

**AMENDED AGREEMENT
BETWEEN
BENNETT’S VILLAGE, INC. AND THE CITY OF CHARLOTTESVILLE**

THIS AMENDED AGREEMENT (the "Amended Agreement") is entered into effective as of the ____ day of _____, 2024 (the "Effective Date"), by and between **CITY OF CHARLOTTESVILLE, VIRGINIA**, a body politic and municipal corporation of the Commonwealth of Virginia (sometimes referred to herein as the “City” or “Owner”), and **BENNETT’S VILLAGE, INC.**, a Virginia non-stock corporation (sometimes referred to herein as the “Operator,” “BV,” or “Bennett’s Village”) whose principal offices are located at 716 Shamrock Road, Charlottesville, Virginia, 22903. (The City and BV are sometimes jointly referred to as the "parties"). For and in consideration of the premises and mutual covenants hereinafter contained, and subject to the conditions herein set forth, the parties set forth these amended terms to their November 26, 2019, Memorandum of Agreement and subsequent September 8, 2021, amendment attached as Exhibit "A" and made a part hereof (collectively, the “Prior Agreement”), as follows:

Recitals

WHEREAS, on April 2, 2019, the Charlottesville City Council adopted a Resolution “*Establishing a Partnership between the City of Charlottesville and Bennett’s Village*” (the "Resolution"), following receipt of a proposal from Bennett’s Village to construct, at its cost and expense, a multi-generational, all-abilities play space within the City's park system at Pen Park that is designed for accessibility and inclusion (the “Project”); and

WHEREAS, on November 27, 2019, the Charlottesville City Manager executed a document titled “*Memorandum of Agreement Bennett’s Village, the ARC of the Piedmont and the City of Charlottesville, November 26, 2019*” (2019 “MOA”) containing a statement that the purpose of the MOA was to assign and identify the various responsibilities in the relationship between the City and BV with respect to the Project; and

WHEREAS, the "2019 MOA” was amended on September 8, 2021, to remove the ARC of the Piedmont from the partnership as they ceased to be a Bennett’s Village fiscal sponsor; and

WHEREAS, BV and the City desire to refine and update their respective roles relative to the Project and the project planning activities that have been underway within BV since 2019; and

WHEREAS, the parties believe that this Amended Agreement is in the respective best interests of the parties.

NOW, THEREFORE, the parties, intending to be legally bound hereby and for in consideration of the mutual covenants contained herein, do hereby set forth their agreement as follows superseding, where applicable, the Prior Agreement:

Article A. PURPOSE; PROJECT SCOPE

I. Purpose: This Amended Agreement shall assign and identify the various rights, responsibilities and obligations in the relationship between the City and BV for the design, development, future operation, and ownership of an All Abilities Play Space (the "Play Space") and ancillary facilities for the project as depicted within a Concept Plan prepared by Mahan Rykiel Associates, Inc., dated February 5, 2020 (the "Project").

II. Scope: The Project is a multipart development that will be undertaken in several phases (each a "Phase" and, collectively, the "Phases"), upon approximately four (4.0) acres of land within Pen Park (See Exhibit "B" – Total Project Area). The area to be developed by BV within each Phase shall first be leased to BV under terms set forth within attachments to this Agreement (See Exhibit "C" – Phasing).

The City and BV agree to enter into a new lease for each Phase of the Project (each, a "Phase Lease") consistent with the model Phase Lease. Once each respective Phase is completed, each respective Phase Lease shall, as provided herein, be terminated and, simultaneously, all rights and interest to the equipment, facilities, improvements, and fixtures (collectively, the "EFIF") constituting the respective completed Phase of the Project's Play Space shall be contributed and transferred to and accepted by the City. This contribution, transfer and acceptance shall be affected by gift deed that will identify, as applicable, the representations of BV and the gift conditions of the City.

III. Phasing of Development: Subject to the commitment of the parties to the Project in its entirety as provided herein, the parties acknowledge that each Phase shall be deemed a distinct and independent part of the Project during a distinct time period. During each Phase Lease, the City shall lease to BV and BV shall have the exclusive right to enter onto and develop the park land owned by the City in accordance with the terms and conditions of this Amended Agreement, the Project, and the current applicable Phase Lease.

Upon completion of the development in the Play Space for each Phase of the Project, BV shall provide notice to the City of their intention to terminate the applicable Phase Lease within sixty (60) days (a "Phase Lease Termination Notice") that shall include all documentation required by Article B, Section VII. Within this sixty (60) day period, the Parties shall review and inspect the EFIF built during the current Phase. Upon approval by the City of the EFIF as being consistent with the Project (such approval not to be

unreasonably withheld, delayed or conditioned, the parties agreeing that certification by the Contractor (as defined below) to both the City and BV of construction compliance of the EFIF with the respective Play Space as described in the Project shall constitute a presumption of approval), BV shall transfer the EFIF by Gift Deed to the City. Once (1) a Phase has been completed, (2) the Phase Lease terminated and a (3) contribution effected via Gift Deed, the terms of this Amended Agreement shall no longer apply to the completed Phase and all rights, liabilities and interest in the leased property constituting the respective Phase Lease together with the EFIF shall revert to the City and be the sole responsibility of the City to maintain and operate the Play Space consistent with the respective Gift Deed. The City shall execute for BV documents accepting the completed work as a contribution, shall terminate the Phase Lease and release any contractual obligations relating to, inter alia, maintaining insurance coverage over the terminated Phase Lease.

Phase Funding Requirement, Notice to Proceed, and Term: The parties acknowledge and agree that, as a condition of commencing construction on any Phase of the Project, BV must demonstrate that it has sufficient funding to complete the distinct Phase prior to the City's agreement to issue a notice to proceed (the "Notice to Proceed"). The City's agreement to issue a Notice to Proceed may be based on BV's current cash and securities, third party pledges, letters of credit or any other commercially reasonable basis but the City's agreement may not be unreasonably withheld, delayed, or conditioned, the parties agreeing that current dedicated cash assets alone or in combination with a letter of credit shall be presumed to be sufficient for the City's approval. As conditioned above, the Notice to Proceed shall be issued within thirty (30) days of BV's written request to the City to proceed with construction (a "Request to Proceed") provided that BV has also provided the documentation described in Article B, Section III below. Each Phase Lease shall have an Initial Term of two (2) years with the right to a two (2) year extension.

IV. Subsequent Phase Construction, Funding and Term: The parties agree that subsequent Phases shall require distinct budgets, construction plans, and a new Phase Lease approved by the Charlottesville City Council in accordance with the laws of the Commonwealth of Virginia and this Amended Agreement. As provided herein, the parties shall mutually agree upon the budget and construction plans prior to the execution of a new Phase Lease.

Notice to Proceed from the City to BV shall, as provided above, occur only after approval of all budgets, construction plans and a fully executed Phase Lease. The Parties mutually agree that each Phase Lease shall substantially conform to the form provided in Exhibit "D" and shall be subject to review and approval by City Council in accordance with the Laws of the Commonwealth of Virginia and this Amended Agreement.

Article B. RESPONSIBILITIES OF BENNETT'S VILLAGE

BV shall be responsible for the following activities:

I. Plans and Specifications:

For each Phase of the Project, BV shall, except as otherwise provided herein, be responsible for payment of all costs and expenses necessary for preparation of concept design plans, construction plans, specifications, and services necessary for or in connection with securing applicable governmental permits and approvals; provided, however, that the City shall waive all filing fees for the City of Charlottesville and otherwise provide Bennett's Village with all waivers from fees and taxes as are accorded to entities recognized as tax-exempt under Section 501(c)(3) of the Internal Code of 1986, as amended.

Construction plans (the "Construction Plans") shall include, as necessary and/or required by relevant City, State or Federal codes existing at the time of plan submittals, the location and materials for buildings, structures and equipment to be constructed or installed, in specific locations, and the manner in which the development site will be connected to and accessed from other sections of Pen Park (a/k/a "site development plans"); and, as applicable, erosion and sediment control plans; stormwater management plans; water, sewer and electric utility plans (both temporary, to serve construction activities, and permanent); and necessary wildlife conflict resolution strategies.

Final Construction Plans shall include measures by which BV and its contractors shall minimize disruption to Pen Park and the uses and activities occurring within the park outside of the Leased Premises. Measures may include, but shall not necessarily be limited to, restricted hours of construction or land-disturbing activity; alternative pedestrian access in full compliance with all ADA requirements, parking, or traffic arrangements; sound dampening measures; or tree protection measures.

II. Cost Estimates; Payment for Labor, Materials and Supplies:

For each Phase of the Project, BV shall provide the City with detailed cost estimates (which shall include separate estimates for construction, construction contingencies and construction administration services). Such cost estimates shall be developed during the conceptual development and schematic design phases of each Phase of the Project and verified prior to commencement of any construction or installation activities for a respective Phase.

During construction/installation of each Phase of the Project, BV shall timely pay all its contractors, subcontractors, materialmen, and suppliers all amounts due to them, and BV shall not suffer or allow any mechanics or other liens to attach to any City park land.

III. Request(s) for Notice to Proceed:

For each Phase of the Project, when BV is ready to commence the Work, BV will send a written communication to the City (a "Request to Proceed"), requesting the City to issue a written Notice to Proceed according to the criteria established above.

BV's Request to Proceed to the City shall include the following documentation:

- 1) the final cost of the Project Phase, as evidenced by a binding contract for construction (“Contract Price”);
- 2) a contract for administration of the contract for construction unless included in the contract with a licensed General Contractor;
- 3) evidence that BV has a Budget for the Phase, including, without limitation: sufficient funds (cash on hand, pledged funds, letter of credit, etc. according to the standards and presumptions described above) to cover the Contract Price including a reasonable construction contingency/ reserve of no more than ten percent (10%) of the Contract Price;
- 4) sufficient funds (cash on hand, pledged funds, letter of credit, etc. according to the standards and presumptions described above) to cover the cost of construction administration, if applicable and distinct from the Contractor; and
- 5) a final Schedule for construction/ installation of the work in such Phase.

IV. BV Project Coordinator: BV shall appoint a Project Coordinator to interact with the City regarding the Project.

V. Contractors:

BV will be responsible for construction/installation of the Project using only contractors and subcontractors licensed and otherwise authorized to do business within the Commonwealth of Virginia. The Contractor and, if applicable, any replacement Contractor must be a licensed General Contractor in the Commonwealth of Virginia.

VI. Documentation of Completion, Donation and Acceptance by the City:

Upon commencement of construction of each Phase of the Project, it shall be the responsibility of BV to require its contractors and their subcontractors (“Contractors”) to construct and install all building, structures and equipment in accordance with the approved construction/ installation plans and specifications (“Project Approvals”).

In circumstances where a deviation from the Project Approvals is necessary due to unanticipated conditions or other reason, the Contractors shall be required by BV to promptly indicate on the face of the Project Approvals the precise change in location, materials, or other deviation and BV shall promptly submit the same to the City for review (“Redlined Plans”).

Upon completion of each Phase of the Project, BV will submit to the City a Phase Lease Termination Notice that shall include (i) a set of Record Drawings (As-Built) and related documentation, consisting of the actual, as-built conditions, proof that payment in full has been made to all contractors and suppliers who provided labor and materials for the completed work; (ii) evidence of the transferability/assignability of all warranties to the City, and (iii) a written Contribution of all of the Work and improvements which have been completed and installed within that particular Phase.

VII. Annual reports prior to Project Completion; Annual Audits:

BV shall provide a written annual report to the City on or before October first of each calendar year, providing information to City Council regarding major Project milestone achievements, status of fundraising efforts, a budget-to-actual expenditures-report for each Project Phase then remaining in progress, and a summary and report of operations and goals for the ensuing year. Additionally, within three (3) months of the end of BV's annual financial reporting period, BV shall provide to the City a written report specifying the amount of funding received by BV from all sources during the preceding year and specifying the amount of funding expended by BV for and in connection with any applicable Phase of the Project during the preceding year. This document shall be a public record.

Article C. RESPONSIBILITIES OF THE CITY:

The City shall be responsible for the following activities in connection with the Project:

I. Plans and Specifications:

For each Phase of the Project, the City will, at its sole cost and expense, promptly review proposed concept designs and proposed Construction Plans prior to BV's official submission of the plans for governmental permits or approvals. The City will offer comments and may request changes to the construction plans and specifications.

II. Cost Estimates:

For each Phase of the Project, the City will, at its sole cost and expense, promptly review all cost estimates (labor and materials for construction/ installation, construction/installation contingency, and construction/installation administration). If the City is concerned about the accuracy or completeness of the cost estimates, the City and BV shall meet in person to resolve the concerns.

III. City Notice to Proceed:

For each Phase of the Project, the City will, within sixty (60) days of BV's request for a new Phase Lease, execute a new Phase Lease with BV and promptly issue a written Notice to Proceed according to the requirements described above for the next Phase to authorize commencement of land disturbing activity, construction, and equipment installation. This Notice to Proceed is expressly conditioned as provided above.

IV. City Project Coordinator:

The City will, at the City's sole cost and expense, designate a Project Coordinator, who will be a City employee tasked with monitoring the progress of the Project, and assisting BV with understanding all the permits, governmental approvals, and requirements necessary for the progress of the Project.

V. Documentation of Completion; Donation and Acceptance by the City:

Upon completion of each Phase of the Project, the City will review a set of record (as-built) drawings presented by BV along with (i) a written offer of donation and dedication to the City of all the Work and improvements which have been completed and installed within that Phase, and (ii) documentation confirming transfer/ assignment of all warranties to the City. If the as-built plans demonstrate that all the work was constructed and installed in accordance with the approved plans for the Project, and upon being satisfied that all warranties will be transferred or assigned to the City, the City will accept the respective Contribution by Gift Deed as provided herein and provide a written confirmation of acceptance of ownership and maintenance of the Work. Thereafter, the City and BV will terminate the Phase Lease and will be responsible for normal operating expenses such as utilities, custodial services, and routine repairs and maintenance activities.

VI. Hours of Operation:

Hours of operation of those portions of the park included in the project shall be 6:00 a.m. to 10:00 p.m. unless modified by the City's Parks and Recreation Director.

Article D. GENERAL TERMS

The Parties recognize that this Agreement is designed for the purpose of governing a multi-year relationship between the City and BV for the long-term implementation, development and operation of this Project at Pen Park.

I. Modification:

This MOA will be reviewed and updated as needed to facilitate the efficient development of the Play Space and the Project. The provisions of this Amended Agreement may be modified by the parties by mutual consent set forth in a written addendum approved and signed by the parties in the same manner and with the same formality as this Amended Agreement.

II. No Assignment of Rights:

BV shall have no right to assign or sublease, in any manner or fashion, any of its rights, privileges, or interest accruing to it under this Agreement or any attached Phase Lease to any other individual or entity without the prior written consent of the City. The City's consent shall not be unreasonably withheld if BV proposes an assignment to a successor charitable organization and the assignee demonstrates to the City's satisfaction that it is in all respects capable of performing all the obligations hereunder.

III. Funding Contingency:

Both parties acknowledge that the obligations and responsibilities of both BV and the City under this Amended Agreement are expressly made contingent upon the availability of funding according to the standards provided above and, in the case of the City, upon both the availability and the appropriation of funding by the City Council.

IV. Notices:

Except as otherwise provided herein, notice shall be given either by first class mail, postage prepaid, deposited in the United States Postal Service, or by prepaid overnight delivery service requiring acknowledgement of receipt. While the parties may authorize subsequent use of e-mail notices for other purposes under this Amended Agreement, the parties agree that Notice to Proceed, Request to Proceed, and the Phase Lease Termination Notice (or subsequent Phase termination notices) may all be provided by e-mail.

Notices given under this Amended Agreement shall be addressed as follows:

- 1) City's designated representative to receive all notices and correspondence is the City Manager, said notices and correspondence to be given to the following address: P.O. Box 911, Charlottesville, Virginia 22902 (mail), or City Hall, 605 East Main Street, Second Floor, Charlottesville, Virginia, 22902 (delivery) a copy of said notice shall also be sent to the Charlottesville City Attorney at PO Box 911, Charlottesville, VA 22902.
- 2) BV's designated representative to receive all notices and correspondence regarding this Lease is its Executive Director, said notices and correspondence to be given to the following address: 716 Shamrock Road, Charlottesville, Virginia 22903.
- 3) Either party may change its designated representative or address(es) by giving written notice to the other party as provided in this paragraph.

V. No Waiver of Rights:

No failure on the part of the City to enforce any of the terms or conditions set forth in this Amended Agreement shall be construed as or deemed to be a waiver of the right to enforce such terms or conditions. No waiver of a breach of any covenant in this Agreement shall be construed as a waiver of any succeeding breach of the same covenant. No delay or failure by either party to exercise any right under this Amended Agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

VI. Entire Agreement

Except as otherwise expressly provided herein, this Amended Agreement contains the entire agreement between the parties as of the effective date specified herein and it supersedes all prior agreements and understandings of the parties, whether verbal or written, as to matters that are set forth within this Amended Agreement. There are no collateral agreements, stipulations, promises or undertakings whatsoever upon the respective parties, in any way touching the subject matter of this instrument, which are not expressly contained herein within this document, or the Exhibits and Addendum incorporated herein, if any. The execution of this Amended Agreement has not been induced by either party by representations, promises or understandings other than those expressly set forth herein.

VII. Non-Appropriations Clause

Payment and performance obligations, if any, of the City, beyond the initial year of this Amended Agreement, are expressly conditioned upon the availability of and appropriation by the City of public funds therefor in each subsequent fiscal year. When public funds are not appropriated or are otherwise unavailable to support continuation of performance by the City in a subsequent fiscal period, this Amended Agreement's payment requirements and the City's obligations hereunder shall automatically expire, without liability or penalty to the City.

VIII. Additional Insured Status:

BV shall cause the City to be identified as an "additional insured" under all insurance policies and coverages required by this Amended Agreement.

IX. Record Keeping:

In accordance with income tax accounting standards, BV shall maintain books and records pertaining to the funds received from the City and amounts expended by it in connection with this Amended Agreement. BV shall maintain such books and records for a period of at least three (3) years following the expiration or earlier termination of this Amended Agreement. Upon request, the City shall be entitled, at its own expense, to obtain an audit of all funds received and expended by BV under this Amended Agreement. Upon receipt of notice that the City desires an audit, BV shall make its books and records available to the City and its auditor(s) and shall cooperate with the audit.

X. Public Disclosure of Agreement Documents:

BV acknowledges and understands that this Amended Agreement, and all related public proceedings and records, shall be open to the inspection of any citizen, or any interested person, firm or corporation, in accordance with the Virginia Freedom of Information Act.

XI. Independent Contractor

Neither BV, nor its agents, employees, assignees or subcontractors shall be deemed employees or agents of the City by virtue of any services performed pursuant to this Amended Agreement or the contractual relationship established hereby. BV shall have sole responsibility for its staff, including their work, personal conduct, directions and compensation.

XII. Binding Effect of Agreement

The terms, provisions and conditions of this Amended Agreement shall bind and inure to the benefit of the respective parties hereto and to their representatives, successors, and (where permitted by this Amended Agreement) their assigns.

XIII. Severability

If any term, provision or condition of this Amended Agreement, or the application thereof to any person or circumstances, shall be held by a court of competent

jurisdiction to be invalid or unenforceable, the remainder of this Amended Agreement, and the application of any term, provision or condition contained herein to any person or circumstances other than those to which it has been held invalid or unenforceable, shall not be affected thereby.

XIV. Interpretation of Provisions

In the event of any conflict, discrepancy or inconsistency between this document and any other documents which have been incorporated into this document by reference or made exhibits or attachments hereto, then the provisions set forth within the body of this document shall govern the parties' agreement.

XV. Headings

Section, article and paragraph headings contained within this Amended Agreement have been inserted only as a matter of convenience and for reference, and they in no way define, limit, or describe the scope or intent of any term, condition or provision of this Amended Agreement.

XVI. Choice of Laws:

This Amended Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia. All litigation arising out of this Amended Agreement shall be commenced and prosecuted in the federal, state or local court(s) having jurisdiction within the City of Charlottesville, Virginia.

IN WITNESS WHEREOF, the parties do hereby set forth their signatures, representing that the individuals who affix their signatures hereto have been duly authorized to bind each party to the terms and conditions of the foregoing Amended Agreement:

BV:	CITY		
By:	_____	By:	_____
Title:	_____	Title:	<u>City Manager</u>

Approved As to Form: _____
City Attorney or designee

Funds Are Available: _____
Director of Finance or designee

Exhibits & Attachments:

Exhibit A, November 26, 2019 Memorandum of Agreement and subsequent September 8, 2021 amendment

Exhibit B, Total Project Area

Exhibit C, Proposed Phasing

Exhibit D, Model Phase Lease