



Board of Public Works and Safety

Agenda Item

Cover Sheet

MEETING DATE: October 15, 2024

- ☐ Consent Agenda Item
- ☒ New Item for Discussion
- ☐ Previously Discussed Item
- ☐ Miscellaneous

ITEM #: 2

INITIATED BY: Matt Light

- ☒ Information Attached
- ☐ Bring Paperwork from Previous Meeting
- ☐ Verbal
- ☐ No Paperwork at Time of Packets

Memorandum of Understanding

This document constitutes a Memorandum of Understanding (hereinafter referred to as “MOU”) between **Friends of Central Pool, Inc.** (hereinafter referred to as “FOCP”), an Indiana nonprofit corporation, and the City of Noblesville, Indiana, a municipal corporation (hereinafter referred to as “City” or “Noblesville”), is executed pursuant to the terms and conditions set forth herein.

Recitals

Whereas, the City owns property at Forest Park on Cicero Road that includes an aquatic center, locker rooms, and associated amenities, a facility that is collectively referred to as “Forest Park Aquatic Center” (hereinafter “FPAC”);

Whereas, pursuant to an agreement FOCP leases FPAC from the City and is responsible for maintenance and operation of FPAC for the benefit of Noblesville residents and visitors;

Whereas, FOCP operates FPAC through trained full-time staff, part-time staff, and volunteers under the direction of its governing board, in coordination with the City’s Parks Department;

Whereas, FPAC provides valuable recreational, personal development, economic, tourism, and community connections opportunities and impact;

Whereas, the City provides \$50,000 per year in a public purpose grant to supplement operational revenues and support continued maintenance of the FPAC as a valuable capital asset;

Whereas, the City has supplemented this funding from time to time to support larger capital repair and renovation needs that go beyond FPAC lease obligations and capital reserves

Whereas, the City partnered with FPAC in January 2023 to fund a capital assessment by Counsilman Hunsaker, a consultant that specializes in pool and aquatic center construction, renovation, and capital maintenance;

Whereas, Counsilman Hunsaker delivered to the City and FPAC a set of recommendations and options for making certain repairs and renovations to replace outdated equipment and improve the asset in ways that would sustain its presence and enhance its impact in Noblesville;

Whereas, the consultant’s recommendations included “duct tape repairs,” which have already been funded and completed, as well as options for renovating the facility in a way that featured indoor and outdoor areas, with retractable walls, so that the facility could be used twelve months of the year instead of only during the summer season;

Whereas, the City desires to move forward with the first phase of repairs and renovations to improve the facility in ways consistent with the consultant's recommendations;

Whereas, the City appropriated available American Rescue Plan funding to support the implementation of the consultant's indoor/outdoor concept and to begin work on phase one of that project;

Whereas, FOCP desires to receive the appropriated funding, to select and manage contractors to complete the necessary work in coordination with the City's Parks Department, to use the funding consistent with this agreement and American Rescue Plan usage parameters, and to report back to the City an accounting of the use of the funds;

Now therefore, in consideration of the mutual promises contained herein and other considerations, the receipt and sufficiency of which are hereby acknowledged; FOCP and the City agree as follows:

1. RECITALS. The representations set forth in the above recitals are material to the MOU and are hereby incorporated into and made a part of the MOU as if fully set forth in the body of the MOU.

2. DUTIES OF FOCP. FOCP shall use the funding to complete phase one of the consultant's indoor/outdoor project recommendations as set forth or described in **Exhibit A**, attached to and made a part of this MOU.

3. TERM AND RENEWAL.

A. The term of this MOU shall be for two (2) years , beginning on October 15, 2024, and ending on October 15, 2026 unless terminated or modified in accordance with this MOU.

B. The parties may renew or extend this agreement by mutual agreement.

4. COMPENSATION OF FOCP.

A. FOCP shall furnish, or contract for the furnishing of, all labor, materials, supplies, and services in accordance with the conditions of this MOU necessary to perform the functions as defined in **Exhibit A**.

B. Payment will be for the amount of \$1,000,000, subject to invoice(s) being submitted by FOCP detailing the quote(s) for services to be rendered consistent with this MOU and funding appropriation.

5. TERMINATION FOR CAUSE OR CONVENIENCE.

- A. If FOCP becomes insolvent, or if it refuses or fails to perform the work and functions provided by this MOU, or if it refuses to perform disputed work or functions as directed pending resolution of such dispute, or if it fails to make payments to subcontractors or consultants employed by it, or if it otherwise violates or fails to perform any term, covenant or provision of this MOU, then City may, without prejudice to any other right or remedy, terminate this MOU in whole or in part, in writing, provided that FOCP shall be given, except in the case of emergencies, (a) not less than ninety (90) calendar days' notice of City's intent to terminate, and (b) an opportunity for consultation with City prior to termination. In determining the amount of final payment to be made to FOCP upon such termination for default, if any, no amount shall be allowed for anticipated profit on unperformed services or other work; furthermore, an adjustment shall be made to the extent of any additional costs incurred or reasonably foreseen by City to be incurred by reason of FOCP's default.
- B. This MOU may be terminated in whole or in part in writing by City for City's convenience; provided that FOCP is given (a) not less than ninety (90) calendar days' notice of intent to terminate and (b) an opportunity for consultation with City prior to termination. If City effects termination for convenience, FOCP's compensation shall be equitably adjusted.

6. **TERMINATION FOR FAILURE OF FUNDING.** Notwithstanding any other provision of this MOU and pursuant to Indiana law, if funds for the continued fulfillment of this MOU by City are at any time insufficient or not forthcoming through failure of any entity to appropriate funds or otherwise, then City shall have the right to terminate this Agreement without penalty by giving written notice documenting the lack of funding, in which instance unless otherwise agreed to by the parties, this Agreement shall terminate and become null and void.

7. GENERAL PROVISIONS.

- A. Non-Agent. Notwithstanding anything to the contrary in this MOU or elsewhere, is not an agent of the City and shall not in any way purport to act or speak for or on behalf of the City.
- B. Independent Contractor. The parties agree that FOCP is an independent contractor as that term is commonly used and is not an employee of City. As such, FOCP is solely responsible for all taxes and none shall be withheld from the sums paid to FOCP. FOCP acknowledges that it is not insured in any manner by City for any loss of any kind whatsoever. FOCP has no authority, express or implied, to bind or obligate City in any way.
- C. Subcontracting. The parties agree that FOCP shall not subcontract, assign or delegate any responsibility to perform under this Agreement without prior written approval of City; however, it is understood that FOCP has obtained or will obtain quotes from contractors to perform the work identified in this MOU and the City anticipates approving the subcontracting upon review of updated or final quotes. In the event that City approves of any such subcontracting, assignment or delegation, FOCP shall remain responsible for managing, directing and paying the person or persons to whom such responsibilities or obligations are sublet, assigned or delegated. City shall have no obligation whatsoever toward such persons. FOCP shall take sole responsibility for the quality and quantity of any services rendered by such persons. Any consent given in accordance with this provision shall not be construed to relieve FOCP of any responsibility for performing under this Agreement.

- D. Necessary Qualifications. FOCP certifies that it will furnish to City, if requested, any and all documentation, certification, authorization, license, permit, or registration required by the laws or rules and regulations of City, other units of local government, the State of Indiana, and the United States. FOCP further certifies that it is now and will remain in good standing with such governmental agencies and that it is now and will maintain all licenses, permits, registrations, authorizations, or certifications, as applicable to the services in force during the term of this Agreement.
- E. Confidentiality of City Information. FOCP understands that the information provided to it or obtained from City during the performance of its responsibilities may be confidential and may not, without prior written consent of City, be disclosed to a person not in City's employ except to employees or agents of FOCP who have a need to know in order to provide the services. The obligations of this section shall survive the termination of this Agreement and shall be applicable to the full extent permissible under statutes governing access to public records. Confidential information shall not include information, that: (a) was known by FOCP at the time it was received; (b) is, as of the time of its disclosure or thereafter becomes, part of the public domain through a source other than FOCP; (c) is made known to FOCP by a third person who does not impose any obligation of confidence on FOCP with respect to such information; (d) is required to be disclosed pursuant to governmental authority, law, regulation, duly authorized subpoena, or court order whereupon FOCP shall provide notice and an opportunity to object to City prior to such disclosure; or (e) information that is independently developed by FOCP without references to the confidential information. FOCP shall not, under any circumstances, release information provided to it by, or on behalf of, City that is required to be kept confidential by City pursuant to Indiana law, except as contemplated by this section, clause (d).
- F. Records; Audit. FOCP shall maintain books, records, documents and other evidence directly pertinent to performance under this Agreement. FOCP shall make such materials available at its offices at all reasonable times during the Agreement period and for three (3) years from termination or the date of final payment under this Agreement for inspection by City or any other authorized representative of City. Copies thereof, if requested, shall be furnished at no cost to City. FOCP acknowledges that the funding in this MOU is provided through the

City's American Rescue Plan allocation, which carries with it specified reporting documentation obligations, and FOCP will cooperate with the City to ensure those obligations are satisfied. This includes providing proof of payment to contractors and consultants who perform work within the scope of this agreement.

- G. Remedies. Following the occurrence of any default, breach, or other failure to perform, or an act of negligence or misconduct causing damage to either Party, by the other or any of its employees, agents, or subcontractors, the aggrieved party shall have every remedy now or hereafter existing at law or in equity or by statute or otherwise which may be available. This provision shall survive any termination of this Agreement.
- H. Indemnification. FOCP agrees to indemnify, defend, and hold harmless City and its officers, agents, officials, and employees for any and all third party claims, actions, causes of action, judgments and liens to the extent they arise out of any act or omission by FOCP or any of its officers, agents, employees or subcontractors, regardless of whether or not it is caused in part by the negligence of a party indemnified hereunder. Such indemnity shall include attorney's fees and all costs and other expenses arising therefrom or incurred in connection therewith and shall not be limited by reason of the enumeration of any insurance coverage. This provision shall survive any termination of this Agreement.
- I. Insurance. FOCP shall furnish, or cause to be furnished, City with certification of comprehensive general liability insurance coverage with a minimum limit of Two Million Dollars (\$2,000,000.00) per occurrence. FOCP shall furnish certificates of insurance provided by the insurer, and the certificates shall name the City as additional insured and provide that such insurance is in effect and will not be cancelled during the required period without thirty (30) days prior written notice of such cancellation to City.
- J. Notice. Any notice or other correspondence required to be sent under this Agreement shall be sent to:

To Noblesville FOCP:

To Noblesville:

Friends of Central Pool, Inc.
2 North 9th Street
P.O. Box 10

City of Noblesville
16 S. 10th Street
Noblesville, IN 46060

Noblesville, IN 46060
Attn: Greg Conner

Attn: Savannah Wines, Parks
Director

Copy to:
City of Noblesville
Attn: City Attorney
16 S. 10th Street
Noblesville, IN 46060

K. Non-discrimination. FOCP and its subcontractors shall not discriminate against any employee or applicant for employment to be employed in the performance of this Agreement, with respect to her or his hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment, because of her or his race, religion, color, sex, sexual orientation, handicap, disability, national origin, ancestry, disabled veteran status, or Vietnam-era veteran status. Breach of this section shall be regarded as a material breach of this Agreement.

L. Conflict of Interest. FOCP certifies and warrants to Noblesville that neither it nor any of its agents, representatives or employees who will participate in the performance of any services required by this Agreement has or will have any conflict of interest, direct or indirect, with Noblesville.

M. Force Majeure. In the event that either party is unable to perform any of its obligations under this Agreement – or to enjoy any of its benefits – because of natural disaster, pandemic, or decrees of governmental bodies not the fault of the affected party (hereinafter referred to as Force Majeure Event), the party who has been so affected shall immediately give notice to the other and shall take commercially reasonable actions to resume performance. Upon receipt of such notice, all obligations under this Agreement shall be immediately suspended except for payment obligations with respect to service already provided. If the period of nonperformance exceeds one hundred eighty (180) days from the receipt of the Force Majeure Event, the party whose ability to perform has not been so affected may, by giving written notice, terminate this Agreement.

N. Applicable Laws; Forum. FOCP agrees to comply with all applicable federal, state and local laws, rules, regulations or ordinances, and all provisions required thereby to be included herein are hereby incorporated by reference. The enactment of any state or federal statute or the promulgation of regulations

thereunder after execution of this Agreement shall be reviewed by Noblesville and FOCP to determine whether the provisions of the Agreement require formal modification.

This Agreement shall be construed in accordance with the laws of the State of Indiana, and by all applicable Municipal Ordinances, Resolutions, Rules, Regulations, or Codes of Noblesville. Suit, if any, shall be brought in the State of Indiana, County of Hamilton.

- O. Waiver. Neither party's delay or inaction in pursuing the remedies set forth in this Agreement, or available by law, shall not operate as a waiver of any of Party's rights or remedies.
- P. Severability. If any provision of this Agreement is held to be invalid, illegal, or unenforceable by a court of competent jurisdiction, the provision shall be stricken, and all other provisions of this Agreement which can operate independently of such stricken provisions shall continue in full force and effect.
- Q. Attorneys' Fees. Either party shall be liable to the other for reasonable attorneys' fees incurred by in connection with the collection or attempt to collect, any damages arising from the negligent or wrongful act or omission of the other party from a breach of any provision of this Agreement, from an indemnity obligation, or from a failure to fulfill any provisions or responsibility provided herein. This provision shall survive any termination of this Agreement.
- R. Successors and Assigns. Noblesville and FOCP each binds itself and its partners, successors, executors, administrators and assigns to the other party of this Agreement and to the partners, successors, executors, administrators and assigns of such other party, in respect to all covenants of this Agreement; except as otherwise provided herein, neither party shall assign, sublet, or transfer its interest in this Agreement without the written consent of the other. Nothing herein shall be construed as creating any personal liability on the part of any officer or agent of Noblesville or FOCP.

8. INTERPRETATION AND INTENT.

- A. This Agreement constitutes the entire agreement between the parties and supersedes all prior agreements, written or verbal, between City and FOCP. No statements, promises or agreements whatsoever, in writing or verbal, in conflict with the terms of the Agreement have been made by City or FOCP which in any way modify, vary, alter,

enlarge or invalidate any of the provisions and obligations herein stated. This Agreement may be amended and modified only in writing signed by both City and FOCP.

- B. In resolving conflicts, errors, discrepancies and disputes concerning the scope of the work or services to be performed by FOCP or other rights or obligations of City or FOCP, the document or provision thereof imposing the greater obligation upon City and affording the greater right or remedy to City, shall govern.
- C. Any interpretation applied to this Agreement, by the parties hereto, by an arbitrator, court of law, or by any other third party, shall not be made against City solely by virtue of City or City's representatives having drafted all or any portion of this Agreement.
- D. This Agreement shall include, and incorporate by reference, any provision, covenant or condition required or provided by law or by regulation of any state or federal regulatory or funding agency.

Entered into this _____ date of _____, 2024.

Friends of Central Pool, Inc.

By: _____

Title: _____

All of which is approved by the Board of Public Works and Safety of the City of
Noblesville this _____ day of _____, 2024.

JACK MARTIN, PRESIDENT

JOHN DITSLEAR, MEMBER

LAURIE DYER, MEMBER

ROBERT J. ELMER, MEMBER

RICK L. TAYLOR, MEMBER

ATTEST:

EVELYN L. LEES, CLERK
CITY OF NOBLESVILLE, INDIANA

EXHIBIT A

[Insert Councilman Hunsaker report or executive summary]

Coordination with City parks department representatives to complete the project and provide necessary documentation.