

AQUARIUM OF NIAGARA FUNDING AGREEMENT

THIS AGREEMENT, made this 10 day of May, 2021, by and between the **CITY OF NIAGARA FALLS, NEW YORK**, a municipal corporation organized and existing pursuant to the laws of the State of New York (hereinafter, "CITY") and **NIAGARA AQUARIUM FOUNDATION a/k/a AQUARIUM OF NIAGARA**, a not for profit foundation organized and existing pursuant to the laws of the State of New York, with offices at 701 Whirlpool St., Niagara Falls, NY 14301 (hereinafter, "AQUARIUM").

WITNESSETH:

WHEREAS, the AQUARIUM submitted an application to the Niagara River Greenway Commission relative to its Whirlpool Commons Plaza Project; and

WHEREAS, the project will connect residents and visitors to the region's rich ecological assets and promote the critical mission of environmental conversation and offer more family-centric activities in the City; and

WHEREAS, at its meeting held on January 19, 2021, the Niagara River Greenway Commission Host Community Standing Committee determined that the project was consistent with the Greenway Plan and approved funding in the amount of \$250,000.00 from CITY'S Greenway Commission Fund Account; and

WHEREAS, the parties hereto wish to agree on the terms and conditions relative to the grant funding provided by CITY from said Greenway Commission fund to AQUARIUM.

NOW, THEREFORE, in consideration of the mutual covenants herein contained and other good and valuable consideration, it is hereby agreed between the parties hereto as follows:

1. **ASSISTED PROJECT.** AQUARIUM shall construct a new exhibit space called "Whirlpool Commons Plaza" (the "Project") which will create a central hub for ecological tours, hikes and programming focused on the region's natural resources and also enhance educational and outdoor recreational opportunities along the rim of the Niagara Gorge and the new Shoreline Trail. The Project's costs estimated at \$250,000.00 include architecture and engineering and construction. A copy of the Whirlpool Commons Plaza Project description is attached hereto as "Exhibit A".
2. **GRANT.** CITY agrees to provide a grant (the "Grant") to AQUARIUM of funds provided to the CITY pursuant to its portion of Niagara River Greenway Commission Funds in the amount of \$250,000.00. CITY has determined that the Project is necessary and desirable to accommodate and enhance the tourism experience for visitors to the CITY. The CITY agrees to release funds to the AQUARIUM as described in Paragraph "3" below.
3. **RELEASE OF FUNDS FOR PROJECT CONSTRUCTION.**
 - a. The CITY agrees to release \$125,000.00 of the Grant Funds to AQUARIUM upon execution of this Agreement by both parties.
 - b. The CITY agrees to release the remaining \$125,000.00 of the Grant Funds to AQUARIUM upon presentment of written certification of completion of the Project by AQUARIUM. In this

regard, the AQUARIUM must certify, in writing, that all aspects of the Project, including all close-outs and reporting, are complete.

4. **TERM OF AGREEMENT.** Unless otherwise terminated as set forth herein, the Project must be completed and all Grant Funds provided under this Agreement must be fully disbursed no later than September 30, 2021. Any Grant Funds not disbursed by said date, or any extension thereof, shall remain with CITY for its sole purpose and use and no further disbursements to AQUARIUM shall be made.
5. **TRANSFER OF PROPERTY AND OPERATION OF AQUARIUM.** AQUARIUM represents and warrants that it will not sell, transfer or otherwise dispose of the Project real property at 701 Whirlpool Street, Niagara Falls, NY or otherwise cease or suspend operation of the AQUARIUM (except by governmental order or for planned temporary closures for repairs and/or maintenance, etc.) on or before September, 2021. In the event AQUARIUM violates the representation and warranty contained herein, AQUARIUM agrees to repay to the CITY any and all grant funds contributed by the City pursuant to this Agreement to the cost of the Project.
6. **TERMINATION OR VIOLATION OF AGREEMENT.**
 - a. This Agreement may be terminated by CITY at any time in the event that CITY, in its sole discretion, determines that AQUARIUM has misrepresented any material fact or that AQUARIUM is not complying with any material term, limitation and condition herein including the commercially reasonable advancement of the Project. CITY shall promptly notify AQUARIUM in writing in the event of such deficiency or noncompliance or misrepresentation of material fact and issue a written notice of deficiency to AQUARIUM and provide AQUARIUM the opportunity to cure the deficiency prior to termination of the Agreement. If a Notice of Deficiency is issued, AQUARIUM shall respond with ten (10) business days from the date of receipt by submitting to the CITY a written corrective action in response to the Notice of Deficiency.
 - b. In the event that of such termination, AQUARIUM shall not receive any Grant Funds which have not been disbursed by CITY to AQUARIUM.
 - c. In the event of such termination of the Agreement, AQUARIUM shall repay to CITY, in CITY'S sole option, all Grant Funds paid by CITY to AQUARIUM, so much of the Grant as has been advanced at the time of termination, or so much of the Grant as relates to the misrepresentation or noncompliance with the terms of the Agreement.
 - d. AQUARIUM shall pay or reimburse CITY promptly for all costs and expenses including reasonable attorney's fees of the CITY incident to the enforcement of any provision of this Agreement, only in the event that the AQUARIUM has been found to have misrepresented a material fact.
 - e. The remedies described herein are cumulative, and exercise of one remedy shall not preclude the exercise of another remedy.
7. **AVAILABILITY OF BOOKS AND RECORDS.** AQUARIUM shall keep records of the expenditure of funds granted hereunder for three (3) years following completion of the Project. Upon request, AQUARIUM shall make available to CITY, New York State Comptroller or their designees, all books, records, contracts and proof of payment relative to this Project.

8. **STATUS OF AQUARIUM AND INDEMNIFICATION.** AQUARIUM is an independent contractor with regard to the programs to be carried out under this Agreement, and is not an agent of the CITY. AQUARIUM shall indemnify and hold CITY harmless from and against any and all claims or losses resulting from any act or omission of AQUARIUM, its officers, agents, employees or assigns, in carrying out the terms of this Agreement and any programs funded hereunder.
9. **CONFLICT OF INTEREST.** No official or employee of CITY has or shall have any personal interest, direct or indirect, in the Project, or the AQUARIUM or in any limited liability company, trust, corporation, partnership or association hired by AQUARIUM for the Project.
10. **PHOTOGRAPHS AND OTHER PUBLICITY.** CITY shall have the right to photograph, videotape or otherwise record (the "Recordings") the Project and Project activities. The Recordings shall be the property of CITY. CITY shall have unrestricted authority to publish, disclose or distribute the Recordings in any fashion for any use connected with CITY business.
11. **NO ASSIGNMENT.** This Agreement and the rights arising hereunder may not be assigned by AQUARIUM.
12. **AMENDMENT.** This Agreement represents the entire Agreement of the parties and may be altered or amended only upon written instrument, duly approved and executed by the parties.

IN WITNESS WHEREOF, the parties hereto have set their hands the day and year first above written:

CITY OF NIAGARA FALLS, NY

By: _____
Robert M. Restaino, Mayor

ATTEST: _____
City Clerk

AQUARIUM OF NIAGARA

By: _____
Gary Siddall, President and CEO