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**LEASE and OPERATING AGREEMENT**

by and between

**CITY OF HOUSTON, TEXAS,**

as Landlord,

and

**Houston Botanic Garden**

as Tenant

Houston, Harris County, Texas

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## TABLE OF CONTENTS

ARTICLE 1 DEFINITIONS .....	5
Section 1.1 Certain Definitions.....	5
Section 1.2 Certain Other Defined Terms.....	7
ARTICLE 2 .....	7
Section 2.1 Option to Lease. ....	7
Section 2.2 Fundraising Schedule. ....	7
Section 2.3 Fundraising Reports.....	8
Section 2.4 Fundraising Default. ....	8
Section 2.5 Grant of Development Rights. ....	8
2.5.1 Right of Entry. ....	8
2.5.2 Naming Rights. ....	8
Section 2.6 Commencement Date. ....	9
Section 2.7 Standards Committee.....	9
2.7.1 Composition.....	9
2.7.2 Ex-Officio.....	10
2.7.3 Decisions.....	10
2.7.4 Committee Functions and Powers.....	10
2.7.5 Powers.....	10
ARTICLE 3 LEASE GRANT; POSSESSION; QUIET ENJOYMENT; USE.....	10
Section 3.1 Lease Grant.....	10
Section 3.2 Condition of the Premises. ....	10
Section 3.3 Delivery of Possession.....	11
Section 3.4 Covenant of Quiet Enjoyment.....	11
Section 3.5 Use.....	11
Section 3.6 Prohibited Uses .....	12
ARTICLE 4 DESIGN AND CONSTRUCTION.....	13
Section 4.1 Plans and Specifications. ....	13
4.1.1 Approved Design.....	13
4.1.2 Plans.....	13
4.1.3 Hike and Bike Trail.....	14
Section 4.2 Permits and Fees.....	14
Section 4.3 Contractors. ....	14
Section 4.4 Construction. ....	15
Section 4.5 Substantial Completion. ....	15
Section 4.6 Final Completion. ....	16
Section 4.7 MWBE.....	16
ARTICLE 5 TERM .....	16

ARTICLE 6 RENT; UTILITIES; TAXES.....	16
Section 6.1 Rent.....	16
Section 6.2 Additional Capital contribution from the City.....	17
Section 6.3 Special Events.....	17
Section 6.4 Water.....	17
Section 6.6 Utilities.....	17
Section 6.7 Taxes.....	17
Section 6.8 Contract Administrative Fee.....	17
Section 6.9 Existing City Utilities.....	18
ARTICLE 7 MAINTENANCE REPAIRS, and ALTERATIONS.....	18
Section 7.1 Maintenance and Housekeeping Responsibilities.....	18
Section 7.2 Right to Alter.....	18
Section 7.3 Repairs.....	19
ARTICLE 8 OPERATIONS.....	19
Section 8.1 Duties.....	19
Section 8.2 Operations Performance.....	20
Section 8.3 Exhibits.....	20
Section 8.4 Fees and Schedule.....	20
8.4.1 Admission Fees and membership.....	20
8.4.2 Scheduled.....	21
Fixtures, Installations and Equipment.....	21
Public Relations Marketing, Advertising, Fund Raising.....	21
8.6.2 Cross-Marketing.....	21
HBG's Personnel.....	21
Reports and Records.....	22
Section 8.7 Audited Statements.....	22
Section 8.8 Audited Statements.....	22
Section 8.9 Inspections and Permits.....	22
Section 8.10 Inspections and Permits.....	22
Section 8.11 Certifications.....	23
ARTICLE 9 NONDISCRIMINATION.....	23
ARTICLE 10 INSURANCE.....	23
Section 10.1 Insurance.....	23
Section 10.2 Additional insurance requirements.....	24
10.2.1 Forms of Policies.....	24
10.2.2 Certificates.....	24
10.2.3 Issuers.....	24
10.2.4 Additional Insured.....	24
10.2.5 Deductibles.....	24
10.2.6 Cancellation.....	25
10.2.7 Subrogation.....	25
10.2.8 Endorsements.....	25
10.2.9 Premiums.....	25
10.2.10 Blanket Policies.....	25

Section 10.3	10.2.12Contractors	25
	WAIVER OF RIGHT OF RECOVERY	25
ARTICLE 11 DAMAGE OR DESTRUCTION		26
Section 11.1	Occurrence of Casualty and Use of Insurance Proceeds	26
Section 11.2	Repairs	26
Section 11.3	Property at HBG's Risk	26
Section 11.4	Destruction of Properties under Contract	26
ARTICLE 12 CONDEMNATION		26
Section 12.1	Definitions	26
Section 12.2	Efforts to Prevent Taking	27
Section 12.3	Entire Taking	27
Section 12.4	Partial Taking	27
Section 12.5	Temporary Taking	28
Section 12.6	Condemnation Award	28
Section 12.7	Settlement of Proceedings	28
Section 12.8	Survival	28
ARTICLE 13 ASSIGNMENT; SUBLETTING		28
Section 13.1	Restrictions on Assignment	28
Section 13.2	Concessions	29
Section 13.3	Nondisturbance and Attornment Agreements	29
ARTICLE 14 DEFAULT OF TENANT		29
Section 14.1	Defaults by Tenant	29
Section 14.2	Remedy	30
ARTICLE 15 DEFAULT OF LANDLORD		30
Section 15.1	Defaults and Remedies	30
ARTICLE 16 RELEASE		31
ARTICLE 17 INDEMNIFICATION		31
Section 17.3	INDEMNIFICATION - PROCEDURES	32
17.3.1	Notice of Claims	32
17.3.2	Defense of Claims	32
ARTICLE 18 REPRESENTATIONS AND WARRANTIES		33
Section 18.1	Landlord's Representations and Warranties	33
Section 18.2	Tenant's Representations and Warranties	34
ARTICLE 19 MISCELLANEOUS		34
Section 19.1	Inspection	35
Section 19.2	Estoppel Certificates	35
Section 19.3	Release	35

Section 19.4	Landlord's Right to Perform Tenant's Covenants .....	35
Section 19.5	Notices .....	35
Section 19.6	Modifications .....	37
Section 19.7	Descriptive Headings .....	37
Section 19.8	Unavoidable Default and Delays .....	37
Section 19.9	Partial Invalidity .....	37
Section 19.10	Applicable Law and Venue .....	38
Section 19.11	Attorneys' Fees .....	38
Section 19.12	Interpretation .....	38
Section 19.13	Brokerage Commission .....	38
Section 19.14	Non-Waiver .....	38
Section 19.15	Survival .....	38
Section 19.16	Entire Agreement .....	38
Section 19.17	Parties in Interest; Limitation on Rights of Others .....	39
Section 19.18	Covenants Running with the Land .....	39
Section 19.19	Non-Merger of Estates .....	39
Section 19.20	City Council Approvals and Appropriations .....	39

## EXHIBITS

<b>Exhibit A</b>	Description of site boundaries
<b>Exhibit B</b>	Operations rules
<b>Exhibit C</b>	Schedule - days, dates, and hours
<b>Exhibit D</b>	Minimum Maintenance Standards
<b>Exhibit E</b>	Transferred equipment
<b>Exhibit F</b>	Permitted Encumbrances
<b>Exhibit G</b>	Maximum Fees and Rates
<b>Exhibit H</b>	Employee/Volunteer Performance Manual
<b>Exhibit I</b>	Naming, Sponsorship, Advertising, and Signage Policy

## LEASE and OPERATING AGREEMENT

This GROUND LEASE (this "Agreement") is made and entered into as of the date this agreement is Countersigned by the City Controller of the City of Houston, Texas (the "Effective Date"), by and between the City of Houston, Texas, a home-rule city organized under the laws of the State of Texas (the "City" or "Landlord"), and Houston Botanic Garden, a Texas Non-Profit corporation organized under Chapter 22 of the Texas Business Organizations Code, as amended ("HBG" or the "Tenant"). Landlord and Tenant are referred to herein collectively as the "Parties" and individually as a "Party."

### RECITALS

WHEREAS, the City owns the Glenbrook Golf Course ("Glenbrook"), and

WHEREAS, Houston Botanic Garden desires to raise funds to create, construct and operate a Botanic Garden (the "Improvements") at Glenbrook; and

WHEREAS, the City and the HBG desire to develop sustainable long term operations for the Botanic Garden,

WHEREAS, after completion of the Improvements, HBG desires to donate the completed Improvements to City upon termination of the lease excluding certain items reserved at that time including but not limited to sculptures, collections, and research materials; and

WHEREAS, City desires to accept the gift of the Improvements, and desires to provide for long term sustainability of the Botanic Garden through an Operations agreement;

NOW, THEREFORE, in furtherance of the foregoing, the parties hereto agree as follows:

### **AGREEMENTS**

For and in consideration of the respective covenants and agreements of Landlord and Tenant set forth herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by Landlord and Tenant, Landlord and Tenant do hereby agree as follows:

### **ARTICLE 1 DEFINITIONS**

Section 1.1 Certain Definitions. The following terms not otherwise defined herein in writing shall have the meaning set forth below in this Section 1.1:

(a) Chief Development Officer ("CDO"). The director of the division of the Mayor's Office that develops, implements and manages citywide policies and procedures for economic development programs, or any other City official as designated in writing by the Mayor.

(b) City Council. The acting City Council of the City.

(c) Commencement Date. The Commencement Date for this Agreement as set forth in Section 2.6.2 of this Agreement.

(d) Director. The Director of Houston Parks and Recreation Department or any director appointed by the mayor to administer this agreement.

(e) Encumbrances. Any defects in, easements, covenants, conditions or restrictions affecting, or Liens or other encumbrances on, the title to the Premises, whether evidenced by written instrument or otherwise evidenced.

(f) Firm Commitments. Firm Commitments shall include: cash donations and written pledges from credible and reliable donors.

(g) Governmental Rule. Any statute, law, treaty, rule, code, ordinance or regulation applicable to Persons, facilities or activities within the jurisdiction of the Governmental Authority promulgating the same, any permit, interpretation, certificate or order of any Governmental Authority pursuant to the foregoing or any judgment, decision, decree, injunction, writ, order or like action of any court, arbitrator or other Governmental Authority with respect to any of the foregoing.

(h) Improvements. Means all improvements, structures, buildings and fixtures of any kind whatsoever, whether above or below grade, including buildings, the foundations and footings thereof, utility installations, storage, loading facilities, walkways, driveways, landscaping, signs, site lighting, site grading and earth movement, and all fixtures, plants, apparatus, appliances, furnaces, boilers, machinery, engines, motors, compressors, dynamos, elevators, fittings, piping, connections, conduits, ducts and equipment of every kind and description now or hereafter affixed or attached to any of such buildings, structures or improvements and used or procured for use in connection with the heating, cooling, lighting, plumbing, ventilating, air conditioning, refrigeration, or general operation of any of such buildings, structures or improvements, and any exterior additions, changes or alterations thereto or replacements or substitutions therefor installed or constructed to serve or for use at the Botanic Garden.

(i) Liens. With respect to any property, any mortgage, lien, pledge, charge or security interest, and with respect to the Premises, the term "Lien" shall also include any lien for builder, mechanic, warehouseman, materialman, contractor, workman, repairman or carrier lien or other similar liens, including, but not limited to, Mechanic's Liens and claims.

(j) Mechanic's Liens. Any Lien or claim of Lien, whether choate or inchoate filed or which any third party may be entitled to file against the interest of Landlord or Tenant in the Premises by reason of any work, labor, services or materials supplied or claimed to have been supplied on or to the Premises.

(k) Person. Any individual, corporation, partnership, joint venture, association, joint stock company, trust, limited liability company, unincorporated organization, Governmental Authority or any other form of entity.

(l) Permitted Uses. Permitted uses are those allowed pursuant to Section 3.5 of this agreement

(m) Premises. The premises includes the property now known as Glenbrook Golf Course and a route of access through Charlton Park as illustrated but not defined in Exhibit A-1, less an allowance for the Hike and Bike Trail and access trails to be determined in the conceptual design to be approved by the Mayor in Section 4.1.1, and any additional real property acquired by the City or its subsets or the HBG during the term of this agreement to serve or service the Botanic Garden.

(n) Term. The term of this Agreement as provided in Section 5.1 of this Agreement.

Section 1.2 Certain Other Defined Terms. Any initially capitalized terms used in this Agreement and not specifically defined herein shall have the meanings assigned to such terms in the Lease and Development Agreement.

## ARTICLE 2 FUNDING

Houston Botanic Garden, Inc. shall be solely responsible for raising any and all capital required to create, construct, install, maintain and operate a Botanic Garden and other desired improvements at Glenbrook. In consideration for this commitment, The City grants an irrevocable option to be exercised by the HBG to lease Glenbrook from the City, subject to the terms hereof, and upon exercise of the option, the City agrees to convey the personal property and fixtures existing at Glenbrook to HBG. HBG shall retain all revenue received from operations or concessions after the Commencement Date for the benefit of the Botanic Garden. The City will not provide any additional funding for the restoration, refurbishing, construction, maintenance or operations of the Botanic Garden.

Section 2.1 Option to Lease. No earlier than November 30, 2015 and no later than December 31, 2015, HBG may exercise an option to lease Glenbrook by written instrument to the Chief Development Officer, together with written representation of the Chairman of the Board of Directors of the HBG of Firm Commitments aggregating at least \$5,000,000.

Section 2.2 Fundraising Schedule. The total project is expected to cost \$40 million. Firm Commitments for the initial \$20 million shall be raised on the following schedule:

2.2.1 \$5 million prior to exercise of the option to lease the golf course but no later than December 31, 2015.

2.2.2 \$20 million (cumulative) by December 31, 2017.

2.2.3 By a vote of City Council, each deadline set by this section may be extended by one year at the request of the HBG.

Section 2.3 Fundraising Reports. After exercise of its option, HBG shall provide a report of fundraising activities and achievements to the Chief Development Officer on a quarterly basis.

Section 2.4 Fundraising Default. Failure to reach the required target of \$20,000,000 by the date specified constitutes a fundraising default. Upon the occurrence of a fundraising default, the City will provide notice to HBG that a fundraising default has occurred. Within 60 days of the date of the notice, HBG must cure the fundraising default and show proof to the Chief Development Officer that the fundraising default has been cured. Without amendment by City Council and HBG, this contract will terminate upon failure to show such proof.

Section 2.5 Grant of Development Rights. As of the Effective Date of this Agreement, City grants to HBG all of the Development Rights set forth in this Section 2.5. All such Development Rights shall remain in effect from the Effective Date of this Agreement throughout the term of this Agreement.

2.5.1 Right of Entry. City hereby grants to HBG, and its respective employees, engineers, architects and consultants, contractors and other representatives, following reasonable notice to the Director, the right of entry on Glenbrook to perform all activities as are reasonably necessary or appropriate in connection with the performance of their rights and obligations permitted or required hereunder and all other lawful acts incidental thereto. In connection with any work prior to the Commencement date on Glenbrook, HBG shall comply, and contractually require its contractors to comply with the insurance and indemnification requirements set forth in Article 10, Insurance, Article 16, Release, and Article 17, Indemnification, to the extent permitted by law.

2.5.2 Naming Rights. Subject to this Section, HBG may name features and improvements within the Botanic Garden in accordance with this Agreement.

(a) HBG must submit and obtain approval of the Standards Committee of a Names and Sponsorship policy prior to reaching any final agreement with respect to any feature for naming, accepting any gift contingent upon naming a feature, or seeking or accepting corporate sponsorship of any program or event at the Botanic Garden. HBG's policy must be consistent with the general principles in the Policy for Naming Park Property Policy Number 1010.4 or any successor policy adopted by the City and must incorporate, by reference or otherwise, the General Criteria set out therein.

(b) Names shall become effective only upon the substantial completion of construction as set out in Section 4.5. No name shall be granted for a term longer than the term of this Agreement.

(c) HBG shall not rename any area or feature at Glenbrook that was previously named by City except with the prior approval of City.

(d) In no event will any feature be named for a commercially available product unless the name of product is also the name of the corporation selling the product.

(e) Without the prior approval of the Standards Committee of any change, the Botanic Garden will be named the Houston Botanic Garden.

Section 2.6 Commencement Date. HBG shall prepare a detailed construction budget (the "Budget") for (i) the creation, installation or construction of the Botanic Garden and other desired improvements and (ii) a phasing cost plan and submit it to the Chief Development Officer and the Director. In addition, HBG will prepare an Operating Plan that projects the expenses and funding plan for the ongoing operation and maintenance of the Botanic Garden when it opens to the public and submit this Operating Plan to the Standards Committee for approval prior to the opening of the Botanic Gardens

2.6.1 Unless the dates in Section 2.2 are extended by the City Council, the Chair of the Board of Directors of HBG shall certify to the Chief Development Officer prior to January 1, 2018 that it has raised sufficient funds as required in Section 2.2.

2.6.2 The Chief Development Officer shall review and approve the certification and shall give notice of his/her approval and provide a Commencement Date to HBG in writing, which shall be no later than 30 days after submittal of the certification.

2.6.3 The provisions of Articles 3 through 14 of this agreement commence on the Commencement Date.

Section 2.7 Standards Committee. The Parties shall appoint a 5-member Standards Committee consisting of two representatives of HBG, two representatives of the City as appointed by the Mayor, and a fifth committee member selected by the other four committee members. At least one of the Mayor's representatives will not be an employee of the HPARD or a contractor doing or seeking business with the HPARD. At least one of the representatives of HBG will not be an employee of HBG or a contractor doing or seeking business with HBG.

2.7.1 Composition. The jointly selected fifth committee member shall be an individual who (i) has knowledge and expertise in the efficient and cost effective operation and maintenance of parks and green space, and (ii) is an independent, neutral party with respect to all Parties, or the other committee members, i.e., one who has no contractual, financial, fiduciary or other business or family relationship to any of such entities or individuals. Such fifth committee member shall serve for a term of three (3) years, each such term ending on the anniversary of the Date that HBG exercises an option to Lease; provided, however, no maximum number of terms is required under this Agreement; and provided further, that during any such term, the fifth committee

member shall withdraw, or the Standards Committee shall replace such member, if such member enters into a relationship with, and loses his or her independent, neutral status with respect to, any Party, or other committee members.

2.7.2 Ex-Officio. The Standards Committee shall also include a representative appointed by the Director who shall serve in an ex officio non-voting advisory role to the Standards Committee.

2.7.3 Decisions. All decisions of the Standards Committee shall be decided upon a majority vote, which must include at least one of the representatives of the City.

2.7.4 Committee Functions and Powers. The Standards Committee shall meet at a location in the City of Houston at least quarterly each calendar year.

2.7.5 Powers. The Standards Committee shall have the following powers:

- (a) Approval of the Operations Rules (O), Schedule (O), Minimum Maintenance Standards (O), Maximum Fees and Rates (Exhibit G), Employee/Volunteer Performance Manual (Exhibit H) Naming, Sponsorship, Advertising and Signage Policy (Exhibit I), and any subsequent amendments; these Exhibits will be final no later than the date of substantial completion pursuant to Section 4.5 and when final will be attached and incorporated hereto.
- (b) Approval of any future development of improvements and hardscape involving major capital in the Project; and
- (c) Resolution of any disagreement between the Director and HBG as to any matter arising under Sections 4.1.2 and 4.1.4, ARTICLE 7, ARTICLE 8 or ARTICLE 13 of this agreement.

(d) To perform all functions assigned to the Standards Committee in this Agreement.

### ARTICLE 3

#### LEASE GRANT; POSSESSION; QUIET ENJOYMENT; USE

Section 3.1 Lease Grant. Upon and subject to the terms and provisions contained herein, on the Commencement Date, Landlord does hereby lease, let, demise and rent unto Tenant, and Tenant does hereby take, lease and rent from Landlord, the Premises, to have and to hold such Premises for the Term as hereinafter provided.

Section 3.2 Condition of the Premises. HBG accepts the premises "as is" in its condition as of the execution of this Agreement.

3.2.1 HBG agrees that except as provided in this section no representations have been made by the City or its agents to HBG with respect to the condition of the Premises nor have there been any promises made to alter, repair, or improve same before or after execution of this Agreement. From the Effective Date to

the Commencement Date, that the City will not materially after or allow the alteration of Glenbrook.

3.2.2 City accepts no responsibility or liability for any loss or damage to HBG-owned equipment or conveyances.

3.2.3 Condition and Surrender of the Premises. Upon expiration or termination of the Agreement, HBG shall give up to the City immediate possession of the Premises in as good condition as they are in on Commencement Date, subject to changes to Glenbrook under the terms of this Agreement and reasonable wear and tear and damage from fire or the elements only excepted. HBG is not required to re-install or return the property to a Golf Course, but HBG is required to remove any diseased vegetation, plant material which may become invasive if not managed and repair or remove any dangerous condition or building that exists at the time of termination. If HBG does not at once surrender possession of same, the Director may re-enter and repossess the premises.

3.2.4 Personal property of HBG must be removed from the property upon the expiration of the Contract Term unless otherwise authorized by the Director. If any property of HBG is not removed upon the expiration date of the Contract Term or by the date otherwise authorized by the Director, such property shall become and remain the property of the City. If termination is as of a date other than the scheduled lease termination, the City shall give HBG at least 90 days to remove personal property.

Section 3.3 Delivery of Possession. On the Commencement Date, Landlord shall deliver to Tenant exclusive possession, use and occupancy of the Premises, free of all litigation, liens, tenancies and parties in possession of the Premises (other than those arising by, through or under Tenant), subject only to (i) the rights of Landlord under this Agreement, and (ii) the easements and other encumbrances or restrictions of record set forth on 0 attached hereto and made a part hereof (collectively, the "Permitted Encumbrances").

Section 3.4 Covenant of Quiet Enjoyment. Effective as of the Commencement Date, Landlord covenants that Tenant, upon keeping, observing and performing the terms, covenants and conditions of this Agreement to be kept, observed and performed by Tenant, shall and may quietly and peaceably hold, occupy, use, and enjoy the Premises without ejection or interference by or from Landlord or any other Person (other than Persons claiming by, through or under Tenant), subject only to the Permitted Encumbrances.

Section 3.5 Use. Tenant throughout the Term shall install and operate a Botanic Garden, and a failure to do so shall be an event of Default as set out in Section 14.1 allowing early termination of this agreement in addition to any other remedy available to the City. Tenant throughout the Term, shall have the exclusive right to use and occupy the Premises, for any lawful purpose other than the Prohibited Uses (as hereinafter defined), including without limitation for the following purposes (collectively, the "Permitted Uses") but in all cases consistent with the Operating Rules (Exhibit B) and Applicable Laws:

- (a) The creation, installation, construction and operation of a Botanic Garden; and
- (b) Restaurants, event spaces, clubs and bars ;
- (c) Sale of food and alcoholic and non-alcoholic beverages, souvenirs and other items customarily sold and marketed in Botanic Gardens;
- (d) Parking in any parking facilities located on the Premises;
- (e) Retail uses, including such uses located in kiosks, carts and similar movable or temporary retail facilities;
- (f) Entertainment, museum and educational uses;
- (g) Conducting day-to-day business operations in Tenant's office space constructed or maintained on the premises;
- (h) Storage of maintenance equipment and supplies used in connection with the operation of the Premises or all other Permitted Uses;
- (i) Construction Work permitted or required pursuant to the terms of this Lease;
- (j) The use and enjoyment of the rights and licenses granted to Tenant under this Lease regarding any intangible property rights;

Other uses reasonably related or incidental to any of the foregoing or not inconsistent with any of the foregoing that are not Prohibited Uses.

Section 3.6 Prohibited Uses. Tenant shall not use, or permit the use of, the Premises for any of the following (collectively, the "Prohibited Uses"):

(a) Use or allow the Premises to be used for the sale or display of any pornographic material or material which is obscene under standards set forth in any Applicable Laws, or operate or allow any Person to operate in, on or about the Premises any store or other facility, a principal or significant portion of the business of which is an "Enterprise," as such term is defined in Section 28-121 of the City of Houston Municipal Code, as same may be amended from time to time during the Term, or any similar business;

(b) Use or allow the Premises to be used for the sale or display of any lewd, offensive or immoral sign or advertisement, including any sign or advertisement that promotes lewd, offensive or immoral activities, including sexually immoral activities;

(c) Use or allow the Premises to be used for the sale of paraphernalia or other equipment or apparatus which is used primarily in connection with the taking or use of illegal drugs;

(d) Use or allow the Premises to be used as a place of residence by any Person except for a caretaker or security staff member and family;

(e) Use or permit the Premises to be used for a shooting gallery, target range, vehicle repair or cleaning facility (except vehicles primarily used onsite by HBG), car wash facility, warehouse (but any area for the storage of goods intended to be sold or used in connection with Tenants' operations permitted hereunder shall not be deemed to be a warehouse), convalescent care facility or mortuary, or use or permit the Premises to be used for any assembly, manufacture, distillation, refining, smelting or other industrial or commercial operation or use;

(f) Use any portion of the Premises for storage (other than that required for permitted uses); or

(g) Use or permit the use of the Premises as a casino (or other establishment in which gambling is permitted or games of chance are operated), an establishment that allows full or partial nudity, a massage parlor (provided that massage services may be offered by a licensed massage therapist as a part of a health, beauty or fitness operation) or a tanning parlor.

#### **ARTICLE 4** **DESIGN AND CONSTRUCTION**

Section 4.1 Plans and Specifications. Subject to the other terms and provisions of this Agreement, HBG shall be the only party responsible for the design, development and construction, reconstruction, refurbishing, rehabilitation or restoration ("Construction") of the Improvements. Without limiting the generality of the foregoing, HBG shall have sole responsibility for the selection, engagement and payment of the project architect, the contractors, all subcontractors and consultants, and all others that may at any time and from time to time be engaged in the planning, development or construction of the Improvements.

4.1.1 HBG shall, without expense to City, prepare conceptual plans for the Improvements. No later than six months after the Commencement Date, HBG shall present to the Director and the Mayor or her designee ("Mayor") conceptual plans, schematic drawings and preliminary elevations for the Improvements (the "Conceptual Plans"), which shall include an event venue reasonably acceptable to the Mayor and shall show access, traffic, curb cuts, and similar matters (collectively, the "Approved Design"). A copy of the Approved Design shall be filed at the offices of Mayor.

4.1.2 Thereafter, HBG shall, without expense to City, prepare plans for construction and development of the Improvements. Thereafter, HBG shall submit copies of the plans to the Director (or the Director's designated representative) at intervals of 50% and 95% completion for review and approval solely to confirm that the Improvements, as so planned, conform to the Approved Design. The Director shall provide HBG comments or approval within fourteen (14) business days of receipt of HBG's submittals of the 50% complete and 95% complete plans; provided, however, if

no response is given to HBG within each 14-day review period, the plans so submitted shall be deemed to have been approved by the Director on behalf of the City. Upon completion of all Plans, HBG shall file same with the Director, and the plans shall be deemed to be incorporated herein by reference for all intents and purposes.

4.1.3 The City reserves the right to plan and construct a hike and bike trail in conjunction with the Bayou Greenways Initiative that may use land currently used by the Golf Course. HBG agrees to accommodate the Hike and Bike Trail without any compensation or reimbursement for its expenses, provided that the costs of the Hike and Bike Trail installation and maintenance shall not be costs of the HBG. HBG will coordinate design, planning and construction with the Director and Houston Parks Board to accommodate the trail running adjacent to the premises and any other existing or planned access trails. HBG acknowledges and recognizes that existence of the trail may be a significant amenity for the Botanic Garden, but may require certain accommodations or design constraints to accommodate spatial, access, aesthetic or safety concerns. HBG agrees to negotiate with the Houston Parks Board to reach amicable resolution of all such concerns, but in any event, the location and design of the trail is subject to the approval of the Director.

4.1.4 HBG agrees that the Plans will not be materially inconsistent with the approved design. During the construction of the Improvements, HBG shall invite the Director's designated representative to attend periodic project meetings with HBG's project manager and general contractor. During construction HBG shall have the right to approve change orders and field changes, but proposed changes that are materially inconsistent with the Approved Design shall be submitted to the Director for approval. Director shall provide such review within fourteen (14) business days of receipt of the proposed change; provided, however, if no response is given by the Director within each 14-day review period, the proposed change so submitted shall be deemed to have been approved by the Director on behalf of the City. If the Director's comments are not acceptable to the HBG, the matter will be referred to the Standards Committee.

4.1.5 City shall have no responsibility for the preparation of the Plans or the construction of the Improvements, except as otherwise set forth in this Agreement.

Section 4.2 Permits and Fees. HBG shall obtain all building permits, licenses and approvals required by all Governmental Authorities including the City, for the Improvements for construction.

Section 4.3 Contractors. HBG shall enter into the construction contracts with the contractors to construct the Improvements.

4.3.1 Each construction contract shall provide that: (1) the City is a third-party beneficiary of all representations and warranties made by the contractor to HBG; and (2) the contractor shall look solely to HBG for any payment due under the construction contract.

4.3.2 HBG shall require each contractor to furnish payment and performance bonds, naming City as co-obligee or co-beneficiary, in the full amount of

the contract sum for each construction contract, and in form and substance reasonably satisfactory to City, based on such bonds as are then commercially available for major construction projects in the City of Houston taking into account that the HBG as a private, non-profit corporation will be the contracting owner.

4.3.3 All warranties from each contractor shall inure to the benefit of HBG and City and shall be applied to benefit the Premises and Improvements.

Section 4.4 Construction. HBG shall not commence actual construction of the improvements until the Commencement Date. The construction of the Improvements shall be done substantially in accordance with the Plans and the Construction Schedule, in compliance with all Applicable Laws, and in a good and workmanlike manner. HBG shall pay all bills for labor, materials and supplies in connection with such construction, and shall obtain releases of liens from the parties performing such labor or furnishing such materials and supplies. HBG shall pay, or cause to be paid, all fees for engineering, architectural, legal and other professional services incurred by HBG and its contractors in connection with such construction. Upon request of City, HBG shall provide City with a status report covering the progress to date of the construction of the Improvements. HBG shall provide the Director with a monthly status report covering progress to date of the construction.

4.4.1 HBG shall, without expense to City, provide the construction, labor and materials necessary to connect the Improvements to water and sanitary and storm sewer lines and to provide proper surface drainage for the Botanic Garden. City warrants that water supply, sanitary sewer service, and storm drainage is available to Glenbrook subject to Section 4.4.3.

4.4.2 Wet utility lines and connections that serve the Improvements shall be underground except for lines mounted on bridges crossing the channels.

4.4.3 HBG shall arrange or pay for all utility connection fees, including, but not limited to, all fees and charges for water and wastewater capacity reservation (excepting irrigation water), capital recovery, connection and use in connection with the Improvements.

4.4.4 Irrigation plumbing shall be installed for operations under this agreement and shall be segregated from plumbing for delivery of water for human use so as to allow supply of irrigation water from reclaimed wastewater or greywater.

Section 4.5 Substantial Completion. When the work to be performed under a construction contract has been completed substantially in accordance with the Plans (the "Substantial Completion"), HBG will deliver to City a certificate from the Project Architect or Engineer or Landscape Architect certifying that, as of the date specified therein (the "Substantial Completion Date"), the work to be performed under such construction contract has been substantially completed in a good and workmanlike manner and in accordance with the Approved Design, the Plan and any change orders or field changes authorized under this Agreement subject only to items specified in such certificate as requiring corrective work.

Section 4.6 Final Completion. The Improvements shall be deemed to be finally completed on the date (the "Final Completion Date") by which HBG has received all of the items set forth below. The Final Completion Date shall not be later than four years after the Commencement Date subject to Section 19.8.

4.6.1 The Certificate of Final Completion to be issued by HBG's Architect for all of the Construction Contracts, shall include (a) a certification that all punch-list items identified in any Certificates of Substantial Completion have been completed except for any on-going work covered by contractors or manufacturers' warranties; (b) a certificate signed by the Contractor for each Construction Contract, certifying that all matters required to be performed under such Construction Contract have been completed and all labor and materials for which payment is due under the Construction Contract have been fully paid, and that all building materials, supplies and equipment physically incorporated into the Improvements are free and clear of all liens and encumbrances; and (c) all permits, approvals and certificates required by any and all Governmental Authorities for occupancy of the Improvements including but not limited to any applicable Certificate of Occupancy.

Section 4.7 MWBE. HBG shall comply and shall require its contractors to comply with the City's Small Business Minority and Women Business Enterprise ("MWBE") programs for design and construction of the Botanic Garden as in Chapter 15 of the City of Houston Code of Ordinances. The City's policy does not require HBG to in fact meet or exceed this goal, but it does require HBG to objectively demonstrate that it has made good faith efforts to do so. To this end, HBG's contractors shall maintain records showing: (i) subcontracts with MWBEs, and (ii) specific efforts to identify and award subcontracts and supply agreements to MWBEs.

## **ARTICLE 5**

### **TERM**

Section 5.1 Term. The term of this Lease (the "Term") is 30 years and shall commence at 12:00 a.m. on the Commencement Date, and expire at the end of 30 years or such earlier termination of this Agreement in accordance with the terms of this Agreement. Upon a vote of council, HBG may renew this Agreement on the same terms as set forth herein for two consecutive renewal terms of 30 years each, by giving the City written notice of renewal no less than one year before the last day of the then current term. The initial and renewal terms (if in effect hereunder) are individually and collectively referred to as the Term.

## **ARTICLE 6**

### **RENT; UTILITIES; TAXES**

Section 6.1 Rent. Landlord hereby acknowledges the receipt of Rent for the Term in the amount One Hundred and No/100 Dollars (\$100.00), which Tenant has pre-paid for the entire Term (the "Rent"). Notwithstanding the foregoing, the principal and primary consideration is the undertaking by Tenant to cause the Premises to be operated, maintained, and facilities to be constructed thereon as provided herein.

Section 6.2 Additional Capital contribution from the City. The City will commit at least \$1 million through its Capital Improvement Plan or other funding to road and bridge improvements, or any other form of access leading to and around the Botanic Garden, and Charlton Park. The City agrees that it will include the expenditures in its Capital Improvement Plan so that the improvements or other projects funded thereby are timed to support the opening of the Botanic Garden.

Section 6.3 Special Events. The City may use HBG facilities in the Garden for events up to six times a year for a period of no more than 12 hours each time without compensation to the Tenant. City use of the event space will be subject to reasonable scheduling and commitments to other events. The City will reimburse costs incurred by HBG for contract security or insurance riders necessitated by such City use. The City will provide its own catering or pay standard HBG catering rates if provided by HBG.

Section 6.4 Water. Landlord will provide water for ground irrigation purposes from either public potable water lines, reclaimed wastewater, or greywater, or captured rainwater at Landlord's election subject to the acceptability of the water quality and quantity for irrigation purposes. Tenant will develop a water conservation plan consistent with industry practice in similar climates and submit it to the Director for comment. Tenant agrees to follow the water conservation plan.

Section 6.6 Utilities. HBG shall be solely responsible for and promptly pay all charges for any and all desired utilities including but not limited to drinking water, sewage fees, garbage, telephone and internet, and building security system used or consumed by Tenant. The assumption of payments for such utilities shall commence on the Commencement Date. City will provide access for private utility connections through Charlton Park or from other public right-of-way, as needed.

Section 6.7 Taxes HBG shall be responsible for any and all sales taxes, ad valorem taxes, licenses, permits, and fees or other taxes incumbent upon such a business.

Section 6.8 Contract Administrative Fee. The City will provide contract administration services in regard to the lease contract which will require the use of staff time and resources. The annual fee will be calculated based on actual costs to the City not to exceed the following:

<u>Annual Gate Revenue</u>	<u>Maximum City Annual Fee</u>
< \$10,000,000	\$20,000
10,000,001-20,000,000	\$35,000
>20,000,000	\$50,000

The annual fee for Contract Administration will not be effective until two years after the HBG has substantially completed Phase One development and opened the HBG for public access. The City will invoice for these services on an annual basis, and the HBG will respond with payment within its subsequent payables cycle.

Section 6.9 Existing City Utilities. When the City deems it necessary to maintain, replace, upgrade, or construct new utilities within Glenbrook, the City will coordinate the location, design, construction, and schedule of construction with the HBG so as to minimize the impacts of construction, operation, and maintenance of said utilities on the current and future capital and operating plans of the HBG.

## **ARTICLE 7**

### **MAINTENANCE REPAIRS, and ALTERATIONS**

Section 7.1 Maintenance and Housekeeping Responsibilities. HBG shall be responsible at its sole expense for all maintenance and upkeep, including the gathering of litter and refuse.

7.1.1 HBG shall meet the maintenance standards made a part of this Agreement by 0, "Minimum Maintenance Standards." As technology and practices change, the Standards Committee will update and modernize the maintenance standards accordingly. Such maintenance standards will not be changed more than once annually and if a change is required, the Director shall notify HBG and the Standards Committee on the anniversary date of this Agreement.

7.1.2 HBG shall at its sole expense, maintain all equipment, fixtures, and conveyances related to this Agreement in a safe, clean, attractive, and orderly manner.

7.1.3 Should HBG fail to maintain acceptable standards with regard to the foregoing, the Director shall notify HBG, in writing, of noted deficiencies. Thereupon, HBG shall correct, remedy, or eliminate such deficiencies expeditiously, but no later than ten days following receipt of such notification.

Section 7.2 Right to Alter. Tenant shall have the right, pursuant to the terms of the this Lease, to alter, add to, reconstruct, reconfigure, remodel or rebuild any of the Improvements as often as and whenever Tenant and/or Subtenant deems proper or desirable.

7.2.1 HBG shall not make or cause to be made any alterations, additions, or improvements involving investment of more than \$50,000, in the Botanic Garden without first obtaining the Standard Committee's written approval. HBG shall present to the Director plans, specifications, and projected cost for such work at the time approval is sought. HBG shall be responsible for securing its permits for such alterations or additions in the Botanic Garden. HBG shall, at its cost and expense, make all ordinary

and reasonable repairs required to preserve any properties and equipment furnished by the City under this Agreement.

7.2.2 All Botanic Garden alterations, decorations, additions, and improvements made by HBG shall remain the property of the HBG during the Contract Term. The alterations, decorations, additions, and improvements shall not be removed from the Botanic Garden before the end of the Contract Term without the prior written approval of the Director or the Standards Committee or as identified in this Contract.

7.2.3 Upon expiration of this Agreement, HBG shall remove trade fixtures, specialized plant collections, and other items donated for use at the Botanic Gardens as it desires and all such alterations, decorations, additions, and improvements as the Director shall direct and shall restore the Botanic Garden to the same condition as at the Commencement Date, ordinary wear and tear, and damage by unavoidable casualty excluded. HBG is not required to re-install or return the property to a Golf Course, but HBG is required to remove any diseased vegetation, plant material which may become invasive if not managed and repair or remove any dangerous condition that exists at the time of termination. All alterations, decorations, additions, and improvements not directed to be removed shall, upon expiration of the Contract Term, become the property of the City of Houston.

Section 7.3 Repairs. HBG is authorized and required to make repairs of a non-casualty nature and must maintain records of substantive repairs. HBG shall be responsible for all rebuilding, restoration, and/or replacement of all property necessitated by casualty resulting from the negligence or intentional act of the HBG, its agents, or employees.

7.3.1 All repairs and/or maintenance, which are required to be performed by HBG under this Section, shall be completed as soon as possible and to the satisfaction of the Standards Committee.

7.3.2 In the event HBG believes the responsibility for a particular repair lies with the City, it shall immediately give such written notice to the Director.

7.3.3 The City may but is not required to authorize, by written notice and at its cost, the rebuilding, restoration and/or replacement of City property where same is necessitated by fire, wind, storm, or other natural casualty not resulting from the negligence or intentional act of the HBG, its agents, or employees. Nothing in this Agreement shall be construed as a requirement of the City to restore such loss.

## **ARTICLE 8**

### **OPERATIONS**

Section 8.1 Duties. HBG shall provide all labor, material and supervision necessary to perform the services described in this Agreement.

8.1.1 HBG shall maintain and operate the Botanic Garden in an environmentally sound manner that complies with all applicable federal, state and

local environmental and related laws and permits. HBG shall keep the Botanic Garden open for the benefit and enjoyment of the general public, collect fees (where applicable), sufficiently stock all products herein allowed that the public might be well served, and adequately staffed so that allowed services are rendered to the levels established by the Standards Committee.

8.1.2 HBG shall obtain written approval from the Standards Committee prior to instituting any service or offering any product that is materially dissimilar from those then authorized. HBG shall not offer any product or service disapproved by the Standards Committee.

Section 8.2 Operations Performance. HBG shall describe its performance goals to the Director and other person that the Director designates. HBG shall promptly inform the Director or his designee of all significant events relating to the performance of this Agreement. HBG and City shall use the first 30 days of the Term as a transition period to transfer the maintenance of the lease property from the City to HBG.

Section 8.3 Exhibits. 0, 0, 0, 0, Exhibit G, Exhibit H and Exhibit I may be amended by mutual agreement between the Director and HBG in order to accommodate necessary changes discovered before or during the transition period or after operations commence.

Section 8.4 Fees and Schedule. HBG shall operate the Botanic Garden in accordance with this Agreement and as further set forth in Exhibits C and G.

8.4.1 HBG will have the exclusive authority to set admission fees, membership rates, and other user fees and to budget and expend the revenues from such fees for the benefit of the Botanic Garden. The fees and rates shall be comparable to those charged by other botanic gardens in major metropolitan areas of the United States and shall be reflected in the Operating Plan described in Section 2.6.1 as updated over time.

(a) HBG will charge fees and set membership donation levels at rates sufficient to maintain the Botanic Garden and facilities.

(b) HBG will implement and administer admissions pricing and programs that are best suited to implement the goal of broad access to the Botanic Garden for all City residents through the adoption of need-based accessibility programs (including selective free admission) as well as education programs and other offerings, designed to encourage economically diverse visitorship of the Botanic Gardens and to provide recreational and educational opportunities for City residents of limited economic resources.

(c) HBG will have the right but not the duty to make distinctions in the admission fee for non-City residents, provided however that such non-resident admission shall never be lower than the amounts charged to comparably situated City residents.

(d) If any municipality other than the City or any county in the Greater Houston Metropolitan Area enters a written contract with HBG to contribute to the Capital, management fees or other comparable contribution, HBG shall have the right, per policy adopted by the Standards Committee, to treat such other jurisdiction's residents on a par with comparably situated City residents for purposes of admission pricing.

(e) Any proceeds from fees received must be used toward the administration, operation, maintenance, and improvements of the Botanic Garden.

8.4.2 HBG shall operate throughout the year in accordance with the scheduled days, dates, and hours as set out in Exhibit C. Certain circumstances beyond the control of HBG, such as weather, construction projects, or special events may necessitate extending, curtailing, or shortening the operating schedule.

Section 8.5 Fixtures, Installations and Equipment. HBG shall pay all costs of installation, maintenance, construction and operation necessary for satisfactorily providing for operation of the Botanic Garden subject to the terms of this Agreement. This will include, but is not limited to, utilities and salaries of HBG's employees, who shall never be considered City Employees. With the exception of the furnishings and fixtures currently located at the Golf Course, HBG shall furnish and maintain all necessary furniture and fixtures and a sufficient amount of movable equipment, including cash registers with recording/communicating devices.

Section 8.6 Public Relations Marketing, Advertising, Fund Raising.

8.6.1 Except as set forth in this Section 8.6, HBG will have exclusive authority and control over public relations, marketing, advertising, and fund raising related to the Botanic Garden.

8.6.2 Cross-Marketing. HBG shall promote other City activities, facilities, and concessions by prominently displaying related brochures, schedules, or other such literature as approved by the Director. The City shall promote HBG in the same manner as it promotes other city visitor facilities.

Section 8.7 HBG's Personnel. The HBG will hire and employ such personnel and volunteers as will, in its judgment, be necessary to operate, manage, and maintain the Botanic Garden facilities in accordance with the provisions of the Agreement. The HBG will prepare an Employee/Volunteer Performance Manual (Exhibit H) and submit it to the Standards Committee for approval.

8.7.1 HBG shall ensure that a number of employees sufficient to protect the employees, volunteers and visitors will be trained in CPR (Cardio Pulmonary Resuscitation), administering first aid, and other life-saving techniques. Certification in such area or techniques is not mandated by this clause.

8.7.2 Except for volunteers and contractors, all personnel shall be employees of HBG and shall be carried as employees on HBG's payroll and shall be

paid at least the minimum wage in accordance with the Fair Labor Standards Act as prescribed by the U. S. Department of Labor, Employee Standards Administration. HBG shall be solely responsible for the compensation of all such personnel, for the withholding of income, social security and other payroll taxes and for the coverage of all workers' compensation benefits.

8.7.3 The Employee/Volunteer Performance manual shall provide a method for accurate records of the names, addresses, and other legal identification of employees and volunteers and to whom badges with photographs are issued.

8.7.4 HBG shall have no authority to employ City personnel, and no employees or independent contractors of HBG shall be deemed to be employees or agents of the City, such persons at all times remaining HBG's employees.

Section 8.8 Reports and Records. HBG shall follow recognized, modern business practices to the end of providing efficient and adequate services to the public at fair and reasonable rates. Accurate, prompt, and timely reporting is of the essence, and failure to do so shall constitute default. The City reserves the right, for three years subsequent to contract termination, for whatever reason, to inspect all revenue records. HBG shall maintain all such records.

8.8.1 HBG shall submit an annual report to the City on April 1 of every year this Agreement is in effect. In addition to financial statements showing revenues, expenses and balance sheets the report shall include operational information including number of visitors, a description of activities and programs including community outreach and educational programs and participants in same, and any other relevant information concerning the operations.

8.8.2 HBG shall keep true, accurate and complete records of all its operations under this Agreement, including all receipts and disbursements. Ledgers, reporting forms, transaction documentation, and accounting methods shall be in such form and kept in such manner as is consistent with non-profit accounting. All books, accounts, records, and operations of HBG shall be open at any time during business hours for inspection and copying by the Department, City Controller's office, City auditor, or other authorized representative or agent. No more than 24 hours advance notice of such requested inspection or copying or both shall be required by HBG.

Section 8.9 The City reserves the right to require audited statements of HBG operations under this Agreement for any revenue periods. Such requirement should be anticipated in the event HBG defaults on this Agreement, with such expense being borne by HBG.

Section 8.10 Inspections and Permits. HBG is required to obtain and maintain any and all permits required by the City or any other governmental agency with authority to regulate the activities on the premises as well as perform or allow any annual or periodic inspections that are required

Section 8.11 Certifications. HBG shall maintain current certifications to use any and all chemicals used in connection with the operations of the Botanic Garden.

**ARTICLE 9**  
**NONDISCRIMINATION**

Section 9.1 HBG shall not discriminate in its employment practices, service provision, or in any other manner in the use of the Properties or in the exercise of the rights and privileges granted by this Contract because of sex, race, color, ethnicity, national origin, age, familial status, marital status, religion, disability, sexual orientation, genetic information, gender identity or pregnancy ancestry, handicap, or religion.

Section 9.2 HBG will, in the conduct of its business as a private non-profit corporation, seek to encourage the hiring of minorities and women employees and the contracting with small minority and disadvantaged business enterprises.

**ARTICLE 10**  
**INSURANCE**

Section 10.1 Insurance. Tenant agrees to obtain and maintain at all times during the Term of this Agreement and to cause any Subtenant and Contractor (“Contractor”) to obtain and maintain at all times during the Term of their contract or sublease insurance meeting at a minimum all of the following requirements:

<b>Coverage</b>	<b>Limit of Liability</b>
1) Workers' Compensation:	Statutory Limits for Workers' Compensation
2) Employer's Liability:	<ul style="list-style-type: none"> <li>• Bodily Injury by Accident \$1,000,000 (each accident)</li> <li>• Bodily Injury by Disease \$1,000,000 (policy limit)</li> <li>• Bodily Injury by Disease \$1,000,000 (each employee)</li> </ul>
3) Commercial General Liability: Including Bodily and Personal Injury; and Products and Completed Operations coverage	Bodily Injury and Property Damage, Combined limit of \$1,000,000 (each occurrence), and \$2,000,000 aggregate

4) Automobile Liability Insurance: (For automobiles furnished by HBG in the course of its performance under this Agreement, including Employer's Non-Owned and Hired Auto Coverage)	\$1,000,000 combined single limit each occurrence
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**Defense costs are excluded from the face amount of the policy.**

**Aggregate Limits are per 12-month policy period unless otherwise indicated.**

Section 10.2 Additional insurance requirements.

10.2.1 Forms of Policies. The insurance may be in one or more policies of insurance.

10.2.2 Certificates. The insurance coverages may be represented in one or more certificates of insurance. It is agreed, however, that nothing included within or omitted from the insurance certificates shall relieve the Tenant from its duties to provide the required coverage hereunder.

10.2.3 Issuers. The issuer of any policy must have a certificate of authority to transact insurance business in the State of Texas issued by the Texas Board of Insurance and a rating of at least "B+" and a financial size of Class VI or better in the most current edition of Best's Insurance Reports. Each issuer must be responsible and reputable and must have financial capability consistent with the risks covered.

10.2.4 Additional Insured. Each policy, except those for Worker's Compensation and Employer's Liability, must name Landlord and its agents, officers, directors, officials, legal representatives, employees and assigns as additional insured parties on the original policy and all renewals or replacement during term of such HBG's agreement or contract with Tenant and/or Subtenant. If any of such policies are written as "claims made" coverage and Landlord is required to be carried as an additional insured, then HBG must purchase policy period extensions so as to provide coverage to Landlord for a period of at least two (2) years after the completion of the work contemplated by such Contractor's agreement or contract with Tenant and/or Subtenant.

10.2.5 Deductibles. A policy may contain deductible amounts as approved by HBG. HBG shall assume and bear any claims or losses to the extent of such deductible amounts and waives any claim it may ever have for the same against Landlord, its officers, agents or employees with respect to such deductible amounts.

10.2.6 Cancellation. All such policies and certificates shall contain an agreement that the insurer shall notify Landlord in writing not less than thirty (30) days before cancellation of any policy. HBG shall notify Landlord in writing not less than thirty (30) days before any material change or reduction of coverage. HBG shall give written notice to Landlord within five (5) days of the date upon which total claims by any party against the Contractor reduce the aggregate amount of coverage below the amounts required by this Agreement. HBG shall notify the Director in writing 30 days prior to any cancellation or material change to HBG's insurance coverage. Within the 30 day period, HBG shall provide other suitable policies in lieu of those about to be canceled or non-renewed so as to maintain in effect the required coverage. If HBG does not comply with this requirement, the Director, at his or her sole discretion, may immediately suspend HBG from any further performance under this Agreement and begin procedures to terminate for default.

10.2.7 Subrogation. Each policy must contain an endorsement to the effect that the insurer waives any claim or right in the nature of subrogation to recover against Landlord, its officers, agents or employees.

10.2.8 Endorsements. Each policy must contain an endorsement that such policy is primary insurance to any other insurance available to Landlord as an additional insured with respect to claims arising hereunder and that the insurance applies separately to each insured.

10.2.9 Premiums. HBG shall pay all insurance premiums, and the City shall not be obligated to pay any premiums.

10.2.10 Blanket Policies. HBG shall be entitled to purchase and maintain the insurance under so called "blanket" policies, provided the coverage thereunder is at least the levels contained herein and is otherwise adequate in keeping with prudent underwriting standards.

10.2.11 At Landlord's request, copies of all policies referred to above, certified by the attorney-in-fact issuing them, together with written proof that the premiums have been paid, shall be deposited by HBG with the Director of Houston Parks and Recreation Department (the "Director"). If the Director fails to request copies of such policies, HBG shall provide certificates of insurance, in lieu of policies, reflecting that the terms of this Section 10.1 have been met, such certificates to be provided before the Contractor begins any work in, on or about the Premises.

10.2.12 Contractors. HBG shall require all contractors whose contracts exceed \$100,000 to provide proof of liability coverage meeting all requirements stated above except amount. The amount must be commensurate with the amount of the subcontract, but no less than \$500,000 per claim.

Section 10.3 WAIVER OF RIGHT OF RECOVERY. ANYTHING TO THE CONTRARY IN THIS AGREEMENT NOTWITHSTANDING, TO THE MAXIMUM EXTENT PERMITTED BY LAW, LANDLORD AND TENANT EACH WAIVE ALL RIGHTS OF RECOVERY, CLAIM, ACTION OR CAUSE OF ACTION OR

SUBROGATION AGAINST THE OTHER AND THE OTHER'S AFFILIATES AND THEIR RESPECTIVE PARTNERS, AGENTS, OFFICERS, DIRECTORS, SHAREHOLDERS, VOLUNTEERS, EMPLOYEES OR REPRESENTATIVES FOR ANY DAMAGE TO THE PREMISES AND/OR THE IMPROVEMENTS, TO THE EXTENT THAT SUCH DAMAGE IS DUE TO AN INSURED CASUALTY RISK (AS SUCH TERM IS DEFINED IN THE LEASE AND DEVELOPMENT AGREEMENT) REGARDLESS OF CAUSE OR ORIGIN, INCLUDING NEGLIGENCE OF LANDLORD, TENANT, THEIR AFFILIATES OR THEIR PARTNERS, AGENTS, OFFICERS, DIRECTORS, SHAREHOLDERS, EMPLOYEES OR REPRESENTATIVES.

#### ARTICLE 11

##### DAMAGE OR DESTRUCTION DURING LEASE TERM

Section 11.1 Occurrence of Casualty and Use of Insurance Proceeds. In the event that all or any part of the Premises or Improvements are materially damaged or destroyed, HBG will immediately notify City as to the nature and extent of such damage or destruction. All proceeds payable with respect to such damage or destruction shall be used promptly to reconstruct, rehabilitate or otherwise benefit the Improvements.

Section 11.2 Repairs. Promptly upon receipt of any insurance proceeds relating to damage or destruction to the Premises or Improvements, HBG will immediately begin to repair and restore the Premises and Improvements to substantially the same condition in which they existed immediately prior to the occurrence of the casualty to the extent of the insurance proceeds available for such restoration.

Section 11.3 Property at HBG's Risk. HBG's supplies and all merchandise, effects, and other property of every kind, nature, and description belonging to HBG, which may be on or in Glenbrook during the Lease Term or any extension thereof, shall be at the sole risk and hazard of HBG; and if the whole or any part thereof shall be destroyed or damaged for any reason, the City shall not be responsible.

Section 11.4 Destruction of Properties under Contract. If the Premises are destroyed or materially damaged to such extent that the Director determines that the Premises are wholly unfit, in whole or in part, for use by HBG in its operations, either the City or HBG may terminate this Agreement. If the Director determines that the Premises are wholly unfit, in whole or in part, due to the fault or neglect of HBG, HBG shall at its own expense cause the damage to be repaired, or the City may, at its option, terminate this Agreement. However, the HBG will have the opportunity to prepare a repair plan and submit it to the City for acceptance in lieu of a termination of the Agreement.

#### ARTICLE 12

##### CONDEMNATION

Section 12.1 Definitions. Whenever used in this Article 12, the following words shall have the definitions and meanings hereinafter set forth:

(a) "Condemnation Proceedings". Any action brought for the purpose of any taking of the Premises, any Improvements thereon, or any part thereof or any property interest therein (including, without limitation, the right to the temporary use of all or any portion of the Premises), by a competent authority as a result of the exercise of the power of eminent domain, including a voluntary sale to such authority either under threat of condemnation or while such action or proceeding is pending.

(b) "Taking" or "Taken". The event and date of such competent authority's depositing of money into the registry of the court for purposes of obtaining title to the Premises, any Improvements thereon, or any part thereof, or any property interest therein (including, without limitation, the right to the temporary use of all or any portion of the Premises), pursuant to a Condemnation Proceeding, or the event and date of execution and delivery of a deed-in-lieu of condemnation.

Section 12.2 Efforts to Prevent Taking. Landlord shall use its reasonable efforts to cause all other competent authorities with the power of eminent domain to refrain from instituting any Condemnation Proceedings or exercising any other powers of eminent domain with respect to the Premises, the Improvements, or any interest in any of the foregoing during the Term of this Agreement.

Section 12.3 Entire Taking. If all or substantially all of the Premises shall be Taken in Condemnation Proceedings, Tenant shall have the right to terminate this Agreement in accordance with Section 12.6 below effective as of the date of such Taking, and from and after such date Tenant and, provided Landlord has fully complied with its obligations under Section 12.2 above and under said Section 12.6 below, Landlord shall not have any further obligations under this Agreement with respect to the Premises.

Section 12.4 Partial Taking.

(a) If less than substantially all of the Premises shall be Taken in Condemnation Proceedings, from and after the effective date of such Taking, Tenant and, provided Landlord has fully complied with its obligations under Section 12.2 above and under Section 12.6 below, Landlord shall not have any further obligations under this Agreement with respect to the portion of the Premises so taken.

(b) If, following any such partial Taking, Tenant, in connection with any such partial Taking, exercises any right of termination under this Agreement, then Tenant, at its election may vacate the Premises, and from and after such vacation Tenant and, provided Landlord has fully complied with its obligations under Section 12.2 above and under Section 12.6 below, Landlord shall not have any other obligations under this Agreement with respect to the Premises. Such election to vacate must be exercised no later than one hundred eighty (180) days after the date of such partial Taking.

(c) If Tenant does not elect to vacate the Premises upon any partial Taking, then (i) the Premises shall be reduced by the portion thereof Taken in the

Condemnation Proceeding, and (ii) Tenant shall have the right to repair or reconstruct any building and any other remaining Improvements on the Premises in accordance with the provisions of this Lease with no abatement of Rent hereunder.

Section 12.5 Temporary Taking. If any right of temporary (hereinafter defined) possession or occupancy of all or any portion of the Premises shall be Taken, the obligations of Tenant hereunder as to the affected portion of the Premises shall be abated during the duration of such Taking. A Taking shall be considered "temporary" only if the period of time during which Tenant is deprived of usage of all or part of the Premises as the result of such Taking does not materially interfere with the ability of tenant to use the Premises for any of the Permitted Uses. Any other Taking that is not "temporary" as described above shall be treated as an entire Taking under Section 12.3 above or as a partial Taking under Section 12.4 above, as determined by Tenant.

Section 12.6 Condemnation Award.

(a) At any time within one hundred eighty (180) days after an entire Taking or a partial Taking following which Tenant vacates the remaining Premises as provided in Section 12.4(b) above, Tenant may terminate this Agreement by delivering a written termination notice to Landlord specifying the effective date of such termination, in which event the Term shall terminate as of the date specified by Tenant in such notice and the entire condemnation award shall be paid to Landlord.

(b) In the event this Agreement is not terminated in connection with a Taking as provided above, the entire condemnation award shall be paid to Tenant (or Subtenant) for use in the rebuilding, restoration and repair of the Improvements on the Premises in accordance with the provisions of this Agreement, and in such event Landlord hereby assigns to Tenant all right, title and interest in any such award.

Section 12.7 Settlement of Proceedings. Landlord shall not make any settlement with the condemning authority in any Condemnation Proceedings nor convey or agree to convey the whole or any portion of the Premises to such authority in lieu of condemnation without first obtaining the written consent of Tenant.

Section 12.8 Survival. The provisions contained in this ARTICLE 12 shall survive the expiration or earlier termination of this Agreement, but only insofar as such provisions relate to any Condemnation Proceedings or condemnation awards that arose prior to the expiration or earlier termination of this Agreement.

**ARTICLE 13**  
**ASSIGNMENT; SUBLETTING**

Section 13.1 Restrictions on Assignment. HBG shall not assign this Contract in whole or in part, nor subcontract all or any part of the contract without first obtaining the written consent of the Director. In the event the Director consents to such assignment or subcontract, HBG shall remain primarily responsible for the Contract performance, including payments herein provided, unless otherwise

expressly provided by the written consent of the Director. If this Contract is assigned, or if the Premises or any part thereunder is sublet or occupied by any person other than HBG without the consent as hereinabove provided, the City may collect rent from the assignee, subtenant, or occupant, but no such assignment, subletting, occupancy, or collection shall be deemed a waiver of this Paragraph, or the acceptance of the assignee, subtenant, or occupant, or a release of HBG from any of the covenants herein contained. Nothing in this clause, however, prevents the assignment of accounts receivable or the creation of a security interest as described in §9.406 of the Texas Business & Commerce Code. In the case of such an assignment, HBG, as appropriate, shall immediately furnish the City with proof of the assignment and the name, telephone number, and address of the Assignee and a clear identification of the fees to be paid to or by the Assignee.

Section 13.2 Concessions. Notwithstanding Section 13.1, HBG may enter into concession agreements with any restaurant or other vendors as set out in the Operating Plan.

Section 13.3 Nondisturbance and Attornment Agreements. In connection with any subleases, licenses or concessions made by HBG pursuant to the provisions of Section 13.1 or any bookings made by HBG, the applicable subtenants, licensees or concessionaires or entities that are granted bookings by HBG may ask City to execute various stoppel letters and nondisturbance and attornment agreements and other such instruments (collectively, "Attornment Agreements"). It is expected that such Attornment Agreement would typically ask City to represent that, subject to the timely performance of the obligations of the applicable subtenant, assignee or organization that is granted such bookings, as the case may be, City will continue to honor the sublease, assignment or booking arrangement of the party requesting the Attornment Agreement notwithstanding the termination of this Agreement by City due to the failure by HBG to perform its obligations under this Agreement. If any such Attornment Agreement is in form and substance reasonably acceptable to the City Attorney of the City of Houston, City agrees that the Attornment Agreement shall be executed by the Mayor, to the extent he or she may lawfully do so and bind the City to the applicable Attornment Agreement, within a reasonable period not to exceed thirty (30) days after the delivery of each such Attornment Agreement to City. The Mayor is hereby authorized to execute the Attornment Agreements on behalf of City.

#### **ARTICLE 14** **DEFAULT OF TENANT**

Section 14.1 Defaults by Tenant. The occurrence of any of the following shall be an "Event of Default" by Tenant or a "Tenant Default":

14.1.1 After installation of the Botanic Garden, the failure of Tenant to operate it as a public botanic garden subject to Section 19.8.

14.1.2 the failure of Tenant to keep, observe or perform any of the material terms, covenants or agreements contained in this Agreement to be kept, performed or

observed by Tenant if (i) such failure is not remedied by Tenant within thirty (30) days after written notice from Landlord of such default or (ii) in the case of any such default which cannot with due diligence and good faith be cured within thirty (30) days, Tenant fails to commence to cure such default within thirty (30) days after written notice from Landlord of such default or Tenant fails to prosecute diligently the cure of such default to completion within such additional period as may be reasonably required to cure such default with diligence and in good faith; it being intended that, in connection with any such default which is not susceptible of being cured with due diligence and in good faith within thirty (30) days, the time within which Tenant is required to cure such default shall be extended for such additional period as may be necessary for the curing thereof with due diligence and in good faith;

14.1.3 the (i) filing by Tenant of a voluntary petition in bankruptcy; (ii) adjudication of Tenant as a bankrupt; (iii) filing of any petition or other pleading in any action seeking reorganization, rearrangement, adjustment, or composition of, or in respect of, Tenant under the United States Bankruptcy Code or any other similar state or federal law dealing with creditors' rights generally, unless within sixty (60) days after such filing such proceeding is stayed or discharged; or (iv) appointment of a receiver, trustee or other similar official of Tenant or its Property; and,

14.1.4 the failure of Tenant to correct any potentially hazardous condition, after written notice of such condition from the City. In the event HBG does not remedy such default within 24 hours or agreed time frame authorized by the Director, receipt of such notice, HBG may be declared in default, and all of their rights under this Agreement shall be terminated.

14.1.5 Landlord shall have all remedies available at law or in equity including, without limitation, injunction, specific performance and actions for damages. All remedies of Landlord under this Agreement shall be cumulative, and the failure to assert any remedy or the granting of any waiver of any event of default shall not be deemed to be a waiver of such remedy or any subsequent event of default.

Section 14.2 In the event such default is not remedied or steps taken to remedy default to the satisfaction and approval of the City within 30 days of receipt of such notice by HBG, HBG may be declared in default, and all of its rights under the Agreement shall be terminated. At the direction of the City, HBG shall vacate the Premises and shall have no right to further operate under this Agreement.

## **ARTICLE 15**

### **DEFAULT OF LANDLORD**

Section 15.1 Defaults and Remedies. In the event of any breach by Landlord of any covenant of Landlord under this Agreement, Tenant shall have the right to deliver to Landlord a written notice specifying such breach, and unless within thirty (30) days from and after the date of delivery of such notice Landlord shall have commenced to remove or to cure such breach or occurrence and shall be proceeding with reasonable diligence to completely remove or cure such breach or occurrence (provided such breach or occurrence must be cured within one hundred twenty (120)

days after such notice), then Tenant shall the right to terminate this agreement. All remedies of Tenant under this Agreement shall be cumulative, and the failure to assert any remedy or the granting of any waiver of any event of default shall not be deemed to be a waiver of such remedy or any subsequent event of default.

**ARTICLE 16**  
**RELEASE.**

Section 16.1 HBG AGREES TO AND SHALL RELEASE THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY") FROM ALL LIABILITY FOR INJURY, DEATH, DAMAGE, OR LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH OR INCIDENTAL TO PERFORMANCE UNDER THIS AGREEMENT, EVEN IF THE INJURY, DEATH, DAMAGE, OR LOSS IS CAUSED BY THE CITY'S SOLE OR CONCURRENT NEGLIGENCE AND/OR THE CITY'S STRICT PRODUCTS LIABILITY OR STRICT STATUTORY LIABILITY.

**ARTICLE 17**  
**INDEMNIFICATION**

Section 17.1 HBG AGREES TO AND SHALL DEFEND, INDEMNIFY, AND HOLD THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY") HARMLESS FOR ALL CLAIMS, CAUSES OF ACTION, LIABILITIES, FINES, AND EXPENSES (INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES, COURT COSTS, AND ALL OTHER DEFENSE COSTS AND INTEREST) FOR INJURY, DEATH, DAMAGE, OR LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH OR INCIDENTAL TO PERFORMANCE UNDER THIS AGREEMENT INCLUDING, WITHOUT LIMITATION, THOSE CAUSED BY:

17.1.1 HBG'S AND/OR ITS AGENTS', EMPLOYEES', OFFICERS', DIRECTORS', OR CONTRACTORS' (IN NUMBERED PARAGRAPHS 17.1.1, 17.1.2, AND 17.1.3, COLLECTIVELY REFERRED TO AS "HBG") ACTUAL OR ALLEGED NEGLIGENCE OR INTENTIONAL ACTS OR OMISSIONS;

17.1.2 THE CITY'S AND HBG'S ACTUAL OR ALLEGED CONCURRENT NEGLIGENCE, WHETHER HBG IS IMMUNE FROM LIABILITY OR NOT; AND

17.1.3 THE CITY'S AND HBG'S ACTUAL OR ALLEGED PRODUCTS LIABILITY OR STRICT STATUTORY LIABILITY, WHETHER HBG IS IMMUNE FROM LIABILITY OR NOT.

HBG SHALL DEFEND, INDEMNIFY, AND HOLD THE CITY HARMLESS DURING THE TERM OF THIS AGREEMENT AND FOR FOUR YEARS AFTER THE AGREEMENT TERMINATES. HBG'S INDEMNIFICATION IS LIMITED TO \$1,000,000 PER OCCURRENCE. HBG SHALL NOT INDEMNIFY THE CITY FOR THE CITY'S SOLE NEGLIGENCE.

Section 17.2 INDEMNIFICATION - CONTRACTORS INDEMNITY. HBG SHALL REQUIRE ALL OF ITS CONTRACTORS (AND THEIR SUBCONTRACTORS) TO RELEASE AND INDEMNIFY THE CITY TO THE SAME EXTENT AND IN SUBSTANTIALLY THE SAME FORM AS ITS RELEASE AND INDEMNITY TO THE CITY.

Section 17.3 INDEMNIFICATION - PROCEDURES

17.3.1 Notice of Claims. If the City or HBG receives notice of any claim or circumstances which could give rise to an indemnified loss, the receiving party shall give written notice to the other party within 30 days. The notice must include the following:

- i. A description of the indemnification event in reasonable detail,
- ii. The basis on which indemnification may be due, and
- iii. The anticipated amount of the indemnified loss.

This notice does not estop or prevent the City from later asserting a different basis for indemnification or a different amount of indemnified loss than that indicated in the initial notice. If the City does not provide this notice within the 30-day period, it does not waive any right to indemnification except to the extent that HBG is prejudiced, suffers loss, or incurs expense because of the delay.

17.3.2 Defense of Claims

- i. Assumption of Defense. HBG may assume the defense of the claim at its own expense with counsel chosen by it that is reasonably satisfactory to the City. HBG shall then control the defense and any negotiations to settle the claim. Within 10 days after receiving written notice of the indemnification request, HBG must advise the City as to whether or not it will defend the claim. If HBG does not assume the defense, the City shall assume and control the defense, and all defense expenses constitute an indemnification loss.

- ii. Continued Participation. If HBG elects to defend the claim, the City may retain separate counsel to participate in (but not control) the defense and to participate in (but not control) any settlement negotiations. HBG may settle the claim without the consent or agreement of the City, unless it (i) would result in injunctive relief or other equitable remedies or otherwise require the City to comply with restrictions or limitations that adversely affect the City, (ii) would require the City to pay amounts that HBG does not fund in full, (iii) would not result in the City's full and complete release from all liability to the plaintiffs or claimants who are parties to or otherwise bound by the settlement.

**ARTICLE 18**  
**REPRESENTATIONS AND WARRANTIES**

Section 18.1 Landlord's Representations and Warranties. Landlord hereby represents, warrants and covenants as follows: Existence. City is a home-rule city duly organized under the laws of the State of Texas and currently existing pursuant to the constitution and laws of the State of Texas.

(a) Authority. Landlord has all requisite power and authority to own the Premises, to execute, deliver and perform its obligations under this Agreement and to consummate the transactions herein contemplated and, by proper action in accordance with all applicable law has duly authorized the execution and delivery of this Agreement.

(b) Binding Obligation. This Agreement is a valid and binding obligation of Landlord and is enforceable against Landlord in accordance with its terms.

(c) No Defaults. The execution by Landlord of this Agreement and the consummation by Landlord of the transactions contemplated hereby do not (i) result in a breach of any of the terms or provisions of, or constitute a default, or a condition which upon notice or lapse of time or both would ripen into a default, under any resolution, indenture, agreement, instrument or obligation to which Landlord is a party or by which the Premises or any portion thereof is bound, or (ii) constitute a violation of any Governmental Rule applicable to Landlord or any portion of the Premises, or of any Governmental Authority having jurisdiction over Landlord or any portion of the Premises.

(d) Consents. No permission, approval or consent by third parties or any other Governmental Authority is required in order for Landlord to enter into this Agreement, make the agreements herein contained or perform the obligations of Landlord hereunder, other than those consents which have been obtained.

(e) Proceedings. There are no actions, suits or proceedings pending or, to the best knowledge of Landlord, threatened or asserted against Landlord which could reasonably be expected to affect or impair Landlord's ability to enter into this Agreement or to perform its obligations hereunder, or which affect in any manner any portion of the Premises, at law or in equity or before or by any governmental authority.

(f) No Condemnation Proceedings. Landlord has not received any notice of any Condemnation Proceedings from any governmental authority.

(g) Free and Clear Use of Glenbrook. There are no liens, leases, or use agreements that would interfere with the use of Glenbrook by the HBG.

(h) Compliance with Laws. Landlord has not received any notice of any violation of any governmental rule or regulation pertaining to the Premises or any portion thereof.

(i) No Personal Liability. Notwithstanding anything herein, no provision, covenant, or agreement contained in this Agreement, or any obligation herein or therein imposed upon HBG or the Landlord, or the breach thereof, shall constitute or give rise to or impose upon any of HBG's or Landlord's officers, employees, or agents a pecuniary liability.

Section 18.2 Tenant's Representations and Warranties. Tenant hereby represents and warrants as follows:

(a) Existence. Tenant is a non profit corporation duly organized under the laws of the State of Texas and currently existing pursuant to the constitution and laws of the State of Texas and is recognized by the United State Internal Revenue Service as exempt from taxation under the section 501 (c) (3) of the Internal Revenue Code.

(b) Authority. Tenant has all requisite power and authority to own its property, operate its business, enter into this Agreement and consummate the transactions herein contemplated, and by proper action has duly authorized the execution and delivery of this Agreement and the consummation of the transactions herein contemplated.

(c) Binding Obligations. This Agreement is a valid and binding obligation of Tenant and is enforceable against Tenant in accordance with its terms.

(d) No Default. The execution by Tenant of this Agreement and the consummation by Tenant of the transactions contemplated hereby do not (i) result in a breach of any of the terms or provisions of, or constitute a default, or a condition which upon notice or lapse of time or both would ripen into a default, under Tenant's charter or any resolution, indenture, agreement, instrument or obligation to which Tenant is a party or by which the Premises or any portion thereof is bound, or (ii) constitute a violation of any Governmental Rule applicable to Tenant or of any Governmental Authority having jurisdiction over Tenant.

(e) Consents. No permission, approval or consent by third parties or any other Governmental Authority is required in order for Tenant to enter into this Agreement, make the agreements herein contained or perform the obligations of Tenant hereunder, other than those consents which have been obtained.

(f) Proceedings. There are no actions, suits or proceedings pending or, to the best knowledge of Tenant, threatened or asserted against Tenant which could reasonably be expected to affect or impair Tenant's ability to enter into this Agreement or to perform its obligations hereunder, at law or in equity or before or by any Governmental Authority.

**ARTICLE 19**  
**MISCELLANEOUS**

Section 19.1 Inspection. Tenant shall permit Landlord and its agents, at all reasonable times and without interfering with the operation being conducted upon the Properties to enter into and upon the Premises during normal business hours for the purpose of inspecting the same, provided that such entry and inspection by Landlord does not interfere with the quiet enjoyment of the Premises by Tenant, Subtenant or any other Party with a right of possession under a Use Agreement.

Section 19.2 Estoppel Certificates. Tenant and Landlord shall, at any time and from time to time upon not less than twenty (20) days prior written request by the other Party, execute, acknowledge and deliver to Landlord or Tenant, as the case may be, a statement in writing certifying (a) its ownership of the interest of Landlord or Tenant hereunder (as the case may be), (b) that this Agreement is unmodified and in full force and effect (or if there have been any modifications, that the same is in full force and effect as modified and stating the modifications), (c) the dates to which any charges required hereunder have been paid, and (d) that, to the best knowledge of Landlord or Tenant, as the case may be, no default hereunder on the part of the other Party exists (except that if any such default does exist, the certifying Party shall specify such default). Upon request by Tenant, Landlord's estoppel certificate also shall be addressed to one or more of its subtenants.

Section 19.3 Release. Tenant shall upon termination of this Agreement, execute and deliver to Landlord an appropriate release, in form proper for recording, of all Tenant's interest in the Premises, and upon request of Tenant, Landlord will execute and deliver a written cancellation and termination of this Agreement and release of all claims (if none are then outstanding or threatened) in proper form for recording to the extent such release is appropriate under the provisions hereof.

Section 19.4 Landlord's Right to Perform Tenant's Covenants. If Tenant shall fail in the performance of any of its covenants, obligations or agreements contained in this Agreement, and such failure shall continue without Tenant curing or commencing to cure such failure within all applicable grace and/or notice and cure periods, Landlord, after ten (10) days' additional written notice to Tenant specifying such failure (or shorter notice if any emergency [meaning that there is imminent danger to the safety of Persons or of substantial damage to property] exists), may (but without any obligation so to do) perform the same for the account and at the expense of Tenant, and the amount of any payment made or other reasonable expenses (including reasonable attorneys' fees) incurred by Landlord in curing such default, together with interest thereon at the rate of ten percent (10%) per annum, shall be payable by Tenant to Landlord on demand. This provision is not in lieu of, but is in addition to, any other rights or remedies Landlord may have with respect to any such failure of performance by Tenant.

Section 19.5 Notices. All notices, consents, directions, approvals, instructions, requests and other communications and all payments, as applicable, given to a Party under this Agreement shall be given in writing to such Party at the address set forth below or at any other address as such Party designates by written notice to the

other Party in accordance with this Section 19.5 and may be (i) sent by registered or certified U.S. Mail with return receipt requested, (ii) delivered personally (including delivery by private courier services) or (iii) sent by telecopy (with electronic confirmation of such notice) to the Party entitled thereto. Any notice shall be deemed to be duly given or made (x) three (3) business days after posting if mailed as provided, (y) when delivered by hand unless such day is not a business day, in which case such delivery shall be deemed to be made as of the next succeeding business day, or (z) in the case of telecopy (with electronic confirmation of such notice), when received, so long as it was received during normal business hours of the receiving Party on a business day or otherwise such delivery shall be deemed to be made as of the next succeeding business day. Each Party hereto shall have the right at any time and from time to time to specify additional parties (the "Additional Addressees") to whom notices hereunder must be given, by delivering to the other Party five (5) days' notice thereof setting forth a single address for each such Additional Addressee; provided, however, that no Party hereto shall have the right to designate, in addition to Subtenant, more than two (2) such Additional Addressees. The notice addresses for the Parties shall be as follows:

Notice to Landlord shall be sent to:

City of Houston  
Mayor's Office  
901 Bagby, 3rd Floor  
Houston, Texas 77002  
Attention: Mayor

with copies of all notices to Landlord being sent to:

City of Houston  
City Attorney's Office  
900 Bagby, 4th Floor  
Houston, Texas 77002  
Attention: City Attorney

and to:

City of Houston  
Department of Parks and Recreation  
2999 South Wayside  
Houston, Texas 77023  
Attention: Director

and to:

City of Houston  
Office of the Mayor  
901 Bagby, 4<sup>th</sup> Floor  
Houston, Texas 77002  
Attention: Chief Development Officer

Notice to Tenant shall be sent to:

Houston Botanic Garden  
PO Box 27510  
Houston, Texas 77227-0510  
Attention: President & CEO  
  
And to  
  
Houston Botanic Gardens 3701 Kirby Drive, Suite 992  
Houston, Texas 77098

Section 19.6 Modifications. Subject to ARTICLE 7 AND ARTICLE 8 hereof, this Agreement may be amended or modified at any time, but only by written agreement signed by Landlord and Tenant except where allowed for the Standards Committee.

Section 19.7 Descriptive Headings. The descriptive headings of this Agreement are inserted for convenience in reference only and do not in any way limit or amplify the terms and provisions of this Agreement.

Section 19.8 Unavoidable Default and Delays. The time within which either Party hereto shall be required to perform any act under this Agreement shall be extended by a period of time equal to the number of days during which performance of such act is delayed by Condemnation Proceedings, casualty damage, strikes, lockouts, acts of God, governmental restrictions, failure or inability to secure materials or labor, reason of priority or similar regulations or order of any Governmental Authority, enemy action, civil disturbance, fire, unavoidable casualties or any other cause beyond the reasonable control of the Party seeking the delay. The provisions of this Section shall not operate to excuse either Party from prompt payment of monetary obligations required by the terms of this Agreement.

Section 19.9 Partial Invalidity. If any term, provision, condition or covenant of this Agreement or the application thereof to any Party or circumstances shall, to any extent, be held invalid or unenforceable, the remainder of this Agreement, or the application of such term, provision, condition or covenant to Persons or circumstances other than those as to whom or which it is held invalid or unenforceable, shall not be

affected thereby, and each term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

Section 19.10 Applicable Law and Venue. THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS AND THE TERMS, PROVISIONS, OBLIGATIONS AND COVENANTS HEREOF ARE PERFORMABLE IN HARRIS COUNTY, TEXAS. THE PARTIES HEREBY AGREE THAT VENUE FOR ANY ACTION INSTITUTED TO ENFORCE THE RIGHT OF EITHER PARTY HEREUNDER SHALL BE IN A COURT OF COMPETENT JURISDICTION IN HARRIS COUNTY, TEXAS.

Section 19.11 Attorneys' Fees. Should either Party to this Agreement engage the services of attorneys or institute legal proceedings to enforce its rights or remedies under this Agreement, the prevailing party to such dispute or proceedings shall be entitled to recover its reasonable attorneys' fees, court costs and similar costs incurred in connection with the resolution of such dispute or the institution, prosecution or defense in such proceedings from the other party(ies).

Section 19.12 Interpretation. Nothing contained herein shall be deemed or construed by the Parties hereto or by any third party as creating the relationship of principal and agent, partnership, joint venture or any association between the Parties hereto, it being understood and agreed that none of the provisions contained herein or any acts of the Parties in the performance of their respective obligations hereunder shall be deemed to create any relationship between the Parties hereto other than the relationship of Landlord and Tenant.

Section 19.13 Brokerage Commission. Landlord and Tenant represent and warrant one to the other that no broker commission, finder's fees or similar compensation is due to any party claiming by, through or under Landlord or Tenant, as applicable.

Section 19.14 Non-Waiver. No Party shall have or be deemed to have waived any default under this Agreement by the other Party unless such waiver is embodied in a document signed by the waiving Party that describes specifically the default that is being waived. Further, no Party shall be deemed to have waived its rights to pursue any remedies under this Agreement, unless such waiver is embodied in a document signed by such Party that describes specifically any such remedy that is being waived.

Section 19.15 Survival. Covenants in this Agreement providing for performance after termination of this Agreement shall survive the termination of this Agreement.

Section 19.16 Entire Agreement. This Agreement and the documents referenced in this Agreement constitute the entire agreement between Landlord and Tenant regarding the subject matter thereof. There are no representations, promises or agreements of either Landlord or Tenant, one to the other, regarding the subject matter

of this Agreement not contained in this Agreement or the documents referenced in this Agreement. In the event of any conflict between this Agreement and any document referenced in this Agreement, the provisions of this Agreement shall control.

Section 19.17 Parties in Interest; Limitation on Rights of Others. The terms of this Agreement shall be binding upon, inure to the benefit of and be enforceable by the Parties and their permitted successors and assigns.

Section 19.18 Covenants Running with the Land. The Parties hereto covenant and agree that all of the conditions, covenants, agreements, rights, privileges, obligations, duties, specifications and recitals contained in this Agreement, except as otherwise expressly stated herein, shall during the Term be construed as covenants running with title to the Premises, and the leasehold estate hereunder, respectively, which shall extend to, inure to the benefit of and bind Landlord, Tenant and their respective permitted successors and assigns to the same extent as if such successors and assigns were named as original parties to this Agreement, such that this Agreement shall during the Term bind the owner and holder of any fee or leasehold interest in or to the Premises, or any portion thereof, and shall bind predecessors thereof except as otherwise expressly provided herein.

Section 19.19 Non-Merger of Estates. The interests of Landlord and Tenant in the Premises shall at all times be separate and apart and shall in no event be merged, notwithstanding the fact that this Agreement or the leasehold estate created hereby, or any interest therein, may be held directly or indirectly by or for the account of the same Person who shall own the fee title to the Premises or any portion thereof; and no such merger of estates shall occur by operation of law, or otherwise, unless and until all Persons at the time having any interest in the Premises or under this Agreement join in the execution and recordation of a written instrument effecting such merger of estates.

Section 19.20 City Council Approvals and Appropriations. This Agreement is subject to all applicable terms and provisions of the Charter and the Code of Ordinances of the City, and is subject to approval by the City Council, and shall not be effective until signed by the Mayor and countersigned by the Controller of the City. Notwithstanding anything contained in this Agreement to the contrary, this Agreement does not, nor shall it be construed to, foreclose or waive the application of all lawful requirements under the applicable laws of the State of Texas for (i) the appropriation and payment of funds by the City, or (ii) the approval or issuance of future agreements, permits or licenses by the City. Any provision of this Agreement which contemplates (x) the payment of money by the City, which payment would require the appropriation of funds over and above any sums appropriated prior to the Commencement Date in connection with this Agreement and the other Project Documents (and the transactions contemplated herein or therein), or (y) any other future action, decision, agreement, waiver or approval which by its nature must be approved by the City Council, including without limitation, the issuance of permits or licenses, shall be subject to the approval of

any subsequent City Council to which such matter is presented and to the appropriation by such City Council of the required funds, in the exercise of its legislative discretion.

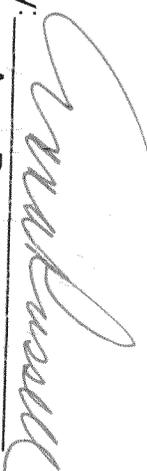
**[Signature Pages Follow]**

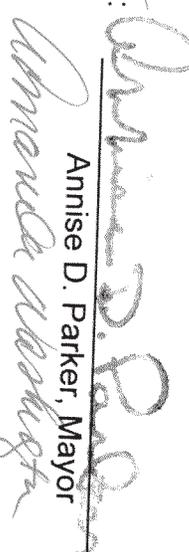
IN WITNESS WHEREOF, this Agreement has been executed by the Parties as of the Effective Date.

ATTEST:

LANDLORD:

**CITY OF HOUSTON, TEXAS**, a home-rule city organized under the laws of the State of Texas

By:   
Anna Russell, City Secretary

By:   
Annise D. Parker, Mayor

COUNTERSIGNED:

By:   
Ronald C. Green, Controller 

DATE OF COUNTERSIGNATURE: 1-28-15

APPROVED:

By:   
Andrew F. Icken,  
Chief Development Officer

APPROVED:

By:   
Joe Turner,  
Director, Houston Parks and Recreation Department

APPROVED AS TO FORM:

By:   
Steven Kirkland  
Senior Assistant City Attorney  
LD # 0421400091001

HBG

**ATTEST/SEAL (if a corporation):**

By: Nancy O'Connor Abendshein

Name: Nancy O'Connor Abendshein

Title: Chairman

**HOUSTON BOTANIC GARDEN**

By: Jeff E. Ross

Name: Jeff E. Ross

Title: President and CEO