

CITY OF FOND DU LAC - Memorandum

City Manager

Date: March 5, 2021
To: City Council
From: Joe Moore, City Manager
Re: Lakeside Park Enhancement Agreement Recommendation

The City Council approved a contract known as the Lakeside Park Enhancement Agreement on September 30, 2020 and the City subsequently entered into it on October 2, 2020. That contract between the City of Fond du Lac, Wisconsin and Lakeside Forward LLC (LSF) set forth a 120 day period to inspect and review documents and proposals as described below.

It directs me, as City Manager, to evaluate and to consider certain reports, agreements and proposals for inspection and review. It also directs me to request the City Council to terminate the Enhancement Agreement if the projects are not feasible or that going forward with any or all of the projects would negatively impact the mission and/or the City's financial stability. What follows is my analysis based upon that direction.

However, before proceeding with that explanation I will point out that you, as Councilors, should apply whatever decision making criteria you deem appropriate. Just like the contract is silent regarding how LSF reaches its determination about whether to proceed, **it in no way limits what you might consider vital, important or unnecessary either**. Thus, your decision is unencumbered by LSF's conclusion or my analysis.

The contract committed the City and LSF to fund, design and construct the following projects in Lakeside Park over a four year period ending October 2, 2024. For the amphitheater and restaurant, the contract specified the locations as well.

- Amphitheater and Skating Rink – on Oven Island
- Restaurant/Mixed Use – west of the Lighthouse
- Pavilion – renovation
- Walking Paths
- Site Improvements – boat docks, parking areas, etc.

Johnson Consulting delivered its Lakeside Park Feasibility Study on November 11, 2020. That date is important because the Enhancement Agreement set forth the Johnson Consulting Feasibility Study delivery date as the beginning of the 120 day inspection and review period.

The **Enhancement Agreement stipulates the following** (see page 1 of the Enhancement Agreement):

“City and LSF desire to make certain improvements to Lakeside Park including but not limited to renovating an existing pavilion building, constructing a new amphitheater and skating rink on the area known as Oven Island, constructing a restaurant with exhibition space west of the Lakeside Park Lighthouse, and varied other improvements”

In other words, **the end of the 120 day period does not require an affirmation to move forward** with the contract since the City Council already provided that affirmation on September 30. However, the **end of the 120 period did create a deadline for termination of the contract if one or more of the triggers for termination exist**. Those are described below.

The expectations for the inspection and review period, as they pertain to the City, are described in Article 2: Completion of Feasibility Study, Plan Approval, and Other Party Responsibilities (see page 4 of the Enhancement Agreement).

Paragraph 1.c of Article 2 reads as follows:

“The City Manager shall have one hundred and twenty (120) days to inspect and review the Feasibility Study Report, this agreement, and any proposals provided by the Alternative Master Plan (AMP) management team. The City manager must provide the same opportunity to the Advisory Park Board, Plan Commission, City Council and the public at large. If the City Manager reasonably and in good faith determines that the Projects are not feasible as a result of reviewing the Feasibility Study Report and any proposals provided by the AMP management team, or the City Manager determines that going forward with any or all of the Projects would negatively impact the mission and/or financial stability of the City, the City Manager may ask that the Council terminate this Agreement, and upon receiving such request, the Council may terminate this Agreement by resolution within one hundred and twenty days of the City Manager's receipt of the Feasibility Study Report.”

The clause above stipulates **three considerations** that could trigger unilateral termination of the contract by the City. What follows is an **analysis of Article 2 and each of those three considerations**.

1. “The City Manager shall have one hundred and twenty (120) days to inspect and review the Feasibility Study Report, this agreement, and any proposals provided by the Alternative Master Plan (AMP) management team. The City manager must provide the same opportunity to the Advisory Park Board, Plan Commission, City Council and the public at large.”
 - The 120 day period began on November 11, 2020 (See page 4 of the attachment for reference)
 - The 120 day period ends on March 11, 2021 (See page 5 of the attachment for reference)
 - Advisory Park Board reviews occurred on:
 - 11/23/20 (See page 4 of the attachment)
 - 1/25/21 (See page 5 of the attachment)
 - 2/22/21 (See page 5 of the attachment)
 - City Council reviews occurred on:
 - 11/11/20 (See page 4 of the attachment)
 - 1/27/21 (See page 5 of the attachment)
 - 2/10/21 (See page 5 of the attachment)
 - 2/24/21 (See page 5 of the attachment)
 - The public at large could view and speak at the seven meetings listed above and participate in two public information meetings on:
 - 2/25/21 (See page 5 of the attachment)
 - 3/2/21 (See page 5 of the attachment)
 - The Plan Commission will be consulted as specific items yet to be determined in the Capital Improvement Plans of 2021 – 2025 are identified.

2. “If the City Manager reasonably and in good faith determines that the Projects are not feasible as a result of reviewing the Feasibility Study Report and any proposals provided by the AMP management team...”
 - The Alternative Master Plan proposed the construction of two major facilities;
 - An amphitheater on Oven Island. The amphitheater plan had also allocated space for an ice skating rink within its footprint.
 - A restaurant/mixed use building on Lighthouse Peninsula Island.
 - With reference to project feasibility described in the Feasibility Study Report, Johnson Consulting concluded the following:
 - **“The Consulting Team concludes that an amphitheater venue is feasible in Lakeside Park.”** (See page 7 of the Lakeside Park Feasibility Study)
 - Johnson concluded that the site selected in the AMP was feasible, but problematic.
 - As described in Management Team presentations, the proposal to construct an amphitheater on Oven Island was set aside until demand for such a venue could be determined. As a basis for making that determination the Management Team proposed a series of three entertainment productions in Lakeside Park during 2022. The viability of these events will contribute to a reevaluation of whether to pursue the construction of an amphitheater somewhere within Lakeside Park.
 - The Management Team’s recommendation reduces risk to the City.
 - The Management Team also considered the ice skating rink and concluded that it was an amenity important enough to not only retain but to expand. As a result, the Management Team proposed the construction of a standalone rink immediately west of the children’s play area off Main Street.
 - The Management Team’s recommendation expands upon the City’s familiarity and expertise with ice rinks and other outdoor recreational activities.
 - **“The Consulting Team concludes that a food and beverage establishment is feasible in Lakeside Park.”** (See page 8 of the Lakeside Park Feasibility Study)
 - Johnson concluded that the site selected in the AMP was feasible, but too close to the Lighthouse.
 - As described in Management Team presentations, the proposed location to construct a restaurant/mixed use building on Lighthouse Peninsula Island was adjusted to better align with Johnson Consulting’s recommendations.
3. “...or the City Manager determines that going forward with any or all of the Projects would negatively impact the mission and/or financial stability of the City...”
 - The Enhancement Agreement requires a collective investment of \$10.4 million in support of the Alternative Master Plan, split evenly between the City and LSF. Thus, the City’s contracted commitment as part of the AMP is \$5.2 million (see page 5 of the Enhancement Agreement).
 - The City’s 2020 Capital Improvement Plan (CIP) approved on 11/13/19 included \$3.5 million for the construction of a new Pavilion (see page 2 of the attachment).

At that time the City had verified its debt capacity was sufficient for the project. Although that project was later canceled (see page 2 of the attachment) it illustrated the City's ambition and its financial capacity to make significant investments in Lakeside Park.

- On 8/18/20 the City published a request for bids to renovate the Pavilion. Additionally, the City commenced procurement processes for equipping and furnishing the newly renovated Pavilion as well as upgrading its IT infrastructure. Taken together the cost of these efforts is approximately \$1.6 million.
 - That \$1.6 million is part of the City's \$5.2 million investment.
 - The City issued debt against that requirement in 2020 and it is now part of the property tax levy.
- On 9/16/20 the City Council directed an additional \$2.51 million to the 2021 Capital Improvement Plan for investment in the AMP.
 - That \$2.51 million is part of the City's \$5.2 million investment.
 - The City will issue debt against that requirement in 2021 and it will be part of the 2022 property tax levy.
- As a result of those actions, which total roughly \$4.1 million, the City's remaining capital investment in support of the AMP contractual obligation is \$1.09 million. Given the City's debt capacity and the flexibility to obligate **the remaining \$1.09 million in either 2022, 2023 or 2024, this requirement does not "negatively impact the financial stability of the City."**
- There are other considerations; for example:
 - The City will not invest funds to design, construct or operate the Restaurant/Mixed Use building because the responsibility for that facility lies with LSF.
 - The rent from that facility will contribute to maintenance of that facility and to park improvements.
 - The facility itself will become the property of the City, a property that, given current estimates, will exceed \$3 million in value.
 - LSF will assume financial risks associated with the facility and its operation for the first 21 years of its existence.
 - LSF has not, according to its responsibilities described in Article 2, paragraph 1.b, determined that the Feasibility Study Report or the proposals by the Management Team fails to comport with the AMP. Thus, it has determined not to terminate the Enhancement Agreement.
 - Where there are differences between the contract and Johnson's recommendations, the Management Team gave more weight to the contract since it expressed the joint desire of the Council and LSF. For example:
 - The Enhancement Agreement's Article 6, which pertains to the Restaurant/Mixed Use Space, lays out the expectation for LSF to own the building initially, the sublease it to a restaurant operator and to disburse accrued revenues to the City. That is different than Johnson's recommendation, "that the City of Fond du Lac retain ownership of the land on which the establishment will sit as well as of the shell and permanent features of the structure within which the restaurant will operate." The Management Team reconciled that difference by limiting the term of LSF's ownership to seven years

and it took Mr. Johnson's comments into account when he said,
"Land lease in my mind is ownership in a way, a direct line to
ownership because you control the asset."

In conclusion, Council's determination "to make certain improvements to Lakeside Park including but not limited to renovating an existing pavilion building, constructing a new amphitheater and skating rink on the area known as Oven Island, constructing a restaurant with exhibition space west of the Lakeside Park Lighthouse, and varied other improvements," **was validated by the Feasibility Study** and, although modified by the Management Team, **validated by the Team's analysis and recommendations**. Additionally, **there was no triggering conclusion that invalidates the Enhancement Agreement**. Thus, there is no contractual basis for the City Manager to request termination or to request the City Council to vote to do so.

CHRONOLOGY OF EVENTS – PLANNED AND PROPOSED CHANGES FOR LAKESIDE PARK 2014 – 2021

2014 – (June)	Council created Lakeside Park Exploratory Committee (LPEC)
2014 – (August)	LPEC members appointed
2015 – (June)	LPEC published its findings and recommendations
2016 –	City retained Excel Engineering to assist with the creation of Lakeside Park master plan based upon the LPEC findings and recommendations
2016 – (June)	City staff unveiled master plan to Council
2016 – (November)	Council rejected the proposed master plan, deciding instead to build a new pavilion as well as directing the creation of a revised master plan
2017 – (April)	Council approved revised master plan and the construction of a new Pavilion
2018 –	City retained Angus Young to design a new Pavilion

2019	
FEBRUARY	<ul style="list-style-type: none"> • 2/27/19 (Council Meeting) <ul style="list-style-type: none"> ➤ Angus Young Architects unveiled design concepts for the new pavilion, which were rejected by Council
JUNE	<ul style="list-style-type: none"> • 6/24/19 (APB Meeting) <ul style="list-style-type: none"> ➤ Park Board recommended approval to City Council of the revised Pavilion concept plan as designed by Angus Young (<i>for a new Pavilion</i>)
	<ul style="list-style-type: none"> • 6/26/19 (Council Meeting) <ul style="list-style-type: none"> ➤ Council endorsed the revised pavilion design as presented (<i>for the construction of a new pavilion</i>)
OCTOBER	<ul style="list-style-type: none"> • 10/16/19 <ul style="list-style-type: none"> ➤ At his request, Council Member Ben Giles met with the City Manager and the City Attorney to request the addition of the Lakeside Park Pavilion construction project to the 10/23/19 agenda in order to ask the Council to reconsider the project.
	<ul style="list-style-type: none"> • 10/17/19 <ul style="list-style-type: none"> ➤ City Clerk published the agenda for the 10/23/19 Council meeting, an agenda which communicated Mr. Giles' interest in discussing whether the Pavilion project scope, design, location and budget were appropriate
	<ul style="list-style-type: none"> • 10/23/19 (Council Meeting) <ul style="list-style-type: none"> ➤ Mr. Giles introduced a request to delay the Pavilion construction project that had been endorsed by Council in June

NOVEMBER	<ul style="list-style-type: none"> • 11/13/19 (Council Meeting) <ul style="list-style-type: none"> ➤ Council approved the 2020 Capital Improvement Plan (CIP), which included \$3.5 million to construct a new Pavilion in 2020 and \$60K for fiber connectivity to the new pavilion ➤ Council approved a delay in the Pavilion project until 2/15/20 to evaluate alternate proposals from community partners
	<ul style="list-style-type: none"> • 11/25/19 (Advisory Park Board Meeting) <ul style="list-style-type: none"> ➤ Park Board considered land use options and restrictions for LSP <ul style="list-style-type: none"> ▪ A Motion was made to restrict development to the current Pavilion footprint only; the motion died for lack of second. ▪ A Motion was made to recommend to City Council to prohibit development on the green space at the end of Main Street where the master plan of 2016 had proposed the construction of an Amphitheater and Pavilion; the motion was adopted.
DECEMBER	<ul style="list-style-type: none"> • 12/11/19 (Council Meeting) <ul style="list-style-type: none"> ➤ Council endorsed the APB recommendation prohibiting development in Lakeside Park in the wooded area immediately north of Main Street
2020	
JANUARY	<ul style="list-style-type: none"> • 1/20/20 <ul style="list-style-type: none"> ➤ Supporters of the LPEC hosted a public meeting at the Pavilion to introduce an Alternative Master Plan (AMP) to the public
	<ul style="list-style-type: none"> • 1/27/20 (Advisory Park Board Meeting) <ul style="list-style-type: none"> ➤ Alternate Lakeside Park Master Plan was presented by Tom Schermerhorn, representing the Supporters of the Lakeside Park Exploratory Committee, to introduce the AMP to the Park Board
FEBRUARY	<ul style="list-style-type: none"> • 2/12/20 (Council Meeting) <ul style="list-style-type: none"> ➤ Presentation of alternate Lakeside Park Master Plan was presented by Tom Schermerhorn, representing the Supporters of the Lakeside Park Exploratory Committee, to introduce the AMP to the Council <ul style="list-style-type: none"> ▪ Council approved indefinite postponement of the Pavilion project ▪ Council ordered a feasibility analysis ▪ Council adopted the alternative master plan concept
	<ul style="list-style-type: none"> • 2/26/20 (Council Meeting) <ul style="list-style-type: none"> ➤ Presentation by staff regarding the AMP implementation strategy, focused on when and how to renovate the pavilion
	<ul style="list-style-type: none"> • City terminated the contract with Angus Young for design and engineering services associated with the construction of a new Pavilion
MARCH	<ul style="list-style-type: none"> • 3/25/20 (Council Meeting) <ul style="list-style-type: none"> ➤ Presentation by staff regarding the details of the pavilion renovation ➤ Discussion about whether to survey the community about the AMP
MAY	<ul style="list-style-type: none"> • 5/13/20 (Council Meeting) <ul style="list-style-type: none"> ➤ Motion to refer community survey discussion to the APB failed

JUNE	<ul style="list-style-type: none"> • 6/24/20 (Council Meeting) <ul style="list-style-type: none"> ➤ Presentation by staff about the scope of the feasibility analysis and the proposed approach for AMP-related activities for the remainder of 2020 ➤ Update from staff on the design for the pavilion renovation
	<ul style="list-style-type: none"> • 6/25/20 <ul style="list-style-type: none"> ➤ City published RFP for feasibility analysis
	<ul style="list-style-type: none"> • 6/29/20 (Advisory Park Board Meeting) <ul style="list-style-type: none"> ➤ City hosted a public information meeting about the AMP
JULY	<ul style="list-style-type: none"> • 7/15/20 <ul style="list-style-type: none"> ➤ Friends of LSP erected two signs in LSP to generate community input about the AMP on the city's website
	<ul style="list-style-type: none"> • 7/22/20 <ul style="list-style-type: none"> ➤ City awarded feasibility study contract to Johnson Consulting
	<ul style="list-style-type: none"> • 7/27/20 (Advisory Park Board Meeting) <ul style="list-style-type: none"> ➤ APB recommended to Council to hold an advisory referendum and to pause the pavilion renovation
AUGUST	<ul style="list-style-type: none"> • 8/5/20 <ul style="list-style-type: none"> ➤ Supporters of the LPEC hosted a meeting at the fairgrounds to discuss the AMP with the public
	<ul style="list-style-type: none"> • 8/12/20 (Council Meeting) <ul style="list-style-type: none"> ➤ Motion made to delay pavilion renovation until after the publication of the feasibility analysis – motion died for lack of 2nd ➤ City Attorney presented an overview about direct legislation, binding and advisory referendums
	<ul style="list-style-type: none"> • 8/18/20 <ul style="list-style-type: none"> ➤ City published a request for bids for the Pavilion renovation
SEPTEMBER	<ul style="list-style-type: none"> • 9/9/20 (COW) <ul style="list-style-type: none"> ➤ Johnson Consulting presented its feasibility analysis methodology
	<ul style="list-style-type: none"> • 9/14/20 <ul style="list-style-type: none"> ➤ City awarded Pavilion renovation contract to Capelle Brothers & Diedrich
	<ul style="list-style-type: none"> • 9/16/20 <ul style="list-style-type: none"> ➤ Council Member Arletta Allen provided the Lakeside Forward LLC (LSF) proposed Enhancement Agreement to the City Manager
	<ul style="list-style-type: none"> • 9/16/20 (Special Council Meeting) <ul style="list-style-type: none"> ➤ Closed session held to discuss potential conflict of interest, ethics considerations and the possibility of litigation ➤ Annual special budget meeting held to discuss all budget and CIP matters ➤ Council approved the addition of \$2.51 million to the CIP for the LSP AMP

	<ul style="list-style-type: none"> • 9/18/20 <ul style="list-style-type: none"> ➤ City Clerk published the agenda for the 9/23/20 Council meeting, an agenda which communicated the LSF Enhancement Agreement
	<ul style="list-style-type: none"> • 9/23/20 <ul style="list-style-type: none"> ➤ Friends of Lakeside Park delivered a direct legislation petition pertaining to Lighthouse Peninsula Island to the City Clerk
	<ul style="list-style-type: none"> • 9/23/20 (Council Meeting) <ul style="list-style-type: none"> ➤ Ms. Allen introduced the LSF Enhancement Agreement for deliberation and approval
	<ul style="list-style-type: none"> • 9/30/20 <ul style="list-style-type: none"> ➤ Friends of Lakeside Park delivered a direct legislation petition pertaining to Oven Island to the City Clerk
	<ul style="list-style-type: none"> • 9/30/20 (Special Council Meeting) <ul style="list-style-type: none"> ➤ Council adopted modified Enhancement Agreement
OCTOBER	<ul style="list-style-type: none"> • 10/2/20 <ul style="list-style-type: none"> ➤ Enhancement Agreement went into effect, an agreement that set forth a 120 day review period to begin with the publication of the feasibility analysis
	<ul style="list-style-type: none"> • 10/5/20 <ul style="list-style-type: none"> ➤ Friends of Lakeside Park Lighthouse Peninsula Island petition certified by City Clerk
	<ul style="list-style-type: none"> • 10/7/20 <ul style="list-style-type: none"> ➤ Friends of Lakeside Park Oven Island petition certified by City Clerk
	<ul style="list-style-type: none"> • 10/14/20 (Council Meeting) <ul style="list-style-type: none"> ➤ Council adopted resolution finding that the Friends of Lakeside Park's petitions are not proper subjects for direct legislation
	<ul style="list-style-type: none"> • 10/19/20 <ul style="list-style-type: none"> ➤ Friends of Lakeside Park filed lawsuit
	<ul style="list-style-type: none"> • 10/21/20 <ul style="list-style-type: none"> ➤ Friends of Lakeside Park filed motion for temporary injunction
	<ul style="list-style-type: none"> • 10/30/20 <ul style="list-style-type: none"> ➤ City Clerk served with Friends of Lakeside Park et al v. City of Fond du Lac lawsuit
NOVEMBER	<ul style="list-style-type: none"> • 11/11/20 (Council Meeting) <ul style="list-style-type: none"> ✦ <i>Day 1 of Contractual Review Period</i> ➤ Johnson Consulting presented its feasibility analysis findings and recommendations
	<ul style="list-style-type: none"> • 11/12/20 <ul style="list-style-type: none"> ✦ <i>Day 2 of Contractual Review Period</i> ➤ 1st Meeting of the AMP Management Team Co-Chairs

	<ul style="list-style-type: none"> • 11/23/20 (Advisory Park Board Meeting) <ul style="list-style-type: none"> ✦ <i>Day 12 of Contractual Review Period</i> ➤ Josh Musack, Co-Chair of the Alternate Master Plan Management Team, presented a review of the feasibility analysis recommendations
	<ul style="list-style-type: none"> • 11/24/20 <ul style="list-style-type: none"> ➤ Scheduling conference held on Friends of Lakeside Park lawsuit
2021	
JANUARY	<ul style="list-style-type: none"> • 1/25/21 (Advisory Park Board Meeting) <ul style="list-style-type: none"> ✦ <i>Day 75 of Contractual Review Period</i> ➤ Josh Musack presented the Management Team recommendations for facility locations and design
	<ul style="list-style-type: none"> • 1/27/21 (City Council Meeting) <ul style="list-style-type: none"> ✦ <i>Day 77 of Contractual Review Period</i> ➤ Josh Musack presented the Management Team recommendations for facility locations and design
FEBRUARY	<ul style="list-style-type: none"> • 2/5/21 <ul style="list-style-type: none"> ➤ Postponed Motion Hearing on Friends of Lakeside Park et al v. City of Fond du Lac
	<ul style="list-style-type: none"> • 2/10/21 (City Council Meeting) <ul style="list-style-type: none"> ✦ <i>Day 91 of Contractual Review Period</i> ➤ City Manager and Josh Musack reviewed Council requests for the Lakeside Park Master Plan brought forth at the CC meeting on 1/27/2021
	<ul style="list-style-type: none"> • 2/22/21 (Advisory Park Board Meeting) <ul style="list-style-type: none"> ✦ <i>Day 103 of Contractual Review Period</i> ➤ Josh Musack and Dyann Benson presented the Management Team update on the Restaurant/Multi-Purpose Facility Lease Negotiations
	<ul style="list-style-type: none"> • 2/24/21 (City Council Meeting) <ul style="list-style-type: none"> ✦ <i>Day 105 of Contractual Review Period</i> ➤ Josh Musack and Dyann Benson presented the Management Team update on the Restaurant/Multi-Purpose Facility Lease Negotiations
	<ul style="list-style-type: none"> • 2/25/21 <ul style="list-style-type: none"> ➤ Public Information Meeting hosted by the Management Team
MARCH	<ul style="list-style-type: none"> • 3/2/21 <ul style="list-style-type: none"> ➤ Public Information Meeting hosted by the Management Team
	<ul style="list-style-type: none"> • 3/5/21 <ul style="list-style-type: none"> ➤ Motion Hearing on Friends of Lakeside Park et al v. City of Fond du Lac (Petitioner's Motion for Temporary Injunction, Defendant's Motion to Dismiss)
	<ul style="list-style-type: none"> • 3/11/21 <ul style="list-style-type: none"> ✦ <i>Day 120 of Contractual Review Period</i> ➤ Enhancement Agreement deadline for termination