

File No. 211305

Committee Item No. 7

Board Item No. \_\_\_\_\_

## COMMITTEE/BOARD OF SUPERVISORS

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Completed by: Brent Jalipa Date January 19, 2022

Completed by: Brent Jalipa Date \_\_\_\_\_

1 [Lease and Management Agreement Amendment - Botanical Garden Society - Botanical  
2 Garden, Japanese Tea Garden, and Conservatory of Flowers in Golden Gate Park]

3 **Resolution approving and authorizing an amendment to the Lease and Management**  
4 **Agreement between the Recreation and Park Department and the San Francisco**  
5 **Botanical Garden Society for the San Francisco Botanical Garden in Golden Gate Park,**  
6 **to also include the Japanese Tea Garden and the Conservatory of Flowers as part of**  
7 **the leased premises (which shall be known collectively as “the Gardens of Golden Gate**  
8 **Park”), to commence upon approval by the Board of Supervisors.**

9  
10 WHEREAS, The Recreation and Park Department manages Golden Gate Park and the  
11 special gardens and attractions in Golden Gate Park; and

12 WHEREAS, The San Francisco Botanical Garden Society (“SFBGS”) has been the  
13 City’s partner at the Botanical Garden since approximately 1955; in 2013, via Ordinance No.  
14 162-13, the City approved a lease and management agreement (“the Lease”) that allows  
15 SFBGS to lease and operate the Botanical Garden (including certain office and related space)  
16 in partnership with the Recreation and Park Department (“RPD”) for an initial term of ten  
17 years, with two ten-year extension options; the Lease has enabled the SFBGS to assist with  
18 the operation and management of the Botanical Garden and with education, fundraising, and  
19 other activities to support and enhance the Botanical Garden; a copy of the Lease and  
20 Ordinance No. 162-13 are on file with the Clerk of the Board of Supervisors in File No. 211305  
21 and incorporated by reference as though set forth fully herein; and

22 WHEREAS, The Japanese Tea Garden first opened around 1894 and is a premiere  
23 attraction in Golden Gate Park; historically, visitor services consisted only of selling tickets for  
24 admissions; during the COVID-19 pandemic and in order to reopen the Japanese Tea Garden  
25

1 to the public, the SFBGS agreed to help manage the entrance to the Japanese Tea Garden;  
2 and

3 WHEREAS, The Conservatory of Flowers first opened in 1879 but was almost  
4 destroyed following a devastating storm in 1995; it was eventually rebuilt and since 2003 has  
5 been managed under a license with the Friends of Recreation and Park Corporation, today  
6 known as the San Francisco Parks Alliance, who helped to raise the funds needed for the  
7 renovation for the facility to reopen; the license expired in 2012 and has been in holdover and  
8 has not been updated; and

9 WHEREAS, RPD and SFBGS seek to amend the Lease to include the Japanese Tea  
10 Garden, and Conservatory of Flowers as part of the premises that the SFBGS leases and  
11 operates, so that all three gardens can be operated collectively and known as “the Gardens of  
12 Golden Gate Park;” a copy of the proposed Lease amendment is on file with the Clerk of the  
13 Board of Supervisors in File No. 211305 and is incorporated by reference as though set forth  
14 fully herein; and

15 WHEREAS, Merging certain functions of all three attractions would improve visitor  
16 services and eliminate nonprofit redundancies; it would also allow visitors, volunteers, and  
17 schoolchildren a combined educational and cultural experience, and assist the Department in  
18 raising funds for needed repairs and maintenance and possible capital improvements at each  
19 location; the three gardens would have a campus feel while keeping their individual legacy  
20 names; together, they would be recognized and marketed as a regional organization with  
21 national and international recognition and partnerships; and

22 WHEREAS, The proposed amendments to the Lease will have numerous public  
23 benefits, as noted above, and will enhance the City’s ability to manage the Gardens of Golden  
24 Gate Park and provide education and public programming, and given the SFBGS’s existing  
25

1 Lease for the Botanical Garden portion of premises reliance on competitive bidding  
2 procedures for this Amendment would be impractical or impossible; and

3 WHEREAS, On November 18, 2021, the Recreation and Park Commission adopted  
4 Resolution No. 2111-005, recommending that the Board of Supervisors approve the  
5 amendments to the Lease; a copy of the Resolution is on file with the Clerk of the  
6 Board of Supervisors in File No. 211305; now, therefore, be it

7 RESOLVED, That the Board of Supervisors hereby authorizes the General Manager of  
8 the Recreation and Park Department, or their designee, to execute and enter into the  
9 Amendment to the Lease with SFBGS substantially in the form filed with the Clerk of the  
10 Board of Supervisors in File No. 211305; and, be it

11 FURTHER RESOLVED, That the Board of Supervisors authorizes the RPD General  
12 Manager, or their designee, to enter into any further modifications and amendments to the  
13 Lease, including to any of its exhibits, that the RPD General Manager determines, in  
14 consultation with the City Attorney, are in the best interests of the City, do not materially  
15 increase the obligations or liabilities of the City, are necessary or advisable to effectuate the  
16 purposes of the Lease, and are in compliance with all applicable laws including the City's  
17 Charter; and, be it

18 FURTHER RESOLVED, That within 30 days of the Amendment being fully executed by  
19 all parties, the Recreation and Park Department shall provide a copy of the final Amendment  
20 to the Clerk of the Board for inclusion into the official file.

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<p><b>Items 7 &amp; 8</b> <b>Files 21-1305 &amp; 21-1295</b></p>	<p><b>Department:</b> Recreation &amp; Parks</p>
<p><b>EXECUTIVE SUMMARY</b></p>	
<p style="text-align: center;"><b>Legislative Objectives</b></p> <ul style="list-style-type: none"> <li>• <b>File 21-1305:</b> The proposed resolution would approve an amendment to the lease and management agreement with the San Francisco Botanical Garden Society to also include the Japanese Tea Garden and the Conservatory of Flowers as part of the leased premises.</li> <li>• <b>File 21-1295:</b> The proposed ordinance would amend the Park Code to waive admission fees for San Francisco residents to the Japanese Tea Garden and the Conservatory of Flowers and reauthorize the Recreation and Park Department to set admission fees for non-resident adults at the Japanese Tea Garden, the Conservatory of Flowers, and the Botanical Garden through flexible pricing.</li> </ul> <p style="text-align: center;"><b>Key Points</b></p> <ul style="list-style-type: none"> <li>• The Botanical Garden Society (SFBGS) is responsible for admissions collections and other services for the Botanical Garden. The Conservatory of Flowers is currently managed by the Parks Alliance, and the Department is typically responsible for managing admissions at the Japanese Tea Garden in addition to garden maintenance. Under the proposed amendment, SFBGS would provide these same services to the Japanese Tea Garden and the Conservatory of Flowers. Non-profit costs are covered by admission revenues.</li> </ul> <p style="text-align: center;"><b>Fiscal Impact</b></p> <ul style="list-style-type: none"> <li>• The Department estimates savings of \$383,484 from joint management of the gardens due to consolidation of admission staffing and resulting in lower admissions costs than historical spending for the three gardens. The proposed budget includes an annual deposit of \$514,105 to the City’s Garden Improvement Fund for maintenance and improvement of the gardens.</li> <li>• The Department estimates that waiving resident fees at the gardens would result in \$271,385 in annual lost revenue, but that this would be off-set by higher non-resident adult admission fees. Any net revenue would be assigned to the City’s Garden Improvement Fund.</li> </ul> <p style="text-align: center;"><b>Policy Consideration</b></p> <ul style="list-style-type: none"> <li>• The original lease and management agreement with the Botanical Garden Society approved by the Board of Supervisors was not competitively procured and may be extended through May 2043. Because management of the three gardens has never been competitively procured, we do not know if costs are reasonable or if there are other providers that would bid on a competitive solicitation.</li> </ul> <p style="text-align: center;"><b>Recommendations</b></p> <ul style="list-style-type: none"> <li>• Approval of Files 21-1305 and 21-1295 are policy matters for the Board of Supervisors.</li> </ul>	

## MANDATE STATEMENT

City Charter Section 9.118(c) states that any lease, modification, amendment, or termination of a lease that had an initial term of ten years or more, including options to extend, or that had anticipated revenues of \$1 million or more is subject to Board of Supervisors approval.

City Charter Section 2.105 states that all legislative acts shall be by ordinance, approved by a majority of the members of the Board of Supervisors.

## BACKGROUND

### Current Lease and Management Agreement

Under an existing lease and management agreement between the Recreation and Parks Department and the nonprofit organization, San Francisco Botanical Garden Society, the San Francisco Botanical Garden Society is responsible for visitor services, admissions collections, educational programming, marketing, and other services to support operations of the Botanical Garden in Golden Gate Park. The existing agreement was effective beginning in December 2013 and expires December 2023 and includes two options to extend for ten years each.

### Proposed Gardens of Golden Gate Park

The Recreation and Parks Commission seeks to bring the Botanical Garden, Japanese Tea Garden, and the Conservatory of Flowers under joint management. The three gardens would be referred to collectively as “the Gardens of Golden Gate Park.”

Currently, all three gardens are separately managed. As mentioned above, the Botanical Garden is managed under a lease and management agreement with the San Francisco Botanical Garden Society. The Conservatory of Flowers is currently managed under a license with the San Francisco Parks Alliance. The license has been in holdover status since it expired in 2012. The Recreation and Parks Department is primarily responsible for managing admissions at the Japanese Tea Garden in addition to garden maintenance.<sup>1</sup> However, the San Francisco Botanical Garden Society has managed admissions collections for the Japanese Tea Garden during the COVID-19 pandemic according to a supplemental agreement to the existing lease and management agreement.

### Admission Fees

The Park Code establishes admission fees for the San Francisco Botanical Garden, the Japanese Tea Garden, and the Conservatory of Flowers. There are different rates for children, adults, and seniors. San Francisco residents do not pay any fees at the Botanical Garden and receive discounts at the Japanese Tea Garden and Conservatory of Flowers.

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<sup>1</sup> According to Recreation and Parks Department staff, the Department receives support from the Friends of the Japanese Tea Garden and a concessionaire operates the historic Tea House and Gift Shop.

In 2019, the Board of Supervisors authorized the Recreation and Park Department to set non-resident adult admission fees for the three gardens through “flexible pricing” (File 19-0629). This allowed the Department to temporarily increase or decrease the fees based on factors such as public demand, facility conditions, and rates at comparable facilities. The Department could only increase prices once per year by up to 50% and was only permitted to increase prices during certain times of the year depending on the facility. The existing law permits price increases for non-resident adults as follows:

- **Botanical Garden:** Increases only on Saturdays and Sundays
- **Conservatory of Flowers:** Increases only on Fridays, Saturdays, and Sundays
- **Japanese Tea Garden:** Increases only March through October

The flexible pricing system was scheduled to sunset on June 30, 2021, but the Board of Supervisors authorized the extension of flexible pricing at the gardens until December 7, 2021 (File 21-0653). The 2019 flexible pricing legislation also allowed the General Manager to adjust non-resident admission fees for Coit Tower, however that authority was never implemented and expired in June 2021.

## DETAILS OF PROPOSED LEGISLATION

### File 21-1305

The proposed resolution would approve an amendment to the lease and management agreement with the San Francisco Botanical Garden Society to also include the Japanese Tea Garden and the Conservatory of Flowers as part of the leased premises. The term of the agreement with the Botanical Garden Society remains unchanged.

### File 21-1295

The proposed ordinance would amend the Park Code to:

- Waive admission fees for San Francisco residents to the Japanese Tea Garden and the Conservatory of Flowers;
- Authorize the Recreation and Park Department to waive or discount other admission fees at the Japanese Tea Garden, the Conservatory of Flowers, and the Botanical Garden;
- Re-authorize the Recreation and Park Department to set admission fees for non-resident adults at the three gardens through flexible pricing; and
- Affirm the Planning Department’s determination that all associated actions comply with the California Environmental Quality Act.

### **Selection of San Francisco Botanical Garden Society**

Chapter 23.33 of the Administrative Code requires that leases be competitively bid unless competitive bidding procedures are impractical or impossible. The Department determined that holding a competitive bid for the lease and management of the Conservatory of Flowers and the Japanese Tea Garden would not be practical or feasible given the San Francisco Botanical Garden Society’s specialized knowledge and experience pertaining to specialty gardens, its existing

agreement for the Botanical Garden, and the assumed benefits from bringing the three gardens under joint management. Therefore, the Department is proposing to amend the existing lease and management agreement to include the two other gardens. The Board of Supervisors authorized the waiver of the requirement under Chapter 23.33 of the Administrative Code that the existing lease and management agreement be competitively bid, given the San Francisco Botanical Garden Society's specialized knowledge and experience in 2013 (File 13-0537). At that time, the Department estimated that the value of the services provided by the lease was \$2.1 million annually, which exceeded the fair market value of the annual rent of \$384,062, as estimated by an appraiser. The Department has not conducted a new appraisal of the Botanical Garden nor of the Japanese Tea Garden or the Conservatory of Flowers.

### **Services Provided**

Under the existing agreement, the San Francisco Botanical Garden Society is responsible for managing the following aspects of the Botanical Garden operations: visitor services, admissions collection, educational programming, marketing, volunteer program coordination, special events, and community relations. The Department is responsible for garden maintenance and oversight, including strategic and master site planning, plant collections development and documentation, signage, as well as improvements, renovations, and maintenance of the Botanical Garden. As described below in the Fiscal Impact Section, costs for these services are covered by admission fees and the Botanical Garden Society pays the City a base rent of \$100 per year.

Under the proposed amendment to the lease and management agreement, the San Francisco Botanical Garden Society would provide the same services that it currently provides at the Botanical Garden to the Japanese Tea Garden and the Conservatory of Flowers. Similarly, the Department would continue to be responsible for garden maintenance, facility maintenance, and oversight at all three gardens.

### **Admissions Receipts**

According to Exhibit E of the proposed amendment to the lease and management agreement, fees paid for admission to the three gardens may only be used for the benefit of the three gardens. The San Francisco Botanical Garden Society (SFBGS) would collect admission fees and remit them in full to the Department. The Department would allocate monies collected monthly in the following order:

- a) SFBGS expenses associated with collection of admission fees, such as personnel costs, office supplies, and rent or related fees for equipment;
- b) Department expenses associated with maintenance and oversight of the gardens of \$4.4 million per fiscal year;
- c) SFBGS education and community outreach expenditures of \$650,000 per fiscal year;

- d) The balance of admission receipts would be paid into the “Gardens of Golden Gate Park Improvement Fund,” which would be maintained by the City.<sup>2</sup>

This reflects the allocation model in the existing agreement for the Botanical Garden. According to the Department, admission receipts from the Japanese Tea Garden historically accrued to the Department’s general fund and were used for costs associated with managing admissions and maintenance of all of the gardens. According to Department staff, admission receipts from the Conservatory of Flowers have not been paid directly to the Department. According to a November 2021 Budget and Legislative Analyst Report, *Relations between Recreation and Parks Department and San Francisco Parks Alliance*, there is no provision for a minimum guaranteed amount of admissions receipts to be allocated to the Department in the 2003 agreement with the San Francisco Parks Alliance.

### **Admission Fee Changes (File 21-1295)**

The proposed ordinance would waive admission fees for residents and re-authorize and standardize flexible pricing for adult non-residents. The proposed ordinance would allow the Department to increase prices for non-resident adults only by up to 50% of the Park Code set fee upon 30 days’ notice to the public rather than just once per year and does not constrain price increases to certain months or days unlike the existing law. The Department could also decrease fees at any time. In addition, the proposed ordinance would also remove the sunset date for flexible pricing, allowing the Recreation and Park Department to continue using flexible pricing at the three gardens indefinitely. Fee changes must be due to changes in demand at particular days and times, adverse weather, or facility conditions.

#### *Flexible Pricing Use at the Gardens*

The Recreation and Parks Department provided an update on flexible pricing at the three gardens to the Board of Supervisors in May 2021. The regular non-resident adult admission fee was \$9 at all three gardens until FY 2020-21 when it was increased to \$10 at the Japanese Tea Garden and the Conservatory of Flowers and in FY 2021-22 when it increased to \$10 at the Botanical Garden due to allowable CPI increases. According to that report, flexible pricing for non-resident adults was applied as follows:

- Botanical Garden: Applied on the weekends starting in November 2019 with a \$3 increase.
- Conservatory of Flowers: Applied on the weekends starting in October 2019 with a \$2 increase.
- Japanese Tea Garden: Applied starting in March 2020 through September 2020 with a \$2 increase. In October 2020, the price was adjusted back to \$10, and the \$2 increase was restored starting in March 2021.

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<sup>2</sup> According to the proposed amendment, expenditures from the Gardens of Golden Gate Park Improvement Fund may only be used for expenses associated with maintenance, renovation, and improvement of the gardens, unless the Recreation and Park Commission and the San Francisco Botanical Garden Society otherwise agree in writing.

*Other City Departments Use of Flexible Pricing*

At the request of a Supervisor, we completed a short survey of City entities that charge for use of City property.

Our survey found that the Recreation and Parks Department uses a flexible pricing structure for golf fees, which allows the General Manager to adjust resident and tournament rates based on demand, prices at other golf courses, and course conditions.<sup>3</sup> The Academy of Sciences uses dynamic admissions pricing, which varies by day and time. However, the Fine Arts Museums, which include the De Young and Legion of Honor Museums, does not use dynamic pricing for admissions, though the museums charge higher fees for special exhibits.

Additionally, we found that the San Francisco Municipal Transportation Agency (SFMTA) uses dynamic pricing (referred to as transportation demand management) for garage and parking meter fees, both of which are generally based on demand. According to SFMTA staff, since the implementation of dynamic pricing in 2011, garage fees have generally increased and parking meter fees have fluctuated between \$0.50 and \$10 per hour based on demand for curb space. Garage and parking meter fees are adjusted by SFMTA staff.

**Performance of Botanical Garden Society**

The existing lease and management agreement does not have performance metrics. Data provided by the Recreation and Parks Department show that admissions increased from 240,000 in FY 2011-12 to 424,000 in FY 2018-19 (the last full year before COVID-19), an increase of 76.7%.

**FISCAL IMPACT**

The Recreation and Parks Department developed the Gardens of Golden Gate Park budget based on actual spending from FY 2018-19 due to the impact of COVID-19 on subsequent years. Exhibit 1 below summarizes the sources and uses of the proposed amended lease and management agreement.

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<sup>3</sup> Park Code Section 12.12(d), which relates to municipal golf courses, states that the General Manager may discount resident rates by 50% and increase them by 25%; tournament rates may be increased by 50%.

**Exhibit 1: Sources and Uses of Proposed Gardens of Golden Gate Park**

<b>Sources</b>	<b>Botanical Garden</b>	<b>Conservatory of Flowers</b>	<b>Japanese Tea Garden</b>	<b>Total</b>
Admissions Receipts	\$1,393,527	\$1,047,127	\$4,280,000	\$6,720,654
<b>Total Sources</b>	<b>\$1,393,527</b>	<b>\$1,047,127</b>	<b>\$4,280,000</b>	<b>\$6,720,654</b>
<b>Uses</b>				
SFBGS Admissions Cost	536,998	323,202	306,203	1,166,403
Rec & Park Operating Expenses	287,573	250,000	3,865,000	4,402,573
SFBGS Education and Community Engagement Expenses	287,573	250,000	100,000	637,573
Garden Improvement Fund	281,383	223,925	8,797	514,105
<b>Total Uses</b>	<b>\$1,393,527</b>	<b>\$1,047,127</b>	<b>\$4,280,000</b>	<b>\$6,720,654</b>

Source: Recreation and Parks Department

Note: Admission receipts are based on FY 2018-19 fees. At that time, flexible pricing was not in use for adult non-residents, and adult residents paid discounted fees at the Conservatory of Flowers and the Japanese Tea Garden and no admission fee at the Botanical Garden.

As shown above, the proposed budget includes \$4.4 million in operating expenses for the Recreation and Parks Department for maintenance and oversight of the three gardens. According to Department staff, the estimates are based on three years of spending and include costs associated with 27.15 FTE positions (including 14.25 FTE Gardeners, 4.0 Nursery Specialists, 2.25 Custodians, and other maintenance positions), deferred maintenance, and materials and supplies. City costs are expected to increase from \$3.9 million in FY 2018-19 to \$4.4 million in the first year of the proposed agreement due to increases in City salary and benefits costs and costs associated with maintenance of the Conservatory of Flowers, which was previously paid for by the San Francisco Parks' Alliance out of admissions revenue. Attachment 1 compares the proposed budget to FY 2018-19 actual expenses for the three gardens.

The Department estimates savings of \$383,484 from joint management of the gardens compared to FY 2018-19 expenses, due to consolidation of admission staffing and resulting in lower admissions costs than historical spending for the three gardens. The proposed budget assumes annual admission levels are the same as FY 2018-19 levels.

The savings would support an increase of \$150,000 in education and community engagement programming for the San Francisco Botanical Garden Society to cover the additional facilities as well as increases in the Recreation and Parks Department budget described above. The proposed amended lease and management agreement would result in an estimated annual deposit of \$514,105 to the Gardens of Golden Gate Park Improvement Fund. This reflects an increase from prior year deposits to the Garden Improvement Fund because admission receipts from the Conservatory of Flowers and the Japanese Tea Garden were not previously deposited to a dedicated improvement fund.

**Admission Fee Changes (File 21-1295)**

As noted above, under the proposed ordinance, fees for resident admissions are waived at the Conservatory of Flowers and the Japanese Tea Garden to align with current practices at the Botanical Garden, and the Department could raise fees for non-residents by a maximum of \$5, up to \$15 at all three gardens. Exhibit 2 below shows the number of visitors and total admissions revenue for the three gardens for FY 2018-19. Admissions were lower in subsequent years due to the impacts of COVID-19. In FY 2018-19 non-resident adult admission fee collections across the three gardens accounted for approximately three-quarters of total admissions revenue.

**Exhibit 2: Total Visitors and Admissions Revenue, FY 2018-19**

<b>Facility</b>	<b>Resident</b>	<b>Non-Resident Adult</b>	<b>Non-Resident Other <sup>a</sup></b>	<b>Other Free <sup>b</sup></b>	<b>Total Visitors</b>
Botanical Garden	211,719	107,056	54,339	63,618	436,732
Conservatory of Flowers	20,338	74,383	49,064	25,042	168,827
Japanese Tea Garden	29,400	380,145	100,364	246,270	756,179
<b>Total Visitors</b>	<b>261,457</b>	<b>561,584</b>	<b>203,767</b>	<b>334,930</b>	<b>1,361,738</b>
<b>Admissions Revenue</b>	<b>\$271,385</b>	<b>\$5,054,301</b>	<b>\$1,221,695</b>	<b>\$0</b>	<b>\$6,547,381</b>
Percent of Total Revenue	4.1%	77.2%	18.7%	0.0%	100.0%

Source: Recreation and Parks Department

<sup>a</sup> Non-Resident other includes discounted admissions for children and senior non-residents.

<sup>b</sup> Other Free includes free admissions for low-income residents and non-residents, free admissions hours at the gardens, and other free admissions.

Note: FY 2018-19 revenues for the Botanical Garden was \$1.2 million, \$1.0 million for the Conservatory of Flowers, and \$4.3 million for the Japanese Tea Garden.

Recreation and Parks Department staff estimate that waiving resident fees at the Conservatory of Flowers and the Japanese Tea Garden would result in \$271,385 in annual lost revenue based on admission fee collections for residents in FY 2018-19, as shown above. The Department estimates this lost revenue would be more than off-set by increased revenue from reauthorizing flexible pricing for non-resident adult admission fees. Non-resident admission fees are currently \$10 at each of the three gardens. If the Department increased admission fees for non-residents by \$2 up to \$12 for the entire year, admission receipts would increase by approximately \$1.1 million based on FY 2018-19 admissions data from the Department. If non-resident adult admissions decrease because of the \$2 price increase, the increased revenue would be lower than \$1.1 million but would likely still cover the \$271,385 in lost revenue from waiving admission fees for residents. Under the proposed lease and management agreement, any surplus revenue would be assigned to the City's Gardens of Golden Gate Park Improvement Fund for expenses associated with maintenance, renovation, and improvement of the gardens.



**POLICY CONSIDERATION****Agreement Amendment**

The proposed lease and management agreement amendment (File 21-1305) allows the Botanical Garden Society, which operates the Botanical Garden, to operate the Japanese Tea Garden, typically operated by City staff, and the Conservatory of Flowers, currently operated by the San Francisco Parks Alliance. According to Recreation and Parks Department staff, the Botanical Garden Society temporarily took over admission operations at the Japanese Tea Garden during the pandemic and City staff have been re-assigned to recreation centers.

Net revenues from the Conservatory of Flowers, which previously went to the San Francisco Parks Alliance, together with revenues from the Japanese Tea Garden and Botanical Garden, will all be provided to the Recreation and Parks Department account to cover Department staffing costs and facility maintenance costs. Overall, City costs are expected to increase from \$3.9 million in FY 2018-19 to \$4.4 million in the first year of the proposed agreement due to increases in City salary and benefits costs and costs associated with maintenance of the Conservatory of Flowers, which was previously paid for by the San Francisco Parks' Alliance out of admissions revenue. Beyond that, the proposed agreement does not expand the scope of City services related to the gardens.

The original lease and management agreement with the Botanical Garden Society approved by the Board of Supervisors was not competitively procured and may be extended through May 2043. Aside from expanding operations to include the Japanese Tea Garden and Conservatory of Flowers, the proposed lease and management agreement amendment is generally consistent with the original agreement approved by the Board of Supervisors. Lease and management of each of the three gardens has never been competitively procured. The Botanical Garden Society has been operating the Botanical Garden since 1955. The Japanese Tea Garden has been operated by the City, and the Conservatory of Flowers has been operated by the San Francisco Parks' Alliance since it reopened in 2003. The Department believes that the Botanical Garden Society is uniquely suited to operate garden admissions, given the organization's \$20 million endowment and fundraising capacity that may be used to fund garden improvements, strong community ties, and network of volunteers.

Because management of the three gardens has never been competitively procured, we do not know if costs are reasonable or if there are other providers that would bid on a competitive solicitation. We therefore consider approval of the proposed resolution (File 21-1305) to be a policy matter for the Board of Supervisors.

**Fee Ordinance**

As noted above, the proposed ordinance (File 21-1295) would eliminate residential admission fees for the three gardens and continue to allow dynamic pricing for non-resident adult admission fees. The \$271,385 annual revenue loss from the elimination of residential admission fees could

be offset by an increase of \$0.50 in non-resident admission fees.<sup>4</sup> If the proposed ordinance modifying the garden admission fees is not approved, the admission fees for the gardens are expected to cover the operating expenses of both the Botanical Garden Society and the City for all three gardens. If the non-resident fees are increased beyond that breakdown point, all additional net revenue would accrue to an improvement fund dedicated to garden improvements.

We consider approval of the proposed ordinance (File 21-1295) to be a policy matter for the Board of Supervisors.

## RECOMMENDATIONS

1. Approval of File 21-1305 is a policy matter for the Board of Supervisors.
2. Approval of File 21-1295 is a policy matter for the Board of Supervisors.

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<sup>4</sup> In FY 2018-19, the three gardens had 561,584 visitors. Therefore, a \$0.50 increase in admissions fees with the same number of visitors would equate to \$280,792 in new revenues.

## Attachment 1

**Exhibit 3: Proposed Gardens of Golden Gate Park Budget Compared to FY 2018-19 Actuals (All Gardens)**

<b>Sources</b>	<b>FY 2018-19 Actuals</b>	<b>Proposed Budget</b>	<b>Difference</b>	<b>Percent Difference</b>
Admissions Receipts	\$6,568,309	\$6,720,654	\$152,345	2.3%
<b>Total Sources</b>	<b>\$6,568,309</b>	<b>\$6,720,654</b>	<b>\$152,345</b>	<b>2.3%</b>
<b>Uses</b>				
SFBGS Admissions Cost	1,549,857	1,166,403	(383,454)	-24.7%
Rec & Park Operating Expenses	3,914,343	4,402,573	488,230	12.5%
<i>Botanical Garden</i>	287,573	287,573	0	0.0%
<i>Conservatory of Flowers</i>	0	250,000	250,000	
<i>Japanese Tea Garden</i>	3,626,770	3,865,000	238,230	6.6%
SFBGS Education and Community Engagement Expenses	487,573	637,573	150,000	30.8%
Garden Improvement Fund	209,409	514,105	304,696	145.5%
<b>Total Uses</b>	<b>\$6,161,182</b>	<b>\$6,720,654</b>	<b>\$559,472</b>	<b>9.1%</b>

Source: Recreation and Parks Department

Note: FY 2018-19 actuals do not include Rec & Park operating costs for the Conservatory of Flowers. Garden Improvement Fund amounts for FY 2018-19 are less than the difference between sources and SFBGS and City uses because, under the existing license agreement with the San Francisco Parks Alliance, net revenues from the Conservatory of Flowers are provided to the City.

## GARDENS OF GOLDEN GATE PARK

### LEASE AND MANAGEMENT AGREEMENT AMENDMENT

THIS AMENDMENT (this “**Amendment**”) is made as of \_\_\_\_\_, 20\_\_\_\_, in San Francisco, California, by and between CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation (“**City**” or “**Landlord**”), acting by and through its Recreation and Park Commission (“**Commission**”) and SAN FRANCISCO BOTANICAL GARDEN SOCIETY AT STRYBING ARBORETUM, a California nonprofit public benefit corporation (“**SFBGS**” or “**Lessee**”).

### RECITALS

THIS AMENDMENT is made with reference to the following facts and circumstances:

A. City and Lessee previously entered into an existing agreement, dated as of December 11, 2013 (the “**2013 Agreement**”), for the lease and management of certain property in and around the San Francisco Botanical Garden (the “**SFBG**”) located along Martin Luther King Jr. Drive and Lincoln Way, between 9th Avenue and 19th Avenue, San Francisco, California.

B. SFBGS has successfully managed admission to SFBG since 2010, increasing visitors and improving visitor experience. Annual visitations have increased 135%. In addition, admissions have generated a total for the Garden Improvement Fund of over \$1.3 million.

C. City owns two other admission-gated specialty gardens within Golden Gate Park, the Conservatory of Flowers (“**COF**”) and Japanese Tea Garden (“**JTG**”). The COF is along John F Kennedy Drive and Conservatory Drive and west of Conservatory Access Road, and is shown on attached *Exhibit AM-A*. The COF has been managed under an existing license with The Friends of Recreation and Park Corporation, dated as of August 7, 2003, as amended and extended. The JTG is located west of Hagiwara Tea Garden Drive between Martin Luther King Jr. Drive and the de Young Museum, and is shown on attached *Exhibit AM-B*. SFBGS presently manages JTG admissions pursuant to a COVID-19 addendum dated July 14, 2020.

D. The COF and the JTG are within one mile of each other and with the SFBG constitute a museum dedicated to the horticultural world and continuing education. Since 2002, the San Francisco Parks Alliance has operated the COF providing similar public benefits to the City relating to the COF. The City believes that there would be significant benefits to having one not-for-profit partner help to provide services to all three gardens and is proposing that all services provided by the SFBGS to the SFBG will be expanded to include the COF and JTG under the terms of the 2013 Agreement.

E. The Commission desires to bring the COF and JTG under joint management with the SFBG. SFBG, COF, and JTG are collectively referred to as the “**Gardens of Golden Gate Park**.” Shared management will improve efficiency and help to avoid staffing shortages at any given garden and the model created by the 2013 Agreement will translate readily to the COF and JTG.

F. The parties desire to add the COF and JTG to the 2013 Agreement through this Amendment, creating funds for maintenance and capital work at the COF and JTG similar to the setup for SFBG.

G. The parties now desire to modify the 2013 Agreement on the terms and conditions set forth in this Amendment.

ACCORDINGLY, in consideration of the matters described in the foregoing Recitals, and for other good and valuable consideration, the receipt and sufficiency of which are mutually acknowledged, the City and Lessee agree as follows:

1. Except as stated in this Amendment, all references to “Botanical Garden” in the 2013 Agreement are replaced with “Gardens of Golden Gate Park.”
2. Section 1. (Basic Lease Information) is amended to add new subsection entitled “**2021 Premises**,” with the text “The gift shop and kiosks at the COF as shown on *Exhibit AM-A*; and the admissions kiosk at the JTG as shown on *Exhibit AM-B*.”
3. As of the Effective Date of this Amendment, the 2021 Premises are added to the “Premises” as defined in the 2013 Agreement.

4. The definition of “Building” or “Buildings” in Section 2 (Definitions) is replaced with the following:

“Building” or “Buildings” means the Library Building, the County Fair Building, the COF, the JTG, COF and JTG admissions kiosks, and the COF concessions kiosk, and, if applicable, the Nursery Building.

5. Section 3.4(a) (Inspection of Premises) is amended to include the 2021 Premises as applicable, and replaced with the following: “SFBGS represents and warrants that SFBGS has conducted a thorough and diligent inspection and investigation, either independently or through Agents of SFBGS’s own choosing, of the Initial Premises and 2021 Premises and the suitability of the Initial Premises and 2021 Premises for SFBGS’s intended use. SFBGS is fully aware of the needs of its operations and has determined, based solely on its own investigation, that the Initial Premises and 2021 Premises are suitable for its operations and intended uses. SFBGS presently occupies the Initial Premises and the portion of the Premises at the JTG.”

6. Section 5.4(xiv) is amended to remove references to outdated law and replaced with the following:

SFBGS will develop a program to work toward a zero waste goal, including the implementation of a composting system for food waste, packaging and 100% biodegradable supplies whenever practical and in compliance with applicable law. SFBGS will submit a recycling and composting plan at Commencement of Lease, and provide an annual report on each anniversary date of this Lease outlining its progress toward meeting the recycling and composting goals described above and its success toward a zero waste goal.

7. Section 6.1(d)(i) and (iii) are amended to include specific information regarding COF and JTG (including limiting certain text to apply only to SFBG), and are replaced with the following:

(i) The staffing of the curation, planning, management and documentation of the plant collections is currently done by SFBGS with respect to SFBG and by the Department with respect to the JTG and COF. As of the Effective Date, the two parties will coordinate this work to determine if there are efficiencies and improvements for the future. With respect to the Department’s Primary Responsibilities, curatorial and plant collections management staff employed by SFBGS work with City staff under the leadership and guidance of the Garden Director in consultation with the Executive Director, and, because SFBGS’s curatorial and plant collections management staff also have responsibilities in support of SFBGS’s Primary

Responsibilities, the Garden Director and Executive Director will consult as needed on their work priorities. All staff employed by SFBGS are supervised by the Executive Director in accordance with SFBGS employee policies. The Department and the SFBGS will work over the next three years to develop and overall Gardens of Golden Gate Park Master Plan to replace the Botanical Garden Master Plan.

(iii) Pursuant to **Section 6.1(a)** above, maintenance of the Gardens of Golden Gate Park is within the Department's Primary Responsibilities.

**8.** Section 6.7(a) (Supplemental Funding by SFBGS) is amended to include the future master plan activities for the Gardens of Golden Gate Park. The section is replaced with the following:

SFBGS will use its reasonable efforts to raise private funds for the Gardens of Golden Gate Park for the purposes of (i) providing funds to supplement City appropriations for the Gardens of Golden Gate Park including, but not limited to, renovation and installation of gardens, maintenance of existing gardens, acquisition of special plant collections, procurement of special equipment and satisfaction of other capital improvement projects in accordance with the Botanical Garden Master Plan and future Gardens of Golden Gate Park Master Plan (or as may be mutually agreed upon through joint planning of SFBGS and the Department), and (ii) otherwise providing funds to enhance City funding for educational programs, other particular programs, ancillary mission- related activities, operations and services of the Gardens of Golden Gate Park. Such fundraising is intended to enhance the Gardens of Golden Gate Park and not to replace traditional sources or levels of City funding. As part of its fundraising responsibilities, SFBGS will be allowed free use of exterior Gardens of Golden Gate Park areas and the Buildings for fundraising and membership benefit events, subject to prior approval of scheduling and other arrangements by the Garden Director, and subject to the terms and conditions applicable to Special Events under **Section 5.1** above.

**9.** Section 6.9 (Operation of Botanical Garden; Days and Hours of Operation) is now entitled "Operation of Gardens of Golden Gate Park; Days and Hours of Operation." The section is replaced with the following:

The hours of public operation are approved, and may be amended, by the Commission and may not be altered in any manner without prior written approval from the Commission or from such person, if any, to whom the Commission has delegated authority to approve changes in the hours of operation.

**10.** Section 6.11 (Fees for Admission) is amended to rely solely on the Park Code for setting fees, and is replaced with the following:

(a) Fees for admission to the Gardens of Golden Gate Park are as stated in the San Francisco Park Code, as it may be amended from time to time by action of City's Board of Supervisors in its sole discretion.

(b) SFBGS will not be required to reimburse City for nonresidents receiving free admission (i) as part of the San Francisco and national Museums for All programs available to those receiving SNAP, Medi-Cal, or CalFresh benefits (ii) as a benefit provided to SFBGS members in recognition of their financial support of the Gardens of Golden Gate Park, (iii) as members of other botanical gardens participating with SFBGS in reciprocal member programs, and (iv) as a school group student, teacher or chaperone.

(c) As of the Commencement Date, the SFBG will be open without charge one day a month, plus Thanksgiving, Christmas and New Year's Day. Such free admission days may be amended from time to time by action of City's Board of Supervisors in its sole discretion.

(d) Every morning, between 7:30 and 9:00 am, the SFBG will be open to the public, including nonresidents, free of charge.

**11.** Section 7.5 (Cash Register Requirements) is amended to account for modern point of sale systems and replaced with the following:

SFBGS will use a system that registers every transaction made in, on, about or from the Premises, including every type of income, and the tape or digital record of each such cash register will be accessible to and subject to inspection by the RPD Manager or his/her agent, provided that such inspection will be conducted in a manner reasonable designed to minimize interference with the conduct of the SFBGS's business at the Premises, and City will not perform such inspection unless SFBGS is present. SFBGS will make a manager available to City for such inspection during business hours on request (which may be oral) by City. Each sale or other transaction generated in the Premises must be recorded at the time of each sale or other transaction, in the presence of the customer or by phone or internet order.

**12.** Section 10.1(e) (Restrooms) is amended to address restrooms across the Gardens of Golden Gate Park. It is replaced with the following:

City will be responsible for the regular cleaning of the public restrooms located in the Gardens of Golden Gate Park, except as provided below. The restrooms will be open to the public no later than 9:00 am. At City's election, City personnel may open the restrooms to the public at any time between 7:30 am and 9:00 am. The restrooms will be kept clean, neat, orderly and functioning properly at all times. Notwithstanding the foregoing to the contrary, SFBGS, at its own expense, will keep those restrooms located inside the headhouse of the Nursery Building, inside the Library Building in a clean, neat and orderly condition and will provide all necessary items for such restrooms, including, but not limited to, toilet tissue, paper towels, seat covers, hand soap, and cleaning materials and supplies necessary to maintain such restrooms in the condition as described above. Such restrooms will be inspected for supplies and neatness a minimum of two (2) times during each day the facility is open to the public and will be cleaned not less frequently than twice a week. The SFBGS will be responsible for cleaning any restrooms inside the COF that are not open to the public.

**13.** Section 20.1 (SFBGS's Insurance) is amended to increase the limit for commercial general liability insurance to \$2,000,000.

**14.** Section 27.30 (Tobacco Product Advertising Prohibition) is amended to comply with current law, including updating the heading to "Prohibition of Tobacco Sales and Advertising." The text is replaced with the following:

Lessee acknowledges and agrees that no advertising of cigarettes or tobacco products is allowed on the property that is the subject of this Lease. This advertising prohibition includes the placement of the name of a company producing cigarettes or tobacco products or the name of any cigarette or tobacco product in any promotion of any event or product. In addition, Lessee acknowledges and agrees that no Sales, Manufacture, or Distribution of Tobacco Products (as such capitalized terms are defined in Health Code Section 19K.1) is allowed on the Premises and such prohibition must be included in all subleases or other agreements allowing use of the Premises. The prohibition against Sales, Manufacture, or Distribution of Tobacco Products does not apply to persons who are affiliated with an accredited academic institution where the Sale, Manufacture, and/or Distribution of Tobacco Products is conducted as part of academic research.

**15.** Section 27.37 (Notification of Limitation on Contributions) is amended to comply with current law and replaced with the following:

For the purposes of this Section, a “**City Contractor**” is a party that contracts with, or seeks to contract with, the City for the sale or leasing of any land or building to or from the City whenever such transaction would require the approval by a City elective officer, the board on which that City elective officer serves, or a board on which an appointee of that individual serves. Through its execution of this Agreement, Lessee acknowledges that it is familiar with Section 1.126 of the San Francisco Campaign and Governmental Conduct Code, which prohibits a City Contractor from making any campaign contribution to (1) the City elective officer, (2) a candidate for the office held by such individual, or (3) a committee controlled by such individual or candidate, at any time from the commencement of negotiations for the contract until the later of either the termination of negotiations for that contract or twelve (12) months after the date that contract is approved. Lessee acknowledges that the foregoing restriction applies only if the contract or a combination or series of contracts approved by the same individual or board in a fiscal year have a total anticipated or actual value of \$100,000 or more. Lessee further acknowledges that (i) the prohibition on contributions applies to Lessee, each member of Lessee’s board of directors, Lessee’s chief executive officer, chief financial officer and chief operating officer, any person with an ownership interest of more than ten percent (10%) in Lessee, any subcontractor listed in the contract, and any committee that is sponsored or controlled by Lessee, and (ii) within thirty (30) days of the submission of a proposal for the contract, the City department seeking to enter into the contract must notify the Ethics Commission of the parties and any subcontractor to the contract. Additionally, Lessee certifies it has informed each of the persons described in the preceding sentence of the prohibitions contained in Section 1.126 by the time it submitted a proposal for the contract to the City, and has provided the names of the persons required to be informed to the City department seeking to enter into that contract within thirty (30) days of submitting its contract proposal to the City department receiving that submittal, and acknowledges the City department receiving that submittal was required to notify the Ethics Commission of those persons.

**16.** Section 27.42 (Food Service Waste Reduction Requirements) is amended to comply with current law and replaced with the following:

Lessee will comply with and be bound by all of the applicable provisions of the Food Service and Packaging Waste Reduction Ordinance, as set forth in the San Francisco Environment Code, Chapter 16, including the remedies provided therein, and implementing guidelines and rules. The provisions of Chapter 16 are incorporated into this Lease by reference and made a part of this Lease as though fully set forth. Accordingly, Lessee acknowledges that City contractors and lessees may not use Food Service Ware for Prepared Food in City Facilities and while performing under a City contract or lease (1) where the Food Service Ware is made, in whole or in part, from Polystyrene Foam, (2) where the Food Service Ware is not Compostable or Recyclable, or (3) where the Food Service Ware is Compostable and not Fluorinated Chemical Free. The capitalized terms (other than Lessee and City) in the previous sentence are defined in San Francisco Environment Code Section 1602.

**17.** Section 27.47 (San Francisco Packaged Water Ordinance) is added to comply with current law, with text as follows:

Lessee will comply with San Francisco Environment Code Chapter 24 (“**Chapter 24**”). Lessee may not sell, provide, or otherwise distribute Packaged Water, as defined in Chapter 24 (including bottled water), in the performance of this Lease or on City property unless Lessee obtains a waiver from City’s Department of the Environment. If Lessee violates this requirement, City may exercise all remedies in this Lease and the Director of City’s Department of the Environment may impose administrative fines as set forth in Chapter 24.



**18.** Section 27.48 (Criminal History in Hiring and Employment Decisions) is added to comply with current law, with text as follows:

**a.** Unless exempt, Lessee will comply with and be bound by all of the provisions of San Francisco Administrative Code Chapter 12T (Criminal History in Hiring and Employment Decisions), as amended from time to time (“**Chapter 12T**”), which are incorporated into this Lease as if fully set forth, with respect to applicants and employees of Lessee who would be or are performing work at the Premises.

**b.** Lessee will incorporate by reference the provisions of Chapter 12T in all subleases of some or all of the Premises, and require all subtenants to comply with those provisions. Lessee’s failure to comply with the obligations in this subsection will constitute a material breach of this Lease.

**c.** Lessee and subtenants may not inquire about, require disclosure of, or if the information is received base an Adverse Action on an applicant’s or potential applicant for employment, or employee’s: **(i)** Arrest not leading to a Conviction, unless the Arrest is undergoing an active pending criminal investigation or trial that has not yet been resolved; **(ii)** participation in or completion of a diversion or a deferral of judgment program; **(iii)** a Conviction that has been judicially dismissed, expunged, voided, invalidated, or otherwise rendered inoperative; **(iv)** a Conviction or any other adjudication in the juvenile justice system; **(v)** a Conviction that is more than seven years old, from the date of sentencing; or **(vi)** information pertaining to an offense other than a felony or misdemeanor, such as an infraction.

**d.** Lessee and subtenants may not inquire about or require applicants, potential applicants for employment, or employees to disclose on any employment application the facts or details of any conviction history, unresolved arrest, or any matter identified in subsection (c) above. Lessee and subtenants may not require that disclosure or make any inquiry until either after the first live interview with the person, or after a conditional offer of employment.

**e.** Lessee and subtenants will state in all solicitations or advertisements for employees that are reasonably likely to reach persons who are reasonably likely to seek employment with Lessee or subtenant at the Premises, that the Lessee or subtenant will consider for employment qualified applicants with criminal histories in a manner consistent with the requirements of Chapter 12T.

**f.** Lessee and subtenants will post the notice prepared by the Office of Labor Standards Enforcement (“**OLSE**”), available on OLSE’s website, in a conspicuous place at the Premises and at other workplaces within San Francisco where interviews for job opportunities at the Premises occur. The notice will be posted in English, Spanish, Chinese, and any language spoken by at least 5% of the employees at the Premises or other workplace at which it is posted.

**g.** Lessee and subtenants understand and agree that on any failure to comply with the requirements of Chapter 12T, City will have the right to pursue any rights or remedies available under Chapter 12T or this Lease, including a penalty of \$50 for a second violation and \$100 for a subsequent violation for each employee, applicant, or other person as to whom a violation occurred or continued, or termination of this Lease in whole or in part.

**h.** If Lessee has any questions about the applicability of Chapter 12T, it may contact City’s Real Estate Division for additional information. City’s Real Estate Division may consult with the Director of City’s Office of Contract Administration who may also grant a waiver, as set forth in Section 12T.8.

**19.** Section 27.49 (All Gender Toilet Facilities) is added to comply with current law, with text as follows:

If applicable, Lessee will comply with San Francisco Administrative Code Section 4.1-3 requiring at least one all-gender toilet facility on each floor of the Building where extensive renovations are made. An “all-gender toilet facility” means a toilet that is not restricted to use by persons of a specific sex or gender identity by means of signage, design, or the installation of fixtures, and “extensive renovations” means any renovation where the construction cost exceeds 50% of the cost of providing the toilet facilities required by Administrative Code Section 4.1-3. If Lessee has any question about applicability or compliance, Lessee should contact the Department’s Real Estate Director for guidance.

**20.** Section 27.50 (Lessee’s Compliance with City Business and Tax and Regulations Code) is added to comply with current law, with text as follows:

Lessee acknowledges that under Section 6.10-2 of the San Francisco Business and Tax Regulations Code, the City Treasurer and Tax Collector may require the withholding of payments to any vendor that is delinquent in the payment of any amounts that the vendor is required to pay the City under the San Francisco Business and Tax Regulations Code. If, under that authority, any payment City is required to make to Lessee under this Lease is withheld, then City will not be in breach or default under this Lease, and the Treasurer and Tax Collector will authorize release of any payments withheld under this paragraph to Lessee, without interest, late fees, penalties, or other charges, upon Lessee coming back into compliance with its San Francisco Business and Tax Regulations Code obligations.

**21.** Section 27.51 (Consideration of Salary History) is added to comply with current law, with text as follows:

Lessee will comply with San Francisco Administrative Code Chapter 12K, the Consideration of Salary History Ordinance or “Pay Parity Act.” For each employment application to Lessee for work that relates to this Lease or for work to be performed in the City or on City property, Lessee is prohibited from considering current or past salary of an applicant in determining whether to hire the applicant or what salary to offer the applicant. Lessee will not (1) ask such applicants about their current or past salary or (2) disclose a current or former employee’s salary history without that employee’s authorization unless the salary history is publicly available. Lessee is subject to the enforcement and penalty provisions in Chapter 12K. Information about Chapter 12K is available on the web at <https://sfgov.org/olse/consideration-salary-history>.

**22.** Section 27.52 (GASB 87 Lease Accounting) and *Exhibit AM-C* are added to comply with current City practices, with text as follows:

The Governmental Accounting Standards Board (GASB), an independent organization that establishes accounting and financial reporting standards for U.S. state and local governments, issued Statement 87 to improve certain reporting and accounting practices. In connection with GASB 87, Lessee agrees to complete the checklist set forth in *Exhibit AM-C* and provide the same to City within thirty (30) days of the Effective Date in order to facilitate the City’s collection and evaluation of information for City’s financial reporting purpose.

**23.** *Exhibit E* is updated to address the COF and JTG. It is replaced with the version attached to this Amendment.

**24.** Section 27.53 (Conflicts of Interest) is added to comply with current City practices, with text as follows:

By executing this Agreement, Lessee certifies that it does not know of any fact which constitutes a violation of Section 15.103 of the City’s Charter; Article III, Chapter 2 of City’s

Campaign and Governmental Conduct Code; Title 9, Chapter 7 of the California Government Code (Section 87100 *et seq.*), or Title 1, Division 4, Chapter 1, Article 4 of the California Government Code (Section 1090 *et seq.*), and further agrees promptly to notify the City if it becomes aware of any such fact during the term of this Agreement. For example, Lessee will notify Department if it becomes aware that any Department employee or officer participates in a decision in which the employee or officer, or a member of their family, has a financial interest. In addition, the Parties agree and acknowledge that Lessee's or its donors' fiscal support of Department, or lack thereof, will have no bearing on and will not be relevant towards any future contracting, leasing, or permitting decisions by Department.

**25.** Section 27.54 (Statement of Incompatible Activities) is added to comply with current City practices, with text as follows:

Department's Statement of Incompatible Activities (SIA) was adopted under the provisions of San Francisco Campaign & Governmental Conduct Code section 3.218 on October 8, 2008. In general, Department's SIA (1) prohibits outside activities that are incompatible with Department's mission; (2) restricts the use of City resources, City work-product and prestige for any non-City purpose, including any political activity or personal purpose; and (3) prohibits receipt/acceptance of gifts in exchange for doing the employee's job. A copy of the SIA is attached as ***Exhibit AM-D***. Lessee agrees that it will not knowingly cause Department staff to violate the SIA. In addition, Lessee will ensure that no employee or officer of Department is a member of Lessee's board of directors or otherwise holds a fiduciary position with Lessee, and that no employee or officer of Department and no member of a Department employee or officer's immediate family receives income from Lessee.

**26.** Section 27.55 (Disclosure Obligations; Recordkeeping and Auditing) is added to comply with current City practices, with text as follows:

The parties will also comply with the additional provisions regarding disclosures, recordkeeping, and auditing attached hereto as ***Exhibit AM-E*** which are fully incorporated herein.

**27.** **Transition with San Francisco Parks Alliance Required.** To facilitate the addition of the COF to the Premises, SFBGS and the City agree to work cooperatively with the San Francisco Parks Alliance (the "SFPA"), the entity managing the COF under an existing license, to (A) transfer ownership of all furniture, fixtures, and equipment used by the COF to the City or the SFBGS, and (B) arrange to transfer books and accounts as necessary.

**28.** **No Joint Venture.** This Amendment or any activity by the City hereunder does not create a partnership or joint venture between the City and Lessee relating to the Lease or otherwise. This Amendment does not constitute authorization or approval by the City of any activity conducted by Lessee, and the City will in no way be responsible for the acts or omissions of Lessee on the Premises or otherwise.

**29.** **Attorneys' Fees.** In the event a dispute arises concerning this Amendment, the party not prevailing in such dispute will pay any and all costs and expenses incurred by the other party in enforcing or establishing its rights hereunder, including, without limitation, court costs and reasonable attorneys' fees. For purposes of this Amendment, reasonable fees of attorneys of City's Office of the City Attorney will be based on the fees regularly charged by private attorneys with the equivalent number of years of experience in the subject matter area of the law for which the City Attorney's services were rendered who practice in the City of San Francisco in law firms with approximately the same number of attorneys as employed by the Office of the City Attorney.

**30. References.** No reference to this Amendment is necessary in any instrument or document at any time referring to the Lease. Any future reference to the Lease will be deemed a reference to such document as amended hereby.

**31. Applicable Law.** This Amendment will be governed by, construed and enforced in accordance with the laws of the State of California.

**32. Taxes, Assessments, Licenses, Permit Fees, and Liens.** San Francisco Administrative Code Sections 23.38 and 23.39 require that certain information relating to the creation, renewal, extension, assignment, sublease, or other transfer of this Lease be provided to the County Assessor within sixty (60) days after the transaction. Accordingly, Lessee must provide a copy of this Lease to the County Assessor not later than sixty (60) days after the Effective Date, and any failure of Lessee to timely provide a copy of this Lease to the County Assessor will be a default under this Lease. Lessee will also timely provide any information that City may request to ensure compliance with this or any other reporting requirement.

**33. Further Instruments.** The parties hereto agree to execute such further instruments and to take such further actions as may be reasonably required to carry out the intent of this Amendment.

**34. Effective Date.** The date of which this Amendment will become effective as of the date this Amendment is duly executed and exchanged by the parties hereto.

**35. Operations Commencement Date.** Lessee will commence operation of the COF as of the date agreed to in writing by the Department and the SFBGS, which date will be no later than 90 days after the Effective Date.

**36. Miscellaneous.** Except as expressly modified herein, the terms, covenants and conditions of the Lease will remain unmodified and in full force and effect. The Lease as amended by this Amendment constitutes the entire agreement of the parties concerning the subject matter hereof, and supersedes and cancels any and all previous negotiations, agreements, or understandings, if any, regarding the matters contained herein. The execution of this Amendment will not constitute a waiver of relinquishment of any rights that City may have relating to the Lease. Lessee and City hereby ratify and confirm all of the provisions of the Lease as amended by this Amendment.

NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS AMENDMENT, SFBGS ACKNOWLEDGES AND AGREES THAT NO OFFICER OR EMPLOYEE OF CITY HAS AUTHORITY TO COMMIT CITY HERETO UNLESS AND UNTIL A RESOLUTION OF CITY'S BOARD OF SUPERVISORS WILL HAVE BEEN DULY ENACTED APPROVING THIS AMENDMENT AND AUTHORIZING THE TRANSACTIONS CONTEMPLATED HEREBY, WHICH RESOLUTION WILL THEN BE DULY APPROVED BY THE CITY'S MAYOR. THEREFORE, ANY OBLIGATIONS OR LIABILITIES OF CITY HEREUNDER ARE CONTINGENT UPON ENACTMENT OF SUCH AN RESOLUTION AND THE APPROVAL THEREOF BY THE MAYOR, AND THIS AMENDMENT WILL BE NULL AND VOID UNLESS CITY'S MAYOR AND THE BOARD OF SUPERVISORS APPROVE THIS AMENDMENT, IN THEIR RESPECTIVE SOLE AND ABSOLUTE DISCRETION, AND IN ACCORDANCE WITH ALL APPLICABLE LAWS. APPROVAL OF THIS AMENDMENT BY ANY DEPARTMENT, COMMISSION OR AGENCY OF CITY WILL NOT BE DEEMED TO IMPLY THAT SUCH RESOLUTION WILL BE ENACTED, NOR WILL ANY SUCH APPROVAL CREATE ANY BINDING OBLIGATIONS ON CITY.

In witness whereof, the parties hereto have executed this Amendment as of the date written above.

LESSEE: SAN FRANCISCO BOTANICAL GARDEN SOCIETY AT STRYBING ARBORETUM, a California nonprofit public benefit corporation

By: \_\_\_\_\_  
Its: \_\_\_\_\_

By: \_\_\_\_\_  
Its: \_\_\_\_\_

LANDLORD: CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation

By: \_\_\_\_\_  
Philip A. Ginsburg  
General Manager  
Recreation and Park Department

APPROVED BY:

RECREATION AND PARK COMMISSION  
PURSUANT TO RESOLUTION NO.

\_\_\_\_\_ DATED: \_\_\_\_\_

\_\_\_\_\_  
Ashley Summers, Commission Liaison

APPROVED AS TO FORM:

DAVID CHIU, City Attorney

By: \_\_\_\_\_  
Shari Geller Diamant  
Deputy City Attorney

## EXHIBIT E

### ALLOCATION AND DISTRIBUTION OF ADMISSIONS RECEIPTS

Fees paid for admission to the Gardens of Golden Gate Park pursuant to Section 6.11 of the Lease (“**Admission Receipts**”) will be solely for the benefit of the Gardens of Golden Gate Park and will be allocated and distributed pursuant to the terms of Article 7 of the Lease and this Exhibit E. It is understood and agreed by the Parties that the charging of admissions to the Gardens of Golden Gate Park, the rate of such admissions and the terms of such allocation are subject to amendment by action of City’s Board of Supervisors, in its sole discretion at any time, and in the event of such an amendment Article 7 of the Lease and this Exhibit E will be revised to the extent required to reflect such amendment.

1. Allocation. Admission Receipts will be allocated and paid out on a monthly basis as described below:

a. Admission Receipts will first be used to reimburse SFBGS for its approved “Authorized Collection Expenses” during such period. As used in this Exhibit E, “**Authorized Collection Expenses**” means all costs and expenses incurred by SFBGS in connection with its collection of Admission Receipts, including, without limitation, personnel costs, rent or related fees for equipment, telephone and data charges, office supplies, training, visitor maps and publications, and advertising and publicity costs in connection with the collection of Admissions Receipts. “Authorized Collection Expenses” will not include capital expenses, penalties, late charges or interest on any late payments, or taxes or other amounts withheld from wages or salaries which have not actually been paid by SFBGS during the month for which reimbursement is being made. The SFBGS will submit annually a budget for Authorized Collection Expenses by December 15 for the next Fiscal Year.

b. Secondly, following the payment of the amounts specified in Paragraph 1(a) above, the Admissions Receipts will be paid to the Department until the Department has received an aggregate amount of \$4,400,000 per Fiscal Year pursuant to this Paragraph 1(b) (such amount subject to adjustment as provided in Paragraph 1(e) below) (the “**Annual RPD Allocation Cap**”); provided, however, that before the allocation is used for any other Gardens of Golden Gate Park purpose, the Department will use the allocation to fund three (3) gardeners who are dedicated solely to the care and maintenance of the SFBG and \$250,000 (as adjusted) of which will be dedicated to cover materials and supplies for the COF.

c. Thirdly, following the payment of the amounts specified in Paragraphs 1(a) and 1(b) above, the Admission Receipts will be paid to SFBGS until SFBGS has received an aggregate of \$650,000 per Fiscal Year pursuant to this Paragraph 1(c) (such amount subject to adjustment as provided in Paragraph 1(e) below) (the “**Annual SFBGS Allocation Cap**”). SFBGS will expend Admissions Receipts received pursuant to this Paragraph 1(c) for its “Education and Community Outreach Expenditures.” As used in this Exhibit E, “Education and Community Outreach Expenditures” means costs and expenses incurred by SFBGS for education, community outreach, public programs and other initiatives agreed upon by SFBGS and the Garden Director and approved in writing by the Garden Director. “Education and Community Outreach Expenditures” may include, without limitation, costs and expenses for implementation of free days for the general public, organization and management of volunteer and docent programs, organization and implementation of programs for seniors and school groups, administration of a community education program providing related classes and activities for minimal or no cost, and operation of the Library and Bookstore, including ordering and stocking books.

d. Finally, following the payment of the amounts specified in Paragraphs 1(a), 1(b), and 1(c) above, the balance of Admission Receipts will be paid into the “Gardens of Golden Gate Park Improvement Fund,” which will be maintained by City without charge and will not be commingled with other City funds. Any interest accruing on the funds in the Gardens of Golden Gate Park Garden Improvement Fund will be added to the Gardens of Golden Gate Park Improvement Fund. Expenditures from the Gardens of Golden Gate Park Improvement Fund will be used by City and SFBGS only for the payment of costs and expenses for maintenance, renovation and improvement of the Gardens of Golden Gate Park and will not be used for any other purpose unless the Parties otherwise agree in writing. Expenditures from the Gardens of Golden Gate Park Improvement Fund are intended to enhance the Gardens of Golden Gate Park and not to replace traditional sources or levels of City funding. Expenditures from the Gardens of Golden Gate Park Improvement Fund must be agreed upon by the Garden Director after consultation with the Executive Director and are subject to approval by the General Manager.

e. The Annual RPD Allocation Cap and the Annual SFBGS Allocation Cap will each be subject to adjustment as follows:

- i. Both the Annual RPD Allocation Cap and the Annual SFBGS Allocation Cap will be adjusted annually by the consumer price index (CPI) increase used by the City and County of San Francisco Controller’s Office for labor projections.
- ii. Either or both may be adjusted every three (3) years based on agreement of the parties in order to provide additional support or continuing support (in the event of cost increase not covered by (i) above) for or services to the Gardens of Golden Gate Park

f. CPI Formula. The Adjustment Index will be compared with the Base Index. If the Adjustment Index has increased over the Base Index, then the Annual RPD Allocation Cap and the Annual SFBGS Allocation Cap on and after such Adjustment Date will each be set by multiplying the then-current Annual RPD Allocation Cap and the Annual SFBGS Allocation Cap by a fraction, the numerator of which is the Adjustment Index and the denominator of which is the Base Index.

Notwithstanding the foregoing,

2. With respect to any Fiscal Year as to which the aggregate amount of Admission Receipts available for distribution pursuant to Paragraphs 1(b) and 1(c) above (after deduction of any amount payable with respect to such Fiscal Year pursuant to Paragraph 1(a)) exceeds \$500,000 but is less than the amount needed to distribute the fully-adjusted Allocation Amount to the Department and SFBGS pursuant to Paragraphs 1(c) above, the Allocation Adjustment will be reduced dollar for dollar so that the amount is distributed to each Party under Paragraph 1(b) above and Paragraph 1(c) above are each reduced equally.

3. Admission Account. SFBGS will establish, fund and maintain a bank account for the deposit of Admission Receipts (the “**Admission Account**”) with a depository institution reasonably acceptable to City in accordance with Section 7.6 of the Lease. SFBGS will use the Admission Account for all Admission Receipts prior to disbursement to City as required under this Lease. Any interest accruing on the funds in the Admission Account will be added to the Admission Account. Funds from the Admission Account will not be commingled with other funds. SFBGS will cause each person who has authority to withdraw or transfer funds from the Admission Account to be bonded or otherwise insured. The Admission Account will be subject to a mutually-agreed control agreement pursuant to which City will be granted a perfected

security interest therein. Upon the occurrence of either an Event of Default, or the expiration or earlier termination of this Lease, City will have the immediate right of possession of the funds in Admission Account.

4. Distributions.

a. On or before the thirtieth (30th) day following its receipt of a Monthly Admission Receipts Statement, City will pay to SFBGS via check the amount of its Authorized Collection Expenses for such month.

b. Once City has received the amounts specified in Paragraph 1(b) above in any given Fiscal Year, City will begin to pay to SFBGS the amounts described in Paragraph 1(c), and to the Gardens of Golden Gate Park Improvement Fund the amounts described in Paragraph 1(d), such payments to be made on a monthly basis and on or before the thirtieth (30<sup>th</sup>) day following City's receipt of the applicable Monthly Admissions Receipts Statement.

c. In the event this Lease terminates during any given month, (i) payment of Admission Receipts to City for that portion of the month during which SFBGS was in occupancy of the Premises will be determined and reported by SFBGS to City within twenty (20) days after SFBGS ceases to collect Admission Receipts on the Premises, and (ii) SFBGS's and City's payment obligations under this Exhibit E will remain in effect.

5. Annual True-Up. In the event that the payments made by SFBGS and City in respect of Admission Receipts and Authorized Collection Expenses during the Fiscal Year described by an Annual Admission Receipts Report have not been properly made in accordance with this Exhibit E, City and/or SFBGS, as the case may be, will make payments to each other, or the Gardens of Golden Gate Park Improvement Fund, as appropriate, so as to properly allocate the Admissions Receipts for such Fiscal Year. Such payments will be made within thirty (30) days of City's receipt of such Annual Admission Receipts Statement.

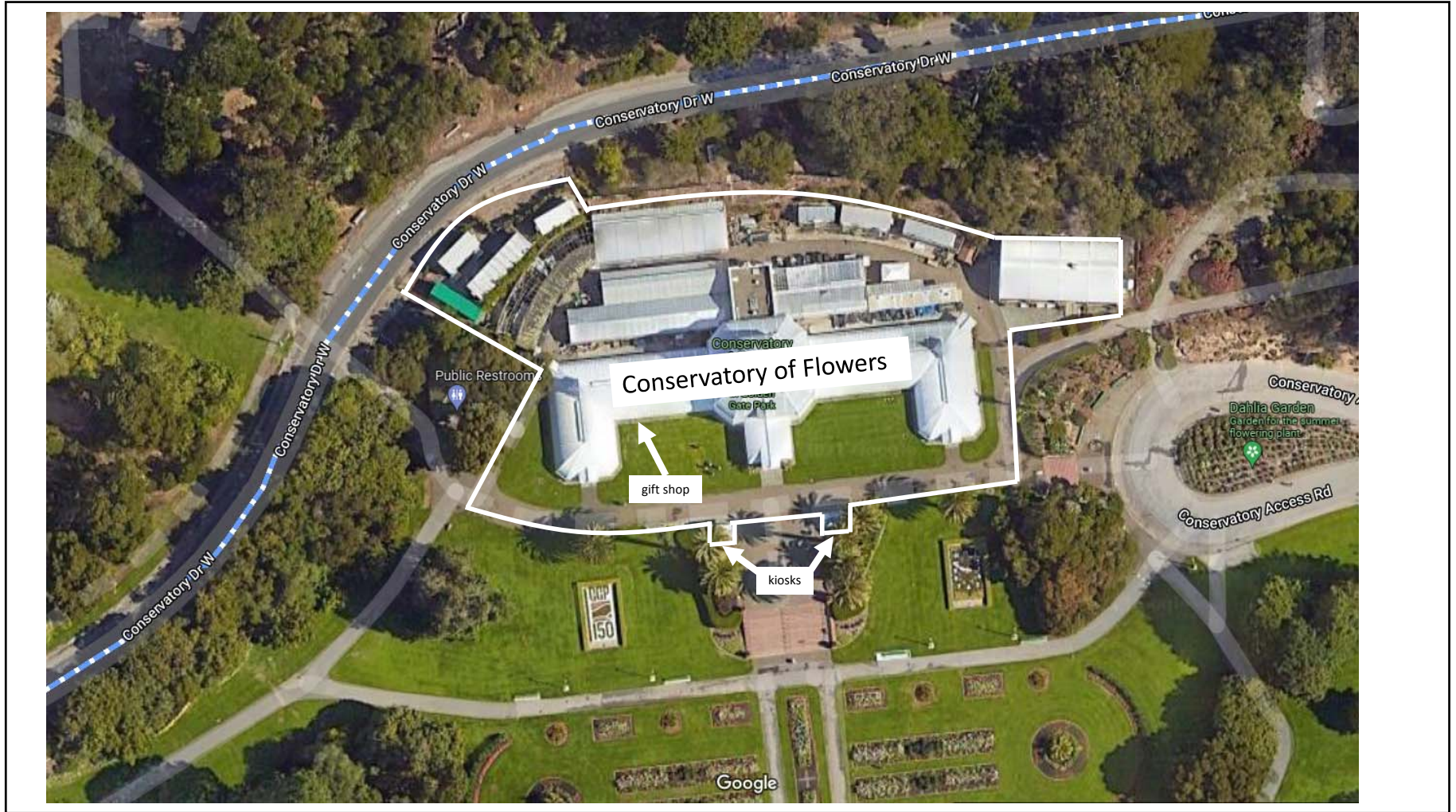


**EXHIBIT AM-A**

Conservatory of Flowers

*[attached]*

Exhibit AM-A Premises of COF



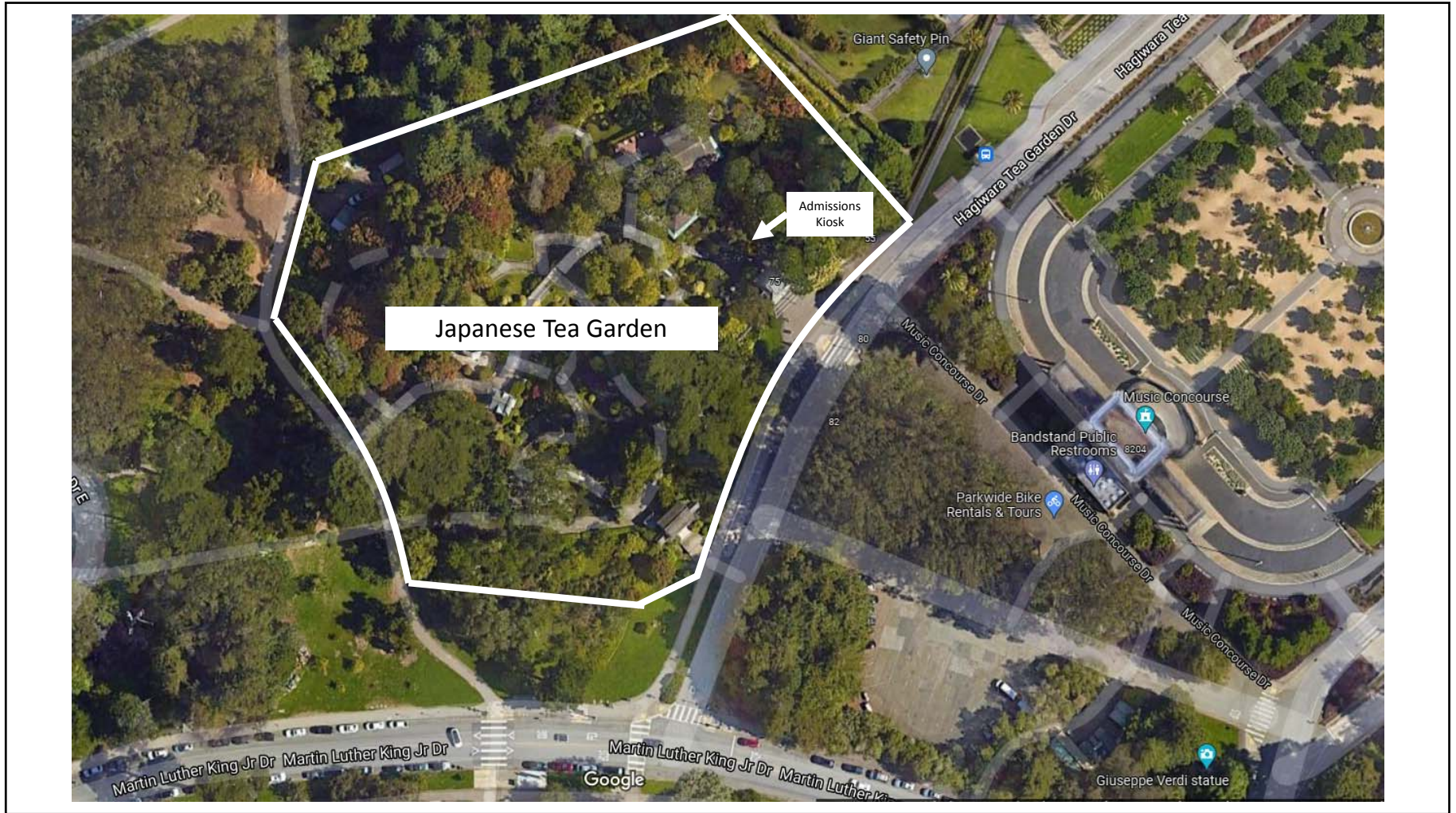
**EXHIBIT AM-B**

Japanese Tea Garden

*[attached]*



Exhibit AM-A Premises of JTG



## EXHIBIT AM-C

### GASB 87 Lease Accounting Checklist

#### Checklist for Supplier Lease Contracts

<b>Lease Term and Provision</b>	<b>Yes</b>	<b>No</b>	<b>N/A</b>
1. Is this an amendment of existing lease?	<input type="checkbox"/>	<input type="checkbox"/>	
2. Confirm the lease agreement date	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. Confirm the lease commencement date and end date	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4. Include payment frequency (such as one time, monthly, quarterly, annually or event based)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5. Identify the based amount per payment frequency	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6. Is lease payment rate adjustment applicable?  <i>Note: For example, reference index, specific rate or of calculation method.</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7. Any variable payments by performance is applicable?  <i>Note: For examples, retail space rent includes calcula based on gross sales or copier charges for per-page fee.</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8. Is lease incentives applicable?  <i>Note: Lease incentives refer to incentives provided by for lease improvements or moving expenses. For example, rei credits or free rent during constructions.</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9. Any security deposit required? (Please include the amount)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10. Is the lease cancelable?  <i>Note: please include when and who can request to can agreement. Also, identify any penalties.</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11. Does this lease contain Renewal options?  <i>Note1: Please include terms, rent calculation, and any lease procedure of renewal Note2: Indicate the date that the lessor is required to b notified by in order to renew the lease.</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
12. Does this lease contain a purchase option?  <i>Note: is the lessee reasonably certain to exercise this purchase option?</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**EXHIBIT AM-D**

Statement of Incompatible Activities

*[attached]*



**RECREATION AND PARK DEPARTMENT**  
**STATEMENT OF INCOMPATIBLE ACTIVITIES**

**I. INTRODUCTION**

This Statement of Incompatible Activities is intended to guide officers and employees of the San Francisco Recreation and Park Department (“Department”) and the Recreation and Park Commission (“Commission”) about the kinds of activities that are incompatible with their public duties and therefore prohibited. For the purposes of this Statement, and except where otherwise provided, “officer” shall mean the Appointing Officer (“General Manager”) and/or a member of the Commission; and “employee” shall mean all employees of the Department.

This Statement is adopted under the provisions of San Francisco Campaign & Governmental Conduct Code (“C&GC Code”) section 3.218. Engaging in the activities that are prohibited by this Statement may subject an officer or employee to discipline, up to and including possible termination of employment or removal from office, as well as to monetary fines and penalties. (C&GC Code § 3.242; Charter § 15.105.) Before an officer or employee is subjected to discipline or penalties for violation of this Statement, the officer or employee will have an opportunity to explain why the activity should not be deemed to be incompatible with his or her City duties. (C&GC Code § 3.218.) Nothing in this document shall modify or reduce any due process rights provided pursuant to the officer’s or employee’s collective bargaining agreement.

In addition to this Statement, officers and employees are subject to Department policies and State and local laws and rules governing the conduct of public officers and employees, including but not limited to:

- Political Reform Act, California Government Code § 87100 *et seq.*;
- California Government Code § 1090;
- San Francisco Charter;
- San Francisco Campaign and Governmental Conduct Code;
- San Francisco Sunshine Ordinance; and
- Applicable Civil Service Rules.

Nothing in this Statement shall exempt any officer or employee from applicable provisions of law, or limit his or her liability for violations of law. Examples provided in this Statement are for illustration purposes only, and are not intended to limit application of this Statement. Nothing in this Statement shall interfere with the rights of employees under a collective bargaining agreement or Memorandum of Understanding applicable to that employee.

Nothing in this Statement shall be construed to prohibit or discourage any City officer or employee from bringing to the City’s and/or public’s attention matters of actual or perceived malfeasance or misappropriation in the conduct of City business, or from filing a complaint alleging that a City officer or employee has engaged in improper governmental activity by violating local campaign finance, lobbying, conflicts of interest or governmental ethics laws, regulations or rules; violating the California Penal Code by misusing City resources; creating a specified and substantial danger to public health or



safety by failing to perform duties required by the officer's or employee's City position; or abusing his or her City position to advance a private interest.

No amendment to any Statement of Incompatible Activities shall become operative until the City and County has satisfied the meet and confer requirements of State law and the collective bargaining agreement.

If an employee has questions about this Statement, the questions should be directed to the employee's supervisor, General Manager or designee. Similarly, questions about other applicable laws governing the conduct of public employees should be directed to the employee's supervisor or the General Manager/designee, although the supervisor or General Manager/designee may determine that the question must be addressed to the Ethics Commission or City Attorney. Employees may also contact their unions for advice or information about their rights and responsibilities under these and other laws.

If a City officer has questions about this Statement, the questions should be directed to the officer's appointing authority, the Ethics Commission or the City Attorney.

## **II. MISSION OF THE RECREATION AND PARK DEPARTMENT**

*The mission of the Recreation and Park Department is to provide enriching recreational activities, maintain beautiful parks and preserve the environment for the well-being of our diverse community.*

## **III. RESTRICTIONS ON INCOMPATIBLE ACTIVITIES**

This section prohibits outside activities, including self-employment, that are incompatible with the mission of the Department. Under subsection C, an officer or employee may seek an advance written determination whether a proposed outside activity is incompatible and therefore prohibited by this Statement. Outside activities other than those expressly identified here may be determined to be incompatible and therefore prohibited. For an advance written determination request from an employee, if the General Manager delegates the decision-making to a designee and if the designee determines that the proposed activity is incompatible under this Statement, the employee may appeal that determination to the General Manager.

### **A. RESTRICTIONS THAT APPLY TO ALL OFFICERS AND EMPLOYEES**

#### **1. ACTIVITIES THAT CONFLICT WITH OFFICIAL DUTIES**

No officer or employee may engage in an outside activity (regardless of whether the activity is compensated) that conflicts with his or her City duties. An outside activity conflicts with City duties when the ability of the officer or employee to perform the duties of his or her City position is materially impaired. Outside activities that materially impair the ability of an officer or employee to perform his or her City duties include, but are not limited to, activities that disqualify the officer or employee from City assignments or responsibilities on a regular basis. Unless (a) otherwise noted in this section or (b) an advance written determination under subsection C concludes that such activities are not incompatible, the following activities are expressly prohibited by this section.

**[RESERVED.]**



## 2. ACTIVITIES WITH EXCESSIVE TIME DEMANDS

Neither the General Manager nor any employee may engage in outside activity (regardless of whether the activity is compensated) that would cause the General Manager or employee to be absent from his or her assignments on a regular basis, or otherwise require a time commitment that is demonstrated to interfere with the General Manager's or employee's performance of his or her City duties.

*Example.* An employee who works at the Department's front desk answering questions from the public wants to take time off every Tuesday and Thursday from 2:00 to 5:00 to coach soccer. Because the employee's duties require the employee to be at the Department's front desk during regular business hours, and because this outside activity would require the employee to be absent from the office during regular business hours on a regular basis, the General Manager or his/her designee may, pursuant to subsection C, determine that the employee may not engage in this activity.

## 3. ACTIVITIES THAT ARE SUBJECT TO REVIEW BY THE DEPARTMENT

Unless (a) otherwise noted in this section or (b) an advance written determination under subsection C concludes that such activities are not incompatible, no officer or employee may engage in an outside activity (regardless of whether the activity is compensated) that is subject to the control, inspection, review, audit or enforcement of the Department. In addition to any activity permitted pursuant to subsection C, nothing in this subsection prohibits the following activities: appearing before one's own department or commission on behalf of oneself; filing or otherwise pursuing claims against the City on one's own behalf; running for City elective office; or making a public records disclosure request pursuant to the Sunshine Ordinance or Public Records Act. Unless (a) otherwise noted in this section or (b) an advance written determination under subsection C concludes that such activities are not incompatible, the following activities are expressly prohibited by this section.

a. Assistance in Responding to City Bids, Request for Qualifications (RFQs) and Request for Proposals (RFPs). No officer or employee may knowingly provide selective assistance (i.e., assistance that is not generally available to all competitors) to individuals or entities in a manner that confers a competitive advantage on a bidder or proposer who is competing for a City contract. Nothing in this Statement prohibits an officer or employee from providing general information about a bid for a City contract, a Department RFQ or RFP or corresponding application process that is available to any member of the public. Nothing in this Statement prohibits an officer or employee from speaking to or meeting with individual applicants regarding the individual's application, provided that such assistance is provided on an impartial basis to all applicants who request it.

***b. Other than in his or her official capacity, no officer or employee may assist private individuals or entities in securing permits for the use of Recreation and Park facilities.***

***Notwithstanding the above prohibitions, officers and employees are not prohibited from providing general information about the contracting process or about how to apply for permits to any member of the public.***

**B. RESTRICTIONS THAT APPLY TO EMPLOYEES IN SPECIFIED POSITIONS**

In addition to the restrictions that apply to all officers and employees of the Department, unless (a) otherwise noted in this section or (b) an advance written determination under subsection C concludes that such activities are not incompatible, the following activities are expressly prohibited by this section for individual employees holding specific positions.

**1. OFFICERS OR EMPLOYEES RESPONSIBLE FOR THE PROCUREMENT OF SUPPLIES, MATERIALS, CONTRACTS OR SERVICES**

*No officer or employee who is responsible for the procurement of supplies, materials, contracts or services may receive compensation or anything of value from any person or entity from which such materials, contracts or services were procured, if such compensation or thing of value is received as a result of the officer's or employee's duties with the Department.*

*Example: An employee whose duties include the procurement of supplies or materials for the Department authorizes the purchase of sporting goods from a local retail sporting goods store. After such purchase, the sporting goods store offers the employee a discount on any future purchases he or she wishes to make for him or herself. The employee may not accept the discount offer because the employee may not benefit materially from a purchase with the sporting goods store made in the course of his or her employment with the Department. This prohibition is also covered under section V of this Statement.*

**2. OFFICERS OR EMPLOYEES RESPONSIBLE FOR THE DISTRIBUTION OR ALLOCATION OF SUPPLIES, MATERIALS, CONTRACTS OR SERVICES**

*No officer or employee whose duties include the distribution or allocation of supplies, materials, contracts or services for the Department may receive compensation or anything of value from any person or entity to which such materials, contracts or services were distributed or allocated, if such compensation or thing of value is received as a result of the officer's or employee's duties with the Department.*

*Example: An employee provides swimming lessons to the public as part of his or her City duties. At the swimming facility, a member of the public offers compensation or a thing of value to the employee. The employee may not accept the compensation or anything of value for services rendered as part of his or her official duties. This prohibition is also covered under section V of this Statement.*

*Example: An employee coaches softball at a City playground as part of his or her duties for the Department. The employee may not solicit or receive anything of value from any member of the public, who utilizes the services of the playground, for performing his or her City job duties. This prohibition is also covered under section V of this Statement.*

**C. ADVANCE WRITTEN DETERMINATION**

As set forth below, an employee of the Department or the General Manager or a member of the Commission may seek an advance written determination whether a proposed outside activity conflicts with the mission of the Department, imposes excessive time demands, is subject to review by the

Department, or is otherwise incompatible and therefore prohibited by section III of this Statement. For the purposes of this section, an employee or other person seeking an advance written determination shall be called “the requestor”; the individual or entity that provides an advance written determination shall be called “the decision-maker.”

## 1. PURPOSE

This subsection permits an officer or employee to seek an advance written determination regarding his or her obligations under subsections A or B of this section. A written determination by the decision-maker that an activity is not incompatible under subsection A or B provides the requestor immunity from any subsequent enforcement action for a violation of this Statement if the material facts are as presented in the requestor’s written submission. A written determination cannot exempt the requestor from any applicable law.

If an individual has not requested an advance written determination under subsection C as to whether an activity is incompatible with this Statement, and the individual engages in that activity, the individual will not be immune from any subsequent enforcement action brought pursuant to this Statement.

Similarly, if an individual has requested an advance written determination under subsection C as to whether an activity is incompatible with this Statement, and the individual engages in that activity, the individual will not be immune from any subsequent enforcement action brought pursuant to this Statement if:

- (a) the requestor is an *employee* who has not received a determination under subsection C from the decision-maker, and 20 working days have not yet elapsed since the request was made; or
- (b) the requestor is an *officer* who has not received a determination under subsection C from the decision-maker; or
- (c) the requestor has received a determination under subsection C that an activity is incompatible.

In addition to the advance written determination process set forth below, the San Francisco Charter also permits any person to seek a written opinion from the Ethics Commission with respect to that person's duties under provisions of the Charter or any City ordinance relating to conflicts of interest and governmental ethics. Any person who acts in good faith on an opinion issued by the Commission and concurred in by the City Attorney and District Attorney is immune from criminal or civil penalties for so acting, provided that the material facts are as stated in the opinion request. Nothing in this subsection precludes a person from requesting a written opinion from the Ethics Commission regarding that person's duties under this Statement.

## 2. THE DECISION-MAKER

Decision-maker for request by an employee: An employee of the Department may seek an advance written determination from the General Manager or his or her designee. The General Manager or his or her designee will be deemed the decision-maker for the employee’s request.

Decision-maker for request by the General Manager: The General Manager may seek an advance written determination from his or her appointing authority. The appointing authority will be deemed the decision-maker for the General Manager's request.

Decision-maker for request by a member of the Commission: A member of the Commission may seek an advance written determination from his or her appointing authority or from his or her commission, or the Ethics Commission. The appointing authority, Commission or Ethics Commission will be deemed the decision-maker for the member's request.

### **3. THE PROCESS**

The requestor must provide, in writing, a description of the proposed activity and an explanation of why the activity is not incompatible under this Statement. The written material must describe the proposed activity in sufficient detail for the decision-maker to make a fully informed determination whether it is incompatible under this Statement.

When making a determination under this subsection, the decision-maker may consider any relevant factors including, but not limited to, the impact on the requestor's ability to perform his or her job, the impact upon the Department as a whole, compliance with applicable laws and rules and the spirit and intent of this Statement. The decision-maker shall consider all relevant written materials submitted by the requestor. The decision-maker shall also consider whether the written material provided by the requestor is sufficiently specific and detailed to enable the decision-maker to make a fully informed determination. The decision-maker may request additional information from the requestor if the decision-maker deems such information necessary. For an advance written determination request from an employee, if the General Manager delegates the decision-making to a designee and if the designee determines that the proposed activity is incompatible under this Statement, the employee may appeal that determination to the General Manager.

The decision-maker shall respond to the request by providing a written determination to the requestor by mail, email, personal delivery, or other reliable means. For a request by an employee, the decision-maker shall provide the determination within a reasonable period of time depending on the circumstances and the complexity of the request, but not later than 20 working days from the date the request *is received*. If the decision-maker does not provide a written determination to the employee within 20 working days from the date *the request is received*, the decision-maker shall be deemed to have determined that the proposed activity does not violate this Statement.

The decision-maker may revoke the written determination at any time based on changed facts or circumstances or other good cause, by providing advance written notice to the requestor. The written notice shall specify the changed facts or circumstances or other good cause that warrants revocation of the advance written determination.

### **4. DETERMINATIONS ARE PUBLIC RECORDS**

To assure that these rules are enforced equally, requests for advance written determinations and written determinations, including approvals and denials, are public records to the extent permitted by law.

#### **IV. RESTRICTIONS ON USE OF CITY RESOURCES, CITY WORK-PRODUCT AND PRESTIGE**

##### **A. USE OF CITY RESOURCES**

No officer or employee may use City resources, including, without limitation, facilities, telephone, computer, copier, fax machine, e-mail, internet access, stationery and supplies, for any non-City purpose, including any political activity or personal purpose. No officer or employee may allow any other person to use City resources, including, without limitation, facilities, telephone, computer, copier, fax machine, e-mail, internet access, stationery and supplies, for any non-City purpose, including any political activity or personal purpose. Notwithstanding these general prohibitions, any incidental and minimal use of City resources does not constitute a violation of this section. Nothing in this subsection shall be interpreted or applied to interfere with, restrict or supersede any rights or entitlements of employees, recognized employee organizations, or their members under state law or regulation or pursuant to provisions of a collective bargaining agreement to use City facilities, equipment or resources, as defined herein.

*Example.* An officer or employee may use the telephone to make occasional calls to arrange medical appointments or speak with a child care provider, because this is an incidental and minimal use of City resources for a personal purpose.

*Example.* While arborist technicians are removing a large tree from a neighborhood park, a nearby resident asks one of the staff to remove a tree from his or her front yard. Although the arborist technician may perform work for the resident, the employee may do so only on his or her own time and only when using equipment that does not belong to the City.

Nothing in this Statement shall exempt any officer or employee from complying with more restrictive policies of the Department regarding use of City resources, including, without limitation, the Department's e-mail policy.

##### **B. USE OF CITY WORK-PRODUCT**

No officer or employee may, in exchange for anything of value and without appropriate authorization, sell, publish or otherwise use any non-public materials that were prepared on City time or while using City facilities, property (including without limitation, intellectual property), equipment and/or materials. For the purpose of this prohibition, appropriate authorization includes authorization granted by law, including the Sunshine Ordinance, California Public Records Act, the Ralph M. Brown Act as well as whistleblower and improper government activities provisions, or by a supervisor of the officer or employee, including but not limited to the officer's or employee's appointing authority. Nothing in this subsection shall be interpreted or applied to interfere with, restrict or supersede any rights or entitlements of employees, recognized employee organizations, or their members under state law or regulation or pursuant to provisions of a collective bargaining agreement to use public materials for collective bargaining agreement negotiations.

##### **C. USE OF PRESTIGE OF THE OFFICE**

No officer or employee may use his or her City title or designation in any communication for any private gain or advantage. The following activities are expressly prohibited by this section.

**1. USING CITY BUSINESS CARDS**

No officer or employee may use his or her City business cards for any purpose that may lead the recipient of the card to think that the officer or employee is acting in an official capacity when the officer or employee is not.

*Example of inappropriate use.* An employee's friend is having a dispute with his new neighbor who is constructing a fence that the friend believes encroaches on his property. The friend invites the employee over to view the disputed fence. When the neighbor introduces herself, the employee should not hand the neighbor her business card while suggesting that she could help resolve the dispute. Use of a City business card under these circumstances might lead a member of the public to believe that the employee was acting in an official capacity.

*Example of acceptable use.* An employee is at a party and runs into an old friend who has just moved to town. The friend suggests meeting for dinner and asks how to get in touch with the employee to set up a meeting time. The employee hands the friend the employee's business card and says that he can be reached at the number on the card. Use of a City business card under these circumstances would not lead a member of the public to believe that the employee was acting in an official capacity. Nor would use of the telephone to set up a meeting time constitute a misuse of resources under subsection A, above.

**2. USING CITY LETTERHEAD, CITY TITLE, OR E-MAIL**

No officer or employee may use City letterhead, City title, City e-mail, or any other City resource, for any communication that may lead the recipient of the communication to think that the officer or employee is acting in an official capacity when the officer or employee is not. (Use of e-mail or letterhead in violation of this section could also violate subsection A of this section, which prohibits use of these resources for any non-City purpose.)

*Example.* An officer or employee is contesting a parking ticket. The officer or employee should not send a letter on City letterhead to the office that issued the ticket contesting the legal basis for the ticket.

**3. HOLDING ONESELF OUT, WITHOUT AUTHORIZATION, AS A REPRESENTATIVE OF THE DEPARTMENT**

No officer or employee may hold himself or herself out as a representative of the Department, or as an agent acting on behalf of the Department, unless authorized to do so.

*Example.* An employee who lives in San Francisco wants to attend a public meeting of a Commission that is considering a land use matter that will affect the employee's

neighborhood. The employee may attend the meeting and speak during public comment, but should make clear that he is speaking in his private capacity and not as a representative of the Department.

## **V. PROHIBITION ON GIFTS FOR ASSISTANCE WITH CITY SERVICES**

State and local law place monetary limits on the value of gifts an officer or employee may accept in a calendar year. (Political Reform Act, Gov't Code § 89503, C&GC Code §§ 3.1-101 and 3.216.) This section imposes additional limits by prohibiting an officer or employee from accepting any gift that is given in exchange for doing the officer's or employee's City job.

No officer or employee may receive or accept gifts from anyone other than the City for the performance of a specific service or act the officer or employee would be expected to render or perform in the regular course of his or her City duties; or for advice about the processes of the City directly related to the officer's or employee's duties and responsibilities, or the processes of the entity they serve.

*Example.* A member of the public who regularly works with and receives assistance from the Department owns season tickets to the Giants and sends a pair of tickets to an employee of the Department in appreciation for the employee's work. Because the gift is given for the performance of a service the employee is expected to perform in the regular course of City duties, the employee is not permitted to accept the tickets.

*Example.* A member of the public requests assistance in resolving an issue or complaint that is related to the City and County of San Francisco, but that does not directly involve the Department. The employee directs the member of the public to the appropriate department and officer to resolve the matter. The member of the public offers the employee a gift in appreciation for this assistance. The employee may not accept the gift, or anything of value from anyone other than the City, for providing this kind of assistance with City services.

As used in this Statement, the term gift has the same meaning as under the Political Reform Act, including the Act's exceptions to the gift limit. (See Gov't Code §§ 82028, 89503; 2 Cal. Code Regs. §§ 18940-18950.4.) For example, under the Act, a gift that, within 30 days of receipt, is returned, or donated by the officer or employee to a 501(c)(3) organization or federal, state or local government without the officer or employee taking a tax deduction for the donation, will not be deemed to have been accepted. In addition to the exceptions contained in the Act, nothing in this Statement shall preclude an employee's receipt of a bona fide award, or free admission to a testimonial dinner or similar event, to recognize exceptional service by that employee, and which is not provided in return for the rendering of service in a particular matter. Such awards are subject to the limitation on gifts imposed by the Political Reform Act and local law.

In addition, the following gifts are de minimis and therefore exempt from the restrictions on gifts imposed by section V of this Statement:

- i. Gifts, other than cash, with an aggregate value of \$25 or less per occasion; and

- ii. Gifts such as food and drink, without regard to value, to be shared in the office among officers or employees.

*Example.* A member of the public who regularly works with and receives assistance from the Department sends a \$15 basket of fruit to an employee as a holiday gift. Although the fruit may in fact be offered in exchange for performing services that the employee is expected to perform in the regular course of City duties, the employee may accept the fruit because the value is de minimis. (Because the reporting requirement is cumulative, an employee may be required to report even de minimis gifts on his or her Statement of Economic Interests if, over the course of a year, the gifts equal or exceed \$50.)

*Example.* A member of the public who regularly works with and receives assistance from the Department sends a \$150 basket of fruit to the Department as a holiday gift. Although the fruit may in fact be offered in exchange for performing services that the Department is expected to perform in the regular course of City duties, the Department may accept the fruit basket because it is a gift to the office to be shared among officers and employees.

## **VI. AMENDMENT OF STATEMENT**

Once a Statement of Incompatible Activities is approved by the Ethics Commission, the Department may, subject to the approval of the Ethics Commission, amend the Statement. (C&GC Code § 3.218(b).) In addition, the Ethics Commission may at any time amend the Statement on its own initiative. No Statement of Incompatible Activities or any amendment thereto shall become operative until the City and County of San Francisco has satisfied the meet and confer requirements of State law and the collective bargaining agreement.



## EXHIBIT AM-E

### Disclosure Obligations; Recordkeeping and Auditing

A. **Acknowledgment of Disclosure Obligations under City Law.** San Francisco Administrative Code Section 67.29-6 requires the Department to disclose on its website the amount and source of all money, goods or services worth more than \$100 in the aggregate for the purpose of carrying out or assisting any City function. For all gifts, grants, and other donations received under the “**Lease**” (defined for purposes of this Exhibit AM-E as the 2013 Agreement as amended by this Amendment) or otherwise for the benefit of the Gardens of Golden Gate Park, the disclosure must identify SFBGS as the contributor, the amounts contributed, and a statement as to any financial interest SFBGS has involving the City, including a contract, grant, lease, or request for license, permit, or other entitlement for use. Under the Administrative Code, the Department must post this information on its website within 30 days of the date of any such donation. If required by City law, the Department must also disclose this or other information about donations from SFBGS in any related resolution or ordinance submitted to the Board of Supervisors for approval.

#### B. **SFBGS’s Reporting & Disclosure Obligations.**

1. **Donor and Grant Information.** SFBGS agrees to comply with San Francisco Administrative Code Section 67.29-6 by posting on its website the names of all individuals or organizations that contribute \$100 or more to SFBGS, by gift, grants, or other instruments, in the form of money, goods, or services, for the purpose of carrying out or assisting the Department’s performance of its City functions; the amounts contributed; and a statement as to any financial interest the donor contributing to the SFBGS has involving the City, including any donor’s contract, grant, lease, or request for license, permit, or other entitlement for use. SFBGS will post this information on its website within 30 days of receipt of any gift, grant or other instrument, and will also provide this information to the Department each year by no later than July 15 for the preceding fiscal year. SFBGS will maintain this donor information on its website until at least the end of the fifth fiscal year after the donation. To ensure compliance with this requirement and to maximize public transparency, SFBGS will not accept anonymous donations from a single source aggregating more than \$100 for purposes covered under the Lease. These provisions shall also apply to any grants received by SFBGS, if those grant funds are transferred to the City for the purpose of carrying out or assisting any City function.

2. **Financial Reports.** SFBGS will provide to the Department and the Department will upload a PDF (searchable text) copy of SFBGS’s annual audited financial report and IRS Form 990 annual tax return into the City’s financial system as part of the Lease documentation and prior to City’s execution of the Lease. The annual audited financial report filings provided by SFBGS must include detailed information about SFBGS’s total sources and uses of funds and also the sources and uses of funds dedicated to support the Department covered under the Lease, the names of SFBGS’s Board of Directors and Officers, and the names of any and all payees of funds covered by the Lease, including consultants, contractors and subcontractors and any current or past City employees paid and any funds provided directly to the Department to support the Department’s functions including but not limited to employee recognition and public events. Additionally, SFBGS will post its audited financial report and

its IRS Form 990 and all related tax return schedules on its website annually within 60 days of the completion of each.

3. **Links to SFBGS Website.** The Department will provide a link on its website to SFBGS's website for the public to readily access the information required under this Amendment. SFBGS will also post the Lease on its website along with copies of any other copies of Grant Awards or other City Contracts and MOU Agreements with any City Department including the Department covered by this Lease.

4. **SFBGS's Supplier Registration.** As part of the Amendment execution, SFBGS must register and submit an IRS Form W-9 through the SF City Partner portal, a complete copy of their most recent IRS Form 990 tax return and complete their Approved Supplier set up through the Controller's Supplier Management Unit.

5. **SFBGS's Invoices through SF City Partner Online (eSettlements) site.** If the Lease includes invoicing by SFBGS to the City Department, all invoices must be submitted online with any/all required supporting documentation through the SF City Partner portal's Online eSettlements site.

**C. Recordkeeping and Auditing.**

1. **Recordkeeping.** SFBGS will maintain books and records relating to Lease, in accordance with generally accepted accounting practices consistently applied, that contain all information required to allow the Department and/or the City's Controller, at their discretion, to audit SFBGS's records and to verify contributions and expenditures in accordance with the Lease.

2. **Auditing.** SFBGS shall make such books and records relating to the Lease available to the Department and/or the City's Controller (or their representatives) upon commercially reasonable prior written notice, but in no event more than ten (10) days after such notice is provided to conduct an audit. SFBGS shall retain and shall allow the Department and/or the City's Controller to access such books and records for a period of the later of (i) five (5) years after the end of each year to which such books and records apply, (ii) five (5) years after the issuance date of the SFBGS's audited financial statement or the IRS Form 990 annual tax return to which such books and records apply, or (iii) if an audit is commenced or if a controversy should arise between the parties hereto regarding the contributions or expenditures hereunder, until such audit or controversy is terminated.



Edwin M. Lee, Mayor  
Philip A. Ginsburg, General Manager

**LEASE AND MANAGEMENT AGREEMENT**

between

**CITY AND COUNTY OF SAN FRANCISCO, Landlord**

and

**SAN FRANCISCO BOTANICAL GARDEN SOCIETY AT STRYBING ARBORETUM,**  
a California nonprofit public benefit corporation,  
formerly known as Strybing Arboretum Society,  
Lessee

**For the Lease of Premises and Cooperative Operation and Management of  
San Francisco Botanical Garden at Strybing Arboretum**

located in Golden Gate Park

San Francisco, California

December 11<sup>th</sup>, 2013

**CITY AND COUNTY OF SAN FRANCISCO**

Edwin M. Lee, Mayor

**SAN FRANCISCO RECREATION and PARK COMMISSION**

Mark Buell, President

Allan Low, Vice President

Paige Arata, Commissioner

Gloria Bonilla, Commissioner

Tom Harrison, Commissioner

Meagan Levitan, Commissioner

Eric McDonnell, Commissioner

Philip A. Ginsburg, General Manager

McLaren Lodge, Golden Gate Park | 501 Stanyan Street | San Francisco, CA 94117 | PH: 415.831.2700 | FAX: 415.831.2096 | [www.parks.sfgov.org](http://www.parks.sfgov.org)



**RECREATION AND PARK DEPARTMENT  
LEASE AND MANAGEMENT AGREEMENT  
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**RECREATION AND PARK DEPARTMENT  
LEASE AND MANAGEMENT AGREEMENT**

THIS LEASE AND MANAGEMENT AGREEMENT (this "Lease"), dated for reference purposes only as of December 11<sup>th</sup>, 2013, is by and between the CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation ("City" or "Landlord"), acting by and through its Recreation and Park Commission (the "Commission"), and SAN FRANCISCO BOTANICAL GARDEN SOCIETY AT STRYBING ARBORETUM, a California nonprofit public benefit corporation, formerly known as Strybing Arboretum Society ("SFBGS" or "Lessee"), and is made with reference to the facts and circumstances described in the Recitals set forth below.

RECITALS

A. City owns San Francisco Botanical Garden at Strybing Arboretum, formerly known as Strybing Arboretum, a 55-acre garden and associated facilities located in the southeast portion of San Francisco's Golden Gate Park along Martin Luther King Jr. Drive and Lincoln Way, between 9<sup>th</sup> Avenue and 19<sup>th</sup> Avenue, more particularly defined below as the "Botanical Garden." The Commission has jurisdiction over the Botanical Garden and is responsible, through City's Recreation and Park Department (the "Department"), for its operation and management. The Botanical Garden is a living museum of more than 8,000 different kinds of plants, many rare and endangered and no longer found in their native habitats, and is a treasure for the residents of San Francisco and the Bay Area as well as for visitors from around the world. The Botanical Garden was created to serve people in many ways. The Botanical Garden offers calm respite from urban congestion and traffic for walking, sitting, and enjoying the peace the Botanical Garden offers as well as observing plants and trees.

B. SFBGS is a nonprofit 501(c)(3) corporation devoted to supporting, promoting, and enhancing the use, appreciation and stature of the Botanical Garden. SFBGS has provided crucial support and assistance to City in the management and operation of the Botanical Garden since 1955, including the construction and donation of the Helen Crocker Russell Library Building; management and operation of the Library and Visitor Orientation Center and Bookstore (each as defined below); funding and developing a special area plan (the "Botanical Garden Master Plan") for the Golden Gate Park Master Plan; providing education and visitors programs, visitor publications, curatorial and plant collections management services, community programming, horticulture education and volunteer programs; planning and managing improvements in the Botanical Garden; paying costs to support the hiring of an eleventh (11th) City gardener dedicated solely to the care and maintenance of the Botanical Garden; and fundraising to support the Botanical Garden.

C. On March 1, 2002, City and SFBGS entered into (i) a Memorandum of Agreement (Strybing Arboretum) (the "Cooperation Agreement"), pursuant to which City and SFBGS agreed to cooperatively manage the Botanical Garden, with the Department taking a primary role in managing certain functions and SFBGS taking a primary role in managing other functions and (ii) that certain Recreation and Park Department Lease (the "Original Lease") pursuant to which SFBGS leased from City certain office space, library space, horticultural space and book kiosk space within the Botanical Garden. The terms of the Cooperation Agreement and the Original Lease have expired, and City and SFBGS have continued to operate under such agreements.

D. In addition to the Original Lease and the Cooperation Agreement, City and SFBGS entered into a Grant Agreement, dated July 1, 2010 (as amended from time to time, the "Grant Agreement"), pursuant to which City provided a grant to SFBGS for the purpose of

funding certain education and community outreach and the operation and maintenance of the Botanical Garden's entrance fee collection program, as more particularly described in the Grant Agreement. Under the most recent amendment, the Grant Agreement expired on June 30, 2013.

E. SFBGS has proposed constructing a Nursery: Center for Sustainable Gardening within the Botanical Garden for the joint use of City and SFBGS. The proposed project is referred to as the "Nursery Project," the building which is a part of the Nursery Project is referred to as the "Nursery Building," and the Nursery Building and the outdoor space which is a part of the Nursery Project are referred to collectively as the "Nursery." The Nursery Project includes construction of a new 9,830 square-foot nursery facility, demolition of the existing greenhouse building and associated pavement and ancillary structures, widening the existing access road from Martin Luther King Jr. Drive to accommodate emergency vehicles, creation of one ADA-compliant parking space and an emergency vehicle turn-around space adjacent to the Nursery Building, re-routing existing pedestrian walkways that currently traverse the project area and expanded growing grounds. The proposed Nursery Building would consist of a new, LEED-certified nursery structure that includes a greenhouse, shade house, and headhouse (including staff work space), support space, public restrooms, outdoor nursery space, and an outdoor Learning Court. The headhouse portion of the Nursery would be designed so that it could be expanded by up to approximately 1,320 square feet at a later date, as the programmatic needs and funds allow.

F. The proposed Nursery is contemplated by both (a) the Botanical Garden Master Plan (adopted by the Commission in 1995) and (b) the Golden Gate Park Master Plan (adopted by the Commission in 1998) (together, the "Master Plans"). SFBGS provided a gift of architectural services and oversaw, in collaboration with the Department, the development of a conceptual plan (the "Conceptual Plan"), which was approved by the Commission on November 20, 2008. On November 29, 2011, the Planning Department issued a Final Mitigated Negative Declaration (the "FMND") for the Nursery, finding that all environmental impacts associated with the project would be mitigated to less than significant levels through implementation of the mitigation measures set forth in the FMND. In addition, the Planning Department staff reviewed the proposed Nursery Project and concluded that it is, on balance, in conformity with the City's General Plan.

G. SFBGS has offered to donate the design and construction of the Nursery to the City and County of San Francisco as a gift-in-place, subject to certain understandings about the use of the Nursery to be incorporated into a lease agreement before construction of the Nursery begins. These understandings are included in **Article 5** of this Lease. On March 15, 2012, the Commission adopted Commission Resolution No. 1203-08 in which the Commission adopted the FMND, approved the Agreement for Design and Construction of the Nursery and Center for Sustainable Gardening (as amended from time to time, the "Construction Agreement"), and recommended that the Board of Supervisors accept a gift from SFBGS currently valued at approximately Fourteen Million Dollars (\$14,000,000). On April 10, 2012, City's Board of Supervisors adopted Resolution No. 125-12, in which the Board of Supervisors (a) adopted the FMND and the Mitigation Monitoring and Reporting Program (the "MMRP") referenced therein, (b) imposed all the mitigation measures set forth in the MMRP as conditions of such approval, and (c) accepted a gift-in-place to the City of the Nursery. The Parties understand that the construction of the Nursery Project is subject to SFBGS's success in raising the balance of the necessary funds.

H. City and SFBGS recognize the need for continued collaboration to meet the challenges and opportunities of creating and sustaining world-class botanical gardens for the 21st century. The Parties have the shared goal of creating one of the world's outstanding public botanical gardens, representing San Francisco's horticultural heritage as well as diverse



collections from around the world, and of increasing levels of private and public financial support and resources to support such goal. In connection with SFBGS's ongoing relationship with the Botanical Garden and Department, SFBGS desires to continue to lease certain office and related space in the Botanical Garden for administrative purposes, to lease and continue to operate the Library (as defined below), to access and utilize horticultural space in the Botanical Garden, and to utilize space in the buildings within the Botanical Garden for educational seminars, receptions, lectures and other special events. City and SFBGS further desire for SFBGS to provide assistance with the operation and management of the Botanical Garden and with education, fundraising and other activities which will support and enhance the Botanical Garden, and in connection with such assistance and support, the Parties desire to provide a clear management structure in which both the Department and SFBGS participate and to provide a structure which facilitates SFBGS's efforts to raise private funds to help augment City funding for the Botanical Garden. Upon completion of the Nursery Project, City will deliver certain space within the Nursery to SFBGS for SFBGS's use and occupancy, and SFBGS will surrender certain of the space outside of the Nursery then used and occupied by SFBGS. Accordingly, City and SFBGS desire to enter into a multiphase lease and management agreement, which sets forth the terms of the cooperative management and operations of the Botanical Garden as well as SFBGS's use and lease of certain space, all as more particularly set forth in the terms and conditions of this Lease.

I. This Lease will have numerous public benefits, and will lessen the burden on the City in operating and maintaining the Botanical Garden and in providing public programming and education.

J. All initially capitalized terms used herein are defined in **Articles 1** and **2** below or have the meanings given them when first defined.

ACCORDINGLY, for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties agree as follows:

#### **1. BASIC LEASE INFORMATION**

The following is a summary of basic lease information (the "Basic Lease Information"). Each item below shall be deemed to incorporate all of the terms set forth in this Lease pertaining to such item. In the event of any conflict between the information in this Article and any more specific provision of this Lease, the more specific provision shall control.

Lease Reference Date: December 11<sup>th</sup>, 2013

Landlord: CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation

Lessee: SAN FRANCISCO BOTANICAL GARDEN SOCIETY AT STRYBING ARBORETUM, a California nonprofit public benefit corporation

Premises; Initial Premises (Section 3.1): The Initial Premises shall consist of a portion of the Botanical Garden located in Golden Gate Park (as more particularly described in **Exhibit A**) in San Francisco, California, owned by City and under the jurisdiction of the Department, comprised of the following, as generally depicted on **Exhibit B-1** and **Exhibit B-2**:

(i) approximately 1,207 square feet of office space located in the rooms presently designated as Rooms 1 and 3 of the San

Francisco County Fair Building (“County Fair Building”) and in the rooms presently designated as Rooms 23, 24, 25 and 30 of the Helen Crocker Russell Library Building (“Library Building”) (collectively, the “Office Space”), shown generally on **Exhibit B-1** attached hereto;

- (ii) approximately 1,378 square feet of space located in the rooms presently designated as Rooms 31, 32, 35, 36, and 37 of the Library Building (the “Library Space”), for operation of the Helen Crocker Russell Library of Horticulture (the “Library”), as generally depicted on **Exhibit B-1** attached hereto;
- (iii) approximately 84 square feet of space constituting the bookstore and approximately 800 square feet of space outside of the bookstore (the “Visitor Orientation Center and Bookstore”), shown generally on **Exhibit B-1** attached hereto;
- (iv) horticultural space comprised of approximately 800 square feet of space in the main greenhouse (“Greenhouse”), approximately 800 square feet of space in the main lath house (“Lath House”), and approximately 80 square feet of space in the container growing grounds (the “Associated Growing Grounds”), all as generally depicted on **Exhibit B-2** attached hereto (collectively, the “Horticultural Premises”), subject however to adjustment from time to time by City, in its reasonable discretion; and
- (v) approximately 308 square feet of storage space located in the room presently designated as Room 21 of the County Fair Building, and, subject to shared use by the City, approximately 50 square feet of space in the room presently designated as Room 14 of the County Fair Building for voice and data connections and a server closet (collectively, the “Storage and Utility Space”) shown generally on **Exhibit B-1** attached hereto

As of the Commencement Date, the Premises consist of the Initial Premises.

Additional Premises (Section 3.1): Upon mutual agreement of SFBGS and the General Manager upon a plan of renovation of the room presently designated as Room 22 of the County Fair Building, as generally depicted in **Exhibit B-1**, such Room 22 shall be added to the Office Space and the Premises.

Nursery Premises; Nursery Shared Use Areas (Section 3.1): The Nursery Premises shall consist of the areas designated for exclusive use by SFBGS (including the work areas in the headhouse for curatorial and plant collections management staff, storage closets and library and display space in the commons area of the headhouse (the “Commons”) and storage closets on the exterior of the Nursery Building), all as generally depicted in **Exhibit B-4**. Upon the Nursery Premises Commencement Date, the Nursery Premises shall be added to the Premises under this Lease and, following demolition of the Horticultural Premises, SFBGS shall surrender the Horticultural Premises to City, and the “Premises” shall thereupon be comprised of the Office Space, the



Visitor Orientation Center and Bookstore, the Library Space, the Storage and Utility Space and the Nursery Premises. In addition to the Nursery Premises, in order to fulfill its responsibilities and obligations, as set forth in this Lease, continue to support activities similar to those conducted in the Horticultural Premises after the Horticultural Premises are surrendered, and engage in other Permitted Uses, SFBGS shall have access to and shared use of the Nursery Shared Use Areas, all as generally depicted in Exhibit B-4 and as provided in **Section 3.1** and **Section 5.2**.

Term (Article 4):

Ten (10) years, commencing on the Effective Date (the "Commencement Date") and expiring on the date immediately preceding the tenth (10th) anniversary of the Commencement Date, subject to extension pursuant to **Section 4.2**.

Options to Extend (Section 4.2):

SFBGS shall have the option to extend the term of this Lease for two successive ten (10)-year extension periods, commencing on the date immediately following the expiration of the initial term or the first extension term, as applicable, on the terms and conditions set forth in **Section 4.2**.

Use (Article 5):

SFBGS shall use the Office Space for office and administrative purposes and community meetings; the Library Space for operation of a horticultural library open to the public during hours approved by the Department and educational seminars and fundraising events at other times; the Visitor Orientation Center and Bookstore space for providing visitor orientation services and materials to the public and operation of a book and gift store selling materials approved by Department (which use shall include the utilization of space outside the Visitor Orientation Center and Bookstore for plant sales); the Horticultural Premises for propagation and sales of plants; the Storage and Utility Space for the storage of supplies and equipment incident to its operations; and, if applicable, the Nursery Premises and Nursery Shared Use Areas for observation, study, and community programs related to horticulture and natural resources conservation, the propagation and sales of plants related thereto, and nursery administrative work areas, all in accordance with the provisions of **Article 5**. In addition to and without limiting the foregoing, the Premises and, if applicable, the Nursery Shared Use Areas may be used for educational and fundraising seminars, receptions, lectures, plant sales and other events sponsored by SFBGS, as provided in **Sections 5.1 and 5.2**. Neither the Premises nor the Nursery Shared Use Areas shall be used by SFBGS for any other purpose.

Operation and Management  
(Article 6):

The Department and SFBGS shall cooperatively manage the Botanical Garden as provided in **Article 6**. Among other matters, SFBGS has primary responsibility for visitor services, admissions collection, garden interpretation, educational programming, community relations, marketing, special events, bookstore management, volunteer program coordination, library operations and coordination of use of the Nursery outside its working hours.

Admission Receipts (Section 7.1): SFBGS shall collect Admission Receipts (as defined below) from admission to the Botanical Garden, subject to SFBGS's right to reimbursement of its Authorized Collection Costs (as defined below) and the other terms and conditions contained in **Section 7.1** and in **Exhibit E**.

Base Rent (Section 7.2): SFBGS shall pay Base Rent of \$100 per year, payable as provided in **Section 7.2**.

Security Deposit (Section 25): None

Notice Address of City (Section 27.1): Recreation and Park Department  
Property Management  
McLaren Lodge Annex  
San Francisco, California 94117  
Re: Botanical Garden

with a copy to: Office of the City Attorney  
City Hall, Room 234  
1 Dr. Carlton B. Goodlett Place  
San Francisco, California 94102-4682  
Attn: Real Estate/Finance Team

Key Contact for City: Director of Property; Nicholas A. Kinsey  
Telephone No.: (415) 831-2774

Address for SFBGS (Section 27.1): San Francisco Botanical Garden Society at Strybing Arboretum  
1199 9th Avenue at Lincoln Way  
Golden Gate Park  
San Francisco, California 94122

Key Contact for SFBGS: Executive Director,  
San Francisco Botanical Garden Society at Strybing Arboretum

Telephone No.: (415) 661-1316  
Fax No.: (415) 661-3539

**2. DEFINITIONS**

For purposes of this Lease, initially capitalized terms shall have the meanings ascribed to them in this Section:

“**Accounts**” has the meaning given in **Section 7.6** hereof.

“**ADA**” has the meaning given in **Section 5.4(xv)** hereof.

“**Additional Charges**” means any and all real and personal property taxes, possessory interest taxes, insurance premiums and other costs, impositions and expenses described in hereof or otherwise payable by SFBGS under this Lease.

“**Adjustment Index**” means the Index which is published most immediately preceding a particular Allocation Adjustment Date.

“**Admission Account**” has the meaning given in **Paragraph 2 of Exhibit E**.

“**Admission Receipts**” means fees paid for admission to the Botanical Garden pursuant to **Section 6.11**.

“**Agents**” means, when used with reference to either Party to this Lease, the officers, directors, employees, agents and contractors of such Party, and their respective heirs, legal representatives, successors and assigns.

“**Allocation Adjustment**” has the meaning given in **Paragraph 1(f) of Exhibit E**.

“**Allocation Adjustment Date**” has the meaning given in **Paragraph 1(f) of Exhibit E**.

“**Allocation Amount**” means the amount of Admission Receipts to be allocated to a Party pursuant to the provisions of **Paragraph 1 of Exhibit E**.

“**Alterations**” means any alterations, installations or additions to any Improvements or to the Premises, including but not limited to any interior alterations or renovations.

“**Annual Admission Receipts Statement**” has the meaning given in **Section 7.7(b)** hereof.

“**Annual RPD Allocation Cap**” has the meaning given in **Paragraph 1(b) of Exhibit E**.

“**Annual SFBGS Allocation Cap**” has the meaning given in **Paragraph 1(d) of Exhibit E**.

“**Assignment**” has the meaning given in **Section 17.1** hereof.

“**Associated Growing Grounds**” has the meaning set forth in the Basic Lease Information.

“**Authorized Collection Expenses**” has the meaning given in **Paragraph 1(a) of Exhibit E**.

“**Award**” means all compensation, sums or value paid, awarded or received for a Taking, whether pursuant to judgment, agreement, settlement or otherwise.

“**Base Index**” means the Index published most immediately preceding July 1, 2013, with respect to the July 1, 2018, Allocation Adjustment described in **Exhibit E**, and, with respect to each subsequent Allocation Adjustment means the Index which is published most immediately preceding the previous Allocation Adjustment Date.

“**Base Rent**” means the annual Base Rent specified in the Basic Lease Information and described in **Section 7.2** hereof.

“**Basic Lease Information**” means the information with respect to this Lease summarized in **Article 1** hereof.

“**Botanical Garden**” means San Francisco Botanical Garden at Strybing Arboretum, a 55-acre garden and associated facilities located in the southeast portion of San Francisco’s Golden Gate Park along Martin Luther King Jr. Drive and Lincoln Way, between 9<sup>th</sup> Avenue and 19<sup>th</sup> Avenue, in San Francisco, California, and any and all improvements now or hereafter located thereon, as such area and improvements may be modified, expanded or revised from time to time.

**“Botanical Garden Improvement Fund”** has the meaning given in **Paragraph 1(e)** of **Exhibit E**.

**“Botanical Garden Master Plan”** has the meaning given in **Recital B**.

**“Building”** or **“Buildings”** means the Library Building, the County Fair Building, and, if applicable, the Nursery Building.

**“Building Systems”** has the meaning given in **Section 10.2** hereof.

**“City”** means the City and County of San Francisco, a municipal corporation.

**“City Commitment”** has the meaning given in **Section 6.8(b)** hereof.

**“Commencement Date”** has the meaning set forth in the Basic Lease Information.

**“Commission”** means the City and County of San Francisco Recreation and Park Commission or its successor.

**“Common Areas”** has the meaning set forth in **Section 3.1** hereof.

**“Commons”** has the meaning given in the Basic Lease Information.

**“Conceptual Plan”** has the meaning given in **Recital F**.

**“Construction Agreement”** has the meaning given in **Recital G**.

**“Cooperation Agreement”** has the meaning given in **Recital C**.

**“County Fair Building”** has the meaning given in the Basic Lease Information.

**“Date of Taking”** means the earlier of (i) the date upon which title to the portion of the Premises taken passes to and vests in the condemnor or (ii) the date on which SFBGS is dispossessed.

**“Department”** means City’s Recreation and Park Department.

**“Department Facilities”** means any and all real property located in the Botanical Garden, including any improvements located thereon, owned by the City, except the Premises and any Common Areas to which SFBGS has a non-exclusive right of access pursuant to this Lease.

**“Department’s Primary Responsibility”** has the meaning given in **Section 6.1(a)** hereof.

**“Education and Community Outreach Expenditures”** has the meaning given in **Exhibit E**.

**“Effective Date”** means the later of (i) the date on which the Parties have executed and delivered this Lease or (ii) the date on which each of the following have occurred: (a) thirty (30) days after Commission approval, and (b) the effective date of an ordinance by the City’s Board of Supervisors approving this Lease and authorizing the City’s execution.

**“Encumber”** means create any Encumbrance; **“Encumbrance”** means any mortgage, deed of trust, assignment of rents, fixture filing, security agreement, or similar security instrument, or other lien or encumbrance.

**“Encumbrancer”** means a mortgagee, beneficiary of a deed of trust or other holder of an Encumbrance.

**“Environmental Laws”** means any present or future federal, state or local Laws or policies relating to Hazardous Material (including, without limitation, its use, handling, transportation, production, disposal, discharge or storage) or to human health and safety, industrial hygiene or environmental conditions in, on, under or about the Premises (including any permitted Improvements) and any other property, including, without limitation, soil, air and groundwater conditions.

**“Event of Default”** means any one of the events of default described in **Section 18.1** hereof.

**“Executive Director”** has the meaning given in **Section 6.1(c)** hereof.

**“Expiration Date”** has the meaning set forth in **Section 4.1(a)** hereof.

**“Extension Deadline”** has the meaning given in **Section 4.2(a)** hereof.

**“Extension Options”** has the meaning given in **Section 4.2(a)** hereof.

**“Extension Term”** has the meaning given in **Section 4.2(a)** hereof.

**“Fiscal Year”** shall mean the City’s accounting year of July 1st through June 30th.

**“FMV”** has the meaning given in **Section 6.8(d)** hereof.

**“FMND”** has the meaning given in **Recital F**.

**“Garden Director”** has the meaning given in **Section 6.1(c)** hereof.

**“General Manager”** means the General Manager of the Recreation and Park Department.

**“Grant Agreement”** has the meaning set forth in **Recital D**.

**“Greenhouse”** has the meaning set forth in the Basic Lease Information. For the avoidance of doubt, the capitalized term “Greenhouse” refers to a portion of the Horticultural Premises, not to a portion of the Nursery Premises.

**“Hazardous Material”** means any material that, because of its quantity, concentration or physical or chemical characteristics, is deemed by any federal, state or local governmental authority to pose a present or potential hazard to human health or safety or to the environment. Hazardous Material includes, without limitation, any material or substance defined as a “hazardous substance,” or “pollutant” or “contaminant” pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA”, also commonly known as the “Superfund” law), as amended, (42 U.S.C. Sections 9601 *et seq.*) or pursuant to Section 25281 of the California Health & Safety Code; any “hazardous waste” listed pursuant to Section 25140 of the California Health & Safety Code; any asbestos and asbestos containing materials whether or not such materials are part of the structure of any existing improvements on the Premises, any Improvements to be constructed on the Premises by or on behalf of SFBGS, or are naturally occurring substances on, in or about the Premises; and petroleum, including crude oil or any fraction thereof, and natural gas or natural gas liquids.

**“Hazardous Material Claims”** means any and all enforcement, Investigation, Remediation or other governmental or regulatory actions, agreements or orders threatened, instituted or completed pursuant to any Environmental Laws, together with any and all Losses made or threatened by any third party against City, the Department, their Agents, or the Premises or any Improvements, relating to damage, contribution, cost recovery compensation, loss or injury resulting from the presence, release or discharge of any Hazardous Materials, including, without limitation, Losses based in common law. Hazardous Materials Claims include, without limitation, Investigation and Remediation costs, fines, natural resource damages, damages for decrease in value of the Premises or any Improvements, the loss or restriction of the use or any amenity of the Premises or any Improvements, and attorneys’ fees and consultants’ fees and experts’ fees and costs.

**“Horticultural Premises”** has the meaning set forth in the Basic Lease Information.

**“Horticultural Premises Deletion Date”** has the meaning given in **Section 4.1(c)** hereof.

**“Improvements”** means any and all buildings, structures, fixtures and other improvements constructed, installed or placed on the Premises by or on behalf of SFBGS pursuant to this Lease, including, without limitation, any trailers, mobile homes, permanent tent facilities, signs, billboards or other advertising materials, roads, trails, driveways, parking areas, curbs, walks, fences, walls, stairs, poles, plantings and landscaping. For avoidance of doubt, improvements does not include other improvements made by or on behalf of SFBGS that are in the Botanical Garden but not part of the Premises.

**“Indemnified Parties”** means City, including, but not limited to, all of its boards, commissions, departments, agencies and other subdivisions, including, without limitation, the Department, and all of its and their respective Agents, and their respective heirs, legal representatives, successors and assigns, and each of them.

**“Indemnify”** means indemnify, protect, defend and hold harmless forever.

**“Index”** means the Consumer Price Index for All Urban Consumers (base years 1982-1984 = 100) for the San Francisco-Oakland-San Jose area, published by the United States Department of Labor, Bureau of Labor Statistics. If the Index is changed so that the base year differs from that used as of the date most immediately preceding the Commencement Date, the Index shall be converted in accordance with the conversion factor published by the United States Department of Labor, Bureau of Labor Statistics. If the Index is discontinued or revised during the Term, such other government index or computation with which it is replaced shall be used in order to obtain substantially the same result as would be obtained if the Index had not been discontinued or revised.

**“Initial Premises”** has the meaning set forth in the Basic Lease Information.

**“Investigation”** when used with reference to Hazardous Material means any activity undertaken to determine the nature and extent of Hazardous Material that may be located in, on, under or about the Premises, any Improvements or any portion thereof or which have been, are being, or threaten to be Released into the environment. Investigation shall include, without limitation, preparation of site history reports and sampling and analysis of environmental conditions in, on, under or about the Premises or any Improvements.

**“Invitees”** when used with respect to SFBGS means the clients, customers, invitees, guests, members and licensees, assignees and sublessees of SFBGS, including participants of formal advertised programs provided by SFBGS on the Premises, and participants of special events held

or hosted by SFBGS (whether the Botanical Garden is open or closed to the public), excluding however, participants of public tours of the Botanical Garden that SFBGS conducts in public areas during hours that the Botanical Garden is open to the public and any employee of the Department while such employee is on duty. In no event shall "Invitees" include persons visiting the Botanical Garden generally.

**"Landlord"** means the City and County of San Francisco.

**"Law"** means any law, statute, ordinance, resolution, regulation, proclamation, order or decree of any municipal, county, state or federal government or other governmental or regulatory authority with jurisdiction over the Premises, or any portion thereof, whether currently in effect or adopted in the future and whether or not in the contemplation of the Parties.

**"Learning Court"** has the meaning given in **Section 5.2** hereof.

**"Lease"** means this Lease as it may be amended in accordance with its terms.

**"Lessee"** or **"SFBGS"** means the Party identified as the Lessee in the Basic Lease Information and at the beginning of this Lease. Except when immediately followed by the word "itself," the term SFBGS or Lessee shall also refer to the successors and assigns of SFBGS's interests under this Lease, provided that the rights and obligations of SFBGS's successors and assigns shall be limited to only those rights and obligations that this Lease permits to be transferred and that have been transferred in accordance with this Lease.

**"Library"** has the meaning set forth in the Basic Lease Information.

**"Library Building"** has the meaning set forth in the Basic Lease Information.

**"Library Collection"** has the meaning given in **Section 6.8(a)** hereof.

**"Library Space"** has the meaning set forth in the Basic Lease Information.

**"Losses"** means any and all claims, demands, losses, liabilities, damages, liens, injuries, penalties, fines, lawsuits and other proceedings, judgments and awards and costs and expenses, including, without limitation, reasonable attorneys' and consultants' fees and costs.

**"Master Plans"** has the meaning set forth in **Recital F**.

**"MMRP"** has the meaning set forth in **Recital F**.

**"Monthly Admission Receipts Statement"** has the meaning set forth in **Section 7.7(a)** hereof.

**"Notice of Proposed Transfer"** has the meaning given in **Section 17.2** hereof.

**"Nursery"** has the meaning set forth in **Recital E**. The Nursery includes (i) the Nursery Premises, which are designated for exclusive use by SFBGS, (ii) areas designated for exclusive use by the Department (including work areas in the headhouse and greenhouse for Department staff assigned to the Botanical Garden), and (iii) the Nursery Shared Use Areas, all as generally depicted on **Exhibit B-4**.

**"Nursery Building"** has the meaning set forth in **Recital E**.

**"Nursery Premises"** has the meaning set forth in the Basic Lease Information.

“**Nursery Premises Commencement Date**” has the meaning given in **Section 4.1**.

“**Nursery Project**” has the meaning set forth in **Recital E**.

“**Nursery Shared Use Areas**” means areas within the Nursery designated for shared use by SFBGS and the Department, as generally depicted on **Exhibit B-4**.

“**Office Space**” has the meaning set forth in the Basic Lease Information.

“**Official Records**” means the official records of the county(ies) in which the Premises are located.

“**Original Lease**” has the meaning set forth in **Recital C**.

“**Party**” means City or SFBGS; “**Parties**” means both City and SFBGS.

“**Permitted Uses**” has the meaning given in **Section 5.1** hereof.

“**Premises**” has the meaning given in **Section 3.1** hereof. The Premises shall include any existing or permitted Improvements, together with any additions, modifications or other Alterations thereto permitted hereunder. Notwithstanding anything to the contrary in this Lease, the Premises do not include Department Facilities, nor any water, water rights, riparian rights, water stock, mineral rights or timber rights relating to the Premises.

“**Purchase Price**” has the meaning given in **Section 6.8(d)** hereof.

“**Referee**” has the meaning given in **Section 6.8(d)** hereof.

“**Release**” when used with respect to Hazardous Material means any actual or imminent spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing.

“**Remediation**” when used with reference to Hazardous Material means any activities undertaken to clean up, remove, contain, treat, stabilize, monitor or otherwise control any Hazardous Material which has been, is being, or threatens to be Released into the environment. Remediate includes, without limitation, those actions included within the definition of “remedy” or “remedial action” in California Health and Safety Code Section 25322 and “remove” or “removal” in California Health and Safety Code Section 25323.

“**Rent**” means the Base Rent, together with any and all Additional Charges, whether or not any such amounts are specifically characterized as rent.

“**Rules and Regulations**” has the meaning given in **Section 3.3** hereof.

“**Sale Notice**” has the meaning given in **Section 6.8(b)** hereof.

“**SFBGS**” means San Francisco Botanical Garden Society at Strybing Arboretum, a California nonprofit public benefit corporation.

“**SFBGS’s Board Chair**” has the meaning given in **Section 6.2** hereof.



“**SFBGS’s Personal Property**” means the personal property of SFBGS described in **Section 9.3** hereof.

“**Special Events**” has the meaning given in **Section 5.1** hereof.

“**Storage and Utility Space**” has the meaning set forth in the Basic Lease Information.

“**Sublease**” has the meaning given in **Section 17.1** hereof.

“**Sunshine Ordinance**” has the meaning given in **Section 6.7(e)** hereof.

“**Taking**” means a taking or damaging, including severance damage, by eminent domain, inverse condemnation or for any public or quasi-public use under Law. A Taking may occur pursuant to the recording of a final order of condemnation, or by voluntary sale or conveyance in lieu of condemnation or in settlement of a condemnation action.

“**Term**” means the term of this Lease as determined under **Section 4.1** hereof.

“**Transfer**” means any Assignment or Sublease.

“**Transferee**” means any recognized assignee of any part of SFBGS’s leasehold interest hereunder or any recognized sublessee of any portion of the Premises, pursuant to a Transfer that complies with **Article 17** hereof.

“**Unmatured Event of Default**” means any default by SFBGS under this Lease that, with the giving of notice or the passage of time, or both, would constitute an Event of Default hereunder.

“**Visitor Orientation Center and Bookstore**” has the meaning given in the Basic Lease Information.

### **3. PREMISES**

#### **3.1. Leased Premises; Nursery Shared Use Areas; Common Areas.**

(a) **Premises; General Statement of Limitation.** “Premises” shall mean the real property and improvements from time to time leased to SFBGS pursuant to the terms of this Lease. The “Premises” shall initially mean the Initial Premises. Any acreage or square footage stated in this Lease with respect to the Premises or any part thereof is an estimate only, and City does not warrant it to be correct. Subject to the terms, covenants and conditions of this Lease, City leases the Premises to SFBGS and SFBGS leases the Premises from City.

(b) **Initial Premises; Acceptance of Initial Premises.** “Initial Premises” has the meaning set forth in the Basic Lease Information. SFBGS acknowledges that SFBGS is presently in possession of the Initial Premises. The term of this Lease shall commence with respect to the Initial Premises as provided in **Section 4.1** below.

(c) **Nursery Premises.** “Nursery Premises” has the meaning set forth in the Basic Lease Information. The Nursery Premises shall be added to the Premises under this Lease in accordance with the provisions of **Section 4.1** below. Upon commencement of the Term with respect to the Nursery Premises, “Premises,” as used in this Lease, shall refer to the Office Space, the Visitor Orientation Center and Bookstore, the Library Space, the Storage and Utility Space and the Nursery Premises, and, solely until surrender thereof pursuant to **Section 4.1** below, the Horticultural Premises.

(d) **Nursery Shared Use Areas.** The Parties contemplate that SFBGS will be permitted to use approximately half of the available growing space in the Nursery's greenhouse and shadehouse, and a portion of the growing grounds reasonably satisfactory to the Garden Director, all of which are part of the Nursery Shared Use Areas, in accordance with the provisions of **Section 5.2** below and the terms and conditions of this Lease. It is the Parties' intent that the license granted under this Lease for use of the Nursery Shared Use Areas shall be co-terminus with the Lease. Accordingly, the termination or expiration of the Lease in accordance with the terms hereof shall effect the termination of the license to use the Nursery Shared Use Areas.

(e) **Horticultural Premises Deleted from Premises Upon Surrender.** Upon SFBGS's surrender of the Horticultural Premises pursuant to **Section 4.1** below, the Premises shall no longer include the Horticultural Premises.

(f) **Common Areas.** Subject to the Rules and Regulations (as defined below), SFBGS shall have the non-exclusive right to use, together with City and any other tenants of the Buildings, the lobbies, corridors, restrooms, elevators, stairways and other public areas of the Buildings and the exterior public portions of the Botanical Garden, and the non-exclusive right to use, together with City, certain areas of the Greenhouse, Lath House and Associated Growing Grounds as may be designated by City from time to time, and the Nursery Shared Use Areas (collectively, the "Common Area" or "Common Areas"), and the non-exclusive right of access to and from the Premises and Nursery Shared Use Areas by the main entrances to the Buildings and through the exterior portions of the Botanical Garden required for such access. City shall have the right, in City's sole discretion and from time to time, (i) to make changes to the Common Area, including, without limitation, changes in the location, size, shape and number of driveways, entrances, parking spaces, parking areas, loading and unloading areas, ingress, egress, direction of traffic, landscape areas, and walkways, (ii) to close temporarily any of the Common Areas for maintenance or safety purposes, so long as reasonable access to the Premises and Nursery Shared Use Areas remains available, (iii) to install, use, maintain, repair, alter, relocate or replace any Common Area, and (iv) to do and perform such other acts and make such other changes in, to or with respect to the Common Areas and the Botanical Garden as City may, in its sole discretion, deem to be appropriate or prudent, provided, in each instance, that such changes, closures, repairs and alterations do not materially and unnecessarily interfere with, or adversely affect, SFBGS' use of the Premises or the Nursery Shared Use Areas. In connection with any temporary closure, repair, alteration or changes to the Common Areas made by City, City agrees to use its reasonable efforts, following consultation with SFBGS where reasonably feasible, to minimize disruption to SFBGS's use and occupancy of the Premises and the Nursery Shared Use Areas. SFBGS agrees that City shall have no liability to SFBGS for disruption of SFBGS's operations caused by any changes made by City in accordance with this **Section 3.1(f)**. Nothing in this Lease is intended to grant SFBGS any right whatsoever to possess, use or operate the Department Facilities, or any portion thereof.

(g) **Additional Premises.** If SFBGS desires to lease part or all of that portion of the County Fair Building known as Room 22, as generally depicted on **Exhibit B-1**, SFBGS shall provide City with written notice of such desire, together with proposed plans for the renovation of such Room 22 and a written description of SFBGS's proposed use of Room 22. If the General Manager, in his or her sole discretion, approves SFBGS's proposal, such Room 22 shall be added to the Office Space and the Premises as of a date designated by the General Manager, on all the terms and conditions of this Lease except as otherwise conditioned by the General Manager in writing. The Parties shall memorialize the addition of Room 22 to the Premises in writing.

(h) City shall reasonably cooperate with SFBGS in furnishing secure space for SFBGS's telephone, server and data support.

**3.2. Rights Reserved to City.** Notwithstanding anything to the contrary in this Lease, City reserves and retains all of the following rights relating to the Premises and Nursery Shared Use Areas at all times:

(a) Any and all water and water rights, including, but not limited to (i) any and all surface water and surface water rights, including, without limitation, riparian rights and appropriative water rights to surface streams and the underflow of streams, and (ii) any and all groundwater and subterranean water rights, including, without limitation, the right to export percolating groundwater for use by City or its water customers;

(b) Any and all timber and timber rights, including, without limitation, all standing trees and downed timber;

(c) Any and all minerals and mineral rights of every kind and character now known to exist or hereafter discovered in the Premises or Nursery Shared Use Areas, including, but not limited to, oil and gas and rights thereto, together with the sole, exclusive, and perpetual right to explore for, remove, and dispose of those minerals by any means or methods suitable to City or its successors and assigns, but without entering upon or using the surface of the lands of the Premises and in such manner as not to damage the surface of the Premises or to interfere with the permitted use thereof by SFBGS, without SFBGS's prior written consent;

(d) All rights to use, operate, maintain, repair, enlarge, modify, expand, replace and reconstruct any Department Facilities;

(e) The right to grant future easements and rights of way over, across, under, in and upon the Premises and Nursery Shared Use Areas as City shall determine to be in the public interest, conditioned upon the grantee's assumption of liability to SFBGS for damage to its property that SFBGS may sustain hereunder as a result of the grantee's use of such easement or right of way, provided that any such easement or right-of-way shall not materially interfere with SFBGS's use of the Premises or the Nursery Shared Use Areas hereunder and provided further that City will grant no easements, rights of way, permits and/or licenses in or upon the Premises or elsewhere in the Botanical Garden for commercial cellular towers, commercial antennae, commercial billboards, commercial signs or commercial advertising kiosks.

(f) All rights of access provided for in **Article 21** below; and

(g) Except as otherwise provided for in this Lease, the right to rent, control, change, amend, modify, temporarily close, repair, maintain, alter, replace or relocate all or any portion of the Botanical Garden or the Buildings (excluding the Premises), including, without limitation, the Common Area, and the right to do and perform such other acts and make such other changes in, to or with respect to such areas as City may, in its sole discretion, deem to be appropriate or prudent.

For the purposes of item (e) of this **Section 3.2** signage to promote the Botanical Garden or Golden Gate Park or to recognize donors will not be considered "commercial."

**3.3. Subject to Public and Municipal Uses and Rules.** SFBGS acknowledges that the property of which the Premises are a part constitutes a portion of City's public park system, which City holds for public and municipal use. SFBGS's rights under this Lease shall be subject and subordinate to City's use of the Premises and Nursery Shared Use Areas for such purposes.

However, so long as there is no Event of Default or Unmatured Event of Default on the part of SFBGS outstanding hereunder and subject to the terms and conditions of this Lease, City shall avoid interfering with SFBGS's quiet use and enjoyment of the Premises and the Nursery Shared Use Areas. SFBGS shall comply with the Department's rules and regulations relating to its park property, as the same may change from time to time (the "Rules and Regulations"). A copy of the current Rules and Regulations can be downloaded from the web address provided in the attached **Exhibit D**.

**3.4. As Is Condition of Premises and Nursery Shared Use Areas.**

**(a) Inspection of Premises.** SFBGS represents and warrants that SFBGS has conducted a thorough and diligent inspection and investigation, either independently or through Agents of SFBGS's own choosing, of the Initial Premises and the suitability of the Initial Premises for SFBGS's intended use. SFBGS is fully aware of the needs of its operations and has determined, based solely on its own investigation, that the Initial Premises are suitable for its operations and intended uses. SFBGS presently occupies the Initial Premises.

**(b) As Is; Disclaimer of Representations.** SFBGS acknowledges and agrees that the Premises are being leased and the Nursery Shared Use Areas are being licensed, and (in each case) accepted in their "**AS IS, WITH ALL FAULTS**" condition, without representation or warranty of any kind (other than City's express obligations under this Lease), and subject to all applicable Laws governing the use, occupancy, management, operation and possession of the Premises and the Nursery Shared Use Areas. Without limiting the foregoing, this Lease is made subject to any and all covenants, conditions, restrictions, easements and other title matters affecting the Premises, Nursery Shared Use Areas, or any portion thereof, whether or not of record. SFBGS acknowledges and agrees that neither City, the Department, nor any of their Agents have made, and City hereby disclaims, any representations or warranties, express or implied, concerning: (i) title or survey matters affecting the Premises or the Nursery Shared Use Areas, (ii) the physical, geological, seismological or environmental condition of the Premises or the Nursery Shared Use Areas, (iii) the quality, nature or adequacy of any utilities serving the Premises or the Nursery Shared Use Areas, (iv) the present or future suitability of the Premises or Nursery Shared Use Areas for SFBGS's business and intended uses, (v) the feasibility, cost or legality of constructing any Improvements on the Premises or Nursery Shared Use Areas if required for SFBGS's use and permitted under this Lease, or (vi) any other matter whatsoever relating to the Premises or Nursery Shared Use Areas or their use, including, without limitation, any implied warranties of merchantability or fitness for a particular purpose, except, in all cases, the express representations and warranties and covenants of City under this Lease.

**3.5. Adjustment of Premises.** The General Manager shall have the authority, in the General Manager's sole and complete discretion, to increase the Premises by not more than five percent (5%).

**3.6. Accessibility Inspection Disclosure.** California law requires commercial landlords to disclose to tenants whether the property being leased has undergone inspection by a Certified Access Specialist to determine whether the property meets all applicable construction-related accessibility requirements. The law does not require landlords to have the inspections performed. SFBGS is hereby advised that the Premises have not been inspected by a Certified Access Specialist.

#### 4. TERM

##### 4.1. Term of Lease; Commencement Date and Expiration Date.

(a) **Commencement Date and Expiration Date.** The Initial Premises are leased for a term commencing on the Commencement Date, subject to this Lease becoming effective pursuant to **Section 4.3** below. The Term of this Lease shall end with respect to the entire Premises then subject to this Lease on the expiration date specified in the Basic Lease Information, unless sooner terminated pursuant to the provisions of this Lease or extended pursuant to **Section 4.2** below. The date on which the Term terminates pursuant hereto is referred to as the "Expiration Date." The period commencing on the Commencement Date and ending on the Expiration Date is referred to herein as the "Term."

(b) **Nursery Premises.** Notwithstanding the foregoing, the term of this Lease shall commence with respect to the Nursery Premises (or portion thereof, in the case of a Partial Acceptance Letter) on the date of the Acceptance Letter (or Partial Acceptance Letter) or deemed acceptance of the Nursery Improvements, as provided in the Construction Agreement (the "Nursery Premises Commencement Date"). Prior to the Nursery Premises Commencement Date, SFBGS's use of the Nursery Premises shall be governed by the terms and conditions of the Construction Agreement.

(c) **Surrender of Horticultural Premises.** Promptly after completion of the demolition of the Horticultural Premises, SFBGS shall surrender the Horticultural Premises to City. The date on which SFBGS surrenders the Horticultural Premises to City is referred to as the "Horticultural Premises Deletion Date." The term of this Lease shall expire with respect to the Horticultural Premises on the Horticultural Premises Deletion Date; provided, however, that SFBGS shall remain liable for all of SFBGS's obligations under this Lease as to events or omissions occurring with regard to the Horticultural Premises prior to the Horticultural Premises Deletion Date and SFBGS's indemnification obligations set forth in this Lease with regard to such events or omissions that survive the expiration or termination of this Lease shall survive the Horticultural Premises Deletion Date. The Horticultural Premises Deletion Date shall be confirmed by the Parties in writing following the occurrence thereof.

##### 4.2. Options to Extend.

(a) **Extension Option.** City grants to SFBGS two successive options (the "Extension Options"), each to extend the Term of this Lease for an additional ten (10) year period (each, an "Extension Term") commencing upon the date immediately following the expiration of the initial term or the first Extension Term, as applicable, upon the following terms and conditions. In order to exercise an Extension Option, SFBGS must give written notice to City thereof not more than four (4) years and not less than one hundred eighty (180) days prior to the expiration of the Term to be extended (the "Extension Deadline"). Any such exercise notice by SFBGS shall be irrevocable by SFBGS. If SFBGS exercises an Extension Option, then the lease for the applicable Extension Term shall be upon all of the terms, covenants and conditions of this Lease.

(b) **Restrictions on Exercise.** SFBGS's right to exercise each Extension Option is personal to, and may be exercised only by, SFBGS and such of its permitted assignees as qualify under Section 501(c)(3) of the Internal Revenue Code and include in its mission the mission of SFBGS. No other permitted assignee or subtenant, or any unpermitted assignee or subtenant, shall have any right to exercise any Extension Option granted herein. Further, if any Event of Default by SFBGS is outstanding hereunder at the time of SFBGS's delivery of an Extension Option exercise notice and such Event of Default continues at the end of a thirty (30)

day cure period following written notice of such Event of Default from City to SFBGS, then City may elect by notice to SFBGS to reject SFBGS's exercise of the Extension Option, whereupon the purported exercise of the Extension Option shall be null and void, but without prejudice to any later re-exercise pursuant to **Section 4.2(a)**. If this Lease shall terminate for any reason, then immediately upon such termination all Extension Options shall simultaneously terminate and become null and void.

**4.3. Effective Date; Termination of Prior Agreements.** This Lease shall become effective on the Effective Date, as defined in **Article 2**, and City and SFBGS shall cease operating under the Original Lease and Cooperation Agreement as of the date immediately preceding the Effective Date. Notwithstanding the foregoing or any provision of the Original Lease or the Cooperation Agreement to the contrary, the terms of **Article 7** hereof and **Exhibit E** hereto will apply to the Admission Receipts collected after the June 30, 2013 expiration date of the Grant Agreement.

## **5. USE; COVENANTS TO PROTECT PREMISES AND DEPARTMENT FACILITIES**

**5.1. SFBGS's Permitted Use; Special Events.** SFBGS shall continuously use the Premises, Nursery Shared Use Areas and Improvements for the uses specified in the Basic Lease Information and this Lease (collectively the "Permitted Uses"), and for no other purpose. If SFBGS desires to engage in any use of the Premises or Nursery Shared Use Areas other than Permitted Uses, SFBGS shall request the approval of the General Manager, which may be withheld in the General Manager's reasonable discretion. SFBGS acknowledges and agrees that SFBGS shall have no right to use or rent other areas of the Buildings or other portions of the Botanical Garden for activities, such as educational seminars, receptions and lectures, that would constitute Special Events under the Department's permitting and reservations guidelines, as they may be amended from time to time (collectively, "Special Events") (a) without the prior written consent of the Department in accordance with the Department's permitting and reservations guidelines, as they may be amended from time to time, or (b) unless otherwise provided in this Lease (including **Section 6.7(a)** and **Section 6.7(d)** below).

The following conditions and restrictions shall apply to Special Events:

- (i) Reservation and use of additional space in the County Fair Building will be permitted in accordance with official Department processes. All reservation fees will be waived. Hourly fees for non-fee programs shall also be waived, such programs including, without limitation, the following: community events such as SFBGS's Lunar New Year celebration; classes and lectures offered to the public without charge; SFBGS's annual plant sale (including use of the Gallery for seven (7) days, the Auditorium for four (4) days and the entire County Fair Building for two (2) days); volunteer appreciation events; docent enrichment and training programs; staff meetings; and meetings of SFBGS's Board of Trustees and other volunteer meetings. SFBGS will be charged the Garden Club rate (as set forth in San Francisco Park Code Section 12.46) for programs where a fee is charged. Room cancellations submitted before thirty (30) days of reservation will receive a full refund. Room cancellations received within thirty (30) days of reservation will be assessed a fifty percent (50%) cancellation penalty fee. Reservations may not be transferred to other users and must be exclusively for programs or activities sponsored or co-sponsored by SFBGS.
- (ii) SFBGS will coordinate with the San Francisco Park Patrol and, as required, the San Francisco Police Department to develop appropriate security plans for Special Events.

- (iii) The number of persons attending the Special Events shall not exceed the number allowed by the permit.
- (iv) Special Events shall comply with such other guidelines as City may establish from time to time.

**5.2. Use of Nursery.** The Parties anticipate that upon completion, the Nursery will replace the existing nursery and will become the hub of the Botanical Garden's plant propagation and plant collections management. The Nursery will be used jointly by SFBGS and the Department to support activities similar to those conducted in the existing nursery. In order to better support those activities, the Nursery also will include work space for SFBGS's nursery staff, including curatorial and plant collections management staff, and for the Department's gardening staff assigned to the Botanical Garden, as well as restrooms with a shower and emergency eyewash station, storage areas, and space for meetings related to nursery and gardening operations and for horticultural reference materials provided by SFBGS. During the Nursery's working hours, the public will be able to visit the Nursery's outdoor learning court (the "Learning Court"), where there will be interpretive displays about the Nursery's design and operations. The Nursery Building's open design will allow visitors to walk the perimeter of the Learning Court and observe first-hand the plant propagation and other work going on inside. In addition, public restrooms will be accessible from the Learning Court. Given the Nursery's location near the Children's Garden, the Learning Court also will provide a place for school groups to gather. Storage closets on the exterior of the Nursery Building will provide a secure location for storing backpacks and educational supplies. In order to prevent disruption of Nursery operations and protect the growing grounds surrounding the Nursery Building and the plant propagation conducted inside, other uses of the Nursery – for events and community programs – will be limited and closely supervised. City and SFBGS further agree as follows: (a) all uses of the Nursery will be to further the mission and purpose of the Botanical Garden, including cultivating support for the Botanical Garden and the bond between people and plants and (b) the Nursery shall not be available for rental to third parties.

**5.3. Appropriate Operations.** SFBGS will use the Premises and Nursery Shared Use Areas in accordance with the Permitted Uses except as otherwise permitted by this Lease or by the General Manager. Without limiting the provisions of **Section 18** of this Lease, if SFBGS breaches the immediately preceding sentence and such breach is not cured within thirty (30) calendar days of receiving written notice of such breach from City, or, if the deficiency cannot be corrected within such 30-day period, SFBGS does not submit, no later than the end of such 30-day period, a reasonable written proposal, subject to approval by the Department at the Department's reasonable discretion, such failure to cure or submit shall constitute an Event of Default.

**5.4. Covenants Regarding Use.** As a material inducement to City to enter into this Lease, SFBGS covenants with City as follows:

(i) **No Unlawful Uses or Nuisances.** SFBGS shall not use or occupy any of the Premises or Nursery Shared Use Areas or any Improvements, or permit the use or occupancy thereof, in any unlawful manner or for any illegal purpose, or permit to be carried on any offensive, immoral, noisy or hazardous use or any use in violation of the conditions of any certificate of occupancy. SFBGS shall take all reasonable precautions to avoid any nuisances or hazards relating to its activities on or about the Premises or Nursery Shared Use Areas or any Improvements permitted hereunder.

(ii) **Covenant Against Waste.** SFBGS shall not cause or permit any waste, damage or injury to the Premises or Nursery Shared Use Areas.

**(iii) Covenant Regarding Damage to Premises, Nursery Shared Use Areas, Other Common Areas and Department Facilities.** At all times during the Term of this Lease, SFBGS shall protect the Premises from any damage, injury or disturbance, provided, however, that nothing in this paragraph shall relieve City of its maintenance and repair obligations in this Lease. If SFBGS or any of its Agents or Invitees damages, injures or disturbs any of the Premises, the Nursery Shared Use Areas, other Common Areas or the Department Facilities, or any portion thereof, SFBGS shall immediately notify City of that occurrence. Without limiting any of its other rights hereunder, City may immediately take all actions it deems proper to repair such Nursery Shared Use Areas, other Common Areas or Department Facilities at SFBGS's sole expense (but only to the extent City is not otherwise obligated to make such repairs under this Lease), and, following notice and a reasonable opportunity to cure (except in the event of an emergency in which case no notice or cure period is required), City may take all actions it deems proper to repair the Premises at SFBGS's sole expense (but only to the extent City is not otherwise obligated to make such repairs under this Lease). SFBGS shall promptly, upon City's request, remove or alter to City's satisfaction and at SFBGS's sole cost, any Improvements, Alterations or SFBGS's Personal Property placed on the Premises or Nursery Shared Use Areas by or on behalf of SFBGS as necessary to avoid interference with City's use of the Premises or Nursery Shared Use Areas for municipal purposes; provided, such removal shall be at City's sole cost if the applicable Improvements or Alterations were approved by City in writing pursuant to the terms of this Lease or were existing as of the Commencement Date. City may adopt from time to time such rules and regulations with regard to SFBGS's facilities and operations hereunder as City may determine are necessary or appropriate to safeguard the Nursery Shared Use Areas, other Common Areas and Department Facilities and City's interests in the Premises. SFBGS shall comply with all such rules and regulations upon receipt of a copy thereof.

**(iv) Covenant Against Dumping; Waste Disposal.** SFBGS shall not cause or permit the dumping or other disposal on, under or about the Premises of landfill, refuse, Hazardous Material or other materials that are unsightly or could pose a hazard to the human health or safety, native vegetation or wildlife, or the environment. Organic wastes from the Premises and Nursery Shared Use Areas shall be composted on-site to the extent reasonably possible. SFBGS shall use its best efforts to reduce the amount of trash and waste generated from the Premises and generated by SFBGS from the Nursery Shared Use Areas, to acquire products for use on the Premises and the Nursery Shared Use Areas which reuse or recycle packaging, and to recycle all materials used on the Premises or used by SFBGS on the Nursery Shared Use Areas to the extent reasonably possible.

**(v) Covenant to Protect Trees or Other Native Vegetation.** SFBGS shall not engage in or permit the cutting, removal, or destruction of trees or any other native vegetation on the Premises or Nursery Shared Use Areas, without the prior written approval of the General Manager.

**(vi) No Tree Planting.** SFBGS shall not plant any trees on the Premises or Nursery Shared Use Areas, nor shall SFBGS plant any other vegetation on the Premises or Nursery Shared Use Areas without the prior written approval of the General Manager.

**(vii) Covenant Against Hunting.** SFBGS shall not engage in or permit any hunting or, trapping on or about the Premises or Nursery Shared Use Areas, except for hunting or trapping for the purpose of controlling predators or problem animals by the appropriate use of selective control techniques approved in advance by the General Manager in writing, provided such hunting and trapping is done in strict accordance with all applicable Laws. Whenever possible, all measures used for such control shall be limited in their application to the specific problem animals. SFBGS shall not use poison bait, cyanide guns, traps or other similar non-selective control techniques. In no event may SFBGS use any prophylactic predator control measures. The restrictions of this Section applicable to the identification and control of predators and problem animals shall not apply to commensal rodents.



**(viii) Pesticides Prohibition.** SFBGS shall comply with the provisions of Section 39.9 of Chapter 39 of the San Francisco Administrative Code (the "Pesticide Ordinance") which (i) prohibit the use of certain pesticides on City property, (ii) require the posting of certain notices and the maintenance of certain records regarding pesticide usage, and (iii) require SFBGS to submit to the Department an integrated pest management ("IPM") plan that (a) lists, to the extent reasonably possible, the types and estimated quantities of pesticides that SFBGS may need to apply to the Premises or Nursery Shared Use Areas during the terms of this Lease, (b) describes the steps SFBGS will take to meet the City's IPM Policy described in Section 39.1 of the Pesticide Ordinance, and (c) identifies, by name, title, address and telephone number, an individual to act as SFBGS's primary IPM contact person with the City. In addition, SFBGS shall comply with the requirements of Sections 39.4(a) and 39.4(b) of the Pesticide Ordinance as of January 1, 1999 and January 1, 2000, respectively.

**(ix) Weed Control.** SFBGS shall not introduce any noxious weeds on or about the Premises or the Nursery Shared Use Areas. SFBGS shall control noxious weeds on or about the Premises and the Nursery Shared Use Areas, provided that SFBGS may use chemical herbicides only if such use complies with the requirements of **Section 5.4(viii)** above.

**(x) Covenant Against Burning.** SFBGS shall not burn any weeds, debris or other substances on or about the Premises or the Nursery Shared Use Areas.

**(xi) Sewerage System.** SFBGS shall not permit any sewage or fouled waste water to be disposed of on the Premises and shall not dispose of any sewage or fouled water on the Nursery Shared Use Areas, except as provided for and as customary per the sewage system on the Premises and the Nursery Shared Use Areas.

**(xii) Soil Erosion.** SFBGS shall not cause any material erosion of soil on or around the Premises or the Nursery Shared Use Areas. SFBGS shall not engage in any activity that causes a material change, disturbance, fill, alteration or impairment to the topography of the Premises or the Nursery Shared Use Areas by placing on it any soil, dredging, spoils, landfill, or other material, nor shall SFBGS engage in any activity that would change, disturb, alter or impair the significant relatively natural ecological features and values of the Premises or the Nursery Shared Use Areas, without the prior written approval of the General Manager.

**(xiii) Operating Covenants.** SFBGS shall use the Premises and the Nursery Shared Use Areas for the permitted use specified in the Basic Lease Information and in this Lease and shall not allow the Premises to remain unoccupied or unused without City's prior written consent, which City may give or withhold in its sole discretion. SFBGS shall conduct its operations on the Premises and the Nursery Shared Use Areas in a professional manner.

**(xiv) Recycling and Resource Conservation.** The City of San Francisco has set ambitious recycling and composting goals for City Departments including 75% landfill diversion by 2010 and maximum participation in the City's municipal composting program at all City Department locations where there is food service. In addition, the City has recently passed the Food Service Waste Reduction Ordinance (see **Section 27.42**) which, in part, "Prohibits the use of polystyrene foam dispensable food service ware and requires the use of recyclable or compostable food service ware by restaurants, retail food vendors, City Departments and the City's contractors and lessees." City contractors and lessees may not use Disposable Food Service Ware that contains Polystyrene Foam in City Facilities while performing under a City contract or lease. City contractors and lessees using any Disposable Food Service Ware shall use suitable Biodegradable/Compostable or Recyclable Disposable Food Service Ware in City Facilities and while performing under a City contract or lease unless there is no suitable Affordable Biodegradable/Compostable or recyclable product available as determined by the City Administrator in accordance with Subsection 1604(a). SFBGS shall develop a program to work toward a zero waste goal, including the implementation of a composting system for food waste, packaging and 100% biodegradable supplies whenever practical. SFBGS shall submit a recycling

and composting plan at Commencement of Lease, and provide an annual report on each anniversary date of this Lease outlining its progress toward meeting the recycling and composting goals described above and its success toward a zero waste goal.

(xv) **Americans with Disabilities Act.** SFBGS acknowledges that the Americans with Disabilities Act (the “ADA”) requires that programs, services and other activities provided by a public entity to the public, whether directly or through a contractor, must be accessible to the disabled public. SFBGS further acknowledges its obligation to comply with the ADA and any other federal, state or local disability rights legislation. Without limiting the provisions of **Section 9.1** and **Article 13** below, SFBGS warrants that it will fulfill that obligation, and that it will not discriminate against disabled persons in the provision of services, benefits or activities pursuant to this Lease. City shall bear all responsibility and cost for mandated physical changes to the Premises or the Nursery Shared Use Areas resulting from disability access laws.

## **6. COOPERATIVE OPERATIONS AND MANAGEMENT**

**6.1. General; Primary Responsibilities.** The Department and SFBGS shall cooperatively manage the Botanical Garden as provided in this **Article 6**.

(a) The Department, in collaboration with SFBGS, shall take the primary role in managing the following aspects of the Botanical Garden operations: strategic and master site planning, plant collections development, plant collections documentation, signage, and improvements, renovations and maintenance of the Botanical Garden, the Buildings and other Premises, as more fully-described in **Article 10** (collectively, “Department’s Primary Responsibilities”).

(b) SFBGS, in collaboration with the Department, shall take the primary role in managing the following aspects of the Botanical Garden operations: visitor services, admissions collection, garden interpretation, educational programming, community relations, marketing, special events, bookstore management, volunteer program coordination, library operations, and coordination of use of the Nursery Building outside the Nursery’s working hours in accordance with **Section 5.2** above (collectively, “SFBGS’s Primary Responsibilities”).

(c) The Department shall remain responsible for managing its own activities related to the Department’s Primary Responsibilities, but shall consult with SFBGS’s executive director (the “Executive Director”) in the management of such activities in the event that the Department’s activities may have a material impact on SFBGS’s activities. In addition, SFBGS shall remain responsible for managing its own activities related to SFBGS’s Primary Responsibilities, including without limitation book and plant sales, fundraising, and membership, but shall consult with the City’s Garden Director or such other City employee designated by the General Manager from time to time in accordance with the provisions of **Section 6.3** below (the “Garden Director”) in the management of such activities in the event that SFBGS’s activities may have a material impact on the Department’s activities.

(d) The Parties acknowledge that in order to meet their shared goal of creating one of the world’s outstanding public botanical gardens, as provided in **Recital H** of this Lease, the Department relies on SFBGS to provide funding, outside expertise and staff support relating to certain of the Department’s Primary Responsibilities, including strategic and master site planning, plant collections development, plant collections documentation and signage. SFBGS’s activities in support of the Department’s Primary Responsibilities are conducted under the oversight and guidance of the Department. All decisions regarding the level of funding, outside expertise and staff support SFBGS is able to provide pursuant to this **Section 6.1(d)** are within the sole discretion of SFBGS. Subject to the foregoing, the Parties further agree:

(i) SFBGS currently funds and staffs the curation, planning, management and documentation of the Botanical Garden's plant collections, including signage. With respect to the Department's Primary Responsibilities, curatorial and plant collections management staff employed by SFBGS work with City staff under the leadership and guidance of the Garden Director in consultation with the Executive Director, and, because SFBGS's curatorial and plant collections management staff also have responsibilities in support of SFBGS's Primary Responsibilities, the Garden Director and Executive Director will consult as needed on their work priorities. All staff employed by SFBGS are supervised by the Executive Director in accordance with SFBGS employee policies.

(ii) Pursuant to **Section 6.1(a)** above, improvements to the Botanical Garden are within the Department's Primary Responsibilities. From time to time, SFBGS designs, supervises and funds Botanical Garden improvements. All such activities by SFBGS are subject to Department oversight and approval.

(iii) Pursuant to **Section 6.1(a)** above, maintenance of the Botanical Garden is within the Department's Primary Responsibilities. Since 2003, SFBGS has reimbursed costs to support the hiring of an eleventh (11<sup>th</sup>) City gardener dedicated solely to care and maintenance of the Botanical Garden. SFBGS's voluntary contribution is made only when City has allocated, funded and filled ten (10) gardener positions dedicated solely to care and maintenance of the Botanical Garden, and only if SFBGS's contribution will not replace traditional sources or levels of City funding for the Botanical Garden. Increases in the costs voluntarily paid by SFBGS are capped at three (3) percent per year with reference to a baseline amount established in 2003. It is acknowledged that this contribution has been provided on a voluntary, non-binding basis, and is not a condition of this Lease.

**6.2. Participation on SFBGS's Board.** The Garden Director shall serve as a member of SFBGS's Board of Trustees, and the General Manager may designate one (1) other person to serve as a member of SFBGS's Board of Trustees, provided the Garden Director and the designee (if any) may not vote and such designee may not be the General Manager or a current Commission member. The Garden Director and the designee (if any) may participate in such of SFBGS's committees, as may be assigned by the chairperson of SFBGS's Board of Trustees ("SFBGS's Board Chair").

**6.3. Garden Director Vacancy/Executive Director Vacancy.** In the event that there is a vacancy in the position of the Garden Director, the General Manager, in the General Manager's discretion, will establish a search committee to nominate a Garden Director candidate to the General Manager, and the General Manager will appoint at least two members to such search committee. SFBGS's Board Chair will appoint one additional member of such search committee for every two members appointed by the General Manager, and such additional member(s) appointed by SFBGS's Board Chair shall include the Executive Director. The final selection of the Garden Director shall be made by the General Manager. All other Department staff for the Botanical Garden will be appointed through ordinary City procedures. The parties acknowledge and agree that all employment and discharge decisions and procedures shall be subject to all applicable Laws, including without limitation, any approvals by the Civil Service Commission, if applicable. In the event that there is a vacancy in the position of SFBGS's Executive Director, SFBGS, in SFBGS's discretion, will establish a search committee to nominate an Executive Director and the Garden Director shall be invited to serve on such search committee. The final selection of the Executive Director shall be made by SFBGS's Board of Trustees.

**6.4. Resolution of Disagreements.** The Garden Director will consult with and carefully consider the views of the Executive Director in his or her management and operational

decisions relating to the Department's Primary Responsibilities. The Executive Director will consult with and carefully consider the views of the Garden Director in his or her management and operational decisions relating to SFBGS's Primary Responsibilities. If the Garden Director and the Executive Director are unable to reach agreement on an issue relating to the Department's Primary Responsibilities or SFBGS's Primary Responsibilities, the General Manager will consult SFBGS's Board Chair, the Executive Director and the Garden Director, and the General Manager will decide the issue. If SFBGS's Board Chair does not agree with the outcome of such decision, the parties will cooperate with each other to submit the dispute to an independent mediator who is compliant with applicable contracting requirements of the City (to be selected by unanimous consent of the parties, which shall only be withheld on the basis of good faith concerns about the independence, adequacy of expertise, or compliance with City contracting requirements of the proposed mediator, and to be hired and paid for by SFBGS) who shall have ten (10) business days after the matter is fully submitted to him or her to propose a non-binding settlement of the dispute. Each party agrees to participate in good faith in the mediation and to bear its own costs; provided, however, SFBGS shall pay all other costs of the mediation. If any party refuses, in its sole discretion, to accept the proposed resolution of the mediator, it shall give prompt written notice of such refusal to the other party, and the dispute shall be submitted to the Commission. Final decision making authority on all matters relating to operation and management of the Botanical Garden shall rest with the Commission.

**6.5. Department Intellectual Property and Goodwill.** The Parties recognize the goodwill associated with the Department, Golden Gate Park, the Botanical Garden, and SFBGS. SFBGS and the Department agree not to take any action detrimental to such goodwill, and SFBGS agrees not to take any action which may confuse the public as to the ownership of the Botanical Garden. In effecting this provision, and in order to delineate and protect each Party's intellectual property rights, the Parties agree as follows:

(a) **Trademark/Copyright.** SFBGS agrees not to infringe upon any trademark or copyright now or hereafter owned by City or the Department. The Department agrees not to infringe upon any trademark or copyright now or hereafter owned by SFBGS. Any such infringement by SFBGS shall be treated as an Event of Default under this Lease.

(b) **Right of Review.** The Department shall have the right to review and approve in advance materials used for merchandising and certain of SFBGS's publications and membership or general mailings, including without limitation informational and educational brochures, newsletters, solicitations, and fundraising campaign materials. All print and web-based publications by SFBGS and the Department also shall make clear that the Botanical Garden is owned by the City and cooperatively managed with SFBGS, through use of approved logos, letterhead, or by other approved means. The Department may establish guidelines and procedures relating to approval of such materials and shall not unreasonably withhold or delay its approval of such materials. If any such material is not commented upon or approved by the Department within seven (7) business days after receipt by the Department, then such material shall be deemed approved.

(c) **Third Party Infringement.** Each Party hereto shall have the right to take whatever action it deems necessary to protect the intellectual property to which it has exclusive ownership. With regard to any jointly owned intellectual property, the Department shall have the sole right to take any action with regard to such property, provided that after the payment of any and all costs or expenses incurred by the City or the Department in connection with such claim, SFBGS and the Department shall share equally in the remainder of any such recovery or compensation that may be awarded.

**6.6. Volunteer Releases.** SFBGS shall obtain a duly authorized written release and waiver in substantially the form attached hereto as **Exhibit C**, as the same may be amended from time to time by City in its sole discretion, from each volunteer who performs any interpretation, gardening or other work in or about the Botanical Garden and shall provide copies of all executed releases to the Garden Director.

**6.7. Supplemental Funding and Distribution of Revenue.**

**(a) Supplemental Funding by SFBGS.** SFBGS shall use its reasonable efforts to raise private funds for the Botanical Garden for the purposes of (i) providing funds to supplement City appropriations for the Botanical Garden including, but not limited to, renovation and installation of gardens, maintenance of existing gardens, acquisition of special plant collections, procurement of special equipment and satisfaction of other capital improvement projects in accordance with the Botanical Garden Master Plan (or as may be mutually agreed upon through joint planning of SFBGS and the Department), and (ii) otherwise providing funds to enhance City funding for educational programs, other particular programs, ancillary mission-related activities, operations and services of the Botanical Garden. Such fundraising is intended to enhance the Botanical Garden and not to replace traditional sources or levels of City funding. As part of its fundraising responsibilities, SFBGS shall be allowed free use of exterior Botanical Garden areas and the Buildings for fundraising and membership benefit events, subject to prior approval of scheduling and other arrangements by the Garden Director, and subject to the terms and conditions applicable to Special Events under **Section 5.1** above.

**(b) Disposition of Contributed Revenues.** Any gifts, donations, sponsorships, tributes, philanthropic aid or the like that are intended to benefit the Botanical Garden and that are paid directly to the City or the Department shall be the City's or the Department's, as the case may be, alone and for the benefit of the Botanical Garden. Any membership (including corporate membership) fees and any gifts, donations, sponsorships, tributes, philanthropic aid or the like and that are paid directly to SFBGS shall be SFBGS's alone and for the benefit of the Botanical Garden.

**(c) Disposition of Admission Receipts.** All receipts generated from admissions to the Botanical Garden shall be solely for the benefit of the Botanical Garden. The disposition of such receipts from admissions shall be subject to the terms set forth in **Article 7** and in **Exhibit E** attached hereto.

**(d) Disposition of Other Garden Revenues.** It is the intent of the City, the Department and SFBGS to expand their relationship to enhance other sources of revenues for the benefit of the Botanical Garden, which sources may include, for example, third-party rentals, stationary food and beverage outlets and expanded service concessions (e.g., birthday parties). All such receipts generated in the Botanical Garden shall be for the benefit of the Botanical Garden. The generation and disposition of such receipts shall be subject to the terms established from time to time upon by mutual agreement of the Department and SFBGS, subject to such additional approvals as may be required.

**(e) Notice to Department of Terms of Gifts.** SFBGS shall not accept any proposed gifts which could impose financial or other obligations or liabilities on the City or the property, programs or activities under the Commission's jurisdiction, including the Botanical Garden, without previously obtaining all required City approvals. SFBGS shall provide the City with reasonable advance written notice of the terms and conditions of any such gift, and prior to City's acceptance of any such gift, SFBGS shall obtain the approval of the General Manager, the Commission, and the Board of Supervisors if required. With respect to disclosure of gift and

donor information, SFBGS agrees to comply with all applicable laws, including any applicable provision of Chapter 67 of the San Francisco Administrative Code (the "Sunshine Ordinance").

(f) **Acceptance of Gifts.** The General Manager shall be authorized to accept and expend gifts from SFBGS in accordance with the Commission's policy on accepting gifts, for Botanical Garden-related purposes throughout the term of this Lease and to agree to reasonable terms and conditions imposed with respect to such gifts, except where such conditions involve the expenditure of City funds or the incidence of City obligations that are inconsistent with the City Charter.

(g) **Fiscal and Budgetary Provisions.** All the terms of this **Article 6** shall be subject to the City Charter's fiscal and budgetary provisions.

(h) **Funding to the Botanical Garden.** For so long as SFBGS leases space pursuant to this Lease, SFBGS may make material gifts of funds or assets only to the Botanical Garden and not to any other botanical garden or park.

(i) **Public Commitment.** The Department shall use its reasonable efforts to achieve the level of public funding required to provide the personnel, supplies and physical infrastructure necessary to meet the maintenance standards established by the Department for the Botanical Garden and to meet its shared goal with SFBGS of creating one of the world's outstanding public botanical gardens, as reflected in **Recital H**.

#### **6.8. Library Collection; Right of First Offer.**

(a) **Library Collection.** SFBGS's use and operation of the Library or portions thereof shall include the display, storage, preservation and protection of that certain collection of books, records, prints, periodicals, photographs, graphics, and other art and archival materials currently located in the Library, and any data or information related thereto, as the same may be supplemented from time to time (collectively, the "Library Collection") and made available to the public. The parties acknowledge and agree that as of the Effective Date, (i) the City owns the special collection of architectural, landscape architectural and engineering plans, surveys, specifications and drawings currently stored or located in the Rare Book Room of the Library, and such materials and documents specifically are excluded from the Library Collection, and (ii) SFBGS owns the Library Collection. In an effort to preserve and protect the Library Collection, the Parties agree to cooperate in good faith to design, install and construct in the future a mutually acceptable improved fire protection system and related improvements for the Library. Any such improvements shall be deemed to be Alterations by SFBGS, and shall be completed in accordance with plans and specifications acceptable to and approved by City in its sole and absolute discretion and otherwise in accordance with the terms and conditions set forth in this Lease related to Alterations.

(b) **Right of First Offer.** If at any time during the term of this Agreement SFBGS intends to offer for sale to third parties or to accept an offer of a third party to purchase any portion or item of the Library Collection which SFBGS owns having in each instance a value of greater than One Thousand Dollars (\$1,000.00) per item, SFBGS shall first give written notice to City of its intention to sell any such portion or item of the Library Collection (the "Sale Notice"). The Sale Notice shall constitute an offer to sell any such portion of the Library Collection to City at the Purchase Price (as defined below) and otherwise in accordance with the terms of the Sale Notice. City shall have thirty (30) days after receipt of the Sale Notice to accept such offer, by delivery of written notice to SFBGS (the "City Commitment"), subject however to all applicable fiscal provisions of the City's Charter, any applicable Laws, and to the determination of a Purchase Price (as defined below) acceptable to City in its reasonable

discretion which has been approved by City in accordance with applicable Laws. In the event that City fails to provide to SFBGS the City Commitment within such thirty (30) day time period, City shall be deemed to have rejected the offer evidenced by the Sale Notice.

(c) **Closing.** In the event that City exercises its right of first offer, the Parties shall promptly execute any and all documents deemed reasonably necessary by City to evidence and consummate the sale of the applicable portion of the Library Collection. The closing date shall be thirty (30) days after the date of the City's receipt of all final approvals by the City as required under applicable Law; provided, however, that in the event the City fails to receive such final approvals, City shall be entitled to terminate the City Commitment and shall have no further liability or obligation under the City Commitment. The Purchase Price shall be paid in full at closing in cash, or as otherwise agreed between the parties. SFBGS shall represent and warrant to City that SFBGS has full legal title to the portion of the Library Collection being transferred, and shall transfer such portion of the Library Collection to City free from any and all liens or encumbrances and otherwise completed in accordance with the terms and condition of any transfer documents entered into by the parties.

(d) **Purchase Price.** The Purchase Price ("Purchase Price") shall be equal to the fair market value ("FMV") of the portion of the Library Collection. For purposes of this Agreement, FMV means the fairest price estimated in terms of money which SFBGS could obtain if the applicable portion of the Library Collection were sold in bulk in the open market, allowing a reasonable time to find a purchaser who purchases with knowledge of the uses for which the Library Collection portion in its then condition is adapted and for which it is capable of being used, and taking into account the completeness of any collection within the Library Collection portion and the rarity and condition of any component of the applicable portion of the Library Collection. The FMV shall be determined as follows: upon delivery of the City Commitment to SFBGS, the parties shall endeavor to agree on the FMV, and, if they are unable to do so on or before the thirtieth (30th) day after SFBGS's receipt of the City Commitment, then the parties, or their respective designees or agents, shall each simultaneously exchange with each other a sealed envelope with a written determination of the FMV at 12 p.m. on the ninetieth (90th) day after the expiration of that thirty (30)-day period. If both valuations are timely submitted and they differ by less than five percent (5%) of the lower of the two, the average of the two valuations shall be the FMV and shall be final and binding on the Parties. If the two valuations are not timely submitted, or if the two valuations differ by more than five percent (5%) of the lower of the two, the Parties shall select a neutral evaluator, acceptable to the City in its reasonable discretion (including compliance with any applicable City contracting requirements) (the "Referee") within twenty (20) days thereafter. If the two valuations are not timely submitted, then the Referee shall make a FMV determination of the applicable portion of the Library Collection within ninety (90) days after being selected as Referee. The Parties shall deliver copies of both valuations (to the extent available) to the Referee, and within five (5) business days after the later of the Referee's receipt of such valuation, or if applicable, the Referee's FMV determination, the Referee shall select the valuation which he or she believes most accurately represents the FMV. The selected valuation shall be the FMV and shall be final and binding upon the Parties, subject however to any necessary approvals by the City. The Referee appointed pursuant to this Section shall have not less than ten (10) years' experience evaluating the fair market value of assets comparable to the Library Collection portion. The cost of the Referee shall be borne equally by the Parties.

**6.9. Operation of Botanical Garden; Days and Hours of Operation.** SFBGS shall actively operate the Botanical Garden and use its reasonable efforts to further the operations thereof and to serve the public. City shall open the Botanical Garden every morning at 7:30 am. SFBGS shall staff the admission kiosks no later than 9:00 am and collect admission commencing at 9:00 am.

SFBGS's hours of operation of the Botanical Garden for public use shall be as follows:

*Year Round*

Open daily not later than 9:00 am

*Spring & Summer*

2nd Sunday in March through September: Last entry at 6:00 pm  
(closed at 7:00 pm)

*Fall & Winter*

October through early November: Last entry at 5:00 pm

1st Sunday in November through January: Last entry at 4:00 pm

February through early March: Last entry at 5:00 pm  
(closed one hour after last entry)

The hours of public operation are approved, and may be amended, by the Commission and may not be altered in any manner without prior written approval from the Commission or from such person, if any, to whom the Commission has delegated authority to approve changes in the hours of operation.

**6.10. Rates and Charges.** The rates and charges for goods sold and services offered by SFBGS at the Premises shall be reasonable and competitively priced with similar businesses in San Francisco. The Department reserves the right to review and approve the increases in rates and charges for rentals and food and beverage items.

**6.11. Fees for Admission.**

(a) Fees for admission to the Botanical Garden are as stated in the San Francisco Park Code, as it may be amended from time to time by action of City's Board of Supervisors in its sole discretion. As of the Commencement Date, nonresidents of San Francisco are required to pay an admission fee as follows:

\$7.00 for Adults

\$5.00 for Youth ages 12-17 and Seniors age 65 and over

\$2.00 for Children ages 5-11

No charge for Children ages 4 and under

\$15.00 for Families (2 adults and all children ages 17 and under residing in the same household)

San Francisco residents are expected to provide proof of residence.

(b) SFBGS shall not be required to reimburse City for nonresidents receiving free admission (i) as a benefit provided to SFBGS members in recognition of their financial support of the Botanical Garden, (ii) as members of other botanical gardens participating with SFBGS in reciprocal member programs, and (iii) as a school group student, teacher or chaperone.

(c) As of the Commencement Date, the Botanical Garden will be open without charge one day a month, plus Thanksgiving, Christmas and New Year's Day. Such free admission days may be amended from time to time by action of City's Board of Supervisors in its sole discretion.

(d) Every morning, between 7:30 and 9:00 am, the Botanical Garden will be open to the public, including nonresidents, free of charge.



## 7. ADMISSION RECEIPTS AND RENT

**7.1. Admission Receipts.** All receipts from admission to the Botanical Garden shall be solely for the benefit of the Botanical Garden. The disposition, allocation and terms of the Admission Receipts shall be subject to the terms set forth in this **Article 7** and **Exhibit E**. It is understood and agreed by the Parties that the charging of admissions to the Botanical Garden, the rate of such admissions and the terms of such allocation are subject to amendment by action of City's Board of Supervisors, in its sole discretion at any time and in the event of such an amendment, this **Article 7** and **Exhibit E** shall be revised to the extent required to reflect such amendment.

**7.2. Base Rent.** SFBGS shall pay to City during the Term of this Lease, beginning on the first anniversary of the Commencement Date and in arrears, the Base Rent specified in the Basic Lease Information. Base Rent shall be payable on or before the tenth (10<sup>th</sup>) day after each anniversary of the Commencement Date, without prior demand and without any deduction, setoff or counterclaim whatsoever, except as otherwise provided in this Lease.

**7.3. Payment; Generally.** Rent and Admission Receipts shall be paid in lawful money of the United States, at Revenue Unit, Recreation and Park Department, McLaren Lodge Annex, 501 Stanyan Street, San Francisco, California 94117, or such other place as City may designate in writing. If SFBGS pays by check and such check is not honored, then City may require SFBGS to make all future payments in cash or by cashier's check. City reserves the right to direct SFBGS, upon thirty (30) days written notice, to deposit all payments required under this Lease from SFBGS's account into the City designated revenue account by bank or wire transfer.

**7.4. Payment of Admission Receipts.** On or before the twentieth (20th) day of each full calendar month of the Term and the calendar month immediately following the expiration or termination of the Lease, SFBGS shall pay to City the Admission Receipts collected by SFBGS for the last preceding calendar month in accordance with the payment provisions of **Section 7.3** above, to the extent not previously paid to City. Simultaneously with such payment, SFBGS shall deliver to City a Monthly Admission Receipts Statement, as provided in **Section 7.7(a)** below. Notwithstanding the foregoing, SFBGS shall endeavor to pay Admission Receipts to City at least every two weeks, provided that for purposes of this Lease, including without limitation, **Section 7.8** and **Section 7.9** below, payments of Admission Receipts shall not be deemed to be "due" or "payable" every two weeks.

### **7.5. Cash Register Requirements.**

**(a)** SFBGS shall install on the Premises at least one cash register. SFBGS shall use cash registers which segregate sales by categories and shall have separate function keys with non-resettable daily sequential transaction numbers and non-resettable daily cumulative sales totals. Such cash register(s) used on the Premises shall be of a type approved by General Manager in writing and shall register every transaction made in, on, about or from the Premises or made by SFBGS in, on or about the Nursery Shared Use Areas, including every type of Admission Receipts, and the tape or digital record of each such cash register shall be accessible to and subject to inspection by the General Manager or his/her agent, provided that such inspection shall be conducted in a manner reasonably designed to minimize interference with the conduct of SFBGS's operations at the Premises, and City shall not perform such inspection unless a manager of SFBGS's operations is present. SFBGS shall make a manager available to City for such inspection during business hours upon request (which may be oral) by City.

**(b)** Mechanical cash register(s) must have a non-resettable cumulative total, a detail audit tape, a transaction number with a four-digit capacity, an indicator readily visible to customers as the amount rung, and a seven-digit capacity or greater, as determined by the General

Manager based on the type of business, with a four-digit overrun counter. If computerized cash registers or other similar electronic devices are used, that system must accurately record all sales on the Premises and sales by SFBGS on the Nursery Shared Use Areas and be no more subject to tampering than mechanical cash register(s).

(c) Each sale or other transaction on the Premises or by SFBGS on the Nursery Shared Use Areas must be recorded at the time of each sale or other transaction, in the presence of the customer, and SFBGS shall present a receipt from such sale or other transaction to the customer. Each customer must be issued a receipt or sales slip for each transaction, which transaction must be recorded either on serially numbered sales slips or cash register tapes. All cash receipts must include SFBGS's identification thereon. Each cash register (including computerized cash registers or other similar electronic devices) shall be serviced by an established contractor approved by General Manager. At General Manager's request, SFBGS must furnish to City a statement from an established contractor that the transaction number, the cumulative total and the overrun counter have been sealed in a manner approved by General Manager.

(d) Upon the installation or removal of any cash register (including computerized cash registers or other similar electronic devices) used on the Premises or the Nursery Shared Use Areas, SFBGS must immediately furnish to General Manager notice in writing stating make, model number, serial number and cumulative total reading and overrun counter reading of the cash register(s) (including computerized cash registers or other similar electronic devices). Any repair contractor employed to repair or replace any cash register (including computerized cash registers or other similar electronic devices if used) on the Premises or the Nursery Shared Use Areas is hereby authorized and directed to disclose and furnish to City or its auditors any information obtained by the contractor in the course of making such repair or replacement pertaining to such cash register (including computerized cash registers or other similar electronic devices if used). City shall have the right during business hours to examine the totals of the cash register(s) (including computerized cash registers or other similar electronic devices if used) used on the Premises or the Nursery Shared Use Areas and to inspect for compliance with this section.

**7.6. Accounts.** SFBGS shall establish, fund and maintain the bank accounts required to fulfill its obligations under this Lease (collectively, the "Accounts") with one or more depository institutions reasonably acceptable to City and approved by City in writing. The following depository institutions will be deemed approved hereunder: (i) any institution approved by the Controller for deposit by City of City funds; and (ii) any institution in which SFBGS's deposits will be afforded full FDIC deposit insurance coverage for the entire balance in the accounts held in such institution. Lessee shall respect any limit on the size of the funds held in any Account(s) as shall be established from time to time by the Controller for City funds with the goal of ensuring that SFBGS is afforded full FDIC deposit insurance coverage for the deposit in such Account(s). Any interest accruing on the funds in any Account shall be added to such Account. Funds from Admission Receipts shall not be commingled with other funds. SFBGS shall cause each person who has authority to withdraw or transfer funds from any Account to be bonded or otherwise insured. The Admission Account (as defined in Paragraph 2 of **Exhibit E**) shall be subject to a mutually-agreed control agreement pursuant to which City will be granted a perfected security interest therein, and SFBGS shall execute, deliver, file and refile, at SFBGS's expense, any instruments, financing statements, continuation statements, or other security agreements that may be required from time to time to perfect such security interest. Upon the occurrence of either an Event of Default, or the expiration or earlier termination of this Lease, City shall have the immediate right of possession of the funds in the Admissions Account.

## 7.7. Reporting; Books and Records; Audits

(a) **Monthly Admission Receipts Statement; Authorized Collection Expenses; Determination of Allocation of Admission Receipts.** On or before the twentieth (20th) day of each full calendar month of the Term and the calendar month immediately following the expiration or termination of the Lease, SFBGS shall deliver to City a statement (the "Monthly Admission Receipts Statement") certified as correct by an officer of SFBGS and otherwise in form satisfactory to City, reporting Admission Receipts during the last preceding calendar month, SFBGS's Authorized Collection Expenses for such month, the allocation of such Admission Receipts in accordance with **Exhibit E**, and the amount of Admission Receipts for such month previously paid by SFBGS to City pursuant to **Section 7.4**. Each such Monthly Admission Receipts Statement shall correct any misstatement of Admission Receipts or Authorized Collection Expenses made in connection with any payment of Admission Receipts previously made by SFBGS to City pursuant to **Section 7.4**, and any such correction shall be taken into account in any audit conducted by City under **Section 7.7(d)**. Pursuant to **Exhibit E**, City shall pay SFBGS its Authorized Collection Expenses and any other amounts due SFBGS pursuant to the allocation provisions of **Exhibit E** on or before the thirtieth (30th) day following City's receipt of the Monthly Admission Receipts Statement.

(b) **Annual Admission Receipts Statement.** On or before the date which is ninety (90) days following the close of each Fiscal Year during the Term and ninety (90) days following the end of the Term, SFBGS shall deliver to City a statement (the "Annual Admission Receipts Statement"), certified as correct by an officer of SFBGS and otherwise in form satisfactory to City. The Annual Admission Receipts Statement shall set forth (i) the Admission Receipts for the Fiscal Year just concluded broken down by category, if applicable, (ii) the Authorized Collection Costs incurred by SFBGS for such Fiscal Year, and (iii) distributions made and amounts received in accordance with the provisions of **Exhibit E** for such Fiscal Year, broken down by category. The Annual Admission Receipts Statement shall also include an itemized statement for such year, certified as correct by an officer of SFBGS, showing Admission Receipts received or retained by SFBGS, and Education and Community Outreach Expenditures paid from such Admission Receipts. Pursuant to **Exhibit E**, City or SFBGS, as the case may be, shall make any true-up payment required by **Exhibit E** within thirty (30) days of City's receipt of such Annual Admission Receipts Statement.

(c) **Books and Records.** SFBGS agrees to keep accurate books and records of SFBGS's operations at the Botanical Garden according to generally accepted accounting principles. For purposes herein "books and records" shall include, but not be limited to, daily sales journals, cash register tapes, pre-numbered receipts, guest checks, sales tickets, monthly sales summaries summarizing daily sales, general ledgers, income statements, sales tax returns, income tax returns and any other bookkeeping documents SFBGS utilizes in its operations. SFBGS shall not co-mingle personal funds with operational funds.

(d) **Audit.** SFBGS agrees to make its books and records available to City, or to any City auditor, or to any auditor or representative designated by City, for the purpose of examining such books and records to determine the accuracy of SFBGS's statements provided hereunder. Such books and records shall be kept for four (4) years and shall be maintained and/or made available in San Francisco to City's representative for the purpose of auditing or re-auditing these accounts; except that, if an audit is made within such four-year period and City claims that errors or omissions have occurred, the books and records shall be retained and made available until those matters are resolved. If an audit reveals that SFBGS has understated Admission Receipts or overstated Authorized Collection Costs in one or more statements provided to City, such that SFBGS has underpaid City or has received excess reimbursement from City, SFBGS shall pay City, promptly upon demand, the difference between the amount SFBGS has so paid or

received and the amount it should have paid to or received from City. If SFBGS so understates its Admission Receipts by five percent (5%) or more, the cost of the audit shall be borne by SFBGS. If SFBGS so understates its Admission Receipts by five percent (5%) or more with knowledge of such understatement or by reason of gross negligence, then, in addition to paying for the cost of the audit, SFBGS shall pay City twice the amount of the shortfall and a second such understatement made with knowledge of or by reason of gross negligence within seven (7) years after the prior understatement made with knowledge of or by reason of gross negligence shall be an Event of Default. If an audit reveals that SFBGS has overstated Admission Receipts or understated Authorized Collection Costs, such that SFBGS has overpaid City or has received less than the allowable reimbursement from City, City shall pay SFBGS, promptly upon demand, the amount of such overstated Admission Receipts (to the extent SFBGS previously paid such overstated Admission Receipts to City) or such understated Authorized Collection Costs.

(e) **Patrons Audit.** SFBGS shall participate in the City's Patrons Audit program whereby signs provided by the City will be clearly posted at each point of sale, stating that receipts are to be given for each admission or purchase, and that if a receipt is not given, the patron shall be allowed some form of compensation as mutually agreed upon by the City and SFBGS.

**7.8. Late Charge.** If SFBGS fails to pay any Rent or Admission Receipts payable to the Department by the date the same is due and payable and the aggregate overdue amount owed by SFBGS exceeds aggregate overdue amounts, if any, owed by City to SFBGS under this Lease, such excess amount will be subject to a late payment charge equal to three percent (3%) of the amount due. The late payment charge has been agreed upon by City and SFBGS, after negotiation, as a reasonable estimate of the additional administrative costs and detriment that City will incur as a result of any such failure by SFBGS, the actual costs thereof being extremely difficult if not impossible to determine. The late payment charge constitutes liquidated damages to compensate City for its damages resulting from such failure to pay and SFBGS shall promptly pay such charge to City, together with such unpaid amount.

**7.9. Default Interest.** If any Rent or Admission Receipts payable to the Department is not paid on the applicable due date and the aggregate overdue amount owed by SFBGS exceeds aggregate overdue amounts, if any, owed by City to SFBGS under this Lease, such excess amount shall bear interest from the due date until paid at the prime rate of interest, not to exceed ten percent (10%) per year, published from time to time by The Wall Street Journal. However, interest shall not be payable on late charges incurred by SFBGS nor on any amounts on which late charges are paid by SFBGS to the extent this interest would cause the total interest to be in excess of that which an individual is lawfully permitted to charge. Payment of interest shall not excuse or cure any default by SFBGS.

**7.10. Net Lease.** This Lease is a "net lease." Accordingly, SFBGS shall pay to City all Rent (including the Base Rent, Additional Charges and any other payments hereunder) free of any charges, assessments or deductions of any kind, without prior demand and without abatement, counterclaim or setoff. Under no circumstances, whether now existing or hereafter arising, and whether or not beyond the present contemplation of the Parties, shall City be expected or required to make any payment of any kind whatsoever with respect to SFBGS's use or occupancy of the Premises or use of the Nursery Shared Use Areas and any permitted Improvements or this Lease, except as may otherwise be expressly set forth herein. Without limiting the foregoing, except as may be specifically and expressly provided otherwise in this Lease, SFBGS shall be solely responsible for paying each item of cost or expense of every kind and nature whatsoever, the payment of which City would otherwise be or become liable by reason of its estate or interests in the non-structural portions of the Premises, Nursery Shared Use Areas and any Improvements, any rights or interests of City in or under this Lease, or the ownership, leasing, operation,

management, maintenance, repair, rebuilding, remodeling, renovation, use or occupancy of the non-structural portions of the Premises, Nursery Shared Use Areas, any permitted Improvements, or any portion thereof. Except as may be specifically and expressly provided otherwise in this Lease, no occurrence or situation arising during the Term, nor any present or future Law, whether foreseen or unforeseen, and however extraordinary, shall relieve SFBGS from its liability to pay all of the sums required by any of the provisions of this Lease, or shall otherwise relieve SFBGS from any of its obligations under this Lease, or shall give SFBGS any right to terminate this Lease in whole or in part. SFBGS waives any rights now or hereafter conferred upon it by any existing or future Law to terminate this Lease or to receive any abatement, diminution, reduction or suspension of payment of such sums, on account of any such occurrence or situation.

## **8. TAXES, ASSESSMENTS AND OTHER EXPENSES**

### **8.1. Taxes and Assessments, Licenses, Permit Fees and Liens.**

(a) **Payment Responsibility.** SFBGS shall pay any and all real and personal property taxes, general and special assessments, excises, licenses, permit fees and other charges and impositions of every description levied on or assessed against SFBGS's rights with respect to the Premises, Nursery Shared Use Areas, any Improvements, SFBGS's Personal Property, the leasehold estate or any subleasehold estate, or SFBGS's use of the Premises, or Nursery Shared Use Areas or any Improvements. SFBGS shall make all such payments directly to the charging authority when due and payable and at least ten (10) days prior to delinquency, subject to SFBGS's right to contest the validity of such charge pursuant to **Section 8.1(c)**. However, with respect to real property taxes and assessments levied on or assessed against the Premises for which City receives the tax bill directly from the taxing authority, SFBGS shall reimburse City for payment of such sums immediately upon demand.

(b) **Taxability of Possessory Interest.** Without limiting the foregoing, SFBGS recognizes and agrees that this Lease may create a possessory interest subject to property taxation and that SFBGS may be subject to the payment of property taxes levied on such interest.

(c) **No Liens.** SFBGS shall not allow or suffer a lien for any taxes payable by SFBGS hereunder to be imposed upon the Premises or Nursery Shared Use Areas or upon any equipment or other property located thereon without promptly discharging the same. SFBGS may have a reasonable opportunity to contest the validity of any such taxes provided SFBGS, before commencement of any proceeding or contest, furnishes to City a surety bond issued by a surety company qualified to do business in California and acceptable to City's Controller. The amount of such bond shall be equal to one hundred twenty five percent (125%) of the amount of taxes in dispute and shall be in such form as approved by the City Attorney of City. The bond shall insure payment of any judgment that may be rendered should SFBGS be unsuccessful in any such contest. SFBGS shall Indemnify City, the other Indemnified Parties, and the Premises and Nursery Shared Use Areas from and against any Losses arising out of any proceeding or contest provided for hereunder. The foregoing Indemnity shall not be limited by the amount of the bond.

(d) **Reporting Requirement.** SFBGS agrees to provide such information as City may request to enable City to comply with any tax reporting requirements applicable to this Lease.

**8.2. Other Expenses.** Except as otherwise provided in this Lease, including, without limitation, **Articles 10 and 11**, SFBGS shall be responsible for any and all other charges, costs and expenses related to its use, occupancy, operation or enjoyment of the Premises, Nursery Shared Use Areas or any Improvements permitted thereon.

**8.3. Evidence of Payment.** SFBGS shall, upon City's request, furnish to City within ten (10) days after the date when any charges are due and payable, official receipts of the appropriate taxing authority or other evidence reasonably satisfactory to City, evidencing payment thereof.

## **9. ALTERATIONS AND IMPROVEMENTS**

**9.1. Construction of Alterations and Improvements.** Except as provided herein or by the Construction Agreement, SFBGS shall not construct, install or otherwise place any Improvements or make or permit any Alterations in, to or about the Premises or (after the Nursery Premises Commencement Date) the Nursery Shared Use Areas, without the General Manager's prior written consent in each instance, which the General Manager may give or withhold in the General Manager's sole and absolute discretion. Subject to the General Manager's consent as provided above, any permitted Improvements or Alterations shall be done at SFBGS's sole expense (i) in strict accordance with designs, plans and specifications approved in advance by the General Manager in writing, (ii) by duly licensed and bonded contractors or mechanics approved by the General Manager, (iii) in a good and professional manner, (iv) in strict compliance with all Laws (including, without limitation, all health, disabled access and building codes and ordinances), and (v) subject to all other conditions that the General Manager or the Commission may reasonably impose, including, without limitation, provision of such completion security as is acceptable to City. In no event shall the construction or installation of any such Improvements or the making of any Alterations impair the use or operation of Common Areas or Department Facilities (if any), or any portion thereof, or the Department's access thereto. Prior to the commencement of any work on the Premises or, after the Nursery Premises Commencement Date, on the Nursery Shared Use Area, to construct any permitted Improvements or make any permitted Alterations, SFBGS, at its sole expense, shall procure all required permits and approvals and shall promptly upon receipt deliver copies of all such documents to City. No material change from the plans and specifications approved by City may be made without City's prior written consent, which shall not be unreasonably withheld, conditioned or delayed. City and its Agents shall have the right to inspect the course of such construction at all times. Upon completion of such Improvements or Alterations, SFBGS shall furnish City with a complete set of final as-built plans and specifications. SFBGS shall require from each contractor and subcontractor performing any work on or about the Premises or, after the Nursery Premises Commencement Date, on the Nursery Shared Use Area, a policy of commercial general liability insurance, with such limits as may reasonably be required by City from time to time, but in any event not less than One Million Dollars (\$1,000,000) combined single limit. Such insurance shall also be in compliance with the requirements set forth in **Section 20.2** below. With respect to any Alterations which would be visible from the exterior of the Premises or Nursery Building, SFBGS, shall obtain the prior written approval of City's Arts Commission to the extent the Arts Commission has jurisdiction over the design of such proposed alterations under City's Charter Section 5.103.

**9.2. Ownership of Improvements.** Improvements or Alterations constructed on or affixed to the Premises or Nursery Shared Use Areas by or on behalf of SFBGS above shall be and remain SFBGS's property during the Term. Upon the Expiration Date or any earlier termination hereof, SFBGS shall, upon City's request, remove all such Improvements and Alterations from the Premises or Nursery Shared Use Areas in accordance with the provisions of **Section 23.1** hereof, unless City, at its sole option and without limiting any of the provisions of **Section 9.1** above, specifies at the time of City's approval of any such Improvements or Alterations or thereafter that such Alterations or Improvements may remain on the Premises or Nursery Shared Use Areas following the expiration or termination of this Lease.

**9.3. SFBGS's Personal Property.** All furniture, furnishings and articles of movable personal property and equipment installed in the Premises or Nursery Shared Use Areas by or for

the account of SFBGS that can be removed without structural or other material damage to the Premises (all of which are herein called "SFBGS's Personal Property") shall be and remain the property of SFBGS and may be removed by it subject to the provisions of **Section 23.1** hereof.

**9.4. Notice to Proceed with Improvements.** SFBGS agrees that any alterations, improvements and repairs to be made by SFBGS pursuant to the terms and conditions of this Lease shall not commence until this Lease has been approved by the Board of Supervisors of the City and County of San Francisco and SFBGS obtains from City written approval to proceed.

## **10. REPAIRS AND MAINTENANCE**

### **10.1. SFBGS Responsible for Maintenance and Repair.**

Except as provided in **Section 10.2** below, and except for any damage, excluding normal wear and tear, caused by any act or omission of City, its Agents or Invitees:

(a) City shall not under any circumstances be responsible for the performance of any Alterations or Improvements to the Premises, Nursery Shared Use Areas or any adjoining property (including, without limitation, access roads, utilities and other infrastructure serving the Premises), nor shall City be liable for any portion of the cost thereof.

(b) SFBGS shall maintain the Premises and any existing and permitted Improvements at all times in clean, safe, attractive and sanitary condition and in good order and repair, to City's reasonable satisfaction, and subject to City's prior written consent (not unreasonably to be withheld, conditioned or delayed), may, at its option, perform specified maintenance activities in the interior of the Nursery Building. If any portion of the Premises or Nursery Shared Use Areas or any of City's property located on or about the Premises or Nursery Shared Use Areas is damaged by any of the activities conducted by SFBGS or its Agents or Invitees hereunder, SFBGS shall immediately, at its sole cost, repair any and all such damage and restore the Premises or Nursery Shared Use Areas or City's property to its previous condition. SFBGS shall have no obligation to repair damage to the Nursery Shared Use Areas resulting from any of the activities conducted by City or its Agents or Invitees.

(c) SFBGS shall keep all fixtures and equipment on the Premises and, after the Nursery Premises Commencement Date, all of SFBGS's equipment in the Nursery Shared Use Areas, clean, neat, safe, sanitary and in good order at all times. SFBGS shall remove all waste, trash, rubbish, papers, cartons and refuse from the Premises and remove all of SFBGS's waste, trash, rubbish, papers, cartons and refuse from the Nursery Shared Use Areas, and dispose of trash in containers provided by SFBGS that are large enough to adequately serve the needs of the facility. If necessary, SFBGS shall provide a dumpster and shall keep it in clean and orderly condition. Notwithstanding the foregoing, SFBGS shall have no obligation to remove from the Nursery Shared Use Area waste, trash, rubbish, papers, cartons and refuse, or pick up or dispose of trash, resulting from activities conducted by City or its Agents or Invitees.

(d) **Food Service and Seating Areas.** During the hours the Botanical Garden is open to the public, SFBGS shall keep any food service and seating areas and any furniture free of dishes, utensils, debris and spills and in a neat, clean, orderly and attractive condition at all times and shall, as necessary, provide and empty garbage receptacles serving such area. The tables and chairs in any seating areas shall be configured so that there are walkways and sufficient area for pedestrian ingress and egress on either side of the tables and to minimize any potential tripping or other hazards.

(e) **Restrooms.** City shall be responsible for the regular cleaning of the public restrooms located in the Botanical Garden, except as provided below. The restrooms shall be open to the public no later than 9:00 am and shall remain open at all times thereafter that the Botanical Garden is open to the public. At City's election, City personnel may open the restrooms to the public at any time between 7:30 am and 9:00 am. The restrooms shall be kept clean, neat, orderly and functioning properly at all times. Notwithstanding the foregoing to the contrary, SFBGS, at its own expense, shall keep those restrooms located inside the headhouse of the Nursery Building and inside the Library Building in a clean, neat and orderly condition and shall provide all necessary items for such restrooms, including, but not limited to, toilet tissue, paper towels, seat covers, hand soap, and cleaning materials and supplies necessary to maintain such restrooms in the condition as described above. Such restrooms shall be inspected for supplies and neatness a minimum of two (2) times during each day the Botanical Garden is open to the public and shall be cleaned not less frequently than twice a week.

**10.2. City's Maintenance and Repair Obligations.** Notwithstanding **Section 10.1** and subject to the limitations set forth below, City shall repair, maintain and replace, if necessary, all structural elements of the Premises and, upon the Nursery Premises Commencement Date, the Nursery Building, including, without limitation, the structural portions and exterior walls of the Buildings, including the heating, ventilation, air conditioning, plumbing, electrical, fire protection, life safety, security and other mechanical, electrical, communications systems of the Buildings (except fire protection systems in the Library Building with respect to which City shall have no maintenance or repair obligation) (collectively, the "Buildings Systems"), the Greenhouse and Lath House, the Nursery Shared Use Areas and the other Common Areas located in the Botanical Garden in accordance with current maintenance standards; provided, however, City makes no representation or warranty of any kind regarding the physical condition or quality, nature or adequacy of any utilities or Buildings Systems serving the Premises or Nursery, including without limitation, any fire, safety or security systems; and provided further, however, that SFBGS shall reimburse City for any damage, excluding normal wear and tear, caused by any act or omission of SFBGS, its Agents or Invitees. For the purpose of making any such repairs, City may use structures in the Premises and the Nursery Shared Use Areas where reasonably required by the character of the work to be performed, provided that City will use reasonable efforts to minimize any interference with SFBGS's operations. SFBGS waives any claim for damages for any injury or inconvenience to or interference with SFBGS's operations, any loss of occupancy or quiet enjoyment of the Premises, any loss of use of the Nursery Shared Use Areas, or any other loss occasioned thereby. Notwithstanding anything to the contrary contained in this Lease, SFBGS acknowledges and agrees that City shall not be responsible for any fire safety protection systems for any portion of the Library Building. City shall be responsible for the structural integrity of each Building's roof and its structural members. SFBGS shall provide City with prompt written notice of any required repair or maintenance item. City shall maintain, repair and keep in good condition any property adjoining the Botanical Garden under the jurisdiction of the Commission, including gardening and landscaping services.

**10.3. No Right to Repair and Deduct.** SFBGS expressly waives the benefit of any existing or future Law or judicial or administrative decision that would otherwise permit SFBGS to make repairs or replacements at City's expense, or to terminate this Lease because of City's failure to keep the Premises, Nursery Shared Use Areas or any adjoining property (including, without limitation, access roads, utilities and other infrastructure serving the Premises) or any part thereof in good order, condition or repair, or to abate or reduce any of SFBGS's obligations hereunder on account of the Premises or any adjoining property (including, without limitation, access roads, utilities and other infrastructure serving the Premises) or any part thereof being in need of repair or replacement. Without limiting the foregoing, SFBGS expressly waives the provisions of California Civil Code Sections 1932, 1941 and 1942 or any similar Laws with respect to any right of SFBGS to terminate this Lease and with respect to any obligations of City



for tenantability of the Premises and any right of SFBGS to make repairs or replacements and deduct the cost thereof from Rent.

## **11. UTILITIES**

**11.1. Utilities and Services.** City shall provide to the Premises and, after the Nursery Premises Commencement Date, the Nursery Shared Use Areas, basic utility services, including electricity, heating, ventilation, service hookups to the exterior walls of the Buildings (including telephone, internet and burglar alarm) for the operation of SFBGS's offices, natural gas, water and refuse disposal on the same basis as the other Botanical Garden facilities and pursuant to current standards observed by City in providing such services (the "Standard Utilities and Services"), subject however to energy conservation efforts which may be established or implemented by the City from time to time, and subject further to the terms and conditions contained herein. SFBGS shall be responsible for furnishing, at no cost to the City, the janitorial service (pursuant to specifications approved by the General Manager) and telephone, internet and burglar alarm service for the Premises and any other utilities or services other than or in excess of the Standard Utilities and Services that SFBGS may need for its use of the Premises and the Nursery Shared Use Areas. If SFBGS desires any upgrades to water, gas or electricity services in connection with SFBGS's operations at the Premises or the Nursery Shared Use Areas, such upgrades shall be subject to City's prior written consent, and shall be made at SFBGS's sole cost and expense.

**11.2. Interruption of Services.** City's obligation to provide utilities and services for the Premises and the Nursery Shared Use Areas are subject to applicable Laws (including the rules or actions of the public utility company furnishing the utility or service), and shutdowns for maintenance and repairs, for security purposes, or due to strikes, lockouts, labor disputes, fire or other casualty, acts of God, or other causes beyond the control of City. In the event of an interruption in, or failure or inability to provide any service or utility for the Premises or the Nursery Shared Use Areas for any reason, such interruption, failure or inability shall not constitute an eviction of SFBGS, constructive or otherwise, or impose upon City any liability whatsoever, including, but not limited to, liability for consequential damages or loss of operations by SFBGS. SFBGS hereby waives the provisions of California Civil Code Section 1932(1) or any other applicable existing or future Law permitting the termination of this Lease due to such interruption, failure or inability.

**11.3. Water and Energy Conservation; Mandatory or Voluntary Restrictions.** In the event any law, ordinance, code or governmental or regulatory guideline imposes mandatory or voluntary controls on City or the Premises or the Nursery Shared Use Areas or any part thereof, relating to the use or conservation of energy, water, gas, light or electricity or the reduction of automobile or other emissions, or the provision of any other utility or service provided with respect to this Lease, or in the event City is required or elects to make alterations to any part of the Improvements on the Premises or the Nursery Shared Use Areas in order to comply with such mandatory or voluntary controls or guidelines, such compliance and the making of such alterations shall in no event entitle SFBGS to any damages, relieve SFBGS of the obligation to pay the full Base Rent and Additional Charges reserved hereunder or to perform each of its other covenants hereunder or constitute or be construed as a constructive or other eviction of SFBGS. City shall have the right at any time to install a water meter in the Premises or otherwise to measure the amount of water consumed on the Premises, and the cost of such meter or other corrective measures and the installation and maintenance thereof shall be paid for by SFBGS.

**11.4. Antennae.** No antennae or telecommunication dish may be installed on the Premises without the advance written approval of City. No such antennae or telecommunications dishes shall interfere with City's emergency and non-emergency communications facilities or the

transmission facilities of City. SFBGS agrees, at the request of City, to permit City to install, at City's sole cost, transmission equipment for City's emergency or 800 MHz City wide radio system communications facilities (or its successor) at a location on top of the Improvements acceptable to SFBGS.

## **12. LIENS**

SFBGS shall keep the Premises and the Nursery Shared Use Areas and all of City's property free from any liens arising out of any work performed, material furnished or obligations incurred by or for SFBGS. In the event SFBGS does not, within five (5) days following the imposition of any such lien, cause the lien to be released of record by payment or posting of a proper bond, City shall have in addition to all other remedies provided herein and by Law or equity the right, but not the obligation, to cause the same to be released by such means as it shall deem proper, including, but not limited to, payment of the claim giving rise to such lien. All such sums paid by City and all expenses it incurs in connection therewith (including, without limitation, reasonable attorneys' fees) shall be payable to City by SFBGS upon demand. City shall have the right at all times to post and keep posted on the Premises and the Nursery Shared Use Areas any notices permitted or required by Law or that City deems proper for its protection and protection of the Premises and the Nursery Shared Use Areas and City's property, from mechanics' and materialmen's liens. SFBGS shall give City at least fifteen (15) days' prior written notice of the commencement of any repair or construction on any of the Premises or the Nursery Shared Use Areas. Notwithstanding the foregoing, SFBGS shall have the right, upon posting of an adequate bond or other security acceptable to City, to contest any such lien, and in such case City shall not seek to satisfy or discharge such lien unless SFBGS has failed to do so within ten (10) days after final determination of the validity thereof. SFBGS shall Indemnify City, the other Indemnified Parties and the Premises and the Nursery Shared Use Areas against any and all Losses arising out of any such contest.

## **13. COMPLIANCE WITH LAWS**

**13.1. Compliance with Laws.** SFBGS shall promptly, at its sole expense, maintain the Premises and any Improvements permitted hereunder and shall conduct its use and operations thereon and in the Nursery Shared Use Areas in strict compliance at all times with all present and future Laws, whether foreseen or unforeseen, ordinary as well as extraordinary. Such Laws shall include, without limitation, all Laws relating to health and safety and disabled accessibility including, without limitation, the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. and Title 24 of the California Code of Regulations, all present and future Environmental Laws (as defined in this Lease below), and all present and future life safety, fire sprinkler, seismic retrofit and other building code requirements. Notwithstanding anything to the contrary contained in this Lease, (a) SFBGS shall not be required to make any structural Alterations, repairs or improvements in order to comply with such Laws unless such Alterations, repairs or improvements shall be occasioned, in whole or in part, directly or indirectly, by the Improvements or any other Alterations made by SFBGS after the Commencement Date of this Lease, SFBGS's use of the Premises, or any act or omission of SFBGS, its Agents or Invitees; and (ii) SFBGS shall not be required to make any structural Alterations in order to comply with such Laws to the extent such are in connection with any noncompliance with any such Laws as of the Commencement Date. Any Alteration made by or on behalf of SFBGS pursuant to the provisions of this Section shall comply with the provisions of **Section 10.1** above. The Parties acknowledge and agree that SFBGS's obligation to comply with all laws as provided herein is a material part of the bargained-for consideration under this Lease. Subject to the provisions of **Article 11**, SFBGS's obligations under this Section shall include, without limitation, (to the extent otherwise covered by this Section) the responsibility of SFBGS to make substantial or structural repairs and alterations to the Premises and the Nursery Shared Use Areas (including

any Improvements), regardless of, among other factors, the relationship of the cost of curative action to the Rent under this Lease, the length of the then remaining Term hereof, the relative benefit of the repairs to SFBGS or City, the degree to which the curative action may interfere with SFBGS's use or enjoyment of the Premises or the Nursery Shared Use Areas, the likelihood that the parties contemplated the particular Law involved, and whether the Law involved is related to SFBGS's particular use of the Premises or the Nursery Shared Use Areas. Subject to **Section 27.36**, no occurrence or situation arising during the Term, nor any present or future Law, whether foreseen or unforeseen, and however extraordinary, shall relieve SFBGS from its obligations hereunder, or shall give SFBGS any right to terminate this Lease in whole or in part or to otherwise seek redress against City. SFBGS waives any rights now or hereafter conferred upon it by any existing or future Law to terminate this Lease, to receive any abatement, diminution, reduction or suspension of payment of Rent, or to compel City to make any repairs to comply with any such Laws, on account of any such occurrence or situation.

### **13.2. Regulatory Approvals**

**(a) Responsible Party.** SFBGS understands and agrees that SFBGS's use of the Premises or the Nursery Shared Use Areas may require authorizations, approvals or permits from governmental regulatory agencies with jurisdiction over the Premises or the Nursery Shared Use Areas. SFBGS shall be solely responsible for obtaining any and all such regulatory approvals. SFBGS shall not seek any regulatory approval without first obtaining the written consent of the General Manager. SFBGS shall bear all costs associated with applying for, obtaining and maintaining any necessary or appropriate regulatory approval and shall be solely responsible for satisfying any and all conditions imposed by regulatory agencies as part of a regulatory approval. Any fines or penalties levied as a result of SFBGS's failure to comply with the terms and conditions of any regulatory approval shall be immediately paid and discharged by SFBGS, and City shall have no liability, monetary or otherwise, for any such fines or penalties. SFBGS shall Indemnify City and the other Indemnified Parties against all Losses arising in connection with SFBGS's failure to obtain or comply with the terms and conditions of any regulatory approval.

**(b) City Acting as Owner of Real Property.** SFBGS further understands and agrees that City, acting by and through the Commission, is entering into this Lease in its capacity as a property owner with a proprietary interest in the Premises and the Nursery Shared Use Areas and not as a regulatory agency with police powers. Nothing in this Lease shall limit in any way SFBGS's obligation to obtain any required approvals from City departments, boards or commissions having jurisdiction over the Premises and the Nursery Shared Use Areas. By entering into this Lease, City is in no way modifying or limiting SFBGS's obligation to cause the Premises or any permitted Improvements to be used and occupied in accordance with all applicable Laws, as provided further above.

**13.3. Compliance with City's Risk Management Requirements.** SFBGS shall not do anything, or permit anything to be done, in or about the Premises, the Nursery Shared Use Areas or any Improvements permitted hereunder that would create any unusual fire risk, and shall take commercially reasonable steps to protect City from any potential premises liability. SFBGS shall faithfully observe, at its expense, any and all reasonable requirements of City's Risk Manager with respect thereto and with the requirements of any policies of public liability, fire or other policies of insurance at any time in force with respect to the Premises, the Nursery Shared Use Areas and any Improvements as required hereunder.

**13.4. Reports.** SFBGS shall submit a report and provide such documentation to City as City may from time to time request regarding SFBGS's operations and evidencing compliance thereof with this Lease and all Laws.

#### **14. FINANCING; ENCUMBRANCES; SUBORDINATION**

**14.1. Encumbrance of City's Fee Interest.** The following provisions shall apply notwithstanding anything to the contrary contained in this Lease.

(a) **Encumbrance by City.** To the extent permitted by applicable Law, City may at any time sell or otherwise transfer or encumber its fee estate in any portion of the Premises and the Nursery Shared Use Areas provided that (i) any such sale or Encumbrance shall be subject and subordinate to all of the terms of this Lease and the leasehold estate created hereby, and (ii) the right of possession of SFBGS to the Premises and the right to use the Nursery Shared Use Areas shall not be affected or disturbed by any such sale or Encumbrance, or by the exercise of any rights or remedies by any purchaser or Encumbrancer arising out of any instrument reflecting such sale or Encumbrance so long as no Event of Default or Unmatured Event of Default is outstanding hereunder.

(b) **Encumbrance By SFBGS.** SFBGS shall not under any circumstances whatsoever Encumber in any manner City's estate in the Premises or the Nursery Building or any adjoining property, or City's interest under this Lease, or any portion thereof.

**14.2. Leasehold Encumbrances.** Without limiting **Article 17** hereof, SFBGS shall not Encumber this Lease or SFBGS's interest in this Lease, or assign or pledge assignment of the same as security for any debt, without first obtaining the written consent of City, which City may give or withhold in its sole discretion.

#### **15. DAMAGE OR DESTRUCTION**

**15.1. Damage or Destruction to the Improvements.** If the Premises, the Nursery Shared Use Areas or the Improvements are damaged by fire or other casualty, then City shall repair the same (subject to the provisions of **Section 15.2** below) provided that funds for such repairs are appropriated by City's Board of Supervisors, in its sole discretion, for such purpose and provided further that such repairs can be made within two hundred ten (210) days after the date of such damage (the "Repair Period"). In the event such conditions are satisfied, this Lease shall remain in full force and effect except that SFBGS shall be entitled to a proportionate reduction of Base Rent and Additional Charges during the period of such repairs based upon the extent to which such damage and the making of such repairs materially interferes with SFBGS's use or occupancy of the Premises or use of the Nursery Shared Use Areas (except to the extent that the damage or destruction was caused by the negligence or intentional misconduct of SFBGS or its Agents). City shall use good faith efforts to notify SFBGS within ninety (90) days after the date of such damage whether or not such repairs can be made within the Repair Period, and City's determination thereof shall be binding on SFBGS. If City determines that such repairs cannot be made within the Repair Period, City shall have the option to notify SFBGS of: (a) City's intention to repair such damage and diligently prosecute such repairs to completion within a reasonable period after the Repair Period, subject to the Board of Supervisors' appropriation of all necessary funds, in which event this Lease shall continue in full force and effect and the Base Rent and Additional Charges shall be reduced as provided herein; or (b) City's election to terminate this Lease or to terminate this Lease with respect to the damaged Premises or the damaged Nursery Shared Use Areas only as of a date specified in such notice, which date shall be not less than thirty (30) nor more than sixty (60) days after notice is given by City. In case of termination, the Base Rent and Additional Charges shall be reduced as provided above, and SFBGS shall pay such reduced Base Rent and Additional Charges up to the date of termination. If at any time during the last twelve (12) months of the Term of this Lease, the Premises, the Nursery Shared Use Areas or the Improvements are damaged or destroyed, then either City or

SFBGS may terminate this Lease by giving written notice to the other party of its election to do so within thirty (30) days after the date of the occurrence of such damage; provided, however, SFBGS may terminate only if such damage or destruction substantially impairs its use of the Premises or the Nursery Shared Use Areas for the uses permitted hereunder. The effective date of termination shall be specified in the notice of termination, which date shall not be more than thirty (30) days from the date of the notice.

**15.2. SFBGS's Obligations.** Notwithstanding anything to the contrary in this Lease, City shall have no obligation to repair the Premises, the Nursery Shared Use Areas or the Improvements in the event the damage or destruction is attributable to any act or omission of SFBGS or its Agents. In no event shall City be required to repair any damage to SFBGS's Personal Property or any Improvements or Alterations installed or made on the Premises or the Nursery Shared Use Areas by or at the expense of SFBGS. With respect to any damage to or destruction by fire or any other casualty attributable to any act or omission of SFBGS or its Agents affecting any Alterations or Improvements permitted hereunder made by or on behalf of SFBGS during the Term hereof, if and when City repairs the Premises or the Nursery Shared Use Areas pursuant to **Section 15.1** above, SFBGS shall, at its sole cost, restore, repair, replace or rebuild such Alterations or Improvements to the condition such Alterations or Improvements were in prior to such damage or destruction, subject to any changes made in strict accordance with the requirements of **Section 10.1** above, unless this Lease is terminated as provided in **Section 15.1** above. If this Lease is terminated as provided in **Section 15.1** above, then at City's written request SFBGS shall promptly, at its sole cost, demolish such damaged Alterations and damaged Improvements or Alterations that were installed or made on the Premises or the Nursery Shared Use Areas by or at the expense of SFBGS and remove them (including all debris) from the Premises and the Nursery Shared Use Areas in compliance with the provisions of **Section 23.1** below.

**15.3. Waiver.** The Parties understand and agree that the foregoing provisions of this Section are intended to govern fully the rights and obligations of the Parties in the event of damage or destruction to the Premises, the Nursery Shared Use Areas or Improvements, and City and SFBGS each hereby waives and releases any right to terminate this Lease in whole or in part under Sections 1932.2 and 1933.4 of the Civil Code of California or under any similar Laws now or hereafter in effect, to the extent such rights are inconsistent with the provisions hereof.

## **16. EMINENT DOMAIN**

**16.1. General.** If during the Term or during the period between the execution of this Lease and the Commencement Date, any Taking of all or any part of the Premises or the Nursery Shared Use Areas or any interest in this Lease occurs, the rights and obligations of the Parties hereunder shall be determined pursuant to this Section. City and SFBGS intend that the provisions hereof govern fully in the event of a Taking and accordingly, the Parties each hereby waives any right to terminate this Lease in whole or in part under Sections 1265.120 and 1265.130 of the California Code of Civil Procedure or under any similar Law now or hereafter in effect.

**16.2. Total Taking; Automatic Termination.** If a total Taking of the Premises and the Nursery Shared Use Areas occurs, then this Lease shall terminate as of the Date of Taking.

### **16.3. Partial Taking; Election to Terminate.**

(a) If a Taking of any portion (but less than all) of the Premises and the Nursery Shared Use Areas occurs, then this Lease shall terminate in its entirety under either of the following circumstances: (i) if all of the following exist: (A) the partial Taking renders the

remaining portion of the Premises and the Nursery Shared Use Areas untenable or unsuitable for continued use by SFBGS, (B) the condition rendering the Premises and the Nursery Shared Use Areas untenable or unsuitable either is not curable or is curable but City is unwilling or unable to cure such condition, and (C) SFBGS elects to terminate; or (ii) if City elects to terminate, except that this Lease shall not terminate if SFBGS agrees to, and does, pay full Rent and Additional Charges, without abatement, and otherwise agrees to, and does, fully perform all of its obligations hereunder.

(b) City shall have the right to terminate this Lease in the event of a partial Taking of a substantial portion of any of City's adjoining real property, even if the Taking does not directly affect the Premises or the Nursery Shared Use Areas.

(c) Either Party electing to terminate under the provisions of this **Article 16** shall do so by giving written notice to the other Party before or within thirty (30) days after the Date of Taking, and thereafter this Lease shall terminate upon the later of the thirtieth day after such written notice is given or the Date of Taking.

**16.4. Rent; Award.** Upon termination of this Lease pursuant to an election under **Section 16.3** above, then: (i) SFBGS's obligation to pay Rent shall continue up until the date of termination, and thereafter shall cease, except that Rent shall be reduced as provided in **Section 16.5** below for any period during which this Lease continues in effect after the Date of Taking, and (ii) City shall be entitled to the entire Award in connection therewith (including, but not limited to, any portion of the Award made for the value of the leasehold estate created by this Lease), and SFBGS shall have no claim against City for the value of any unexpired term of this Lease, provided that SFBGS may make a separate claim for compensation, and SFBGS shall receive any Award made specifically to SFBGS, for SFBGS's relocation expenses or the interruption of or damage to SFBGS's operations or damage to SFBGS's Personal Property.

**16.5. Partial Taking; Continuation of Lease.** If a partial Taking of the Premises and the Nursery Shared Use Areas occurs and this Lease is not terminated in its entirety under **Section 16.3** above, then this Lease shall terminate as to the portion of the Premises or the Nursery Shared Use Areas so taken, but shall remain in full force and effect as to the portion not taken, and the rights and obligations of the Parties shall be as follows: (i) Base Rent shall be reduced by an amount that is in the same ratio to the Base Rent as the area of the Premises and the Nursery Shared Use Areas taken bears to the area of the Premises and the Nursery Shared Use Areas prior to the Date of Taking, and (ii) City shall be entitled to the entire Award in connection therewith (including, but not limited to, any portion of the Award made for the value of the leasehold estate created by this Lease). SFBGS shall have no claim against City for the value of any unexpired Term of this Lease, provided that SFBGS may make a separate claim for compensation. SFBGS shall retain any Award made specifically to SFBGS for SFBGS's relocation expenses or the interruption of or damage to SFBGS's operations or damage to SFBGS's Personal Property.

**16.6. Temporary Takings.** Notwithstanding anything to contrary in this Section, if a Taking occurs with respect to all or any part of the Premises or the Nursery Shared Use Areas for a limited period of time not in excess of sixty (60) consecutive days, this Lease shall remain unaffected thereby, and SFBGS shall continue to pay Rent and to perform all of the terms, conditions and covenants of this Lease. In the event of such temporary Taking, SFBGS shall be entitled to receive that portion of any Award representing compensation for the use or occupancy of the Premises or use of the Nursery Shared Use Areas during the Term up to the total Rent owing by SFBGS for the period of the Taking, and City shall be entitled to receive the balance of any Award.

## **17. ASSIGNMENT AND SUBLETTING**

**17.1. Restriction on Assignment and Subletting.** SFBGS shall not directly or indirectly (including, without limitation, by merger, acquisition, sale or other transfer of any controlling interest in SFBGS), voluntarily or by operation of Law, sell, assign, encumber, pledge or otherwise transfer any part of its interest in or rights with respect to the Premises, the Nursery Shared Use Areas any Improvements or its leasehold estate hereunder (collectively, "Assignment"), or permit any portion of the Premises or any Improvements to be occupied by anyone other than itself, or sublet or sublicense any portion of the Premises, the Nursery Shared Use Areas or any permitted Improvements thereon (collectively, "Sublease"), without the General Manager's prior written consent in each instance, which the General Manager may withhold in the General Manager's sole and absolute discretion to the extent any assignment, or any sublease exceeding 20% of the Premises, is involved and may otherwise withhold in the General Manager's reasonable discretion. Any Assignment or Sublease, without the General Manager's prior consent, shall be voidable at the option of the City in its sole and absolute discretion; and, to the extent any assignment, or any sublease exceeding 20% of the Premises, is involved, the General Manager shall have the right to terminate immediately this Lease by sending written notice to SFBGS.

**17.2. Notice of Proposed Transfer.** If SFBGS desires to enter into an Assignment or a Sublease, then it shall give written notice (a "Notice of Proposed Transfer") to City of its intention to do so. The Notice of Proposed Transfer shall identify the proposed transferee and state the terms and conditions under which SFBGS is willing to enter into such proposed Assignment or Sublease, including a copy of the proposed Assignment or Sublease agreement. SFBGS shall provide City with current financial statements for the proposed transferee prepared by an independent certified public accountant and such additional information regarding the proposed transfer as the Department may reasonably request.

**17.3. Required Terms and Conditions.** Any Sublease or concession agreement approved hereunder shall be on such terms and conditions and on such form as shall have been approved by the General Manager. Revenue from any Sublease or concession agreement shall be payable to City, except as otherwise expressly approved by the General Manager, and shall be subject to the terms of **Section 6.7(d)** above.

**17.4. Effect of Transfer.** No Sublease or Assignment by SFBGS shall relieve SFBGS, or any guarantor, of any obligation to be performed by SFBGS under this Lease. Any Sublease or Assignment without the General Manager's prior consent shall constitute a material Event of Default by SFBGS under this Lease. The acceptance of any Rent or other payments by City from a proposed Transferee shall not constitute consent to such Sublease or Assignment by City or a recognition of any Transferee, or a waiver by City of any failure of SFBGS or other transferor to comply with this Section.

**17.5. Indemnity for Relocation Benefits.** Without limiting **Section 17.4**, SFBGS shall cause any Transferee to expressly waive entitlement to any and all relocation assistance and benefits in connection with this Lease. SFBGS shall Indemnify City and the other Indemnified Parties for any and all Losses arising out of any relocation assistance or benefits payable to any Transferee.

## **18. DEFAULT; REMEDIES**

**18.1. Events of Default.** Any of the following shall constitute an event of default ("Event of Default") by SFBGS hereunder:

**(a) Rent.** Any failure to pay any Rent or other sums as and when due, provided SFBGS shall have a period of five (5) business days from the date of written notice of such failure from City within which to cure any default in the payment of Rent or other sums; provided, however, that City shall not be required to provide such notice regarding SFBGS's failure to make such payments when due more than twice during any calendar year, and any such failure by SFBGS after SFBGS has received two such notices in any calendar year from City shall constitute a default by SFBGS hereunder without any requirement on the part of City to give SFBGS notice of such failure or an opportunity to cure except as may be required by Section 1161 of the California Code of Civil Procedure;

**(b) Vacation or Abandonment.** Any vacation or abandonment of the Premises as a whole for more than fourteen (14) consecutive days;

**(c) Bankruptcy.** The appointment of a receiver to take possession of all or substantially all of the assets of SFBGS, or an assignment by SFBGS for the benefit of creditors, or any action taken or suffered by SFBGS under any insolvency, bankruptcy, reorganization, moratorium or other debtor relief act or statute, whether now existing or hereafter amended or enacted, if any such receiver, assignment or action is not released, discharged, dismissed or vacated within sixty (60) days;

**(d) Insurance.** Any failure to maintain any insurance required to be maintained by SFBGS under this Lease; provided SFBGS shall have a period of three (3) business days from the date of written notice of such failure from City within which to cure any such default;

**(e) Abandonment of Nursery Construction.** If all of the following have occurred:

- (i) SFBGS commences construction of the Nursery Project,
- (ii) a stoppage of construction of the Nursery Project (other than a stoppage beyond the reasonable control of SFBGS) continues for more than one hundred twenty (120) days,
- (iii) following a period of at least sixty (60) days for consultation between City and SFBGS to arrive at a mutually-agreed solution that will allow the Nursery Project to move forward or the situation to be otherwise resolved to City's reasonable satisfaction, SFBGS either (x) materially fails to perform any such agreement reached or (y) fails to identify a reasonable solution, and City gives SFBGS written notice of such failure,
- (iv) SFBGS fails, within thirty (30) days after such notice, to commence taking reasonable steps to either cure such stoppage or restore the property to a condition suitable for public use, or SFBGS fails thereafter to diligently pursue such steps and, in each case, no other solution can be found, and
- (v) City is not willing to waive the Event of Default otherwise arising from this **Section 18.1(e)**;

**(f)** Those matters described as Events of Default in **Sections 5.3, 6.5(a), 7.7(d), 17.4, and 27.23**; or

**(g) Covenants, Conditions and Representations.** Any failure to perform or comply with any other covenant, condition or representation made under this Lease, provided



SFBGS shall have a period of fifteen (15) days from the date of written notice from City of such failure within which to cure such default under this Lease, or, if such default is not capable of cure within such 15-day period, SFBGS shall have a reasonable period to complete such cure if SFBGS promptly undertakes action to cure such default within such 15-day period and thereafter diligently prosecutes the same to completion and SFBGS uses its best efforts to complete such cure within sixty (60) days after the receipt of notice of default from City; provided, however, that upon the occurrence within a 12-month period during the Term of two (2) defaults of the same obligation, City shall not be required to provide any notice regarding SFBGS's failure to perform such obligation, and any subsequent failure by SFBGS after SFBGS has received two such notices shall constitute a default by SFBGS hereunder without any requirement on the part of City to give SFBGS notice of such failure or an opportunity to cure.

**18.2. Remedies.** Upon the occurrence of an Event of Default by SFBGS, City shall have the following rights and remedies in addition to all other rights and remedies available to City at Law or in equity:

**(a) Terminate Lease and Recover Damages.** The rights and remedies provided by California Civil Code Section 1951.2 (damages on termination for breach), including, but not limited to, the right to terminate SFBGS's right to possession of the Premises and right to use the Nursery Shared Use Areas and to recover the worth at the time of award of the amount by which the unpaid Base Rent and Additional Charges for the balance of the Term after the time of award exceeds the amount of rental loss for the same period that SFBGS proves could be reasonably avoided, as computed pursuant to subsection (b) of such Section 1951.2. City's efforts to mitigate the damages caused by SFBGS's breach of this Lease shall not waive City's rights to recover damages upon termination.

**(b) Continue Lease and Enforce Rights.** The rights and remedies provided by California Civil Code Section 1951.4 (continuation of lease after breach and abandonment), which allows City to continue this Lease in effect and to enforce all of its rights and remedies under this Lease, including the right to recover Rent as it becomes due, for so long as City does not terminate SFBGS's right to possession, if SFBGS has the right to sublet or assign, subject only to reasonable limitations. For purposes hereof, none of the following shall constitute a termination of SFBGS's right of possession: acts of maintenance or preservation; efforts to relet the Premises or the appointment of a receiver upon City's initiative to protect its interest under this Lease; or withholding consent to an Assignment or Sublease, or terminating an Assignment or Sublease, if the withholding or termination does not violate the rights of SFBGS specified in subdivision (b) of California Civil Code Section 1951.4. If City exercises its remedy under California Civil Code Section 1951.4, City may from time to time sublet the Premises or sublicense the Nursery Shared Use Areas or any part thereof for such term or terms (which may extend beyond the Term) and at such rent and upon such other terms as City in its sole discretion may deem advisable, with the right to make alterations and repairs to the Premises and the Nursery Shared Use Areas. Upon each such subletting, SFBGS shall be immediately liable for payment to City of, in addition to Base Rent and Additional Charges due hereunder, the cost of such subletting and such alterations and repairs incurred by City and the amount, if any, by which the Base Rent and Additional Charges owing hereunder for the period of such subletting (to the extent such period does not exceed the Term) exceeds the amount to be paid as Base Rent and Additional Charges for the Premises for such period pursuant to such subletting. No action taken by City pursuant to this **Section 18.2(b)** shall be deemed a waiver of any default by SFBGS and, notwithstanding any such subletting without termination, City may at any time thereafter elect to terminate this Lease for such previous default.

**(c) Appointment of Receiver.** The right to have a receiver appointed for SFBGS upon application by City to take possession of the Premises and to apply any rental

collected from the Premises and the Nursery Shared Use Areas and to exercise all other rights and remedies granted to City pursuant to this Lease.

**18.3. City's Right to Cure SFBGS's Defaults.** If SFBGS defaults in the performance of any of its obligations under this Lease, then City may at any time thereafter with three (3) days prior oral or written notice (except in the event of an emergency as determined by City), remedy such Event of Default for SFBGS's account and at SFBGS's expense. SFBGS shall pay to City, as Additional Rent, promptly upon demand, all sums expended by City, or other costs, damages, expenses or liabilities incurred by City, including, without limitation, reasonable attorneys' fees, in remedying or attempting to remedy such Event of Default. SFBGS's obligations under this Section shall survive the termination of this Lease. Nothing herein shall imply any duty of City to do any act that SFBGS is obligated to perform under any provision of this Lease, and City's cure or attempted cure of SFBGS's Event of Default shall not constitute a waiver of SFBGS's Event of Default or any rights or remedies of City on account of such Event of Default.

**18.4. City's Defaults, Claims.** Subject to the waivers set forth in **Section 19.1(a)** below with respect to injury, accident or death of any person or damage to any property not resulting from negligence or willful misconduct of City or its Agents and in **Section 19.1(b)** below with respect to consequential or incidental damages, SFBGS shall be entitled to enforce this Lease, make claims for the reimbursement of damage caused by negligence or intentional misconduct of City or its Agents and pursue all other causes of action otherwise available, as provided in Sections 905 and following of the California Government Code, and otherwise in the manner available under applicable law.

## **19. WAIVER OF CLAIMS; INDEMNIFICATION**

**19.1. Waiver of Claims.** SFBGS covenants and agrees that City shall not be responsible for or liable to SFBGS for, and, to the fullest extent allowed by Law, SFBGS hereby waives all rights against City and its Agents and releases City and its Agents from, any and all Losses, including, but not limited to, incidental and consequential damages, relating to any injury, accident or death of any person or loss or damage to any property, in or about the Premises, the Nursery Shared Use Areas or any other City property, from any cause whatsoever. Nothing herein shall relieve City from liability caused by the negligence or willful misconduct of City or its Agents, provided that City shall not be liable under any circumstances for any consequential, incidental or punitive damages. Without limiting the foregoing:

(a) SFBGS expressly acknowledges and agrees that the Rent payable hereunder does not take into account any potential liability of City for any consequential or incidental damages including, but not limited to, lost profits arising out of disruption to the Improvements or SFBGS's uses hereunder. City would not be willing to enter into this Lease in the absence of a complete waiver of liability for consequential or incidental damages due to the acts or omissions of City or its Agents, and SFBGS expressly assumes the risk with respect thereto. Accordingly, without limiting any indemnification obligations of SFBGS or other waivers contained in this Lease and as a material part of the consideration for this Lease, SFBGS fully RELEASES, WAIVES AND DISCHARGES forever any and all claims, demands, rights, and causes of action against City for consequential and incidental damages (including without limitation, lost profits), and covenants not to sue for such damages, City, its departments, commissions, officers, directors and employees, and all persons acting by, through or under each of them, arising out of this Lease or the uses authorized hereunder, including, without limitation, any interference with uses conducted by SFBGS pursuant to this Lease regardless of the cause, and whether or not due to the negligence or gross negligence of City or its Agents.

(b) In connection with the foregoing releases, SFBGS acknowledges that it is familiar with Section 1542 of the California Civil Code, which reads:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

SFBGS acknowledges that the releases contained herein include all known and unknown, disclosed and undisclosed, and anticipated and unanticipated claims. SFBGS realizes and acknowledges that it has agreed upon this Lease in light of this realization and, being fully aware of this situation, it nevertheless intends to waive the benefit of Civil Code Section 1542, or any statute or other similar law now or later in effect. The releases contained herein shall survive any termination of this Lease.

**19.2. SFBGS's Indemnity.** SFBGS, on behalf of itself and its successors and assigns, shall Indemnify City and the other Indemnified Parties from and against any and all Losses incurred in connection with or arising directly or indirectly, in whole or in part, out of: (a) any accident, injury to or death of a person, including, without limitation, Agents and Invitees of SFBGS, or loss of or damage to property (including, without limitation, the Common Areas or the Department Facilities) howsoever or by whomsoever caused, occurring in, on or about the Premises or Nursery Shared Use Areas in connection with SFBGS's activities; (b) any default by SFBGS in the observation or performance of any of the terms, covenants or conditions of this Lease to be observed or performed on SFBGS's part; (c) the use, occupancy, conduct or management, or manner of use, occupancy, conduct or management by SFBGS, its Agents or Invitees or any person or entity claiming through or under any of them, of the Premises, Nursery Shared Use Areas or any Improvements; (d) the condition of the Premises or any Improvements constructed by or on behalf of SFBGS, or, to the extent resulting from activity by SFBGS or its Agents or Invitees, the condition of the Nursery Shared Use Areas, or SFBGS's failure to properly repair or maintain any Improvements on the Premises or on the Nursery Shared Use Areas to the extent required under this Lease; (e) any construction or other work undertaken by SFBGS on or about the Premises, Nursery Shared Use Areas or any Improvements whether before or during the Term of this Lease; or (f) any acts, omissions or negligence of SFBGS, its Agents or Invitees in, on or about the Premises, Nursery Shared Use Areas or any Improvements; all regardless of the active or passive negligence of, and regardless of whether liability without fault is imposed or sought to be imposed on, the Indemnified Parties, except (in each case) (i) to the extent that such Indemnity is void or otherwise unenforceable under applicable Law in effect on or validly retroactive to the date of this Lease or (ii) to the extent such Losses are caused by the negligence or intentional wrongful acts or omissions of the Indemnified Parties. The foregoing Indemnity shall include, without limitation, reasonable fees of attorneys, consultants and experts and related costs and City's costs of investigating any Loss. SFBGS specifically acknowledges and agrees that it has an immediate and independent obligation to defend City and the other Indemnified Parties from any claim which actually or potentially falls within this indemnity provision even if such allegation is or may be groundless, fraudulent or false, which obligation arises at the time such claim is tendered to SFBGS by City and continues at all times thereafter. SFBGS's obligations under this Section shall survive the expiration or sooner termination of the Lease.

## 20. INSURANCE

**20.1. SFBGS's Insurance.** SFBGS, at no cost to the City, shall procure and keep in effect at all times during the Term insurance as follows:

(i) Commercial general liability insurance with limits not less than One Million Dollars (\$1,000,000) each occurrence combined single limit for bodily injury and property damage, including contractual liability, independent contractors, broad-form property damage, fire damage legal liability (of not less than Two Hundred Fifty Thousand Dollars (\$250,000)), personal injury, and products and completed operations. If the operation of SFBGS's business includes food sales, such coverage shall include Food Products Liability Insurance with limits not less than One Million Dollars (\$1,000,000) each occurrence. If the operation of SFBGS's business includes the sale of alcoholic beverages, such coverage shall include legal liquor liability coverage with limits not less than One Million Dollars (\$1,000,000) each occurrence.

(ii) Worker's Compensation Insurance with Employer's Liability Limits not less than One Million Dollars (\$1,000,000) each accident.

(iii) Business automobile liability insurance with limits not less than One Million Dollars (\$1,000,000) each occurrence combined single limit for bodily injury and property damage, including owned and non-owned and hired vehicles, as applicable, if SFBGS uses automobiles in connection with its use of the Premises or the Nursery Shared Use Areas.

(iv) A Blanket Fidelity Bond or a Blanket Crime Policy (Employee Dishonesty Coverage) covering all officers and employees in an amount not less than \$25,000 with any deductible not to exceed \$5,000 and including City as additional obligee or loss payee as its interest may appear.

(v) Such other risks in such amounts as City's Risk Manager may from time to time reasonably require.

**20.2. General Requirements.** All insurance provided for under this Lease shall be effected under valid enforceable policies issued by insurers of recognized responsibility and reasonably approved by City.

(a) Should any of the required insurance be provided under a claims-made form, SFBGS shall maintain such coverage continuously throughout the term hereof and, without lapse, for a period of three (3) years beyond the expiration or termination of this Lease, to the effect that, should occurrences during the Term give rise to claims made after expiration or termination of this Lease, such claims shall be covered by such claims-made policies.

(b) Should any of the required insurance be provided under a form of coverage that includes a general annual aggregate limit or provides that claims investigation or legal defense costs be included in such general annual aggregate limit, such general aggregate limit shall double the occurrence or claims limits specified above.

(c) All liability insurance policies shall be endorsed to provide the following:

Name SFBGS as the insured and the City and County of San Francisco, its officers, agents and employees, as additional insureds, as their respective interests may appear hereunder.

That such policies are primary insurance to any other insurance available to the additional insureds, with respect to any claims arising out of this Lease, and that insurance applies separately to each insured against whom claim is made or suit is brought. Such policies shall also provide for severability of interests and that an act or omission of one of the named insureds which would void or otherwise reduce coverage shall not reduce or void the coverage as to any insured, and shall afford coverage for all claims based on acts, omissions, injury or damage which occurred or arose (or the onset of which occurred or arose) in whole or in part during the policy period.

All policies shall be endorsed to provide thirty (30) days' advance written notice to City of cancellation, non-renewal or reduction in coverage, mailed to the address(es) for City set forth in the Basic Lease Information.

(d) Each insurance policy required hereunder shall be issued by an insurance company licensed in the State of California and with a general policyholders' rating of "A-" or better and a financial size ranking of "Class VIII" or higher in the most recent edition of Best's Insurance Guide.

**20.3. Proof of Insurance.** SFBGS shall deliver to City certificates of insurance in form and with insurers satisfactory to City, evidencing the coverages required hereunder, on or before the Commencement Date, together with complete copies of the policies promptly upon City's request, and SFBGS shall provide City with certificates or policies thereafter at least thirty (30) days before the expiration dates of expiring policies. In the event SFBGS shall fail to procure such insurance, or to deliver such policies or certificates, City may, at its option, procure the same for the account of SFBGS, and the cost thereof shall be paid to City within five (5) days after delivery to SFBGS of bills therefor.

**20.4. Review of Insurance Requirements.** SFBGS and City shall periodically review the limits and types of insurance carried pursuant to this Section. If the general commercial practice in the City and County of San Francisco is to carry liability insurance in an amount or coverage materially greater than the amount or coverage then being carried by SFBGS with respect to risks comparable to those associated with the Premises and the Nursery Shared Use Areas, then, at City's option, SFBGS shall increase at its sole cost the amounts or coverages carried by SFBGS to conform to such general commercial practice.

**20.5. No Limitation on Indemnities.** SFBGS's compliance with the provisions of this Section shall in no way relieve or decrease SFBGS's indemnification obligations under Sections 19.2 and 24.2 hereof, or any of SFBGS's other obligations or liabilities under this Lease.

**20.6. Lapse of Insurance.** Notwithstanding anything to the contrary in this Lease, City may elect, in City's sole and absolute discretion, to terminate this Lease upon the lapse of any required insurance coverage by written notice to SFBGS.

**20.7. SFBGS's Personal Property and Alterations and Improvements.** SFBGS shall be responsible, at its expense, for separately insuring SFBGS's Personal Property, Alterations, and Improvements made by or on behalf of SFBGS.

**20.8. City's Self Insurance.** SFBGS acknowledges that City self-insures against casualty, property damage and public liability risks and agrees City shall not be required to carry any third party insurance with respect to the Premises, the Nursery Shared Use Areas or otherwise.

**20.9. Waiver of Subrogation.** Notwithstanding anything to the contrary contained herein, to the extent permitted by their respective policies of insurance, City and SFBGS each

hereby waive any right of recovery against the other party and against any other party maintaining a policy of insurance covering the Premises and the Nursery Shared Use Areas or other City property and their contents, or any portion thereof, for any loss or damage sustained by such other party with respect to the Premises, the Nursery Shared Use Areas, other City property or any portion thereof or the contents of the same or any operation therein, whether or not such loss is caused by the fault or negligence of such other party. If any policy of insurance relating to the Premises, the Nursery Shared Use Areas or other City property carried by SFBGS does not permit the foregoing waiver or if the coverage under any such policy would be invalidated due to such waiver, SFBGS shall obtain, if possible, from the insurer under such policy a waiver of all rights of subrogation the insurer might have against City or any other party maintaining a policy of insurance covering the same loss, in connection with any claim, loss or damage covered by such policy.

## **21. ACCESS BY CITY**

### **21.1. Access to Premises by City.**

(a) **General Access.** City reserves for itself and its designated Agents, the right to enter the Premises and any portion thereof at all reasonable times upon not less than forty-eight (48) hours oral or written notice to SFBGS (except in the event of an emergency) for any of the following purposes:

To determine whether the Premises are in good condition and to inspect the Premises (including, without limitation, soil borings or other Hazardous Material Investigations);

To determine whether SFBGS is in compliance with its obligations hereunder and to cure or attempt to cure any such default in accordance with the provisions of **Section 18.3** hereof;

To serve, post or keep posted any notices required or allowed under any of the provisions of this Lease;

To do any maintenance or repairs to the Premises that City has the right or the obligation, if any, to perform hereunder; and

To show it to any prospective purchasers, brokers, encumbrancers or public officials, or, during the last year of the Term of this Lease, exhibiting the Premises to prospective tenants or other occupants, and to post any "for sale" or "for lease" or "coming soon" signs in connection therewith.

(b) **Emergency Access.** In the event of any emergency, as determined by City, City may, at its sole option and without notice, enter the Premises and alter or remove SFBGS's Personal Property on or about the Premises. City shall have the right to use any and all means City considers appropriate to gain access to any portion of the Premises in an emergency. In such case, City shall not be responsible for any damage or injury to any such property, nor for the replacement of any such property and any such emergency entry shall not be deemed to be a forcible or unlawful entry onto or a detainer of, the Premises, or an eviction, actual or constructive, of SFBGS from the Premises or any portion thereof.

(c) **No Liability.** City shall not be liable in any manner, and SFBGS hereby waives any claims, for any inconvenience, disturbance, loss of business, nuisance or other damage arising out of City's entry onto the Premises, except damage resulting directly and

exclusively from the gross negligence or willful misconduct of City or its Agents and not contributed to by the acts, omissions or negligence of SFBGS, its Agents or Invitees.

(d) **No Abatement.** SFBGS shall not be entitled to any abatement in Rent if City exercises any rights reserved in this Section.

(e) **Minimize Disruption.** City shall use its reasonable good faith efforts to conduct any activities on the Premises allowed under this Section in a manner that, to the extent practicable, will minimize any disruption to SFBGS's use hereunder.

**21.2. Department Facilities and Utility Installations.** Without limiting Section 21.1 above, City shall have the right at all times, to enter upon the Premises upon forty eight (48) hours advance written or oral notice (except in cases of emergency as determined by City), to use, install, construct, repair, maintain, operate, replace, inspect, and remove the Department Facilities, if any, or any public park or utility facilities. City shall bear the expense of any such activities, unless the need is occasioned by the acts, omissions or negligence of SFBGS, its Agents or Invitees. City shall not be responsible for any temporary loss or disruption of SFBGS's use of the Premises occasioned by any such facility installations or other activities.

**21.3. Roadways.** City and its Agents shall have the right to enter upon and pass through and across the Premises on any existing or future roadways and as City desires.

**21.4. Rights of Public.** SFBGS shall keep the Premises open to the public at all times consistent with the uses permitted hereunder, subject to the Rules and Regulations or as otherwise provided in this Lease or approved by the General Manager in writing. Notwithstanding the foregoing, SFBGS may exclude from public access SFBGS's office space and certain horticultural or academic, employee working areas.

## **22. ESTOPPEL CERTIFICATES**

Either Party hereto shall, from time to time during the Term upon not less than twenty (20) days' prior written notice from the other Party, execute, acknowledge and deliver to the other Party, or such persons or entities designated by such other Party, a statement in writing certifying: (a) the Commencement Date and Expiration Date of this Lease, (b) that this Lease is unmodified and in full force and effect (or, if there have been modifications, that the Lease is in full force and effect as modified and stating the modifications), (c) that there are no defaults under this Lease (or if so, specifying the same), (d) the dates, if any, to which the Rent has been paid, and (e) any other information that may be reasonably required by any such persons or entities. Any such certificate delivered pursuant to the provisions hereof may be relied upon by the other Party or any prospective purchaser or Encumbrancer of its estate. The General Manager shall be authorized to execute, acknowledge and deliver any such certificates of the City.

## **23. SURRENDER**

**23.1. Surrender of the Premises and Nursery Shared Use Areas.** Upon the Expiration Date or any earlier termination of this Lease pursuant hereto, SFBGS shall surrender to City the Premises and, if such expiration or termination occurs after the Nursery Premises Commencement Date, the Nursery Shared Use Areas, in good condition, order and repair (except any damages, excluding normal wear and tear, caused by any act or omission of City or its Agents), free from debris and hazards created by SFBGS or its Agents or Invitees, and free and clear of all liens, easements and other Encumbrances created or suffered by, through or under SFBGS. On or before the Expiration Date or any earlier termination hereof, or later upon City's request, SFBGS shall, at its sole cost, remove any and all of SFBGS's Personal Property from the

Premises and, if applicable, the Nursery Shared Use Areas, and demolish and remove any and all Improvements and Alterations from the Premises and, if applicable, the Nursery Shared Use Areas, requested by City to be removed (except for any Improvements or Alterations that City agrees are to remain part of the Premises or and, if applicable, the Nursery Shared Use Areas pursuant to the provisions of **Section 9.2** above). In addition, SFBGS shall, at its sole expense, repair any damage to the Premises and the Nursery Shared Use Areas resulting from the removal of any such items and restore the Premises and the Nursery Shared Use Areas to their condition immediately prior to the presence of any Improvements or Alterations. In connection therewith, SFBGS shall obtain any and all necessary permits and approvals, including, without limitation, any environmental permits, and execute any manifests or other documents necessary to complete the demolition, removal or restoration work required hereunder. SFBGS's obligations under this Section shall survive the Expiration Date or other termination of this Lease. Any items of SFBGS's Personal Property remaining on or about the Premises or the Nursery Shared Use Areas after the Expiration Date of this Lease may, at City's option, be deemed abandoned and in such case City may dispose of such property in accordance with Section 1980 *et seq.* of the California Civil Code or in any other manner allowed by Law. If SFBGS fails to surrender the Premises and the Nursery Shared Use Areas to City on the Expiration Date or earlier termination of the Term as required by this Section, SFBGS shall Indemnify City against all Losses resulting therefrom, including, without limitation, Losses made by a succeeding lessee resulting from SFBGS's failure to surrender the Premises and the Nursery Shared Use Areas.

**23.2. Automatic Reversion.** Upon the Expiration Date or earlier termination of this Lease, the Premises and the Nursery Shared Use Areas shall automatically, and without further act or conveyance on the part of SFBGS or City, become the property of City, free and clear of all liens and Encumbrances and without payment therefor by City and shall be surrendered to City upon such date. Upon or at any time after the date of termination of this Lease, if requested by City, SFBGS shall promptly deliver to City, without charge, a quitclaim deed to the Premises and the Nursery Shared Use Areas suitable for recordation and any other instrument reasonably requested by City to evidence or otherwise effect the termination of SFBGS's leasehold estate hereunder and to effect such transfer or vesting of title to the Premises and the Nursery Shared Use Areas or any permitted Improvements or Alterations that City agrees are to remain part of the Premises pursuant to the provisions of **Section 9.2** above.

## **24. HAZARDOUS MATERIALS**

**24.1. No Hazardous Materials.** SFBGS covenants and agrees that neither SFBGS nor any of its Agents or Invitees shall cause or permit any Hazardous Material to be brought upon, kept, used, stored, generated or disposed of in, on or about the Premises, the Nursery Shared Use Areas or any Improvements or transported to or from the Premises, the Nursery Shared Use Areas or any Improvements; provided that SFBGS may store and use such substances in the Premises in such limited amounts as are customarily used for general office purposes (such as copy toner and supplies) so long as such storage and usage permitted hereunder shall be at all times in full compliance with applicable Environmental Laws. SFBGS shall immediately notify City if and when SFBGS learns or has reason to believe there has been any Release of Hazardous Material in, on or about the Premises, the Nursery Shared Use Areas or any Improvements. City may from time to time request SFBGS to provide adequate information for City to determine that any Hazardous Material permitted hereunder is being handled in compliance with all applicable Environmental Laws, and SFBGS shall promptly provide all such information. Without limiting **Article 21** hereof, City and its Agents shall have the right to inspect the Premises for Hazardous Material and compliance with the provisions hereof at all reasonable times upon reasonable advance oral or written notice to SFBGS (except in the event of an emergency).



**24.2. SFBGS's Environmental Indemnity.** If SFBGS breaches any of its obligations contained in **Section 24.1** above (other than the obligation to provide notice when SFBGS learns or has reason to believe there has been a Release of Hazardous Materials in the Nursery Shared Use Areas resulting from any act or omission or negligence of City or any of its Agents or Invitees), or, if any act or omission or negligence of SFBGS or any of its Agents or Invitees results in any Release of Hazardous Material in, on, under or about the Premises or the Nursery Shared Use Areas (including any Improvements thereon) or any other City property, without limiting SFBGS's general Indemnity contained in **Section 19.2** above, SFBGS, on behalf of itself and its successors and assigns, shall Indemnify City and the Indemnified Parties, and each of them, from and against all Hazardous Materials Claims arising during or after the Term of this Lease and relating to such Release. The foregoing Indemnity includes, without limitation, all costs associated with the Investigation and Remediation of Hazardous Material and with the restoration of the Premises, the Nursery Shared Use Areas or any other City property to its prior condition including, without limitation, fines and penalties imposed by regulatory agencies, natural resource damages and losses, and revegetation of the Premises, the Nursery Shared Use Areas or other City property. Without limiting the foregoing, if SFBGS or any of SFBGS's Agents or Invitees, causes or permits the Release of any Hazardous Materials in, on, under or about the Premises or the Nursery Shared Use Areas or causes the Release of any Hazardous Materials in, on, under or about any other City property, SFBGS shall, immediately, at no expense to City, take any and all appropriate actions to return the Premises or the Nursery Shared Use Areas or other City property affected thereby to the condition existing prior to such Release and otherwise Investigate and Remediate the Release in accordance with all Environmental Laws. SFBGS shall provide City with written notice of and afford City a full opportunity to participate in any discussions with governmental regulatory agencies regarding any settlement agreement, cleanup or abatement agreement, consent decree, permit, approvals, or other compromise or proceeding involving Hazardous Material.

## **25. SECURITY DEPOSIT**

SFBGS shall not be obligated to pay any security deposit in connection with entry into this Lease.

## **26. HOLDING OVER**

Any holding over after the expiration of the Term with the express consent of City shall be construed to automatically extend the Term of this Lease on a month-to-month basis on the terms and conditions herein specified so far as applicable (except for those pertaining to the Term). Any holding over without City's consent shall constitute a default by SFBGS and entitle City to exercise any or all of its remedies as provided herein, notwithstanding that City may elect to accept one or more payments of Rent, and whether or not such amounts are at the holdover rate specified below or the rate in effect at the end of the Term of this Lease. Any holding over after the expiration of the Term after written notice from City that City does not consent to such holding over shall be at a monthly rental rate equal to the then fair market rental rate for the Premises, as determined by the Department, and as offset by the value of services provided by SFBGS, as determined by the Department; provided, however, if City agrees in writing that a lower monthly rent shall apply during such period, then the monthly rent specified in such written notice or agreement shall instead apply.

## **27. GENERAL PROVISIONS**

**27.1. Notices.** Except as otherwise expressly provided in this Lease, any notice given hereunder shall be effective only if in writing and given by delivering the notice in person, or by sending it first-class mail or certified mail with a return receipt requested or reliable commercial

overnight courier, return receipt requested, with postage prepaid, to: (a) SFBGS (i) at SFBGS's address set forth in the Basic Lease Information, if sent prior to SFBGS's taking possession of the Premises, or (ii) at the Premises if sent on or subsequent to SFBGS's taking possession of the Premises, or (iii) at any place where SFBGS or any Agent of SFBGS may be found if sent subsequent to SFBGS's vacating, abandoning or surrendering the Premises; or (b) City at City's address set forth in the Basic Lease Information; or (c) to such other address as either City or SFBGS may designate as its new address for such purpose by notice given to the other in accordance with the provisions of this Section at least ten (10) days prior to the effective date of such change. Any notice hereunder shall be deemed to have been given two (2) days after the date when it is mailed if sent by first-class or certified mail, one day after the date it is made if sent by commercial overnight courier, or upon the date personal delivery is made, and any refusal by either Party to accept the attempted delivery of any notice, if such attempted delivery is in compliance with this **Section 27.1** and applicable Laws, shall be deemed receipt of such notice. For convenience of the Parties, copies of notices may also be given by telefacsimile to the telefacsimile number set forth in the Basic Lease Information or such other number as may be provided from time to time; however, neither party may give official or binding notice by telefacsimile. The effective time of a notice shall not be affected by the receipt, prior to receipt of the original, of a telefacsimile copy of the notice.

**27.2. No Implied Waiver.** No failure by City to insist upon the strict performance of any obligation of SFBGS under this Lease or to exercise any right, power or remedy arising out of a breach thereof, irrespective of the length of time for which such failure continues, no acceptance of full or partial Base Rent or Additional Charges during the continuance of any such breach, or possession of the Premises prior to the expiration of the Term by any Agent of City, shall constitute a waiver of such breach or of City's right to demand strict compliance with such term, covenant or condition or operate as a surrender of this Lease. No express written waiver of any default or the performance of any provision hereof shall affect any other default or performance, or cover any other period of time, other than the default, performance or period of time specified in such express waiver. One or more written waivers of a default or the performance of any provision hereof shall not be deemed to be a waiver of a subsequent default or performance. The consent of City given in any instance under the terms of this Lease shall not relieve SFBGS of any obligation to secure the consent of City in any other or future instance under the terms of this Lease.

**27.3. Amendments.** Neither this Lease nor any term or provisions hereof may be changed, waived, discharged or terminated, except by a written instrument signed by the Parties hereto. Whenever this Lease requires or permits the giving by City of its consent or approval, the General Manager of the Department shall be authorized to provide such approval, except as otherwise provided by this Lease or by applicable law, including the Charter. Any amendments or modifications to this Lease, including, without limitation, amendments to or modifications to the exhibits to this Lease, shall be subject to the mutual written agreement of City and SFBGS, and City's agreement may be made upon the sole approval of the General Manager of the Department provided such amendment or modification does not (i) decrease the amount of rental income payable by SFBGS to City, (ii) materially increase City's liabilities or financial obligations under this Lease, (iii) materially increase the size of the Premises or the Nursery Shared Use Areas, (iv) change the Term of this Lease, or (v) materially change the permitted uses of the Premises or the Nursery Shared Use Areas. Any proposed amendment which falls into the above specified categories shall require the approval of the Commission, and, if required under the City's Charter or Administrative Code, the Mayor, and the Board of Supervisors.

**27.4. Status; Authority.** SFBGS represents and warrants as follows, as of the date hereof and as of the Commencement Date. SFBGS is a nonprofit corporation duly organized and validly existing under the Laws of the State of California. SFBGS has all requisite power and

authority to own its property and conduct its business as presently conducted. SFBGS has made all filings and is in good standing in the State of California. SFBGS has all requisite power and authority to execute and deliver this Lease and the agreements contemplated by this Lease and to carry out and perform all of the terms and covenants of this Lease and the agreements contemplated by this Lease. The execution and delivery of this Lease and the agreements contemplated hereby by SFBGS have been duly and validly authorized by all necessary action. This Lease will be a legal, valid and binding obligation of SFBGS, enforceable against SFBGS in accordance with its terms.

**27.5. Joint and Several Obligations.** The word "Lessee" as used herein shall include the plural as well as the singular. If there is more than one Lessee, the obligations and liabilities under this Lease imposed on the Lessees shall be joint and several.

**27.6. Interpretation of Lease.** The captions preceding the articles and sections of this Lease and in the table of contents have been inserted for convenience of reference only and such captions shall in no way define or limit the scope or intent of any provision of this Lease. This Lease has been negotiated at arm's length and between persons sophisticated and knowledgeable in the matters dealt with herein and shall be interpreted to achieve the intents and purposes of the Parties, without any presumption against the party responsible for drafting any part of this Lease. Provisions in this Lease relating to number of days shall be calendar days, unless otherwise specified, provided that if the last day of any period to give notice, reply to a notice or to undertake any other action occurs on a Saturday, Sunday or a bank or City holiday, then the last day for undertaking the action or giving or replying to the notice shall be the next succeeding business day. Use of the word "including" or similar words shall not be construed to limit any general term, statement or other matter in this Lease, whether or not language of non-limitation, such as "without limitation" or similar words, are used. Unless otherwise provided herein, whenever the consent of City is required to be obtained by SFBGS hereunder, City may give or withhold such consent in its sole and absolute discretion. All such consents may be made by the General Manager acting alone, unless stated to the contrary herein.

**27.7. Successors and Assigns.** Subject to the provisions of **Article 17** hereof relating to Assignment and Subletting, the terms, covenants and conditions contained in this Lease shall bind and inure to the benefit of City and SFBGS and, except as otherwise provided herein, their personal representatives and successors and assigns; provided, however, that upon any sale, assignment or transfer by City (or by any subsequent landlord) of its interest in the Premises and the Nursery Shared Use Areas as owner or lessee, including any transfer by operation of Law, City (or any subsequent landlord) shall be relieved from all subsequent obligations and liabilities arising under this Lease subsequent to such sale, assignment or transfer.

**27.8. Brokers.** Neither party has had any contact or dealings regarding the leasing of the Premises, licensing of the Nursery Shared Use Areas, or any communication in connection therewith, through any licensed real estate broker or other person who could claim a right to a commission or finder's fee in connection with the lease contemplated herein except as identified in the Basic Lease Information, whose commission, if any is due, shall be paid pursuant to a separate written agreement between such broker and the party through which such broker contracted. In the event that any other broker or finder perfects a claim for a commission or finder's fee based upon any such contact, dealings or communication, the party through whom the broker or finder makes a claim shall be responsible for such commission or fee and shall Indemnify the other party from any and all Losses incurred by the indemnified party in defending against the same. The provisions of this Section shall survive any termination of this Lease.

**27.9. Severability.** If any provision of this Lease or the application thereof to any person, entity or circumstance shall, to any extent, be invalid or unenforceable, the remainder of

this Lease, or the application of such provision to persons, entities or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each other provision of this Lease shall be valid and be enforceable to the fullest extent permitted by Law.

**27.10. Governing Law.** This Lease shall be subject to, and construed and enforced in accordance with, the Laws of the State of California and the City's Charter and Administrative Code.

**27.11. Entire Agreement.** This instrument (including the exhibits hereto, which are made a part of this Lease) contains the entire agreement between the Parties and supersedes all prior written or oral negotiations, discussions, understandings and agreements with respect to the subject matter herein. The Parties further intend that this Lease shall constitute the complete and exclusive statement of its terms and that no extrinsic evidence whatsoever (including prior drafts of this Lease and any changes therefrom) may be introduced in any judicial, administrative or other legal proceeding involving this Lease. SFBGS hereby acknowledges that neither City nor City's Agents have made any representations or warranties with respect to the Premises, the Nursery Shared Use Areas or this Lease except as expressly set forth herein, and no rights, easements or licenses are or shall be acquired by SFBGS by implication or otherwise unless expressly set forth herein.

**27.12. Attorneys' Fees.** In the event that either City or SFBGS fails to perform any of its obligations under this Lease or in the event a dispute arises concerning the meaning or interpretation of any provision of this Lease, the defaulting party or the party not prevailing in such dispute, as the case may be, shall pay any and all costs and expenses incurred by the other party in enforcing or establishing its rights hereunder (whether or not such action is prosecuted to judgment), including, without limitation, court costs and reasonable attorneys' fees. For purposes of this Lease, reasonable fees of attorneys of City's Office of the City Attorney shall be based on the fees regularly charged by private attorneys with the equivalent number of years of experience in the subject matter area of the law for which the City Attorney's services were rendered who practice in the City of San Francisco in law firms with approximately the same number of attorneys as employed by the Office of the City Attorney.

**27.13. Time of Essence.** Time is of the essence with respect to all provisions of this Lease in which a definite time for performance is specified.

**27.14. Cumulative Remedies.** All rights and remedies of either party hereto set forth in this Lease shall be cumulative, except as may otherwise be provided herein.

**27.15. Survival of Indemnities.** Termination of this Lease shall not affect the right of either party to enforce any and all indemnities, waivers and representations and warranties given or made to the other party under this Lease, nor shall it affect any provision of this Lease that expressly states it shall survive termination hereof. SFBGS specifically acknowledges and agrees that, with respect to each of the indemnities contained in this Lease, SFBGS has an immediate and independent obligation to defend City and the other Indemnified Parties from any claim which actually or potentially falls within the indemnity provision even if such allegation is or may be groundless, fraudulent or false, which obligation arises at the time such claim is tendered to SFBGS by City and continues at all times thereafter.

**27.16. Relationship of Parties.** City is not, and none of the provisions in this Lease shall be deemed to render City, a partner in SFBGS's business, or joint venturer or member in any joint enterprise with SFBGS. Neither party shall act as the agent of the other party in any respect hereunder, and neither party shall have any authority to commit or bind the other party without such party's consent as provided herein. This Lease is not intended nor shall it be

construed to create any third party beneficiary rights in any third party, unless otherwise expressly provided. The granting of this Lease by City does not constitute authorization or approval by City of any activity conducted by SFBGS on, in or relating to the Premises or the Nursery Shared Use Areas.

**27.17. Transfer by City.** If City sells or otherwise transfers the Premises and the Nursery Shared Use Areas, City shall be released from its obligations hereunder arising on or after the date of such sale or transfer and SFBGS shall look solely to the successor-in-interest to City. Upon a sale of the Premises and the Nursery Shared Use Areas by City, SFBGS shall attorn to the purchaser or transferee, such attornment to be effective and self-operative without the execution of any further instruments on the part of the parties to this Lease. This Lease shall not be deemed to constitute any commitment by City, or create any priority or right in favor of SFBGS, with regard to any future sale or other disposition of the Premises or the Nursery Shared Use Areas, or any portion thereof.

**27.18. Recording.** SFBGS agrees that it shall not record this Lease in the Official Records.

**27.19. Non-Liability of City Officials, Employees and Agents.** No elective or appointive board, commission, member, officer, employee or other Agent of City shall be personally liable to SFBGS, its successors and assigns, in the event of any default or breach by City or for any amount which may become due to SFBGS, its successors and assigns, or for any obligation of City under this Lease or otherwise.

**27.20. Wages and Working Conditions.** With respect to the construction of any Improvements or Alterations, any employee performing services for SFBGS shall be paid not less than the highest prevailing rate of wages, shall be subject to the same hours and working conditions, and shall receive the same benefits as in each case are provided for similar work performed in the City and County of San Francisco. SFBGS shall require any contractor to provide, and shall deliver to City every calendar month during any construction period, certified payroll reports with respect to all persons performing labor in the construction of any Improvements or Alterations on the Premises or, after the Nursery Premises Commencement Date, the Nursery Shared Use Areas.

**27.21. Prevailing Wages for Theatrical Workers.** Pursuant to San Francisco Administrative Code Section 21.25-3, unless excepted, Contracts, Leases, Franchises, Permits, and Agreements awarded, let, issued or granted by the City and County of San Francisco for the use of property owned by the City and County of San Francisco shall require any Employee engaged in theatrical or technical services related to the presentation of a Show to be paid not less than the Prevailing Rate of Wages. Employees engaged in theatrical and technical services include, without limitation, those engaged in rigging, sound, projection, theatrical lighting, videos, computers, draping, carpentry, special effects, and motion picture services. Capitalized terms in this Section that are not defined in this Lease shall have the meanings provided in Administrative Code Section 21.25-3. SFBGS agrees to comply with and be fully bound by, and to require its Subcontractors to comply with and be fully bound by, the provisions of Administrative Code Section 21.25-3, including, without limitation, the payment of any penalties for noncompliance and other remedies available to the City. The provisions of Administrative Code Section 21.25-3 are hereby incorporated by reference and made a part of this Lease. SFBGS shall cooperate fully with the Labor Standards Enforcement Officer and any other City official or employee, or any of their respective agents, in the administration and enforcement of the requirements of Administrative Code Section 21.25-3, including, without limitation, any investigation of noncompliance by SFBGS or its Subcontractors. SFBGS agrees that the City may inspect and/or audit any workplace or job site involved in or related to the performance of this Lease, including,

without limitation, interviewing SFBGS's and any Subcontractor's employees and having immediate access to employee time sheets, payroll records, and paychecks for inspection. SFBGS may obtain a copy of the current Prevailing Rate of Wages from City by contacting its Office of Labor Standards Enforcement. SFBGS acknowledges that the City's Board of Supervisors may amend such Prevailing Rate of Wages and agrees that SFBGS and any Subcontractors shall be bound by and shall fully comply with any such amendments by the Board of Supervisors.

**27.22. Intellectual Property; Music Broadcasting Rights.** SFBGS shall be solely responsible for obtaining any necessary clearances or permissions for the use of intellectual property on the Premises or the Nursery Shared Use Areas, including, but not limited to musical or other performance rights. (Note to SFBGS: To obtain the appropriate music performance license, you may contact the BMI Licensing Executive toll free at 1-877-264-2137 Monday – Friday, 9-5 p.m. (Central Time) and the American Society of Composers, Authors and Publishers (“ASCAP”) at 1-800-505-4052 Monday – Friday, 9-5 p.m. (Eastern Time).)

**27.23. Supervision of Minors.**

(a) **Records Request.** If any person applies for employment or for a volunteer position with SFBGS, or any sublessee or subcontractor, in which such applicant would have supervisory or disciplinary power over a minor or any person under such applicant's care, then SFBGS, and any sublessee or subcontractors providing services at the Premises or, after the Nursery Premises Commencement Date, the Nursery Shared Use Areas, shall request from the California Department of Justice records of all convictions or any arrest pending adjudication of such applicant involving the offenses listed in Welfare and Institution Code Section 15660(a), in accordance with the procedures established in California Penal Code Section 11105.3.

(b) **Restriction on Hires for Recreational Sites.** If SFBGS, or any sublessee or subcontractor, is providing services under this Lease at a City park, playground, recreational center or beach (separately and collectively, “Recreational Site”), SFBGS shall not hire, and shall prevent its subcontractors from hiring, any person for employment or a volunteer position to provide supervisory or disciplinary power over a minor or any person under his or her care if that person has been convicted of any offense listed in Welfare and Institution Code Section 15660(a).

(c) **Notice Required for Sites Other Than Recreational Sites.** If SFBGS, or any of its sublessees or subcontractors, hires an employee or volunteer to provide services to minors at any location other than a Recreational Site, and that employee or volunteer has been convicted of an offense specified in Penal Code Section 11105.3(c), then SFBGS shall comply, and cause its sublessees and subcontractors to comply, with Penal Code Section 11105.3(c) and provide written notice to the parents or guardians of any minor who will be supervised or disciplined by the employee or volunteer not less than ten (10) days prior to the day the employee or volunteer begins his or her duties or tasks. SFBGS shall provide, or cause its sublessees or subcontractors to provide, City with a copy of any such notice at the same time that it provides notice to any parent or guardian, to the extent permitted by law.

(d) **General Requirements.** SFBGS shall expressly require any of its subcontractors with supervisory or disciplinary power over a minor to comply with this Section of the Lease as a condition of its contract with the subcontractor. SFBGS acknowledges and agrees that failure by SFBGS or any of its subcontractors to comply with any provision of this Section of this Lease shall constitute an Event of Default. SFBGS further acknowledges and agrees that such Event of Default shall be grounds for the City to terminate the Lease, partially or in its entirety, to recover from SFBGS any amounts paid under this Lease, and to withhold any future payments to SFBGS. The remedies provided in this Section shall not limit any other remedy available to the City hereunder, or in equity or law for an Event of Default, and each remedy may

be exercised individually or in combination with any other available remedy. The exercise of any remedy shall not preclude or in any way be deemed to waive any other remedy.

**27.24. Employee Signature Authorization Ordinance.** City has enacted an ordinance at Chapter 23, Article VI of its Administrative Code, commencing at Section 23.50 (the "Ordinance"), which may apply to employers of employees in hotel or restaurant projects on City property with more than fifty (50) employees. The Parties do not intend that this Lease constitutes a hotel or restaurant project. To the extent that a hotel or restaurant project is requested by SFBGS and approved in writing by City, the terms of the Ordinance will be expressly incorporated herein by reference, and, to the extent SFBGS or its successors or assigns employ more than fifty (50) employees in the Premises in connection with such request and approval, SFBGS hereby agrees as a material condition of this Lease to enter into and abide by a Card Check Agreement with a Labor Organization or Organizations seeking to represent SFBGS's restaurant or hotel employees, if and as required by the Ordinance, and to otherwise fully comply with the requirements of the Ordinance.

**27.25. Non-Discrimination in City Contracts and Benefits Ordinance.**

(a) **Covenant Not to Discriminate.** In the performance of this Lease, SFBGS covenants and agrees not to discriminate on the basis of the fact or perception of a person's race, color, creed, religion, national origin, ancestry, age, sex, sexual orientation, gender identity, domestic partner status, marital status, height, weight, disability or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status) against any employee of, any City employee working with, or applicant for employment with SFBGS, in any of SFBGS's operations within the United States, or against any person seeking accommodations, advantages, facilities, privileges, services, or membership in all business, social, or other establishments or organizations operated by SFBGS.

(b) **Subleases and Other Subcontracts.** SFBGS shall include in all Subleases and other subcontracts for the performance of SFBGS's obligations under this Lease by third parties on SFBGS's behalf a non-discrimination clause applicable to such Sublessee or other subcontractor in substantially the form of subsection (a) above. In addition, SFBGS shall incorporate by reference in all subleases and other subcontracts the provisions of Sections 12B.2(a), 12B.2(c)-(k), and 12C.3 of the San Francisco Administrative Code and shall require all sublessees and other subcontractors to comply with such provisions. SFBGS's failure to comply with the obligations in this subsection shall constitute a material breach of this Lease.

(c) **Non-Discrimination in Benefits.** SFBGS does not as of the date of this Lease and will not during the Term, in any of its operations in San Francisco or where the work is being performed for the City or elsewhere within the United States, discriminate in the provision of bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits, as well as any benefits other than the benefits specified above, between employees with domestic partners and employees with spouses, and/or between the domestic partners and spouses of such employees, where the domestic partnership has been registered with a governmental entity pursuant to state or local law authorizing such registration, subject to the conditions set forth in Section 12B.2(b) of the San Francisco Administrative Code.

(d) **Condition to Lease.** As a condition to this Lease, SFBGS shall execute the "Chapter 12B Declaration: Nondiscrimination in Contracts and Benefits" form (Form HRC-12B-101) with supporting documentation and secure the approval of the form by the San Francisco Human Rights Commission.

(e) **Incorporation of Administrative Code Provisions by Reference.** The provisions of Chapters 12B and 12C of the San Francisco Administrative Code relating to non-discrimination by parties contracting for the lease of City property are incorporated in this Section by reference and made a part of this Lease as though fully set forth herein. SFBGS shall comply fully with and be bound by all of the provisions that apply to this Lease under such Chapters of the Administrative Code, including but not limited to the remedies provided in such Chapters. Without limiting the foregoing, SFBGS understands that pursuant to Section 12B.2(h) of the San Francisco Administrative Code, a penalty of \$50 for each person for each calendar day during which such person was discriminated against in violation of the provisions of this Lease may be assessed against SFBGS and/or deducted from any payments due SFBGS.

**27.26. No Relocation Assistance; Waiver of Claims.** SFBGS acknowledges that it will not be a displaced person at the time this Lease is terminated or expires by its own terms, and SFBGS fully RELEASES, WAIVES AND DISCHARGES forever any and all claims, demands, rights, and causes of action (including, without limitation, consequential and incidental damages) against, and covenants not to sue, City, its departments, commissions, officers, directors and employees, and all persons acting by, through or under each of them, under any Laws, including, without limitation, any and all claims for relocation benefits or assistance from City under federal and state relocation assistance laws (including, but not limited to, California Government Code Section 7260 *et seq.*), except as otherwise specifically provided in this Lease with respect to a Taking.

**27.27. MacBride Principles - Northern Ireland.** The City and County of San Francisco urges companies doing business in Northern Ireland to move toward resolving employment inequities and encourages them to abide by the MacBride Principles as expressed in San Francisco Administrative Code Section 12F.1, *et seq.* The City and County of San Francisco also urges San Francisco companies to do business with corporations that abide by the MacBride Principles. SFBGS acknowledges that it has read and understands the above statement of the City and County of San Francisco concerning doing business in Northern Ireland.

**27.28. Conflicts of Interest.** Through its execution of this Lease, SFBGS acknowledges that it is familiar with the provisions of Section 15.103 of the San Francisco Charter, Article III, Chapter 2 of City's Campaign and Governmental Conduct Code, and Section 87100 *et seq.* and Section 1090 *et seq.* of the Government Code of the State of California, and certifies that it does not know of any facts which would constitute a violation of such provisions, and agrees that if SFBGS becomes aware of any such fact during the term of this Lease SFBGS shall immediately notify City.

**27.29. Tropical Hardwood and Virgin Redwood Ban.** SFBGS shall not permit the use of any tropical hardwood, tropical hardwood wood product, virgin redwood, or virgin redwood wood product in or on the Premises or the Nursery Shared Use Areas or otherwise in the performance of this Lease. The City and County of San Francisco urges companies not to import, purchase, obtain or use for any purpose, any tropical hardwood, tropical hardwood wood product, virgin redwood, or virgin redwood wood product. In the event SFBGS fails to comply in good faith with any of the provisions of Section 12I of the San Francisco Administrative Code, SFBGS shall be liable for liquidated damages for each violation in any amount equal to SFBGS's net profit on the contract, or five percent (5%) of the total amount of the contract dollars, whichever is greatest. SFBGS acknowledges and agrees that the liquidated damages assessed shall be payable to the City and County of San Francisco upon demand and may be set off against any monies due to SFBGS from any contract with the City and County of San Francisco.

**27.30. Tobacco Product Advertising Prohibition.** SFBGS acknowledges and agrees that no advertising of cigarettes or tobacco products is allowed on any real property owned by or



under the control of the City, including the property which is the subject of this Lease. This prohibition includes the placement of the name of a company producing, selling, or distributing cigarettes or tobacco products or the name of any cigarette or tobacco product in any promotion of any event or product. This prohibition does not apply to any advertisement sponsored by a state, local or nonprofit entity designed to communicate the health hazards of cigarettes and tobacco products or to encourage people not to smoke or to stop smoking.

**27.31. First Source Hiring Ordinance.** The provisions of San Francisco Administrative Code Chapter 83, the First Source Hiring Program, are incorporated in this Section by reference, and are made a material part of this Lease as though fully set forth herein. As an essential term of, and consideration for, this Lease, unless exempted by the City's Office of Economic and Workforce Development, SFBGS shall enter into a First Source Hiring Agreement with the City, on or before the effective date of the Lease. SFBGS shall keep, and provide to the City, accurate records demonstrating its compliance with the First Source Hiring Program. Violation of the requirements of Chapter 83 is subject to an assessment of liquidated damages. The assessment of liquidated damages and the evaluation of any defenses or mitigating factors shall be made by the Office of Economic and Workforce Development.

**27.32. Sunshine Ordinance.** In accordance with Section 67.24(e) of the San Francisco Administrative Code, contracts, contractors' bids, leases, agreements, responses to Requests for Proposals, and all other records of communications between City and persons or firms seeking contracts will be open to inspection immediately after a contract has been awarded. Nothing in this provision requires the disclosure of a private person's or organization's net worth or other proprietary financial data submitted for qualification for a contract, lease, agreement or other benefit until and unless that person or organization is awarded the contract, lease, agreement or benefit. Information provided which is covered by this Section will be made available to the public upon request.

**27.33. Counterparts.** This Lease may be executed in two (2) or more counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument.

**27.34. Vending Machine/Non-alcoholic Beverage Contract.** SFBGS hereby agrees to abide by any and all provisions of any contract entered into by City for the purpose of the sales of non-alcoholic beverages at City-owned facilities. No vending machines that advertise on the refrigerated vending case shall be visible anywhere in the Botanical Garden.

**27.35. No Light, Air or View Easement.** Any diminution or shutting off of light, air or view by any structure which may be erected on lands adjacent to the Premises shall in no way affect this Lease or impose any liability on City as landlord under this Lease.

**27.36. Parties' Inability to Perform.** If either Party is unable to perform or is delayed in performing any of its obligations under this Lease, by reason of acts of God, accidents, breakage, repairs, strikes, lockouts, other labor disputes, protests, riots, demonstrations, inability to obtain utilities or materials or by any other reason beyond such Party's reasonable control, no such inability or delay shall constitute an eviction or breach under this Lease, or impose any liability upon such Party or its Agents by reason of inconvenience, annoyance, interruption, injury or loss to or interference with the other Party's business or, in the case of SFBGS, SFBGS's use and occupancy or quiet enjoyment of the Premises or use of the Nursery Shared Use Areas or any loss or damage occasioned thereby.

**27.37. Notification of Limitations on Contributions.** Through its execution of this Lease, SFBGS acknowledges that it is familiar with Section 1.126 of the San Francisco Campaign

and Governmental Conduct Code, which prohibits any person who contracts with the City for the selling or leasing of any land or building to or from the City whenever such transaction would require approval by a City elective officer or the board on which that City elective officer serves, from making any campaign contribution to (1) an individual holding a City elective office if the contract must be approved by the individual, a board on which that individual serves, or a board on which an appointee of that individual serves, (2) a candidate for the office held by such individual, or (3) a committee controlled by such individual, at any time from the commencement of negotiations for the contract until the later of either the termination of negotiations for such contract or six months after the date the contract is approved. SFBGS acknowledges that the foregoing restriction applies only if the contract or a combination or series of contracts approved by the same individual or board in a fiscal year have a total anticipated or actual value of \$50,000 or more. SFBGS further acknowledges that the prohibition on contributions applies to each prospective party to the contract; each member of SFBGS's board of directors, chairperson, chief executive officer, chief financial officer and chief operating officer; any person with an ownership interest of more than twenty percent (20%) in SFBGS; any subcontractor listed in the contract; and any committee that is sponsored or controlled by SFBGS. Additionally, SFBGS acknowledges that SFBGS must inform each of the persons described in the preceding sentence of the prohibitions contained in Section 1.126. SFBGS further agrees to provide to City the name of the each person, entity or committee described above.

**27.38. Public Transit Information.** SFBGS shall establish and carry on during the Term a program to encourage maximum use of public transportation by personnel of SFBGS employed on the Premises or the Nursery Shared Use Areas, including, without limitation, the distribution to such employees of written materials explaining the convenience and availability of public transportation facilities adjacent or proximate to the Premises and encouraging use of such facilities, all at SFBGS's sole expense.

**27.39. Drug-Free Workplace.** SFBGS acknowledges that pursuant to the Federal Drug-Free Workplace Act of 1989, the unlawful manufacture, distribution, possession or use of a controlled substance is prohibited on City premises. SFBGS agrees that any violation of this prohibition by SFBGS, its Agents or assigns shall be deemed a material breach of this Lease.

**27.40. Preservative-Treated Wood Containing Arsenic.** As of July 1, 2003, SFBGS may not purchase preservative-treated wood products containing arsenic in the performance of this Lease unless an exemption from the requirements of Environment Code Chapter 13 is obtained from the Department of Environment under Section 1304 of the Environment Code. The term "preservative-treated wood containing arsenic" shall mean wood treated with a preservative that contains arsenic, elemental arsenic, or an arsenic copper combination, including, but not limited to, chromated copper arsenate preservative, ammoniac copper zinc arsenate preservative, or ammoniacal copper arsenate preservative. SFBGS may purchase preservative-treated wood products on the list of environmentally preferable alternatives prepared and adopted by the Department of Environment. This provision does not preclude SFBGS from purchasing preservative-treated wood containing arsenic for saltwater immersion. The term "saltwater immersion" shall mean a pressure-treated wood that is used for construction purposes or facilities that are partially or totally immersed in saltwater.

**27.41. Resource Efficiency.** SFBGS acknowledges that the City and County of San Francisco has enacted San Francisco Environment Code Sections 700 to 707 relating to resource-efficient buildings and resource-efficient pilot projects. SFBGS hereby agrees that it shall comply with all applicable provisions of such code sections.

**27.42. Food Service Waste Reduction Requirements.** SFBGS agrees to comply fully with and be bound by all of the provisions of the Food Service Waste Reduction Ordinance, as set

forth in San Francisco Environment Code Chapter 16, including the remedies provided, and implementing guidelines and rules. The provisions of Chapter 16 are incorporated herein by reference and made a part of this Lease as though fully set forth. This provision is a material term of this Lease. By entering into this Lease, SFBGS agrees that if it breaches this provision, City will suffer actual damages that will be impractical or extremely difficult to determine; further, SFBGS agrees that the sum of \$100 liquidated damages for the first breach, \$200 liquidated damages for the second breach in the same year, and \$500 liquidated damages for subsequent breaches in the same year is a reasonable estimate of the damage that City will incur based on the violation, established in light of the circumstances existing at the time this Lease was made. Such amount shall not be considered a penalty, but rather agreed monetary damages sustained by City because of SFBGS's failure to comply with this provision.

**27.43. No Smoking in City Parks.** SFBGS agrees to comply with Section 1009.81 of the San Francisco Health Code, which provides: "Smoking is prohibited on any unenclosed area of property in the City and County of San Francisco that is open to the public and under the jurisdiction of the Recreation and Park Commission or any other City department if the property is a park, square, garden, sport or playing field, pier, or other property used for recreational purposes, or a farmers' market."

**27.44. Prohibition of the Sale of Lottery Tickets.** The selling of any lottery tickets on the Premises or the Nursery Shared Use Areas is expressly prohibited.

**27.45. Graffiti Removal.** Graffiti is detrimental to the health, safety and welfare of the community in that it promotes a perception in the community that the laws protecting public and private property can be disregarded with impunity. This perception fosters a sense of disrespect of the law that results in an increase in crime; degrades the community and leads to urban blight; is detrimental to property values, business opportunities and the enjoyment of life; is inconsistent with the City's property maintenance goals and aesthetic standards; and results in additional graffiti and in other properties becoming the target of graffiti unless it is quickly removed from public and private property. Graffiti results in visual pollution and is a public nuisance. Graffiti must be abated as quickly as possible to avoid detrimental impacts on the City and County and its residents, and to prevent the further spread of graffiti. City shall remove all graffiti from the Premises within forty eight (48) hours of the earlier of SFBGS's (a) discovery and notification of the graffiti to City or (b) receipt of notification of the graffiti from the Department of Public Works. The term "graffiti" means any inscription, word, figure, marking or design that is affixed, marked, etched, scratched, drawn or painted on any building, structure, fixture or other improvement, whether permanent or temporary, including by way of example only and without limitation, signs, banners, billboards and fencing surrounding construction sites, whether public or private, without the consent of the owner of the property or the owner's authorized agent, and which is visible from the public right-of-way. "Graffiti" shall not include: (1) any sign or banner that is authorized by, and in compliance with, the applicable requirements of the San Francisco Public Works Code, the San Francisco Planning Code or the San Francisco Building Code; or (2) any mural or other painting or marking on the property that is protected as a work of fine art under the California Art Preservation Act (California Civil Code Sections 987 et seq.) or as a work of visual art under the Federal Visual Artists Rights Act of 1990 (17 U.S.C. §§ 101 et seq.). Any failure of Lessee to comply with this Section of this Lease shall constitute an Event of Default of this Lease, subject to **Section 18.1** above.

**27.46. No Regularly-Scheduled Food Trucks.** There shall be no regularly-scheduled food trucks inside the Botanical Garden.

## **28. QUALITY OF SERVICES AND PRODUCTS OFFERED**

SFBGS hereby agrees that any food and refreshments offered for sale hereunder, if any, shall be of good quality and that the service shall be prompt, clean, courteous, and efficient. Department shall have the right to raise reasonable objections to the quality of the food, beverages, and service(s) provided and SFBGS shall have the obligation to address those objections by modifying the causes of those objections until corrected to the satisfaction of the Department.

## **29. PARTICIPATION IN CITY CUSTOMER SATISFACTION PROGRAM**

SFBGS hereby agrees to participate in any customer satisfaction program developed by the City, provided that the participation requirements of the Customer Satisfaction Program shall be reasonable.

## **30. SIGNS AND ADVERTISING**

SFBGS hereby agrees not to erect or maintain, nor permit to be erected or maintained, upon any part of the Premises or the Nursery Shared Use Areas, any signs without obtaining the Garden Director's written consent in advance.

## **31. SUSTAINABLE FOODS**

Sustainable foods are those which, through their production, purchase, and consumption, enhance the health of the environment, producers and consumers through one or more of these methods: growing, processing and distributing locally; using low or no synthetic agricultural chemicals; fairly trading with developing countries; meeting animal welfare standards; processing minimally; no genetic modification; no unnecessary antibiotics; and no added growth hormones.

SFBGS shall use commercially reasonable efforts to incorporate sustainable food concepts into everyday operations of any food related business on the Premises. City encourages SFBGS to source sustainable foods by buying certified and/or locally produced food products. Acceptable sustainability certifications are limited to organic certification under the National Organic Standards Act ("USDA Organic"), Fair Trade certification, Protected Harvest certification, Food Alliance certification, Rainforest Alliance certification, Certified Humanely Raised and Handled certification, American Humane certification, Marine Stewardship Council certification, and Salmon-Safe certification. Sustainability-related product claims that are acceptable under this clause include "grass-fed" claims, "not treated with artificial growth hormones (RGBH)" claims, "produced without the nontherapeutic use of antibiotics" claims, and "raised without added hormones/no hormones added" claims.

Locally produced food products are produced within 200 miles of San Francisco including the following counties in the North Coast, Central Coast, Sacramento and San Joaquin Valleys: Alameda, Amador, Butte, Calaveras, Colusa, Contra Costa, El Dorado, Fresno, Glenn, Kern, Kings, Lake, Madera, Marin, Mariposa, Mendocino, Merced, Monterey, Napa, Nevada, Placer, Plumas, Sacramento, San Benito, San Francisco, San Joaquin, San Mateo, Santa Clara, Santa Cruz, Sierra, Solano, Sonoma, Stanislaus, Sutter, Tehama, Tulare, Tuolumne, Yolo, and Yuba counties.

SFBGS shall also provide an annual report on each anniversary date of this Lease outlining how SFBGS incorporated these sustainable food concepts into everyday operations of any food and beverage concession and how SFBGS informed customers and the youth employed by SFBGS, if any, regarding sustainable foods. This report shall include the percentage of total sales that were products certified as sustainably produced.

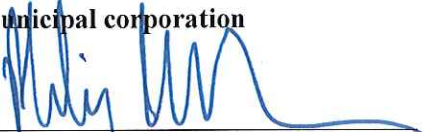
NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS LEASE, LESSEE ACKNOWLEDGES AND AGREES THAT NO OFFICER OR EMPLOYEE OF CITY HAS AUTHORITY TO COMMIT CITY HERETO UNLESS AND UNTIL AN ORDINANCE OF CITY'S BOARD OF SUPERVISORS SHALL HAVE BEEN DULY ENACTED APPROVING THIS LEASE AND AUTHORIZING THE TRANSACTIONS CONTEMPLATED HEREBY, WHICH ORDINANCE SHALL THEN BE DULY APPROVED BY THE CITY'S MAYOR. THEREFORE, ANY OBLIGATIONS OR LIABILITIES OF CITY HEREUNDER ARE CONTINGENT UPON ENACTMENT OF SUCH AN ORDINANCE AND THE APPROVAL THEREOF BY THE MAYOR, AND THIS LEASE SHALL BE NULL AND VOID UNLESS CITY'S MAYOR AND THE BOARD OF SUPERVISORS APPROVE THIS LEASE, IN THEIR RESPECTIVE SOLE AND ABSOLUTE DISCRETION, AND IN ACCORDANCE WITH ALL APPLICABLE LAWS. APPROVAL OF THIS LEASE BY ANY DEPARTMENT, COMMISSION OR AGENCY OF CITY SHALL NOT BE DEEMED TO IMPLY THAT SUCH ORDINANCE WILL BE ENACTED, NOR WILL ANY SUCH APPROVAL CREATE ANY BINDING OBLIGATIONS ON CITY.

City and SFBGS have executed this Lease as of the date first written above.

**SFBGS:**  
**SAN FRANCISCO BOTANICAL GARDEN SOCIETY**  
**AT STRYBING ARBORETUM,**  
a California nonprofit public benefit corporation

By:   
Executive Director

**CITY:**  
**CITY AND COUNTY OF SAN FRANCISCO,**  
a municipal corporation

By:   
PHILIP A. GINSBURG  
General Manager  
Recreation and Park Department

**APPROVED BY**  
**RECREATION AND PARK COMMISSION**  
**PURSUANT TO RESOLUTION NO. 1305-011 DATED: 5/16/13**

  
Margaret McArthur, Commission Liaison

**APPROVED AS TO FORM:**  
**DENNIS J. HERRERA, City Attorney**

By:   
Anita L. Wood, Deputy City Attorney



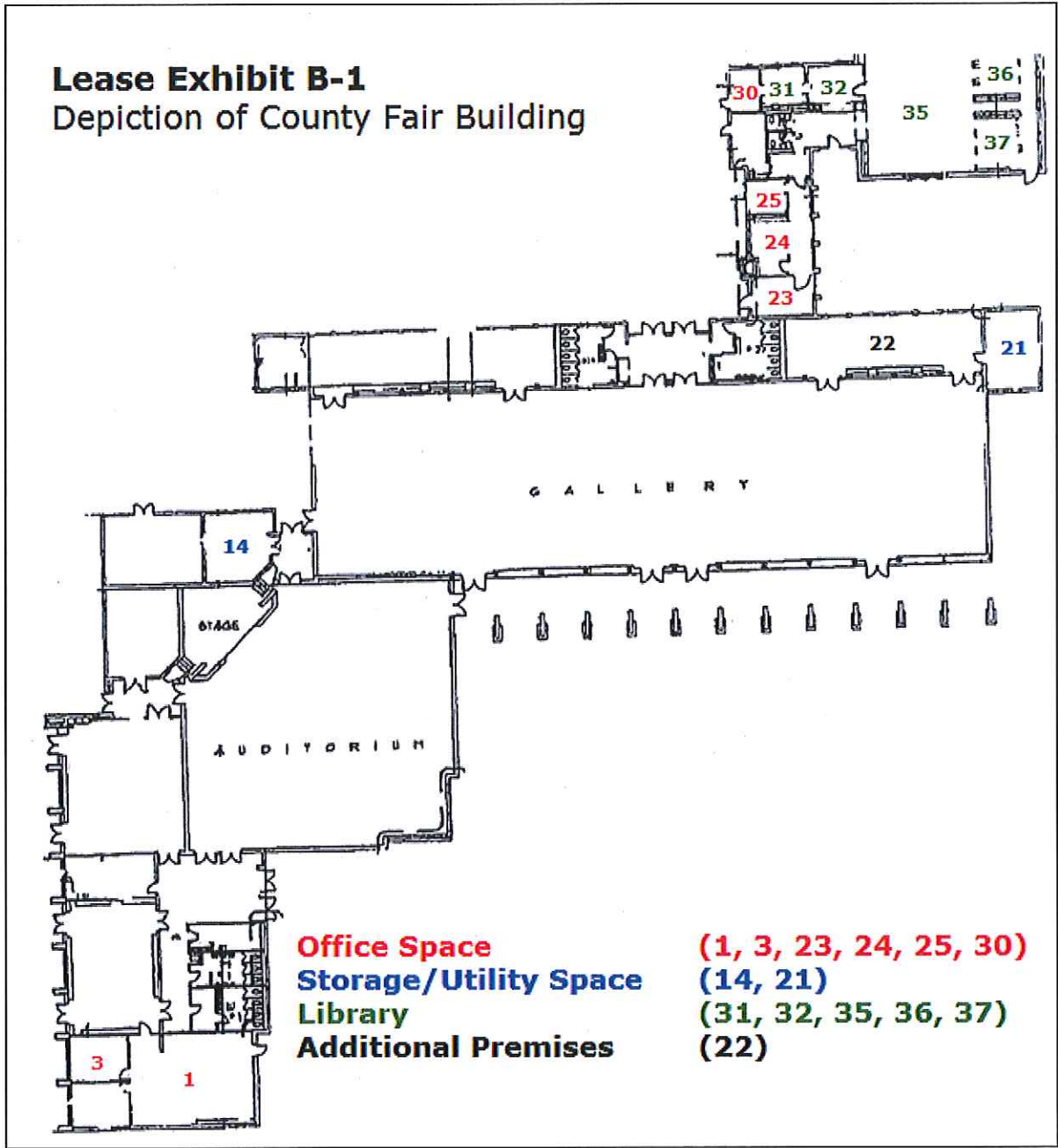
**EXHIBIT A- DEPICTION OF BOTANICAL GARDEN**



**EXHIBIT B – DEPICTION OF PREMISES**

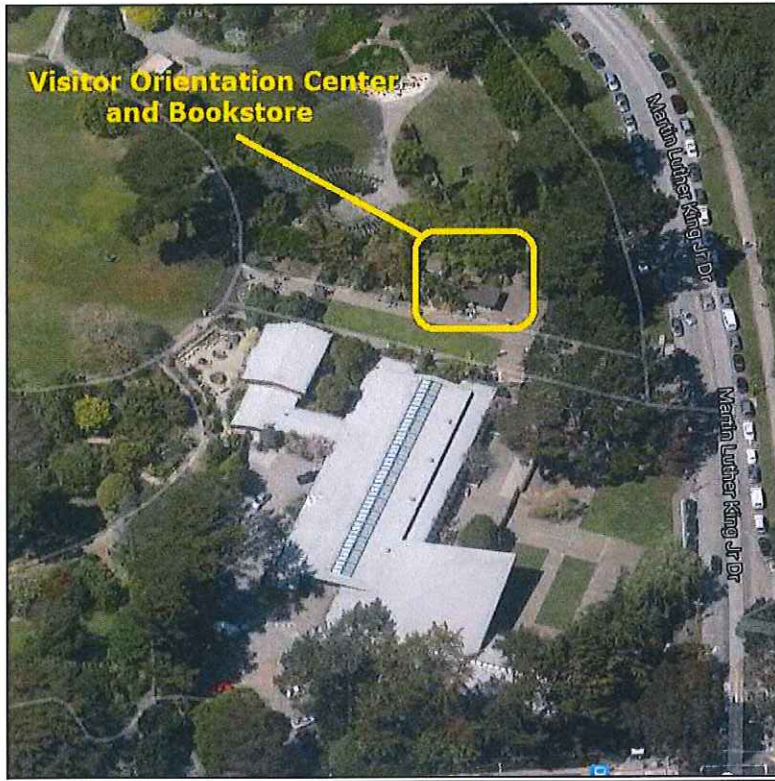
**[EXHIBIT B-1, EXHIBIT B-2, EXHIBIT B-3 AND EXHIBIT B-4 ATTACHED]**

**EXHIBIT B-1 – DEPICTION OF OFFICE SPACE AND LIBRARY SPACE**





**EXHIBIT B-2 - DEPICTION OF LOCATION OF VISITOR ORIENTATION CENTER AND BOOKSTORE**

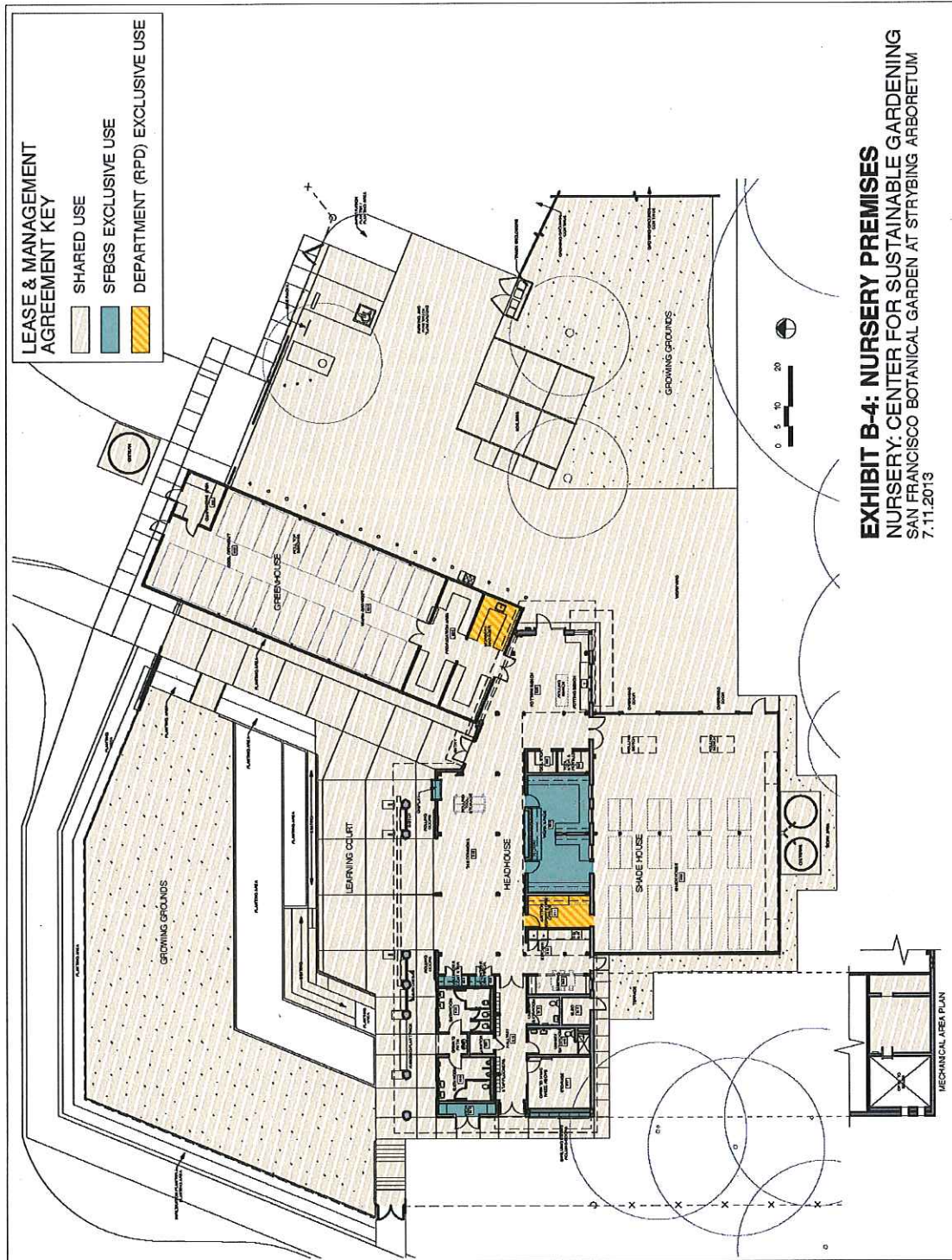




**EXHIBIT B-3 – DEPICTION OF HORTICULTURAL PREMISES**



**EXHIBIT B-4 – NURSERY PREMISES AND NURSERY SHARED USE AREA**



**EXHIBIT B-4: NURSERY PREMISES**  
NURSERY: CENTER FOR SUSTAINABLE GARDENING  
SAN FRANCISCO BOTANICAL GARDEN AT STRYBING ARBORETUM  
7.11.2013

**EXHIBIT C**

**FORM OF VOLUNTEER RELEASE**

**PERMIT TO PERFORM VOLUNTEER WORK AT  
San Francisco Botanical Garden at Strybing Arboretum  
San Francisco Recreation & Park Department**

Applicant/group name \_\_\_\_\_ Number of people \_\_\_\_\_

If a group, contact person's name

\_\_\_\_\_

Applicant/contact person's address

\_\_\_\_\_

E-mail address

\_\_\_\_\_

Telephone: Weekday \_\_\_\_\_

Evening/weekend \_\_\_\_\_

If one-time activity, date of activity \_\_\_\_\_ Time \_\_\_\_\_

Emergency contact \_\_\_\_\_ Relationship \_\_\_\_\_

Telephone: Weekday \_\_\_\_\_

Evening/weekend \_\_\_\_\_

**WAIVER, RELEASE AND HOLD HARMLESS AGREEMENT**

In consideration for being granted permission to work as a volunteer at San Francisco Botanical Garden at Strybing Arboretum, I, the undersigned, hereby agree for myself and for my personal representatives, heirs and next of kin:

To release, waive and discharge the City and County of San Francisco, and its officers, agents, employees, representatives and contractors (herein referred to collectively as "City") from any and all claims or demands of any kind and from all liability, penalties, costs, losses, damages, expenses, claims, or judgements (including attorney's fees) resulting from injury, death or damage to any visitor, third parties or property of any kind, which injury, death or damage arises out of or is in any way connected directly or indirectly to the volunteer work assignment, whether caused by the City's active or passive negligence or otherwise. I understand that this release extends to claims that I do not know or do not expect



to exist at the time of the signing of this release, and I hereby waive the protections of California Civil Code Section 1542.

To protect, hold free and harmless, defend and indemnify the City from any and all claims or demands of any kind and from all liability, penalties, costs, losses, damages, expenses, claims, or judgements (including attorney's fees) resulting from injury, death or damage to any visitor, third parties or property of any kind, which injury, death or damage arises out of or is in any way connected directly or indirectly to the volunteer work assignment, whether caused by the City's active or passive negligence or otherwise. This indemnity shall include, without limitation, reasonable attorneys', experts' and consultants' fees, investigation costs, and all other reasonable costs incurred by the City.

To assume full responsibility for and risk of bodily injury or property damage incurred by myself arising either directly or indirectly from participation in the volunteer work assignment, from any cause whatsoever, whether caused by City's active or passive negligence or otherwise.

Signature \_\_\_\_\_ Date \_\_\_\_\_

File

SFBGS Volunteer Manager \_\_\_\_\_ Date \_\_\_\_\_

SFBGS Director \_\_\_\_\_ Date \_\_\_\_\_

**EXHIBIT D**

---

**RULES AND REGULATIONS**

Please see following link for San Francisco Recreation and Park Department Park Code:

<http://library.municode.com/index.aspx?clientId=14138&stateId=5&stateName=California>

## EXHIBIT E

### ALLOCATION AND DISTRIBUTION OF ADMISSION RECEIPTS

Fees paid for admission to the Botanical Garden pursuant to **Section 6.11** of the Lease (“Admission Receipts”) shall be solely for the benefit of the Botanical Garden and shall be allocated and distributed pursuant to the terms of **Article 7** of the Lease and this **Exhibit E**. It is understood and agreed by the Parties that the charging of admissions to the Botanical Garden, the rate of such admissions and the terms of such allocation are subject to amendment by action of City’s Board of Supervisors, in its sole discretion at any time, and in the event of such an amendment **Article 7** of the Lease and this **Exhibit E** shall be revised to the extent required to reflect such amendment.

1. Allocation. Admission Receipts shall be allocated and paid out on a monthly basis as described below:

(a) Admission Receipts shall first be used to reimburse SFBGS for its approved “Authorized Collection Expenses” during such period. As used in this **Exhibit E**, “Authorized Collection Expenses” means all costs and expenses incurred by SFBGS in connection with its collection of Admission Receipts, including, without limitation, personnel costs, rent or related fees for equipment, telephone and data charges, office supplies, training, visitor maps and publications, and advertising and publicity costs in connection with the collection of Admissions Receipts. “Authorized Collection Expenses” shall not include capital expenses, penalties, late charges or interest on any late payments, or taxes or other amounts withheld from wages or salaries which have not actually been paid by SFBGS during the month for which reimbursement is being made.

(b) Secondly, following the payment of the amounts specified in Paragraph 1(a) above, the Admissions Receipts shall be paid to the Department until the Department has received an aggregate amount of \$250,000 per Fiscal Year pursuant to this Paragraph 1(b) (such amount subject to adjustment as provided in Paragraph 1(f) below) (the “Annual RPD Allocation Cap”); provided, however, that before the allocation is used for any other Botanical Garden purpose, the Department shall use such allocation to fund three (3) gardeners who are dedicated solely to the care and maintenance of the Botanical Garden.

(c) Thirdly, following the payment of the amounts specified in Paragraphs 1(a) and 1(b) above, the Admissions Receipts shall be paid to SFBGS until the remaining approved direct out-of-pocket expenses incurred by SFBGS in the first-year of the Admissions program ending June 30, 2011, have been reimbursed. After payments and adjustments agreed between the Parties prior to execution of this Lease, the remaining amount owed SFBGS is \$12,820.03.

(d) Fourthly, following the payment of the amounts specified in Paragraphs 1(a), 1(b) and 1(c) above, the Admission Receipts shall be paid to SFBGS until SFBGS has received an aggregate of \$250,000 per Fiscal Year pursuant to this Paragraph 1(d) (such amount subject to adjustment as provided in Paragraph 1(f) below) (the “Annual SFBGS Allocation Cap”). SFBGS shall expend Admissions Receipts received pursuant to this Paragraph 1(d) for its “Education and Community Outreach Expenditures.” As used in this Exhibit E, “Education and Community Outreach Expenditures” means costs and expenses incurred by SFBGS for education, community outreach, public programs and other initiatives agreed upon by SFBGS and the Garden Director and approved in writing by the Garden Director. “Education and Community Outreach Expenditures” may include, without limitation, costs and expenses for implementation of free days for the general public, organization and management of volunteer and docent programs, organization and implementation of programs for seniors and school

groups, administration of a community education program providing related classes and activities for minimal or no cost, and operation of the Library and Bookstore, including ordering and stocking books. Then,

(e) Finally, following the payment of the amounts specified in Paragraphs 1(a), 1(b), 1(c) and 1(d) above, the balance of Admission Receipts shall be paid into the "Botanical Garden Improvement Fund," which will be maintained by City without charge and shall not be commingled with other City funds. Any interest accruing on the funds in the Botanical Garden Improvement Fund shall be added to the Botanical Garden Improvement Fund. Expenditures from the Botanical Garden Improvement Fund shall be used by City and SFBGS only for the payment of costs and expenses for maintenance, renovation and improvement of the Botanical Garden and shall not be used for any other purpose unless the Parties otherwise agree in writing. Expenditures from the Botanical Garden Improvement Fund are intended to enhance the Botanical Garden and not to replace traditional sources or levels of City funding. Expenditures from the Botanical Garden Improvement Fund must be agreed upon by the Garden Director and Executive Director and are subject to approval by the General Manager.

(f) The Annual RPD Allocation Cap and the Annual SFBGS Allocation Cap shall each be subject to adjustment July 1, 2018, and on July 1 of every five (5) years thereafter (each adjustment, an "Allocation Adjustment" and each date of adjustment, an "Allocation Adjustment Date"). The Annual RPD Allocation Cap and the Annual SFBGS Allocation Cap shall each be adjusted to the *lesser* of the amount resulting from the following formulas (x) and (y), provided that in no event shall the Annual RPD Allocation Cap or the Annual SFBGS Allocation Cap on or after the Adjustment Date be less than the amount in effect immediately prior to the Adjustment Date:

(x) CPI Formula. The Adjustment Index shall be compared with the Base Index. If the Adjustment Index has increased over the Base Index, then the Annual RPD Allocation Cap and the Annual SFBGS Allocation Cap on and after such Adjustment Date shall each be set by multiplying the then-current Annual RPD Allocation Cap and the Annual SFBGS Allocation Cap by a fraction, the numerator of which is the Adjustment Index and the denominator of which is the Base Index.

(y) 3% Per Annum Increase. The Annual RPD Allocation Cap and the Annual SFBGS Allocation Cap shall each be adjusted by applying a three percent (3%) increase in such amount, to be compounded annually as of July 1 for each of the five years preceding the Allocation Adjustment Date.

Notwithstanding the foregoing,

(i) with respect to any Fiscal Year as to which the aggregate amount of Admission Receipts available for distribution pursuant to Paragraphs 1(b) and 1(d) above (after deduction of any amount payable with respect to such Fiscal Year pursuant to Paragraph 1(c)) is \$500,000 or less, no Allocation Adjustment will apply with respect to such Fiscal Year, and

(ii) with respect to any Fiscal Year as to which the aggregate amount of Admission Receipts available for distribution pursuant to Paragraphs 1(b) and 1(d) above (after deduction of any amount payable with respect to such Fiscal Year pursuant to Paragraph 1(c)) exceeds \$500,000 but is less than the amount needed to distribute the fully-adjusted Allocation Amount to the Department and SFBGS pursuant to Paragraphs 1(b) and 1(d) above, the Allocation Adjustment shall be reduced pro rata so that the same amount is distributed to each Party under Paragraph 1(b) above and Paragraph 1(d) above.



2. Admission Account. SFBGS shall establish, fund and maintain a bank account for the deposit of Admission Receipts (the "Admission Account") with a depository institution reasonably acceptable to City in accordance with **Section 7.6** of the Lease. SFBGS will use the Admission Account for all Admission Receipts prior to disbursement to City as required under this Lease. Any interest accruing on the funds in the Admission Account shall be added to the Admission Account. Funds from the Admission Account shall not be commingled with other funds. SFBGS shall cause each person who has authority to withdraw or transfer funds from the Admission Account to be bonded or otherwise insured. The Admission Account shall be subject to a mutually-agreed control agreement pursuant to which City will be granted a perfected security interest therein. Upon the occurrence of either an Event of Default, or the expiration or earlier termination of this Lease, City shall have the immediate right of possession of the funds in Admission Account.

3. Distributions.

(a) On or before the thirtieth (30th) day following its receipt of a Monthly Admission Receipts Statement, City shall pay to SFBGS via check the amount of its Authorized Collection Expenses for such month.

(b) Once City has received the amounts specified in Paragraph 1(b) above in any given Fiscal Year, City shall begin to pay to SFBGS the amounts described in Paragraphs 1(c) and 1(d), and to the Botanical Garden Improvement Fund the amounts described in Paragraph 1(e), such payments to be made on a monthly basis and on or before the thirtieth (30<sup>th</sup>) day following City's receipt of the applicable Monthly Admissions Receipts Statement.

(c) In the event this Lease terminates during any given month, (i) payment of Admission Receipts to City for that portion of the month during which SFBGS was in occupancy of the Premises shall be determined and reported by SFBGS to City within twenty (20) days after SFBGS ceases to collect Admission Receipts on the Premises, and (ii) SFBGS's and City's payment obligations under this **Exhibit E** shall remain in effect.

4. Annual True-Up. In the event that the payments made by SFBGS and City in respect of Admission Receipts and Authorized Collection Expenses during the Fiscal Year described by an Annual Admission Receipts Report have not been properly made in accordance with this **Exhibit E**, City and/or SFBGS, as the case may be, shall make payments to each other, or the Botanical Garden Improvement Fund, as appropriate, so as to properly allocate the Admissions Receipts for such Fiscal Year. Such payments shall be made within thirty (30) days of City's receipt of such Annual Admission Receipts Statement.

1 [Lease and Management Agreement – Botanical Garden Society – Waiving Fees - Botanical  
2 Garden at Strybing Arboretum in Golden Gate Park]

3 **Ordinance approving and authorizing a Lease and Management Agreement between**  
4 **the City and the San Francisco Botanical Garden Society for the San Francisco**  
5 **Botanical Garden at Strybing Arboretum in Golden Gate Park, with an initial term of 10**  
6 **years with 2 10-year extension options; waiving the non-resident admission fee in Park**  
7 **Code Section 12.46(d) for certain persons and entities as set forth in the Lease and**  
8 **Management Agreement; ratifying prior acts in connection with this Ordinance; and**  
9 **making environmental findings.**

10 NOTE: Additions are *single-underline italics Times New Roman*;  
11 deletions are *strike-through italics Times New Roman*.  
12 Board amendment additions are double-underlined;  
13 Board amendment deletions are ~~strikethrough normal~~.

13 Be it ordained by the People of the City and County of San Francisco:

14 Section 1. **Findings.**

15 (a) The San Francisco Botanical Garden Generally. The City and County of San  
16 Francisco (the "City") owns the San Francisco Botanical Garden (the "Botanical Garden"),  
17 formerly known as Strybing Arboretum, a 55-acre garden and associated facilities located in  
18 the southeast portion of San Francisco's Golden Gate Park along Martin Luther King Jr. Drive  
19 and Lincoln Way, between 9<sup>th</sup> Avenue and 19<sup>th</sup> Avenue. The Recreation and Park  
20 Commission has jurisdiction over the Botanical Garden and is responsible, through the City's  
21 Recreation and Park Department ("RPD"), for its operation and management. The Botanical  
22 Garden is a living museum of more than 8,000 different kinds of plants, many rare and  
23 endangered and no longer found in their native habitats, and is a treasure for the residents of  
24 San Francisco and the Bay Area as well as for visitors from around the world.  
25

1 (b) The San Francisco Botanical Garden Society. The San Francisco Botanical  
2 Garden Society (“SFBGS”) is a nonprofit 501(c)(3) corporation devoted to supporting,  
3 promoting, and enhancing the use, appreciation and stature of the Botanical Garden. SFBGS  
4 has provided crucial support and assistance to the City in the management and operation of  
5 the Botanical Garden since 1955, including the construction and donation of the Helen  
6 Crocker Russell Library Building; management and operation of the Library and Visitor  
7 Orientation Center and Bookstore; funding and developing a special area plan (the “Botanical  
8 Garden Master Plan”) for the Golden Gate Park Master Plan; providing education and visitors  
9 programs, visitor publications, curatorial and plant collections management services,  
10 community programming, horticulture education and volunteer programs; planning and  
11 managing improvements to the Botanical Garden; paying costs to support the hiring of an  
12 eleventh City gardener dedicated solely to the care and maintenance of the Botanical Garden;  
13 and fundraising to support the Botanical Garden.

14 (c) The City and SFBGS’s Prior Agreements. On March 1, 2002, the City and SFBGS  
15 entered into (i) a Memorandum of Agreement (Strybing Arboretum) (the “Cooperation  
16 Agreement”), pursuant to which RPD and SFBGS agreed to cooperatively manage the  
17 Botanical Garden, with RPD taking a primary role in managing certain functions and SFBGS  
18 taking a primary role in managing other functions, and (ii) a lease (the “Original Lease”)   
19 pursuant to which SFBGS leased from the City certain office space, library space, horticultural  
20 space and book kiosk space within the Botanical Garden. The terms of the Cooperation  
21 Agreement and the Original Lease have expired, and the City and SFBGS have continued to  
22 operate under the terms of such agreements. In addition, the City and SFBGS entered into a  
23 Grant Agreement, dated July 1, 2010 (as amended, the “Grant Agreement”), pursuant to  
24 which the City provided a grant to SFBGS for the purpose of funding certain education and  
25

1 community outreach and the operation and maintenance of the Botanical Garden's non-  
2 resident entrance fee collection program. The Grant Agreement expires on June 30, 2013.

3 (d) Nursery Gift. SFBGS has offered to donate to the City the design and construction  
4 of a Nursery Center for Sustainable Gardening within the Botanical Garden for the joint use of  
5 the City and SFBGS (the "Nursery Project") as a gift-in-place valued at approximately \$14  
6 million if SFBGS completes the Nursery Project. On April 10, 2012, the Board of Supervisors  
7 adopted Resolution No. 125-12, in which the Board of Supervisors (a) adopted a Final  
8 Mitigated Negative Declaration ("FMND") and a Mitigation Measuring and Reporting Program  
9 (the "MMRP") for the Nursery Project, (b) imposed all the mitigation measures set forth in the  
10 MMRP as conditions of such approval, and (c) accepted a gift-in-place to the City of the  
11 Nursery Project valued at approximately \$14 million. Construction of the Nursery Project has  
12 not commenced.

13 (e) Need for Continued Collaboration. The City and SFBGS recognize the need for  
14 continued collaboration to meet the challenges and opportunities of creating and sustaining a  
15 world-class botanical garden for the 21st century. The City and SFBGS have the shared goal  
16 of creating one of the world's outstanding public botanical gardens, representing San  
17 Francisco's horticultural heritage as well as diverse collections from around the world, and of  
18 increasing levels of private and public financial support and resources to support such goal.  
19 Towards that end, the City and SFBGS desire for SFBGS to continue to lease certain office  
20 and related space in the Botanical Garden for administrative purposes, to lease and continue  
21 to operate the Library, to access and utilize horticultural space in the Botanical Garden, and to  
22 utilize space in the buildings within the Botanical Garden for educational seminars, receptions,  
23 lectures and other special events. City and SFBGS further desire for SFBGS to provide  
24 assistance with the operation and management of the Botanical Garden and with education,  
25 fundraising and other activities which will support and enhance the Botanical Garden. The

1 City and SFBGS desire to provide a clear management structure that facilitates operation and  
2 management of the Botanical Garden and SFBGS's efforts to raise funds to help augment  
3 City funding for the Botanical Garden.

4 (f) Lease and Management Agreement. The City and SFBGS have negotiated a  
5 Lease and Management Agreement that includes the following:

6 (1) An initial term of ten years, with two ten-year extension options.

7  
8 (2) The leased premises shall consist of a portion of the Botanical Garden  
9 comprised of the following, as generally depicted on Exhibits B-1 and B-2 of the Lease and  
10 Management Agreement:

11 (i) Approximately 1,207 square feet of office space located in the rooms  
12 presently designated as Rooms 1 and 3 of the San Francisco County Fair Building and in the  
13 rooms presently designated as Rooms 23, 24, 25 and 30 of the Helen Crocker Russell Library  
14 Building (collectively, the "Office Space"). SFBGS shall use the Office Space for office and  
15 administrative purposes and community meetings.

16 (ii) Approximately 84 square feet of space constituting the bookstore and  
17 approximately 800 square feet of space outside of the bookstore (the "Visitor Orientation  
18 Center and Book Store"). SFBGS shall use the Visitor Orientation Center and Book Store  
19 space for providing visitor orientation services and materials to the public and operation of a  
20 book and gift store selling materials approved by RPD, including plant sales in the (space  
21 outside the Visitor Orientation Center and Book Store.

22 (iii) Approximately 1,378 square feet of space located in the rooms  
23 presently designated as Rooms 31, 32, 35, 36, and 37 of the Library Building (the "Library  
24 Space"), for operation of the Helen Crocker Russell Library of Horticulture. SFBGS shall use  
25

1 the Library Space for operation of a horticultural library open to the public during hours  
2 approved by RPD and educational seminars and fundraising events at other times.

3 (iv) Horticultural space comprised of approximately 800 square feet of  
4 space in the existing main greenhouse, approximately 800 square feet of space in the main  
5 lath house, and approximately 80 square feet of space in the container growing grounds  
6 (collectively, the "Horticultural Premises"), subject to adjustment from time to time by the City,  
7 in its reasonable discretion. SFBGS shall use the Horticultural Premises for propagation and  
8 sales of plants.

9 (v) Approximately 50 square feet of storage space located in the room  
10 presently designated as Room 21 of the County Fair Building, and, subject to shared use by  
11 the City, sufficient space in the room presently designated as Room 14 of the County Fair  
12 Building for voice and data connections and a server closet (collectively, the "Storage and  
13 Utility Space"). SFBGS shall use the Storage and Utility Space for the storage of supplies and  
14 equipment incident to its operations.

15 (vi) Upon the completion of the Nursery Project and acceptance of the  
16 improvements by RPD, the nursery (the "Nursery Premises") will be added to the leased  
17 premises, with a portion of the Nursery Premises for the exclusive use of SFBGS and a  
18 portion of the Nursery Premises available for shared used by SFBGS and RPD, as depicted  
19 on Exhibit B-3 to the Lease and Management Agreement. Following completion of the  
20 Nursery Project and demolition of the Horticultural Premises, SFBGS shall surrender the  
21 Horticultural Premises to the City, and the leased premises shall thereupon be comprised of  
22 the Office Space, the Visitor Orientation Center and Book Store, the Library Space, the  
23 Storage and Utility Space and the Nursery Premises. SFBGS shall use the Nursery Premises  
24 for observation, study, and community programs related to horticulture and natural resources  
25

1 conservation, the propagation and sales of plants related thereto, and nursery administrative  
2 work areas.

3 (vii) In addition to the foregoing, the leased premises may be used for  
4 educational and fundraising seminars, receptions, lectures, plant sales and other special  
5 events sponsored by SFBGS. The leased premises shall not be used for any other purpose.

6 (3) SFBGS shall pay the City a base rent of \$100 per year.

7  
8 (4) Fees paid by non-residents for admission to the Botanical Garden pursuant  
9 to Park Code Section 12.46 and Section 6.11 of the Lease and Management Agreement  
10 ("Admission Receipts") shall be solely for the benefit of the Botanical Garden and shall be  
11 allocated and distributed pursuant to the terms of Article 7 of the Lease and Management  
12 Agreement and Exhibit E thereto. SFBGS shall collect Admission Receipts and remit them to  
13 the City. Such receipts shall be distributed on a monthly basis by RPD according to the  
14 following schedule:

15 (i) Admission Receipts shall first be used to reimburse SFBGS for its  
16 approved "Authorized Collection Expenses" during such period. "Authorized Collection  
17 Expenses" means all costs and expenses incurred by SFBGS in connection with its collection  
18 of admission receipts, including personnel costs. "Authorized Collection Expenses" shall not  
19 include capital expenses, penalties, late charges or interest on any late payments, or taxes or  
20 other amounts withheld from wages or salaries which have not actually been paid by SFBGS  
21 during the month for which reimbursement is being made.

22 (ii) Second, following the payment of the Authorized Collection Expenses  
23 specified in (i) above, remaining Admissions Receipts shall next be paid to RPD until RPD has  
24 received an aggregate amount of \$250,000 per Fiscal Year, provided, however, that before  
25 the allocation is used for any other Botanical Garden purpose, RPD shall use such allocation

1 to fund three gardeners who are dedicated solely to the care and maintenance of the  
2 Botanical Garden.

3 (iii) Third, any remaining Admissions Receipts shall next be paid to  
4 SFBGS until the remaining approved direct out-of-pocket expenses that were incurred by  
5 SFBGS during the first year of the non-resident admissions program ending June 30, 2011,  
6 have been reimbursed.

7 (iv) Fourth, any remaining Admission Receipts shall next be paid to  
8 SFBGS until SFBGS has received an aggregate of \$250,000 per fiscal year in addition to the  
9 reimbursement for Authorized Collection Expenses described in (i) above. SFBGS shall  
10 expend such admissions receipts for its costs and expenses for education, community  
11 outreach, public programs and other initiatives.

12 (v) Finally, the balance of Admission Receipts shall be paid into the  
13 "Botanical Garden Improvement Fund," which will be maintained by the City and shall not be  
14 commingled with other City funds. Any interest accruing on the funds in the Botanical Garden  
15 Improvement Fund shall be added to the Botanical Garden Improvement Fund. Expenditures  
16 from the Botanical Garden Improvement Fund shall be used by the City only for the payment  
17 of costs and expenses for maintenance, renovation and improvement of the Botanical Garden  
18 and shall not be used for any other purpose unless the parties otherwise agree in writing.  
19 Expenditures from the Botanical Garden Improvement Fund are intended to enhance the  
20 Botanical Garden and not to replace traditional sources or levels of City funding.

21 (5) Under Section 6.11 of the Lease and Management Agreement, SFBGS is  
22 not required to reimburse the City for the following nonresidents receiving free admission to  
23 the Botanical Garden subject to the Board of Supervisors' approval by ordinance: (i) SFBGS  
24 members, (ii) members of other botanical gardens participating with SFBGS in reciprocal  
25 member programs, and (iii) school group students, teachers or chaperones. The Botanical



1 Garden will also be open to the public, including non-residents, without charge every morning  
2 between 7:30 a.m. and 9:00 a.m., and all day, during its hours of operation, one day a month,  
3 plus Thanksgiving, Christmas and New Year's Day.

4 A copy of the proposed Lease and Management Agreement is on file with the  
5 Clerk of the Board of Supervisors in File No. 130537 and is incorporated herein by reference.

6 (g) Public Benefits. The Board finds that the proposed Lease and Management  
7 Agreement will have numerous public benefits, and will lessen the burden on the City in  
8 operating and maintaining the Botanical Garden and in providing public programming and  
9 education.

10 (h) Recreation and Park Commission Approval. Pursuant to San Francisco Charter,  
11 Article IX, Section 9.118, any lease of real property for a period of ten or more years, including  
12 options to renew, requires approval by the Board of Supervisors. On May 20, 2013, by  
13 Recreation and Park Commission Resolution No. 1305-11, a copy of which is on file with the  
14 Clerk of the Board in File No. 130537, the Recreation and Park Commission recommended  
15 that the Board of Supervisors approve the Lease and Management Agreement between the  
16 City and SFBGS.

17 (i) Competitive Bidding Waiver. Pursuant to Chapter 23.33 of the Administrative Code,  
18 the Board finds that due to the unique nature of the SFBGS as an organization dedicated  
19 solely to supporting and promoting the Botanical Garden, competitive bidding the Lease and  
20 Management Agreement is impractical or infeasible. The Board further finds that the Lease  
21 and Management Agreement provides consideration in an amount not less than the fair  
22 market value of the leased premises because the monetary value of the services and  
23 functions that SFBGS will provide under the proposed Lease and Management Agreement  
24 exceeds the fair market value of the leased premises. A 2012 appraisal report prepared for  
25

1 the City by Clifford Advisory, LLC., a copy of which is on file with the Clerk of the Board in File  
2 No. 130537, estimated the fair market value ("FMV") of the initial leased premises, not  
3 including the new Nursery Premises, as \$81,289 annually, and the FMV of the space to be  
4 utilized by the SFBGS within the proposed Nursery Premises, if the Nursery Premises are  
5 added to the leased premises, as \$302,773 annually. The annual value of the services and  
6 support to the Botanical Garden to be provided by SFBGS under the Lease and Management  
7 Agreement is estimated to be \$2,163,000, which far exceeds the FMV for the leased premises  
8 even after the Nursery Premises are added to the leased premises, if applicable. SFBGS'  
9 support includes employing a professional curatorial staff to assist RPD in plant collection  
10 development (\$573,504), conducting youth education programming (\$210,429), operating the  
11 Helen Crocker Russell Botanical Library (\$196,412), and volunteer management, docent  
12 program, classes and public program (\$189,351), and garden improvements (\$283,264).  
13 Further, if SFBGS completes the Nursery Project, the estimated cost of which is  
14 approximately \$14 million, then upon completion SFBGS will donate the Nursery Project to  
15 the City in accordance with Board of Supervisors Resolution 125-12 dated April 10, 2012.

## 17 Section 2. **Environmental Findings.**

18 This Lease and Management Agreement authorizes the existing, ongoing operation  
19 and use of the San Francisco Botanical Garden at Strybing Arboretum by the San Francisco  
20 Botanical Garden Society. No change in use is proposed, and this lease would not be  
21 considered a project under the California Environmental Quality Act. As noted in Section 1,  
22 the previously approved Nursery Project, approved by the Recreation and Park Commission  
23 on March 15, 2012 by Resolution No. 1203-008, and by this Board on April 10, 2012 by  
24 Resolution No. 125-12, was analyzed in a Final Mitigated Negative Declaration ("FMND"),  
25 which was reviewed, considered, and adopted by both the Recreation and Park Commission

1 and this Board. By those same actions, the Recreation and Park Commission and this Board  
2 also adopted the Mitigation Measuring and Reporting Program ("MMRP") for the Nursery  
3 Project. Both the FMND and the MMRP are on file with the Clerk of the Board of Supervisors  
4 in File No. 120288 and are incorporated herein by reference.

5  
6 **Section 3. Approval of Lease and Management Agreement and waiver of non-**  
7 **resident entrance fee for specified persons/entities.**

8 (a) The Board of Supervisors hereby authorizes the General Manager of the  
9 Recreation and Park Department or his designee to execute and enter into the Lease and  
10 Management Agreement with SFBGS in substantially the form filed with the Clerk of the  
11 Board of Supervisors in File No. 130537.

12 (b) The Board of Supervisors waives the non-resident entrance fee in Park Code  
13 Section 12.46(d) for the following non-resident persons and entities as set forth in the Lease  
14 and Management Agreement filed with the Clerk of the Board of Supervisors in File No.  
15 130537: 1) school group students, teachers and chaperones, 2) SFBGS members, 3)  
16 members of other botanical gardens participating with SFBGS in reciprocal member  
17 programs, and 4) the general public, including non-residents, every morning between 7:30  
18 a.m. and 9:00 a.m., and all day, during its hours of operation, one day per month, and on  
19 Thanksgiving, Christmas and New Year's Day.

20 (c) The Board of Supervisors authorizes the General Manager to enter into additions,  
21 amendments, or other modifications to the Lease and Management Agreement (including,  
22 without limitation, preparation and attachment of, or charges to, any or all of the exhibits) that  
23 the General Manager, in consultation with the City Attorney, determines are in the best  
24 interest of the City, do not materially decrease the benefits of the Lease and Management  
25 Agreement to the City, do not materially increase the obligations or liabilities of the City, do

1 not authorize the performance of any activities without pursuing all required regulatory and  
2 environmental review and approvals, and are necessary or advisable to complete the  
3 transactions which the Lease and Management Agreement contemplate and effectuate the  
4 purpose and interest of this Ordinance, such determination to be conclusively evidenced by  
5 the execution and delivery by the General Manager of the Lease and Management  
6 Agreement and any such additions, amendments, or other modifications to those documents.  
7

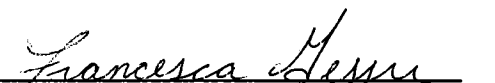
8 **Section 4. Ratification of Prior Acts.**

9 All actions that City officers and employees have heretofore taken with respect to the  
10 subject matter of this Ordinance and not inconsistent herewith are hereby approved,  
11 confirmed and ratified.  
12

13 **Section 5. Effective Date.** This ordinance shall become effective 30 days from the  
14 date of passage.  
15

16 APPROVED AS TO FORM:  
17 DENNIS J. HERRERA, City Attorney

18 By:

  
19 **FRANCESCA GESSNER**  
20 Deputy City Attorney

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# City and County of San Francisco

## Tails Ordinance

City Hall  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4689

**File Number:** 130537

**Date Passed:** July 23, 2013

Ordinance approving and authorizing a Lease and Management Agreement between the City and the San Francisco Botanical Garden Society for the San Francisco Botanical Garden at Strybing Arboretum in Golden Gate Park, with an initial term of 10 years with two 10-year extension options; waiving the non-resident admission fee in Park Code, Section 12.46(d) for certain persons and entities as set forth in the Lease and Management Agreement; ratifying prior acts in connection with this Ordinance; and making environmental findings.

June 20, 2013 Budget and Finance Committee - CONTINUED

June 21, 2013 Budget and Finance Committee - AMENDED, AN AMENDMENT OF THE WHOLE BEARING SAME TITLE

June 21, 2013 Budget and Finance Committee - RECOMMENDED AS AMENDED

July 16, 2013 Board of Supervisors - PASSED ON FIRST READING

Ayes: 8 - Breed, Chiu, Cohen, Farrell, Kim, Tang, Wiener and Yee

Noes: 3 - Avalos, Campos and Mar

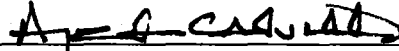
July 23, 2013 Board of Supervisors - FINALLY PASSED

Ayes: 8 - Breed, Chiu, Cohen, Farrell, Kim, Tang, Wiener and Yee

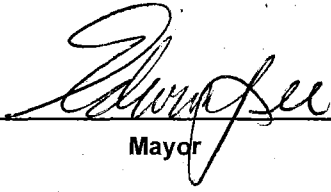
Noes: 3 - Avalos, Campos and Mar

File No. 130537

I hereby certify that the foregoing  
Ordinance was FINALLY PASSED on  
7/23/2013 by the Board of Supervisors of the  
City and County of San Francisco.



Angela Calvillo  
Clerk of the Board

  
Mayor

Date Approved

**RECREATION AND PARK COMMISSION**  
**City and County of San Francisco**  
**Resolution Number 2111-005**

**GARDENS OF GOLDEN GATE PARK AGREEMENT – LEASE  
AMENDMENT**

**RESOLVED**, This Commission does recommend that the Board of Supervisors approve an amendment to the Lease and Management Agreement with the San Francisco Botanical Garden Society dated December 11, 2013, to expand the current agreement to include similar services for the Japanese Tea Garden and Conservatory of Flowers, substantially in the same form as the draft agreement dated November 4, 2021 but subject to deleting references to the COVID-19 deficit and the use of City funds to pay said deficit.

Adopted by the following vote

Ayes	7
Noes	0
Absent	0

I hereby certify that the foregoing resolution was adopted at the Recreation and Park Commission meeting held on November 18, 2021.



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Ashley Summers, Commission Liaison