

LEASE AGREEMENT

This Lease Agreement (“Lease”) is made and executed effective the ____ day of September, 2020, by and among the City of Billings, Montana, a Montana municipal corporation, of PO Box 1178, Billings, Montana 59103 (“Lessor”); and Better Billings Foundation, a Montana nonprofit corporation, of PO Box 50489, Billings, Montana 59105 (collectively, “Lessee”).

Recitals

The background of this Lease is as follows:

A. Lessor owns the following described real property located in Yellowstone County, Montana (the “Premises”):

Tract 2-A, Amended Plat of Tract 1 of the Amended Plat of Sahara Park, Sahara Sands Subdivision 2nd Filing and of Sahara Park, Sahara Sands Subdivision 1st Filing, in the City of Billings, Yellowstone County, Montana, according to the official plat on file in the office of the Clerk and Recorder of said County under Document No. 3560469

B. Lessee owns the adjacent real property described as follows (the “Oasis Property|”):

Tract 1-A, Amended Plat of Tract 1 of the Amended Plat of Sahara Park, Sahara Sands Subdivision 2nd Filing and of Sahara Park, Sahara Sands Subdivision 1st Filing, in the City of Billings, Yellowstone County, Montana, according to the official plat on file in the office of the Clerk and Recorder of said County under Document No. 3560469

C. The Oasis Property presently includes a water park with related features and some undeveloped land. A portion of the undeveloped land located on the Oasis Property and the entirety of the Premises will be uniformly developed as a neighborhood park.

D. This Lease is being entered after Lessor and Lessee discussed a lease or donation of the Premises at a City Council work session and Lessor subsequently provided notice of a possible sale or donation of the Premises to be considered at a City Council regular meeting. At such regular meeting, the City Council voted to lease the Premises to Lessee while also granting Lessee the option to acquire the Premises for a minimal fee consistent with the public notice provided prior to the City Council regular meeting.

E. Lessee desires to lease the Premises from Lessor and Lessor is willing to so let the Premises to Lessee, upon the terms and conditions contained in this Lease.

Agreement

For good and valuable consideration, in money or money’s worth, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. Letting and Term. Lessor hereby lets the Premises to Lessee and Lessee hereby leases the Premises from Lessor, upon the terms and conditions contained in this Lease. This Lease is subject to all liens, encumbrances, covenants, restrictions, easements and rights-of-way of record affecting the Premises. The term of this Lease shall commence on September _____, 2020 (the "Commencement Date") and shall continue until December 31, 2041 (the "Term"). The Term shall automatically extend for one five-year renewal term (the "Renewal Term") unless Lessee gives Lessor notice of its intent not to renew at least sixty (60) days prior to the expiration of the Initial Term. The Initial Term and the Renewal Term shall be collectively referred to as the Term.

2. Rent.

2.1. Annual Rent. During the Term, Lessee shall pay annual rent to Lessor, in advance, without demand and without offset or deduction the sum of One Dollar (\$1.00) which amount Lessee may pay in advance in its entirety.

2.2 Other Charges. Lessee shall pay all utilities, real property taxes and assessments and insurance premiums in the manner provided in this Lease.

3. Taxes and Assessments. Lessee shall not be responsible for real property taxes and assessments levied upon and assessed against the Premises, if any.

4. Utilities.

Lessee shall pay before delinquent all charges by any public or private utility, or others, for utility services furnished to or placed upon the Premises. The term "utility services" shall include telephone, internet, gas, water, and electricity along with any other charges, such as refuse removal, that are charged as part of a utility service.

5. Use of Premises.

5.1 Use. Lessee shall use the Premises as a neighborhood park and only for such other purposes as Lessor has given prior written consent. Lessee shall not use the Premises for other purposes without the express prior consent of Lessor; such consent shall not be unreasonably withheld. Lessee and all assignees and sublessees shall comply with all laws, rules, regulations and restrictions now in force or hereafter existing which affect the Premises, including, without limitation, building, use, zoning, safety, health, sanitary, environmental and similar type laws, rules, regulations and restrictions. Lessee anticipates constructing such features as bike and walking paths, basketball and volleyball courts, picnic structures, a harmony music park and related landscaping (the "Planned Features"). Lessee shall (a) construct the neighborhood park allowing unobstructed access to the general public, other than to features where fencing is advisable or other safety restrictions, and (b) operate the neighborhood park free of charge to the general public, other than special event or facility use fees which Lessee may occasionally charge or fees for use of any specialized equipment located on the Premises.

5.2 Quiet Enjoyment. So long as Lessee is not in default of any terms, conditions or covenants of this Lease, Lessee shall at all times during the Term be entitled to peaceably have, hold and enjoy the Premises without any hindrance from Lessor or any other person or persons claiming through Lessor. Notwithstanding the forgoing provision, Lessee shall use its best efforts to provide

updates to or meet with the Billings Parks and Recreation Department no less frequently than annually.

5.3 Non-Discrimination and Civil Rights Compliance. Lessee shall not conduct its business at the Premises or act in a manner which violates Title VI or Title VII of the Civil Rights Act of 1964, as amended, or Title 49 of the Montana Code Annotated. All hiring must be on the basis of merit and qualifications and there may not be discrimination on the basis of race, color, religion, creed, political ideas, sex, marital status, physical or mental disability, or national origin. Lessee shall maintain open hiring and employment practices and shall receive applications for employment in compliance with all requirements of applicable federal, state and local laws and regulations issued pursuant thereto relating to nondiscriminatory hiring and employment practices. Lessee shall serve the general public without unlawful discrimination as to any person's age, sex, race, religion, color, national origin or handicap.

6. Construction, Maintenance and Operation of Premises.

6.1 Repair and Maintenance. Lessee shall, at Lessee's expense, keep and maintain the exterior of the Premises and any improvements constructed on the interior of the Premises.

6.2 Alterations. Lessee shall proceed to construct the Planned Features without any prior approval from Lessor, other than appropriate or necessary building permits and clearances from all appropriate government authorities. Lessee shall not make any other improvements on or to the Premises without first having secured: (a) all appropriate or necessary building permits and clearances from all appropriate governmental authorities, and (b) consent from Lessor and approval of Lessor, which approval shall not be unreasonably withheld, of detailed plans of the work to be done on the Premises. Lessee shall ensure that such alterations, additions, replacements, improvements or renovations are completed to plan specifications, and in a good and workmanlike manner. Lessee shall install and maintain any playground equipment in accordance with all applicable national standards and safety guidelines, including the United States Consumer Product Safety Commission's Public Playground Safety Handbook.

6.3 Public Parks Rules and Ordinances. Lessee shall operate the Premises consistently with all rules and regulations applicable to City of Billings public parks located in Chapter 19 of the Billings, Montana City Code. For purposes of clarification, the foregoing rules and regulations apply to the Premises but not the Oasis Property.

6.4 Compliance with Applicable Laws
Lessee shall comply with all applicable federal, state and local laws and ordinances during the term of this Agreement.

7. Indemnification And Insurance.

7.1 Insurance and Indemnification. Lessee shall carry workers compensation insurance in accordance with the applicable laws of the State of Montana. Lessee shall carry and maintain comprehensive general liability insurance with limits of at least \$750,000 for each claim and \$1,500,000 for each occurrence. Lessee shall name Lessor as an additional insured under its comprehensive general liability insurance policy. In the event that Lessee contracts with one or more third parties to perform services at the Premises, Lessee shall require that any such third party comply with the workers' compensation laws of the State of Montana and carry comprehensive

general liability insurance limits of at least \$750,000 for each claim and \$1,500,000 for each occurrence and provide proof of such coverage to Lessee or Lessor upon request. The comprehensive general liability insurance policy of any such third party shall name Lessor as an additional insured. Lessee shall, at all times, indemnify and hold the Lessor harmless from and against all liability, loss, damages, costs and expenses, including litigation expenses and reasonable attorney's fees, which Lessor sustains or incurs as a result of the activities of Lessee or its agents or employees in the construction and operation of the Premises.

7.2 Cancellation of Insurance. No change or cancellation in insurance shall be made without thirty (30) days written notice to the Lessor. Insurance coverage required in this Lease shall be in force throughout the Term. Should Lessee fail to provide acceptable evidence of current insurance within ten (10) days or receipt of written notice at any time during the Term. Lessor shall have the right to consider Lessee in default.

8. Ownership And Destruction To Premises.

8.1 Ownership. All capital improvements, alterations or additions shall be made at Lessee's sole expense and shall become the property of Lessor upon termination of this Lease. Lessee will provide Lessor with as-built plans for any structural capital improvements or for any underground irrigation system that may be constructed or employed at the Premises.

8.2 Destruction. In the event the Premises or any portion thereof shall be totally or partially destroyed by risk covered by the insurance required, Lessee shall either restore the destroyed portion or terminate this Lease. Lessee shall make the loss adjustment with the insurance company insuring the loss. If Lessee restores the Premises, Lessee shall receive payment of the proceeds of insurance. If this Lease is terminated, Lessor shall receive payment of proceeds. If the destruction is from a risk for which coverage is not required or provided under said policy of insurance, Lessee may elect to restore the destroyed portion of the Premises at its expense. Said insurance proceeds, if any, shall be held for the benefit of Lessee only in the event of an election by Lessee to restore the destroyed portion of the Premises and shall be disbursed in installments as construction progresses for payment of the costs of restoration.

9. Assignment And Subletting.

Lessee shall not assign any of its rights, all or any part, of this Lease, voluntarily or involuntarily, nor sublet or part with possession of any part of the Premises without the prior consent of Lessor, such consent shall not be unreasonably withheld. Nothing in the preceding sentence shall preclude use of the Premises by members of the general public or Lessee allowing the portion of the Premises to be used on a short-term basis by a particular group as a special event.

10. Default.

10.1 Events of Default. Time shall be of the essence in the performance of this Lease. The happening of any one or more of the following events shall constitute an "event of default" under this Lease:

- (a) Lessee shall fail to fully and timely perform or observe any of the terms, covenants or conditions of this Lease on Lessee's part to be performed or observed, and such nonperformance or nonobservance

shall continue for a period of fifteen (15) days after notice thereof by Lessor to Lessee; or

- (b) The happening of any other event described elsewhere in this Lease as an event of default, and such default remains uncured for a period of fifteen (15) days after notice thereof by Lessor to Lessee.

10.2 Lessor's Right To Perform. If Lessee fails to timely observe or perform any of Lessee's obligations under this Lease for fifteen (15) days after notice thereof by Lessor to Lessee, Lessor may, without waiving any rights or remedies, at Lessor's election, take such actions as Lessor deems necessary or advisable to fulfill such obligations (whether by payment of amounts or by other performances), and Lessee shall reimburse Lessor upon demand for all costs so incurred by Lessor.

10.3 Remedies. Upon the happening of any event of default, Lessor shall have the right, to terminate this Lease by notice to Lessee specifying the date of such termination, whereupon Lessee's rights under this Lease and right to possession of the Premises shall cease and this Lease shall thereupon be terminated as of the date so specified.

11. Surrender.

Upon expiration of the Term or upon any other termination of this Lease, Lessee shall promptly vacate, quit and surrender the Premises to Lessor, in good, clean, safe and secure order, repair and condition, except for ordinary wear and tear.

12. Miscellaneous.

12.1 Waiver. No failure by Lessor to insist upon strict performance of any term, condition or covenant of this Lease or to exercise any right or remedy consequent of a breach thereof, and no acceptance of full or partial rent during the continuance of any such breach, shall constitute a waiver of any breach or of any such term, condition or covenant. No term, condition or covenant of this Lease to be performed or complied with by Lessee, and no breach thereof, shall be waived, altered or modified except by instrument executed by Lessor. No waiver of any breach shall affect or alter this Lease; but each and every term, condition and covenant of this Lease shall continue in full force and effect with respect to any other then existing or subsequent breach thereof. Notwithstanding any termination of this Lease, this Lease shall continue in full force and effect as to any provisions hereof which require observance or performance of Lessee subsequent to termination.

12.2 Acceptance of Premises. By execution of this Lease, Lessee acknowledges that Lessee has inspected the Premises and accepts the Premises in its present condition.

12.3 Notices and Payments. Any and all notices, consents, approvals, requests, demands, instruments or other communications required under or pertaining to this Lease shall be in writing and shall be delivered in person or sent by United States mail, with proper postage prepaid, certified or registered, return receipt requested, addressed to each respective party as set forth in the first paragraph of this Lease. Notice served by mail shall be deemed complete three (3) days after the same has been mailed. Such addresses may be changed by either party by giving the other party notice thereof in the manner specified by this Section.

12.4 Force Majeure. Any obligation of Lessor or Lessee under this Lease which is delayed or not performed due to acts of God, strike, riot, war, weather, failure to obtain labor or materials at a reasonable cost or any other reason beyond the control of Lessor or Lessee shall not constitute a default under this Lease and shall be performed within a reasonable time after the end of such cause for delay or nonperformance.

12.5 Severability. If any provision of this Lease shall be illegal, void, invalid or unenforceable under present or future laws, the remaining provisions of this Lease shall remain in full force and effect and shall in no way be affected, impaired or invalidated thereby and such remaining provisions shall be construed in a manner most clearly approximating the intention of the parties with respect to the illegal, invalid, void or unenforceable provision of this Lease.

12.6 Binding Effect. This Lease shall be binding upon, inure to the benefit of, and be enforceable by the parties, and their respective legal representatives, successors and assigns.

12.7 Entire Agreement. This Lease shall be deemed to include the entire agreement between the parties regarding the Premises. Lessee acknowledges and agrees that Lessee has not relied upon any statements, representations, agreements or warranties regarding the Premises or this Lease except as expressly stated in this Lease.

13. Ownership Option.

13.1 Grant of Option and Exercise. Lessee shall have the exclusive right and option to acquire fee simple ownership of the Premises. Lessee shall exercise the option, if at all, by notifying Lessor of its election to exercise the option on or before the expiration of the Term.

13.2 Price and Payment. The price for the Premises shall solely be Lessee reimbursing Lessor all costs associated with recording the deed described in Section 13.3.

13.3 Closing. The closing of the sale and purchase shall occur within thirty (30) days of the exercise of the option by Lessor conveying the Premises to Lessee by Lessor executing a deed in the form attached hereto as Exhibit A.

IN WITNESS WHEREOF, the parties have executed this Lease the day and year first above written.

City of Billings, Montana

By: _____
William A. Cole, its Mayor

APPROVED AS TO FORM:

Brent Brooks, City Attorney

Better Billings Foundation

By: _____
Charles A. Barthuly, its Executive Director

EXHIBIT A

After recording return to:
Better Billings Foundation
PO Box 50489
Billings, MT 59105

WARRANTY DEED

FOR VALUABLE CONSIDERATION receipt of which is hereby acknowledged on the ____ day of _____, 20__ the undersigned, CITY OF BILLINGS, MONTANA, (“Grantor”) hereby grants unto the BETTER BILLINGS FOUNDATION, a Montana, non-profit Corporation, and to its successors and assigns forever, “(Grantee”) the hereinafter described real estate situated in Yellowstone County, Montana, to wit:

Tract 2-A, Amended Plat of Tract 1 of the Amended Plat of Sahara Park, Sahara Sands Subdivision 2nd Filing and of Sahara Park, Sahara Sands Subdivision 1st Filing, in the City of Billings, Yellowstone County, Montana, according to the official plat on file in the office of the Clerk and Recorder of said County under Document No. 3560469.

TO HAVE AND TO HOLD unto the Grantee, and to his successors and assigns forever, subject, however, to:

- (a) All reservations and exceptions of record and in patents from the United States or the State of Montana;
- (b) All existing easements of record, rights of way, building, use, zoning sanitary and environmental restrictions;
- (c) Taxes and assessments for the year 20__ and subsequent years;
- (d) All prior conveyances, leases or transfers of any interest in minerals, including oil, gas and other hydrocarbons;

EXCEPT with reference to items referred to in paragraphs (a) through (d) above, this deed is given with the usual covenants expressed in Section 30-11-110, Montana Code Annotated.

Deed Restrictions and Reversion

This Deed is made and delivered from Grantor to Grantee upon the following conditions:

- (a) The property conveyed herein in fee simple to Grantee shall be used solely and exclusively for the development and continuous operation of a park open to the public for recreational use generally without charge;

- (b) Fee simple ownership of the property shall automatically revert back to Grantor if Grantee fails to comply with the restrictions and conditions immediately above in section 2(a).

This conveyance is made and accepted upon the express agreement that the consideration heretofore given constitutes an adequate and full consideration in money or money's worth.

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

CITY OF BILLINGS, MONTANA

By: _____
_____, MAYOR

STATE OF MONTANA)
 : ss
County of Yellowstone)

On this _____ day of _____, 20__ before me a Notary Public for the State of Montana, personally appeared _____, known to me to be the Mayor, and acknowledged to me that he executed the foregoing record.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial seal the day and year first above written.

[notary signature/affix seal to left or below]