

**AGREEMENT BETWEEN THE CITY OF WALNUT CREEK AND THE WALNUT CREEK AQUATIC
FOUNDATION FOR CONTRIBUTION OF FUNDING TO THE CONSTRUCTION OF A NEW AQUATIC
FACILITY AT HEATHER FARM PARK**

THIS AGREEMENT (“Agreement”) is entered into by and between the City of Walnut Creek, a Municipal Corporation (“City”) and the Walnut Creek Aquatic Foundation, a non-profit corporation (“WCAF”), effective as of _____, 2022 (“Effective Date”). City and WCAF are sometimes referred individually as a “Party” and together as “Parties.”

RECITALS

- A. The City owns a swimming pool complex located at Heather Farm Park known as the Clarke Memorial Swim Center, which includes a 50-meter pool, a 25-meter diving well, and an instructional pool, all of which have served the community since it opened in 1972.
- B. The Clarke Memorial Swim Center is an important community asset, providing instructional and recreational activities for people of all ages and abilities. In addition to formal learn-to-swim and swim team programming, it is used for fitness and recreation by the community, camps, safety certification training, swim team rentals, and as a host site for swim meets including the Walnut Creek All City Swim Meet.
- C. The City has been evaluating and planning for a new aquatic facility at Heather Farm Park since 2010, in recognition of the value of aquatics programs in the community and the likely demise of the existing aquatic facility in the foreseeable future.
- D. WCAF is a non-profit organization incorporated in 2014, which was established to promote and advance local recreational, learn-to-swim, competitive, fitness, and therapeutic aquatic activities and facilities.
- E. WCAF is comprised of community members that include representatives of the three swim teams that currently rent pool time at the Clarke Memorial Swim Center (Walnut Creek Masters, Walnut Creek Aquabears, Walnut Creek Aquanuts), and that use Clarke as a base for operations of their swim programs. These operations include practices, swim meets, and other special events.
- F. The City of Walnut Creek has initiated a *Your Parks, Your Future* project with the specific City Council goal to: “Meet ongoing infrastructure maintenance needs and create clear priorities and funding strategies for parks, athletic fields, community buildings and other related facilities and infrastructure as identified in the ‘Your Parks, Your Future’ plan.” To secure possible funding for these new facilities, the City is exploring a potential revenue ballot measure in November 2022, while also encouraging additional sources of funds to supplement proceeds from such a measure.

- G. After more than 50 years of service to the Walnut Creek community, and as an integral part of its “Your Parks, Your Future” initiative, the Walnut Creek City Council has prioritized replacement of the existing Clarke Memorial Swim Center in Heather Farm Park. The new swim center at Heather Farm Park (“the Project”) is intended to support aquatic programs to meet a variety of community needs well into the future, including the current and anticipated needs of the three swim teams that currently rent pool time at the Clarke Memorial Swim Center.
- H. As currently envisioned, the Project to replace the existing facility includes a combined aquatic/community center, and two pools: a family recreation pool and a lap pool. The WCAF community members consider a 50-meter lap pool and additional water space to accommodate the existing and long-term needs of the three swim teams, as well as current programming/user groups of the Clarke Memorial Swim Center, to be an essential component of the Project design.
- I. In recognition that the programs and participants of the swim teams represented by WCAF will benefit in a unique way from the construction of a new swim center in Heather Farm Park, and in particular, from the inclusion of a new 50-meter lap pool and one additional water space to accommodate the existing and long-term needs of the three swim teams as well as other current programming/user groups of the Clarke Memorial Swim Center, the City has asked WCAF to contribute financially toward the cost of the Project to construct the new aquatic facility.
- J. In consideration of the City’s agreement to construct a new aquatic facility as part of its *Your Parks, Your Future* program, the design and construction of which will include a 50-meter lap pool and one additional water space, and the City’s commitment to continue existing aquatic programming by the swim teams represented by WCAF at reasonable rental rates, WCAF has pledged to use its best efforts to raise and donate funds to the City for the purpose of supporting the construction of the Project at Heather Farm Park and securing water space to accommodate the existing and long-term needs of the three swim teams, and other current programming/user groups of the Clarke Memorial Swim Center.

NOW, THEREFORE, in consideration of the terms and conditions contained herein, the City and WCAF agree as follows:

AGREEMENT

A. Statement of Intent by the Parties

1. Fundraising by WCAF. WCAF’s intent to raise and donate funds to the City to support the construction of a new aquatic facility at Heather Farm Park (“the Project”) is premised on the following commitments by the City:

- a. The City will adhere to the design process and standards described in Section C of this Agreement leading to Project, which consists of the construction of a new swim center that will include a 50-meter pool and a family recreation pool to accommodate the existing and long-term needs of the three swim teams, and other current programming/user groups at the Clarke Memorial Swim Center.
 - b. The City will continue to provide water space and time at the new facility, at reasonable rental rates, to accommodate the existing and long-term needs of the three swim teams, and other current programming/user groups of the Clarke Memorial Swim Center.
2. Aquatics Programming by City. The City's intent is to maintain the existing pool time and space for the three swim teams and other current programs at the new facility and at Larkey, understanding that this is necessary to continue the quality community aquatics programs that now exist. The Parties acknowledge that specific program needs will change over time, but understand that there is no intent by the City to substantially diminish the availability of these programs, and actions to do so would constitute a breach of good faith implied in this agreement.

B. WCAF Fundraising Obligations

1. Fundraising Pledge by WCAF. WCAF agrees to use its "best efforts" to raise \$3 million (the "Fundraising Goal") to be donated to the City for the purpose of contributing towards the cost of the Project. "Best efforts" shall include commercially reasonable steps to collect the full amount pledged under the Fundraising Goal, including but not limited to, seeking financial support from other government sources, public and private foundations, businesses, and individuals. The City acknowledges that a portion of the monetary donations received by WCAF for this purpose may be used by WCAF for communication, printing, and other costs associated with fundraising.
2. Fundraising Components. The fundraising pledge by WCAF specified in section B.1. of this Agreement shall consist of the following distinct components:
 - a. Initial Donation by WCAF. WCAF agrees to make an initial donation to the City in the amount of \$100,000 within three (3) months of the City Council award of a contract to construct the Project. This initial donation may be made from any source but shall not count towards the obligations for naming opportunities in section B.2.b.
 - b. Naming Opportunities. The City authorizes WCAF to use its best efforts to solicit donations based on naming opportunities for the various structures or amenities at the Project with a goal for these donations to make up at least \$1 million of the Fundraising Goal; provided, however, that the City retains final authority to approve or disapprove any specific naming proposal by WCAF. Naming opportunities are defined as the ability of donors to have their name, or a name designated by them, placed on or about the various structures or amenities located at the Project. Prior

to soliciting donations based on naming requests, WCAF will consult with the City to develop a menu of structures and other amenities, and minimum dollar amounts, for which a naming request may be approved. Prior to final approval of any naming request, City staff will consult with WCAF on the placement of names to ensure that public health and safety are not compromised. The City retains final approval regarding the placement of signage, structures, and amenities associated with naming requests. The City acknowledges that WCAF will have met its obligations for this fundraising component if the City receives bona fide offers of donations in exchange for naming opportunities in an amount equal to or greater than \$1 million.

- c. General Contributions. WCAF will use its best efforts to seek financial support from other government sources, public and private foundations, businesses, and individuals and donate \$3.0 million to the City for the Project, less the amounts provided in fulfillment of the obligations in sections B.2.a and B.2.b.
3. Time Period for Fundraising by WCAF (“the Fundraising Period”). The total fundraising amount specified in Section B.2.c. of this Agreement shall be achieved by WCAF over a ten-year period commencing upon the City Council award of a contract to construct the Project. Additionally, fifty percent (50%) of the total fundraising amount identified in Section B.2.c. shall be achieved by WCAF within five (5) years of the opening of the Project for general public use and for use by the swim teams (the “Interim Fundraising Goal”).
4. City Support for WCAF Fundraising. The City agrees to support WCAF fundraising efforts by providing access to, and allowing the WCAF to use, images of the designs for the new swim facility, other information about the Project, and accommodating other reasonable requests to support the WCAF’s fundraising campaign.
5. Provision for Failure of WCAF to Achieve Fundraising Goal. If WCAF is unable to achieve the Fundraising Goal defined in Section B.2. within the Fundraising Period defined in Section B.3., or if WCAF is unable to achieve the Interim Fundraising Goal described in Section B.3., the City and WCAF shall enter discussions for the purpose of reaching an agreement to extend the Fundraising Period. In addition, at the end of the time period for fundraising, or in the case of the Interim Fundraising Goal not having been achieved, the City retains the right to assess a “facilities fee” in addition to the standard pool rental fees charged to the user groups as a means to recover any shortfall in the WCAF Fundraising Goal defined in Section B.2.c. The “facilities fee” that may be levied by the City to recover the fundraising shortfall shall not exceed 10% of the rental fee, and shall not extend beyond the time necessary to collect the amount of the shortfall. The City agrees that its only methods to unilaterally collect the Fundraising Goal are as set forth in this paragraph.
6. Form of Payment by WCAF to City. WCAF will make contributions from fundraising activity to the City via a mutually acceptable method. The Fundraising Goal shall be

transferred in annual amounts to be spread out over the Fundraising Period from WCAF to the City on July 1 of each year during the Fundraising Period. Fundraising payments to the City by WCAF shall be accompanied by a financial report in a form to be agreed to in advance by the City and WCAF.

7. Optional Termination of Agreement by City and WCAF.

- a. The City may terminate this Agreement, and it shall be no further force and effect, if the City provides written notification to WCAF that it is electing not to proceed with the Project.
- b. WCAF shall have the option to terminate this Agreement if the City Council has not awarded a contract to construct the Project by December 31, 2025. The intent of this optional termination clause is to allow WCAF to represent to potential donors that the Project will be diligently pursued by the City to its completion, and to ensure timely performance by the City of its obligations under this agreement.
- c. Nothing in this section shall preclude the Parties from negotiating a mutually acceptable extension to the time frames in this Agreement, or otherwise amending the Agreement as may be mutually beneficial under the circumstances. The Parties acknowledge that the purpose of amending the Agreement would not be to increase or reduce the Fundraising Goal committed to by WCAF which is based on the fundraising capacity study commissioned by WCAF.

C. New Swim Center Design Standards

1. Swim Center Design Standards. The City agrees that the reconstructed swim center will include a 50-meter pool that meets Fédération Internationale de Natation (FINA) training and competition standards, and, along with the family recreation pool, shall be designed to allow, at a minimum, the continuation of aquatic programming by the three swim teams and other current users/groups, as currently exist at the Clarke Memorial Swim Center.
2. Consultation Between the City and WCAF Concerning Project Design. The City shall invite WCAF to appoint a representative to the panel interviewing and recommending the Project architect. The City shall also consult with WCAF to provide input on potential designs and locations of the aquatic facility during the preliminary design, design development, and final design stages, prior to the City giving final approval on any design or location.

D. Consideration by City to WCAF Represented Swim Teams for Undertaking Fundraising Obligations

1. Continuation of Program Use by Swim Teams. During the Fundraising Period defined in Section B.3. of this Agreement, the City shall continue to grant the three swim teams (Walnut Creek Masters, Walnut Creek Aquabears, Walnut Creek Aquanuts), pool rental time consistent with current usage. During the design phase and before awarding a contract to construct the Project, the City shall meet and confer in good faith with representatives of each of the three swim teams to determine the pool rental time to be provided to each team during the Fundraising Period, while also preserving the City's interest in providing a balance of programming time for the community.
2. Rental Rates for Aquatic Programs. During the Fundraising Period defined in Section B.3. of this Agreement, the City shall continue to grant the three swim teams (Walnut Creek Masters, Walnut Creek Aquabears, Walnut Creek Aquanuts) pool rental time at rental rates to be no greater than the rental rates charged by the City to these groups as of the beginning of the Fundraising Period, as may be adjusted annually on July 1 of each year during the Fundraising Period, consistent with the City's current approved cost recovery policy for the pool rental program.
3. Facility to Remain Open. During the Fundraising Period defined in Section B.3. of this Agreement, absent any instance of force majeure, which is defined as an event beyond a party's control and that could not be reasonably anticipated or mitigated, and upon completion of construction of the Project, the City agrees to maintain the Project available for use by the community and the three swim teams on a year-round basis, except for necessary maintenance activity as determined by the City requiring its temporary closure.
4. Program Rental During Construction. If the Clarke Swim Center is closed during construction of the Project, the City shall make the Larkey Swim Center available for rental to the three swim teams, and other current user groups, to the maximum extent possible while considering other aquatics programs at Larkey, at rental rates no greater than that described in section D.2.
5. "Best Efforts" To Minimize Closure Period. The City agrees to use "best efforts" to minimize the closure period of the Clarke Swim Center. The City will require all those working on the Project, including architects, project managers, and general contractors, to use "best efforts," to eliminate or minimize the period of time during which the aquatic center at Clarke is closed during construction of, and prior to opening, the Project. "Best efforts" shall include, but not be limited to, phasing or staging construction of the Project as may be necessary to eliminate or minimize closure of the aquatic facility.

E. Counterparts

This Agreement may be executed in multiple counterparts and by electronic means, each of which so fully executed counterpart shall be deemed an original. No counterpart shall be

deemed to be an original or presumed delivered unless and until the counterpart executed by the other Party to this Agreement is in the physical possession of the Party seeking enforcement thereof.

F. Authority to Execute

Each Party hereto expressly warrants and represents that he/she/they has/have the authority to execute this Agreement on behalf of his/her/their organization or governmental entity and warrants and represents that he/she/they has/have the authority to bind his/her/their entity to the performance of its obligations hereunder.

G. No Third-Party Beneficiaries

There shall be no third-party beneficiaries to this Agreement.

H. Severability

If any term, provision, or condition of this Agreement is held by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement shall continue in full force and effect.

I. Entire Agreement; Amendment

This Agreement contains the entire agreement between the Parties with respect to the subject matter hereof, and supersedes all prior written or oral agreements, understandings, representations or statements between the Parties with respect to the subject matter hereof. This Agreement may only be amended in writing by mutual consent of the Parties.

J. No Joint Ventures or Agents

Nothing in this Agreement is intended to or shall establish the Parties as partners or co-venturers with one another, or as agents of each other. Except as otherwise specifically provided in this Agreement or as City may otherwise specify in writing, WCAF shall have no right or authority, express or implied, to act on behalf of City in any capacity whatsoever as an agent or to commit or otherwise bind City to any obligation.

K. Independent Contractor

During the term of this Agreement, WCAF's employee's, agents and subcontractors shall be independent contractors and shall not be employees of City.

L. Governing Law

This Agreement shall be governed by and construed in accordance with the laws of the

State of California without regard to principles of conflicts of laws.

M. Notices

Except as otherwise specified in this Agreement, all notices to be sent pursuant to this Agreement shall be made in writing, and sent to the Parties at their respective addresses specified below or to such other address as a Party may designate by written notice delivered to the other Party in accordance with this Section. All such notices shall be sent by:

1. Personal delivery, in which case notice is effective upon delivery;
2. Email transmission, followed by delivery by certified or registered mail, return receipt requested, in which case notice shall be deemed delivered on receipt if delivery is confirmed by a return receipt;
3. Email transmission, followed by delivery by a nationally recognized overnight courier, with charges prepaid or charged to the sender's account, in which case notice is effective on delivery if delivery is confirmed by the delivery service;

CITY: City of Walnut Creek
 1666 North Main Street
 Walnut Creek, CA 94596

WCAF: President
 WCAF
 P.O. Box 5405
 Walnut Creek, CA 94596

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the Effective Date.

Walnut Creek Aquatic Foundation
 DocuSigned by:
 By Mike Heaney 4/26/2022
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Michael P. Heaney, President

City of Walnut Creek
 By _____

Dan Buckshi, City Manager

Approved as to Form:

 City Attorney