



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**

**located in Golden Gate Park**

**San Francisco, California**

**May 1, 2013**

**CITY AND COUNTY OF SAN FRANCISCO  
Edwin M. Lee, Mayor**

**SAN FRANCISCO RECREATION and PARK COMMISSION  
Mark Buell, President  
Allan Low, Vice President  
Tom Harrison, Commissioner  
Gloria Bonilla, Commissioner  
Meagan Levitan, Commissioner  
Lawrence Martin, Commissioner  
Paige Arata, Commissioner**

**Philip A. Ginsburg, General Manager**



**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 May 1, 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, 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 enjoyment of 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 will expire 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 are 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 targeted 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 Measuring 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:	May 1, 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 <b>Exhibit A</b> ) in San Francisco, California, owned by City and under the jurisdiction of the Department, comprised of the following, as generally depicted on <b>Exhibit B-1</b> and <b>Exhibit B-2</b> :  (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 84 square feet of space constituting the bookstore and approximately 800 square feet of space outside of the bookstore (the “Visitor Orientation Center and Book Store”), shown generally on **Exhibit B-1** attached hereto;
- (iii) approximately 1378 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;
- (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, 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 50 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, sufficient 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”).

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 (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) and for shared use by SFBGS with the Department’s gardening staff assigned to the Botanical Garden (including the balance of the Commons, the greenhouse (including propagation and quarantine areas), shadehouse, growing grounds, storage room, tool storage and fertilizer room areas and interior bathrooms), all as generally depicted in **Exhibit B-3**. Upon the completion and commencement of full operation of the Nursery, 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 Book Store, the Library Space, the Storage and Utility Space and the Nursery Premises.

- 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 Book Store space for providing visitor orientation services and materials to the public and operation of a book and gift store selling approved materials by Department (which use shall include the utilization of space outside the Visitor Orientation Center and Book Store 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 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 may be used for educational and fundraising seminars, receptions, lectures, plant sales and other special events sponsored by SFBGS, as provided in **Sections 5.1 and 5.2**. The Premises shall not be used 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 <b>Section 7.2</b> .
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:	_____
Telephone No.:	_____
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:

“**Account**” has the meaning given in **Section 7.6** 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 **Exhibit E**.

“**Admission Receipts**” has the meaning given in **Exhibit E**.



“**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 Date**” has the meaning set forth in **Exhibit E**.

“**Allocation Amount**” has the meaning given in **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 **Exhibit E**.

“**Annual SFBGS Allocation Cap**” has the meaning given in **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 **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 Rent**” means the annual Base Rent specified in the Basic Lease Information and described in **Section 7.2** hereof.

“**Base Index**” has the meaning set forth in **Exhibit E**.

“**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 Account**” has the meaning given in **Exhibit E**.

“**Botanical Garden Improvement Fund**” has the meaning given in **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(a)** 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 a resolution 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 19.1** hereof.

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

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

“**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 7.4** hereof.

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

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

“**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**.

“**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 have been, are being, or threaten 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.

“**Reminder Notice**” has the meaning given in **Section 4.2(a)** hereof.

“**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(a)** 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.**

(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 Book Store, 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) **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 Horticulture Premises.

(e) **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 and Associated Growing Grounds as may be designated by City from time to time, (collectively, the “Common Area” or “Common Areas”), and the non-exclusive right of access to and from the Premises 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

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. In connection with any temporary closure, repair, alteration or changes to the Common Areas made by City, City agrees to use its reasonable efforts to minimize disruption to SFBGS's use and occupancy of the Premises. 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(e)**. Nothing in this Lease is intended to grant SFBGS any right whatsoever to possess, use or operate the Department Facilities, or any portion thereof.

**(f) 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.

**(g)** 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 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, 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 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



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 antennas, 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 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. 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.**

(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 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. Without limiting the foregoing, this Lease is made subject to any and all covenants, conditions, restrictions, easements and other title matters affecting the Premises, 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, (ii) the physical, geological, seismological or environmental condition of the Premises, (iii) the quality, nature or adequacy of any utilities serving the Premises, (iv) the present or future suitability of the Premises for SFBGS's business and intended uses, (v) the feasibility, cost or legality of constructing any Improvements on the Premises if required for SFBGS's use and permitted under this Lease, or (vi) any other matter whatsoever relating to the Premises 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%).

#### **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 Cooperation Agreement.** This Lease shall become effective on the Effective Date, as defined in **Article 2**. For avoidance of doubt, City and SFBGS shall cease operating under the Original Lease and Cooperation Agreement as of the Effective Date.

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

**5.1. SFBGS's Permitted Use; Special Events.** SFBGS shall continuously use the Premises 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 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 **Sections 6.7(a) and (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'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 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 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 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 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 any Improvements permitted hereunder.

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

**(iii) Covenant regarding Damage to Premises, 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 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 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 by or on behalf of SFBGS as necessary to avoid interference with City's use of the Premises 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 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 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, to acquire products for use on the Premises which reuse or recycle packaging, and to recycle all materials used on the Premises 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, without the prior written approval of the General Manager.

**(vi) No Tree Planting.** SFBGS shall not plant any trees on the Premises, nor shall SFBGS plant any other vegetation on the Premises 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, 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 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. SFBGS shall control noxious weeds on or about the Premises, 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.

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

**(xii) Soil Erosion.** SFBGS shall not cause any material erosion of soil on or around the Premises. SFBGS shall not engage in any activity that causes a material change, disturbance, fill, alteration or impairment to the topography of the Premises 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, without the prior written approval of the General Manager.

**(xiii) Operating Covenants.** SFBGS shall use the Premises 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 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 26.40) 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 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 his or her 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 Admissions 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 their shared goal 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. SFBFS shall staff the admissions kiosk during the following hours of operation:

*Year Round*

Beginning daily at 9:00am

*Spring & Summer*

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

*Fall & Winter*

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

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

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

The hours of 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. City shall open the Botanical Garden every morning at 7:30 a.m., allowing entry to the public before the admission kiosks are staffed.

**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 under 17 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. 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 a.m., 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. Monthly Admission Receipts Statements; 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 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. Simultaneously with such payment, 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 and the allocation of such Admission Receipts in accordance with **Exhibit E**. 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.

**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, 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 reasonable 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 grater, 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 be no more subject to tampering than mechanical cash register(s).

(c) Each sale or other transaction on the Premises 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 types. 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, 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 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 other similar electronic devices if used) used on the Premises 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; (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 Accounts(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 as 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 Report.** SFBGS shall provide the Monthly Admission Receipts Statement described in **Section 7.4** above.

(b) **Annual Admission Reports.** 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, SFBGS shall pay City, promptly upon demand, the difference between the amount SFBGS has paid and the amount it should have paid to City. If SFBGS understates its Admission Receipts by five percent (5%) or more, the cost of the audit shall be borne by SFBGS. If SFBGS 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, City shall repay SFBGS, promptly upon demand, the difference between the amount SFBGS has paid and the amount it should have paid to City.

(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.

**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 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 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, 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, any Improvements, SFBGS's Personal Property, the leasehold estate or any subleasehold estate, or SFBGS's use of the Premises 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 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 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 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, 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 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 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, 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.** Except with respect to the Library Improvements, which shall be donated to City upon completion as provided herein, Improvements or Alterations constructed on or affixed to the Premises 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 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 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 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 the 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 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. If any portion of the Premises or any of City's property located on or about the Premises 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 City's property to its previous condition.

(c) SFBGS shall keep all fixtures and equipment on the Premises 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, pick up trash and debris in the immediate vicinity of the Premises and dispose of trash in containers provided by SFBGS that are large enough to

adequately serve the needs of the facility. SFBGS shall provide a dumpster and shall keep it in clean and orderly condition.

**(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) Public Restrooms.** City shall be responsible for the regular cleaning of the public restrooms located in the Botanical Garden. The restrooms shall be open to the public at all times the Botanical Garden is open to the public. The restrooms shall be kept clean, neat, orderly and functioning properly at all times. SFBGS, at its own expense, shall provide all necessary items for the restrooms located on the Premises including, but limited to, toilet tissue, paper towels, seat covers and hand soap. SFBGS shall provide, at its sole expense, all cleaning materials and supplies necessary to maintain the public restrooms located in the Premises in the condition as described above. Such restrooms shall be thoroughly cleaned daily and inspected for supplies and neatness a minimum of two (2) times during each day the Premises are open to the public.

**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, 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 and the 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, 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 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 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 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 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. If SFBGS desires any upgrades to water, gas or electricity services in connection with SFBGS's operations at the Premises, 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 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 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 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 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 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 any notices permitted or required by Law or that City deems proper for its protection and protection of the Premises 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. 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 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, any Improvements permitted hereunder and SFBGS's use and operations thereon 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 obligation under this Section shall include, without limitation, the responsibility of SFBGS to make substantial or structural repairs and alterations to the Premises (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, 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. 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 may require authorizations, approvals or permits from governmental regulatory agencies with jurisdiction over the Premises. 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 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. 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 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 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 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, (ii) the right of possession of SFBGS to the Premises 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 any adjoining property, or City's interest under this Lease, or any portion thereof.

**14.2. Leasehold Encumbrances.** Without limiting **Article 18** 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 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 (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 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 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 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 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 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 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 by or at the expense of SFBGS and remove them (including all debris) from the Premises 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 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 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 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 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 untenable or unsuitable for continued use by SFBGS, (B) the condition rendering the Premises 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.

(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 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 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 taken bears to the area of the Premises 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 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 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, 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 any portion of the Premises 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; or

(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.**

(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 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 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. 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 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 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 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 or any Improvements; (d) the condition of the Premises or any Improvements constructed by or on behalf of SFBGS, or SFBGS's failure to properly repair or maintain any Improvements on the Premises to the extent required under this Lease; (e) any construction or other work undertaken by SFBGS on or about the Premises 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 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, products and completed operations, and explosion, collapse and underground (XCU). 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.

(iv) Business Interruption Insurance insuring that the Rent will be paid to City for a period of at least one (1) year if SFBGS is unable to operate its business at the Premises. Such insurance shall also cover business interruptions due to failures or interruptions in telecommunications services, strikes, employee lockouts, riots, or other civil commotion. To calculate Rent during any such interruption of business, the Rent for the 12-month period immediately preceding the incident causing the business interruption shall be used.

(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, 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 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 or other City property and their contents, or any portion thereof, for any loss or damage maintained by such other party with respect to the Premises, 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 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.** Upon the Expiration Date or any earlier termination of this Lease pursuant hereto, SFBGS shall surrender to City the Premises, 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 demolish and remove any and all Improvements and Alterations from the Premises requested by City to be removed (except for any Improvements or Alterations that City agrees are to remain part of the Premises pursuant to the provisions of **Section 9.2** above). In addition, SFBGS shall, at its sole expense, repair any damage to the Premises resulting from the removal of any such items and restore the Premises 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 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 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.

**23.2. Automatic Reversion.** Upon the Expiration Date or earlier termination of this Lease, the Premises 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 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 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 or any Improvements or transported to or from the Premises 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 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, 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 (including any Improvements thereon) or any other City property, without limiting SFBGS's general Indemnity contained in **Section 20.2** 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 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 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 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 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 at a monthly Base Rent equal to one hundred ten percent (110%) of the amount set forth in **Section 7.2** hereof, and shall otherwise be 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 above or the rate in effect at the end of the Term of this Lease. Any holding over after the expiration of the Term without the City's consent shall be at a monthly rental rate equal to one hundred fifty percent (150%) of the rate in effect at the end of the Term of this Lease.

## 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, (iv) change the Term of this Lease, or (v) materially change the permitted uses of the Premises. 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 named herein (or by any subsequent landlord) of its interest in the Premises 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, 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 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.

**27.17. Transfer by City.** If City sells or otherwise transfers the Premises, 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 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 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.

**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, 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, 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 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' use and occupancy or quiet enjoyment of the Premises 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, 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 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, 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 (RBGH)" 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.

**[No further text this page.]**



**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. \_\_\_\_\_ DATED: \_\_\_\_\_**

\_\_\_\_\_  
Margaret McArthur, Commission Liaison

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

By \_\_\_\_\_  
Anita L. Wood, Deputy City Attorney

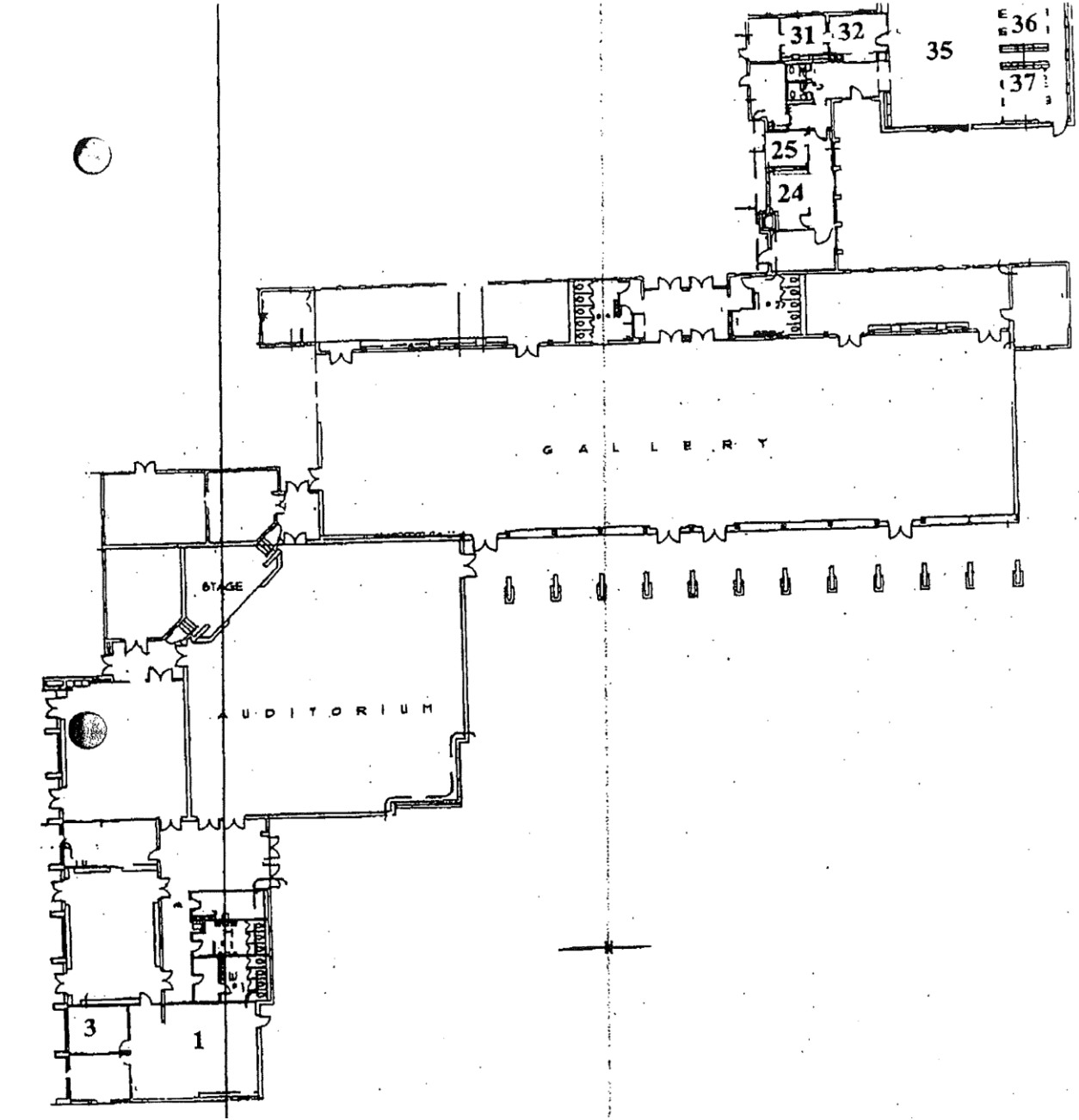
**EXHIBIT A- DEPICTION OF BOTANICAL GARDENS**

City and County of San Francisco

Beginning at a point on the northeast corner of Nineteenth Avenue and Lincoln Way; thence running easterly along the south boundary of Golden Gate Park to the westerly line of the Ninth Avenue entrance to the Park; thence running northerly along the new westerly line of the new Ninth Avenue drive to the intersection of the said westerly line of the new Ninth Avenue drive with the southerly line of Middle Drive; thence westerly along the southerly line of the South Drive [renamed Martin Luther King, Jr. Drive] to the easterly line of the Cross-Over Drive; thence southerly and along the easterly line of Cross-Over Drive to the point of beginning.

**EXHIBIT B- DEPICTION OF PREMISES**

**EXHIBIT B-1 – OFFICE AND LIBRARY SPACE LOCATIONS**



**EXHIBIT B-2 – HORTICULTURAL  
PREMISES**



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**EXHIBIT C**

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**FORM OF VOLUNTEER RELEASE**

PROJECT SITE: \_\_\_\_\_

DATE: \_\_\_\_\_

GROUP NAME: \_\_\_\_\_

**HOLD HARMLESS AGREEMENT**

In consideration for being granted permission to work as a volunteer, I, the undersigned, shall protect, hold free and harmless, defend and indemnify the City and County of San Francisco including its agents from any and all claims 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 visitor, third parties, myself or other volunteers, or property of any kind, which injury, death or damage arises out of or is in any way connected to the volunteer work assignment.

Name(Print) _____	Signature _____	Date _____
Name(Print) _____	Signature _____	Date _____
Name(Print) _____	Signature _____	Date _____
Name(Print) _____	Signature _____	Date _____
Name(Print) _____	Signature _____	Date _____
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Name(Print) _____	Signature _____	Date _____
Name(Print) _____	Signature _____	Date _____

## **EXHIBIT D**

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### **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

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### ALLOCATION AND DISTRIBUTION OF ADMISSIONS 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. The Parties agree that this amount, as of June 30, 2011, was \$86,620, of which \$11,000 was reimbursed by City by check dated August 23, 2012.

(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 every five years beginning with July 1 of the Fiscal Year that is five (5) years after the year of the Commencement Date (e.g., July 1, 2018 if the Commencement Date is in 2013), 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 7.5** 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.