

**MEMORANDUM OF UNDERSTANDING BETWEEN THE ST. JOSEPH COUNTY
BOARD OF COMMISSIONERS AND THE CITY OF SOUTH BEND, INDIANA
BOARD OF PARK COMMISSIONERS REGARDING PONADER PARK**

This Memorandum of Understanding (“MOU”) is entered into this ___ day of _____, 2020 (“Effective Date”), by and between the St. Joseph County Board of Commissioners (the “County”), and the City of South Bend, Indiana, by and through its Board of Park Commissioners (the “Park Board”) (each a party and collectively referred to herein as the parties).

WHEREAS, the County is currently undergoing an improvement project related to Douglas Road (the “Project”) which calls for the reconstruction of Douglas Road from Ivy Road to SR 23; and

WHEREAS, the proposed improvements, including expanding Douglas Road to a four-lane road, will result in benefits to residents of the County, including the City of South Bend; and

WHEREAS, the Park Board owns and is in control of property located in the Project area, commonly referred to as Ponader Park, that contains established ecological communities and wetlands that play a critical role in the ecosystem, particularly as it relates to the conservation of Juday Creek; and

WHEREAS, in order to complete the Project, the County would like to acquire 0.399 acres of Ponader Park in fee simple as well as 0.944 acres of temporary easement for construction of its Project (the “Park Property”), as depicted within Exhibit A, incorporated herein by reference and attachment. Additionally, the County requests the Park Board to release 0.10 acres of a currently existing wetland easement; and

WHEREAS, the Park Board has expressed concerns about the ecological impact the fee simple and temporary easement acquisitions will have on Ponader Park; and

WHEREAS, the County and the Park Board, by and through this MOU, desire to set forth the terms and conditions by which the County can acquire the Park Property while also adequately addressing the Park Board’s concerns.

NOW, THEREFORE, the parties hereby agree as follows:

1. Transfer of Park Property and Release of Easement. In conjunction with the execution of this MOU, the Park Board agrees to pass a resolution authorizing the transfer of the Park Property described above and execute the transfer documents necessary, as required by INDOT for federal aid participation, to transfer the property interests as contemplated under this MOU including but not limited to an Acceptance of Uniform Property Offer, Warranty Deed, related sales disclosure forms, and payment voucher (the “Transfer Documents”). In addition, the Park Board agrees to execute a Temporary Easement and a Release of Wetland Easement.

2. Compensation. In exchange for the transfer of the Park Property, the County has offered to pay the Park Board the sum of \$4,975.00 (the “Purchase Offer Price”) based upon an appraisal performed by a company engaged by the County (“County Appraisal”). The County

acknowledges that the County Appraisal did not take into consideration the value of the ecological communities and wetlands of the Park Property nor the critical role they play in the local ecosystem, particularly as it relates to the conservation of Juday Creek. The County did, however, seek to address the ecological impact on the Park Property through the purchase of wetland mitigation credits as well as through offering the compensation referenced in paragraph 4(c) hereinbelow.

In consideration of the time constraints expressed by the County related to the Project, the City agrees to accept the Purchase Offer Price as a partial payment for the Park Property to be supplemented by the payment related the wetland mitigation credits, as more fully explained in paragraph 4(c) below.

3. Relocation of City Owned Lift Station. The City of South Bend currently owns a lift station which sits in the County owned right-of- way on Douglas Road. As a result of the Project, the County notified the City that the lift station would need to be relocated. The County and the South Bend Engineers office had collaborative discussions regarding the potential relocation of the lift station to Ponader Park. The Park Property was identified as a potential relocation site. The Park Board expressed concerns about the ecological impact of relocation of the Lift Station to the Park Property. The parties agree to work together to reach a mutually acceptable resolution of the Park Board's concerns and mutually work together to address the same.

4. Ecological Mitigation. The Park Board has identified the following concerns regarding the various ecological disturbances which may occur as a result of the Project.

(a) Construction Limits. As a result of the construction work associated with the Project, it is possible that certain invasive vegetation currently existing within the Temporary Easement area of Ponader Park could be spread to other areas of the Park through the use of construction equipment. As a result of this concern, the County agrees to require that its Project contractors take all reasonable steps to limit the spread of invasive vegetation and limit the use of heavy construction equipment to only the areas defined within the construction limits of the Project. The County will further seek the input of the Park Board and its representatives to help determine sensitive areas to limit such equipment. Further, the County will work with its contractors to limit the Project's impact on the Swale, referenced in 4(b) below.

(b) Protection of Swale. The County will take all reasonable measures to minimize the impact of the construction on the area of the Swale. Any areas of the Swale that are disturbed as a result of the Project will be reconstructed to maintain the purpose and drainage pattern of the existing swale. County contractors will be required to preserve and re-use topsoil in the area of the Swale. Further, within the seeding and planting guidelines allowed by the IDNR permit requirements, the County will work with the Park Board to determine the appropriate seed mixture and plantings to be used on the reconstructed areas of the Swale. In addition, as set forth in paragraph 4(d), below, the County believes that it can relocate the proposed tree plantings in the area of the Swale in order to address the Park Board's concerns related to the planting's effect on the vegetation located within the Swale.

(c) Wetland Mitigation. The County has purchased for the Project wetland mitigation credits in the amount of \$279,120 through the Indiana Department of Natural Resource (“IDNR”) In Lieu Fee program. Due to the purchase of mitigation credits, the County cannot guarantee that the credits will be used for a wetlands project within the City of South Bend. The Park Board City has requested that the County use a local wetland mitigation strategy to ensure replacement of the wetlands being lost to the City under the County’s Project are replaced by a wetland’s project within the City. Therefore, the County agrees to pay to the City, through the Park Board, the amount of \$47,880.00 toward a wetlands project within the City.

(d) Tree Mitigation. The Parties recognize and agree that tree, spacing, amounts, location, and types of trees and shrubs to be used for mitigation purposes has a significant impact on the future ecological health of Ponader Park. The County therefore agrees to collaborate with the Park Board, its representatives, and the Forester for the City to work within the Army Corps/IDNR requirements to select the type and location of all plantings under this MOU. In addition to the above, at the time of the drafting of this MOU, the County believes that it may be able to relocate the plantings identified in the area of the Swale to other property not located within Ponader Park. Further, the County agrees to incorporate into the contractor Project requirements a 3-year monitoring period for all trees and shrubs. The post construction care, upkeep and replacement of all trees, shrubs and other plantings will be at the cost of the County.

(e) Juday Creek. The Park Board and its representatives have raised concerns related to the Project’s effect on Juday Creek and specifically its affect on the substrate of the creek and creek bed and the ability for animals to traverse under the bridge over the Creek. Since those concerns were raised, the County has confirmed that the Project will not affect the creek bed and that the construction of the new bridge over Juday Creek will provide the same, if not better, area for the traversing of animals than currently exists, including the widening of the bank area under the bridge. Further, the County has coordinated with the Juday Creek Task Force regarding the parts of the Project associated with Juday Creek and the Juday Creek Task Force have not raised any objections.

(f) Construction Guidelines. The County agrees to require its Project contractor(s) to use Exhibit B, incorporated herein by reference and attachment, as a set of guidelines to be followed when performing work in Ponader Park.

5. Term and Termination. This MOU is valid for a term of five (5) years from the Effective Date. If either party breaches any provision of this MOU and if such breach is not cured within thirty (30) days after receiving written notice from the other party specifying such breach in reasonable detail, the non-breaching party shall have the right to terminate this agreement by giving written notice thereof to the party in breach, which termination shall go into effect immediately on receipt. This MOU can only be terminated for convenience by written, mutual agreement of the parties.

6. Records. The parties shall retain all records relating to this MOU for a period of three (3) years following expiration or termination of the MOU, or following resolution of a dispute under this MOU, whichever occurs later.

7. Notices. Any notice required or permitted to be given by the parties pursuant to the terms of this MOU shall be in writing and shall be deemed given when delivered personally or deposited in the U.S. mail, first class with postage prepaid, and addressed to the parties as follows:

If to the County: Andrew Kostielney, President
St. Joseph County Board of Commissioners
7th Floor
227 W. Jefferson Blvd.
South Bend, IN 46601

With copy to: Jamie C. Woods, Esq.
County Attorney
Thorne • Grodnik, LLP
P.O. Box 1210
Mishawaka, IN 46546-1210

If to the City: City of South Bend
Board of Park Commissioners
227 W. Jefferson Blvd., Ste. 1400 S
South Bend, IN 46601
Attn: Executive Director

With a copy to: South Bend Legal Department
227 W. Jefferson Blvd., Ste. 1200 S
South Bend, IN 46601
Attn: Corporation Counsel

8. Miscellaneous.

(a) The parties agree by signing this MOU that they have the necessary authority to enter into this MOU and have each taken all necessary actions to bind themselves to the terms, conditions, and obligations of this MOU.

(b) This MOU is solely for the benefit of the parties hereto and gives no right to any other party.

(c) Nothing in this MOU is intended or will be deemed to create a partnership or joint venture between the parties.

(d) This MOU is not assignable except by written consent of both parties.

(e) Any waiver by a party of a breach of a provision of this MOU will not operate or be construed to be a waiver of any other breach of that provision or of any breach of any other provision of this MOU. A failure by a party to insist upon strict adherence to any term of this MOU on one or more occasion will not be considered a waiver or deprive that party of the right thereafter to insist upon strict adherence to that term or any other term of this MOU. Any waiver must be in writing and signed by the party against whom enforcement of the waiver is sought.

(f) This MOU shall be construed in accordance with the laws of the State of Indiana. In the event of a dispute, controversy, or claim arising out of or relating to this MOU or to any agreement(s) concluded pursuant to this MOU, the parties will use their best efforts to promptly settle such dispute through direct negotiation. Any dispute that is not settled within sixty (60) days from the date a party has notified the other of the nature of the dispute and of the measures that should be taken to rectify it shall be resolved by litigation in the Circuit or Superior Courts of St. Joseph County, Indiana.

(g) If any one or more of the provisions of this MOU shall be held invalid, illegal, or unenforceable, the validity and enforceability of all other provisions of this MOU shall not be affected.

(h) No representation, promise, inducement, or statement of intention has been made by or on behalf of any party hereto that is not set forth in this MOU. This MOU may be amended only by written agreement signed by each of the parties involved.

(i) The language used in this Agreement is language developed and chosen by all parties to express their mutual intent and no rule of strict construction shall be applied against any party.

(j) This MOU may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement.

(signature page follows)

IN WITNESS WHEREOF, the County and the Park Board through their duly authorized representatives, enter into this MOU.

ST. JOSEPH COUNTY BOARD OF COMMISSIONERS

Andrew Kostielney, President

Deborah Fleming, D.M.D., Vice-President

Dave Thomas, Member

CITY OF SOUTH BEND, INDIANA BOARD OF PARK COMMISSIONERS

Mark Neal, President

Consuella Hopkins, Vice President

Aimee Buccellato, Member

Dan Farell, Member

EXHIBIT B

Ponader Park Construction Invasive Vegetation Guidelines

Purpose

Ponader Park, a South Bend City Park located along Douglas Road near Maple Lane, is a park property that the South Bend Board of Park Commissioner's Ecological Advocacy Committee has identified as being an ecologically sensitive area. Contained within Ponader Park is a section of Juday Creek along with its wooded floodplain, numerous ecologically valuable species of plants and trees, and a bioswale containing native vegetation that holds and filters stormwater runoff before draining into Juday Creek.

The proposed widening of Douglas Road, along with the relocation and expansion of the existing lift station, will negatively impact the ecology of Ponader Park. Although it is impossible to mitigate all of the environmental damage caused by the proposed construction, following the guidelines in this document will help to lessen the impact.

Invasive Species Control

Ponader Park contains several species of plants listed as officially invasive by the Indiana Invasive Species Council. They are:

- Asian bush honeysuckle (*Lonicera spp.*)
- bull thistle (*Cirsium vulgare*)
- Canada thistle (*Cirsium arvense*)
- crown vetch (*Coronilla varia*)
- dame's rocket (*Hesperis matronalis*)
- garlic mustard (*Alliaria petiolata*)
- glossy buckthorn (*Frangula alnus*)
- hybrid cattail (*Typha x glauca*)
- Japanese hedge parsley (*Torilis japonica*)
- mugwort (*Artemisia vulgaris*)
- multiflora rose (*Rosa multiflora*)
- Queen Anne's lace (*Daucus carota*)
- reed canarygrass (*Phalaris arundinacea*)

- Siberian elm (*Ulmus pumila*)
- white mulberry (*Morus alba*)
- yellow sweet clover (*Melilotus alba*)

Contractors and consultants should learn to recognize these species and take necessary precautions to prevent their spread, including:

- Removing flowers and fruit before ground disturbances and disposing of in sealed containers.
- Washing down all major construction equipment off-site and immediately before entry into the project site.
- Preventing construction equipment from entering park property outside of the designated rights-of-way.
- Minimizing soil disturbances within the construction zone.

Post Construction Mitigation

Soil disturbances within the temporary right-of-way will result in an influx of invasive species. Contractors should, for the first year, monitor the areas of disturbance for the establishment of invasive species, and manually remove when present.