

# WATER CONSERVATION AUTHORITY

## AMENDED AND RESTATED

### WATER CONSERVATION GARDEN OPERATION AGREEMENT

(Cuyamaca College Water Conservation Garden)

THIS AMENDED AND RESTATED WATER CONSERVATION GARDEN OPERATION AGREEMENT (Cuyamaca College Water Conservation Garden) (this “**Agreement**”) is dated as of \_\_\_\_\_, for reference purposes only, and is entered into by and between the WATER CONSERVATION AUTHORITY, a Joint Powers Agency (the “**Authority**”), and FRIENDS OF THE WATER CONSERVATION GARDEN, a California nonprofit public benefit corporation (the “**Operator**”) (collectively the “**Parties**”), with reference to the following recited facts:

#### RECITALS

A. The Grossmont-Cuyamaca Community College District (“**GCCCD**”), a California community college district and the Authority have entered into that certain License Agreement for Operation of a Water Conservation Garden, dated August 1, 2006 (“**License Agreement**”), attached hereto as Exhibit C and incorporated herein by reference, with respect to certain real property specifically described in the License Agreement for operation of a water conservation demonstration garden (“**Garden**”); and

B. The Authority and the Operator entered into that certain Water Conservation Garden Operation Agreement, dated October 13, 2010, to provide for the Operator to assume all responsibility for operation and maintenance of the Garden in accordance with the License Agreement and the terms and conditions of this Agreement.

C. The Authority and Operator now desire to amend and restate the Agreement to clarify responsibilities and obligations associated with the operation of the Garden including, but not limited to:

1. Committing that the Authority will continue and increase involvement with the Garden as specified within this Agreement;

2. Authority member dues shall decrease over time to the Base Contribution amount as defined herein;

3. Authority dues shall be based upon the maintenance of Core Exhibits, as that term is defined herein; and

4. Operator shall increase and improve communication with Authority member agencies, including clarifying the lines of communication between the constituent parties.

NOW, THEREFORE, FOR GOOD AND VALUABLE CONSIDERATION AND THE PROMISES OF THE AUTHORITY AND THE OPERATOR SET FORTH IN THIS AGREEMENT, THE AUTHORITY AND THE OPERATOR AGREE, AS FOLLOWS:

1. **DEFINITIONS.** The following definitions apply in this Agreement:

1.1 “Application” means any agreement, application, certificate, document, or submission (or amendment of any of the foregoing): (a) necessary or appropriate for any activity regarding the Garden that this Agreement requires or allows, including any application for any building permit, certificate of occupancy, utility service or connection, easement, covenant, condition, restriction or such other instrument as the Operator may from time to time reasonably request in performing its obligations under this Agreement; (b) to enable the Operator from time to time to seek any Approval or to use or operate the Garden in accordance with this Agreement; or (c) otherwise reasonably necessary and appropriate to permit the Operator to perform its obligations under this Agreement.

1.2 “Approvals” means any and all licenses, permits, approvals, consents, certificates (including certificate(s) of occupancy), rulings, variances, authorizations, or amendments to any of the foregoing as shall be necessary or appropriate under any Law to commence, perform, or complete any use, maintenance, repair or operation of the Garden.

1.3 “Authority” means the Water Conservation Authority, a California joint powers authority.

1.4 “Authority Activity” shall have the meaning ascribed to the term in Section 5.13.

1.5 “Authority Parties” means, collectively, the Authority, its governing board, officers, employees, agents and legal representatives.

1.6 “Authority Party” means, individually, the Authority and each of its officers, employees, agents and legal representatives.

1.7 “Authority Representative” means an employee or agent of the Authority designated, from time to time by the Authority through Notice to the Operator. As of the Effective Date, the Authority Representative is the President of the Authority.

1.8 “Automobile Liability Insurance” means insurance coverage against claims of personal injury (including bodily injury and death) and property damage covering all owned, leased, hired and non-owned vehicles used by the Operator, with minimum limits for bodily injury and property damage of ONE MILLION DOLLARS (\$1,000,000) each occurrence and TWO MILLION DOLLARS (\$2,000,000) aggregate. Such insurance shall be provided by a business or commercial vehicle policy.

1.9 “Bankruptcy Law” means Title 11, United States Code, and any other or successor state or federal statute relating to assignment for the benefit of creditors, appointment of a receiver or trustee, bankruptcy, composition, insolvency, moratorium, reorganization, or similar matters.

1.10 “Bankruptcy Proceeding” means any proceeding, whether voluntary or involuntary, under any Bankruptcy Law.

1.11 “Casualty” means any damage or destruction of any kind or nature, ordinary or extraordinary, foreseen or unforeseen, affecting all or any part of the Garden Improvements, whether or not insured or insurable.

1.12 “Casualty Termination” means a termination of this Agreement because of a Substantial Casualty, when and as this Agreement expressly allows such a termination pursuant to Section 13.3.

1.13 “Construction” means any alteration, construction, demolition, development, expansion, reconstruction, redevelopment, repair, restoration, or other work affecting any Garden Improvements, including new construction.

1.14 “County” means the County of San Diego, California.

1.15 “Core Exhibits” means Irrigation Exhibit , Backyard Retrofit House, Turf Exhibit , Tree Exhibits and Care, Watershed/Water Capture, Soils, Erosion , California Water Story, Seven Steps of Xeriscape, and Water Supply Towers.

1.16 “Default” means any Monetary Default or Non-Monetary Default.

1.17 “Deferred Maintenance Projects” shall mean DG pathway stabilizer, irrigation upgrades, electrical upgrades, re-stucco/paint, and mature tree replacement.

1.18 “GCCCCD” means the Grossmont-Cuyamaca Community College District, a California community college district.

1.19 “Educational Programming” means those certain demonstration and educational programs and activities approved by the Authority to be provided to the public by the Operator at the Garden in accordance with the terms and conditions of this Agreement.

1.20 “Effective Date” means the first date on or after January 1, 2011 on which all of the following events have occurred: (1) the Authority has received three (3) counterpart originals of this Agreement executed by the authorized representative(s) of the Operator; (2) the Authority has received a certified copy of the Operator Official Action executed by the authorized representative(s) of the Operator; (3) this Agreement has been approved by the governing board of the Authority; (4) this Agreement has been signed by the authorized representative(s) of the Authority and a fully signed original of this Agreement has been delivered to the Operator by the Authority.

1.21 “Environmental Law” means any Law regarding any of the following at, in, under, above, or upon the Garden: (a) air, environmental, ground water, or soil conditions; or (b) clean-up, control, disposal, generation, storage, release, transportation, use of, or liability or standards of conduct concerning, Hazardous Substances.

1.22 “Expiration Date” means the date when this Agreement terminates or expires in accordance with its terms, whether on the Scheduled Expiration Date, by the Authority’s exercise of remedies for an Event of Default, termination of the License Agreement, or otherwise, whichever is earlier.

1.23 “FF&E” means all movable furniture, furnishings, equipment, and personal property that may be removed without material damage to the Garden and without adversely affecting: (a) the structural integrity of the Garden Improvements; (b) any electrical, plumbing, mechanical, or other system of the Garden; (c) the present or future operation of any such system; (d) the present or future provision of any utility service to the Garden; or (e) the

elements of any exhibit within the Garden. FF&E includes items such as furniture, movable equipment, telephone, telecommunications and facsimile transmission equipment, point of sale equipment, televisions, radios, network racks, and computer systems and peripherals.

1.24 “Garden” is defined in Recital A to this Agreement.

1.25 “Garden Endowment Fund” means a non-wasting investment fund held by The San Diego Foundation or its successor with bi-annual payments of interest paid to Operator for maintenance of The Garden.

1.26 “Garden Expenses” means all costs of operating and maintaining the Garden pursuant to the terms and conditions of this Agreement incurred after the Effective Date.

1.27 “Garden Improvements” means those certain improvements in existence at the Garden as of the Effective Date and all improvements to or located at the Garden from time to time after the Effective Date.

1.28 “Garden Maintenance Standards” means the standards, specifications, protocols and conditions for maintenance of the Garden.

1.29 “Government” means each and every governmental agency, authority, bureau, department, quasi-governmental body, or other entity or instrumentality having or claiming jurisdiction over the Garden (or any activity this Agreement requires or allows), including the United States government, the State of California, the County and their subdivisions and Municipalities, including the Authority and all other applicable governmental agencies, authorities, commissions, boards, department and subdivisions thereof.

1.30 “Group Function” means use by a Third Person of the Garden for a private event.

1.31 “Hazardous Substance” includes flammable substances, explosives, radioactive materials, asbestos, asbestos-containing materials, polychlorinated biphenyls, chemicals known to cause cancer or reproductive toxicity, pollutants, contaminants, hazardous wastes, medical wastes, toxic substances or related materials, explosives, petroleum and petroleum products, and any “hazardous” or “toxic” material, substance or waste that is defined by those or similar terms or is regulated as such under any Law, including any material, substance or waste that is: (i) defined as a “hazardous substance” under Section 311 of the Water Pollution Control Act (33U.S.C. § 1317), as amended; (ii) substances designated as “hazardous substances” pursuant to 33 U.S.C. § 1321; (iii) defined as a “hazardous waste” under Section 1004 of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901, et seq., as amended; (iv) defined as a “hazardous substance” or “hazardous waste” under Section 101 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Reauthorization Act of 1986, 42 U.S.C. § 9601 et seq. or any so-called “superfund” or “super lien” law; (v) defined as a “pollutant” or “contaminant” under 42 U.S.C.A. § 9601(33); (vi) defined as “hazardous waste” under 40 C.F.R. Part 260; (vii) defined as a “hazardous chemical” under 29 C.F.R. Part 1910; any matter within the definition of “hazardous substance” set forth in 15 U.S.C. § 1262; (viii) any matter, waste or substance regulated under the Toxic Substances Control Act (“TSCA”) (15 U.S.C. Sections 2601, et seq.); any matter, waste or substance regulated under the Hazardous Materials Transportation Act, 49 U.S.C. Sections 1801, et seq.; any matter, waste or substance regulated under the

Resource Conservation and Recovery Act, 42 U.S.C. Sections 6901, et seq.; those substances listed in the United States Department of Transportation (DOT) Table (49 CFR 172.101), or designated by the EPA, or any successor authority, as a hazardous substance [40 CFR Part 302]; and those substances defined as “hazardous waste” in Section 25117 of the California Health and Safety Code or, as a “hazardous substance” in Section 25316 of the California Health and Safety Code; (ix) subject to any other Law regulating, relating to or imposing obligations, liability or standards of conduct concerning protection of human health, plant life, animal life, natural resources, property or the enjoyment of life or property free from the presence in the environment of any solid, liquid, gas, odor or any form of energy from whatever source; or (x) other substances, materials, and wastes that are, or become, regulated or classified as hazardous or toxic under federal, state, or local laws or regulations and in the regulations adopted pursuant to said laws, and shall also include manure, asbestos, polychlorinated biphenyl, flammable explosives, radioactive material, petroleum products.

1.32 “Hazardous Substance Discharge” means any deposit, discharge, generation, release, or spill of a Hazardous Substance that occurs at or from the Garden, or into the Garden, or that arises at any time from the use or operation of the Garden or any activities conducted at the Garden or any adjacent or nearby real property, or resulting from seepage, leakage, or other transmission of Hazardous Substances from other real property to the Garden, whether or not caused by a Party to this Agreement and whether occurring before or after the Effective Date.

1.33 “Indemnify” means, where this Agreement states that the Parties shall “indemnify” each other from, against, or for a particular matter, that the Parties shall indemnify the other and defend and hold each other harmless from and against any and all loss, claims, liability, penalties, judgments, damages, and other injury, detriment, or expense that each Party suffers or incurs: (a) from, as a result of, or on account of the particular matter; or (b) in enforcing the other Party’s indemnity obligation.

1.34 “Law” means all laws, ordinances, requirements, orders, proclamations, directives, rules, and regulations of any Government affecting the Garden or this Agreement in any way, including any use, maintenance, taxation, operation, or occupancy of, or environmental conditions affecting the Garden or otherwise relating to this Agreement or any Party’s rights or remedies under this Agreement, or any Transfer of any of the foregoing, whether in force on the Effective Date or passed, enacted, or imposed at some later time, subject in all cases, however, to any applicable waiver, variance, or exemption.

1.35 “Legal Costs” of any Person means all reasonable costs and expenses such Person incurs in any legal proceeding (or other matter for which such Person is entitled to be reimbursed for its Legal Costs), including reasonable attorneys’ fees, court costs and expenses.

1.36 “Liability Insurance” means commercial general liability insurance against claims for personal injury, death, or property damage occurring upon, in, or about the Garden or adjoining streets or passageways, providing coverage for a combined single limit of Two Million Dollars (\$2,000,000) for any one occurrence.

1.37 “License Agreement” is defined in Recital A to this Agreement.

1.38 “Maintenance and Repair” means all routine and ordinary maintenance and repairs to the Garden required to preserve and operate the Garden in first-class condition during

the Term, in accordance with the Garden Maintenance Standards, including any required Renovation.

1.39 “Modification” means any abandonment, amendment, cancellation, discharge, extension, modification, rejection, renewal, replacement, restatement, substitution, supplement, surrender, termination, or waiver of a specified agreement or document, or of any of its terms or provisions, or the acceptance of any cancellation, rejection, surrender, or termination of such agreement, document, or terms.

1.40 “Modify” means agree to, cause, make, or permit any Modification.

1.41 “Monetary Default” means the Operator’s failure to pay or deposit any money (including insurance premiums) when and as this Agreement requires.

1.42 “Non-Monetary Default” means the Operator’s: (a) failure to comply with any affiliate or negative covenant or obligation in this Agreement, except a Monetary Default; or (b) breach of any representation or warranty (as of the date made or deemed made).

1.43 “Notice” means any consent, demand, designation, election, notice, or request relating to this Agreement, including any Notice of Default.

1.44 “Notify” means give a Notice.

1.45 “Notice of Default” means any Notice claiming or giving Notice of a Default or alleged Default.

1.46 “Operating Inventory” means consumable items used or held in storage for use in the operation of the Garden, including bathroom supplies, paper towels, cleaning materials, supplies, gardening supplies and equipment and other similar items.

1.47 “Operator” means the Friends of the Water Conservation Garden, a California nonprofit public benefit corporation.

1.48 “Operator Official Action” means the official action of the Operator’s governing body authorizing the Operator’s entry into and performance of this Agreement, in substantially the form attached to this Agreement as Exhibit “B,” signed by the authorized representative(s) of the Operator.

1.49 “Operator Parties” means, collectively, the Operator, its directors, officers, employees, agents and legal representatives.

1.50 “Operator Party” means, individually, the Operator and each of its directors, officers, employees, agents and legal representatives.

1.51 “Parties” means, collectively, the Authority and the Operator.

1.52 “Party” means, individually, either the Authority or the Operator, as applicable.

1.53 “Person” means any association, corporation, Government, individual, joint venture, joint-stock company, limited liability company, partnership, trust, unincorporated organization or other entity of any kind.

1.54 “Prohibited Lien” means any mechanic’s, vendor’s, laborer’s, or material supplier’s statutory lien or other similar lien arising from work, labor, services, equipment, or materials supplied, or claimed to have been supplied, to the Operator (or anyone claiming through the Operator).

1.55 “Property Insurance” means insurance providing coverage against loss, damage, or destruction of the Garden and all Garden Improvements by fire and other hazards encompassed under the broadest form of property insurance coverage then customarily used for like properties in the County (except earthquake or war risk) from time to time during the Term, in an amount equal to 100% of the replacement value (without deduction for depreciation) of all of the Garden Improvements (excluding excavations and foundations) and in any event sufficient to avoid co-insurance, with “ordinance or law” coverage. Such insurance may contain a deductible clause not exceeding Five Thousand Dollars (\$5,000). To the extent customary for like properties in the County at the time, such insurance shall include coverage for earthquake; coverage for explosion of steam and pressure boilers and similar apparatus located at the Garden; coverage for terrorism; an “increased cost of Construction” endorsement; and an endorsement covering demolition and cost of debris removal.

1.56 “Property Insurance Proceeds” means net proceeds (after reasonable costs of adjustment and collection, including Legal Costs) of Property Insurance, when and as received by the Authority or the Operator.

1.57 “Renovation” means the replacement, major repair, renewal or reconstruction of all or any portion of the Garden Improvements, including building roofs, slabs, foundations or walls; heating, ventilation, air conditioning, plumbing, sewer, utility, irrigation or drainage systems; lighting; paved areas, including circulation walkways; signage, windows, awnings, patio covers and exterior facade components and coverings.

1.58 “Restoration” means, after a Casualty, the alteration, clearing, rebuilding, reconstruction, repair, replacement, restoration and safeguarding of the damaged or remaining Garden Improvements, substantially consistent with their condition before the Casualty, subject to any changes in Law that would limit any such activities.

1.59 “Restoration Funds” means any Property Insurance Proceeds (and deposits by the Operator) to be applied to Restoration.

1.60 “Restore” means accomplish a Restoration.

1.61 “Scheduled Expiration Date” means 11:59 p.m. on June 30, 2023.

1.62 “Substantial Casualty” means a Casualty that: (a) renders 40% (forty percent) or more of the Garden not capable of being used or occupied for more than one hundred eighty (180) days; (b) requires Restoration whose cost the Authority reasonably estimates in writing would exceed Two Hundred Thousand Dollars (\$200,000); or (c) pursuant to Law, prevents the

Garden from being Restored to substantially the same bulk, and for the same use(s), as before the Casualty.

1.63 “Term” is defined in Section 4.

1.64 “Third Person” means any Person that is not a Party or an elected official, officer, director, manager, shareholder, member, principal, partner, employee or agent of a Party.

1.65 “Unavoidable Delay” means delay in performing any obligation under this Agreement, except payment of money, arising from or on account of any cause whatsoever beyond the obligor’s reasonable control, despite such obligor’s reasonable diligent efforts, including industry-wide strikes, labor troubles or other union activities, the obligor’s inability to obtain required labor or materials after commercially reasonable efforts to do so, litigation (unless caused by the obligor), Casualty, accidents, Laws, governmental preemption, war, or riots. Unavoidable Delay shall exclude delay caused by the obligor’s financial condition, illiquidity, or insolvency. Any Party claiming Unavoidable Delay shall Notify the other Party: (a) within ten (10) days after the claiming Party knows of any such Unavoidable Delay; and (b) within ten (10) days after such Unavoidable Delay ceases to exist. To be effective, any such Notice must describe the Unavoidable Delay in reasonable detail. Where this Agreement states that performance of any obligation is subject to Unavoidable Delay(s) or words of similar import, such Unavoidable Delay(s) shall extend the time for such performance only by the number of days by which such Unavoidable Delay(s) actually delayed such performance.

1.66 “Waiver of Subrogation” means a provision in, or endorsement to, any insurance policy, by which the carrier agrees to waive rights of recovery by way of subrogation against either Party to this Agreement for any loss such policy covers.

1.67 “Workers Compensation Insurance” means worker’s compensation insurance complying with the provisions of California law and an employer’s liability insurance endorsement with commercially standard limits covering all employees of the Operator, its contractors and vendors.

**2. INCORPORATION OF LICENSE AGREEMENT.** This Agreement is expressly subject to all of the terms and conditions of the License Agreement and this Agreement shall automatically terminate on the termination of the License Agreement in its entirety. The Authority shall have the right to modify or amend the License Agreement with the reasonable consent of the Operator. All of the terms and conditions of the License Agreement are incorporated into this Agreement by reference.

**3. ASSUMPTION OF LICENSE OBLIGATIONS.** The Operator hereby acknowledges and assumes all obligations of the Authority under and pursuant to the terms and conditions of the License Agreement regarding use and operation of the Garden.

**4. TERM.** The “Term” of this Agreement shall: (a) commence, if at all, on the Effective Date; and (b) continue until the Scheduled Expiration Date, unless terminated sooner.

**5. GARDEN OPERATION AND MAINTENANCE.**

5.1 Operation and Maintenance Covenant. The Authority hereby contracts with the Operator to maintain and operate the Garden pursuant to the terms of this Agreement, and the



Operator covenants and agrees to continuously maintain and operate the Garden pursuant to the terms of this Agreement, throughout the entire Term.

5.2 Operation and Maintenance License. The Authority hereby licenses the Operator to enter the Garden to perform Maintenance and Repair and to operate the Garden as provided in this Agreement, without further consent or approval from the Authority, except as otherwise provided in this Agreement.

5.3 Permits, Licenses, Etc. The Operator shall, for the full Term, at the Operator's sole cost and expense, maintain all franchises, permits, contractual arrangements, licenses, and registrations necessary for the Operator to conduct all operations, Maintenance and Repair, Educational Programming and other activities relating to the Garden to be undertaken by the Operator pursuant to this Agreement.

5.4 Abandonment. The Operator shall not abandon or surrender the operation of all or any part of the Garden during the Term, except as otherwise expressly provided in Section 14 or Section 17.

5.5 General Operational Responsibilities. The Operator shall have the following described general responsibilities regarding operation of the Garden, in which the Operator shall perform at Operator's sole expense:

5.5.1 enter into and pay any costs associated with contracts for the furnishing of utilities, maintenance, telecommunications, repair and other services to the Garden;

5.5.2 incur and pay such expenses as shall be reasonably necessary for the proper operation of the Garden;

5.5.3 maintain a level of Operating Inventory reasonably appropriate for supplying the needs of the Garden and its users;

5.5.4 apply for, obtain and maintain all licenses and permits required of the Operator in connection with the operation of the Garden. The Authority shall reasonably cooperate with the Operator in the application for, obtaining and maintenance of such licenses and permits; provided that such cooperation by the Authority is legally permitted and does not result in any direct or indirect cost to the Authority;

5.5.5 exercise reasonable efforts to do, or cause to be done, all acts in and about the Garden as shall be reasonably necessary to comply with any applicable insurance policies or Law;

5.5.6 maintain FF&E and purchase new FF&E as necessary to perform Maintenance and Repair and operate the Garden, including replacing worn out, damaged, destroyed, lost or stolen FF&E;

5.5.7 in accordance, as applicable, with defense and indemnification rights contained in contracts of insurance procured and maintained by the Operator, defend and settle claims, lawsuits and demands relating to the Garden and retain legal counsel (and pay legal fees and costs) who, under the direction of the Operator or the insurance carrier, will defend any claims or actions brought against the Operator Parties relating to the Garden and will institute

and defend any and all legal actions or proceedings as shall be reasonably necessary to collect charges, fees or other income for the Garden, or to cancel or terminate any license, vendor or concession agreement or other contract on the grounds of default. The Operator shall notify the Authority of any claims or lawsuits relating to the Garden on a timely basis. Legal counsel to the Operator's insurance carrier that is providing a defense to the Authority Parties shall be deemed satisfactory to the Authority, subject to any conflict of interest or incompetency of such legal counsel; and

5.5.8 hire, train, and supervise all employees necessary for operation of the Garden, including providing Educational Programming to the public;

5.5.9 make reasonable good faith marketing and outreach efforts to market the Garden and Educational Programming to the public, including maintenance of the current website marketing the Garden;

5.5.10 establish accounting and payroll procedures and functions for the Garden; and

5.5.11 continue to operate the Garden on the days and at hours consistent with the Authority's practices as of the Effective Date, or greater, subject to closure due to inclement weather, Casualty, or Unavoidable Delay.

**5.6 Maintenance and Repair:** Except to the extent that this Agreement otherwise expressly provides or allows, the Operator shall, during the Term, keep and maintain the Garden in good order, condition, and repair, at Operator's sole cost and expense, subject to Casualty, reasonable wear and tear, and any other condition that this Agreement does not require the Operator to repair or Restore. The Operator's obligation to maintain the Garden includes the obligation to make all repairs and Restorations that the Garden may require (including plumbing, heating, air conditioning, ventilating, electrical, lighting, fixtures, walls, any required Renovation, building systems, ceilings, floors, windows, doors, plate glass, skylights, landscaping, driveways, site improvements, curb cuts, parking lots, fences and signs located in, on or at the Garden, together with any sidewalks and streets adjacent to the Garden) by Law, pursuant to applicable insurance policies or pursuant to the Garden Maintenance Standards, from time to time during the Term, whether structural or nonstructural, foreseen or unforeseen, capital or operating. The Operator shall remove trash, snow, mud, sand and debris from the Garden and the adjoining sidewalks and maintain them in a reasonably clean condition. **Notwithstanding the foregoing and as a way of clarification, the Parties agree to assign and share costs as set forth in Exhibit D.**

5.7 Contracts and Agreements. All equipment leases, financing agreements, contracts and agreements relating to the Garden (including without limitation contracts for utility services, telecommunications services, Maintenance and Repair, pest control, supplies, landscaping services, and agreements for Group Functions), entered into during the Term shall be entered into by the Operator as the contracting party. The Operator shall not have any authority to enter into any equipment lease, financing agreement, contract or agreement that extends beyond the Term of this Agreement or that is secured by all or any part of the Garden or the Garden Improvements. All contracts entered into by the Operator regarding the Garden shall automatically expire on the Expiration Date.

5.8 No Discrimination or Segregation. Developer covenants by and for itself and all Persons claiming under or through it that there shall be no discrimination against or segregation of any Person or group of Persons, on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the use, occupancy, tenure, or enjoyment of the Garden nor shall the Operator or any Person claiming under or through the Operator establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use, or occupancy, of users or vendors of the Garden.

5.9 Noise. The Operator shall not use or permit the use of the Garden in any manner that creates or maintains any noise or sound that, when measured at any place along the boundary line of the Garden, exceeds the applicable sound level standard established by any Government for the Garden.

5.10 Nuisance. The Operator shall not itself and shall not allow any other Person to use the Garden for any unlawful purpose and shall not itself and shall not allow any other Person to perform, permit or suffer any act or omission upon or about the Garden that would result in a nuisance or a violation of any Law, as the same may now or hereafter be in force and effect.

5.11 Signage.

5.11.1 All signs on or in the Garden will be maintained by the Operator in good condition during the Term.

5.11.2 At the Authority's request, the Operator will remove signs identified by the Authority that are installed on or in the Garden by the Operator on or before the Expiration Date, except as otherwise agreed between the Operator and the Authority, and repair and restore any damage caused by installation or removal of such signs. All signs on or in the Garden shall comply with all applicable Laws.

5.11.3 The Operator shall not cause or allow the display of any advertising of alcohol, tobacco products or adult entertainment on, in or about the Garden.

5.12 Group Functions. The Operator shall be responsible for administration of Group Functions at the Garden, including approving applications for Group Functions, entering into Group Function agreements and charging fees for Group Functions.

5.13 Authority Activities. The Authority shall have the right to use the Garden for Authority initiated special events that are scheduled with the prior approval of the Operator, in the Operator's reasonable discretion (each, an "Authority Activity"). The Garden shall be available for each Authority Activity free of any facility rental or admission charge to the Authority.

5.14 Payment of Prevailing Wages.

5.14.1 When so required by California law, the Operator agrees that not less than "prevailing wages," as that term is defined in California Labor Code Sections 1770, et seq., shall be paid by the Operator, its contractors, and any sub-contractors to all laborers employed in connection with the Construction or installation of any improvements or Maintenance and

Repair related to the Garden. The Operator shall maintain and shall cause each of its contractors to maintain certified payroll records, pursuant to California Labor Code Section 1776, relative to all work performed relating to the Garden. The Authority shall have the right, but not the obligation, to inspect and copy all of the Operator's payroll records and the payroll records of each of the Operator's contractors and subcontractors relating to the Garden. The Authority shall also have the right to exercise the remedies provided in the California Labor Code, in addition to all other remedies available to the Authority at law, under contract, or in equity, in the event of a breach or Default by the Operator of its obligations under this Section 5.14.

5.14.2 THE OPERATOR, ON BEHALF OF ITSELF, ITS SUCCESSORS, AND ASSIGNS, WAIVES AND RELEASES THE AUTHORITY FROM ANY RIGHT OF ACTION THAT MAY BE AVAILABLE TO ANY OF THEM PURSUANT TO CALIFORNIA LABOR CODE SECTION 1781. THE OPERATOR ACKNOWLEDGES THE PROTECTIONS OF CALIFORNIA CIVIL CODE SECTION 1542 RELATIVE TO THE WAIVER AND RELEASE CONTAINED IN THIS SECTION 5.14, WHICH READS AS FOLLOWS:

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.

5.14.3 BY INITIALING BELOW, THE OPERATOR KNOWINGLY AND VOLUNTARILY WAIVES THE PROVISIONS OF CALIFORNIA CIVIL CODE SECTION 1542 SOLELY IN CONNECTION WITH THE WAIVERS AND RELEASES CONTAINED IN THIS SECTION 5.14.

5.14.4 ADDITIONALLY, THE OPERATOR SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS THE AUTHORITY, PURSUANT TO THE PROVISIONS OF SECTION 13, AGAINST ANY CLAIMS PURSUANT TO CALIFORNIA LABOR CODE SECTION 1781 ARISING FROM THIS AGREEMENT OR THE CONSTRUCTION OR INSTALLATION OF ANY IMPROVEMENTS OR MAINTENANCE AND REPAIR RELATING TO THE GARDEN, UNDERTAKEN BY OR ON BEHALF OF THE OPERATOR.

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Initials of Authorized Operator Representative

5.15 Independent Contractor. The Operator shall at all times be an independent contractor under this Agreement. Nothing contained in this Agreement shall be construed to be or create a partnership or joint venture between the Authority and the Operator or its successors or assigns.

5.16 Shared Resources. To the extent allowed by and consistent with Authority member agencies rules, regulations, and policies, the Authority, through its member agencies, and Operator shall use their best efforts to share resources and work cooperatively to advance the

Garden. ~~No later than June 30, 2018,~~If necessary the Authority and Operator shall develop a policy designed to increase cooperation in the following areas:

5.16.1 Donation of in kind services and support including donation of surplus furniture, fixtures and equipment; and

5.16.2 Evaluation and census data collection efforts; and

5.16.3 Outreach and membership drives; and

5.16.4 Marketing development and efforts.

5.17 Naming Rights. The naming or renaming of the Garden, any facilities at the Garden, or Core Exhibits shall be done by mutual consent of the Authority and the Operator.

6. **OPERATOR ACCEPTANCE OF CONDITION OF GARDEN.** The Operator agrees to accept the Garden on the Effective Date in an “as-is” condition, subject to any and all physical, legal or other faults. The Operator acknowledges that the Operator will be accepting the Garden based upon the Operator’s own investigations of the Garden’s condition. Except as otherwise specifically stated in this Agreement, the Operator also agrees to accept the Garden based on the Operator’s knowledge that neither the Authority nor any agent of the Authority, has made any representation or warranty whatsoever, express or implied, with regard to the physical condition of the Garden or the suitability of the Garden for any particular purpose or use, including, without limitation, any representations or warranties regarding the applicability or non-applicability of any Law, the soil or subsoil, surface or subsurface conditions, topography, possible Hazardous Substance contamination, fill, drainage, access to public roads, availability of utilities, existence of underground storage tanks, applicability of or compliance with any Environmental Laws, environmental impact report requirements or any other matter of any nature whatsoever.

## 7. **GARDEN EXPENSES**

7.1 Operator to Pay All Garden Expenses. Except as expressly provided in Section 7.3, the Operator shall pay all Garden Expenses. The Operator shall pay and discharge, as and when due, each and every item of expense, of every kind and nature whatsoever, related to or arising from the Garden, or by reason of or in any manner connected with or arising from the operation, management, maintenance, repair, use or any other matter affecting the Garden and attributable to the Term. The Operator further acknowledges and agrees that the Operator will be solely responsible for operating losses or deficits arising in the operation of the Garden during the Term and that any such losses or deficits shall not abate any obligations of the Operator under this Agreement.

7.2 Acknowledgment of Possessory Interest Tax. The Operator acknowledges that, if and to the extent that this Agreement gives rise to assessment of a possessory interest tax under Revenue and Taxation Code Section 107 or any other tax, the Operator shall be obligated to pay such tax.

7.3 Authority Contribution and Annual Budget Process.

7.3.1 The Authority has and shall continue to make an annual financial contribution (“Authority Contribution”) to the Operator. As of the date of this Agreement, Authority’s Contribution for FY 2018/2019 is \$484,000. The Authority’s Contribution shall decrease ~~annual~~annually, pursuant to the schedule below, until it reaches \$320,000 (the “Base Contribution”). ~~Each subsequent fiscal year the Authority Contribution shall be the Base Contribution.~~

(a) FY 2018/2019 Contribution: \$484,000

(b) FY 2019/2020 Contribution: \$459,800 (5% reduction)

(c) FY 2020/2021 Contribution \$413,820 (10% reduction)

(d) FY 2021/2022 Contribution \$372,440 (10% reduction)

(e) FY 2022/2023 and forward annual Contribution \$320,000 (14% reduction)

7.3.2 ~~By FY 2022/2023~~At least \$20,000 of the Authority’s Contribution shall be allocated ~~as follows:~~to Deferred Maintenance annually.

~~(a) \$300,000 for operations including maintenance staff, supplies and utilities; and~~

~~(b) \$20,000 for Deferred Maintenance Projects.~~

~~(c) Any additional funding provided by the Authority shall be allocated by mutual consent of the Parties.~~

~~(a) (d) Any reallocation of the Base Contribution shall be by mutual consent of the Parties.~~

7.3.3 On or before each May 15 during the Term, Operator shall prepare and submit to Authority for the Authority’s information an annual operating budget for the Garden for the fiscal year beginning on the immediately following July 1 showing, at a minimum, projected income from Garden operations for such fiscal year (including the specific amounts of fees or charges to be assessed for Garden use during such fiscal year), projected Operator fundraising revenue for Garden Expenses for such calendar year and the projected amount of Garden Expenses for such fiscal year, each on a semi- annual and annual basis. The proposed annual budget shall show assumptions and anticipated significant events during the subject fiscal year. Within thirty (30) calendar days following the Authority’s receipt of the proposed annual budget for the Garden for a particular fiscal year, Authority shall provide any comments on the proposed annual budget for Operator’s consideration.

7.4 Fundraising. The Operator shall at all times during the term maintain its non-profit status with both the federal government of the United States and the government of the State of California. The Operator shall at all times during the Term make good faith fundraising efforts for the collection of charitable donations of funds from Persons other than the Authority to pay Garden Expenses in accordance with the then current annual budget for the Garden ~~approved~~reviewed by the Authority in accordance with Section 7.3.

7.5 Utilities. The Operator shall arrange and pay for all fuel, gas, light, power, water, sewage, garbage disposal, telephone and other utility charges, and the expenses of installation, maintenance, use, and service in connection with the foregoing, for the Garden during the Term. The Authority shall have absolutely no liability or responsibility for any utilities or other services for the Garden during the Term. Notwithstanding the foregoing, one half of all utility costs shall be paid from the Authority contribution as set forth in Section 7.3.

7.6 Garden Endowment Contribution. The Parties agree that with the Authority Contribution decreasing annually until reaching the Base Contribution in 2022/2023, the Operator will need to increase fundraising and endowment growth efforts. The Operator shall commence in FY 2019/2020 depositing five percent (5%) of revenue received from corporate membership funds, overall sales onsite and online, and unrestricted donations into the Garden Endowment Fund. In FY 2021/2022, the Parties shall conduct a fiscal assessment of the Garden finances to determine if the this annual endowment contribution can be increased to a maximum of ten percent (10%) of the above identified revenues. Any increase shall be at a mutually agreed upon amount.

## 8. RECORDS, REPORTS AND AUDITS

8.1 Sales Recording and Records. The Operator shall record at the time of sale, in the presence of the customer, receipts from sales or other transactions, whether cash or credit, in a cash register or registers, or a point of sale terminal or terminals, having a tape that accumulates and consecutively numbers all transactions. A receipt from any transaction showing the correct amount of purchase shall be offered to the customer at the time of any transaction, including any cash sale. Transactions not ordinarily recorded in a cash register or point of sale terminal shall be noted on and kept in a ledger format.

8.2 Retention of Books and Records. The Operator shall, for a period of five (5) years following the end of the Term, keep and maintain, safe and intact, all of the records, books and accounts required to be maintained by the Operator regarding the Garden pursuant to this Agreement, and shall from time to time, upon request, make these records available to the Authority, the Authority's auditor, representative or agent for examination at any reasonable time, on ten (10) calendar days advance Notice. The Authority shall also have the right to make abstracts from the records or make copies of any or all of the records. In addition, on request of the Authority or the Authority's representative, the Operator shall furnish copies of the Operator's State of California and local sales and use tax returns.

8.3 Annual Update to Strategic Plan. Annually, Operator will review the Strategic Plan with the Authority.

### 8.4 Operator and Annual Reports.

8.4.1 Operator shall provide to each Authority member agency Board no later than March 15, June 15, September 15, and December 15 of each year, in writing, or in person if requested by the Authority member agency Board, a quarterly report which shall address:

(a) Financials: Financial reporting will include summary of fundraising efforts, educational income, grants and earned revenue and expenses.

(b) Attendance: Attendance through turnstiles, classes, field trips, assemblies and outreach.

(c) Garden Renewal: Update on renewal efforts of Deferred Maintenance Projects and continued maintenance of Core Exhibits.

(d) Exhibits: Consultation regarding any new exhibits over \$100,000 or major overhaul of Core Exhibits consistent with Section 10 below.

8.4.2 By December 15 each year, Operator shall provide to each Authority member agency Board in writing, or in person if requested by the Authority member agency Board, the Operator's Annual Report and updates to the Strategic Plan.

8.5 Communication. To facilitate open, effective, and efficient communication the Parties shall utilize the following communication process:

8.5.1 Member agencies shall communicate to and through the Authority Board;

8.5.2 Authority may provide direction to the Executive Director regarding the Core Exhibits and the Section 8.3 Reports. The Authority shall not provide direction to the Executive Director regarding day to day operational issues;

8.5.3 Authority and Operator shall share information regularly, including holding not less than one joint meeting annually. Authority may provide direction to the Operator regarding Core Exhibits and the Section 8.3 Reports;

~~8.5.4 The Operator and Executive Director shall share information regularly. The Operator Board may provide direction to the Executive Director regarding policy and operational issues;~~

~~8.5.5 The Executive Director shall be responsible for all communication with Garden staff.~~

9. **LEGAL COMPLIANCE.** The Operator shall during the Term, at the Operator's sole cost and expense, in all material respects: (a) comply with all Laws; and (b) procure and comply with all Approvals required by Law.

10. **ALTERATIONS TO GARDEN.** Operator shall not do any of the following without the prior written approval of Authority: (a) construct any new buildings or exhibits within the Garden with a value in excess of One Hundred Thousand Dollars (\$100,000.00);(b)remove any exhibits; or (c) construct an exhibit so significant as to change the focus or purpose of the Core Exhibit. Operator may make new plantings, modify existing exhibits or maintain existing buildings and exhibits as reasonably required or desirable in the normal operation of the Garden in accordance with its obligations under this Agreement, without any further consent of Authority.

## 11. PROHIBITED LIENS

11.1 Operator's Covenant. If a Prohibited Lien is filed, then the Operator shall, within fifteen (15) days after receiving notice of such filing, cause such Prohibited Lien to be



released. If the Authority receives notice of any such filing, then the Authority shall promptly Notify the Operator.

11.2 Protection of the Authority. NOTICE IS HEREBY GIVEN THAT THE AUTHORITY SHALL NOT BE LIABLE FOR ANY LABOR OR MATERIALS FURNISHED OR TO BE FURNISHED TO THE OPERATOR UPON CREDIT AND THAT NO MECHANIC'S OR OTHER LIEN FOR ANY SUCH LABOR OR MATERIALS SHALL ATTACH TO OR AFFECT THE FEE ESTATE. NOTHING IN THIS AGREEMENT SHALL BE DEEMED OR CONSTRUED IN ANY WAY TO CONSTITUTE THE AUTHORITY'S CONSENT OR REQUEST, EXPRESS OR IMPLIED, BY INFERENCE OR OTHERWISE, TO ANY CONTRACTOR, SUBCONTRACTOR, LABORER, EQUIPMENT OR MATERIAL SUPPLIER FOR THE PERFORMANCE OF ANY LABOR OR THE FURNISHING OF ANY MATERIALS OR EQUIPMENT, NOR AS GIVING THE OPERATOR ANY RIGHT, POWER OR AUTHORITY TO CONTRACT FOR, OR PERMIT THE RENDERING OF, ANY SERVICES, OR THE FURNISHING OF ANY MATERIALS OR EQUIPMENT THAT WOULD GIVE RISE TO THE FILING OF ANY LIENS AGAINST THE FEE ESTATE. THE OPERATOR SHALL INDEMNIFY THE AUTHORITY AGAINST ANY ACTION UNDERTAKEN BY THE OPERATOR OR ANYONE CLAIMING THROUGH THE OPERATOR, AND AGAINST ALL PROHIBITED LIENS, PURSUANT TO SECTION 13.

11.3 Garden Not Subject to Mechanic's Liens. The Garden is owned by the GCCCD, which is a public entity, and as a result, the Garden is not subject to the imposition of mechanic's liens. The Operator agrees to notify, in writing, each provider of labor, material or services on or to the Garden of such fact and that neither the GCCCD, the Authority nor the Garden shall be responsible for payment of any claims by any such providers of labor, material or services. The Authority shall have the right at all reasonable times to post and keep posted on the Garden any notices that the Authority may deem necessary for the protection of the Authority or the Garden from mechanic's liens or other claims. The Operator shall give the Authority, at least, ten (10) calendar days prior Notice of the commencement of any work on the Garden with a reasonably anticipated cost exceeding Ten Thousand Dollars (\$10,000) and that could otherwise give rise to a mechanic's lien or other similar claim or lien, but for the Authority's ownership of the Garden, to enable the Authority to post any notices that the Authority may deem appropriate.

## 12. HAZARDOUS SUBSTANCES

12.1 Restrictions. The Operator shall not cause or permit to occur on, under or at the Garden during the Term: (a) any violation of any Environmental Law; or (b) the use, generation, release, manufacture, refining, production, processing, storage, or disposal of any Hazardous Substance, or transportation to or from the Garden of any Hazardous Substance, unless both: (i) reasonably necessary and customary to operate and maintain the Garden for uses this Agreement permits; and (ii) in compliance with all Environmental Law.

12.2 Compliance; Clean-Up. The Operator shall, at the Operator's sole expense: (a) comply with all Environmental Laws applicable to the Garden and, to the extent Environmental Law requires, clean up any Hazardous Substance Discharge; (b) make all submissions to, deliver all information required by, and otherwise fully comply with all requirements of any Government under Environmental Law; (c) if any Government requires any clean-up plan or clean-up because of a Hazardous Substances Discharge, prepare and submit the

required plans and all related bonds and other financial assurances; (d) promptly and diligently carry out all such clean-up plans; and (e) Indemnify the Authority Parties against any Hazardous Substances Discharge or violation of Environmental Law, in accordance with Section 13.

### 13. **INDEMNIFICATION; LIMIT ON LIABILITY OF AUTHORITY**

13.1 Operator Indemnification of Authority Parties. The Operator shall Indemnify the Authority Parties against any: (a) wrongful act, wrongful omission, or negligence of the Operator (and anyone claiming by or through the Operator) or its or their shareholders, directors, officers, elected officials, partners, attorneys, agents or employees; (b) breach or Default by the Operator under this Agreement; or (c) breach of any representation or warranty the Operator makes in this Agreement; (d) any Application made at the Operator's request; (e) use, occupancy management or operation of the Garden; (f) any agreements that the Operator (or anyone claiming through the Operator) makes regarding the Garden; (g) the condition of the Garden or any street, curb or sidewalk adjoining the Garden, or of any vaults, tunnels, passageways or space under, adjoining or appurtenant to the Garden; and (h) any accident, injury or damage whatsoever caused to any Person in or on the Garden or upon or under the sidewalks adjoining the Garden.

13.2 Authority Indemnification of Operator. The Authority shall Indemnify the Operator against any: (a) wrongful act, wrongful omission, or negligence of the Authority (and anyone claiming by or through the Authority) or its or their shareholders, directors, officers, elected officials, partners, attorneys, agents or employees; (b) breach or Default by the Authority under this Agreement; or (c) breach of any representation or warranty the Authority makes in this Agreement; (d) any Application made at the Authority's request; and (e) any agreements that the Authority (or anyone claiming through the Authority) makes regarding the Garden.

13.3 Limitation on Liability of the Authority. During the Term: (a) the Operator is and shall be responsible for operation of the Garden; and (b) the Authority shall not be liable for any injury or damage to any property (of the Operator or any other Person) or to any Person occurring on or about the Garden, except to the extent caused by the Authority's intentional or negligent act or omission. Provisions of this Agreement or the License Agreement regarding the Authority's rights or obligations with respect to the Garden shall not impose upon the Authority any liability to Third Persons. Nothing in this Agreement shall be construed to exculpate, relieve, or Indemnify the Authority from or against any liability of the Authority: (i) to Third Persons existing on or before the Effective Date; or (ii) arising from the Authority's wrongful intentional act or negligence.

13.4 Strict Liability. The indemnification obligations of the Operator under this Agreement shall apply regardless of whether liability without fault or strict liability is imposed or sought to be imposed on one or more of the Authority Parties.

13.5 Independent of Insurance Obligations. The Operator's indemnification obligations under this Agreement shall not be construed or interpreted as in any way restricting, limiting, or modifying the Operator's insurance or other obligations under this Agreement and is independent of the Operator's insurance and other obligations under this Agreement. The Operator's compliance with its insurance obligations and other obligations under this Agreement shall not in any way restrict, limit, or modify the Operator's

indemnification obligations under this Agreement and are independent of the Operator's indemnification and other obligations under this Agreement.

13.6 Survival of Indemnification and Defense Obligations. The indemnification and defense obligations of the Operator under this Agreement shall survive the expiration or earlier termination of this Agreement, until all claims against any of the Authority Parties involving any of the indemnified matters are fully, finally, and absolutely and completely barred by the applicable statutes of limitations.

## 14. INSURANCE

14.1 Operator to Insure. The Operator shall, during the Term, maintain the following insurance (or its then reasonably available equivalent): (a) Property Insurance; (b) Liability Insurance; (c) Automobile Liability Insurance; (d) Worker 's Compensation Insurance; and (e) Director and Officers Insurance.

14.2 Nature of Insurance Program. All Property Insurance and Liability Insurance policies this Agreement requires will be procured by the Operator through GCCCD or otherwise shall be issued by carriers that: (a) are listed in the then current "Best's Key Rating Guide-Property/Casualty-United States & Canada" publication (or its equivalent, if such publication ceases to be published) with a minimum financial strength rating and a minimum financial size category equivalent to that of GCCCD; and (b) are admitted to do business in the State by the State Department of Insurance. The Operator may provide any Property Insurance or Liability Insurance coverage under a "blanket" or "umbrella" insurance policy, provided that: (i) such policy specifies the amount(s) of the total insurance allocated to the Garden, which amount(s) shall, when combined with the underlying policy liability limits, equal or exceed the amount(s) required by this Agreement and shall not be reduced for claims made for other properties; and (ii) such policy otherwise complies with this Agreement.

14.3 Policy Requirements and Endorsements. All insurance policies this Agreement requires shall contain (by endorsement or other policy provision) the following provisions:

14.3.1 Insured. Liability Insurance policies shall name both the Authority and the GCCCD as an "additional insured." Property Insurance policies shall name both the Authority and the GCCCD as loss payee, as their respective interests may appear. Notwithstanding anything to the contrary in this Section 14.3.1, all Property Insurance Proceeds shall be paid and applied as this Agreement provides.

14.3.2 Primary Coverage. All policies shall be written as primary policies, not contributing to or in excess of any coverage that the Authority may carry.

14.3.3 Contractual Liability. Liability Insurance policies shall contain contractual liability coverage, for the Operator's indemnity obligations under this Agreement. The Operator's obtaining or failure to obtain such contractual liability coverage shall not relieve the Operator from nor satisfy any indemnity obligation of the Operator under this Agreement.

14.3.4 Notice to the Authority. Each insurance policy shall require the carrier to give the Authority no less than thirty (30) calendar days' advance written notice of any cancellation, non-renewal, material change in coverage or available limits of liability under

any insurance policy required by this Agreement; provided, however, only ten (10) calendar days' advance written notice shall be required for cancellation of any insurance policy for non-payment of the premium.

14.4 Deliveries to the Authority. On the Effective Date, and no later than twenty (20) days before any Liability Insurance, Automobile Liability Insurance or Property Insurance expires, is cancelled or its liability limits are materially reduced or exhausted, the Operator shall deliver to the Authority policies of insurance evidencing the Operator 's maintenance of all Liability Insurance, Automobile Liability Insurance and Property Insurance this Agreement requires, in each case providing coverage for, at least, twelve (12) months from the date delivered.

14.5 Waiver of Certain Claims. Policies of Liability Insurance or Property Insurance shall include a Waiver of Subrogation, by endorsement or other policy provision. The Parties release each other, and their respective authorized representatives, from any claims for damage to any Person or property that are caused by or result from risks insured against under such insurance policies.

14.6 No Representation. Neither Party makes any representation that the limits, scope, nor are forms of insurance coverage this Agreement requires adequate or sufficient.

## 15. CASUALTY

15.1 Notice. If either Party becomes aware of any Casualty, such Party shall promptly Notify the other Party.

15.2 Effect of Casualty. If any Casualty occurs, then: (a) this Agreement shall not terminate or be impaired; and (b) the Operator shall Restore with reasonable promptness regardless of cost. If, however, the Casualty is a Substantial Casualty, then the Operator may, by Notice to the Authority, given within thirty (30) days after the occurrence of the Casualty, terminate this Agreement effective sixty (60) days after such Notice, provided that the Operator assigns to the Authority all of the Operator's right, title and interest in and to any Property Insurance Proceeds (and rights thereto) arising from the Casualty.

15.3 Obligation to Restore. If the Operator does not timely elect to terminate this Agreement or is required to Restore the Garden Improvements pursuant to this Agreement, the Operator shall immediately deposit with the Authority either an amount equal to the deficiency in insurance proceeds actually available for Restoration and the cost of Restoration, or security reasonably satisfactory to the Authority for such deficiency. If the Operator is required or elects to Restore, the Operator shall, as soon as is reasonable under the circumstances, commence and continue thereafter diligently and without interruption, at the Operator's sole cost and expense (but the Operator may use any insurance proceeds available for such purpose), Restore the Garden Improvements as nearly as possible to the condition they were in immediately prior to the Casualty, or with such changes or alterations as may be approved by the Authority.

15.4 Adjustment of Claims; Use of Property Insurance Proceeds. Unless the Operator has validly elected a Casualty Termination, the Operator shall have the sole right and authority to adjust any insurance claim. Property Insurance Proceeds shall be disbursed to the Operator, to

be held in trust for the benefit of the Authority, and released by the Operator in installments based on progress of completion of work of Restoration.

16. **ASSIGNMENT.** The Operator may not assign this Agreement, without the Authority's prior written consent, which may be given or withheld in the Authority's sole and absolute discretion. Any approved assignee of the Operator shall assume all obligations and liabilities of the Operator under this Agreement in a writing reasonably satisfactory to the Authority, on the effective date of any such assignment. After the Operator assigns this Agreement and the assignee assumes the Operator's obligations under this Agreement, in accordance with this Agreement, the assignor shall have no obligation or liability under this Agreement, except: (a) any obligation to hold and apply Restoration Funds held by the assignor at the date of the assignment (unless transferred to the assignee in a form acceptable to the Authority); and (b) any unperformed obligations that arose before the assignment (unless assumed in writing by the assignee in a form acceptable to the Authority). If the Operator assigns this Agreement, then as between the Authority and the Operator, the Operator shall be deemed to have assigned to the assignee all claims against the Authority then existing, and the assignee shall be deemed, by assuming this Agreement, to have assumed all liabilities and obligations of the Operator then existing or thereafter arising under this Agreement (except as this Agreement otherwise expressly states).

17. **AUTHORITY AND GCCCD ACCESS TO GARDEN.** Notwithstanding anything to the contrary in this Agreement, the Authority, its agents, representatives or designees may enter the Garden to: (a) ascertain whether the Operator is complying with this Agreement; (b) cure the Operator's Defaults; (c) inspect the Garden; or (d) perform such tests, borings, and other analyses as the Authority determines may be necessary or appropriate relating to (non)compliance with any Law or possible Hazardous Substances Discharge. In addition, the GCCCD shall retain all rights of access to the Garden reserved to it in the License Agreement. In entering the Garden, the Authority or its designees shall not unreasonably interfere with operation of the Garden.

18. **NO PROPERTY ESTATE OR INTEREST CONVEYED.** Notwithstanding any provision of this Agreement to the contrary, the Parties do not intend to convey any interest or estate in real or personal property between them and nothing in this Agreement shall be construed or interpreted as a grant of any interest or estate in any property, except to the extent that Operator agrees to assignment of rights in License Agreement, which provides that property of Authority shall go to Operator in the event of Authority dissolution. If this Agreement or any provision of this Agreement is construed or interpreted by a court of competent jurisdiction as conveying an estate or interest in property between the Parties (excepting FF&E on the Expiration Date), then any Party not then in Default of this Agreement may, in such Party's sole and absolute discretion, terminate this Agreement, without liability to the other Party or any other person for such termination, by delivering Notice of termination to the other Party within thirty (30) calendar days following notice of such court determination. Without limiting the right of either Party to terminate this Agreement, pursuant to the immediately preceding sentence, if neither Party has exercised its contractual right to terminate this Agreement within thirty (30) calendar days following notice of such court determination, then upon the expiration of such thirty (30) calendar day period, the Parties' respective rights to terminate this Agreement pursuant to this Section 18 shall be extinguished.

19. **EVENTS OF DEFAULT; REMEDIES**

19.1 Definition of “Event of Default.” An “**Event of Default**” means the occurrence of any one or more of the following:

19.1.1 Monetary Default. If a Monetary Default occurs and continues for ten (10) calendar days after Notice from the Authority, specifying in reasonable detail the amount of money not paid and the nature and calculation of each such payment.

19.1.2 Prohibited Liens. If the Operator fails to cause any Prohibited Lien to be released within fifteen (15) calendar days after Notice from the Authority of such lien.

19.1.3 Bankruptcy or Insolvency. If the Operator ceases to do business as a going concern, ceases to pay its debts as they become due or admits in writing that it is unable to pay its debts as they become due, or becomes subject to any Bankruptcy Proceeding (except an involuntary Bankruptcy Proceeding dismissed within sixty (60) calendar days after commencement), or a custodian or trustee is appointed to take possession of, or an attachment, execution or other judicial seizure is made with respect to, substantially all of the Operator’s assets or the Operator’s interest in this Agreement (unless such appointment, attachment, execution, or other seizure was involuntary and is contested with diligence and continuity and vacated and discharged within sixty (60) calendar days).

19.1.4 Non-Monetary Default. If any Non-Monetary Default, other than those addressed in Sections 19.1.2 and 19.1.3, occurs and the Operator does not cure such Non-Monetary Default within thirty (30) calendar days after Notice from the Authority describing the Default in reasonable detail, or, in the case of a Non-Monetary Default that cannot with reasonable due diligence be cured within thirty (30) calendar days from such Notice, if the Operator shall not: (i) within thirty (30) calendar days after the Authority’s Notice, advise the Authority of the Operator’s intention to take all reasonable steps to cure such Non-Monetary Default; (ii) duly commence such cure within such period, and then diligently prosecute such cure to completion; and (iii) complete such cure within a reasonable time under the circumstances.

19.2 Remedies. If an Event of Default occurs, then the Authority shall, in the Authority’s sole discretion, have any or all of the following described remedies, all cumulative (so exercise of one remedy shall not preclude exercise of another remedy), in addition to such other remedies as may be available at Law or in equity or under any other terms of this Agreement. The Authority’s remedies shall include:

19.2.1 Termination of Agreement. Either Party may initiate termination of this Agreement if the other party fails to act in good faith under this Agreement and/or breaches any of the terms herein. To initiate termination, either party may provide the other with a Notice of Intent to Terminate or by any other lawful means. Within thirty (30) days of delivery and receipt of such Notice, either party may elect for the parties to proceed to mediation with a mutually agreed upon mediator. The cost of mediation will be equally divided by the parties. If no request for mediation is made by either party within thirty (30) days, the Agreement shall terminate immediately. If the parties participate in mediation and at the completion of such mediation either party still seeks to terminate the Agreement, the Agreement shall terminate immediately. Upon termination of the Agreement, such date of termination shall be the Expiration Date, and the Operator shall immediately vacate the Garden. Additionally, the either Party may bring an

action to recover any amount necessary to compensate itself for all detriment proximately caused by the other Party's failure to perform their obligations under this Agreement.

19.2.2 Receipt of Moneys. No receipt of money by the Authority from the Operator after Notice of Default, the Expiration Date, or the giving of any Notice of termination of this Agreement, shall reinstate, continue, or extend this Agreement or affect any Notice previously given to the Operator, or waive the Authority's right to enforce payment of any amount payable or later falling due, or the Authority's right to enter the Garden, except as this Agreement expressly states otherwise, it being agreed that after service of Notice of Default or Notice of termination of this Agreement or the commencement of suit or proceedings, or after final order or judgment, the Authority may demand, receive, and collect any moneys due or thereafter falling due, without in any manner affecting any such Notice, proceeding, order, suit or judgment, all such moneys collected being deemed payments on account of use of the Garden or, at the Authority's election, on account of the Operator's liability to the Authority.

19.2.3 No Waiver. No failure by the Authority to insist upon strict performance of any covenant, agreement, term or condition of this Agreement or to exercise any right or remedy upon a Default, and no acceptance of full or partial payment during continuance of any such Default, shall waive any such Default or such covenant, agreement, term or condition. No covenant, agreement, term or condition of this Agreement to be performed or complied with by the Operator, and no Default, shall be Modified, except by a written instrument executed by the Authority. No waiver of any default shall modify this Agreement. Each and every covenant, agreement, term and condition of this Agreement shall continue in full force and effect with respect to any other then-existing or subsequent Default of such covenant, agreement, term or condition of this Agreement.

19.2.4 Security Devices. The Authority may change the locks and other security devices providing admittance to the Garden.

19.2.5 Damages. Subject to Section 26.2, the Authority may recover from the Operator all damages the Authority incurs by reason of the Operator 's Default, including reasonable costs of removing the Operator's personnel or property from the Garden, and any and all other damages legally recoverable by the Authority, and reimbursement of the Authority's reasonable out of pocket costs,. The Authority may recover such damages at any time after the Operator 's Default, including after the Expiration Date.

19.2.6 Injunction of Breaches. Whether or not an Event of Default has occurred, the Authority may obtain a court order enjoining the Operator from continuing any Default or from committing any threatened Default. The Operator specifically and expressly acknowledges that damages would not constitute an adequate remedy to the Authority for any Non-Monetary Default.

19.2.7 Continue Agreement. The Authority may, in the Authority's sole discretion, maintain the Operator's right to operate the Garden pursuant to this Agreement. In that case, this Agreement shall continue and the Authority may continue to enforce it.

19.2.8 Restoration Funds. Upon any termination of this Agreement, to the extent that the Authority then holds any Restoration Funds, they shall be the sole property of the Authority and may be applied solely as the Authority directs.

19.3 Authority's Right to Cure. 30 days after a request to Operator by Authority to cure Operator's Default under this Agreement, the Authority, without waiving or releasing the Operator from any obligation or Default and without waiving the Authority's right to take such action as this Agreement may permit as a result of such Default, may (but need not) make any payment or take any action on behalf of the Operator to cure any Default of the Operator. The Operator shall reimburse the Authority for an amount equal to all reasonable sums paid, and reasonable costs and expenses incurred, by the Authority in exercising its cure rights under this Section 19.3. Pursuant to paragraph 17, the Authority may enter the Garden to cure said Default.

19.4 Failure to Vacate. If for any reason or no reason the Operator does not vacate the Garden (removal of all of the Operator 's personnel and property) on or before the Expiration Date, then the Authority will suffer injury that is substantial, difficult, or impossible to measure accurately. Therefore, if the Operator remains in the Garden after the Expiration Date, either by its personnel or its property or both, for any reason or no reason, then in addition to any other rights or remedies of the Authority, the Operator shall pay to the Authority, as liquidated damages and not as a penalty, for each day during which the Operator remains in the Garden after the Expiration Date, a sum equal to One Thousand Dollars (\$1,000.00).

19.5 Survival. No entry into or onto the Garden by the Authority shall relieve the Operator of its liabilities and obligations under this Agreement, all of which shall survive such entry. Termination of this Agreement shall not relieve the Operator of any liabilities or obligations of the Operator arising under this Agreement prior to the date of termination.

20. **END OF TERM.** Upon any Termination Date: (a) the Operator shall vacate the Garden (removal of all of the Operator's personnel), in the condition this Agreement requires, subject to any Casualty that this Agreement does not require the Operator to Restore, and all Garden Improvements and FF&E used in the operation of the Garden shall be the sole and exclusive property of the Authority; (b) the Operator shall deliver the Garden free and clear of all claims except claims that the Authority or any of its agents caused; (c) ~~all unspent income or other consideration due or becoming due for use of the Garden~~ associated with unused Authority dues or fundraised specifically for maintenance of the Core Exhibits as of the Expiration Date shall be immediately transferred to the Authority; (d) all unspent income associated with educational programming, weddings, third party events or funds raised to support educational program shall remain with the Operator as of the Expiration Date; (e) all intellectual property associated with the educational programming shall remain with the Operator as the exclusive owner thereof, including but not limited to the Ms. Smarty Plants program; and (d~~f~~) the Parties shall cooperate to achieve an orderly transition of operation of the Garden from the Operator to the Authority or a designee of the Authority, without interruption, including delivery of such books and records (or copies thereof) as the Authority reasonably requires.

21. **NO INTENDED THIRD PARTY BENEFICIARIES.** This Agreement does not, and shall not be deemed or construed to, confer upon or grant to any Third Person (excepting permitted successors or assigns of the Operator or the Authority pursuant to the terms of this Agreement) any right to claim damages or to bring any suit, action or other proceeding against either the Authority or the Operator because of any breach of this Agreement or to enforce any term, covenant, condition, restriction, reservation, provision or agreement contained in this Agreement.



22. **NOTICES.** All Notices shall be in writing and addressed to the Authority or the Operator (and their designated copy recipients) as set forth in Exhibit "A." Notices (including any required copies) shall be delivered personally or by Federal Express, United Parcel Service or other nationally or regionally recognized overnight (one business day) courier service to the addresses set forth in Exhibit "A," in which case they shall be deemed delivered on the date of delivery (or when delivery has been attempted twice, as evidenced by the written report of the courier service) to such address(es). Either Party may change its address for delivery of Notices by Notice in compliance with this Agreement. Notice of such a change shall be effective only upon receipt. Any Party giving a Notice may request the recipient to acknowledge receipt of such Notice. The recipient shall promptly comply with any such request, but failure to do so shall not limit the effectiveness of any Notice. Any attorney may give any Notice on behalf of its client.

23. **NO BROKER.** Each Party: (a) represents and warrants that it did not engage or deal with any broker or finder in connection with this Agreement and no Person is entitled to any commission or finder's fee on account of any agreement or arrangement made by such Party; and (b) shall indemnify the other Party against any breach of such representation.

24. **MODIFICATION.** Any Modification of this Agreement must be in writing and signed by the Party to be bound.

25. **SUCCESSORS AND ASSIGNS.** This Agreement shall bind and benefit the Authority and the Operator and their successors and assigns, but this Section 25 shall not limit or supersede any Transfer restrictions contained in this Agreement. Nothing in this Agreement confers on any Person (except the Authority and the Operator) any right to insist upon, or to enforce against the Authority or the Operator, the performance or observance by either Party of its rights or obligations under this Agreement.

## 26. **MISCELLANEOUS**

26.1 Waiver of Non-Disturbance. Notwithstanding anything to the contrary in this Agreement, Operator expressly agrees that this Agreement shall terminate and expire in the event that the License Agreement terminates or expires during the Term. To that end, Operator expressly waives any claim of any right to non-disturbance upon expiration of the License Agreement.

26.2 No Consequential Damages. Whenever either Party may seek or claim damages against the other Party (whether by reason of a breach of this Agreement by such Party, in enforcement of any indemnity obligation, for misrepresentation or breach of warranty, or otherwise), neither the Authority nor the Operator shall seek, nor shall there be awarded or granted by any court, arbitrator, or other adjudicator, any speculative, consequential, collateral, special, punitive, or indirect damages, whether such breach shall be willful, knowing, intentional, deliberate, or otherwise. The Parties intend that any damages awarded to either Party shall be limited to actual, direct damages sustained by the aggrieved Party. Neither Party shall be liable for any loss of profits suffered or claimed to have been suffered by the other.

26.3 No Waiver by Silence. Failure of either Party to complain of any act or omission on the part of the other Party shall not be deemed a waiver by the non-complaining Party of any of its rights under this Agreement. No waiver by either Party at any time, express or

implied, of any breach of this Agreement shall waive the same such breach at another time or any other breach.

26.4 Survival. All rights and obligations that by their nature are to be performed after any termination of this Agreement shall survive any such termination.

26.5 Unavoidable Delay. Each Party's obligation to perform or observe any nonmonetary obligation under this Agreement shall be suspended during such time as such performance or observance is prevented or delayed by Unavoidable Delay.

26.6 Authority Contract Administration. The Authority Representative shall administer this Agreement on behalf of the Authority. Except as otherwise expressly provided in this Agreement, the Authority Representative has the authority to approve or consent to those matters in this Agreement requiring the Authority's approval or consent and to make all other decisions on behalf of the Authority, subject to the Authority Representative's retained and reserved sole and absolute discretion to seek approval of the Authority's governing board of any such matter. The Authority may revoke the authorization provided to the Authority Representative in this Section 26.6, at any time, by Notice of such revocation to the Operator.

## 27. **INTERPRETATION, EXECUTION, AND APPLICATION OF AGREEMENT**

27.1 Captions. The captions of this Agreement are for convenience and reference only and in no way affect this Agreement.

27.2 Counterparts. This Agreement may be signed in counterpart originals, each of which shall constitute an original of this Agreement and that, collectively, shall constitute one and the same agreement.

27.3 Entire Agreement. This Agreement contains all of the terms, covenants, conditions and agreements between the Parties regarding the Garden. The Parties have no other understandings or agreements, oral or written, regarding the Garden.

27.4 Governing Law. This Agreement, its interpretation and performance, the relationship between the Parties, and any disputes arising from or relating to any of the foregoing, shall be governed, construed, interpreted, and regulated under the laws of the State of California, without regard to principles of conflicts or choice of laws.

27.5 Partial Invalidity. If any term or provision of this Agreement or its application to any Person or circumstance shall to any extent be invalid or unenforceable, then the remainder of this Agreement, or the application of such term or provision to Persons or circumstances, except those as to which it is invalid or unenforceable, shall not be affected by such invalidity. All remaining provisions of this Agreement shall be valid and be enforced to the fullest extent Law allows.

27.6 Principles of Interpretation. No inference in favor of or against any Party shall be drawn from the fact that such Party has drafted any part of this Agreement. The Parties have both participated substantially in the negotiation, drafting, and revision of this Agreement, with advice from counsel and other advisers of their own selection. A term defined in the singular in this Agreement may be used in the plural, and vice versa, all in accordance with ordinary principles of English grammar, which also govern all other language in this Agreement. The words “include” and “including” shall be construed to be followed by the words: “without limitation.” Each collective noun in this Agreement shall be interpreted as if followed by the words “(or any part of it),” except where the context clearly requires otherwise. Every reference to any document, including this Agreement, refers to such document as Modified from time to time (except any Modification that violates this Agreement), and includes all exhibits, schedules, and riders to such document. The word “or” includes the word “and.”

27.7 Reasonableness. Wherever this Agreement states that a Party’s approval shall be “reasonable” or not unreasonably withheld: (a) such approval shall not be unreasonably delayed or conditioned; (b) no withholding of approval shall be deemed reasonable, unless withheld by Notice specifying reasonable grounds, in reasonable detail, for such withholding, and indicating specific reasonable changes in the proposal under consideration that would make it acceptable; and (c) if a Party grants its consent to any matter, this shall not waive its rights to require such consent for any further or similar matter.

27.8 Time of Essence. Time is of the essence with respect to the performance of each term, provision, covenant or agreement contained in this Agreement.

27.9 Exhibits. All of the exhibits attached to this Agreement are as follows and are incorporated into this Agreement by reference:

- Exhibit “A” =Notice Addresses
- Exhibit “B” =Form of Operator Official Action
- Exhibit “C” =License Agreement
- Exhibit “D” = Operation and Maintenance Obligations

**[Signatures on next page]**

**SIGNATURE PAGE  
TO  
AMENDED AND RESTATED  
WATER CONSERVATION GARDEN OPERATION AGREEMENT**

IN WITNESS WHEREOF, the Authority and the Operator have signed this Agreement by and through the signatures of their authorized representatives set forth below:

**AUTHORITY:**  
WATER CONSERVATION AUTHORITY,  
a California joint powers authority

**OPERATOR:**  
FRIENDS OF THE WATER  
CONSERVATION GARDEN, a California  
nonprofit public benefit corporation

By: \_\_\_\_\_  
Board President

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

ATTEST:

By: \_\_\_\_\_  
Board Secretary

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

APPROVED AS TO FORM:

Best Best & Krieger LLP

By: \_\_\_\_\_  
Authority General Counsel

**ACKNOWLEDGEMENT AND CONSENT TO ASSIGNMENT OF RIGHTS UNDER  
LICENSE AGREEMENT**

The undersigned hereby acknowledges and consents to the assignment of rights and obligations by the Authority to the Operator under the License Agreement pursuant to the terms and conditions of this Agreement.

GROSSMONT-CUYAMACA COMMUNITY  
COLLEGE DISTRICT, a California  
community college district:

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**Discussion Draft No. 3  
September 23, 2017**

**EXHIBIT "A"**

**NOTICE ADDRESSES**

<b><u>Party:</u></b>	<b><u>Notice Address:</u></b>	<b><u>With a copy to:</u></b>
Authority	Water Conservation Authority 12122 Cuyamaca College Drive West El Cajon, CA 92019 Attention: Executive Director	Best Best & Krieger LLP 655 West Broadway 15 <sup>th</sup> Floor San Diego, California 92101 Attention: Paula C.P. de Sousa
Operator	Friends of Water Conservation Garden	

**Discussion Draft No.  
September 23, 2017**

**EXHIBIT “B**

**FORM OF OPERATOR OFFICIAL ACTION**

**[Attached behind this cover page]**

**RESOLUTION OF THE BOARD OF DIRECTORS OF  
FRIENDS OF THE WATER CONSERVATION GARDEN,  
A CALIFORNIA NON-PROFIT PUBLIC BENEFIT CORPORATION**

At a meeting of the board of directors of Friends of the Water Conservation Garden, a California nonprofit public benefit corporation (the "Corporation"), duly held on \_\_\_\_\_, 20\_\_, at which meeting all of the directors of the Corporation were in attendance, the following resolutions were unanimously adopted:

WHEREAS, the Corporation is about to enter into that certain Amended and Restated Water Conservation Garden Operation Agreement with the Water Conservation Authority, a California joint powers authority ("the Authority"), dated as of \_\_\_\_\_, 20\_\_ (the "Agreement"), to maintain and operate certain real property and improvements specifically described in the Agreement (the "Garden"); and

WHEREAS, the Board of Directors of the Corporation has reviewed the Agreement and all documents executed or to be executed in connection with the Agreement and considers the transaction to be in the best interest of the Corporation.

NOW, THEREFORE, BE IT RESOLVED that the Corporation execute the Agreement and all documents previously presented to, reviewed, and approved by the Board of Directors of the Corporation.

RESOLVED, FURTHER, that the following officers of the Corporation acting alone be, and they hereby are, authorized, empowered, and directed on behalf of the Corporation to execute and deliver the Agreement and all other documents to be executed in connection with it, and to take all actions that may be necessary to exercise the Corporation's rights and perform the Corporation's obligations under the Agreement and any such other documents:

President  
[Name]  
Secretary  
[Name]

The authority conferred by this Resolution shall be considered retroactive and any and all acts authorized in this Resolution that were performed before the passage of this Resolution are hereby approved and ratified by the Corporation. The authority conferred by this Resolution shall continue in full force and effect until the Authority shall have received notice in writing, certified by the Secretary of the Corporation, of the revocation of this authority by a separate resolution duly adopted by the Board of Directors of the Corporation.

The undersigned, \_\_\_\_\_, Secretary of the Corporation, certifies that the foregoing is a true copy of the Resolution duly adopted by the Board of Directors of the Corporation at a meeting held on \_\_\_\_\_, 20\_\_.

IN TESTIMONY WHEREOF, I have executed this Resolution and affixed the corporate seal of the Corporation, as of \_\_\_\_\_, 20\_\_.

Date:

\_\_\_\_\_  
Name \_\_\_\_\_  
Secretary

[Seal]

**September 23, 2017**

**EXHIBIT “C”**

**LICENSE AGREEMENT**

**[Attached behind this cover page]**



**LICENSE AGREEMENT FOR  
OPERATION OF A WATER CONSERVATION GARDEN**

THIS AGREEMENT is made and entered into this First day of August, 2006, by and between the GROSSMONT-CUYMAYACA COMMUNITY COLLEGE DISTRICT, on behalf of CUYAMACA COLLEGE (hereinafter, "the District"), and the WATER CONSERVATION GARDEN AUTHORITY, a Joint Powers Agency formed pursuant to Government Code section 6500 (hereinafter, "the Authority"), with reference to the following facts:

A. The parties have previously entered into an Agreement dated April 6, 1993, for the establishment of a Water Conservation Garden at Cuyamaca College for public education purposes and to assist in reducing the demand for imported water in the San Diego region. Pursuant to that Agreement, the Authority has operated a Water Conservation Garden at Cuyamaca College since 1999.

8. The parties desire to extend the term of their agreement and otherwise more clearly set forth the relationship of the parties and the terms of operation of the Water Conservation Garden (hereinafter referred to as "the Garden");

NOW, THEREFORE, the parties hereby agree as follows:

1. LICENSE TO USE LAND. The District hereby grants to the Authority the right to use the approximate 4.28-acre portion of the Cuyamaca College campus, commonly known as the existing Water Conservation Garden and located at 12122 Cuyamaca College Drive West, El Cajon, California (more particularly described in Exhibits A and B attached hereto and incorporated by this reference herein), for purposes of operating a water conservation demonstration garden for public educational purposes.

2. LICENSE TO USE ADDITIONAL PARCELS OF LAND. The District hereby grants to the Authority the right to use the approximate .20-acre portion of the Cuyamaca College campus, commonly known as the Future Parcel "A" located at 12122 Cuyamaca College Drive West, El Cajon, California (more particularly described in Exhibits A and B attached

hereto and incorporated by this reference herein), subject to the District and the Authority signing an agreement defining the terms and conditions for the use of the future parcel. Additionally, the District hereby grants to the Authority the right to use the approximate .37-acre portion of the Cuyamaca College campus, commonly known as the Future Parcel "B" located at [2122 Cuyamaca College Drive West, El Cajon, California (more particularly described in Exhibits A and B attached hereto and incorporated by this reference herein), subject to the District and the Authority signing an agreement defining the terms and conditions for the use of the future parcel.

3. TERM. The term of this Agreement shall be from August 1, 2006 to and including July 31, 2033. This Agreement may be renewed for an additional ten-year period by mutual agreement of the parties. This Agreement shall supersede all previous agreements between the parties hereto, provided that it shall not supersede the Joint Powers Agreement Creating the Water Conservation Authority.

4. OPERATION AND MAINTENANCE. The Authority shall operate the Garden and shall make it accessible for visitation by members of the general public for a reasonable number of hours each week. The Authority will maintain the Garden on a continuing basis at a level consistent with its condition at the time of execution of this License Agreement. In the event that the Authority fails to adequately maintain the Garden at such level, or fails to use and maintain the land for a demonstration garden, the District may give written notice of default of this obligation. If the default is not remedied within sixty (60) days, from the date such notice is delivered, the District may then elect to terminate this Agreement without any further obligation to the Authority. Operation and maintenance of the Garden shall be at no cost to the District, and Authority shall pay for all required utilities.

5. INSURANCE. The District shall obtain and keep in force a policy of Commercial General Liability Insurance, Automobile Liability Insurance and Property Insurance in amounts acceptable to Authority insuring the District and naming the Authority as additional insured. The District shall also obtain and keep in force a policy of Workers' Compensation Insurance covering District's employees.

Authority will obtain and keep in force Comprehensive Commercial General Liability and Automobile Insurance, in an amount of \$1,000,000 per occurrence, \$1,000,000 aggregate, and additional Property and Casualty Insurance covering the Authority and the Garden naming the District as additional insured. The Authority shall also obtain and keep in force a policy of Workers' Compensation Insurance covering Authority's employees.

6. INDEMNIFICATION. The District agrees to protect, save, defend and hold harmless the Authority and its agents, officers and employees from any and all claims, liabilities, expenses or damages of any nature, including attorneys' fees, for injury or death of any person, or damage to property, or interference with use of property, arising out of or in any way connected with District's use of the Garden, including negligent acts, errors or omissions or willful misconduct by the District, District's agents, officers, or employees. The only exception to the District's responsibility to protect, save, defend and hold harmless the Authority is for those claims arising from the sole negligence, willful misconduct or active negligence of the Authority.

The Authority agrees to protect, save, defend and hold harmless the District and its Governing Board members, agent,, officers and employees from any and all claims, liabilities, expenses or damages of ,my nature, including attorneys' fees, for injury or death of any person, damage to property, or interference with use of property, arising out of its use of the licensed property. The only exception to the Authority's responsibility to protect, save, defend and hold harmless the District is for those claims arising from the sole negligence, willful misconduct or active negligence of the District.

7. APPLICATION OF HOLD HARMLESS CLAUSES. The hold harmless provisions set forth in Section 5 shall apply to all liability regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation on the amount of indemnification to be provided by either party.

8. ALCOHOLIC BEVERAGES. Both parties understand that California law generally prohibits the possession or use of alcoholic beverages on a community college campus except under certain specified conditions. The Authority agrees. that it shall not allow alcoholic

beverages to be brought into or consumed in the Garden, except under the conditions set forth in Business and Professions Code section 25608. The parties recognize that legislation has been introduced that would allow alcoholic beverages to be served in the Garden; if such legislation is enacted into law, the parties agree to be governed by the law as amended by the legislation.

9. WATER GARDEN EMPLOYEES. The Authority shall be responsible for the hiring, retention, discipline, and termination of the Garden employees.

10. DISTRICT'S RIGHT TO USE THE GARDEN. The District shall have the right to utilize the Garden at reasonable times for District and College events and for College classes. Prior arrangements for such use shall be made with the Executive Director of the Garden.

11. OBLIGATIONS UPON TERMINATION. Upon expiration or termination of this Agreement for any reason, the Authority will leave the Water Conservation Garden in its then-current condition on the date of expiration, and any remaining improvements and equipment shall become the property of the District.

12. NOTICES. All notices permitted or required under this Agreement shall be given to the respective parties at the following address, or such other address as the respective parties may provide in writing for this purpose:

The District: Vice Chancellor, Business Services  
Grossmont-Cuyamaca Community College District  
8800 Grossmont College Drive  
El Cajon, California 92020

The Authority: Executive Director  
Water Conservation Garden  
12122 Cuyamaca College Drive West  
El Cajon, CA 920 \ 9

13. SUCCESSORS AND ASSIGNS. This Agreement shall be binding on the successors and assigns of the party and shall not be assigned by either party without the prior written consent of the other party.

14. GOVERNING LAW. This Agreement shall be governed by the laws of the State of California. Any action brought to enforce the terms of this Agreement shall be brought in a state or federal court located in the County of San Diego, State of California.

15. SEVERABILITY. If any section, subsection, sentence, clause, or phrase of this Agreement or the application thereof to any of the parties is for any reason held invalid or unenforceable, the validity of the remainder of the Agreement shall not be affected thereby and may be enforced by the parties to this Agreement.

16. AMENDMENTS. This Agreement may not be amended except by a writing signed by the District and the Authority.

17. INTERPRETATION. In interpreting this Agreement, it shall be deemed that it was prepared jointly by the parties with full access to legal counsel of their own. No ambiguity shall be resolved against any party on the premise that it or its attorneys were solely responsible for drafting this Agreement or any provision thereof.

18. ENTIRE AGREEMENT. This Agreement contains the entire agreement of the parties with respect to the subject matter hereof and supersedes all prior negotiations, understandings, or agreements.

WATER CONSERVATION GARDEN  
AUTHORITY

GROSSMONT-CVYAMACA COMMUNITY  
COLLEGE DISTRICT

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

By: James S. Antle

Its: President  
WATER CONSERVATION GARDEN  
AUTHORITY

Its: Vice Chancellor

Approved by the Board of Directors on  
July 12, 2006

Approved by the Board of Trustees on  
\_\_\_\_\_

**EXHIBIT 'A'**

**LEGAL DESCRIPTION**

**WATER GARDEN PARCEL**

**EXISTING PARCEL**

Those portions of Tract "E," and Tract "F" of RANCHO JAMACHA in the County of San Diego, State of California, according to Partition Map thereof, filed in the Office of the County Clerk of San Diego County, Case No. 13, Superior Court, Entitled William M. Keighler, Et Al, VS. Mary H Eddy, Et Al, Being more particularly described as follows;

Commencing at a 2" pipe with disk stamped WRCE 13782", marking a point on the Northerly line of County of San Diego Tract 4032-4, according to Map thereof No 11285 in the County of San Diego, State of California, filed in the Office of the County Recorder July 11, 1985 as File No. 85-247463 of Official Records, said 2" pipe bears North 58°23'07" East, 928.98 feet (North 57°54'39" East, 928.52) from a 2" pipe with disk stamped "RCE 13782, also marking a point on the Northerly line of said Map No. 11285; thence retracing along said Northerly line South 58°23'07" West, 346.14 feet to a point of intersection with the Northeasterly right-of-way of Cuyamaca College Drive West (60 feet wide), said intersection being the **TRUE POINT OF BEGINNING**; thence North 31°36'10" West, 150.35 feet; thence South 58°23'50" West, 36.89 feet to the beginning of a non tangent curve concave Southerly having a radius of 240.00 feet and to which a radial bears North 19°50'25" East; thence Westerly 78.97 feet along said curve through a central angle of 18°5'11"; thence North 40°34'04" West, 5.58 feet; thence South 88°24'57" West, 6.87 feet; thence South 30°41'32" West, 6.15 feet; thence South 82°24'56" West, 138.87 feet to a point herein designated as Point 'A'; thence North 03°22'30" West, 67.95 feet; thence North 75°27'37" East, 12.38 feet to the beginning of a curve concave Northwesterly having a radius of 166.50 feet; thence Northeasterly 200.93 feet along said curve through a central angle of 69°08'35"; thence North 80°51'46" West, 21.57 feet; thence North 05°17'39" East, 15.06 feet; thence South 82°15'22" East, 21.09 feet to the beginning of a non tangent curve concave Southwesterly having a radius of 166.50 feet and to which a radial bears South 89°03'30" East; thence Northwesterly 233.40 feet along said curve through a central angle of 80°18'59"; thence South 58°11'04" West, 11.19 feet; thence North 87°14'33" West, 13.10 feet; thence North 39°29'11" West, 12.06 feet to the beginning of a non tangent curve concave Northeasterly having a radius of 90.00 feet and to which a radial bears South 04°12'25" West; thence Northwesterly 67.28 feet along said curve through a central angle of 42°49'54"; thence North 42°57'41" West, 34.59 feet; thence North 47°28'48" East, 122.39 feet; thence South 86°19'44" East, 52.01 feet; thence South 59°25'26" East, 348.57 feet; thence South 23°33'28" East, 84.12 feet; thence South 75°02'48" East, 57.59 feet to a point herein designated as Point 'B'; thence South 41°21'32" East, 92.86 feet; thence South 06°55'30" West, 23.80 feet; thence South 86°54'09" East, 44.08 feet; thence South 42°24'51" East, 66.14 feet; thence South 03°31'01" West, 87.49 feet to a point on the Northerly line of said Map No. 11285; thence along said Northerly line South 58°23'07" West, 256.54 feet to the **TRUE POINT OF BEGINNING**.

**EXRIBIT'A'**

TOGETHER WITH: (PROPOSED PARCEL A")

**BEGINNING** at the hereinabove described Point 'A'; thence South 72°57'56" West, 30.28 feet to the beginning of a non tangent curve concave Northeasterly having a radius of 245.00 feet to which a radial bears South 03°36'02" East; thence Westerly 108.59 feet along said curve through a central angle of 25°23'38" to the beginning of a compound curve concave Northeasterly having a radius of 20.00 feet to which a radial bears South 21°47'36" West; thence Northwesterly 23.88 feet along said curve through a central angle of 68°24'15"; thence North 00°11'S1" East, 19.14 feet to a point herein referenced as Point 'C', said point also being the beginning of a curve concave Southeasterly having a radius of 10.00 feet; thence Northeasterly 13.58 feet along said curve through a central angle of 77°48'05"; thence North 77°59'56" East, 38.33 feet; thence South 63°21'1" East, 18.77 feet; thence North 88°18'34" East., 37.29 feet; thence North 75°27'37" East, 45.81 feet; thence South 03°22'30" East, 67.95 feet to the point of **BEGINNING**.

TOGETHER WITH: (PROPOSED PARCEL "B")

**BEGINNING** at the hereinabove described Point 'B'; thence South 41°21'32" East, 92.86 feet; thence South 06°55'30" West, 23.80 feet; thence South 86°54'19" East, 44.08 feet; thence South 42°24'51" East, 66.14 feet; thence North 40°21'20" East, 94.57 feet; thence North 61°39'21" West, 65.11 feet; thence North 47°25'43" West, 101.29 feet; thence North 71°24'33" West, 25.56 feet; thence South 84°06'49" West, 19.79 feet; thence South 44°32'14" West, 46.41 feet to the point of **BEGINNING**.

Containing 211,796 or 4.86 Acres.

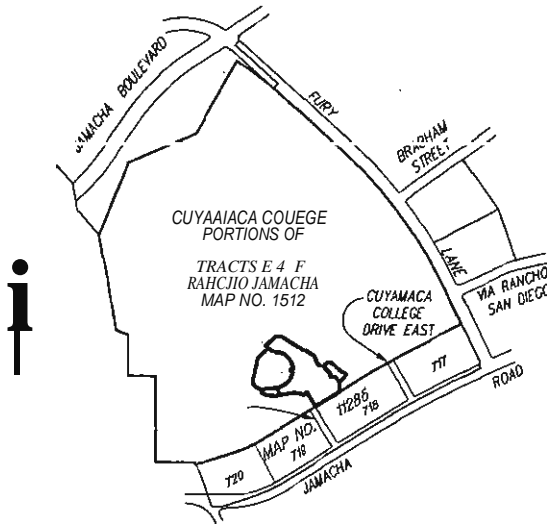
All as shown on map attached herewith and made a part hereof.

Prepared By: Nolle Associates, Inc.

Paul G. Robotta      Date  
L. S. 5334



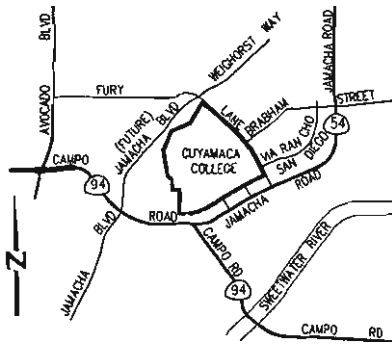
EXH/8IT 21'



**KEY MAP**  
HO SCALE

LINE TABLE		
W/L	BEARING	LENGTH
H	N10°11'0" W	5.58'
d	S88°2'15" E	6.87'
IJ	E 81°11' r	6.15'
U	N75°7' Jn	12.00'
LS	N105°16' Jf	11.57'
L6	N05°7' J9" r	15.06'
L1	S85°22'7" r	11.09'
IS	S58°7'01" f	11.19'
19	NBn1°n	11.10'
L10	N 19°11" f	12.00'
U1	N(1)1°51'7" r	10.11'
U2	S6°71' J7" r	10.11'
UJ	N1878° R7	11.29'
LU	SJ111°55" w	16.85'
L5	S11°35' 1.2" f	16.85'
L6	N71°20' Jf	19.79'
L7	S11°06' 9" W	19.79'
L1B	111°11" r	16.41'

d/1, 1.48, 1	
QH?JCI	RADIUS 1 (1)11A 11EH(TH
Ct	1 1100° 1 6874'15" 1 2188'
Ct -1	1, 100° 1 1n8'D5' 1 11.57'



**VICINITY MAP**  
WJ SCALE

**NOTE:**  
THIS SURVEY FOR THE BOUNDARY OF CUYAMACA COLLEGE WAS BASED ON THE REPORT PREPARED BY FIRST AMERICAN TITLE INSURANCE COMPANY OR ITS OR NO. NCS-65198-SD, DATED DECEMBER 24, 2001.



PAUL G. ROBERTO  
LS SJ.14

OAT



**CUYAMACA COLLEGE  
LEASE PARCELS**

SHEET NUMBER

1

OF 3 SHEETS

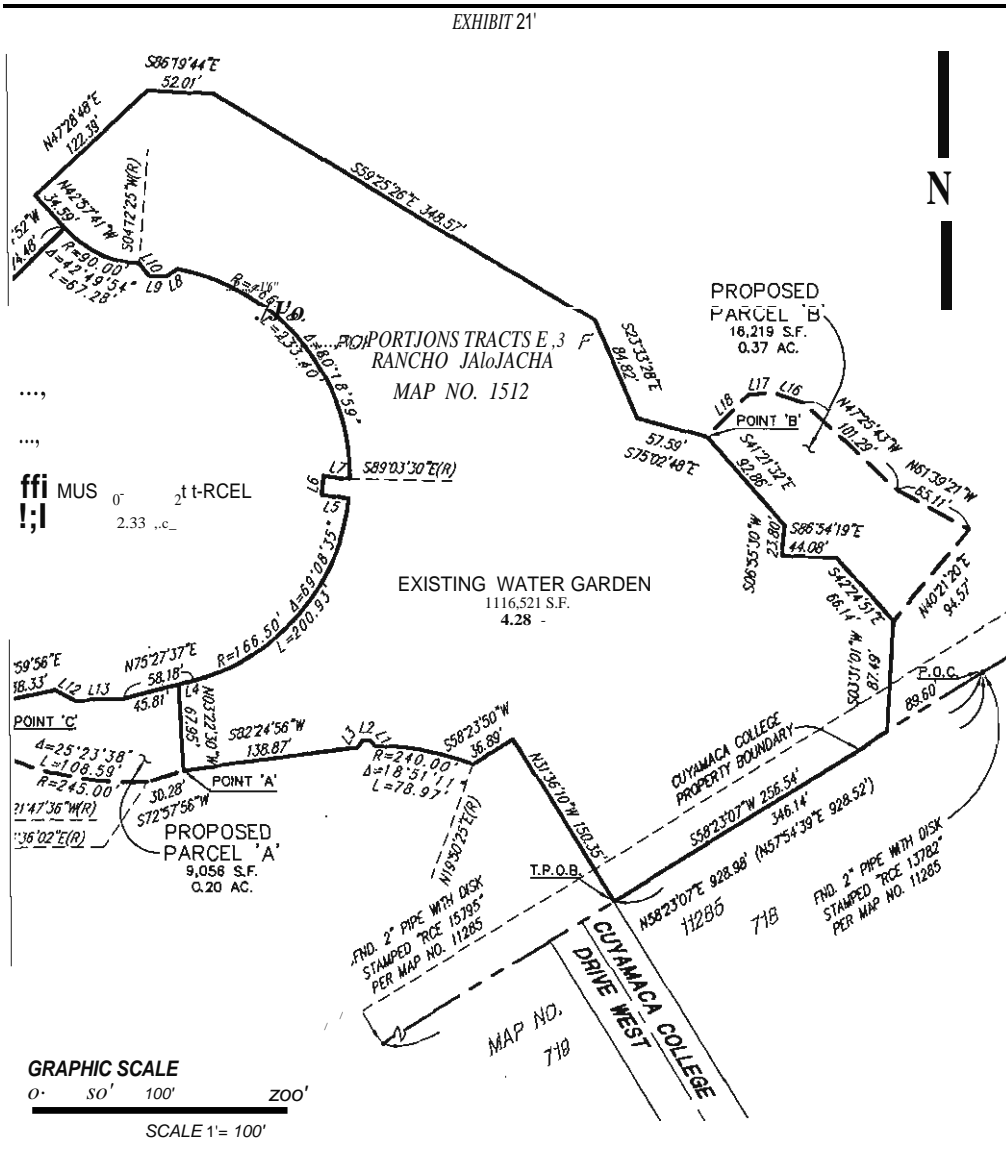
PREPARED FOR: CUYAMACA COLLEGE

DATE

MAY, 2001

JOB NUMBER  
SD6018-112





**NOLTE**  
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**CUYAMACA COLLEGE  
LEASE PARCELS**

SHEET NUMBER

2

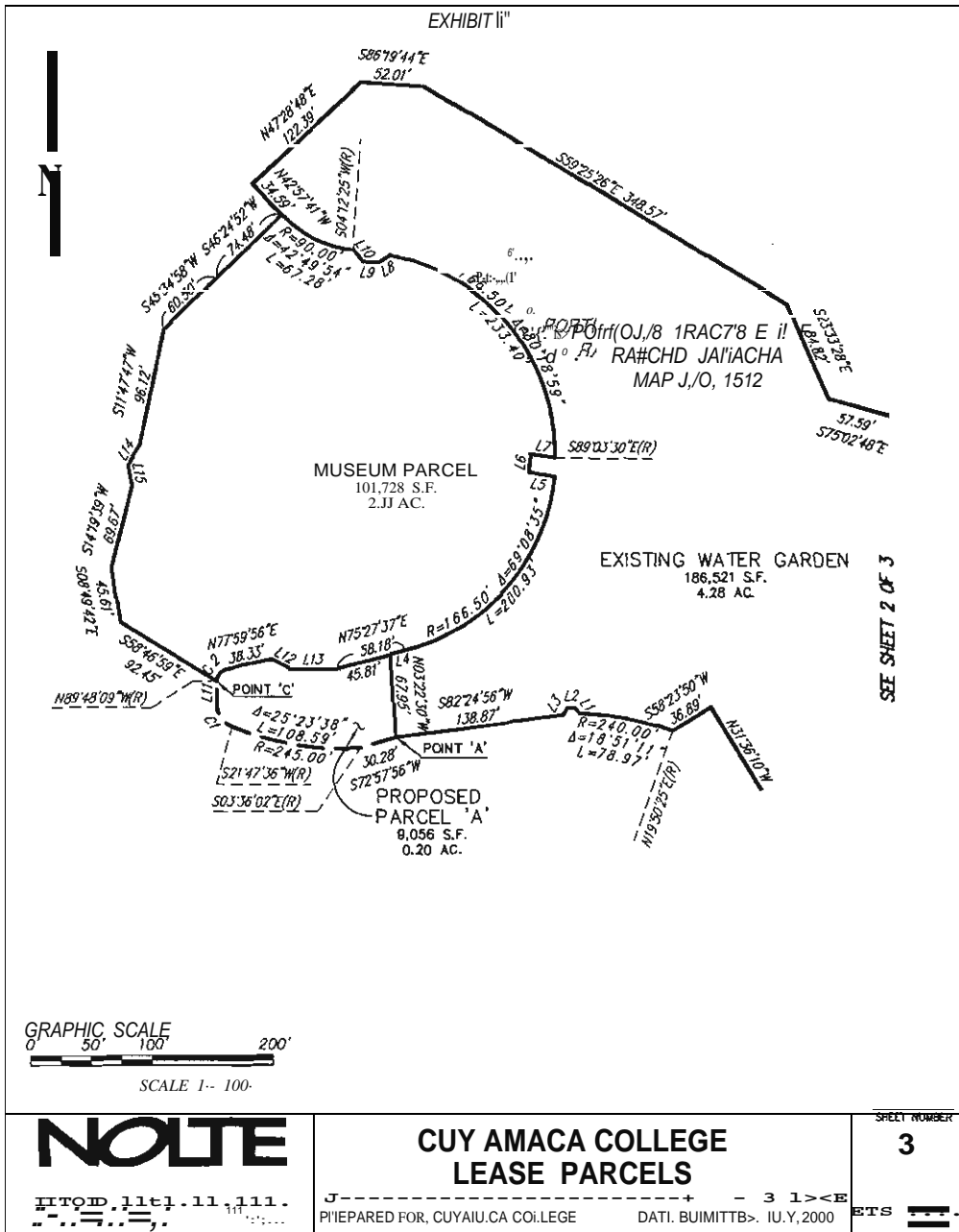
San Diego, CA 92161  
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PREPARED FOR: CUYAMACA COLLEGE

DATE

YAY, 20CMI

OF 3 SHEETS  
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**EXHIBIT D**  
**OPERATION AND MAINTENANCE COSTS**  
**[ATTACHED BEHIND COVER PAGE]**

On-going Operations and Maintenance Costs – Operator Responsibility paid from Authority's Annual Contribution

1. Horticulture staff and benefits
2. Maintenance and supplies
  - a. Irrigation
  - b. Exhibit maintenance
  - c. Plants (includes annuals, perennials, and box trees as necessary)
  - d. Tools
3. Percentage of Utilities

Deferred Maintenance Costs – Authority Responsibility: paid from Annual Contribution  
Deferred Maintenance set aside (see Section 7.3.2) over 5 years

1. Core Exhibit Repair
2. DG pathway stabilizer
3. Fence painting
4. Irrigation upgrade
5. Outside light bulbs (street lamps)
6. Upgrade electrical in plaza and replace GFR throughout Garden
7. Wall re-stucco and painting all buildings

Deferred Maintenance Costs – Operator Responsibility: Paid from Annual Contribution and other funds raised by Operator

1. Amphitheater Bench Repair
2. Meeting Room Carpet
3. Parking Lot Asphalt Sealer
4. Path Edging
5. Water Feature Pumps

Deferred Maintenance Costs – shared responsibility

1. Mature Tree and Shrub Replacement

<b>Summary report:</b>	
<b>Litéra® Change-Pro 7.5.0.135 Document comparison done on 10/19/2017 2:24:14 PM</b>	
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<b>Intelligent Table Comparison:</b> Active	
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Embedded Excel	0
Format changes	0
<b>Total Changes:</b>	<b>58</b>