

RECREATION, LIBRARIES, & AUTHORITIES COMMITTEE

11-0623R

RESOLUTION AUTHORIZING EXECUTION OF AN AGREEMENT WITH
ARROWHEAD ZOOLOGICAL SOCIETY, INC.

CITY PROPOSAL:

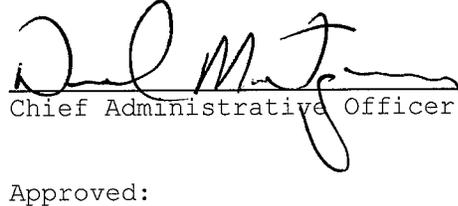
RESOLVED, that the proper city officials are hereby authorized to execute a three-year agreement with an option for two additional three-year terms with the Arrowhead Zoological Society, Inc. substantially the same as that on file in the office of the city clerk as Public Document No. _____, to continue the management and operations of the Lake Superior Zoological Gardens; payment by the city will be made from Fund 200-130-5310, (Zoo, Community Resources, Contract Services).

Approved:



Department Director

Approved for presentation to council:



Chief Administrative Officer

Approved as to form:



Attorney

Approved:



Auditor

PARKS LP:slw 11/22/2011

STATEMENT OF PURPOSE: This resolution approves a three-year agreement with an option for two additional three-year terms with the Arrowhead Zoological Society, Inc., (Society) for its continued management and operations of the Lake Superior Zoological Gardens (Zoo). The Society took over the operations of the Zoo in 2009. Since taking over the operations the Society has made significant improvements to the Zoo including restoring the Zoo's accreditation. The total yearly cost to the city is \$670,000 per year less any state zoo operating grants received by the city.

**ZOO AGREEMENT
BETWEEN THE CITY OF DULUTH AND
THE ARROWHEAD ZOOLOGICAL SOCIETY**

Parties to this Agreement ("Agreement") are CITY OF DULUTH, (the "City"), and ARROWHEAD ZOOLOGICAL SOCIETY, INC., a 501(c)(3), Minnesota nonprofit corporation, (the "Society").

RECITALS:

City is the owner of Fairmont Park, a public recreational area, which contains the Lake Superior Zoological Gardens (the "Zoo"), a public recreational and educational facility containing buildings, pathways, a collection of animals and other items of interest, public amenities, and related improvements.

The Zoo has for many years, as part of the City's Park and Recreation program, provided an educational and recreational facility and resource to the community, the public schools, the residents of Duluth, and visitors to the area.

The Zoo's mission is to be "dedicated to the responsible stewardship of our natural environment through exhibition of living animals and plants and programs in conservation and wildlife education." The Zoo "will strive to be recognized as a quality attraction and resource for people of all ages and a source of pride for the entire region." City wants to retain the services of Society to operate and manage the Zoo in order to continue its public use and purpose.

Society wishes to provide the services needed to continue the operation of the Zoo.

THEREFORE, in consideration of their mutual promises, the parties agree as follows:

I. GENERAL TERMS

A. Single Agreement. This Agreement replaces and supercedes any prior agreements between the parties, including any agreements or amendment authorized by City Council Resolution 97-0213, Resolution 08-0764 and Resolution 09-0665. Under the terms of this Agreement, Society shall hold and operate the Zoo in trust, pursuant to this Agreement, for the benefit of the City as set out in Laws 1961, Chapter 91.

B. Facility. This Agreement pertains to the Zoo premises and facility located in Fairmont Park, which is shown on attached Exhibit A (the "Premises"), and includes all animals, artifacts, collections, displays, buildings, structures, improvements, and fixtures as set forth on Exhibits A and B.

C. Ownership-License. The ownership, title, and all rights of ownership to the Zoo, its animals, collections, improvements, real and personal property shall be and remain with City, subject to the terms of this Agreement.

D. License. The City grants to the Society a license to manage the Zoo to carry out the terms of this Agreement.

E. Statutory Authority. The Zoo was established by Section 35-10 of the Duluth City Code in 1929. Chapter 91 of Session Laws of Minnesota for 1961 authorizes the City to contract with a Minnesota non-profit, zoological to manage the Zoo.

F. Authority to Enter Into Agreement. The City has the authority to enter into and execute the Agreement under the Statutory Authority section above and Sections 1, 18(h), and 32 of the Duluth City Charter.

G. Governmental Program. The parties are entering into this Agreement to carry out a governmental program, which is the operation of a public zoo as further described herein and under the statutory authority described above.

H. Authority to Spend. The Duluth City Council has given the City the authority to spend money to operate the Zoo in Resolution 08-0764 and Ordinance No. 9955, which are authorized under the Council's authority to make appropriations as set forth in Section 58 of the Duluth City Charter.

II. REPRESENTATIONS OF THE SOCIETY

A. The Society is a 501(c)(3), nonprofit corporation duly organized and existing under the laws of the State of Minnesota and has the power to enter into this Agreement and by proper action has been duly authorized to execute this Agreement.

B. The execution and delivery of this Agreement and the consummation of the transactions herein contemplated do not and will not conflict with, or constitute a breach of or a default under, any agreement to which the Society is a party or by which it is bound, or result in the creation or imposition of any lien, charge or encumbrance of any nature upon any of the property or assets of the Society contrary to the terms of any instrument or agreement.

C. There is no litigation pending or to the best of the Society's knowledge threatened against the Society affecting its ability to carry out the terms of this Agreement or to carry out the terms and conditions of any other matter materially affecting the ability of the Society to perform its obligations hereunder.

D. The Society has complied or will comply with all legal requirements applicable to it with respect to this Agreement. The Society will observe all applicable laws,

regulations, ordinances and orders of the United States, State of Minnesota and agencies and political subdivisions thereof.

E. The Society is and will remain a non-profit corporation and a 501(c)(3) tax exempt organization.

F. The Society will promptly give the City written notice of the commencement of any action, suit or proceeding before any court or arbitrator or any governmental department, board, agency or other instrumentality affecting the Society or any property of the Society or to which the Society is a party for which an adverse determination or result could materially adversely affect the Society's financial condition, the operations of its business, or its operation of the Zoo, or which could impair the Society's ability to fully comply with any term, condition, or provision contained in the Agreement and in such written notice Society will state the nature and status of such action, suit or proceeding.

G. The Society will not, without the proper written consent of the City, create or permit to be created or allow to exist any lien on the Zoo.

H. The Society will not, without the prior written consent of the City, enter into any agreement or other commitment the performance of which would constitute a breach of any of the terms, conditions, provisions, representations, warranties and/or covenants contained in the Agreement.

I. The Society will use the Zoo only to provide a public zoo facility consistent with its mission.

J. At a minimum, the Society will comply with USDA requirements for the care of Zoo animals. The Society will operate the Zoo using its best efforts, and in accordance with generally accepted operating practices. The Society shall operate the Zoo in a safe, clean and sanitary condition, consistent with the requirements of the Association of Zoos and Aquariums and shall make reasonable effort to obtain accreditation from that Association.

K. The Society will set the hours of operation of the Zoo with the approval of the City's Manager of Parks and Recreation.

L. The Society in its management and operation of the Zoo, and each Society contractor and subcontractor, shall not discriminate against any person or exclude any person from participating in any programs, activities, or employment or otherwise deny anyone the benefits of such programs or activities, on the basis of age, race, religion, creed, color, sex, sexual orientation, national origin, ancestry, or disability.

M. The Society has had an opportunity to inspect and conduct an independent assessment of the Zoo and agrees to accept the same in its "AS IS" condition. To assist the Society in its due diligence, the City is disclosing certain financial and physical facilities information in Exhibit F.

N. The Society will not alter the names of previously named facilities. Specifically, the “Willard Munger Animal Care Center” and “Griggs Learning Center” names shall remain.

O. The Society will make good faith efforts to explore, with the City, avenues to finance capital improvements, including bonding.

III. DUTIES OF THE SOCIETY

A. Operational Duties of the Society. The Society at its cost and expense, subject to the reimbursement by the City pursuant to Section V.A. hereof, will be solely responsible for the management and operation of the Zoo, including without limitation, the items set forth in Exhibit C. The Society will use the Zoo in a manner that is consistent with its mission, and will provide the City reasonable access to the Zoo. The Society will have the right to set prices for the services it offers, including but not limited to the Zoo entrance fee and education programs offered to the public. Such prices shall be family friendly, to keep the operations financially accessible to the general community.

B. Revenues, Funding, and Reports. Gross Revenues generated from operation of the Zoo and Zoo related activities shall be collected by the Society, turned over to the City, and accounted for, under procedures, methods and instructions set out by the City. The intent of this provision is to ensure that the City complies with all bond requirements that govern the finances and operation of the Zoo and for the Society to maintain its status as a 501(c)(3) nonprofit. This includes all monies received from the operation of the Zoo and the Zoo related fund raising activities and any other money, funds, or donations received by Society as a result of operating the Zoo, excluding restricted gifts to the Society. The parties agree that all the money thus collected shall be used solely to finance the operation of, maintenance of, and capital improvements to the Zoo or the creation of an endowment for the Zoo.

C. Capital Improvements. For the purpose of this Agreement, “Capital Improvement” means the addition or betterment of a long-term asset that extends the useful life of the property, such as a structural improvement to real property. No capital improvements shall be made to the Zoo by Society without first submitting two (2) sets of plans and specifications to the City and obtaining the City’s written approval. Said plans and specifications must be prepared by an architect, engineer, surveyor, landscape architect or interior designer licensed or certified in accordance with Minnesota Statutes Section 326.02 and Minnesota Rules Chapter 1800.5000.

Building contractors employed by Society shall provide and maintain a performance bond and construction insurance as reasonably established by the City. The Society shall provide copies of said performance bond and construction insurance to the City.

Capital improvements to the Zoo constructed by Society under this Agreement will be accepted by the City Council only after verification of the City Architect that the project has been completed in compliance with the plans and specifications approved by the City.

D. Non-Capital Improvements. The Society may make non-capital modifications to the Zoo. All such improvements shall be made with due diligence, in a workman-like manner and in conformity with good industry practice.

E. Information. Each year and within 90 days before the start of its fiscal year, the Society will provide the City with a copy of its annual budget for the coming year. Each year and within 120 days after the start of its fiscal year, the Society will provide the City with a copy of an annual report of the Zoo activities, including reservations, season passes, safety and maintenance. The Society will provide the City audited financial statements when they become available. The Society will supply the City any and all other financial reports detailing other aspects of the Society's operation of the Zoo as the City may reasonably deem necessary. As required by any State grant or bond agreement, the Society will provide the City an initial program report and budget reports that show revenues and expenses and other reports that call for an annual determination that the Zoo is being used for the governmental programs described herein.

F. Sale, Disposal or Replacement of Equipment and Exhibits. The Society shall notify the City, in writing, at least five days before of the need to sell, dispose or replace any Zoo equipment or exhibit, including animals. The Society may immediately dispose of any deceased animals, but will notify the City as soon as possible thereafter. The Society and City will jointly provide of the sale, disposal and replacement of equipment and exhibits in an expeditious manner.

IV. REPRESENTATIONS OF THE CITY

A. No public official of the City has either a direct or indirect financial interest in this Agreement, nor will any public official of the City either directly or indirectly benefit financially from this Agreement.

B. The City has been duly authorized to execute and deliver this Agreement.

C. There is no litigation pending or, to the best of the City's knowledge, threatened against the City affecting its ability to carry out the terms of this Agreement or to carry out the terms and conditions of any other matter materially affecting the ability of the City to perform its obligations hereunder.

D. The City will make good faith efforts, along with the Society, to explore avenues to finance capital improvements, including bonding.

V. DUTIES OF THE CITY

A. Reimbursement of Costs. The City shall reimburse the Society for the actual and direct expenses incurred by the Society in the operation and maintenance of the Zoo on a monthly basis upon submission of a reimbursement request, subject to the limitations set forth herein and in Section V.B. below. Each reimbursement request submitted by the Society shall include a check register sorted by expense category with copies of invoices or other supporting documentation as evidence of payment. The City shall provide a working capital fund in an amount determined by the City Auditor after consultation with the Society.

B. Unless otherwise agreed to by the parties, the maximum amount of expenses to be reimbursed by the City pursuant to the preceding Section V.A. in any calendar year shall not exceed an amount equal to (i) the Gross Revenue generated from operations of the Premises and paid to the City during such calendar year, plus (ii) \$670,000 from funds appropriated by the City Council including the tourism tax ("City Funds") (the Gross Revenues and the City Funds are sometime collectively referred to as the "Compensation"). No management fee shall be paid to the Society. It is understood and agreed between the parties that in the event the Zoo does not utilize a portion of the Compensation in any year during the Term of this Agreement, that such unused amount will be carried-over to the next year and added to the Compensation for the Society's use as provided for herein.

The City's obligation to make payments during any City fiscal year succeeding the current fiscal year shall be subject to availability and appropriation of funds as further provided in Section VIII (M).

For purposes of this Agreement, "Gross Revenue" shall include any and all income, revenue, monies, sums and things of value of whatsoever kind or nature and howsoever designated or obtained (less customary refunds and credits), received by Society from the operation of the Premises from any and all sources directly and/or indirectly arising from and/or pertaining to the Premises and their operation throughout the year, less sales, use and other applicable taxes.

C. The City grants the Society a license to use the Zoo as provided herein.

D. The City grants the Society a non-exclusive, non-transferable license to use all Zoo logos and trademarks in advertising and marketing of the Zoo, including without limitation, the right to use and license third parties to use such logo and trademarks on clothing and other items for sale or for promotional purposes. No changes or modification may be made to such logo and trademarks without the written permission of the City. The City reserves the right for prior review and approval of any items or promotional or advertising materials bearing the City of Duluth name or logo, such consent shall not be unreasonably withheld or denied. The Society agrees that the City shall have the right to review and approve any new logos or trademarks created for use under this Agreement, such approval not to be unreasonably withheld or delayed, and that the City shall own all

rights and interest, including copyright and trademark rights, in any new logo or trademark used in connection with the Zoo.

E. The City will continue to coordinate marketing support with the Society to include such services as a link to the Zoo web page and brochure placement in City facilities.

F. The City will allow the Society to use the lower pavilion storage room and West Duluth library basement storage locker at no charge, all of which are currently being used by the Zoo.

G. The City will be responsible for the repair and maintenance of existing underground electrical, sewer and water lines on the Premises.

VI. TERM AND TERMINATION

A. Term. The term of this Agreement shall commence on January 1, 2012, and shall end on December 31, 2014. The Agreement will automatically renew for two (2) additional terms of three (3) years each, unless either party gives at least four (4) months prior written notice to the other of its objection to the coming automatic renewal.

B. Termination.

1. This Agreement may be terminated at any time by either party upon delivery of 180 day written notice of termination. Upon termination of this Agreement, each party's respective rights, duties, and obligations with respect to matters involving the operation of the Zoo shall be determined solely and exclusively by reference to this Agreement and such provisions of the laws of the State of Minnesota as may be applicable or upon mutual agreement of the parties.

2. In the event of a material breach of the terms of this Agreement by the Society or by the City, the other party shall give the breaching party a 30-day written notice in which to correct such violation or failure. If the breaching party does not correct such breach within 30 days after receipt of the notice, then the other party may terminate this Agreement upon delivery of written notice of termination. In the event that the Society becomes the subject of a bankruptcy proceeding, becomes insolvent, or the City reasonably determines that the health and safety of the animals is in peril, the City may terminate the Agreement immediately upon written notice.

3. The Society may not sell, encumber, loan, or otherwise dispose of any Zoo property after receipt of any written notice of termination.

4. The Society shall take all reasonable measures to turn over the Zoo and all other City-owned property to the City in a timely manner. Upon notice of

termination, all revenues, including gate receipts, and City contributions that have not been used by the Society under this Agreement and are not needed to cover Society's obligations incurred in performing its duties under this Agreement shall be promptly returned and contributed to the City.

5. The Society agrees that upon the termination or expiration of this Agreement, it shall surrender and deliver the animals, equipment, Zoo and improvements thereon in good repair and clean condition, except for pre-existing conditions, the effects of ordinary wear and tear and depreciation arising from lapse of time or damage without fault or liability of the Society.

VII. INSURANCE AND INDEMNITY

A. The Society shall obtain, and at all times maintain, the following coverage or equivalent coverage approved by the City:

1. Society shall provide Liability and Automobile Insurance with limits not less than \$1,500,000 Single Limit Bodily Injury, \$500,000/\$1,500,000 Property Damage or \$1,500,000 Combined Single Limit as an alternate coverage, or \$1,500,000 for any number of claims arising out of a single occurrence.

2. City of Duluth shall be named as Additional Insured under the CGL insurance, or as alternate, Society may provide Owners-Contractors Protective policy, naming Society and City.

3. Society shall also provide evidence of Statutory Minnesota Workers' Compensation Insurance.

B. Society shall provide Certificates of Insurance evidencing such coverage with 30-day notice of cancellation, non-renewal or material change provisions included. The City does not represent or guarantee that these types or limits of coverage are adequate to protect the Society's interests and liabilities.

C. The City does not intend to waive any legal immunities, defenses, or liability limits.

D. When using the "Acord" Certificate form cancellation provisions, the words "endeavor to" on Line 2 must be deleted. As an additional insured under the contract, the City has contractual rights far exceeding that of a certificate holder. Therefore, additional named insured endorsement shall read as follows: "This policy insures the named insured and the City of Duluth and will be primary and not contributory with City of Duluth coverage." The City of Duluth is an additional insured not subject to the "other insurance" condition or other policy terms which conflict with the agreement between the named insured and the City of Duluth.

E. The 2004 edition of ISO Additional Insured Endorsement CG 20 10 is not acceptable. If the CG 20 10 is used, it must be a pre-2004 edition.

F. Society will indemnify the City for any damage to any City property on the Premises caused by Society, its agents, or employees.

G. The City shall not be liable to Society for any injury or damage resulting from any defect in the construction or condition of the Premises, nor for any damage that may result from the negligence of any other person whatsoever.

H. Society agrees to indemnify, save harmless, and defend the City from any and all claims, including but not limited to contribution or subrogation claims, suits, loss, costs, damage, trademark, patent or copyright infringement or expenses on account of injuries to or death of any and all persons whomsoever, including employees of Society, and on account of any and all damages to property to whomsoever belonging, including property owned by Society or in the care, custody, and control of Society, or any other claim for damages, including any claim for environmental damage or environmental response, arising or growing out of the Society's use of occupancy of the Property pursuant to this Agreement or Society's breach of this Agreement.

I. In any dispute between the parties, Society waives the right to claim the protection of any immunities provided for in Minnesota Statutes Section 466.03, or pursuant to the doctrines of official immunity and vicarious official immunity.

VIII. MISCELLANEOUS

A. Mailing of Notices. Except as otherwise specified, all notices and other communications required or permitted under this Agreement shall be given in writing and mailed by first class mail addressed as follows:

If to the City: City of Duluth
 Attn: Manager of Parks and Recreation
 Parks and Recreation Division
 12 East Fourth Street
 Duluth, MN 55805.

If to the Society: Arrowhead Zoological Society, Inc.
 Attn: CEO
 7210 Fremont Street
 Duluth, MN 55807.

All notices shall be deemed given on the day of mailing. Either party to this Agreement may change its address for the receipt of Notices at any time by giving notice thereof to the other as herein provided.

B. Assignment. The rights and liabilities of the Society under this Agreement may not be assigned without the prior written consent of the City.

C. Amendment. This Agreement may not be amended, modified, or canceled except by a written agreement dated and duly executed by each of the parties hereto.

D. Waiver of Compliance. No failure of either party to insist upon the strict performance of any term or condition of this Agreement or to exercise any right available upon a breach thereof shall constitute a waiver of any such breach or such agreement, term, or condition. No waiver of any breach shall affect or alter this Agreement.

E. Invalidity or Unenforceability. If any provision of this Agreement or the application thereof to any person or circumstance shall to any extent be judicially determined to be invalid or unenforceable, the remainder of this Agreement shall not be affected thereby, and each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

F. Entire Agreement. This instrument, including all exhibits attached hereto and incorporated herein by reference, contains the entire agreement between the parties and all prior negotiations and agreements are merged herein.

G. Remedies and Governing Law. The rights and remedies set forth herein are not exclusive and are in addition to any of the rights and remedies provided by law or equity. This Agreement and all actions arising hereunder shall be governed by the laws of the State of Minnesota.

H. Force Majeure. In the event of forced delay in the performance by either party or obligations under this Agreement due to Acts of God or of the public enemy, strikes, lockouts, unusual delay in transportation, unavailability of materials, fire, floods, epidemics, adverse weather conditions, riots, terrorism, insurrection, war, unavoidable casualties, or judicial or governmental action or inaction, other than action by the City, the time for performance of such obligations and for the satisfaction of the conditions precedent shall be extended for the period of the forced delays.

I. Independent Contractor, Beneficiaries. The Society and the City are and shall be deemed to be independent contractors and each party shall in no way be responsible to any person, firms, or corporations for any acts or omissions of the other party or its officers, directors, employees, servants, or volunteers. The parties intend that Society shall exercise independent judgment and control the manner and means of Society's performance. The parties do not intend to create any third party beneficiary of this Agreement.

J. Taxes. The Society shall be responsible for payment of any and all taxes to it arising from operation of the Zoo.

K. Bond Financing - Property Tax/Tax Exempt Status of Society. This Agreement is intended to preserve the tax free nature of the Premises and the bonds that have been used to finance improvements to the Premises. If any provision of this Agreement has, or will have, in the opinion of the trustee for the bondholders or independent bond counsel, the effect of endangering or destroying the tax free nature of the income to bondholders, or, if the City Attorney concludes that a provision has the effect of endangering the tax exempt nature of the Premises, then the City Auditor shall notify the parties, and, upon notice to the parties, that provision will become void, and the parties, upon request of either, shall, in good faith, negotiate a new contract provision acceptable to bond counsel or trustee or City Attorney, as the case may be. If a new contract provision is not agreed to, either party may terminate this Agreement as provided herein for cause. In like manner, if any provision endangers the tax exempt [501(c)(3)] or non-profit status of Society, it may give notice and employ the same remedy.

L. Compliance with Law. The Society shall comply with all applicable ordinances of the City and applicable county, state, and federal laws and regulations and shall obtain all licenses and permits required for operation of the Zoo and any repairs or improvements to the Zoo.

M. Funding Limitations. Notwithstanding any provision in this Agreement to the contrary, the City is not liable hereunder for the payment of any sums for which public monies have not been appropriated in the manner and to the extent required by law.

N. Additional Instruments. The parties further agree to provide information and to execute and deliver any and all additional documents and instruments as may be reasonably necessary to effect this Agreement.

O. Records. In accordance with the provisions of Minnesota law, the Society agrees to maintain books, records, documents and accounts relevant to this Agreement and the use of the financial assistance for a period of six years from the termination of this Agreement. The Society will permit a State or City auditor to examine all such books, records and documents.

P. Dedicated Uses. Whenever the Society procures, provides, donates, or transfers personal property acquired by it to the City for the use of the Zoo or Park, the City agrees that such personal property shall be dedicated for the exclusive use and benefit of the Zoo during the term of this Agreement.

Q. Liens. The Society shall keep the Premises and personal property free from any liens arising out of any work performed, material furnished or obligations incurred by or for the Society and any other liens or encumbrances.

R. Counterparts This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their proper officers, duly authorized.

Dated:

CITY OF DULUTH

ARROWHEAD ZOOLOGICAL
SOCIETY, INC.

By _____
Mayor

By _____
President, Board of Directors

Attest _____
City Clerk

By _____
CEO

Countersigned:

City Auditor

Approved as to form:

City Attorney