

ORDINANCE NO.: 2012-039

*Authorizing the City Manager to execute an Agreement between
the City of Columbia and EnduringFX, LLC*

ORIGINAL
STAMPED IN RED

BE IT RESOLVED by the Mayor and City Council this 5th day of June, 2012, that the City Manager is authorized to execute the attached Agreement between the City of Columbia and EnduringFX, LLC for placement and maintenance of fitness tracking technology at Riverfront Park and Drew Wellness Center.

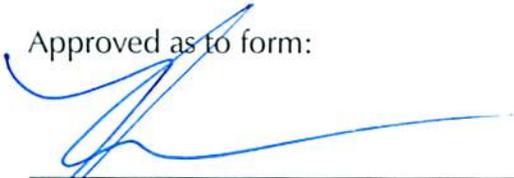
Requested by:

Approved by:



City Manager

Approved as to form:



City Attorney



MAYOR

ATTEST:



City Clerk

Introduced: 5/15/2012
Final Reading: 6/5/2012

AGREEMENT
between
the City of Columbia
and
EnduringFX, LLC

This Agreement ("Agreement") is entered into between the City of Columbia ("City"), a political subdivision of the State of South Carolina, having an address at 1737 Main St., Columbia, South Carolina 29201, and EnduringFX, LLC ("EnduringFX"), a limited liability corporation authorized to do business in South Carolina, having an address at 1301 Gervais St., Suite 200, Columbia, South Carolina 29201.

1. BACKGROUND

- 1.1 The City owns certain properties within the city limits of Columbia, Richland County, South Carolina, including but not limited to Riverfront Park and the Drew Wellness Center.
- 1.2 The City wishes to promote health and fitness with its residents and to increase beneficial usage of Riverfront Park and the Drew Wellness Center for the general health and wellbeing of its residents.
- 1.3 EnduringFX is a newly formed company in Columbia, SC that is developing hardware and software technology that has the capability to track fitness statistics for users of athletic facilities including public parks and recreation centers such as Riverfront Park and/or the Drew Wellness Center.
- 1.4 This Agreement is effective when signed by all parties ("Effective Date") and shall remain in effect for five (5) years from execution unless terminated pursuant to the provisions contained herein.

2. UNDERSTANDING

The Parties agree as follows:

- 2.1 The City grants permission to EnduringFX to install and maintain its technology at Riverfront Park covering the complete trail from the Laurel Street parking area to the diversion dam as well as the segment from the bridge to EdVenture (when it reopens for public access). The installation of the projects described in sections 2.1 and 2.2 are referred to herein individually as "Project" and collectively as "Projects."
 - (a) Installation at the Riverfront Park will include, among other things, the installation of at least six (6) timing stations and a digital scoreboard near the Laurel Street parking area. It is anticipated that the design and installation of the timing stations will be substantially similar to that depicted in Exhibit A, attached hereto. Prior to installation, the design and size of the timing stations and digital scoreboard must be approved by the City Manager, or his designee(s), in the City's sole and exclusive discretion.

- (b) As part of the installation, each timing station may require two asphalt cuts, some trenching to connect the timing equipment to existing power sources, and the installation of a concrete foundation that will be capable of supporting an outdoor post that is very similar to an outdoor streetlight.
- (c) The City will allow EnduringFX to tie into the existing power sources (for current street lights along the path) and the City will pay for the power required for the newly installed EnduringFX systems.
- (d) Internet connectivity will be provided and paid for by EnduringFX via a local provider.
- (e) EnduringFX will cover all other costs to install the technology at Riverfront Park. EnduringFX will retain ownership of the hardware and computer components installed at Riverfront Park as part of the Projects.

2.2 The City grants permission to EnduringFX to install and maintain its technology at the Drew Wellness Center including the outdoor running track, indoor pool, and fitness center areas. In addition, the City grants permission to EnduringFX to install an isokinetic strength testing machine at the Drew Wellness Center.

- (a) As part of the installation at the outdoor running track, a single timing station will be installed, which may require two asphalt cuts, some trenching to connect the timing equipment to existing power sources, and the installation of a foundation that will be capable of supporting an outdoor digital scoreboard.
- (b) As part of the installation in the pool, the water level will be lowered and two horizontal cuts will be made in the concrete across all eight (8) lanes of the pool at both ends of the pool. A signal loop will be installed and the concrete cuts will be filled and sealed with silicon.
- (c) As part of the installation in the fitness center, the isokinetic strength testing machine requires the space of a large workout machine such as a Nautilus leg extension machine. This piece of equipment is used to provide another dimension of wellness assessments and even pre-employment screenings.
- (d) Prior to the installation of any of the above-referenced hardware or equipment, the design and sizing of the hardware or equipment must be approved by the City, in the City's sole and exclusive discretion.
- (e) The City will provide access to existing power and internet service and pay for the cost of both of these utilities (including the needs of the newly installed systems). EnduringFX will pay for the cost of installation of any of its systems.

- (f) EnduringFX will cover all other costs to install the technology at the Drew Wellness Center. EnduringFX will retain ownership of the hardware and computer components installed at Drew Wellness Center as part of the Projects.
- 2.3 In order to finance this project, the City understands and agrees that EnduringFX will award “naming rights” for the timing stations and digital scoreboards located in Riverfront Park and the Drew Wellness Center (including each end of the indoor pool). “Naming rights” for each timing station and/or digital scoreboard shall be limited to one sponsor plaque not to unreasonably exceed the size and design of the respective timing stations and/or digital scoreboards. The size and design of the sponsor plaques shall be approved by the City prior to the installation of the sponsor plaques, in the City’s sole and exclusive discretion.
 - 2.4 The City will allow EnduringFX to set up promotional tents at Riverfront Park and the Drew Wellness Center to allow EnduringFX to promote its technology to the public, to sell chips and assist the public with use of the system.
 - 2.5 Once installed, the City will allow EnduringFX access to both Riverfront Park and Drew Wellness Center locations in order to service and maintain the Projects. This access may include permission to work after hours and/or to drive a truck onto Riverfront Park.
 - 2.6 The City and EnduringFX understand and agree that use of the system is open to the public.
 - 2.7 The City understands that users of the system will be required to purchase and/or have access to a digital chip in order to use the timing systems located in the park. EnduringFX expects that the chip will have an initial suggested retail price of Ninety-nine and No/100 (\$99.00) Dollars each. EnduringFX expects that several local employers, including perhaps the City of Columbia, may make chips available to their employees at a reduced cost. In addition, EnduringFX will offer chips to its website subscribers at a monthly fee.
 - 2.8 The City understands that users of the system will be required to have an online profile on www.enduringfx.com in order to track their fitness-related activities. EnduringFX will provide a free, limited-functionality profile to all users of the system; however, a user will be required to enter his/her personal data in order to see historical results. EnduringFX will provide expanded-functionality profiles at different monthly/annual subscription rates.
 - 2.9 Revenue generated from these Projects will be shared between the City and EnduringFX on a 20/80 ratio on the following basis:
 - (a) Only site specific monthly revenue will be shared between the City and EnduringFX under this Section 2.9, and includes, among other things, advertising revenue on digital signage at either the Drew Wellness Center or at Riverfront Park;

- (b) This revenue sharing provision DOES NOT apply to items like the annual subscriptions for www.enduringfx.com, chip revenue, professional services, or "naming rights revenue" that will be used to cover the hardware cost of the installation.
 - (c) EnduringFX will maintain separate Profit & Loss ledgers for each Project site. The City may review revenue figures at any time. Gross revenue summaries and indicated payment (if any) will be sent to the City's designated address within forty-five (45) days of the close of each calendar quarter.
 - (d) The City understands that the initial revenue stream from the Projects will be modest and perhaps zero until the utilization of the facilities increases.
- 2.10 The City will allow EnduringFX to display community information (event dates/times, etc.) and news at both Project locations on the timing stations and/or digital scoreboards. EnduringFX anticipates all information will be of general interest to the public. The community information to be displayed shall be consistent with the content allowed to be publicized on banners pursuant to Sec. 22-103 of the City of Columbia Code of Ordinances. EnduringFX agrees not to display information on the timing stations and/or digital scoreboards which would constitute a violation of Chapter 17, Article III, Division 12, § 17-401 et seq. of the City of Columbia Code of Ordinances (as amended) (hereinafter referred to as "advertising information"). In the event EnduringFX displays advertising information on the timing stations and/or digital scoreboards, in the City's sole and exclusive discretion, the City will provide EnduringFX with twenty-four (24) hours notice of such violation prior to taking enforcement measures; provided, however, that the City's failure to provide such notice shall not be deemed as a waiver of the City's rights pursuant to this Agreement or at law.
- 2.11 The City understands and acknowledges that EnduringFX's performance of this Agreement is contingent on EnduringFX's ability to raise sufficient capital investment in order to proceed with installation of the Projects. The City will allow EnduringFX to use its name in promoting the Projects and EnduringFX's services. In turn, EnduringFX will allow the City to reference the EnduringFX system in order to promote use of the Riverfront Park and Drew Wellness Center. Both Parties will consult with and allow the other Party to approve any promotional or advertising materials before they are published or disseminated.
- 2.12 The City understands that if capital is difficult or slow to raise that EnduringFX may install portions of the Projects so that forward progress can be achieved.
- 2.13 The City understands that the timing of system installation is contingent upon capital availability and completion of hardware and software development. Therefore, at this moment it is impossible to provide exact dates; however, EnduringFX would like to have all systems installed and operational by June 30, 2013.
- 2.14 This Agreement will expire if EnduringFX is unable to get the system operational within two years of the Effective Date of this Agreement.

- 2.15 At the expiration of this Agreement, EnduringFX will remove any of its installed equipment at its expense. This includes all digital signage and timing systems; however, there are some components (such as concrete foundations and timing antenna loops) that will be buried or embedded in the walls of the pool that and will be very difficult to remove. Therefore, these embedded items will likely remain after the expiration of this agreement.
- 2.16 The City understands and acknowledges that EnduringFX's performance of this Agreement is contingent on EnduringFX's ability to obtain all necessary building permits, zoning permits, and any other applicable project approvals. The City further understands and acknowledges that all engineering studies and design documents will need to be completed before EnduringFX is able to move forward with the installation of the Projects.
- 2.17 The City will grant EnduringFX permission to study facility usage (traffic flow) before, during, and after installation of each Project. This may include having staff/students observing and counting people and perhaps the installation of temporary electronic people counters.
- 2.18 EnduringFX will purchase and maintain Workers' Compensation Insurance on its employees as required by South Carolina law, and shall cause its contractor and any subcontractors performing any installation and/or maintenance activities for the Projects to maintain workers' compensation insurance in connection with those activities as required by South Carolina law. In addition, Enduring FX will purchase and maintain Commercial General Liability insurance on all installed equipment with minimum combined limits of not less than One Million (\$1,000,000.00) Dollars per occurrence and aggregate limits of not less than Two Million (\$2,000,000.00) Dollars, naming the City as an additional insured under such policy or policies. EnduringFX will provide the City with proof of any required coverage prior to commencing installation of the Projects, and will provide to the City annually (or upon renewals but prior to the expiration of the term of such insurance), Accord Form 27 certificates of insurance (or full equivalent stating the coverages, the insureds, and notices to be given) evidencing coverages required by this Agreement.

3. TERM & NOTICE

- 3.1 This Agreement will be for an Initial Term of five (5) years from the effective date as set forth above, unless the term is extended as provided herein. Upon sixty (60) days written notice prior to the expiration of the Initial Term, either EnduringFX or the City may request that this Agreement be extended for an additional five (5) year period, but in no way does this bind the City to extend this Agreement for an additional term. Any such additional term shall be agreed upon by EnduringFX and the City and shall be made in writing prior to the expiration of the Initial Term.

- 3.2 Notwithstanding the provisions of Paragraph 3.1 herein, either EnduringFX or the City may terminate this Agreement upon material breach by the other Party, which breach is not resolved in a reasonable amount of time after written notice from the non-breaching party. In addition, as noted above in Paragraph 2, EnduringFX is under no obligation to proceed further with the Projects if it is unable to secure sufficient capital investment for either or both of the Projects.
- 3.3 Termination by the City: This Agreement may be terminated by the City upon the occurrence of one or more of the following grounds:
- (a) EnduringFX fails to pay to City any fee, amount, or charge required hereunder, and such failure continues for ten (10) days after receipt of written notice and demand;
 - (b) EnduringFX shall become insolvent, shall make a general assignment for the benefit of creditors, shall file a voluntary petition in bankruptcy or indebtedness under the federal bankruptcy laws, or shall consent to the appointment of a receiver, trustee, or liquidator of all or substantially all of its property;
 - (c) The City shall, at its sole option and discretion, have the right to terminate this Agreement, during the Initial Term or any term thereafter, for any reason whatsoever by giving written notice to EnduringFX, in accordance with the notice provisions of this Agreement, in which event this Agreement shall automatically terminate on that day which is exactly sixty (60) days after the date of the giving of the notice of termination, and neither party shall have any further right or obligation hereunder. A termination for default, under this Agreement, if wrongfully made, shall be treated as a termination for convenience under this clause;
 - (d) Upon expiration of the term of the Agreement; and
 - (e) By mutual agreement.
- 3.4 EnduringFX will notify the City immediately if it is unable to secure sufficient capital investment for the Projects. With the exception of equipment removal, the City further understands and acknowledges that EnduringFX will have no further obligation under this Agreement.
- 3.5 Upon termination of this Agreement, or upon notification by EnduringFX that it is unable to secure sufficient capital investment for the projects, EnduringFX will remove its equipment or provide the City with the option to purchase the equipment at a mutually agreeable price.

3.6 Any notices required to be sent under this Agreement will be deemed to have been given when (i) hand delivered or (ii) when received when given by certified or registered U.S. mail, return receipt requested, or by Federal Express or other nationally recognized overnight courier service, and shall be delivered or addressed to the parties at the following addresses:

IF TO THE CITY OF COLUMBIA: Mr. Steve Gantt, City Manager
City of Columbia
PO Box 147
Columbia, SC 29217

IF TO ENDURINGFX: Mr. Jim Stritzinger, President
EnduringFX, LLC
PO Box 11695
Columbia, SC 29211

All such notices hereunder shall be deemed to have been given on the date received if hand delivered, or if not hand delivered, on the date marked on the return receipt unless delivery is refused or cannot be made, in which case the third (3rd) day after the date of postmark shall be deemed the date notice has been given.

4. MISCELLANEOUS

4.1 Indemnification: EnduringFX shall defend, indemnify and hold harmless CITY and its officials, employees, agents, representatives, successors and assigns (the "Indemnified Parties"), from and against all costs, expenses (including reasonable outside attorneys' fees, expenses, and court costs), liabilities, damages, claims, suits, actions and causes of actions whatsoever ("Claims"), to the extent arising directly or indirectly, out of (a) any material breach of this Agreement by EnduringFX, its agents, employees, subtenants or contractors, (b) any false representation or warranty made by EnduringFX hereunder, (c) any negligent act or omission, gross negligence, or willful misconduct of EnduringFX, or its agents, employees, subtenants or contractors in connection with this Agreement, (d) any claim arising from an alleged defect in the Premises ("Premises" being generally referred to as Riverfront Park and the Drew Wellness Center), the actual use of the Premises, or for any damage to or destruction of the Premises brought by or caused by EnduringFX, its agents, employees, invitees, guests, or any and all persons on or about the Premises with the permission, express or implied, of the EnduringFX. EnduringFX'S OBLIGATIONS UNDER THIS PARAGRAPH EXPRESSLY INCLUDE CLAIMS ARISING OUT OF, OR CONCERNING THIS AGREEMENT, OR EnduringFX'S USE OR OCCUPANCY OF THE PREMISES, THAT ARE CAUSED BY THE CONCURRENT NEGLIGENCE OR WILLFUL MISCONDUCT OF EnduringFX, OR ITS AGENTS, EMPLOYEES, SUBTENANTS AND CONTRACTORS. EnduringFX shall assume on behalf of the Indemnified Parties and conduct with due diligence and in good faith the defense of all Claims against any of the Indemnified Parties, except for such Claims arising out of the sole negligence or

willful misconduct of the Indemnified Parties. Maintenance of the insurance required under this Agreement shall not affect EnduringFX's indemnity obligations. EnduringFX may contest the validity of any Claims, in the name of CITY or EnduringFX, as EnduringFX may in good faith deem appropriate, provided that the expenses thereof shall be paid by EnduringFX and EnduringFX shall maintain adequate insurance to cover any loss(es) which might be incurred if such contest is ultimately unsuccessful.

- 4.2 Assignment: EnduringFX will not assign any rights under this Agreement or any portion of the Premises without the prior written consent of the City, which consent may not be unreasonably withheld.
- 4.3 No Liens: Licensee shall keep the Premises and EnduringFX's interest therein, if any, free and clear of any mechanics' or materialmen's lien or encumbrance of any kind whatsoever created by EnduringFX's acts or omissions.
- 4.4 Entire Agreement: It is understood and agreed that this instrument (including the Exhibits described below) contains the entire agreement between the parties hereto with respect to the subject matter of this Agreement, and may not amended or modified except in writing signed by both parties.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement by their respective duly authorized officers hereunto, on the day and year hereinafter written. Any communication or notice to be given shall be forwarded to the respective addresses listed below.

WITNESSES:

Erika D. Moore
S. Allen Ah

City of Columbia:

BY: Steven A. Gantt
ITS: City Manager

Erika D. Moore
S. Allen Ah

EnduringFX, LLC:

BY: Jim R. Stritzinger
ITS: President

