

**MEMORANDUM OF UNDERSTANDING  
BETWEEN  
MILWAUKEE COUNTY DEPARTMENT OF PARKS, RECREATION AND CULTURE  
AND  
FRIENDS OF BOERNER BOTANICAL GARDENS, INC.**

This Agreement is made and entered into effective \_\_\_\_\_, 2016 (the “Effective Date”), by and between the MILWAUKEE COUNTY DEPARTMENT OF PARKS, RECREATION, AND CULTURE (the “County”) and the FRIENDS OF BOERNER BOTANICAL GARDENS, INC. (“FBBG”). Together these named entities constitute the Parties (“Parties”) to this Agreement.

**WITNESSETH:**

**WHEREAS**, Milwaukee County is a municipal body corporate in the State of Wisconsin, and it is Milwaukee County Parks’ mission to sustain the legacy of our world-class park system by managing and conserving natural, cultural, and recreational resources for the benefit of the community; and

**WHEREAS**, Milwaukee County owns, operates and manages Boerner Botanical Gardens and Arboretum (the “Gardens”) located at 9400 Boerner Drive, Hales Corners, WI 53130 in Whitnall Park and has a commitment to the improvement and stewardship of the Gardens (See Exhibit A); and

**WHEREAS**, FBBG is a private non-profit corporation organized under Wisconsin statutes chapter 181 with a tax exempt status under the Internal Revenue Code section 501(c)(3), whose mission is to provide a garden setting for learning that nurtures understanding, enjoyment and stewardship of our natural world, while nourishing and preserving the Gardens for future generations; and

**WHEREAS**, FBBG was formed and has functioned for the purpose of soliciting, holding, managing, investing and expending funds and other gifts, grants and bequests exclusively for the benefit and support of the Gardens, and such of its educational, scientific and cultural programming as determined by its Board of Directors; and

**WHEREAS**, the County and FBBG have had a mutually-beneficial partnership for over thirty years and FBBG has had a significant positive impact in the Gardens and the surrounding community; and

**WHEREAS**, as a private non-profit corporation, FBBG is an independent organization having their own governance and fiscal structure regulated through its articles of incorporation and bylaws and to support, assist and promote the activities of Milwaukee County and FBBG, Milwaukee County Ordinance Chapter 13.06 requires a written agreement between the Parties and approved by the Director of Parks, the County Executive, and the Milwaukee County Board; and

**WHEREAS**, Milwaukee County and FBBG wish to assure the continued success and growth of the Gardens in the future.

**NOW THEREFORE**, the Parties do herewith, in consideration of mutual promises and other good and valuable consideration, agree as follows:

**PROVISIONS:**

**1. TERM.**

- a. The initial term of this Agreement shall be for three (3) years from the Effective Date. The Parties shall have the option to extend the term of the Agreement for one (1) consecutive three (3) year period (“Extended Term”). Such option shall be exercised by written contract extension with signatures of both Parties at least six (6) months prior to the expiration of the Initial Term or the applicable Extended Term.
- b. The Agreement may be terminated upon one (1) year written notice by either Party to the other or by mutual consent or at the end of the initial or renewal term. Additionally, the Agreement may be terminated if either party fails to fulfill their obligations under the Agreement. The terms and conditions of termination are more specifically set forth in Section 17 of this Agreement. Any change in FBBG’s name or non-profit status will immediately terminate this Agreement. FBBG shall provide to the County one (1) calendar year written notice of any change in FBBG’s

name to allow for the negotiation of a new agreement with the newly named organization.

- c. This Agreement contains all the terms and conditions agreed upon by the Parties hereto, and no other agreement, oral or otherwise, regarding the subject matter of this Agreement shall be deemed to exist or to bind any of the Parties hereto, or to vary any of the terms contained herein. All the provisions of this Agreement and any amendment thereto shall extend to and be binding upon and inure to the benefit of the Parties and the successors of the respective Parties. This Agreement, or any provision hereof or any right or obligation arising hereunder, is not assignable by either Party in whole or in part, without the express written consent of the other Party.

## **2. ROLES AND RESPONSIBILITIES.**

- a. Milwaukee County has the exclusive right and obligation to operate and maintain all aspects of the Gardens in accordance with the policies and directives established by the Parks Director, the County Executive, and the Milwaukee County Board of Supervisors (the “County Board”). To discharge its duties in this regard, the County may receive from FBBG support upon which the Parties agree. The County and FBBG recognize that all Milwaukee County employees including the Parks Director must comply with Milwaukee County’s ordinances and policies.
- b. **County Responsibilities:** Milwaukee County is responsible for the management and operations of all gardens and structures on the Gardens campus. This includes, but is not limited to:
  - i. Garden plantings and upkeep
  - ii. Major maintenance and operation of buildings and grounds
  - iii. Management of the Gardens’ garden and administrative full-time, part-time, and seasonal staff
  - iv. Management of the Gardens’ internship program
  - v. Conduct special events and garden education programs on a periodic basis
  - vi. Garden volunteer training and management

- vii. Admissions, including collecting and retaining daily admissions
- viii. Garden permit and rental fees

**c. FBBG Responsibilities:** FBBG is responsible for advocacy, educational programming, and support for the Gardens. This includes, but is not limited to:

- i. Advocacy, marketing, messaging, media relations, website and social media and communications planning for the Gardens in cooperation with the Parks Department
- ii. Volunteer recruitment, retention, and recognition program
- iii. Fundraising and capital funding campaigns for mutually agreed upon capital and supplemental operational needs
- iv. Facilitation of tours, special events, and educational programming
- v. Creating a FBBG Membership Program
- vi. Facilitation of all aspects of the memorial program working in conjunction with the Gardens Director
- vii. Maintaining the gift shop and library
- viii. Manage and maintain the Garden Fund as described in Section 7 of this Agreement

**d. Joint Responsibilities:** The County and FBBG share responsibility for the following:

- i. The County and FBBG agree that, as independent and separate entities, each shall maintain a staff, management and fiscal structure independent of the other.
- ii. FBBG recognizes that the County Board endorses a policy of open meetings, open records, affirmative action and its code of ethics, and expects Milwaukee County employees to understand and comply with such policies in working together with FBBG for the benefit of the Gardens. The Gardens Director or designee will attend meetings of the FBBG full Board of Directors. The Gardens Director will not have the right to vote in FBBG decisions but will have a voice at Board meetings. The Gardens Director or

designee shall also be included in all events that benefit the Gardens.

- iii.** Both the County and FBBG are committed to working together to ensure the sustainability of the Gardens through excellent customer service and garden attractions that draw and increase visitor traffic.
- iv.** The Gardens Director and FBBG President shall jointly develop sponsorship gift opportunities for solicitation of specific donations; such as artwork, sculptures, memorials, books, trees, plants, benches, etc. to benefit the Gardens. All physical gifts and donations to be located in the Gardens themselves or in public areas of the building shall be approved by the Parks Director or designee. Placement of any physical gift or donation on the premises i.e. a garden bench, requires the signature and approval of the Parks Director or designee who must adhere to a strict standard of uniformity throughout the park for gift placement. This shall not be construed to limit FBBG's ability to accept in kind donations to be used in FBBG's operations or programming or for auctions or raffles conducted by FBBG.
- v.** The County and FBBG will collaborate on educational, promotional, marketing and special event initiatives to increase the awareness and caliber of Garden programs.
- vi.** The Gardens Director, FBBG President and other Garden partners will work together to identify volunteer tasks that could be performed or assisted by volunteer staff to help the Gardens stay current with its horticultural workload.
- vii.** The Gardens Director, FBBG President and other Garden partners will work collaboratively to develop a comprehensive signage and label program that addresses the Gardens' educational goals by providing the necessary educational information for all levels of Gardens' visitors.

- viii. The Gardens Director and FBBG President shall jointly develop policies for donor recognition at the Gardens, which shall be approved in writing by the Parks Director or designee and FBBG Chairperson or designee.

### 3. REPORTING REQUIREMENTS.

- a. **Every Month:** The Gardens Director and FBBG President shall hold monthly one-on-one meetings to share updates and plans for the Gardens. The Garden Director will propose meeting dates and locations to the FBBG President at least two (2) weeks in advance and facilitate the meeting.
- b. **Bi-Annual:** The Parks Director or designee, the Gardens Director and appropriate Parks staff and FBBG Board of Directors shall meet to workshop current accomplishments, plans, and issues. The Parks Director or designee will propose meeting dates and locations to FBBG at least two (2) weeks in advance and facilitate the meeting.
- c. **Deadline for Preceding Year Reports:**
  - i. Audited financial report, either a 990 or nonprofit audited financial statement will be provided by September 15<sup>th</sup> each year.
  - ii. Volunteer activity report for volunteer activity during the immediately preceding year will be provided by March 31<sup>st</sup> of each year.
  - iii. Programs and activities report including a description of all promotional and special events at the Gardens that were sponsored, operated and funded by FBBG during the previous year will be provided by March 31<sup>st</sup> of each year.
  - iv. Membership report will be provided by March 31<sup>st</sup> of each year.
  - v. Annual report will be provided by July 31<sup>st</sup> of each year.
- d. **Deadline for Subsequent Year Reports:**
  - i. The Gardens Director shall submit to FBBG President and FBBG Chairperson for consideration a request for funds for capital and

operational specific projects for the subsequent year by March 31. For example, capital and operational reports for 2017 shall be submitted by March 31, 2016. The County and FBBG will collectively consider these requests and mutually determine which, if any, are viable for partnership opportunities. Either Party may accept or deny requests for funding.

- ii. On or before March 31, FBBG President and Gardens Director shall jointly discuss each entity's subsequent year's goals and priorities and shall submit to the Parks Director and FBBG Chairperson a summary of their joint goals, in writing.
- iii. On or before March 31, FBBG shall provide to the Parks Director and Garden Director a written estimate of the amount of its cash support and the nature of its operations and volunteer support to the Gardens for the subsequent year.
- iv. On or before March 31, the Gardens Director and FBBG President, along with appropriate support staff, will meet to jointly establish a prioritized list of capital projects, volunteer projects, strategic activities, operational initiatives, programs, and equipment for the upcoming fiscal year.
- v. On or before May 1, the County and FBBG will collectively review the estimated costs from the above referenced list of projects and mutually agree to specific projects by May 1 each year that FBBG will attempt to fundraise for. For any projects which FBBG agrees to support, the County will account to FBBG as to their use of FBBG's funds, including financial reporting and project timelines.

#### **4. OPERATING PROCEDURES.**

##### **a. Solicitations and Donations:**

- i. FBBG shall have the authority to solicit and receive monetary donations, gifts, grants and other forms of revenue from any source during the term of this Agreement, provided all such

revenue received is used by FBBG for the support of the Gardens and FBBG.

- ii. The Parks Director and designees have authority to solicit funds they determine are appropriate to their programs and goals. The Parks Director and designees, however, may participate in solicitations with FBBG at the request of FBBG.

**b. Memberships:**

- i. The County shall permit FBBG to offer to its members certain benefits and discounts at the Gardens, provided that if FBBG wishes to make changes to the benefits and discounts at the Gardens which are currently offered, the proposed changes are subject to review and approval in writing by the Parks Director or designee each year by March 31st.
- ii. “Free” memberships will continue to be distributed at the discretion of FBBG management in order to build awareness, network, and partner with organizations for the benefit of the Gardens. No more than twenty (20) free memberships will be distributed in any calendar year, absent extenuating circumstances in which case distribution of additional free memberships must be approved in writing by the Gardens Director.
- iii. The County will stock, distribute, and control discount and free admission passes for entrance into the Gardens. Passes will be numbered and attendance counts will be taken at the end of the day. FBBG must quarterly request free admission passes from the Gardens Director stating the reasons why the passes are necessary for awareness building and support of the Gardens. FBBG will receive sixty (60) passes, 30 for each quarter the Gardens is in operation, to be used for awareness building and support of the Gardens at the discretion of FBBG management. In addition, free admission/ guest passes will also continue to be included in FBBG membership packets. The current number of

complementary passes included with the various categories of membership is hereby approved by the County. Any significant increase in the number of passes per each membership packet must be approved by the Gardens Director.

**c. Administration:**

- i.** The County shall provide to FBBG such office space at the Gardens as is reasonably necessary and mutually agreed upon for the on-site operation of FBBG, at a minimum this shall include the current office space occupied by FBBG, including utilities, phone and staff parking.
- ii.** In no event will the County's staff report to, be treated as, or be supervised by employees of FBBG, and in no event will FBBG's staff report to, be treated as, or be supervised by employees of the County.
- iii.** The Gardens Director or designee and FBBG President or designee shall agree to all FBBG volunteer activities in the gardens themselves. The Gardens Director or designee shall designate all volunteer assignments that pertain to the management and operation of the gardens themselves. This shall not be construed to require Gardens Director approval for FBBG' use of volunteers in its operations and educational programs and other special programs of FBBG, except for volunteer activities that occur in the gardens themselves. FBBG may direct volunteer activities so long as the activity is deemed a 'FBBG' activity in Section (2)(c).
- iv.** FBBG must apply for a Special Events Permit for all special events in order for the County to account for all activities and events in the Gardens. However, no permit fees or other fees for usage of the Gardens or space in any of the buildings located on the premises shall be charged to FBBG.
- v.** The Parks Director and the Gardens Director shall participate in the selection of FBBG President and FBBG President and

Chairperson shall participate in the selection of the Gardens Director, if that position were vacant and being filled, by: a.) forwarding to FBBG / County, in writing, suggested selection criteria and b.) participating on the interview panels which would forward its recommendations to FBBG Chairperson / Parks Director.

- vi.** Friends shall be responsible for maintaining its office space, volunteer room, and classrooms after each use by FBBG, in a state of cleanliness.
  
- vii.** All grant applications for garden improvements (e.g. new gardens, water conservation projects, irrigation projects, fountains or artwork in the gardens, building improvements, etc.) shall be approved in writing by both the FBBG President and the Gardens Director prior to submission. However, FBBG is free to seek grants for its operations, programming, and special events, without need to obtain Gardens Director approval. No grant shall be applied for that adversely impacts the County. FBBG shall notify the Gardens Director of the grant applications made on behalf of FBBG at monthly one-on-one meetings.

## **5. GIFT SHOP.**

- a.** FBBG shall operate and manage the Gift Shop in the Gardens, and provide all merchandise and staffing to perform this function. The County reserves the right to sell general merchandise at the Gardens.
  
- b.** The Gift Shop shall have established hours and shall be open during Park Hours In-Season. On the Off-Season FBBG must have established hours for the Gift Shop but does not have to be open during full park hours. The County acknowledges and agrees that FBBG's ability to maintain established hours is dependent upon venue traffic. In the event that venue traffic is insufficient to support operation of the gift shop, hours may need to be limited. Any need to limit hours due to poor traffic will be within the sole discretion of FBBG however the County must be notified immediately so that the County can plan accordingly.

- c. FBBG shall provide daily cleaning and maintenance of the Gift Shop. The trash collected from the gift shop shall be placed by FBBG in the receptacles located behind the building on the loading dock.

## **6. MAINTENANCE FUND.**

- a. In December of each contract year, FBBG shall remit to the County a maintenance fund in lieu of base rent and utilities for major maintenance, repair and replacement of \$15,000 per year for the purposes of maintaining and enhancing the Gardens. This amount shall be pro-rated for 2016 based upon that fraction of the calendar year during which this Agreement is in place.
- b. County shall maintain in good order and provide for all major repairs to all structural components of the Campus, including the roof and roof systems (including gutters, downspouts, etc.), foundation, exterior walls, interior structural walls, and all utility systems, including plumbing and plumbing systems, HVAC, and electrical.
- c. This fund shall be kept in County trust for the Gardens according to generally accepted accounting principles for government. The County will provide FBBG with an annual report of expenditures paid out of this fund during the immediately previous year and balances on hand at the end of the year.

## **7. GARDEN FUND.**

- a. FBBG agrees to maintain a specifically designated account to receive both restricted and unrestricted contributions and donations in support of the Gardens (the "Garden Fund") for the operation and maintenance of the Gardens. FBBG shall remit a minimum of Five Thousand Dollars (\$5,000) per year into this account which shall be designated for the use by the Gardens Director to offset operating costs of the Gardens.
- b. Withdrawals from the Gardens Fund must be supported by financial accountability enumerating how the funds are intended to be used at the Gardens, and must be signed-off on by the FBBG President. For any

structural repairs, capital projects, or major equipment purchases, the Gardens Director must provide the FBBG President with at least three (3) quotes to ensure the price is appropriate and competitive. The Gardens Director must also provide a projected timeline for completing the project or purchasing the items. In addition, upon completion of the project or purchase of the item, the Gardens Director must provide the FBBG President with a final report accounting for the use of the funds.

## **8. CAPITAL PROJECTS.**

- a.** The County and FBBG may agree from time to time to jointly or separately fund capital projects for the Gardens in accordance with the Master Plan. “Capital project” has the meaning given in the Milwaukee County Administrative Manual section 4.03 (1)(h). With regard to each such capital project, the County and FBBG agree to proceed as follows:
  - i.** Appropriations for each project shall be established by the County and reviewed annually during the County budget deliberations or more often if appropriate.
  - ii.** FBBG and the County will agree to share costs only under procedures mutually agreed to by FBBG and the County.
  - iii.** For each such capital project, the County and FBBG will execute a specific agreement describing sources and uses of funds, procedures for transferring FBBG’s share of project costs to the County, program management, project schedule and any other specific agreements.
  - iv.** No such capital project may proceed where the County will share the cost of such capital project until the County Board appropriates funds for such project and until FBBG transfers its share of the appropriation or provides assurances acceptable to the County of the timely availability of such funds.
  - v.** All capital improvements, renovations, or alterations shall become the property of the County, at no cost to the County. The County

will however be responsible for ongoing maintenance and upkeep.

- b. FBBG agrees to notify the Parks Director in writing of any donation or intent to support any new capital project.
- c. Upon receipt of such information, the Parks Director shall determine the appropriateness of the project related to the mission of the Gardens and the County's budget and objectives. If determined appropriate the Parks Director shall inform the appropriate County officials.

## **9. BOND COMPLIANCE.**

- a. FBBG agrees that it has not and will not use or permit the use of the Property in a manner that would result in Private Business Use of the Property to the extent necessary to maintain the tax-exempt status of the interest on outstanding bonds issued or to be issued by County to finance improvements to the Property (the "Bonds") or any future tax-exempt bonds. "Private Business Use" means direct or indirect use in a trade or business carried on by any person other than a state or local government unit (as defined in Section 1.103-1 of the Treasury Regulations). In the event that any of the Bonds are issued as "qualified 501(c)(3) bonds" under Section 145 of the Internal Revenue Code of 1986, as amended (the "Code"), an organization described in Section 501(c)(3) of the Code is treated (with respect to those Bonds) as a state or local government unit with respect to its activities which are not unrelated trades or businesses (without regard to whether the activity results in unrelated trade or business income subject to taxation under Section 512(a) of the Code), determined under Section 513(a) of the Code. Without limiting the foregoing, FBBG agrees that it will not sub-lease or otherwise permit others to use any portion of the Property unless it delivers to the County Comptroller an opinion from County's Bond Counsel to the effect that the proposed sub-lease or other use will not adversely affect the validity of the Bonds or result in the interest paid or payable on any Bond becoming includable for federal income tax purposes in the gross income of any owner of the Bonds. This provision shall survive termination of this Agreement and remain in force as long

as the County has Bonds outstanding for purposes of this Section 9a only, the term Property includes the Property described on Exhibit A as well as any other facilities owned by the County and leased or operated by FBBG.

- b. Office of the Comptroller.** The County and FBBG shall comply with all rules and regulations relating to bonds as long as there is outstanding debt on the facility. The Office of the Comptroller is responsible for reviewing the project, including on site, if necessary, to verify, in consultation with the County's Bond Counsel, that the use of the facility is in compliance with bond rules, regulations and Section 9a.

## **10. RECORDS.**

- a.** FBBG shall provide annually to the Parks Director and Milwaukee County Auditor within ten (10) days of receipt a certified, independently audited, financial statement reporting an audit performed in accordance with generally accepted accounting principles.
- b.** FBBG and the County shall provide each other access to all construction and other documents or records related to the construction of or disbursement of funds for capital improvement projects in which FBBG participate. These documents and records shall include an accounting of the amount of funds received and disbursed by FBBG and/or the County for a particular capital improvement project, but shall not include any documents which would contain information regarding individual donors or other sources of such funds. It is the responsibility of FBBG to verify to the satisfaction of the County the validity of pledges made from anonymous donors, but not yet received, for any capital improvement projects in which FBBG participate.
- c.** FBBG and the County shall provide each other with access to all documents or records related to co-sponsored events or programs. These documents and records shall include an accounting for the expenses incurred and funds received disbursed by FBBG and/or the County for such co-sponsored event or program, but shall not include

any document which would contain information regarding individual donors or other sources of funds.

- d. FBBG may, if it chooses, disclose to the County information regarding specific donors who have given gifts designated to be used in a specific way or for a specific purpose at the Park. Such disclosures shall not obligate FBBG to disclose any other information regarding donors or donations made to FBBG.
- e. FBBG shall also provide the County with a copy of its IRS Form 990 (Return of Organization Exempt from Income Tax).
- f. The County shall provide FBBG an annual financial statement showing the revenues and operational costs for the Gardens each year.

## **11. AUDIT.**

Pursuant to Milwaukee County ordinance section 56.30(6)(e), FBBG shall allow Milwaukee County, the Milwaukee County Department of Audit, or any other Party the Milwaukee County may name, when and with at least (7) days advance notice access to records directly related to joint projects benefiting the Gardens (i.e. vendors, quotes, maps, technical drawings, etc.) Under no circumstances may the County access the confidential records of FBBG that relate to its ethical operation as a private nonprofit entity. Any subcontracting by FBBG in performing the duties described under this agreement shall subject the subcontractor and or associates to the same audit terms and conditions as FBBG. In the event the agreement is terminated, FBBG (or any subcontractor) shall maintain and make available to Milwaukee County the aforementioned audit information for no less than three (3) years.

## **12. INDEMNIFICATION.**

The Parties to this Agreement agree to indemnify, defend and hold harmless the other Party and their elected officials, officers, directors, employees and agents, against any and all liability, losses, charges, fines, costs or expenses including attorney's fees to the extent such damages including suits at law or in equity are caused by or resulting from any wrongful, intentional, or

negligent acts or omissions of the indemnifying Party or any of the officers, employees, agents or representatives of the indemnifying Party which may result in any person, persons, or organization suffering bodily injury, personal injury, death or property loss or damage, employment practices, civil rights or environmental liability and impairments arising out of this Agreement. Milwaukee County's liability shall be limited by Wisconsin State statute sections 345.05(3) for automobile and 893.80(3) for general liability.

**13. ENVIRONMENTAL INDEMNIFICATION.**

FBBG shall, to the fullest extent provided for under any environmental laws, rules and regulations, be responsible for any required repair, cleanup, remediation or detoxification arising out of: (a) any Hazardous Materials brought onto or introduced into the Premises or surrounding areas by FBBG or its agents. FBBG hereby agrees to indemnify, defend and hold the County harmless from and against any and all liabilities, costs, expenses (including taxable costs and taxable attorney's fees), damages (including but not limited to clean-up, remediation or detoxification of) or any other losses caused by FBBG's introduction of any such Hazardous Materials into or onto the Premises and any Hazardous Materials brought onto or introduced into the Premises as described herein by FBBG. "Hazardous Materials" as the term is used herein shall mean any substance: (a) the presence of which requires investigation or remediation under any Federal, State or local statute, regulation, ordinance, order, action or policy; or (b) which is or becomes defined as a "hazardous waste" or "hazardous substance" under any Federal, State or local statute, regulation, ordinance, or amendments thereto.

**14. INSURANCE.**

Milwaukee County assumes no responsibility for any loss or damage to FBBG's personal property while in use or stored at the Gardens. FBBG agree to evidence and maintain proof of financial responsibility to cover costs as may arise from claims of vicarious liability arising from employees or volunteers. Such evidence shall include coverages in the following minimum amounts.

<u>Type of Coverage</u>	<u>Minimum Limits</u>
Wisconsin Workers' Compensation	Statutory

Or Proof of All State Coverage	(waiver of subrogation)
Commercial General Liability	
Bodily Injury and Property Damage Occurrence	\$1,000,000 per
(incl. Personal Injury, Fire Legal Aggregate	\$1,000,000 General
Contractual & Products/Completed Operations	
Automobile Liability	
For non-owned and/or hired	\$1,000,000 per Accident

Milwaukee County, as its interests may appear, shall be named as an additional insured for General and Automobile Liability and be afforded a thirty (30) day written notice of cancellation or non-renewal. Disclosure must be made of any non-standard or restrictive additional insured endorsement, and any use of non-standard or restrictive additional insured endorsement will not be acceptable. A certificate indicating the above coverages shall be submitted for review and approval by the County for the duration of this Agreement. Coverages shall be placed with an insurance company approved by the State of Wisconsin and rated "A" per Best's Key Rating Guide.

Additional information as to policy form, retroactive date, discovery provisions and applicable retentions shall be submitted to County, if requested, to obtain approval of insurance requirements. Any deviations, including use of purchasing groups, risk retention groups, etc., or requests for waiver from the above requirements shall be submitted in writing to the County for approval prior to the commencement of activities under this Agreement.

The insurance requirements contained within this Agreement are subject to periodic review and adjustment by the County Risk Manager.

**15. INDEPENDENT CONTRACTORS.**

In the performance of this Agreement both the County and FBBG will be acting in an individual capacity and not as agents, employees, partners, joint ventures

or associates of one another. The agents or employees of the one shall not be construed to be the agents or employees of the other. Milwaukee County employees shall remain employees of Milwaukee County notwithstanding the fact that they may assist FBBG.

#### **16. CONFLICT OF INTEREST.**

- a. The County and FBBG recognize that the opportunity for a conflict of interest may arise where an employee of one Party is related to an employee of the other. The Parties agree to provide for an additional oversight and disclosure of transactions between related employees.
- b. FBBG may encourage Milwaukee County employees to become members, but Milwaukee County employees shall not serve as officers or directors.
- c. FBBG, its agents and employees shall comply with all applicable federal, state, and local laws and regulations governing conflicts of interest.

#### **17. TERMINATION.**

Either Party may terminate the contract if the other breaches or fails to perform any of its obligations under the Contract and the breach or failure continues for a period of thirty (30) days after the Party has notified the other of such breach or failure; provided that this time period shall be extended as reasonable if the County or FBBG cannot reasonably cure its breach or failure to perform within the thirty (30) day period. Notwithstanding any contrary language contained in this Paragraph, FBBG is not entitled to any notice or cure period before an incurable breach of, or failure to perform under this Contract. In addition, the Contract may be terminated in the event that the Milwaukee County Board of Supervisors, via official action and resolution, elect to close the Gardens during the Term of this Agreement.

#### **18. ASSIGNMENT / SUBLETTING.**

FBBG may not assign this Agreement, in whole or in part, or sublease any part of the Premises without the prior written approval of the Parks Director. FBBG agrees that it will not sub-lease or otherwise permit others to use any portion

of the Property unless it delivers to the County Comptroller an opinion from County's Bond Counsel to the effect that the proposed sub-lease or other use will not adversely affect the validity of the Bonds or result in the interest paid or payable on any Bond becoming includable for federal income tax purposes in the gross income of any owner of the Bonds. This provision shall survive termination of this Agreement and remain in force as long as the County has Bonds outstanding. If this Agreement is terminated, FBBG agrees to provide the Comptroller on behalf of the County with a certificate and any other information the County deems necessary to evidence its compliance with the County's Bond covenants at the County's request until the last Bond matures. For purposes of this Section 18 only, the term Property includes the Property described on Exhibit A as well as any other facilities owned by the County and leased or operated by FBBG.

#### **19. INTERPRETATION.**

The laws of the State of Wisconsin shall govern the validity, performance and enforcement of this Agreement. If any provision of this Agreement is found to be invalid or unenforceable, the remaining provisions of this Agreement shall not be affected, thereby, and shall remain in full force and effect as though the invalid or unenforceable provisions were not contained herein; provided that, if said invalid or unenforceable provisions go to the heart of this Agreement, then the Agreement is terminated. FBBG acknowledges that it has read this Agreement and that it has had the opportunity to confer with counsel in negotiating this Agreement; accordingly, this Agreement shall be construed neither for nor against the County or FBBG, but shall be given a fair and reasonable interpretation in accordance with the meaning of its terms.

#### **20. PARTNERSHIP.**

Nothing contained in this Agreement shall constitute or be construed to create a partnership or joint venture between the County or its successors or assigns and FBBG or its successors or assigns. This Agreement does not create the relationship of principal and agent or of partnership, of joint venture, or of any association between the County and FBBG.

**21. FORCE MAJEURE.**

In the event that either Party shall be delayed or hindered in or prevented from the performance of any act required hereunder by reason of strikes, lockouts, labor troubles, inability to procure materials, failure of power, restrictive governmental laws, regulations orders or decrees, riots, insurrection, war, acts of God, inclement weather, or other reason beyond the Party’s reasonable control, then performance of such act shall be excused for the period of the delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay. Such failure to perform shall not be grounds for termination or default.

**22. NOTICE.**

All notices with respect to this Agreement shall be in writing. Except as otherwise expressly provided in this Agreement, a notice shall be deemed duly given and received upon delivery, if delivered by hand, or three days after posting via US Mail, to the party addressed as follows:

To FBBG:  
Friends of Boerner Botanical Gardens  
President  
9400 Boerner Drive  
Hales Corners, WI 53130

To County:  
Milwaukee County Dept. of Parks  
Parks Director  
9480 Watertown Plank Road  
Wauwatosa, WI 53226

Either party may designate a new address for purposes of this Agreement by written notice to the other party.

**SIGNATURE PAGE FOLLOWS:**

**IN WITNESS WHEREOF, the Parties hereto have set their hands as follows:**

**Friends of Boerner Botanical Gardens, Inc.**

By \_\_\_\_\_ Date \_\_\_\_\_  
Ellen Hayward, President

By \_\_\_\_\_ Date \_\_\_\_\_  
Denasha A. Scott, Board Chair

**Milwaukee County Dep of Parks, Recreation & Culture**

By \_\_\_\_\_ Date \_\_\_\_\_  
John Dargle, Jr., CPRP, Director

*Approved with regards to County Ordinance Chapter 42:*

By \_\_\_\_\_ Date \_\_\_\_\_  
Community Business Development Partners

*Approved as to form and independent status:*

*Reviewed by:*

By \_\_\_\_\_ Date \_\_\_\_\_  
Corporation Counsel

By \_\_\_\_\_ Date \_\_\_\_\_  
Risk Management

*Approved:*

*Approved as to funds available per  
Wisconsin Statutes Section 59.255*

*(2)(e):*

By \_\_\_\_\_ Date \_\_\_\_\_  
County Executive Chris Abele

By \_\_\_\_\_ Date \_\_\_\_\_  
Comptroller Scott B. Manske

*Approved as compliant under Sec. 59.42 (2)(b)5, Stats.:*

By \_\_\_\_\_ Date \_\_\_\_\_