

ADVENTURE AFRICA PHASE III - RHINOS PROJECT AGREEMENT

1. Purpose. This AGREEMENT is hereby entered into this ___ day of _____, 2023 by and between the Zoological Society of Milwaukee County, Inc. a Wisconsin not-for-profit corporation (Society), and Milwaukee County, a Wisconsin municipal corporate body, represented by its Executive Director of the Milwaukee County Zoo (County). The purpose of this Agreement is to define the roles and responsibilities regarding the completion of Phase 3 Rhino of the Adventure Africa habitat (hereinafter referred to as the "Project").
2. Recitals.

Whereas, in December 2013, the Milwaukee County Zoo and the Society completed a master plan to guide redevelopment and development of the Zoo for the next 20 years. Adventure Africa was listed as the initial priority for implementation; and

Whereas, Phase 1 of the Adventure Africa exhibit complex featured a new elephant habitat that opened in May 2019. Phase 2 of Adventure Africa complex featuring hippos was opened in June 2020; and

Whereas, included in the adopted County 2020 capital budget, the County, in association with the Society agreed to begin the design of Adventure Africa Phase 3 Rhino for the replacement of the former elephant habitat renovation of the remainder of the Pachyderm complex and addition of a Central Pathway through the Zoo. Total budgeted design costs were \$902,100 equally divided between the Society and the County; and

Whereas, the schematic design of Phase 3 Rhino is complete and through the use of Construction Manager at Risk (CMAR) contracting, the total construction costs are \$22,209,691, of which the Society will contribute up to \$6,000,165 of the total construction cost and the County will contribute \$16,209,526. It is estimated that an additional amount of \$3,000,000 may be available from the Life Support System (LSS) of Adventure Africa Elephants to fund the rhino project. Each entity will be credited with 50% of any savings resulting from the LSS project. The surplus funds from the LSS project will not be used to increase the total construction budget of \$22,209,526. The Society's contribution for construction is \$6,000,165 along with any surplus from the LSS project (projected at \$1,500,000) for an estimated total contribution of \$7,500,165. Increases in the Society's contribution to the Adventure Africa Phase 3 Rhino construction that are derived from the LSS project surplus will reduce the County's contribution by a like amount; and

Whereas, the Society has agreed to allocate up to \$487,043 of its total commitment towards the cost of completing the construction bid documents in 2023 which will be credited towards the Society's financial commitment of \$6,000,165; and

Whereas, Section 6(a)(2) of the 2020 Memorandum of Understanding (MOU) states, "For each such capital project, the County and the Society will execute a specific agreement describing sources and uses of funds, procedures for transferring the Society's share of project costs to the County, program management, project schedule, County Architectural

Services fees, and any other specific agreements. The Executive Zoo Director will submit each agreement to the Committee on Parks, Energy and Environment for approval prior to bidding the project."; and

Whereas, the Committee on Parks, Energy and Environment has approved this Agreement via Resolution File No. 23-_____, adopted on _____ and authorized _____ to execute this Agreement on the County's behalf.

NOW THEREFORE, the Parties agree to the provisions of this Agreement:

3. Design. The County in consultation with the Society will create the designs, plans and specifications for the Project on or before February 9, 2024, and shall deliver same to the Society upon their completion.
4. Project Approval. The project, including its cost, integration in the Zoo park siting, landscaping, design, equipment, plan, specifications, and construction shall be subject to the written approval of the Society and the County, which approval of the County shall include approval by the Department of Administrative Services-Facilities Management (DAS-FM). The Society's approval of the Project shall not be unreasonably conditioned, withheld or delayed, and shall not constitute, nor shall be deemed to be an approval of the Project's compliance with applicable government laws, ordinances, or rules.
5. Project Construction. Upon approval of the Project by the Society and the County, the County shall promptly begin, and shall have the sole responsibility for the construction of the Project, which construction shall be done in accordance with matters previously approved in writing by and between the parties. The County shall provide contract documents to the Society, obtain bids, secure contracts and administer the Project construction process through its completion. The County shall implement the Project with the intent based on the Construction Manager's Schematic Design Estimate Schedule, that it will be completed and available for occupancy on or before July 3, 2025.
6. Source of Funds. Per Section 6(a)(3) of the 2020 MOU, no such capital project may proceed where the County will share the cost of such capital project until the County Board appropriates funds for such project and until the Society transfers its share of the appropriation or provides assurances acceptable to the County of the timely availability of such funds. The total estimated cost for the Project is \$22,209,691. The County shall appropriate \$12,474,238 in expenditures with \$5,513,122 in revenues from the Society in the 2024 Capital Budget and \$9,248,410 in expenditures the 2025 Capital Budget. The County shall then provide a preliminary listing of Project expenses and commitments to the Society in the fourth quarter of the calendar year. After performing a reconciliation of Project expenses and confirming that they are consistent with the Project budget as previously approved, the County shall provide an accounting of the Project expenses incurred along with the request for reimbursement of Project expenses incurred that is based on the proportional allocation established pursuant to in this Agreement. The Society shall reimburse the County for its proportionate share of the Project expenses incurred, up to a maximum aggregate reimbursement of \$6,000,195 (excluding surplus funding from the LSS Project). The County

shall pay up to a maximum amount of \$16,209,526 of the total construction cost of the Project. The Society shall provide to the County \$6,000,165 to be credited against the cost of the Project per the cash flow schedule. If the Audit Report required under Section 9 below indicates that, based on the due date, pledge receivables plus cash flow schedule, the Society will be required to provide a reserve of available funds or line of credit that bridges the gap in receivables and cash flow, before construction can begin. Upon the request by the Society, and upon written approval by the County, the Society may contract directly with third parties and provide materials, services or equipment that is part of the Project. In the event that the County agrees to accept such monies or materials, in-kind services or equipment, the County shall account for these funds as part of the Society's \$6,000,165 commitment to the Project. Additional funds may be available from the Life Support System ("LSS") of Adventure Africa Elephants to fund the rhino project. Should LSS provide additional funds, each Party shall be credited in equal amount of any savings resulting from the LSS project. With the projected \$3,000,000 savings in the LSS project, the total Society contribution totals \$7,500,165 and the County portion is \$14,709,526.

7. In-Kind Support. Upon the request by the Society, and upon written approval by the County, the Society may contract directly with third parties and provide materials, services, and/or equipment that is part of the Project. The request from the Society shall include an estimate of the fair market value of such materials, services and/or equipment to be provided. The request will be provided to the Milwaukee County Zoo Executive Director, the Performance, Strategy and Budget Director, and Comptroller before the County provides approval. Upon completion or delivery of in-kind materials, services and/or equipment delivery, the Society will provide a final accounting of the fair market value of the materials, services, and/or equipment and costs in writing to the Milwaukee County Executive Zoo Director, Performance, Strategy and Budget Director, and Comptroller. The Project budget will be adjusted to reflect the fair market value of the in-kind scope of work. In the event that the County agrees to accept such monies or materials, in-kind services, and/or equipment, the County shall account for these funds as part of the Society's \$6,000,195 commitment to the Project.

For each year of Project implementation, the Society will provide its prorated share of that year's incurred costs. The end result will be Society contributions and/or in-kind work that equals \$6,000,165 of the total Project costs or \$7,770,694 if the surplus funds from Adventure Africa Elephants LSS are used for the rhino project.

8. Project Management. The Milwaukee County DAS-FM and the Society selected John Teppler from Concord Group as the Project Manager to coordinate the activities of the Project. The cost of these services will not exceed 3.3% of the construction costs of the Project. Any project management work that may lead to the exceedance of 3.3% of the construction cost shall be mutually agreed upon by both parties prior to the commencement of the additional work. The Project Manager, and such other personnel who are involved in the Project as the Society may reasonably request, shall meet with the Society periodically and as requested by the Society, and the Society is hereby granted access to the Project site for inspection and to all of the costs and records regarding the Project, including invoices and bills of material.

The utilization of contingency funds allocated to the Project budget shall be mutually agreed upon by the County and the Society.

9. Records. Per Section 9 of the 2020 MOU, “[t]he Society and the County shall provide each other access to all construction and other documents or records related to the construction of or disbursement of funds for capital improvement projects in which the Society participates. These documents and records shall include an accounting of the amount of funds received and disbursed by the Society and/or the County for a particular capital improvement project but shall not include any documents which would contain information regarding individual donors or other sources of such funds.” It is the responsibility of the Society to verify to the County the validity of pledges and funds received by the Society for the Project. In satisfaction of this responsibility, the Society hereby agrees to engage its external auditor to prepare an audit report of all pledge receivables, cash, and investments, net of any outstanding payables or other commitments for such funds, held by the Society for the Project as of the Society’s April 30, 2023, Audit of a Specific Element Report (Audit Report). The Audit Report was prepared based on the guidelines of the American Institute of CPAs for an “Auditor’s Report on a Specific Element” and has been delivered to the County on June 30, 2023. With the delivery of the Audit Report, the Society has no further responsibility to verify its pledges and funds for the Project.
10. Indemnification. No Party shall be required to indemnify or hold harmless the other Party for any of the other Party’s acts or omissions, or of the acts or omissions of their employees, officers, or agents irrespective of the time and location for those acts. Each Party shall be responsible for its own acts and omissions as well as the acts or omissions of its employees, officers, or agents. Notwithstanding the foregoing, nothing in this Agreement shall in any way constitute a waiver by any party of any immunity, liability limitation, limitation on the amount recoverable, or other protection available to the Party under Section 893.80, Wis. Stats., or any other applicable statute or law.
11. Insurance:

County Insurance. County is a municipal body corporate that self-funds for general liability under Wis. Stat. §§ 893.80 and 895.46(1), and automobile liability under § 345.05. County is also permissibly self-insured under Wis. Stat. § 102.28(2)(b) for Workers’ Compensation. The protection is applicable to officers, employees and agents while acting within the scope of their employment or agency. Retentions and other costs of risk, including County contractual obligations, are financed under appropriation and fund accounting principles applicable to government operations.

Society Insurance. The Society agrees to maintain policies of insurance to cover costs as may arise from claims for damages to property of and/or claims which may arise out of or result from Society’s activities, by whomever performed, in such coverage and amounts as required and approved by the County. Acceptable proof of such coverage shall be furnished to the County prior to commencement of activities under this Agreement. The Society shall provide evidence of the following coverages and minimum amounts: General Liability with limits of \$1,000,000 per occurrence/\$2,000,000 aggregate, Workers’ Compensation Statutory

limit, Employer's Liability with limit of \$100,000/\$500,000/\$100,000, Automobile Liability with a limit of \$1,000,000 per accident, and Umbrella Liability with limits of \$5,000,000 per occurrence/\$5,000,000 aggregate. Umbrella policy will follow form to underlying General, Employer's, and Automobile Liability policies. The County shall be named as an Additional insured on the General and Automobile policies as respects the services provided in the agreement. A Waiver of Subrogation shall be afforded to the County on the Worker's Compensation policy. The County acknowledges that the Society will not carry any Professional Liability coverage. A thirty (30) day written notice of cancellation or non-renewal shall be afforded to the County. The insurance specified above shall be placed with a carrier approved to do business in the State of Wisconsin. The Society has provided to the County the Certificate of Insurance attached hereto as Exhibit B, and the County hereby acknowledges that the carriers identified in such Certificate of Insurance are acceptable to the County. Any Carrier changes post agreement acceptance must be A rated or better per AM Best's Rating Guide or pre-approved by the County Risk Manager.

Third Party Insurance. The Society agrees to require any consultants, contractors, and subcontractors it engages to perform engineering and/or design work to carry Professional Liability coverage with limits of not less than \$2,000,000 per occurrence/\$2,000,000 aggregate.

12. Use of Facility and Naming Rights. The County shall be and remain the sole owner of the Project. The County agrees to maintain and staff such facility and make designated public space available for the use of the Society's members and general Zoo visitor public for the reasonable, useful life of the facility. In addition, the County and Society shall have reasonable access and use of the Project facility's designated public space without cost for events held or operated for the promotion of the Zoo or the Society. The County agrees that the Society is hereby granted the exclusive right to name the Project facility or parts thereof (by use of a single name or multiple names), subject to the County's written approval, which shall not be unreasonably conditioned, withheld, or delayed, and upon such designation by the Society, the Zoo and County will thereafter, during the reasonable, useful life of the Project facility, refer in public to same by such name or names. The County will allow the Society to erect and maintain suitable name plates or other identifying signage that may be reasonably requested by the Society to effectuate such naming designation, and such costs are included in the Project budget. The County will execute such agreements as may be reasonably requested by the Society to confirm such naming rights.
13. Miscellaneous. This Agreement contains the entire understanding of the parties with regard to the subject matter described herein, and it may only be amended by a writing duly executed and approved by both parties.
14. No Private Business Use of the Project. The Society acknowledges that if the Project is financed with tax-exempt bonds, the County will be prohibited from using or permitting the use of the Project in a manner that would result in Private Business Use that would jeopardize the tax-exempt status of the interest on any tax-exempt obligations issued by the County to finance the County's portion of the Project (the "Bonds"). "Private Business Use" means direct or indirect use in a trade or business carried on by any person other than a state

or local government unit (as defined in Section 1.103-1 of the Treasury Regulations) or where an organization described in Section 501©(3) of the Code is treated as a state or local government unit (as defined in Section 1.103-1 of the Treasury Regulations) with respect to its activities which are not unrelated trades or businesses (without regard to whether the activity results in unrelated trade or business income subject to taxation under Section 512(a) of the Code), determined under Section 513(a) of the Code. Without limiting the foregoing, the Society agrees and acknowledges that the Comptroller of the County may reject any contract proposed by the Society to be entered into with respect to the Project if the Comptroller determines, in his or her sole reasonable discretion, that such contract may result in Private Business Use of any portion of the Project (including contracts for naming rights contemplated in Section 12 herein). Further, the Society's use of the Project described in Section 12 herein may be limited by the Comptroller of the County in any year to ensure that any Bonds maintain their tax-exempt status. This provision shall remain in force as long as the County has Bonds outstanding. The Society shall provide the Comptroller with any proposed contract referred to above before entering into such contract and shall, promptly upon the County's written request delivered at any time until the last Bond matures, provide the Comptroller of the County on behalf of the County a certificate (and any other information the County reasonably deems necessary) to evidence that the Society complied with this Section.

15. Public Records. The Parties understand that each are bound by the Wisconsin Public Records Law, and as such, all of the terms of this Agreement are subject to and conditioned on the provisions of Wis. Stat. sec. 19.21 et. sec. The Parties acknowledge that they are obligated to assist each other in retaining and producing records that are subject to the Wisconsin Public Records Law, including but not limited to those records produced or collected by the Party under this Agreement pursuant to Wis. Stat. sec. 19.36(3) and that the failure to do so shall constitute a material breach of this Agreement. Except as otherwise authorized, those records shall be maintained for a period of seven years.
16. County Rights of Access and Audit. Society shall, not less than annually, submit to the Milwaukee County Office of the Comptroller copies of Society's audited financial statements. Furthermore, Society, its officers, directors, agents, partners and employees shall allow the County Audit Services ("Designated Personnel"), and any other party the Designated Personnel may name, with or without notice, to audit, examine, and make copies of any and all records of Society related to matters under this MOU for a period of up to three years following the Expiration Date. Any personally identifiable personnel or donor information reviewed as part of any audit would not be recorded as part of County Audit Services Division's workpapers. Any of Society's contractors or subcontractors performing work under this MOU will be bound by the same audit terms as Society. All contracts, subcontracts, or other agreements for work performed under this MOU will include written notice that the parties understand and will comply with the requirement contained in Milwaukee County Ordinances § 34.095.
17. Independent Contractors. In the performance of this Agreement, both the County and the Society will be acting in an individual capacity and not as agents, employees, partners, joint ventures or associates of one another. The agents or employees of the one shall not be

construed to be the agents or employees of the other. County employees shall remain employees of the County notwithstanding the fact that they may assist the Society.

IN WITNESS WHEREOF, the parties hereto have executed this Contract on the day, month and year first above written.

ZOOLOGICAL SOCIETY

By: _____ Date: _____
Name: _____
Title: _____

MILWAUKEE COUNTY ZOO

By: _____ Date: _____
Executive Zoo Director

ZOOLOGICAL SOCIETY

By: _____ Date: _____
Board Chair, Zoological Society of Milwaukee

Approved with regards to County Ordinance Chapter 42:

By: _____ Date: _____
Community Business Development Partners

Reviewed by:

By: _____ Date: _____
Risk Management

Approved for execution:

By: _____ Date: _____
Corporation Counsel

*Approved as to funds available per
Wis. Stat. sec. 59.255(2)(e):*

By: _____ Date: _____

Approved:

By: _____ Date: _____

Comptroller

County Executive

Approved as compliant under sec. 59.42(2)(b)5, Stats.:

By: _____ Date: _____
Corporation Counsel

DRAFT