL DESCRIPTION OF WESTWARD HO, INC. PROPERTY

Township 1 North, Range 25 East, of the Principal Montana Meridian, in Yellowstone County, Montana.

Section 31: Southeast quarter Northeast quarter

EXCEPT the following 5 parcels:

1. Yellowstone Meadows — Phase I, in Yellowstone County, Montana, according to the official plat on file in the office of the Clerk and Recorder of said County, under Document #873104.
2. That part of the NE1/4 of Section 31, Township 1 North, Range 25 East, of the Principal Montana Meridian, in Yellowstone County, Montana, described as Certificate of Survey #1323 on file in the office of the Clerk and Recorder of said County, under Document #937800.
3. Yellowstone Meadows — Phase III, in Yellowstone County, Montana, according to the official plat on file in the office of the Clerk and Recorder of said County, under Document #1035948.
4. That part of the NE1/4 of Section 31, Township 1 North, Range 25 East, of the Principal Montana Meridian, in Yellowstone County, Montana, described as Certificate of Survey #1815 on file in the office of the Clerk and Recorder of said County, under Document #1103210.
5. The East 30 feet and the South 25 feet as reserved in vacation order recorded October 30, 1970, under Document No. 870492.

EXHIBIT B

QUITCLAIM DEED AND COVENANTS AGREEMENT

FOR A VALUABLE CONSIDERATION, the receipt and sufficiency of which is hereby acknowledged on this _____ day of _____, 2002, the undersigned, WESTWARD HO, INC., Grantor, of 32 Heatherwood Lane, Billings, Montana 59102, hereby conveys and quitclaims unto the CITY OF BILLINGS, Grantee, the hereinafter described real property situated in Yellowstone County, Montana, to-wit:

Township 1 North, Range 25 East, of the Principal Montana Meridian, in Yellowstone County, Montana.

Section 31: Southeast quarter Northeast quarter

EXCEPT the following 5 parcels:

1. Yellowstone Meadows — Phase I, in Yellowstone County, Montana, according to the official plat on file in the office of the Clerk and Recorder of said County, under Document #873104.
2. That part of the NE1/4 of Section 31, Township 1 North, Range 25 East, of the Principal Montana Meridian, in Yellowstone County, Montana, described as Certificate of Survey #1323 on file in the office of the Clerk and Recorder of said County, under Document #937800.
3. Yellowstone Meadows — Phase III, in Yellowstone County, Montana, according to the official plat on file in the office of the Clerk and Recorder of said County, under Document #1035948.
4. That part of the NE1/4 of Section 31, Township 1 North, Range 25 East, of the Principal Montana Meridian, in Yellowstone County, Montana, described as Certificate of Survey #1815 on file in the office of the Clerk and Recorder of said County, under Document #1103210.
5. The East 30 feet and the South 25 feet as reserved in vacation order recorded October 30, 1970, under Document No. 870492.

together with all the tenements, hereditaments, and appurtenances thereto belonging, the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title, interest in the real property, possession/claim and demand whatsoever as well in law as in equity, of the Grantor, of, in or to the said premises and every part and parcel thereof.

TO HAVE AND TO HOLD unto the Grantee and unto its successors and assigns forever.

BUT SUBJECT TO all existing easements and other encumbrances, including the following:

The property conveyed pursuant to this deed or instrument is subject to various covenants and restrictions described in a Charitable Gift and Park Development Agreement (“Agreement”) by which Westward Ho, Inc., a Montana corporation, agreed to donate to the City of Billings approximately 38.16 acres of real estate to be developed and maintained as a multifunctional community park, public school, and/or public library. A copy of the Agreement has been filed with the Yellowstone County Clerk and Recorder. It is expressly understood and agreed by and between the parties hereto that the property herein described is subject to the terms of the Agreement and shall be forever maintained as a public park, school, or library in accordance with the terms of the Agreement. In the event that any portion of the property is used as either a public school or a public library but such use is discontinued for a period of five (5) years, that portion of the property shall revert to the City of Billings for use as a public park and associated uses. Should a portion of the property used as a public school revert to the City of Billings through the operation of this paragraph, said property and attached improvements shall revert “as is” and the School District No. 2 shall not be liable for any costs, expenses or charges whatsoever for its discontinued use of the public school, nor shall it have any duty to remediate, demolish or otherwise participate in the preparation of the designated property for any change in use.

IN WITNESS WHEREOF, the Grantor has executed this instrument the day and year first above written.

WESTWARD HO, INC.

By: _____
Its: _____

STATE OF MONTANA)
)ss.
County of Yellowstone)

This instrument was acknowledged before me on the ____ day of _____, 20__ by _____ as _____ of Westward Ho, Inc.

Notary Public for the State of Montana
Residing at: _____, Montana
My Commission Expires: _____, 20__

EXHIBIT C

LEGAL DESCRIPTION OF YELLOWSTONE MEADOWS PARK

The Park indicated on the Plat of Yellowstone Meadows - Phase One filed with the Yellowstone County Clerk and Recorder's Office on December 15, 1970 as document 873104 with a tax code of C06079 that is approximately 00.51 acres.

The Park indicated on the Plat of Yellowstone Meadows – Phase Three filed with the Yellowstone County Clerk and Recorder's Office on December 6, 1976 as document 1035948 with a tax code of C06083 that is approximately 00.71 acres.

Certificate of Survey 1815 filed with the Yellowstone County Clerk and Recorder's Office on September 7, 1978 as document 1103210 with a tax code of D04650 that is approximately 00.17 acres.

Certificate of Survey 1323, filed with the Yellowstone County Clerk and Recorder's Office on June 27, 1973 as document 937800 with a tax code of D04649 that is approximately 00.42 acres

EXHIBIT D

City of Billings Attorney's Office
Attn: Brent Brooks
P.O. Box 1178
Billings, Montana 59103-1178
(406) 657-8205

QUIT CLAIM DEED

Yellowstone County, a political subdivision of the State of Montana, through its Board of County Commissioners, conveys and quit claims to the City of Billings, a municipal corporation, all its interest in the property described below that is located in Yellowstone County, Montana:

The Park indicated on the Plat of Yellowstone Meadows - Phase One filed with the Yellowstone County Clerk and Recorder's Office on December 15, 1970 as document 873104 with a tax code of C06079 that is approximately 00.51 acres.

The Park indicated on the Plat of Yellowstone Meadows – Phase Three filed with the Yellowstone County Clerk and Recorder's Office on December 6, 1976 as document 1035948 with a tax code of C06083 that is approximately 00.71 acres.

Certificate of Survey 1815 filed with the Yellowstone County Clerk and Recorder's Office on September 7, 1978 as document 1103210 with a tax code of D04650 that is approximately 00.17 acres.

Certificate of Survey 1323, filed with the Yellowstone County Clerk and Recorder's Office on June 27, 1973 as document 937800 with a tax code of D04649 that is approximately 00.42 acres

Harold M. Doolen & Sons Inc. and the Doolen Corporation dedicated the property to the County for the creation of a county park, Yellowstone Meadows Park. The City intends to incorporate the property into a larger city park to be known as Cottonwood Park. The Board of County Commissioners authorized the conveyance of the property pursuant to Section 7-8-102(1) of the Montana Code Annotated (2001) at its October 29, 2002 meeting. Pursuant to Section 7-8-102(2) of the Montana Code Annotated (2001), the City shall use the property as a park. If the City fails to use the property as a park for a period of 5 years in succession, title shall revert back to the County.

Dated this 29th day of October 2002.

Jim Reno, Chairperson
Yellowstone County Commissioner

James A. Ziegler, Sr., Member
Yellowstone County Commissioner

Attest:

Bill Kennedy, Member

Tony Nave

Yellowstone County Commissioner

Yellowstone County Clerk and Recorder

State of Montana }
 ss.
County of Yellowstone }

I acknowledge that on October 29, 2002, before me, personally appeared James A. Zielger, Sr. and Bill Kennedy, members of the Board of County Commissioner of Yellowstone County, and Tony Nave, the Yellowstone County Clerk and Recorder, and executed the attached quit claim deed on behalf of Yellowstone County in their official capacity as Board Members and the Clerk and Recorder.

Kay Ramboldt
Notary Public For the State of Montana
Residing at Billings, Montana.
My commissioner expires November 26, 2005

(Notarial Seal)

EXHIBIT E

COTTONWOOD PARK MASTER PLAN