

CITY OF CLEARWATER CAPITAL PROJECT FUNDING AGREEMENT WITH CLEARWATER MARINE AQUARIUM

THIS AGREEMENT ("Agreement") is made and entered into as of the ____ day of _____, 2017 ("Effective Date"), by and between the City of Clearwater, a municipal corporation of the State of Florida, hereinafter referred to as the "City" and the Clearwater Marine Aquarium, Inc., a Florida non-profit corporation, hereinafter referred to as "CMA" (collectively, the "Parties" or individually a "Party").

WHEREAS, the Clearwater Marine Aquarium, Inc. (CMA) is a 501(c)(3) not for profit corporation located in Clearwater, Florida; and

WHEREAS, it is CMA's mission to preserve our marine life and environment while inspiring the human spirit through leadership in education, research, rescue, rehabilitation, and release; and

WHEREAS, since the 1970's CMA has provided Clearwater with a permanent marine biology learning center focused on preservation, rehabilitation, and education regarding marine life; and

WHEREAS, in 1978 the City of Clearwater donated CMA's current location, a former water treatment plant on Island Estates, to provide space for CMA to accomplish its mission; and

WHEREAS, today, CMA is an internationally respected center for animal care, public education and marine research; and

WHEREAS, the CMA Capital Project, as defined herein, has been determined to promote tourism in Pinellas County and is the interest of the public health, safety and welfare of the community; and

WHEREAS, the City agrees to provide CMA with funding for the Capital Project in the amount and in accordance with the terms and conditions described herein; and

WHEREAS, this agreement sets forth the rights and obligations of the Parties related to the Capital Project, funding, and related matters.

NOW THEREFORE, in consideration of the foregoing recitals, the mutual promises contained herein and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties agree as follows:

- 1. RECITALS.** The above recitals are true and correct and are adopted as an integral part of this Agreement.

2. DEFINITIONS. In addition to other capitalized terms or phrases that may be defined elsewhere in this Agreement, the following capitalized terms shall have the meaning set forth as follows:

- A. "Capital Project" or "Project" means that certain project/facility commonly known as the Clearwater Marine Aquarium "Facility" located in Clearwater, Pinellas County, Florida and described in Exhibit A attached hereto and incorporated herein by reference. Any reduction in the number of parking spaces or the number of dolphin pools and any reduction of 20% or more in the amount of square feet of additional guest space outlined in Exhibit "A" will require approval of the City Manager. CMA may make minor modifications to the approved site plan as determined by the Community Development Coordinator. For purposes of this Capital Project Funding Agreement, any modification to the approved site plan requiring additional Level II approval will require approval by the City Council. The City Council's approval of any modifications requiring additional Level II approval is limited to the Council's agreement to provide Capital Project funding as outlined in this Agreement.
- B. "Commencement Date" means the date that CMA commences construction of the Capital Project improvements on the project site after completion of the project design and the issuance of all permits and approvals necessary to begin construction of the Capital Project.
- C. "Project Budget" means the construction budget with project elements described in Exhibit B attached hereto and incorporated herein by reference.- CMA is attempting to "Value Engineer" its project to minimize cost without affecting visitor programming. If Project Cost is reduced such that final Project Cost falls below \$60,000,000, CMA will reimburse the City a pro-rata share of the cost savings (amount funded by City divided by \$60,000,000 X Cost Savings).

3. TERM. The term of this Agreement shall commence on the effective Date and continue in full force and effect through August 31, 2022 ("Term"), unless otherwise terminated as provided herein.

4. CONDITIONS PRECEDENT TO CAPITAL PROJECT FUNDING. The disbursement of, and any continued funding for the Capital Project herein, is subject to the following conditions precedent during the Term:

- A. CMA continues to own and operate the Clearwater Marine Aquarium.

- B. The Commencement Date occurs no later than August 1, 2018.
- C. CMA and Pinellas County execute Capital Funding Project Agreement for Twenty-Six Million (\$26,000,000.00) Dollars prior to payment of any city funds. Matching funds must be maintained and City must be notified immediately if those matching funds are lost or become unavailable. However, this does not prevent CMA from expending any matching funds for the purpose of constructing the Project.
- D. Obtain the debt financing or other alternative funding equivalent to 75% of the Project Budget necessary to construct the Project prior to payment of any City funds.

5. CONDITION PRECEDENT TO MATCHING FUNDS DISBURSEMENT. Prior to payment by the City of the Two Million Dollar (\$2,000,000.00) matching portion of the City's Capital Project Funding, CMA shall provide City evidence of the private (nongovernmental) cash donations.

6. CITY'S RESPONSIBILITIES. Upon receipt of documentation establishing satisfaction of the conditions precedent as required in Section 4 required by the City, the City agrees to pay to CMA Capital Project funds in the sum not to exceed Five Million Dollars (\$ 5,000,000.00), from legally available funds of the City, as follows:

- A. One payment of Three Million Dollars (\$3,000,000.00) during the City's 2018 fiscal year which commences on October 1, 2017 and ends on September 30, 2018, upon receipt of a written payment request from CMA at the address set out in Section 13.A, with such documentation as reasonably required herein or requested by the Finance Director.
- B. Two Million Dollars (\$2,000,000.00), as referred to in paragraph 5., paid as a one-time matching grant for private (nongovernmental) capital funding raised and received by and immediately available to CMA upon receipt of a written payment request from CMA at the address set out in Section 13.A, with such documentation as reasonably required herein or requested by the Finance Director.
- C. City's contributions of Capital Project funds herein shall in no event exceed any amount agreed to herein and any and all excess Project costs are the sole responsibility of CMA.
- D. The Capital Project Funds shall be paid in accordance with section 218.70 et seq., Florida Statutes. The Local Government Prompt Payment Act."

7. CMA'S RESPONSIBILITIES. During the Term of this Agreement, the CMA shall:

securing all permits and approvals required for the Project, contracting and/or subcontracting with all third parties necessary to complete the Project, and operating the Project/Facility.

- B. Utilize all commercially reasonable efforts to complete the Project within the Project Budget on an agreed upon date but in any event, no later than the term of this Agreement. CMA may elect to increase the Project Budget or any component part thereof, and shall be solely responsible for the additional costs and expenses, including any cost overruns, on the Project.
- C. Enter into Capital Project Funding Agreement with Pinellas County prior to payment of any City funds.
- D. Obtain the debt financing or other alternative funding equivalent to 75% of the Project Budget necessary to construct the Project prior to payment of any City funds.
- E. Operate, maintain, repair, replace, and insure the Facility in a manner consistent with other comparable aquariums in the United States.
- F. Within 48 months of execution of this Agreement, raise a minimum of Two Million (\$2,000,000.00) Dollars of private (nongovernment) cash capital contributions prior to obtaining city matching grant as referred to in paragraph 5. Private cash capital contributions designated for the Project made within 12 months preceding this Agreement may be included in calculating the match.

8. DEFAULTS AND REMEDIES.

- A. Events of Default. Each of the following shall constitute an event of default (each, an "Event of Default") hereunder:
 - 1. A breach by CMA of any material term, covenant, obligation or agreement under this Agreement, and the failure of CMA to cure such breach for a period of thirty (30) days after written notice thereof shall have been given to CMA;
 - 2. CMA's voluntary filing of or consent to a petition under any bankruptcy, insolvency, or reorganization law, failure to secure the dismissal of an involuntary bankruptcy petition within 60 days of filing; or a determination by a court of competent jurisdiction that it is insolvent and unable to pay its debts when due;
 - 3. A payment request containing a material misrepresentation by

CMA;

4. CMA ceases operations of the Capital Project or Facility during the Term;
 5. CMA fails to pay taxes and/or assessments, if any, when due.
- B. Remedies. Upon or at any time after the occurrence of an Event of Default which has not been cured if authorized herein:
1. The City may withhold temporarily or permanently, any or all unpaid portion of the Capital Project Funds, and/or may terminate this Agreement by giving seven (7) calendar days' notice to CMA. The City shall then have no further funding obligation under this Agreement;
 2. If the City has paid any Capital Project funds, CMA shall repay to the City all Capital Project funds received by it for the Project;
 3. Additionally, the City and CMA may exercise any right, power, or remedy as provided in law or equity pursuant to Florida law.
- C. No consent or waiver, express or implied, by the City to or of any breach or default by CMA in the performance of its obligations under this Agreement shall constitute a consent to or waiver of any similar breach or default by CMA. The failure of the City to complain of any act or omission to act by CMA or to declare CMA in default, irrespective of how long such failure continues, shall not constitute a waiver by the City of its rights under this Agreement.

9.COMPLIANCE WITH LAWS. The Parties shall comply with all applicable federal, state, and local laws, ordinances, rules and regulations, the federal and state constitutions, and the orders and decrees of any lawful authorities having jurisdiction over the matter at issue including but not limited to applicable public records laws.

10. INDEMNIFICATION. CMA shall, to the extent permitted by law, protect, defend, indemnify, pay the cost of defense, and hold harmless the City, its agents, elected officials and employees from all damages, suits, actions or claims of any character brought on account of any injuries or damages received or sustained by any person, persons, or property, or in any way relating to or arising

from the construction or operation of the Project herein or its performance under the Agreement; or on account of any act or omission, neglect or misconduct of CMA, its agents, elected officials, employees, contractors, subcontractors; or arising from or by reason of any actual or claimed trademark, patent or copyright infringement or litigation based thereon; or by, or on account of, any claim or amounts received under the Workers' Compensation Law or of any other laws, by-laws, ordinance, order or decree.

11. DUE AUTHORITY. Each party to this Agreement represents and warrants to the other party that: (i) it has the full right and authority and has obtained all necessary approvals to enter into this Agreement; (ii) each person executing this Agreement on behalf of the party is authorized to do so; and (iii) this Agreement constitutes a valid and legally binding obligation of the party, enforceable in accordance with its terms.

12. ASSIGNMENT. No party to this Agreement may assign rights or delegate any duties under this Agreement without the prior written consent of the other party.

13. NOTICES.

- A. Unless and to the extent otherwise provided in this Agreement, all notices, demands, requests for approvals and other communications which are required to be given by either party shall be in writing and shall be deemed given and delivered on the date delivered in person to the authorized representative of the recipient provided below, upon the expiration of five (5) days following the date mailed by registered or certified mail, postage prepaid, return receipt requested, to the authorized representative of the recipient provided below, or upon the date delivered by overnight courier (signature required) to the authorized representative of the recipient provided below:

TO THE CITY:

City Manager
William B. Horne, II
112 S. Osceola Ave.
Clearwater, FL 33756

TO THE CMA:

Chief Operating Officer
Frank L. Dame
249 Windward Passage
Clearwater, FL 33767

- B. Either party may change its authorized representative or address for receipt of notices by providing the other party with written notice of such change. The change shall become effective ten (10) days after receipt by the non-changing party of the written notice of change.

14. WAIVER. No act of omission or commission of either party, including without limitation, any failure to exercise any right, remedy, or recourse, shall be deemed to

be a waiver, release, or modification of the same. Such a waiver, release, or modification is to be effected only through a duly executed written modification to this Agreement.

15. GOVERNING LAW. This Agreement shall be construed in accordance with the Laws of the State of Florida.

16. JURISDICTION AND VENUE. Venue for any action brought in state court shall be in Pinellas County, Clearwater Division. Venue for any action brought in federal court shall be in the Middle District of Florida, Tampa Division, unless a division shall be created in Pinellas County, in which case the action shall be brought in that division. Each party waives any defense, whether asserted by motion or pleading, that the aforementioned courts are an improper or inconvenient venue. Moreover, the Parties consent to the personal jurisdiction of the aforementioned courts and irrevocably waive any objections to said jurisdiction.

17. BINDING EFFECT. This Agreement shall inure to the benefit of and be binding upon the Parties' respective successors and assigns.

18. NO THIRD PARTY BENEFICIARY. Persons not a party to this agreement may not claim any benefit hereunder or as third party beneficiaries hereto. This provision does not affect or inhibit the rights of any lenders providing construction financing to CMA under the terms of separate agreements that the City is not a party to.

19. HEADINGS. The paragraph headings are inserted herein for convenience and reference only and in no way define, limit, or otherwise describe the scope or intent of any provisions hereof.

20. NO CONSTRUCTION AGAINST PREPARER OF AGREEMENT. This Agreement has been prepared by City and reviewed by CMA and its professional advisors. The City, CMA, and their professional advisors believe that this Agreement expresses their understanding and that it should not be interpreted in favor of or against either party merely because of their efforts in preparing it.

21. ENTIRE AGREEMENT. This Agreement constitutes the entire agreement between the parties and no change will be valid unless made by supplemental written agreement executed by the Parties.

22. SEVERABILITY. Should any paragraph or portion of any paragraph of this Agreement be rendered void, invalid or unenforceable by any court of law for any reason, such determination shall not render void, invalid or unenforceable any other paragraph or portion of this Agreement.

23. FUNDING OBLIGATION. This Capital Project Funding Agreement is not a general obligation of the City. The obligations of the City as to any funding required pursuant to this Agreement shall be limited to an obligation in any

given year to budget and appropriate sufficient funding that is required during that year from legally available funds after funding for secured obligations, essential and necessary services. The City agrees to promptly notify CMA in writing at least fifteen (15) days prior to any public hearing related to the anticipated failure to appropriate funding as contemplated herein and notify CMA in writing of such failure of appropriation.

24. INDEPENDENT CAPACITY.

- A. The Parties agree that CMA and its officers, agents, and employees, in performance of this Agreement, will act in the capacity of an independent contractor and not as an officer, employee, or agent of the City. CMA agrees to take such steps as may be necessary to ensure that any third-party it contracts with will be deemed to be an independent contractor and will not be considered or permitted to be an agent of the City.
- B. CMA has no authority to, and shall not pledge the City's credit or make the City a guarantor of payment or surety for any contract, debt, obligation, judgment lien, or any form of indebtedness.

25. DAMAGES. In no event shall either party be liable to the other (nor to any person claiming any right, title, or interest derived from, or as a successor to the Agreement) for incidental, consequential, or special damages of any kind, including without limitation, lost profits or loss of business arising out of this Agreement irrespective of whether the parties have advance notice of the possibility of such damage; provided however, the foregoing limitation does not apply to the indemnification obligations described in Section 9 herein.

26. PUBLIC RECORDS.

- A. CMA acknowledges that information and data relating to its services may be public records in accordance with Chapter 119, Florida Statutes. CMA agrees that prior to providing services it will implement policies and procedures to maintain, produce, secure, retain, and transfer public records in accordance with applicable laws and regulations, including but not limited to the Sec. 119.0701, Florida Statutes. Notwithstanding any other provision of this Agreement relating to compensation, CMA agrees to charge the City, and/or any third parties requesting public records only such fees allowed by Section 119.07, Florida Statutes for locating and producing public records during the term of this Agreement.
- B. If CMA has questions regarding the application of Chapter 119, Florida Statutes, to the duty to provide public records relating to this contract, contact Rosemarie Call, City Clerk at 727-562-4093, Rosemarie.Call@myclearwater.com, or send your questions by mail to:

City Clerk, 112 S. Osceola Ave., Clearwater, FL 33756.

27. TIME IS OF THE ESSENCE. Time is of the essence with respect to all provisions of this Agreement and attachments hereto that specify a time for performance; provided, however, that the foregoing shall not be construed to limit a party's grace period allowed herein.

28. SURVIVAL. The terms and obligations Section 6, 7, 9, 21, and 23 of shall survive the termination of this Agreement.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorized representatives on the date first above written.

WITNESSES

CLEARWATER MARINE AQUARIUM

Sign: Karen Jubrail
Print: Karen Jubrail

By: [Signature]
Printed name: Frank L. Dame, COO

Sign: Lisa Oliver
Print: Lisa Oliver

**CITY OF CLEARWATER CAPITAL PROJECT FUNDING AGREEMENT WITH
CLEARWATER MARINE AQUARIUM**

Countersigned:

CITY OF CLEARWATER, FLORIDA

George N. Cretokos
Mayor

By: William B. Horne II
City Manager

Approved as to form:

Attest:

Pamela K. Akin
City Attorney

Rosemarie Call
City Clerk

Exhibit A Capital Project Description

The Clearwater Marine Aquarium (CMA) is operating out of a converted water treatment plant not designed as an aquarium attraction or rescue facility. The building is capacity constrained and limits increased future growth. The facility operates as a marine hospital whose capacity to care for dolphins, sea turtles, river otters and other marine animals is limited to the existing pools. To provide for optimal care for these marine animals, enhance the guest capacity and improve the guest experience CMA's Capital Improvement Project, with a cost of approximately \$64.0 million is designed to deliver these enhancements.

The project will facilitate high quality in both design of the facility and care for non-releasable resident marine animals it houses as well as enhance the visitor experience. The proposed improvements include a minimum of a 376 space parking garage, 5 new dolphin pools, and approximately 93,500 square feet of additional guest space including new buildings, an elevated deck, balconies and ground floor viewing areas. These additions will provide for improved animal care, guest capacity for future growth, additional exhibits and the enhancement of the organization's ability to educate the public on the preservation of marine life and the environment. This plan also includes improved vehicular access to our facility. Project implementation began in October 2016; and is planned to be phased in, with completion targeted for FY 2020. For the purposes of this analysis, the stable year of operations is assumed to occur in FY 2022, after the Master Plan has been fully implemented.

Exhibit B**Capital Funding Project Budget**

Total Project Cost	\$64,082,918
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Phase 1: Pre-Construction, Architectural & Parking Garage

Owners rep for Pre Construction and Phase I Parking Garage	\$ 206,000
Civil Engineering Documents	\$ 64,500
Additional Civil Engineering Fees (Fisher 5/17)	\$ 12,000
Architectural fees 1/0 to Fisher	\$ 512,400
Architectural fees paid to 1/0	\$ 146,655
Structural Construction Documents	\$ 250,000
Electrical Construction Documents	\$ 185,000
Mechanical & Plumbing Construction Documents	\$ 150,000
Landscaping Design and Document Allowance	\$ 15,000
Geotechnical Services	\$ 12,970
Life Support engineering (Satchell Engineering)	\$ 101,450
Interior design fees	\$ 400,000
Permitting and Impact Fees (Estimated)	\$ 250,000
Parking Consultants (Walker)	\$ 8,000
Pre-Construction Total	\$ 2,313,975

Phase I Parking Garage (223 spaces)

Parking Garage Budget Phase 1	\$ 7,462,073
Site Work Allocation	\$ 1,502,773
Demo and Drive Allowance	\$ 450,000
Guaranteed Maximum Price (GPM) Increase	\$ 29,486
General Conditions, Direct Costs, Contingency, insurance Fee	\$ 1,375,452
Sub Total	\$ 10,819,784

Total Pre-Construction, Const. Management & Phase I Parking Garage Construction (completed)	\$ 13,133,759
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Phase 2: Dolphin, Main building, Phase 2 Parking Demo, & Site Work

Construction Management (Owner's Rep for Phase 2)	\$ 180,000
Dolphin, Main building, 3rd floor TI, Demo, & site work for Phase 2	\$ 40,607,273
2nd floor Interior Buildout for Education	\$ 514,761
Garage Phase 2 & Event Space Shell	\$ 4,232,502
4th floor Interior Buildout, Theater, Dolphin Tale Exhibit, Event Space	\$ 2,306,161
Exhibit Build Out	\$ 1,000,000
Phase 2 Sub Total	\$ 48,840,697

Phase 3 Improvement to Old Facility

Lower Mangrove/Old Pelican exhibit	\$ 241,969
Phase 3 Improvements to Old Facility Sub Total	\$ 241,969

Total Project Cost	\$ 62,216,425
3% Owner Contingency	\$ 1,866,493
Grand Total	\$ 64,082,918

Note: Project Cost does not include FF&E or Capital Campaign expenses