

AN ORDINANCE 2010-10-21-0929

**APPROVING THE SAN ANTONIO BOTANICAL GARDEN MASTER PLAN  
AND AUTHORIZING AGREEMENTS WITH THE SAN ANTONIO  
BOTANICAL GARDEN SOCIETY FOR THE CITY-OWNED BOTANICAL  
GARDEN LOCATED IN COUNCIL DISTRICT 9.**

\* \* \* \* \*

**WHEREAS**, constructed by the City in 1980, the San Antonio Botanical Garden (SABG) is managed by the Parks and Recreation Department with a total annual operating budget of \$1.8M; and

**WHEREAS**, chartered in 1980, the San Antonio Botanical Garden Society (SABS), a 501(c)(3) non-profit organization, was established in support of the SABG; and

**WHEREAS**, the SABS engaged MESA Design Associates of Dallas and Lake Flato Architects of San Antonio to develop the SABG Master Plan, which was completed in Spring 2010; and

**WHEREAS**, the proposed Master Plan encompasses a total of 37.78 acres and includes a new welcome center, education and event center, classrooms, various new garden areas and the expansion of the parking lot; and

**WHEREAS**, SABS anticipates raising funds for the implementation of the improvements over a number of years, as part of a phased approach; and

**WHEREAS**, in 2006, the SABS approached staff about exploring a new private/public partnership in which the SABS would eventually manage and maintain the SABG; and

**WHEREAS**, staff therefore recommends entering into a short term License Agreement with the option for a subsequent long term Lease Agreement with SABS; and

**WHEREAS**, the short term License Agreement's terms and conditions remain consistent with the current relationship between the parties, wherein the SABS facilitates the rental of event space for meetings and social gatherings, operates the restaurant and gift shop, and develops and funds special events and programming, including educational events; and

**WHEREAS**, SABS will have the option to convert the License Agreement into a long term Lease Agreement with a term of twenty years, wherein the SABS would assume full responsibility for SABG management and operations; and

**WHEREAS**, the Parks and Recreation Board endorsed both the adoption of the Master Plan and consideration of the License and Lease Agreements by City Council at their July 26, 2010 meeting; and

**WHEREAS**, the Master Plan was approved by the Historic and Design Review Commission on September 1, 2010 and the Planning Commission on September 22, 2010; and

**WHEREAS**, the City Council Quality of Life Committee recommended this item be forwarded to the full City Council at their September 14, 2010 meeting; **NOW THEREFORE**:

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:**

**SECTION 1.** The San Antonio Botanical Garden Master Plan as developed by MESA Design Associates of Dallas and Lake Flato Architects of San Antonio which was approved by the Historic and Design Review Commission on September 1, 2010 and the Planning Commission on September 22, 2010, is hereby approved. A copy of the Master Plan is incorporated herein by reference and is on file with the Parks and Recreation Department.

**SECTION 2.** The City Manager or her designee, or the Director of the Parks and Recreation Department or his designee is hereby authorized to execute a license with a subsequent lease agreement with the San Antonio Botanical Garden Society Inc. for the San Antonio Botanical Garden located in Council District 9. A copy of said license and lease agreement is attached hereto and incorporated herein for all purposes as **Attachment I**.

**SECTION 3.** The financial fiscal allocations in this Ordinance are subject to approval by the Chief Financial Officer, City of San Antonio. The Chief Financial Officer, may, subject to concurrence by the City Manager or the City Manager's designee, correct allocations to specific SAP Fund Numbers, SAP Project Definitions, SAP WBS Elements, SAP Internal Orders, SAP Fund Centers, SAP Cost Centers, SAP Functional Areas, SAP Funds Reservation Document Numbers, and SAP GL Accounts as necessary to carry out the purpose of this Ordinance.

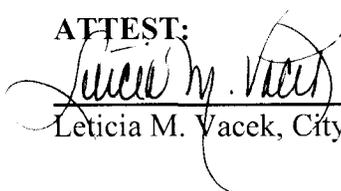
**SECTION 4.** This ordinance shall become effective immediately upon passage by eight (8) or more affirmative votes of the entire City Council; otherwise, said effective date shall be ten (10) days from the date of passage hereof.

PASSED AND APPROVED this 21<sup>st</sup> day of October, 2010.

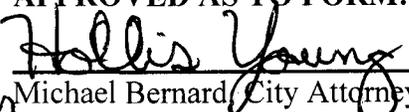


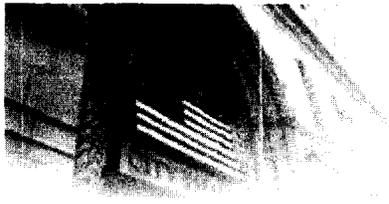
M A Y O R  
Julián Castro

**ATTEST:**

  
\_\_\_\_\_  
Leticia M. Vacek, City Clerk

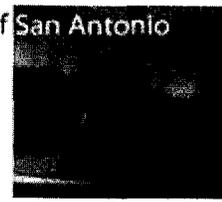
**APPROVED AS TO FORM:**

  
\_\_\_\_\_  
for Michael Bernard, City Attorney



Request for  
**COUNCIL**  
**ACTION**

City of San Antonio



## Agenda Voting Results - 31

<b>Name:</b>	7, 8, 11, 12, 13, 14, 15, 20A, 20B, 22, 23, 24, 25, 26, 31						
<b>Date:</b>	10/21/2010						
<b>Time:</b>	09:43:06 AM						
<b>Vote Type:</b>	Motion to Approve						
<b>Description:</b>	An Ordinance approving the San Antonio Botanical Garden Master Plan and authorizing agreements with the San Antonio Botanical Garden Society for the city-owned Botanical Garden located in Council District 9. [Sharon De La Garza, Assistant City Manager; Xavier Urrutia, Director, Parks & Recreation]						
<b>Result:</b>	Passed						
<b>Voter</b>	<b>Group</b>	<b>Not Present</b>	<b>Yea</b>	<b>Nay</b>	<b>Abstain</b>	<b>Motion</b>	<b>Second</b>
Julián Castro	Mayor		x				
Mary Alice P. Cisneros	District 1		x				x
Ivy R. Taylor	District 2		x				
Jennifer V. Ramos	District 3		x			x	
Philip A. Cortez	District 4		x				
David Medina Jr.	District 5		x				
Ray Lopez	District 6		x				
Justin Rodriguez	District 7		x				
W. Reed Williams	District 8		x				
Elisa Chan	District 9		x				
John G. Clamp	District 10		x				

**SAN ANTONIO BOTANICAL GARDEN AGREEMENT**

This Agreement (“Agreement”) is made and entered into by and between the City of San Antonio, a Texas municipal corporation (“CITY”), acting by and through its City Manager or designee, pursuant to Ordinance No. \_\_\_\_\_, dated \_\_\_\_\_, 2010, and San Antonio Botanical Garden Society, Inc., a Texas non-profit corporation (“SABGS”).

**1. WITNESSETH:**

- 1.1 WHEREAS, CITY owns the real property known as the San Antonio Botanical Garden (“Botanical Garden”) located at 555 Funston in San Antonio, Texas; and
- 1.2 WHEREAS, CITY wishes to continue to offer an educational, scientific, and an aesthetically beautiful botanical experience at an affordable price to citizens and visitors; and
- 1.3 WHEREAS, CITY and SABGS have had a successful relationship operating the Botanical Garden since 1981 and now desire to enter into this Agreement to continue that relationship as well as transition the operation and management of the Botanical Garden from CITY to SABGS; and
- 1.4 WHEREAS, CITY and SABGS desire one Agreement that reflects their relationship with regard to the operating and management of the Botanical Garden, and
- 1.5 WHEREAS, CITY and SABGS wish to establish the terms of their relationship both during a period in which SABGS’S role is similar to what it has been during recent years, as well as, a period in which SABGS’S role and responsibility is to operate the Botanical Garden, this Agreement provides for a short term License Agreement (“License Agreement”) as well as a long term Lease Agreement (“Lease Agreement”) with terms that are consecutive; and
- 1.6 WHEREAS SABGS desires a contractual relationship with the CITY for the Botanical Garden that is of a length that will facilitate their efforts to raise funds for the operation and improvement of the Botanical Garden;

**NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS:**

THAT, for and in consideration of the mutual benefits to CITY and SABGS and the observance of the terms and conditions set forth hereinafter, the parties hereto agree to the following:

**2. LICENSE AGREEMENT**

- 2.01 Attachment A, which is a part of this Agreement, is a License Agreement that establishes the rights, roles, and responsibilities of the CITY and SABGS during the initial phase of this Agreement. Under the terms of the License Agreement, SABGS has the right to use the Botanical Garden for certain defined purposes. In

addition, SABGS is obligated to certain actions that will assist in its transition to the expanded rights, roles, and responsibilities contained in the Lease Agreement.

### **3. LEASE AGREEMENT**

- 3.01 Attachment B, which is a part of this Agreement, is a Lease Agreement that establishes the rights, roles, and responsibilities of the CITY and SABGS during the second phase of this Agreement. Under the terms of the Lease Agreement, SABGS assumes responsibility for the operation and maintenance of the Botanical Garden.

### **4. TERM**

- 4.1 The initial term of the License Agreement shall be five (5) years, commencing on January 1, 2011 (the "Commencement Date") and ending on December 31, 2015, if not earlier terminated according to the terms hereof. As long as SABGS is not then in default of any of the provisions of this Agreement, the term of the License Agreement may be extended by SABGS for up to three (3) one year periods. SABCS may exercise these extension periods by providing a letter to the CITY not later than ninety (90) days prior to the end of the initial term or any extension period(s).one three (3) year renewal period. The term of the License Agreement shall not exceed eight (8) years and the last date of the initial term or any extensions shall be the Expiration Date.
- 4.2 SABGS shall have the right to terminate the License Agreement at any time prior to one year before the Expiration Date and may do so by providing written notification to CITY not later than one hundred eighty (180) days prior to the effective date of termination. In this event, this Agreement and the Lease Agreement shall be null and void.
- 4.3 The term of the Lease Agreement shall be twenty (20) years, commencing immediately following the Expiration of the License Agreement, unless SABGS exercises the termination rights outlined in 4.2 above. As long as SABGS is not then in default of any of the provisions of this Lease Agreement, the term of the Lease Agreement may be extended for one twenty (20) year term, subject to the approval of CITY as evidenced by the passage of an ordinance; except, however, that provisions of Sections 4.2, 4.3, 4.4 and 4.7 of the Lease Agreement shall be renegotiated by the parties prior to the extension.
- 4.3 SABGS shall have the right to terminate the Lease Agreement by providing written notification to CITY not later than two years prior to the effective date of termination.

### **5. TERMINATION OF PRIOR AGREEMENTS**

5.01 Upon the commencement of the License Agreement, the following agreements between CITY and SABGS will terminate: Agreement approved on April 29, 1981 by Ordinance No. 53676 and Amendment No. 1 to the Agreement approved on March 8, 2001 by Ordinance 93554; Concession Agreement approved on December 4, 1986 by Ordinance 64110; and the Grant Agreement approved February 3, 2005 by Ordinance 100377.

**6. AUTHORITY**

6.1 The signer of this Agreement for SABGS hereby represents and warrants that he or she has full authority to execute this Agreement on behalf of SABGS.

IN WITNESS WHEREOF, we have affirmed our signatures this \_\_\_\_ day of \_\_\_\_  
\_\_\_\_\_ 2010.

**CITY:**  
**CITY OF SAN ANTONIO**, a Texas  
Municipal Corporation

\_\_\_\_\_  
Sheryl Sculley  
City Manager

ATTEST:

\_\_\_\_\_  
City Clerk

**SABGS:**  
**San Antonio Botanical Garden**  
**Society, Inc.** a Texas Non-profit  
Corporation

By: Clara Alexander

Title: Board Chairman

APPROVED AS TO FORM: \_\_\_\_\_

City Attorney

**ATTACHMENT A**  
**LICENSE AGREEMENT**  
**SAN ANTONIO BOTANICAL GARDEN**

**1. PREMISES**

- 1.1 CITY, for and in consideration of the covenants and promises herein contained to be kept and performed by SABGS, CITY hereby licenses the real property owned by CITY as shown on Exhibit A (“Premises”) for the uses described in Section 2 below. The Premises are hereby further described as an area consisting of 37.788 acres located at 555 Funston Road, New City Block A-50, San Antonio, Bexar County, Texas, and known as San Antonio Botanical Garden, excluding the area marked Adjacent Parking Area.
- 1.2 SABGS has had sufficient time and opportunity to examine the Premises and acknowledges that there is in and about them nothing dangerous to life, limb, or health and hereby waives any claim for damages that may arise from defects of that character after occupancy. SABGS’S use of the Premises shall be conclusive evidence of SABGS’S acceptance thereof in good satisfactory order in its present condition **AS IS, WHERE IS AND WITH ALL FAULTS** as suitable for the purpose for which licensed. CITY specifically disclaims any warranty of suitability for intended commercial purposes of SABGS.
- 1.3 SABGS agrees that no representations respecting the condition of the Premises and no promises to decorate, alter, repair, or improve the Premises, either before or after the execution hereof, have been made by CITY or its agents to SABGS unless the same are contained herein or made a part of by specific reference herein.

**2. USE**

- 2.1 CITY owns the Premises and, except for the uses, rights and obligations outlined in this Agreement, shall be responsible for the operation and maintenance of the Premises. City shall, during the term of this Agreement, continue to provide property insurance coverage for the Premises in conformance with its general property insurance program.
- 2.2 SABGS shall have the use of certain areas within the Premises for the purposes of the operation of a restaurant, gift shop, plant sales, use agreements with individuals and organizations for events, fundraising, office space, special events, and other uses as may be agreed to by SABGS and CITY, through its Parks and Recreation Director, as further described in this Agreement.

**3. RENTAL OF EVENT SPACE**

- 3.1 SABGS shall have the right to schedule, coordinate and charge fees for the use of certain areas within the Premises for meetings and social gatherings (“Rental of Event Space”). SABGS may use the areas shown on Exhibit B, as well as other spaces as may be agreed

to by SABGS and CITY, through the Director of Parks and Recreation.

- 3.2 SABGS shall establish policies and fees for its Rental of Event Space and a Use Agreement (“Use Agreement”) associated with the Rental of Event Space, such policies and Use Agreement and any future changes thereto to be subject to the prior written approval of CITY, through the Director of Parks and Recreation. Fees established shall be reasonable, customary, and based on rates found at similar facilities for similar use. SABGS shall have the right to reduce or waive rental fees for sponsors and partners of SABGS, horticultural and garden organizations, non-profit organizations, and others that provide support and benefit to SABGS.
- 3.3 SABGS shall maintain a list of approved caterers (“Approved Caterers”) to provide food and beverages for the Rentals of Event Space. All such caterers shall be obligated to execute a Caterer Agreement and provide evidence of appropriate insurance, including liquor liability if alcoholic beverages are to be sold, prior to providing any catering services. SABGS shall have the right to terminate the rights of any Approved Caterer that does not provide an acceptable level of service or does not comply with the provisions of the Caterer Agreement.
- 3.4 SABGS shall have the right to contract for tables, chairs, tents, and other furnishing and equipment for the Rental of Event Space.
- 3.5 SABGS shall retain all revenue collected for the Rental of Event Space, including rental fees, service fees, and percentage rent received from catering and equipment contracts to be used for the benefit of the San Antonio Botanical Garden.
- 3.6 SABGS shall maintain an event calendar for the Premises so that use of the Premises for Rental of Event Space, special events coordinated by CITY and SABGS, as well as maintenance and operational functions can be coordinated by the parties. SABGS shall work cooperatively with CITY to ensure that the Rental of Event Space, including set-up and clean-up activities, does not significantly impact the use of the Premises by visitors.
- 3.7 SABGS shall ensure that all Rental of Event Space events are compliant with City of San Antonio ordinances, including but not limited to those pertaining to alcohol, noise levels, and traffic control. The above notwithstanding, SABGS shall have the right to extend the hours of up to six (6) Rental of Event Space events each calendar year from 11:00 pm to midnight if SABGS ensures that the noise levels do not exceed 63 decibels after 11:00 pm.
- 3.8 CITY shall have the right to schedule up to twenty five (25) City Events each calendar year, subject to availability. City Events shall be defined as the use of an area of the Premises shown on Exhibit B (or subsequently determined by CITY and SABGS to be a Rental of Event Space) or other area within the Premises as may be agreed to by CITY and SABGS by CITY or for a CITY sponsored event, such as meetings, receptions and social events. City Events shall not be of a size or use that significantly impacts the use and enjoyment of the Botanical Garden by other visitors. CITY shall not pay any rental fees or deposits associated with City Events but CITY is responsible for all direct costs associated with City Events. CITY shall use its best efforts to request City Events at least

two weeks in advance; however SABGS acknowledges that this may not always be feasible.

#### **4. RESTAURANT AND GIFT SHOP OPERATION**

- 4.1 SABGS shall have the right to operate, or contract for the operation of, a restaurant (“Restaurant”) in the Carriage House Building, or other location within the Premises. SABGS shall have the right to operate the Restaurant in the manner it deems best, so long as its operation is compliant with all applicable laws, codes, and ordinances. All costs associated with the staffing, maintenance, operations, custodial, commodities, and other costs associated with the Restaurant shall be the responsibility of SABGS. SABGS shall collect all revenue from the operation of the Restaurant and retain and use all net revenue for the benefit of the San Antonio Botanical Garden.
- 4.2 SABGS shall have the right to operate, or contract for the operation of a Gift Shop (“Gift Shop”) located in the Carriage House Building, or other location within the Premises. All costs associated with the staffing, maintenance, operations, commodities, and other costs associated with the Gift Shop shall be the responsibility of SABGS. SABGS shall collect all revenue from the operation of the Gift Shop and retain and use all net revenue for the benefit of the San Antonio Botanical Garden.
- 4.3 SABGS may sell botanical plants on the Premises, including the gift shop, and at other locations as agreed to by the parties.
- 4.4 CITY does not have any obligation for the repair, maintenance, or replacement of furniture, equipment, or fixtures used in the operation of the restaurant or gift shop; but CITY shall continue to be responsible for the repair and maintenance of the structural elements, electrical, plumbing, and HVAC systems and equipment for the Carriage House Building, subject to availability of funds.

#### **5. EVENTS AND ADMISSION REVENUE**

- 5.1 SABGS shall have the right to host and manage special events (“SABGS Special Events”) within the Premises; the location, hours, and dates of such SABGS Special Events to be cooperatively agreed to by SABGS and CITY. SABGS shall pay all costs and retain all proceeds associated with SABGS Special Events for the benefit of the San Antonio Botanical Garden. SABGS shall work cooperatively with CITY to ensure that SABGS Special Events, including set-up and clean-up activities, do not significantly impact the use of the Premises by visitors.
- 5.2 CITY and SABGS shall work cooperatively to develop and implement other special events (“Joint Special Events”) within the Premises, which are defined as events for which SABGS is responsible for all costs associated with the development and marketing, and CITY provides staff support. CITY and SABGS shall determine which party will pay the costs other than development, marketing, and staffing, if any. The location, hours, and dates of such Joint Special Events will be cooperatively agreed to by SABGS and CITY. SABGS shall periodically provide to CITY a list of proposed Joint Special Events with a description of the event, proposed duration, anticipated costs, and

requested staff and other support from CITY. All Joint Special Events shall be subject to the prior written approval of CITY, through its Parks and Recreation Director.

- 5.3 For all Joint Special Events approved by CITY, SABGS shall receive twenty-five (25%) of the admission revenue for the duration of that Joint Special Event.
- 5.4 Catering services for SABGS Special Events and Joint Special Events shall be provided by an Approved Caterer.
- 5.5 SABGS shall have the right to host educational programs (“SABGS Educational Programs”) within the Premises; the location, hours, and dates of such SABGS Educational Programs to be cooperatively agreed to by SABGS and CITY. SABGS shall pay all costs and retain all proceeds associated with SABGS Educational Programs for the benefit of the San Antonio Botanical Garden. SABGS shall work cooperatively with CITY to ensure that SABGS Educational Programs, including set-up and clean-up activities, do not significantly impact the use of the Premises by visitors.
- 5.6 SABGS shall maintain an event calendar so that use of the Premises for SABGS Special Events, Joint Special Events and Educational Programs as well as maintenance and operational functions can be coordinated by the parties.
- 5.7 All SABGS Special Events and Joint Special Events must be compliant with City of San Antonio ordinances, including but not limited to those pertaining to alcohol, noise levels, and traffic control.
- 5.8 CITY agrees to honor the terms of the Reciprocal Admissions Program of the American Horticultural Society (AHS) or its equivalent and provide free admission to the Premises for those persons with current AHS membership cards.

## **6. USE OF ADMINISTRATIVE SPACE**

- 6.1 SABGS shall have the right to use the administrative office space on the second floor of the Carriage House, or other location within the Premises for administrative purposes and storage. SABGS shall be responsible for providing, operating, and maintaining all office furniture, fixtures, and equipment.

## **7. STAFFING**

- 7.1 SABGS and CITY shall be responsible for the management of and costs associated with their respective staff, except as described below.
- 7.2 CITY is not obligated to provide staff to support SABGS Special Events, Rental of Event Space, SABGS Educational Programs, Restaurant, Gift Shop, or administrative functions of SABGS.
- 7.3 CITY shall hire and supervise the Botanical Garden Manager, and SABGS shall provide a contribution of \$20,000 annually, due to CITY on or before January 31 of each year for that calendar year, to supplement the salary cost of the Botanical Garden Manager. In the event that SABGS exercises its option to terminate this Agreement, CITY will not reimburse any portion of this salary contribution paid to CITY. In addition, SABGS shall

pay for Botanical Garden Manager travel expenses, as agreed to by the Parties.

## 8. ANNUAL ACHIEVEMENT REPORT

- 8.1 SABGS and CITY will work cooperatively toward the goal of SABGS assuming responsibility for the operation and management of the Premises at the end of the term of this Agreement and any renewals thereto. In furtherance of this goal, SABGS shall undertake tasks and report annually to CITY on their actions related to this transition, as outlined below.
- 8.2 Within sixty (60) days after the end of each year of the term of this Agreement, SABGS shall provide a written report to the City outlining the matters accomplished by SABGS during the previous year ("Annual Achievement Report"). The Annual Achievement Report shall contain the information outlined in this Section and may contain additional information and recommendations, as desired by SABGS. The CITY's Director of Parks and Recreation shall have the right to approve modifications to the content and schedule outlined below; however, all requested information must be provided to CITY by SABGS no later than the end of the Expiration Date of the License Agreement.
- 8.3 Year One:
- 8.3.1 Review of Rental of Event Space, SABGS Special Event, Restaurant and Gift Shop policies and operations, and develop a plan to increase revenue, reduce expenses, and/or enhance the experience of visitors/participants.
- 8.3.2 Report on information obtained from other botanical facilities concerning their business and operational practices and admission fee policies. SABGS shall analyze and summarize the information received and provide CITY with recommendations regarding changes in operating practices to increase revenue, decrease expenses, and/or enhance the experience of visitors to the Premises.
- 8.4 Year Two:
- 8.4.1 Update on changes to matters presented in Year One report.
- 8.4.2 Capital Improvements/Capital Repairs: Proposed capital improvements/capital repairs, including a prioritization of such projects and general estimate of cost for design and construction. Proposed capital Improvement/capital repair projects must meet one or more of the following criteria: (a) enhance revenue to CITY or SABGS, (b) enhance educational programming, and (c) repair essential infrastructure. Further, proposed capital improvement projects shall not require a significant increase in operating expenses, unless such increase is expected to be offset by additional revenue or by SABGS.
- 8.4.3 CITY and SABGS shall work cooperatively to develop a capital improvement/capital repair plan ("Capital Improvement and Repair Plan") based on projects proposed by SABGS, as well as projects that may be identified by CITY. CITY funding of the Capital Improvement and Repair Plan shall be considered as a part of CITY'S regular and customary capital budget and bond project processes. SABGS funding of projects in the Capital Improvement and

Repair Plan may come from funds raised, donations, revenue from SABGS Special Events, Rental of Event Space, Restaurant, Gift Shop, Educational Programs or other sources of funds.

8.5 Year Three:

- 8.5.1 Update on changes to matters presented in Years One and Two.
- 8.5.2 Evaluation of financial management and internal control matters including (a) current banking relationships and account structure, and any proposed modification, (b) current accounts receivable and payable systems and procedures and any proposed modification.

8.6 Year Four:

- 8.6.1 Update on changes to matters presented in Years One, Two, and Three.
- 8.6.2 Evaluation of legal and risk management matters including (a) anticipated legal relationships and means of controlling risk in those relationships and (b) proposed risk management relationships and practices.
- 8.6.3 Marketing: Proposed marketing plan
- 8.6.4 Vendors/Contractors: Proposed plan for contracting for services and supplies.
- 8.6.5 Furniture, Fixtures and Equipment (FF&E): Proposed plan for the transition of CITY owned FF&E, as well as a plan for the procurement by SABGS of additional FF&E, as needed.
- 8.6.6 Employee Transition: Proposed staffing and compensation plan, to include proposed organizational structure, employee policies, compensation, insurance benefits, retirement benefits, and attendance and leave policies.

8.7 Year Five:

- 8.7.1 Update on changes to matters presented in Years One, Two, Three, and Four.

**9. CITY RESPONSIBILITIES**

- 9.1 CITY shall be responsible for the operation and maintenance of the Premises, and all costs associated therewith, in a manner that is the same or better than provided prior to the commencement of this Agreement, subject to the appropriation of funds.
- 9.2 CITY shall establish fees and collect admission revenue, except as provided in this Agreement.
- 9.3 In the event that CITY is the beneficiary of any donations or contributions designated to benefit the San Antonio Botanical Garden, CITY will receive and process such donations in accordance with CITY's Administrative Directive 8.8 Donations/Contributions. CITY shall consult with SABGS regarding the use of all donations and contributions and, subject to the consent of SABGS; CITY may elect to allow SABGS to facilitate the expenditure of donations and contributions in compliance with their designation.

### **10. RECORDS AND REPORTS**

- 10.1 Throughout the term of this Agreement and any extensions hereof, SABGS shall maintain complete and accurate permanent financial records of all income and expenditures. Such records shall be maintained on a comprehensive basis, in accordance with generally accepted auditing standards. Such financial records and supporting documentation shall be preserved in Bexar County, Texas, for at least five (5) years after the creation of the documentation and shall be open to CITY inspection, review, and audit following reasonable notification of intent to inspect.
- 10.2 CITY reserves the right to conduct, or cause to be conducted, at its expense a review and/or audit of SABGS'S records, and the records at any and all times deemed necessary by CITY provided, however, an audit will be conducted no more often than one time per year. CITY staff, a Certified Public Accountant (CPA), or other auditors as designated by CITY, may perform such audits and/or reviews. CITY reserves the right to determine the scope of every audit and/or review. In accordance herewith, SABGS agrees to make available to CITY all accounting records.
- 10.3 On or before May 1 of each year, or other date as may be agreed to by CITY and SABGS, SABGS shall provide to CITY an audited financial statement ("Annual Audited Financial Statement") for the year ending December 31, or other period as may be agreed to by CITY and SABGS, prepared by an independent Certified Public Accountant. The Annual Audited Financial Statement shall reflect SABGS'S revenue associated with each of the revenue sources, including but not necessarily limited to, Rental of Event Space, Restaurant, Gift Shop, SABGS Special Events, Joint Special Events, SABGS Educational Programs, Funds Raised, and other revenue sources.
- 10.4 SABGS and its contractors shall not obligate CITY for any debt related to the Premises without the prior written consent of CITY.

## 11. CITY'S RIGHT OF INSPECTIONS

- 11.1 CITY, through its Parks and Recreation Director and/or his representative(s), shall have the right to inspect the Premises at any time.

## 12. IMPROVEMENTS

- 12.1 SABGS shall present for review and written approval, all designs, plans, and specifications to the CITY and applicable CITY boards prior to commencing any construction or installation upon the Premises for SABGS's improvement projects during the term of this Agreement. While CITY may render any assistance it deems advisable, all costs for construction and related activities shall be borne solely by SABGS for projects that SABGS and CITY agree that SABGS shall manage. CITY reserves the right to enter the Premises at any time to inspect construction in progress and/or to determine the condition of fields and facilities so as to insure SABGS'S compliance with this Agreement.
- 12.2 SABGS agrees that it shall obtain any and all plans approvals, necessary permits, and clearances relative to lighting, sewer system, and construction from appropriate local, state, and federal regulator agencies, as required. A copy of said permits or clearances shall be provided to CITY prior to the start of any construction. SABGS covenants that it shall not bind, or attempt to bind, CITY for payment of any money in connection with any construction authorized hereunder and that it will fully indemnify and hold harmless the CITY against any and all claims, liens, suits, or actions asserted on account of labor, materials, or services furnished to SABGS during the performance of any said construction and against any claim for injury to person or property.
- 12.3 SABGS shall provide to CITY copies of all environmental studies and reports completed in conjunction with the development and construction of improvements.
- 12.4 When construction and/or renovation is occurring on the Botanical Garden, SABGS'S contractors will be required to secure Builder's Risk insurance and provide CITY with a certificate of insurance evidencing such coverage.

## 13. DEFAULTS AND TERMINATION RIGHTS

- 13.1 Default by SABGS: Any of the following events shall constitute default by SABGS under this Agreement:
- 13.1.1 SABGS shall apply for or consent to the appointment of a receiver, trustee, or liquidator of SABGS or of all or a substantial part of its assets, file a voluntary petition in bankruptcy, or admit in writing its inability to pay its debts as they become due, make a general assignment for the benefit of creditors, file a petition or an answer seeking reorganization or arrangement with creditors or take advantage of any insolvency law, or file an answer admitting the material allegations of a petition filed against SABGS in any bankruptcy, reorganization, or insolvency proceedings, or if any order, judgment, or decree shall be entered by

any court of competent jurisdiction, on the application of a creditor, adjudicating SABGS as bankrupt or insolvent or approving a petition seeking reorganization of SABGS, or appointing a receiver, trustee, or liquidator of SABGS or of all or a substantial part of its assets, and such order, judgment, or decree shall continue non-stayed and in effect for any period of sixty (60) consecutive days; or

13.1.2. SABGS shall fail to keep, observe, or perform any material covenant, agreement, term, or provision of this Agreement to be kept, observed, or performed by SABGS, and such default shall continue for a period of thirty (30) days after notice thereof by CITY to SABGS, or if such default cannot be cured within thirty (30) days, then such additional period as shall be reasonable provided so long as SABGS has commenced to cure such default and diligently pursues such cure to completion.

13.1.3. SABGS abandons all or any part of the Premises.

13.1.4 SABGS fails to maintain its status as a 501(c)(3) non-profit entity, or its equivalent in the event that the Internal Revenue Service tax provisions are modified.

13.2 Remedies of CITY: Upon the occurrence of an event of default by SABGS as specified in this Agreement hereof, CITY shall be entitled to terminate this Agreement and CITY shall have no further obligation hereunder.

13.3 Default by CITY: CITY shall be in default under this Agreement if CITY fails to keep, observe, or perform any material covenant, agreement, term, or provision of this Agreement to be kept, observed, or performed by CITY, and such default shall continue for a period of thirty (30) days after notice thereof by SABGS to CITY, or if such default cannot be cured within thirty (30) days, then such additional period as shall be reasonably provided that CITY has commenced to cure such default and diligently pursues such cure to completion.

13.4 Remedies of SABGS: Upon the occurrence of an event of default as specified in this Agreement hereof, SABGS shall be entitled to terminate this Agreement and shall have such other rights at law or equity to which it may be entitled.

#### 14. INDEMNIFICATION

14.1 **SABGS covenants and agrees to FULLY INDEMNIFY, DEFEND, and HOLD HARMLESS, the CITY and the elected officials, employees, officers, directors, volunteers and representatives of the CITY, individually and collectively, from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, penalties, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal or bodily injury, death and property damage, made upon the CITY arising out of, resulting from or related to SABGS'S activities under this Agreement, including any acts or omissions of SABGS, any agent, officer, director, representative, employee, consultant or subcontractor of SABGS, and their**

respective officers, agents employees, directors and representatives while in the exercise of the rights or performance of the duties under this Agreement. The indemnity provided for in this paragraph shall not apply to any liability resulting from the negligence of CITY, its officers or employees, in instances where such negligence causes personal injury, death, or property damage. IN THE EVENT SABGS AND CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS FOR THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.

- 14.2 The provisions of this INDEMNITY are solely for the benefit of the parties hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity. SABGS shall advise the CITY in writing within twenty four (24) hours of any claim or demand against the CITY or SABGS known to SABGS related to or arising out of SABGS'S activities under this Agreement and shall see to the investigation and defense of such claim or demand at SABGS's cost. The CITY shall have the right, at its option and at its own expense, to participate in such defense without relieving SABGS of any of its obligations under this paragraph.

## 15. INSURANCE REQUIREMENTS

- 15.1 Prior to the commencement of any work under this Agreement, SABGS shall furnish copies of all required endorsements and an original completed Certificate(s) of Insurance to the City's Parks and Recreation Department, which shall be clearly labeled "SAN ANTONIO BOTANICAL GARDEN SOCIETY" in the Description of Operations block of the Certificate. The original Certificate(s) shall be completed by an agent and signed by a person authorized by that insurer to bind coverage on its behalf. The CITY will not accept Memorandum of Insurance or Binders as proof of insurance. The original certificate(s) or form must have the agent's original signature, including the signer's company affiliation, title and phone number, and be mailed, with copies of all applicable endorsements, directly from the insurer's authorized representative to the CITY. The CITY shall have no duty to pay or perform under this License until such certificate and endorsements have been received and approved by the CITY'S Parks and Recreation Department. No officer or employee, other than the CITY'S Risk Manager, shall have authority to waive this requirement.
- 15.2 The CITY reserves the right to review the insurance requirements of this Article during the effective period of this contract and any extension or renewal hereof and to modify insurance coverages and their limits when deemed necessary and prudent by CITY'S Risk Manager based upon changes in statutory law, court decisions, or circumstances surrounding this License. In no instance will CITY allow modification whereupon CITY may incur increased risk.

15.3 SABGS'S financial integrity is of interest to the CITY; therefore, subject to SABGS'S right to maintain reasonable deductibles in such amounts as are approved by the CITY, SABGS shall obtain and maintain in full force and effect for the duration of this License, and any extension hereof, at SABGS'S sole expense, insurance coverage written on an occurrence basis, by companies authorized and admitted to do business in the State of Texas and with an A.M. Best's rating of no less than A- (VII), in the following types and for an amount not less than the amount listed:

TYPE	AMOUNT
Workers' Compensation and Employers Liability	Statutory \$1,000,000/\$1,000,000/\$1,000,000
Broad Form Commercial General Liability Insurance to include coverage for the following:	\$1,000,000 per occurrence \$2,000,000 general aggregate or its equivalent in umbrella or excess liability coverage
a. Premises/Operations	
b. Independent Contractors	
c. Contractual Liability	
d. Products/completed operations	
e. Personal Injury	
f. Liquor Liability*	
Comprehensive Automobile Liability	Combined Single Limit for Bodily Injury and Property Damage of \$1,000,000 per occurrence or its equivalent in umbrella or excess liability coverage
a. Owned/Leased Vehicles	
b. Non-owned Vehicles	
c. Hired Vehicles	
Property Insurance: For physical damage to the real property of SABGS, if any, including improvements and betterment to the Premises, if applicable.	Coverage for 80% of the replacement cost of SABGS's property.
Builders Risk/Installation Floater (applicable when	All Risk Policy written on an occurrence basis for

improvements under  
Section 13 are taking place)

80% replacement cost  
during construction phase  
of any new or existing  
structure.

\*Where applicable

- 15.4 The CITY shall be entitled, upon request and without expense, to receive copies of the policies, declarations page and all endorsements thereto as they apply to the limits required by the CITY, and may require the deletion, revision, or modification of particular policy terms, conditions, limitations or exclusions (except where policy provisions are established by law or regulation binding upon either of the parties hereto or the underwriter of any such policies). SABGS shall be required to comply with any such requests and shall submit a copy of the replacement certificate of insurance to CITY at the address provided below within 10 days of the requested change. SABGS shall pay any costs incurred resulting from said changes.

City of San Antonio

Attn: Parks and Recreation Department/Contract Services

P.O. Box 839966

San Antonio, Texas 78283-3966

- 15.5 SABGS agrees that with respect to the above required insurance, all insurance policies are to contain or be endorsed to contain the following required provisions:
- A. Name the CITY and its officers, officials, employees, volunteers, and elected representatives as additional insureds by endorsement, as respects operations and activities of, or on behalf of, the named insured performed under contract with the CITY, with the exception of the workers' compensation and professional liability policies;
  - B. Provide for an endorsement that the "other insurance" clause shall not apply to the City of San Antonio where the CITY is an additional insured shown on the policy;
  - C. Workers' compensation and employers' liability policies will provide a waiver of subrogation in favor of the CITY; and
  - D. Provide thirty (30) calendar days advance written notice directly to CITY of any suspension, cancellation, non-renewal or material change in coverage, and not less than ten (10) calendar days advance written notice for nonpayment of premium.
- 15.6 Within five (5) calendar days of a suspension, cancellation, or non-renewal of coverage, SABGS shall provide a replacement Certificate of Insurance and applicable endorsements to CITY. CITY shall have the option to suspend SABGS'S performance should there be a

lapse in coverage at any time during this contract. Failure to provide and to maintain the required insurance shall constitute a material breach of this contract.

- 15.7 In addition to any other remedies the CITY may have upon SABGS'S failure to provide and maintain any insurance or policy endorsements to the extent and within the time herein required, the CITY shall have the right to order SABGS to stop work hereunder, and/or withhold any payment(s) which become due to SABGS hereunder until SABGS demonstrates compliance with the requirements hereof.
- 15.8 Nothing herein contained shall be construed as limiting in any way the extent to which SABGS may be held responsible for payments of damages to persons or property resulting from SABGS'S or its subcontractors' performance of the work covered under this License.
- 15.9 It is agreed that SABGS'S insurance shall be deemed primary and non-contributory with respect to any insurance or self insurance carried by the City of San Antonio for liability arising out of operations under this contract.
- 15.10 It is understood and agreed that the insurance required is in addition to and separate from any other obligation contained in this License.
- 15.11 SABGS agrees to require, by written contract, that all subcontractors providing goods and services hereunder obtain the same insurance coverage required of SABGS herein, and provide a certificate of insurance and endorsement that names SABGS and the CITY as additional insureds. SABGS shall provide the CITY with the certificate and endorsement prior to the commencement of any work by the subcontractor. This provision may be modified by CITY's Risk Manager, without subsequent City Council approval, when deemed necessary and prudent, based upon changes in statutory law, court decisions, or circumstances surrounding this Agreement. Such modification may be enacted by letter signed by CITY's Risk Manager, which shall become a part of this Agreement for all purposes.
- 15.12 SABGS and any subcontractors are responsible for all damage to their own equipment and/or property.

## **16. ASSIGNMENT**

- 16.1 This Agreement is personal to SABGS. It is non-assignable, in whole or in part, and any attempt to assign this Agreement will terminate all privileges granted to SABGS hereunder.

## **17. RELATIONSHIP OF PARTIES**

- 17.1 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, partners, joint ventures, or any other similar such relationship between parties hereto. It is understood and agreed that no provision contained herein nor any acts of the parties hereto create a relationship other than the relationship of CITY and SABGS.

## 18. CONFLICT OF INTEREST

- 18.1 SABGS acknowledges that the Charter of the City of San Antonio and its Ethics Code prohibit a CITY officer or employee, as those terms are defined therein, from having a financial interest in any contract with the CITY or any CITY agency such as CITY-owned utilities. A CITY officer or employee has a "prohibited financial interest" in a contract with the CITY or in the sale to the CITY of land, material, supplies, or services, if any of the following individual(s) or entities is a party to the contract or sale: a CITY officer or employee, or his parent, child or spouse; a business entity in which the officer or employee, or his parent, child or spouse owns ten (10) percent or more of the voting stock or shares of the business entity, or ten (10) percent or more of the fair market values of the business entity; a business entity in which any individual or entity above listed is a subcontractor on a CITY contract, a partner or a parent or subsidiary business entity.
- 18.2 SABGS warrants and certifies, and this Agreement is made in reliance thereon, that it, its officers, employees and agents are neither officers nor employees of the CITY or any of its agencies such as CITY owned utilities.

## 19. SEPARABILITY

- 19.1 The parties hereto agree that if any clause or provision of this Agreement is determined to be illegal, invalid or unenforceable under any present or future federal, state, or local law, including, but not limited to, the City Charter, City Code, or City ordinances of the City of San Antonio, Texas, effective during the term of this Agreement, then and in that event it is the intention of the parties hereto that the remainder of this Agreement shall not be affected thereby, and it is also the intention of the parties to this Agreement that in lieu of each clause or provision of this Agreement that is illegal, invalid or unenforceable, there be added as a part of this Agreement a clause or provision as similar in terms to such illegal, invalid or unenforceable clause or provision as may be possible and be legal, valid and enforceable.

## 20. NOTICES

- 20.1 Notices to CITY required or appropriate under this Agreement shall be deemed sufficient if in writing and hand delivered or mailed, registered or certified mail, postage prepaid, addressed to

City of San Antonio  
Department of Parks and Recreation  
Contract Services Division  
P.O. Box 839966  
San Antonio, Texas 78283-3966

City of San Antonio  
City Clerk's Office  
City Hall-Second Floor  
P.O. Box 839966  
San Antonio, Texas 78283-3966

or to such other address as may have been designated in writing by the CITY from time to time. Notices to SABGS shall be deemed sufficient if in writing and hand SABGS at:

San Antonio Botanical Garden Society,      San Antonio Botanical Garden Society,

Inc.  
P O Box 6569  
San Antonio, Texas 78209

Attn: President

Inc.  
555 Funston  
San Antonio, Texas 78209

Attn: Managing Director

or at such other address on file with the City Clerk as SABGS may provide from time to time in writing to CITY.

## **21. TEXAS LAW TO APPLY**

- 21.1 **THIS AGREEMENT SHALL BE CONSTRUED UNDER AND IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, AND ALL OBLIGATIONS OF THE PARTIES CREATED HEREUNDER ARE PERFORMABLE IN BEXAR COUNTY, TEXAS.**

## **22. GENDER**

- 22.1 Words of any gender used in this Agreement shall be held and construed to include any other gender, and words in the singular number shall be held to include the plural, unless the context otherwise requires.

## **23. NON-DISCRIMINATION**

- 23.1 SABGS covenants that it, or its agents, employees or anyone under its control, will not discriminate against any individual or group on account of race, color, sex, age, religion, national origin, or handicap, in employment practices or in the use of or admission to the Premises, which said discrimination SABGS acknowledges is prohibited.

## **24. CAPTIONS**

- 24.1 The captions contained in this Agreement are for convenience of reference only and in no way limit or enlarge the terms and conditions of this Agreement.

## **25. HOLDING OVER**

- 25.1 Should SABGS hold over the Licensed Premises, or any part thereof, after the expiration or termination of the term of this Agreement, or any extension thereof, unless otherwise agreed in writing, such holding over shall constitute and be construed as a month to month contract only, with all terms, conditions and requirements of the preceding Agreement continuing in effect. The inclusion of the preceding sentence shall not be construed as CITY'S consent for SABGS to hold over.

## **26. AUTHORITY**

- 26.1 The signer of this Agreement for SABGS hereby represents and warrants that he or she has full authority to execute this Agreement on behalf of SABGS.
- 26.2 The Director of the Parks and Recreation Department shall be CITY'S principle agent for

monitoring this SABGS'S compliance with this Agreement and shall be CITY'S representative responsible for CITY'S administration of this Agreement. Whenever this Agreement requires the approval or consent of CITY such approval or consent will be given by the Director of Parks and Recreation or his designee, unless otherwise expressly specified in this Agreement.

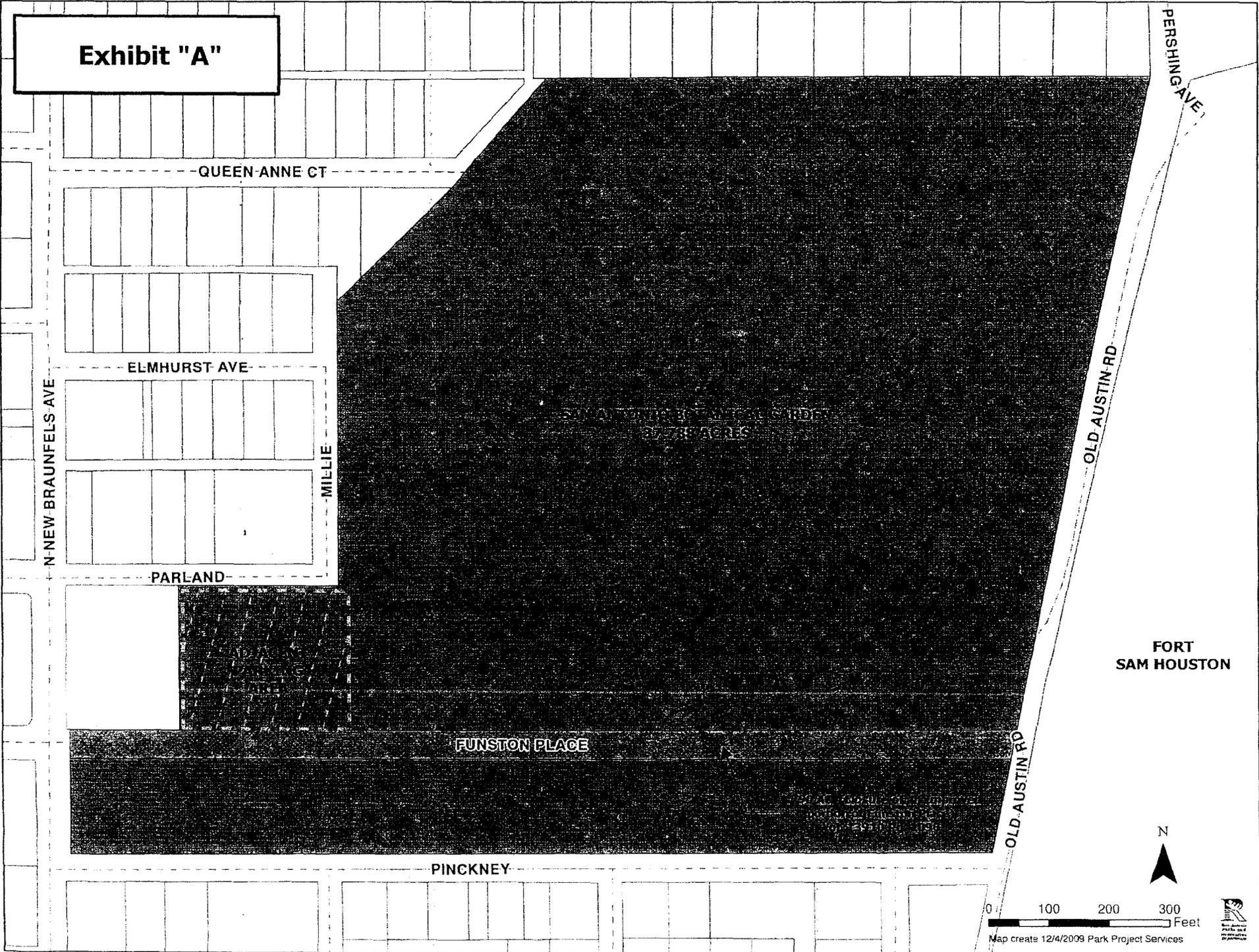
#### **27. ENTIRE AGREEMENT/AMENDMENT**

- 27.1 This Agreement, together with its attached exhibits and the authorizing ordinance, in writing, constitutes the entire agreement between the parties, any other written or parole agreement with CITY being expressly waived by SABGS.
- 27.2 No amendment, modification or alteration of the terms of this Agreement shall be binding unless the same be in writing, dated subsequent to the date hereof and duly executed by the parties hereto.
- 27.3 It is understood that the Charter of the CITY requires that all contracts with the CITY be in writing and adopted by ordinance. All amendments also need approval evidenced by an ordinance.

#### **28. EXHIBITS**

- A. Premises
- B. Rental of Event Space

**Exhibit "A"**



QUEEN ANNE CT

ELMHURST AVE

PARLAND

FUNSTON PLACE

PINCKNEY

OLD AUSTIN RD

OLD AUSTIN RD

PERSHING AVE

N NEW BRAUNFELS AVE

MILLIE

FORT SAM HOUSTON

N

0 100 200 300 Feet

Map create 12/4/2009 Park Project Services





FIELD NOTES  
FOR  
37.788 ACRE TRACT

A 37.788 acre tract of land, situated in the City of San Antonio, Bexar County, Texas and being a portion of Lot 1, Block 3, N.C.B. A-50, of the Mahncke Park Subdivision of record in Volume 9510 Page 46-48 of the Deed and Plat Records of Bexar County, Texas, all of that 1.790 acre tract of land, known as Funston Place, a 50 foot right of way, closed by Ordinance of record in Volume 13910 Page 1096 of the Official Public Records of Bexar County, Texas and all of Lots 1 through 28, N.C.B. 7186, of the Hilltop Terraces Subdivision of record in Volume 1625 Page 163 of the Deed and Plat Records of Bexar County, Texas and being more particularly described by metes and bounds as follows:

**BEGINNING:** At a set 1/2" iron rod with a blue plastic cap stamped "KFW SURVEYING" for the northeast corner of the intersection of Funston Place and New Braunsfels Avenue, being the southwest corner of Lot 1, Block 3, of the Mahncke Park Subdivision, for the most westerly northwest corner of the tract described herein.

**THENCE:** N 89°49'56" E with the south line of Lot 1, Block 3 and the north line of the 1.790 acre tract, a distance of 194.20 feet to a set PK nail with washer stamped "KFW SURVEYING" for an interior corner of the tract described herein.

**THENCE:** N 00°15'55" W into and across Lot 1, Block 3, a distance of 239.45 feet to a set 1/2' iron rod with a blue plastic cap stamped "KFW SURVEYING" in the south right of way line of Parland Place of the Northview Mahncke Park Subdivision of record in Volume 642 Page 89 of the Deed and Plat Records of Bexar County, Texas and a north line of Lot 1, Block 3 for a corner of the tract described herein.

**THENCE:** with the south, east and southeast line of the Northview Mahncke Park Subdivision and the south line of Parland Place right of way line and the east line of Millie Lane and the north, west and northwest line of Lot 1, Block 3 the following calls and distances:

1. N 89°54'14" E, a distance of 260.66 feet to a found 1/2" iron rod with "MLS" Cap at the southeast intersection of Parland Place with Millie Lane, for an interior corner of Lot 1, Block 3 and the tract described herein,
2. N 00°02'23" E, a distance of 511.49 feet to a set 1/2" iron rod with a blue plastic cap stamped "KFW SURVEYING" in the southeast line of Lot 19, Block 4, C.B. 6527 for a westerly corner of Lot 1, Block 3 and the tract described herein,
3. N 44°45'48" E, a distance of 482.39 feet to a found concrete monument in the south line of Lot 1, Block 2, C.B. 6525, for the most northerly northwest corner of Lot 1, Block 3 and the tract described herein, and
4. N 89°48'51" E, a distance of 999.96 feet to a found iron pipe in the northwest line of Old Austin Road, for the southeast corner of Lot 40, Block 2, C.B. 6525, the northeast corner of Lot 1, Block 3 and the tract described herein.

**THENCE:** S 11°58'09" W with the northwest right of way line of Old Austin Road and the southeast line of Lot 1, Block 3, a distance of 1117.42 feet to a found 1/2" iron rod at the northwest intersection of Funston Place with Old Austin Road for the northeast corner of the 1.790 acre tract and the southeast corner of Lot 1, Block 3 and an angle point of the tract described herein.

**THENCE:** S 06°17'23" W across Funston Place, with the east line of the 1.790 acre tract, a distance of 50.32 feet to a found 1/2" iron rod with "MLSCO" Cap at the southwest intersection of Funston Place with Old Austin Road, for the southeast corner of the 1.790 acre tract, the northeast corner of Lot 28, N.C.B. 7186, Hilltop Terraces Subdivision, for an angle point of the tract described herein.

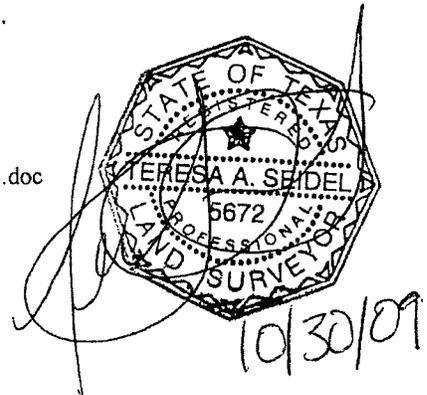
**THENCE:** S 11°47'36" W with the southeast line of Lot 28 and the northwest right of way line of Old Austin Road, a distance of 150.62 feet to a found iron pipe at the northwest intersection of Pinckney Street with Old Austin Road and the southeast corner of Lot 28 and the tract described herein.

**THENCE:** S 89°49'56" W with the south line of Lots 28 thru 1, N.C.B. 7186, of the Hilltop Terraces Subdivision and the north right of way line of Pinckney Street, a distance of 1525.21 feet to a set PK Nail with washer stamped "KFW Surveying" in top of a concrete wall in the east right of way line of New Braunsfels Avenue, for the southwest corner of Lot 1 and the tract described herein.

**THENCE:** with the east right of way line of New Braunsfels Avenue, the west line of Lot 1 and the 1.790 acre tract the following calls and distances:

1. N 00°10'04" W, a distance of 147.35 feet to a found 1/2" iron rod at the southwest intersection of Funston Place with New Braunsfels Avenue, for the southwest corner of the 1.790 acre tract and the northwest corner of Lot 1, and
2. N 00°05'38" W, a distance of 50.00 feet to the **POINT OF BEGINNING** and containing 37.788 acres (1,646,058 Square Feet more or less) and being described in accordance with a survey prepared by KFW Surveying.

Job No.: 08-094  
Prepared by: KFW Surveying  
Date: October 28, 2009  
File: S:\Draw 2008\08-094 SA Botanical Gardens\37.788 ACRES.doc





# SAN ANTONIO BOTANICAL GARDEN

-  Accessible Paths
-  Challenging Paths

- |  |  |                                     |
|--|--|-------------------------------------|
| <b>1</b> Sullivan Carriage House       | <b>9</b> Overlook                              | <b>17</b> Prairie                   |
| <b>2</b> Administration Building       | <b>10</b> Water Saver Garden                   | <b>18</b> Auld House                |
| <b>3</b> Education Building            | <b>11</b> Amphitheater                         | <b>19</b> Rose Garden               |
| <b>4</b> Wisteria Arbor                | <b>12</b> Children's Garden & Sunday House     | <b>20</b> Old Fashioned Garden      |
| <b>5</b> Fountain Plaza                | <b>13</b> Acequia                              | <b>21</b> Sacred Garden             |
| <b>6</b> Garden for the Blind          | <b>14</b> Southwest Texas Area & Adobe Houses  | <b>22</b> Herb Garden               |
| <b>7</b> Kumamoto En (Japanese Garden) | <b>15</b> East Texas Area & Log Cabin          | <b>23</b> Cactus & Succulent Garden |
| <b>8</b> Lucille Halsell Conservatory  | <b>16</b> Hill Country Area & Schumacher House | <b>24</b> Formal Garden             |

**ATTACHMENT B  
LEASE AGREEMENT  
SAN ANTONIO BOTANICAL GARDEN**

**1. BOTANICAL GARDEN TO BE LEASED**

- 1.1 CITY, for an in consideration of the covenants and promises herein contained to be kept and performed by SABGS; CITY hereby leases the real property owned by CITY as shown on Exhibit A (“Premises”) for the uses described in this Agreement. The Premises are hereby further described as an area consisting of 37.388 acres located at 555 Funston Road, New City Block A-50, San Antonio, Bexar County Texas, and known as the San Antonio Botanical Garden. In addition, the Premises include the area identified as “Adjacent Parking Area”, subject to the rights provided in the San Antonio Garden Center Use and Operations Agreement (“Garden Center Agreement”) between the San Antonio Garden Center, Inc., and CITY, and any renewals or extensions thereof. The Garden Center Agreement allows for the Adjacent Parking Area to be available for general public use and for the non-exclusive access to and use by the Garden Center.
- 1.2 SABGS has had full opportunity to examine the Botanical Garden and agrees that no representations respecting the condition of the Botanical Garden and no promises to alter, repair, or improve the Botanical Garden have been made by CITY or its agents to SABGS unless the same are contained herein or made a part hereof by reference herein or are referenced in the License Agreement. SABGS’S lease of the Botanical Garden shall be conclusive evidence of SABGS’S acceptance thereof in good order and satisfactory condition, and SABGS hereby accepts the Botanical Garden in its present condition, AS IS, WHERE IS, WITH ALL FAULTS, as suitable for the purpose of providing a botanical experience to the public and with the full knowledge, understanding, and agreement that CITY disclaims any warranty of suitability for SABGS’S use and possession of the Botanical Garden as a botanical garden or for any other purpose.
- 1.3 All permanent structures existing on the Botanical Garden and those added during the term of this Agreement shall be the property of CITY. CITY shall, during the term of this Lease, continue to provide insurance coverage for its property in conformance with its general property insurance program.
- 1.4 CITY shall have the right to schedule up to twenty five (25) City Events each calendar year, subject to availability. City Event shall be defined as the use of an area of the Premises shown on Exhibit B of the License Agreement (or subsequently determined by CITY and SABGS to be a Rental of Event Space) or other area within the Premises as may be agreed to by CITY and SABGS, by CITY or for a CITY sponsored event, such as meetings, receptions and social events. CITY Events shall not be of a size or use that significantly impacts the use and enjoyment of the Botanical Garden by other visitors. CITY shall not pay any rental fees or deposits associated with City Events but CITY is

responsible for all direct costs associated with City Events. For any hours before or after the Botanical Center operating hours that a City Event is held, City shall be responsible for costs incurred by SABGS for salaries and benefits for such City Event. CITY shall use its best efforts to request City Events at least two weeks in advance; however SABGS acknowledges that this may not always be feasible.

- 1.5 SABGS acts in the capacity of manager and tenant of the Botanical Garden and nothing contained in this Agreement shall be construed by anyone as creating the relationship of principal and agent, partners, joint venture or any other similar such relationship, and all of the services to the public provided by SABGS are provided on behalf of SABGS and not for or on behalf of CITY. Neither party to this Agreement has the authority to bind the other party or to hold out to third parties that it has the authority to bind the other.
- 1.6 SABGS agrees to take no action, either of a temporary or permanent nature, to preclude or limit access to the adjacent Garden Center property through the use of the portion of Funston Place road which was closed in 2009. Further, SABGS agrees to take no action, either of a temporary or permanent nature, to preclude or limit access to the Adjacent Parking Area through the use of the portion of Funston Place road which was closed in 2009, without the prior written approval of CITY.

## **2. SABGS MANAGEMENT STRUCTURE**

- 2.1 SABGS is a 501(c)(3) non-profit organization, authorized under the rules and regulations of the Internal Revenue Service and hereby agrees that it shall not modify this status without the prior written authorization of CITY through its Parks and Recreation Director or designee.
- 2.2 Articles of Incorporation of SABGS outlining the provisions of membership, the structure of the Board of Directors, the process for selection of officers, and the duties and rights and responsibilities of members, officers, and Board members has been filed with the Texas Secretary of State and are attached as Exhibit "B." SABGS hereby agrees that such Articles of Incorporation may not be materially modified without the prior written consent of CITY through its Director of Parks and Recreation or designee, which consent will not be unreasonably withheld or delayed.
- 2.3 SABGS shall allow the Director of Parks and Recreation or his/her designee to serve as a liaison to SABGS'S Board of Directors. Such liaison shall have rights to receive notice of and attend all meetings of the Board of Directors and have full right of access to SABGS'S books and records.

## **3. ALLOWABLE USES AND SERVICES TO BE PROVIDED**

- 3.1 SABGS, or its contractors, as provided in Article 6 below, shall provide the following services at and for the Botanical Garden:

A. General/Operational Responsibilities:

1. provide a botanical garden experience to the citizens of San Antonio and visitors during established operating days and hours, as approved by CITY;
2. hire and employ qualified and customer-service oriented staff;
3. develop and implement policies and procedures that ensure quality and consistent operational standards; and
4. provide amenities, attractions, educational opportunities, and concessions that enhance the experience and enjoyment of the Botanical Garden's customers.

B. Fiscal Responsibilities:

1. develop and implement an annual budget, subject to the approval of CITY;
2. collect and retain all established fees and other revenue;
3. pay all expenses associated with the operation of the Botanical Garden, including, but not limited to, salaries and other personnel costs, maintenance, equipment, and all other operational costs;
4. establish and maintain complete and accurate financial records of all revenue and expenses, in accordance with generally accepted accounting and auditing standards;
5. establish and enforce inventory, cash handling, and other fiscal and material controls that ensure appropriate and safe handling of revenues, expenditures, and assets;
6. establish segregated and dedicated banking accounts for the Botanical Garden; and
7. operate the Botanical Garden in a fiscally responsible manner through effective and efficient management, growth of existing and new revenue opportunities, and appropriate expenditure levels.

C. Maintenance Responsibilities:

1. maintain all permanent structures and other improvements at the Botanical Garden in accordance with the provisions herein; and

2. secure and maintain in good working order all equipment necessary to achieve the maintenance standards provided herein.
- 3.2 SABGS may use the Botanical Garden for operating a botanical garden and related activities, including supporting activities, but for no other uses, unless such other uses have received the written approval of the CITY.
- 3.3 SABGS agrees that the Botanical Garden shall not be used to conduct political activities for the benefit of any candidate for elective public office, partisan or non-partisan, nor shall the Botanical Garden personnel be assigned to work for or on behalf of any partisan or non-partisan political activity.
- 3.4 Upon the commencement of this Lease Agreement, SABGS shall become the owner of the plants and trees ("Plant Collection") within the Premises. Subject to all applicable laws, SABGS may buy, sell, trade, loan, relocate as a part of a capital project, donate receive as donation and breed specimens. Any removal or relocation of trees shall be subject to all applicable City ordinances.

#### **4. CONSIDERATION**

- 4.1 In consideration of the public benefit to be provided by SABGS through its operation, maintenance, fundraising, and capital improvements activities of the Botanical Garden, no rent shall be due or payable to CITY under this Agreement.
- 4.2 Subject to appropriation by the CITY and on a schedule that is acceptable to CITY and SABGS, CITY will advance funds to SABGS for the operation of the Premises ("City Funding"); however in no event will the total annual City Funding in any year during the term of this Lease Agreement exceed the Funding Cap, as defined below. The Funding Cap ("Funding Cap") to be in effect for the term of the Lease Agreement will be based on the CITY's Parks and Recreation Department appropriated budget for revenue and expenditures for the Botanical Garden Division for the CITY fiscal year in which the Lease Agreement commences. To calculate the Funding Cap, the budgeted expenditures will be subtracted from the budgeted revenue. The difference between these figures will be the established Funding Cap.
- 4.3 The Funding Cap will serve as the basis for the recommended City Funding for the first full CITY fiscal year of the term of the Lease Agreement and for the portion of the first year of the term of the Lease in the event that it does not commence at the beginning of a CITY Fiscal Year, adjusted proportionately and as needed to take into consideration revenue collected and expenditures incurred by CITY during the months between the beginning of that fiscal year and the Commencement Date.
- 4.4 During the year prior to the start of the second, sixth, eleventh, and sixteenth full CITY Fiscal Years during the term of the Lease, CITY will review SABGS's proposed City funding, as described in 5.1 C below, to determine the recommended City Funding for

the period of the second through fifth year and the five year periods beginning with the sixth, eleventh and sixteenth years. Criteria to be used by CITY in its determination of its recommended City Funding for years two (2) through the end of the term of this Lease Agreement will include, but not necessarily be limited to, SABGS's projected revenue, expenditures, cash flow, and cash reserves for the Premises.

- 4.5 In any CITY fiscal year in which SABGS revenues are higher and/or expenditures are lower than in the SABGS budget (which has been approved by CITY as outlined in Section 5.1 below), resulting in unused City Funding, SABGS will refund to CITY the unused City Funding ("Refund"). CITY will designate the Refund for Capital Repair and Improvement Funding, as defined below. The Refund will be in addition to the percentage of the City Funding to be designated for Capital Repair and Improvement Funding each fiscal year, as outlined below.
- 4.6 It is the goal of both parties to terminate the City Funding as soon as it is feasible and prudent for SABGS to operate the Premises without funding from the CITY.
- 4.7 The above notwithstanding, a portion of the City Funding will be set aside by CITY to provide for capital repair and improvements for the Premises ("Capital Repair and Improvement Funding"). The portion of the City Funding to be set aside for Capital Repair and Improvement Funding will be based on the percentages outlined below. In the event that the Lease Agreement does not commence at the beginning of a CITY's Fiscal Year, the percentage to be placed in the Capital Repair and Improvement Funding for the months between the Commencement Date and the beginning of the CITY's next Fiscal Year will be 0%. Additionally, the percentage to be placed in the Capital Repair and Improvement Funding for the months between the end of the CITY's Fiscal Year which falls in the last year of the Lease Term and the end of the Lease Term will be 20% of the City Funding for that period. In any year during the term of this Lease that there is no City Funding, CITY will not be obligated to designate any funds for Capital Repair and Improvement Funding.

City Fiscal Year 1 and first partial City Fiscal Year	0%
City Fiscal Years 2 - 5	5%
City Fiscal Years 6 - 10	10%
City Fiscal Years 11 - 15	15%
City Fiscal Years 16 - 20	20%

- 4.8 In the event that SABGS desires to conduct a capital repair or capital improvement to the Botanical Garden, SABGS shall provide the City with a proposal containing a description of the desired improvement, along with an estimate cost and estimated timeline for completion. Use of the Capital Repair and Improvement Funding for the requested improvement and/or repair shall be subject to the approval of CITY, such approval not to be unreasonably withheld. If approved, SABGS shall pay for the repair or improvement and submit to CITY copies of paid invoices and CITY shall reimburse SABGS for all approved costs.

- 4.9 Any Capital Repair and Improvement Funding remaining at the termination of this Lease Agreement shall remain the property of CITY.
- 4.10 The following shall serve as examples of the calculation of City Funding under various scenarios.
- 4.10.1 If SABGS, based on its budget, cash flow, and cash reserves, determines that it has a budgetary shortfall of \$1.6 million in a CITY fiscal year, and the established Funding Cap is \$1.5 million, SABGS would be eligible to receive \$1.5 million in City Funding. Prior to providing the City Funding to SABGS, CITY would set aside 5% for Capital Repair and Improvement Funding (if this year was within CITY Fiscal Years 2-5), resulting in a net funding to SABGS of \$1.425 million. SABGS would need to make budgetary adjustments or secure the remaining needed operating funding from other sources.
- 4.10.2 If SABGS, based on its budget, cash flow, and cash reserves, determines that it has a budgetary shortfall of \$1.1 million in a CITY fiscal year, and the established funding Cap is \$1.5 million, SABGS would be eligible to receive \$1.1 million in City Funding. Prior to providing the City Funding to SABGS, CITY would set aside 5% for Capital Repair and Improvement Funding (if this year was within CITY Fiscal Years 2-5), resulting in a net funding to SABGS of \$1.045 million. SABGS would need to make budgetary adjustments or secure the remaining needed operating funding from other sources.
- 4.10.3 If SABGS, based on its budget, cash flow, and cash reserves, determines that it does not have a budgetary shortfall in a CITY fiscal year, no City Funding will be provided during that year to SABGS and CITY will not set aside any Capital Repair and Improvement Funding.

## **5. BUDGET, FEES, FINANCIAL RECORDS AND REPORTING TO CITY**

- 5.1 On or before May 1 of each year, SABGS shall provide a report to CITY which shall include the following related to the following CITY fiscal year:
- A. a proposed operating budget for the Botanical Garden, including estimated revenue and expenses by categories and such budget may reflect an operating reserve fund, not to exceed ten percent (10%) of the budget;
- B. proposed regular fees, including any special or reduced fee structures and a description of the application of such special or reduced fees; and
- C. On the May 1 prior to the start of the second full CITY fiscal year, SABGS will make a recommendation to CITY of its proposed City Funding for the second full CITY fiscal year, based on SABGS's projected revenue, expenditures, cash flow, and cash reserves for the Premises for the second full CITY fiscal year. Subject to the approval of the Director of Parks and Recreation, this will be the recommended City Funding for the second full CITY fiscal year. The City Funding approved and appropriated by CITY for

the second full CITY fiscal year will also be the recommended City Funding for the following three CITY fiscal years. The same process will occur again for the sixth, eleventh, and sixteenth full CITY Fiscal Years to establish the recommended City funding for the five (5) subsequent CITY fiscal years.

The proposed operating budget is subject to the approval of CITY through its Director of Parks and Recreation, and maximum fees and City Funding are subject to the approval of City Council.

- 5.2 Throughout the term of this Agreement and any extensions hereof, SABGS shall maintain complete and accurate permanent financial records of all income and expenditures. Such records shall be maintained on a comprehensive basis, in accordance with generally accepted auditing standards. Such financial records and supporting documentation shall be preserved in Bexar County, Texas, for at least five (5) years after the creation of the documentation and shall be open to CITY inspection, review, and audit following reasonable notification of intent to inspect.
- 5.3 CITY reserves the right to conduct, or cause to be conducted, at its expense a review and/or audit of SABGS'S records, and the records at any and all times deemed necessary by CITY provided, however, an audit will be conducted no more often than one time per year. CITY staff, a Certified Public Accountant (CPA), or other auditors as designated by CITY, may perform such audits and/or reviews. CITY reserves the right to determine the scope of every audit and/or review. In accordance herewith, SABGS agrees to make available to CITY all accounting records.
- 5.4 On or before May 1 of each year, or other date as may be agreed to by CITY and SABGS, SABGS shall provide to CITY an audited financial statement ("Annual Audited Financial Statement") for the year ending December 31, or other period as may be agreed to by CITY and SABGS, prepared by an independent Certified Public Accountant. The Annual Audited Financial Statement shall reflect SABGS'S revenue associated with each of the revenue sources, including but not necessarily limited to, Rental of Event Space, Restaurant, Gift Shop, Special Events, Funds Raised, and other revenue sources.
- 5.5 SABGS, and when feasible its Concessions contractors, shall utilize and maintain in good working order a "point of sale" ("POS") software accounting system, or a comparable system to handle all transactions authorized under this Agreement. In those events where a POS system is not utilized, SABGS shall ensure that the Concessions contractor uses best business practices to with regard to the collection, management, cash control procedures, and calculation of all payments due to SABGS.
- 5.6 SABGS and its Concessions contractors shall not obligate CITY for any debt related to the Botanical Garden without the prior written consent of CITY.

## 6. EMPLOYMENT AND CONCESSION OPERATION

- 6.1 Except as otherwise provided in this Agreement, SABGS shall have the right to directly operate and retain the revenue from any or all concession operations, which are hereby defined as: (a) food and beverage, (b) gift shop merchandise, (c) educational programs, (d) plant and plant research sales, (e) facility rental, and (f) similar programs or services in support of the Premises (“*Concessions*”), and the right to enter into a contract with individuals or entities to operate any or all of the Concessions. If SABGS contracts for these services, the terms and conditions of the contract(s) must provide for compensation to SABGS based on an established fee or gross receipts generated by those Concessions, clearly state which of SABGS’S responsibilities under the terms and conditions of this Agreement are to be assumed by the Concession contract(s), and shall be subject to the consent of CITY through its Director of Parks and Recreation or designee, which consent shall not be unreasonably withheld, conditioned, or delayed.
- 6.2 SABGS, or its contractors, may employ and terminate employment for staff to operate the Botanical Garden.
- 6.3 SABGS, or its contractors, may hire seasonal, temporary, or volunteer employees to operate the Botanical Garden.
- 6.4 SABGS shall provide employees with competitive wages and benefits based on local market conditions.
- 6.5 SABGS shall provide an opportunity to all staff employed by CITY in its Botanical Garden operations as specified in the Botanical License Agreement to interview for employment with SABGS, but SABGS shall not be obligated to offer employment to any CITY employees.
- 6.6 SABGS, or its contractor, may offer incentive pay to employees based on the attainment of established performance measures related to the overall success of the Botanical Garden, customer service standards, new customers or programs, exceptional maintenance standards, or other measures related to the successful operation of the Botanical Garden.
- 6.7 The contracting of SABGS for Concessions shall not limit the obligations of SABGS under the terms of this Agreement.

## **7. MAINTENANCE AND UTILITIES**

- 7.1 SABGS, at its sole cost and expense, shall be responsible for maintaining the Premises and all existing facilities and improvements and any facilities and improvements added during the term of this Agreement: (a) in good, safe, and clean operating condition, (b) in accordance with standards generally accepted for botanical gardens; and (c) reasonable wear, tear, acts of God, or unavoidable accident insured casualty loss, only excepted. If SABGS is in default of its maintenance obligations, then CITY may, but is not obligated to, make or cause such repairs or maintenance to be made and shall not be responsible to

SABGS for any loss or damage that may accrue to the SABGS'S "business" revenue or operations by reason thereof. If CITY makes or causes such repairs or maintenance to be made, SABGS agrees that it will on demand, pay to CITY the reasonable and necessary cost thereof, and if SABGS shall default in such payment, CITY shall have the remedies provided elsewhere herein for default of indebtedness, costs, or charges due by the SABGS to CITY.

- 7.2 SABGS, at its sole cost and expense, shall provide and pay for all utilities serving the Botanical Garden. SABGS shall provide for and pay directly to the utility companies, all utility company connection charges, including, but not limited to, the cost of installing separate electric and water meters, telephone lines and connections and all charges incurred for heat, gas, electricity, water, sewer, garbage collection, telephone or any other utility services, used in or on the Botanical Garden. SABGS shall also furnish and install and maintain in good working order all electric light bulbs, tubes and ballasts. CITY shall not be liable to SABGS in damages or otherwise if said services are interrupted or terminated because of necessary repairs, installations, improvements or any cause beyond the control of CITY.
- 7.3 To the extent possible with existing irrigation systems or with systems installed during the term of this Agreement, SABGS agrees to provide adequate irrigation to maintain the Botanical Garden in good condition; provided, however, during any time that the Edwards Aquifer Authority or San Antonio Water System (SAWS) has deemed that water restrictions, based on the Aquifer Management Plan, are required, SABGS agrees to follow and comply with the posted water restrictions, as may be modified from time to time, subject to applicable authorized exceptions or exemptions.

## **8. FURNITURE, FIXTURES, AND EQUIPMENT**

- 8.1 CITY hereby transfers to SABGS the ownership of certain CITY-owned furniture, fixtures, and equipment ("*FF&E*") itemized in Exhibit "C", such Exhibit to be prepared and approved by CITY and SABGS upon the commencement of this Agreement. CITY and SABGS hereby acknowledge that the FF&E will be comprised of equipment and vehicles used in the operation and maintenance of the Botanical Garden and shall not include office equipment, including computers, telephones or other administratively used equipment. SABGS shall assume ownership of all FF&E listed in Exhibit C in based on an as-is condition and CITY shall have no further obligations for the repair or replacement of such FF&E. All furniture, fixtures, and equipment owned by others, including but not limited to, SABGS and any SABGS contractor, shall remain the property of the respective entity.
- 8.2 SABGS is responsible for obtaining any furniture, fixtures, and equipment in addition to the Exhibit "C" FF&E necessary for the operation and maintenance of the Botanical Garden, either through donation, purchase, lease, or lease/purchase.

## **9. CAPITAL IMPROVEMENTS AND CONSTRUCTION**

- 9.1 SABGS may not, without the prior written approval of CITY, initiate construction, or allow to be constructed, any permanent improvements of a material nature, on the Botanical Garden, or initiate any permanent alterations to the structures on the Botanical Garden without the prior written approval of (a) the CITY through its Director of Parks and Recreation, (b) the SABGS Board of Directors, and (c) applicable departments, boards or commissions of the CITY, including, but not limited to, the Historic and Design Review Commission and Parks and Recreation Board. All costs and expenses of such approved physical construction, improvements or alterations to the Botanical Garden initiated by SABGS, as well as all required permits and licenses for such construction, shall be at SABGS's sole cost and expense.
- 9.2 SABGS shall be responsible for the funding, design, and construction of all capital improvements during the term of this Agreement. The above notwithstanding, in the event CITY elects to provide funding for design and/or construction of capital improvements within the Premises, CITY and SABGS will enter into a separate funding agreement which will outline the rights and responsibilities of each party with regard to such funding.
- 9.3 All permanent improvements made on the Botanical Garden and/or alterations to permanent structures on the Botanical Garden made by SABGS shall become the property of CITY upon the expiration or earlier termination of this Agreement.
- 9.4 CITY shall not be responsible or liable for, and SABGS covenants that it shall not bind or attempt to bind the CITY for, the payment of any money in connection with the construction, repair, alteration, addition, or reconstruction in, on, or about the Botanical Garden, except as otherwise specified in this Agreement.
- 9.5 When construction and/or renovation is occurring on the Botanical Garden, SABGS'S contractors will be required to secure Builder's Risk insurance and provide CITY with a certificate of insurance evidencing such coverage.

## **10. ASSIGNMENT AND SUBLETTING**

- 10.1 Except as to a parent, subsidiary, or similarly affiliated company, SABGS shall not assign this Agreement, or allow same to be assigned by operation of law or otherwise, or sublet/subcontract the Botanical Garden or any part thereof without the prior written consent of CITY, which may be given only by or pursuant to an ordinance enacted by the City Council of San Antonio, Texas. Any assignment or subletting by SABGS without such permission shall constitute grounds for termination of this Agreement by the CITY; provided, however, that this Section 10.1 shall have no affect on SABGS's right to hire or contract for concession services, as outlined in Section 6, above.
- 10.2 Without the prior written consent of SABGS, CITY shall not have the right to transfer and assign, in whole or in part, any of its rights or obligations under this Agreement and

in the property referred to herein; but, to the extent that an approved assignee assumes CITY'S obligations hereunder, CITY shall, by virtue of such assignment, be released from such obligation.

- 10.3 The receipt by CITY of rent from an assignee or occupant of the Botanical Garden shall not be deemed a waiver of the covenant in this Agreement against assignment, and/or an acceptance of the assignee, or occupant as SABGS, or a release of SABGS from further observance or performance by SABGS of the covenants contained in this Agreement. No provision of this Agreement shall be deemed to have been waived by CITY unless such waiver is in writing and signed by CITY.

### 11. LIENS PROHIBITED

- 11.1 SABGS shall not suffer or permit mechanics liens or other liens to be filed against the fee title of the Botanical Garden or any building or improvement on the Botanical Garden by reason of any work, labor, services, or materials supplied or claimed to have been supplied to SABGS or to anyone holding the Botanical Garden or any part thereof through or under SABGS.
- 11.2 If any mechanics' liens or materialmen's liens shall be recorded against the Botanical Garden, or any improvements thereon, SABGS shall cause the same to be removed within thirty (30) days after such liens are recorded, or, in the alternative, if SABGS in good faith desires to contest the same, SABGS shall be privileged to do so, but in such case, SABGS hereby agrees to indemnify and save CITY harmless from all liability for damages occasioned thereby and shall, in the event of a judgment of foreclosure on said mechanics' lien, cause the same to be discharged and removed prior to the execution of such judgment, such damages to include all costs of court and attorneys' fees.

### 12. INDEMNIFICATION

- 12.1 **SABGS covenants and agrees to FULLY INDEMNIFY, DEFEND, and HOLD HARMLESS, the CITY and the elected officials, employees, officers, directors, volunteers and representatives of the CITY, individually and collectively, from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, penalties, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal or bodily injury, death and property damage, made upon the CITY arising out of, resulting from or related to SABGS'S activities under this Agreement, including any acts or omissions of SABGS, any agent, officer, director, representative, employee, consultant or subcontractor of SABGS, and their respective officers, agents employees, directors and representatives while in the exercise of the rights or performance of the duties under this Agreement. The indemnity provided for in this paragraph shall not apply to any liability resulting from the negligence of CITY, its officers or employees, in instances where such negligence causes personal injury, death, or property damage. IN THE EVENT SABGS AND CITY ARE FOUND JOINTLY LIABLE BY A**

**COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS FOR THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.**

- 12.2 The provisions of this **INDEMNITY** are solely for the benefit of the parties hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity. SABGS shall advise the CITY in writing within 24 hours of any claim or demand against the CITY or SABGS known to SABGS related to or arising out of SABGS'S activities under this Agreement and shall see to the investigation and defense of such claim or demand at SABGS'S cost. The CITY shall have the right, at its option and at its own expense, to participate in such defense without relieving SABGS of any of its obligations under this paragraph.

### **13. INSURANCE REQUIREMENTS**

- 13.1 Prior to the commencement of any work under this Agreement, SABGS shall furnish copies of all required endorsements and an original completed Certificate(s) of Insurance to the City's Parks and Recreation Department, which shall be clearly labeled "SAN ANTONIO BOTANICAL GARDEN SOCIETY" in the Description of Operations block of the Certificate. The original Certificate(s) shall be completed by an agent and signed by a person authorized by that insurer to bind coverage on its behalf. The CITY will not accept Memorandum of Insurance or Binders as proof of insurance. The original certificate(s) or form must have the agent's original signature, including the signer's company affiliation, title and phone number, and be mailed, with copies of all applicable endorsements, directly from the insurer's authorized representative to the CITY. The CITY shall have no duty to pay or perform under this Agreement until such certificate and endorsements have been received and approved by the CITY'S Parks and Recreation Department. No officer or employee, other than the CITY'S Risk Manager, shall have authority to waive this requirement.
- 13.2 The CITY reserves the right to review the insurance requirements of this Article during the effective period of this Agreement and any extension or renewal hereof and to modify insurance coverages and their limits when deemed necessary and prudent by CITY'S Risk Manager based upon changes in statutory law, court decisions, or circumstances surrounding this Agreement. In no instance will CITY allow modification whereupon CITY may incur increased risk.
- 13.3 SABGS'S financial integrity is of interest to the CITY; therefore, subject to SABGS'S right to maintain reasonable deductibles in such amounts as are approved by the CITY, SABGS shall obtain and maintain in full force and effect for the duration of this Agreement, and any extension hereof, at SABGS'S sole expense, insurance coverage

written on an occurrence basis, by companies authorized and admitted to do business in the State of Texas and with an A.M. Best's rating of no less than A- (VII), in the following types and for an amount not less than the amount listed:

TYPE	AMOUNT
1. Workers' Compensation and Employers Liability	Statutory \$1,000,000/\$1,000,000/\$1,000,000
2. Broad Form Commercial General Liability Insurance to include coverage for the following:	\$1,000,000 per occurrence \$2,000,000 general aggregate or its equivalent in umbrella or excess liability coverage
a. Premises/Operations	
b. Independent Contractors	
c. Contractual Liability	
d. Products/completed operations	
e. Personal Injury	
f. Liquor Liability*	
3. Comprehensive Automobile Liability	Combined Single Limit for Bodily Injury and Property Damage of
a. Owned/Leased Vehicles	\$1,000,000 per occurrence or its
b. Non-owned Vehicles	equivalent in excess liability coverage
c. Hired Vehicles	
4. Property Insurance: For physical damage to the real property of SABGS, if any, including improvements and betterment to the Premises, if applicable.	Coverage for 80% of the replacement cost of SABGS'S property.
Builders Risk/Installation Floater (applicable when improvements under Section 9 are taking place)	All Risk Policy written on an occurrence basis for 80% replacement cost during construction phase of any new or existing structure.

\* Where applicable

- 13.4 The CITY shall be entitled, upon request and without expense, to receive copies of the policies, declarations page and all endorsements thereto as they apply to the limits required by the CITY, and may require the deletion, revision, or modification of particular policy terms, conditions, limitations or exclusions (except where policy provisions are established by law or regulation binding upon either of the parties hereto or the underwriter of any such policies). SABGS shall be required to comply with any such requests and shall submit a copy of the replacement certificate of insurance to CITY at the address provided below within 10 days of the requested change. SABGS shall pay any costs incurred resulting from said changes.

City of San Antonio

Attn: Parks and Recreation Department/Contract Services

P.O. Box 839966

## San Antonio, Texas 78283-3966

- 13.5 SABGS agrees that with respect to the above required insurance, all insurance policies are to contain or be endorsed to contain the following required provisions:
- A. Name the CITY and its officers, officials, employees, volunteers, and elected representatives as additional insureds by endorsement, as respects operations and activities of, or on behalf of, the named insured performed under contract with the CITY, with the exception of the workers' compensation and professional liability policies;
  - B. Provide for an endorsement that the "other insurance" clause shall not apply to the City of San Antonio where the CITY is an additional insured shown on the policy;
  - C. Workers' compensation and employers' liability policies will provide a waiver of subrogation in favor of the CITY; and
  - D. Provide thirty (30) calendar days advance written notice directly to CITY of any suspension, cancellation, non-renewal or material change in coverage, and not less than ten (10) calendar days advance written notice for nonpayment of premium.
- 13.6 Within five (5) calendar days of a suspension, cancellation, or non-renewal of coverage, SABGS shall provide a replacement Certificate of Insurance and applicable endorsements to CITY. CITY shall have the option to suspend SABGS'S performance should there be a lapse in coverage at any time during this Agreement. Failure to provide and to maintain the required insurance shall constitute a material breach of this Agreement.
- 13.7 In addition to any other remedies the CITY may have upon SABGS'S failure to provide and maintain any insurance or policy endorsements to the extent and within the time herein required, the CITY shall have the right to order SABGS to stop work hereunder, and/or withhold any payment(s) which become due to SABGS hereunder until SABGS demonstrates compliance with the requirements hereof.
- 13.8 Nothing herein contained shall be construed as limiting in any way the extent to which SABGS may be held responsible for payments of damages to persons or property resulting from SABGS'S or its subcontractors' performance of the work covered under this Agreement.
- 13.9 It is agreed that SABGS'S insurance shall be deemed primary and non-contributory with respect to any insurance or self insurance carried by the City of San Antonio for liability arising out of operations under this Agreement.
- 13.10 It is understood and agreed that the insurance required is in addition to and separate from any other obligation contained in this Agreement.
- 13.11 SABGS agrees to require, by written contract, that all subcontractors providing goods or services hereunder obtain the same insurance coverages required of SABGS herein, and provide a certificate of insurance and endorsement that names SABGS and the CITY as

additional insured. SABGS shall provide the CITY with the certificate and endorsement prior to the commencement of any work by the subcontractor. This provision may be modified by CITY's Risk Manager, without subsequent City Council approval, when deemed necessary and prudent, based upon changes in statutory law, court decisions, or circumstances surrounding this Agreement. Such modification may be enacted by letter signed by the CITY's Risk Manager, which shall become a part of the Agreement for all purposes.

- 13.12 SABGS and any subcontractors are responsible for all damage to their own equipment and/or property.

#### **14. FIRE OR OTHER CASUALTY**

- 14.1 If any part of the improvements on the Botanical Garden should be damaged by fire or other casualty and reconstruction and repair of the damaged improvements is economically practical as determined by CITY and SABGS in its respective reasonable judgment, then, in such event or events, the damaged or destroyed improvements shall be rebuilt and/or repaired to the extent of the insurance proceeds received by CITY and SABCS for such rebuilding and/or repairing. Any rebuilding or reconstruction work shall be performed in a good and workmanlike manner by CITY and SABGS personnel or by one or more independent contractors selected by CITY and SABGS; provided, however, that the extent of such reconstruction or repair shall be limited to restoring the damaged improvements to substantially their condition immediately prior to the casualty unless approval for a design difference from the original design has been obtained from CITY. The approvals required pursuant to Article 9, above, shall be required for these renovations. If CITY and SABCS agree that reconstruction and repair of the damaged improvements is not economically practical, then SABCS may, at its option, terminate this Lease Agreement and all rights in the Botanical Garden.

#### **15. CONDEMNATION**

- 15.1 If the Botanical Garden is taken, in whole or in part, by any governmental authority other than CITY, this Agreement and all rights or permissions to use hereunder shall, at the option of CITY, cease on the date that title to such land so taken or transferred vests in the condemning authority. SABGS hereby waives all rights to any proceeds of such condemnation of the real property owned by CITY, but specifically reserves its rights with respect to loss of business and personal property to seek proceeds from condemnation proceeding of the property and any other proceeds that may become available to SABGS under such proceedings.

#### **16. DEFAULT AND REMEDIES**

- 16.1 The following events shall be deemed to be events of default by SABGS under this Agreement:

A. SABGS, or its assigns, sublessees, or successors in interest, ceases to be a non-profit corporation;

B. SABGS fails to pay CITY any money due and owing as provided for in this Agreement and such failure continues for a period of ten (10) days after written notice thereof to SABGS;

C. SABGS fails to comply with any term, provision, or covenant of this Agreement other than the payment of money, and has not cured such failure within thirty (30) days after written notice thereof to SABGS, unless SABGS has undertaken to effect such cure within such thirty (30) day period and is diligently prosecuting the same to completion; or

D. SABGS initiates any construction or improvement(s) requiring CITY approval without prior written approval of CITY.

16.2 Upon the occurrence of an event of default and after compliance with the procedures set forth herein, CITY may declare this Agreement and all rights and interests created by it to be terminated, may seek any and all damages occasioned by SABGS'S default hereunder, or may seek any other remedy available at law or in equity.

16.3 Upon CITY'S election to terminate this Agreement, CITY, its agent or attorney, may take possession of the Botanical Garden and SABGS shall make good any deficiency. Any termination of this Agreement as herein provided shall not relieve SABGS from the payment of any sum or sums that shall then be due and payable to CITY hereunder, or any claim for damages then or theretofore accruing against SABGS hereunder, and any such termination shall not prevent CITY from enforcing the payment of any such sum or sums or claim for damages by any remedy provided for by law, or from recovering damages from SABGS or any default thereunder. All rights, options and remedies of CITY contained in this Agreement shall be construed and held to be cumulative and no one of them shall be exclusive of the other, and CITY shall have the right to pursue any one or all of such remedies or any other remedy or relief which may be provided by law or at equity, whether or not stated in this Agreement. No waiver by CITY of a breach of any of the covenants, conditions, or restrictions of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same or any other covenant, condition, or restriction herein contained.

16.4 If CITY (a) fails to pay or advance to or on behalf of SABGS any money due and owing as provided for in this Agreement and such failure continues for a period of ten (10) days after written notice thereof to CITY; or (b) fails to comply with any term, provision, or covenant of this Agreement other than the payment of money, and has not undertaken to effect such cure within thirty (30) days after written notice thereof to CITY, unless CITY has undertaken to effect such cure within such thirty (30) day period and is diligently prosecuting the same to completion, then (c) in addition to any other remedy SABGS may have, SABGS may terminate this Agreement.

- 16.5 Except as provided in Article 8, above, SABGS shall have the right, within thirty (30) days after the termination of this Agreement, whether such termination be by the expiration of the term or an earlier termination under any provision of this Agreement, to remove from the Botanical Garden all of its furniture, fixtures, and equipment and other property which are not the property of CITY and have not become the property of CITY as herein provided or by attachment to the Botanical Garden, and with respect to any damage caused thereby, it shall have the obligation to restore the Botanical Garden to its condition prior to such removal, and provided that, if any of SABGS's property remains in or on the Botanical Garden after ninety (90) days following termination of this Agreement and no renewal agreement has been executed, such property as remains thereon shall be deemed to have become the property of CITY and may be disposed of as CITY sees fit, without liability to account to SABGS for the proceeds of any sale thereof.

### 17. MISCELLANEOUS PROVISIONS

- 17.1 SABGS shall observe and comply with all federal, state and local laws, regulations, ordinances, and codes pertaining to its activities under this Agreement. In the event that following the date of this Agreement CITY should modify its laws and/or ordinances and (a) the operations of SABGS otherwise carried out in conformance with the terms of this Agreement are found to be in violation of the terms of this Agreement due to the change in CITY laws and/or ordinances, (b) CITY elects to enforce the terms of this Agreement to remedy such default, and (c) the remedy exercised by CITY will impair the ability of the SABGS to continue to operate in the manner it has in the past under this Agreement, SABGS may elect to terminate this Agreement by providing written notice to CITY of the time (not to exceed twenty-four (24) months) it will take to vacate the Botanical Garden.
- 17.2 SABGS covenants that it, and its agents, employees and anyone under its control, will not discriminate against any individual or group based on race, color, sex, age, religion, disability, political affiliation, belief, or national origin, directly or indirectly, in employment practices or in admission to the Botanical Garden, which said discrimination SABGS acknowledges is strictly prohibited.
- 17.3 SABGS shall pay, on or before their respective due dates, to the appropriate collecting authority, all Federal, State, and local taxes and fees which are now or may hereafter be levied upon the Botanical Garden, or upon SABGS, or upon the business conducted on or in the Botanical Garden, or upon any of SABGS'S property used in connection therewith; and shall maintain in current status all Federal, State, and local licenses and permits required for the operation of the business conducted by SABGS. Failure to comply with these foregoing provisions shall constitute grounds for termination of this Agreement by CITY.
- 17.4 In the event that CITY is the beneficiary of any donations or contributions designated to benefit the San Antonio Botanical Garden, CITY will receive and process such donations in accordance with CITY's Administrative Directive 8.8 Donations/Contributions. CITY

shall consult with SABGS regarding the use of all donations and contributions and, subject to the consent of SABGS; CITY may elect to allow SABGS to facilitate the expenditure of donations and contributions in compliance with their designation.

**18. SEPARABILITY**

18.1 If any article, section, clause, or provision of this Agreement is illegal, invalid or unenforceable under present or future laws effective during the term of this Agreement, then and in that event it is the intention of the parties hereto that the remainder of this Agreement shall not be affected thereby, and it is also the intention of the parties to this Agreement that in lieu of each article, section, clause, or provision of this Agreement that is illegal, invalid or unenforceable, there be added as a part of this Agreement a clause or provision as similar in terms to such illegal, invalid or unenforceable article, section, clause, or provision as may be possible and be legal, valid and enforceable.

**19. NOTICES**

19.1 Notices to CITY required or appropriate under this Agreement shall be deemed sufficient if in writing and hand delivered or mailed, Registered or Certified mail, Postage Prepaid, addressed to:

City of San Antonio Department of Parks and Recreation P.O. Box 839966 San Antonio, Texas 78283-3966	City of San Antonio City Clerk's Office City Hall-Second Floor P.O. Box 839966 San Antonio, Texas 78283-3966
---	--

or to such other address as may have been designated in writing by CITY from time to time.

Notices to SABGS shall be deemed sufficient if in writing and hand delivered or mailed, Registered or Certified mail, Postage Prepaid, addressed to SABGS at:

San Antonio Botanical Garden Society, Inc. P. O. Box 6569 San Antonio TX 78209  Attn: President	San Antonio Botanical Garden Society, Inc. 555 Funston San Antonio TX 78209  Attn: Managing Director
--	--

Or at such other address as SABGS may provide from time to time in writing to CITY.

**20. ENTIRE AGREEMENT/AMENDMENT**

- 20.1 This Agreement, together with its attachments and the authorizing ordinance or ordinances, in writing, constitutes the entire agreement between the parties, any other written or parole agreement between CITY and SABGS being expressly waived by CITY and SABGS.
- 20.2 No amendment, modification or alteration of the terms of this Agreement shall be binding unless the same is in writing, dated subsequent to the date hereof and duly executed by the parties hereto.
- 20.3 It is understood that the CITY Charter requires that all contracts with CITY be in writing and adopted by ordinance. All amendments also need approval evidenced by an ordinance.

**21. TEXAS LAW TO APPLY**

- 21.1 THIS AGREEMENT SHALL BE CONSTRUED UNDER AND IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, AND ALL OBLIGATIONS OF THE PARTIES CREATED HEREUNDER ARE PERFORMABLE IN BEXAR COUNTY, TEXAS.

**22. GENDER**

- 22.1 Words of any gender used in this Agreement shall be held and construed to include any other gender, and words in the singular number shall be held to include the plural, unless the context otherwise requires.

**23. PARTIES BOUND**

- 23.1 If there shall be more than one party designated as SABGS in this Agreement, they shall each be bound jointly and severally hereunder.
- 23.2 The covenants and agreements herein contained shall inure to the benefit of and be binding upon the parties hereto; their respective heirs, legal representatives, successors, and such assigns as have been approved by CITY.

**24. CAPTIONS**

- 24.1 The captions contained in this Agreement are for convenience of reference only, and in no way limit or enlarge the terms and conditions of this Agreement.

**25. CONFLICT OF INTEREST**

- 25.1 SABGS acknowledges that the CITY Charter and its Ethics Code prohibit a CITY officer or employee, as those terms are defined therein, from having a financial interest in any contract with CITY or any CITY agency such as CITY-owned utilities. A CITY officer or employee has a "prohibited financial interest" in a contract with CITY or in the sale to CITY of land, material, supplies, or services, if any of the following individual(s) or entities is a party to the contract or sale: a CITY officer or employee, or his parent, child or spouse; a business entity in which the officer or employee, or his parent, child or spouse owns ten (10) percent or more of the voting stock or shares of the business entity, or ten (10) percent or more of the fair market values of the business entity; or a business entity in which any individual or entity above listed is a subcontractor on a CITY contract, a partner or a parent or subsidiary business entity.
- 25.2 SABGS warrants and certifies, and this Agreement is made in reliance thereon, that, as of the commencement of the term of this Agreement, it, its officers, employees and agents are neither officers nor employees of CITY or any of its agencies such as CITY owned utilities.

## **26. AUTHORITY**

- 26.1 The signer of this Agreement for SABGS hereby represents and warrants that he or she has full authority to execute this Agreement on behalf of SABGS.
- 26.2 The Director of the Parks and Recreation Department shall be CITY'S principle agent for monitoring the SABGS's compliance with this Agreement and shall be CITY'S representative responsible for CITY'S administration of this Agreement. Whenever this Agreement requires the approval or consent of CITY such approval or consent will be given by the Director of Parks and Recreation or his designee, unless otherwise expressly specified in this Agreement.
- 26.3 Unless written notification by SABGS to the contrary is received and approved by CITY, the President shall be SABGS's designated representative responsible for the management of all contractual matters pertaining to this Agreement.

## **27. RESERVATIONS: CITY**

- 27.1 SABGS shall permit CITY'S agents, representatives, or employees to enter upon the Botanical Garden at all reasonable times, for the purpose of audit or inspection, in order to determine whether SABGS is in compliance with the terms hereof.
- 27.2 CITY park police, San Antonio Police Department, and other safety personnel shall have the right of entry on and into the Botanical Garden as needed to investigate any circumstances, conditions, or person(s) that may appear to be suspicious. SABGS shall cooperate with all reasonable requests by such personnel to facilitate public safety and orderly conduct by persons. SABGS expressly understands and agrees that CITY has not

agreed to act and does not act as an insurer of SABGS's property and does not guarantee security against theft, vandalism, or injury of whatever nature and kind to persons or property.

## **28. EXHIBITS**

- A. Description of Botanical Garden
- B. SABGS Articles of Incorporation
- C. Furniture, Fixtures, and Equipment

Exhibit "A"

QUEEN ANNE CT

ELMHURST AVE

N-NEW BRAUNFELS AVE

MILLIE

PARLAND

ADAGE  
PARK

FUNSTON PLACE

PINCKNEY

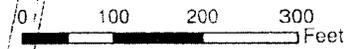
SAN ANTONIO BOTANICAL GARDEN  
67,788 ACRES

FORT  
SAM HOUSTON

OLD AUSTIN RD

OLD AUSTIN RD

PERSHING AVE



Map create 12/4/2009 Park Project Services





FIELD NOTES  
FOR  
37.788 ACRE TRACT

A 37.788 acre tract of land, situated in the City of San Antonio, Bexar County, Texas and being a portion of Lot 1, Block 3, N.C.B. A-50, of the Mahncke Park Subdivision of record in Volume 9510 Page 46-48 of the Deed and Plat Records of Bexar County, Texas, all of that 1.790 acre tract of land, known as Funston Place, a 50 foot right of way, closed by Ordinance of record in Volume 13910 Page 1096 of the Official Public Records of Bexar County, Texas and all of Lots 1 through 28, N.C.B. 7186, of the Hilltop Terraces Subdivision of record in Volume 1625 Page 163 of the Deed and Plat Records of Bexar County, Texas and being more particularly described by metes and bounds as follows:

**BEGINNING:** At a set 1/2" iron rod with a blue plastic cap stamped "KFW SURVEYING" for the northeast corner of the intersection of Funston Place and New Braunsfels Avenue, being the southwest corner of Lot 1, Block 3, of the Mahncke Park Subdivision, for the most westerly northwest corner of the tract described herein.

**THENCE:** N 89°49'56" E with the south line of Lot 1, Block 3 and the north line of the 1.790 acre tract, a distance of 194.20 feet to a set PK nail with washer stamped "KFW SURVEYING" for an interior corner of the tract described herein.

**THENCE:** N 00°15'55" W into and across Lot 1, Block 3, a distance of 239.45 feet to a set 1/2' iron rod with a blue plastic cap stamped "KFW SURVEYING" in the south right of way line of Parland Place of the Northview Mahncke Park Subdivision of record in Volume 642 Page 89 of the Deed and Plat Records of Bexar County, Texas and a north line of Lot 1, Block 3 for a corner of the tract described herein.

**THENCE:** with the south, east and southeast line of the Northview Mahncke Park Subdivision and the south line of Parland Place right of way line and the east line of Millie Lane and the north, west and northwest line of Lot 1, Block 3 the following calls and distances:

1. N 89°54'14" E, a distance of 260.66 feet to a found 1/2" iron rod with "MLS" Cap at the southeast intersection of Parland Place with Millie Lane, for an interior corner of Lot 1, Block 3 and the tract described herein,
2. N 00°02'23" E, a distance of 511.49 feet to a set 1/2" iron rod with a blue plastic cap stamped "KFW SURVEYING" in the southeast line of Lot 19, Block 4, C.B. 6527 for a westerly corner of Lot 1, Block 3 and the tract described herein,
3. N 44°45'48" E, a distance of 482.39 feet to a found concrete monument in the south line of Lot 1, Block 2, C.B. 6525, for the most northerly northwest corner of Lot 1, Block 3 and the tract described herein, and
4. N 89°48'51" E, a distance of 999.96 feet to a found iron pipe in the northwest line of Old Austin Road, for the southeast corner of Lot 40, Block 2, C.B. 6525, the northeast corner of Lot 1, Block 3 and the tract described herein.

**THENCE:** S 11°58'09" W with the northwest right of way line of Old Austin Road and the southeast line of Lot 1, Block 3, a distance of 1117.42 feet to a found 1/2" iron rod at the northwest intersection of Funston Place with Old Austin Road for the northeast corner of the 1.790 acre tract and the southeast corner of Lot 1, Block 3 and an angle point of the tract described herein.

**THENCE:** S 06°17'23" W across Funston Place, with the east line of the 1.790 acre tract, a distance of 50.32 feet to a found 1/2" iron rod with "MLSCO" Cap at the southwest intersection of Funston Place with Old Austin Road, for the southeast corner of the 1.790 acre tract, the northeast corner of Lot 28, N.C.B. 7186, Hilltop Terraces Subdivision, for an angle point of the tract described herein.

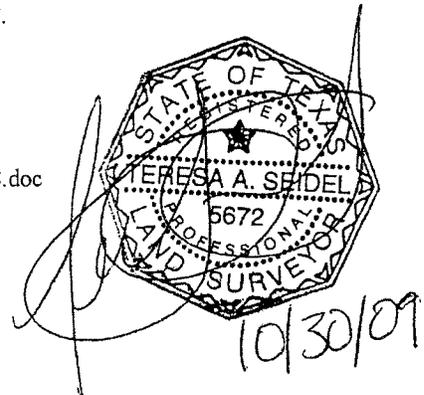
**THENCE:** S 11°47'36" W with the southeast line of Lot 28 and the northwest right of way line of Old Austin Road, a distance of 150.62 feet to a found iron pipe at the northwest intersection of Pinckney Street with Old Austin Road and the southeast corner of Lot 28 and the tract described herein.

**THENCE:** S 89°49'56" W with the south line of Lots 28 thru 1, N.C.B. 7186, of the Hilltop Terraces Subdivision and the north right of way line of Pinckney Street, a distance of 1525.21 feet to a set PK Nail with washer stamped "KFW Surveying" in top of a concrete wall in the east right of way line of New Braunsfels Avenue, for the southwest corner of Lot 1 and the tract described herein.

**THENCE:** with the east right of way line of New Braunsfels Avenue, the west line of Lot 1 and the 1.790 acre tract the following calls and distances:

1. N 00°10'04" W, a distance of 147.35 feet to a found 1/2" iron rod at the southwest intersection of Funston Place with New Braunsfels Avenue, for the southwest corner of the 1.790 acre tract and the northwest corner of Lot 1, and
2. N 00°05'38" W, a distance of 50.00 feet to the **POINT OF BEGINNING** and containing 37.788 acres (1,646,058 Square Feet more or less) and being described in accordance with a survey prepared by KFW Surveying.

Job No.: 08-094  
Prepared by: KFW Surveying  
Date: October 28, 2009  
File: S:\Draw 2008\08-094 SA Botanical Gardens\37.788 ACRES.doc





## Office of the Secretary of State

### CERTIFICATE OF FILING OF

SAN ANTONIO BOTANICAL GARDEN SOCIETY, INC.  
54481801

[formerly: THE SAN ANTONIO BOTANICAL CENTER SOCIETY, INC.]

The undersigned, as Secretary of State of Texas, hereby certifies that a Certificate of Amendment for the above named entity has been received in this office and has been found to conform to the applicable provisions of law.

ACCORDINGLY, the undersigned, as Secretary of State, and by virtue of the authority vested in the secretary by law, hereby issues this certificate evidencing filing effective on the date shown below.

Dated: 03/03/2010

Effective: 03/03/2010



A handwritten signature in black ink, appearing to read "Hope Andrade".

Hope Andrade  
Secretary of State



The State of Texas  
Secretary of State

CERTIFICATE OF INCORPORATION  
OF

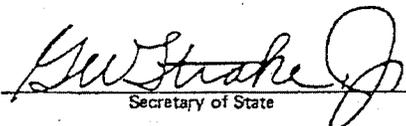
THE SAN ANTONIO BOTANICAL CENTER SOCIETY, INC.  
CHARTER NUMBER 544818

THE UNDERSIGNED, AS SECRETARY OF STATE OF THE STATE OF TEXAS,  
HEREBY CERTIFIES THAT ARTICLES OF INCORPORATION FOR THE ABOVE  
CORPORATION, DULY SIGNED AND VERIFIED HAVE BEEN RECEIVED IN THIS  
OFFICE AND ARE FOUND TO CONFORM TO LAW.

ACCORDINGLY THE UNDERSIGNED, AS SUCH SECRETARY OF STATE, AND BY  
VIRTUE OF THE AUTHORITY VESTED IN HIM BY LAW, HEREBY ISSUES THIS  
CERTIFICATE OF INCORPORATION AND ATTACHES HERETO A COPY OF THE  
ARTICLES OF INCORPORATION.

DATED DEC. 31, 1980



  
Secretary of State

TMK

FILED  
In the Office of the  
Secretary of State of Texas

DEC 31 1980

THE STATE OF TEXAS        )  
                                  )  
COUNTY OF BEXAR         )

CLERK OF  
Corporation Division

KNOW ALL MEN BY THESE PRESENTS:

That we, GRETCHEN C. NORTHRUP, MARGARET G. DEELY, and GILBERT M. DENMAN, JR., all citizens of Bexar County, Texas, under and by virtue of the laws of the State of Texas, do hereby voluntarily associate ourselves together as incorporators for the purpose of forming a private corporation under such laws, upon the following terms and conditions:

I.

The name of this corporation shall be THE SAN ANTONIO BOTANICAL CENTER SOCIETY, INC. The address of the corporation's office is Suite 537, 711 Navarro, San Antonio, Texas 78205. The name of the registered agent is Robert Washington; said person being located at aforesaid address.

II.

The purposes of this corporation shall be to foster, promote and develop the scientific, educational and aesthetic aspects of the San Antonio Botanical Center and in cooperation with the City of San Antonio provide advisory and managerial expertise to develop and exploit the full potential of said facility.

III.

The domicile of the corporation shall be the City of San Antonio, Bexar County, Texas.

IV.

The term for which it is to exist is perpetual.

V.

The number of Trustees shall be not less than ten (10) or more than one hundred (100), said Trustees having been selected on the basis of their professional, scientific, educational, and/or financial management expertise and/or their expressed interests in the

purpose of this corporation as expressed in Article II hereinabove.

The names of the original Trustees follow:

Dr. Rex Moyer	715 Stadium Drive San Antonio, Texas 78284
Mrs. F. J. Oppenheimer	103 Stillwell San Antonio, Texas 78209
Pat Legan	4403 Vance Jackson San Antonio, Texas 78230
Ganahl Walker	14536 Blanco Road San Antonio, Texas 78216
Millard F. McNeal	138 Blue Bonnet Street San Antonio, Texas 78202
Frederick Turner	3440 East Houston Street San Antonio, Texas 78220
Peter C. Selig	117 Lilac San Antonio, Texas 78209
Mrs. Cyrus L. Heard	307 Bushnell San Antonio, Texas 78212
Mrs. George P. Privett	708 Ridgemont San Antonio, Texas 78209
Mrs. Josh H. Groce	302 West Kingshighway San Antonio, Texas 78212
Mrs. Arthur S. Bennett	100 Geneseo Road San Antonio, Texas 78209
Mrs. Victor H. Braunig	542 Oakleaf San Antonio, Texas 78209
Maury Maverick, Jr.	Milam Building, 115 East Travis San Antonio, Texas 78205
Mrs. Joaquin Gonzalez	9714 Laurel Oaks San Antonio, Texas 78241
Dr. Oscar Van Auken	6900 Loop 1604 West San Antonio, Texas 78284
Mrs. Preston Northrup	128 West Brandon San Antonio, Texas 78209
Miss Helen Campbell	St. Anthony Hotel, 300 East Travis San Antonio, Texas 78205
Gilbert M. Denman, Jr.	711 Navarro Street San Antonio, Texas 78205
Robert L. Washington	711 Navarro Street San Antonio, Texas 78205
Mrs. J. T. Deely	123 Park Hill Drive San Antonio, Texas 78212
Mrs. Otis N. Luckman	327 Royal Oaks San Antonio, Texas 78209
Mrs. H. E. Winkenhower	5931 Winding Ridge Dr. San Antonio, Texas 78239
Hall S. Hammond	215 Argyle San Antonio, Texas 78209
Louis P. Bishop	700 East Hildebrand San Antonio, Texas 78212
Mrs. Walter F. Brown	213 Sir Arthur Court San Antonio, Texas 78213
Mrs. Wm. A. Beinhorn	6 Rock Ridge Lane San Antonio, Texas 78209
Miss Helen Hogan	7815 Broadway, San Antonio, Texas 78209
Mrs. Marshall Steves	501 Grandview San Antonio, Texas 78209
Mrs. A. Baker Duncan	336 Geneseo Road San Antonio, Texas 78209
Julian F. Rodriguez	6819 S. Zarzamora, San Antonio, Texas 78224
Dr. Del Weniger	306 Army San Antonio, Texas 78215

VI.

The Board of Trustees is expressly authorized to enact By-laws for carrying out the fostering, promotion and development of the scientific, educational and aesthetic aspects of the San Antonio Botanical Center, which By-laws may be amended from time to time as necessitated by growth and change.

This Board is further authorized to enter into such contract or contracts with the City of San Antonio as may be deemed necessary and proper to provide advisory and managerial expertise directed toward development and exploitation of the San Antonio Botanical Center's full potential.

This Board is further authorized to enter into contract or contracts with individual professionals, scientific and educational institutions, philanthropic organizations and businesses in furtherance of the purposes, goals and objectives outlined hereinbefore.

VII.

The corporation is and shall continue to be without capital stock. It is to be a non-profit organization, solely for the purpose of a civic project for the good of the community.

VIII.

None of the net income or assets of the corporation will inure to the private benefit of any member. In the event of dissolution of the corporation, any assets on hand shall be donated to the City of San Antonio for the purposes of development, operation and maintenance of the San Antonio Botanical Center.

IN TESTIMONY WHEREOF, witness our signatures this

17 day of December, 1980.

Gretchen C. Northrup  
Gretchen C. Northrup  
Address: 128 West Brandon  
San Antonio, Texas 78212

Margaret G. Deely  
Margaret G. Deely  
Address: 123 Park Hill  
San Antonio, Texas 78212

Gilbert M. Denman, Jr.  
Gilbert M. Denman, Jr.  
Address: 535 San Antonio Bank & Trust  
San Antonio, Texas 78205

THE STATE OF TEXAS )  
  )  
COUNTY OF BEXAR     )

BEFORE ME, the undersigned authority, on this day personally appeared Gretchen C. Northrup, Margaret G. Deely and Gilbert M. Denman, Jr., known to me to be the persons whose names are subscribed to the foregoing instrument and severally acknowledged to me that they executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office this 17 day of December, 1980.

MAXINE D. ALBRECHT  
Notary Public, Bexar County, Texas  
My Commission Expires 6/30/1984

Maxine D. Albrecht  
Notary Public, Bexar County, Texas.