

**DEVELOPMENT AGREEMENT
FOR THE
BOERNER BOTANICAL GARDENS CHILDRENS GARDEN
BETWEEN
MILWAUKEE COUNTY PARKS
AND
MARGIE’S SMILE**

This Development Agreement (this “Agreement”) is made and entered into effective _____ (the “Effective Date”), by and between the MILWAUKEE COUNTY PARKS (the “County”), and MARGIE’S SMILE, INC. (the “Developer”). Referenced together, the County and the Developer are the parties (the “Parties”) to this Agreement.

WITNESSETH:

WHEREAS, Margie’s Smile is a Wisconsin corporation which exists to construct a children’s garden to honor the memory of Margaret Purpero Kezman; and

WHEREAS, The County and community partners have from time to time collaborated to fund and install new improvements to Boerner Botanical Gardens (the “Gardens”) in order to enhance the visitors’ experience and support the County’s mission; and

WHEREAS, The County has identified the benefit of adding a new garden to the existing Gardens with improvements and programming that are specifically tailored to engaging children and introducing them to the importance of our natural world; and

WHEREAS, The County desires such park improvements to be made to enhance the Gardens; and

WHEREAS, the Milwaukee County Board of Supervisors, by virtue of adopting Resolution ____ on _____, has authorized the Milwaukee County Parks to enter into this Development Agreement with the Developer for and on behalf of Milwaukee County.

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

1. USE OF THE PREMISES FOR IMPROVEMENTS: The Developer shall furnish and install a children’s garden (the “Children’s Garden”) as set forth in the proposal attached hereto as Exhibit A (the “Proposal”). The Children’s Garden shall be located within the Gardens on the premises specified in Exhibit B (the “Premises”). The Developer has engaged New Eden Landscape Architecture, LLC (“New Eden”) to serve as the Developer’s architect for the Project. Subject to the terms and conditions hereof, the Developer contemplates engaging

several contractors to complete construction of the Project. The furnishing and installation of the Children's Garden on the Premises as contemplated hereby is referred to herein as the "Project."

2. CONDITION OF THE PREMISES: County makes no representation or warranty that the Premises, including but not limited to the land, electrical and other mechanical systems: (a) meet and comply with all federal, state, and local laws, ordinances and regulations; and (b) are in workable and sanitary order and state of repair at the time of delivery to the Developer. The Developer acknowledges that it has been made aware by County that the Developer may use the Premises on an "as-is" basis which may or may not prove to be suitable for all purposes contemplated by the Developer, either now or in the future. The County shall not be responsible for performing any grading or compaction work with respect to the Premises. The Developer is solely responsible for and must make adequate allowance for all excavation and disposal costs necessary for the Project including site restoration and soil relocation. The Developer shall be solely responsible for procuring all property development costs, including, but not limited to, extension of water laterals and utilities to the Premises. The Developer hereby releases and disclaims any claim, damage, loss, injury or obligation whatsoever of the County in any way relating to or arising out of the physical condition of the Premises and/or any matters described in this Section 2. Such disclaimer and release shall include any action at law or in equity, whether arising out of contract or tort law. The Developer further acknowledges that it has freely inspected the Premises and is aware of its general overall condition.

3. CONSTRUCTION SCHEDULE: Subject to the terms and conditions hereof, the Developer agrees (i) to commence construction of the Children's Garden, defined as commencement of site improvements on the Premises for the Children's Garden within nine (9) months after the Effective Date (the "Project Commencement Date") and (ii) to complete construction of the Children's Garden, defined as completion of all items on the Punch List (as defined below) and final cleanup of the Premises, as well as any adjacent County Property that Developer has used as a staging area during construction ("Final Completion"), within eighteen (18) months after the Project Commencement Date, or within such longer period of time as may be needed to complete construction if the Developer is diligently pursuing construction. When the Developer commences site improvements on the Premises, the Developer shall cause New Eden or the Developer's principal landscape contractor to certify to the County that construction on the Children's Garden has been commenced. When the Developer determines the Children's Garden has been substantially completed in accordance with the Proposal and Plans, subject only to items of work that would not adversely affect public use of the Children's Garden, the Developer shall cause New Eden or the Developer's principal landscape contractor to certify to the County that the Children's Garden is complete in accordance with the Proposal and Plans, subject only to items of work on a proposed list. Within ten (10) business days after the delivery of such proposed list to the County, the County shall either approve the proposed list or request modifications thereto. If the County requests modifications thereto, the Parties shall negotiate in good faith to agree on and execute a final list within ten (10) business days after the County requests modifications. The proposed list as approved by the County, or as modified by the agreement of the County and the Developer is referred to herein as the "Punch List." When the Developer determines that Final Completion has been achieved, the Developer shall give notice thereof (a "Notice of Final Completion") to the County. Within ten (10) business days after the Developer delivers notice of Final Completion to the County, the County shall deliver to the Developer (i) a notice accepting Final Completion or (ii) if Final Completion has not in fact been

achieved, a notice rejecting Final Completion identifying all deficiencies, which deficiencies shall be promptly corrected by the Developer. Once such deficiencies have been corrected, the Developer shall deliver a new notice of Final Completion to the County, and such review process shall be repeated until the County accepts Final Completion. The date on which the Developer in fact achieves Final Completion is referred to herein as the “Final Completion Date.” If the Developer ceases construction of the Project before the Final Completion Date, other than due to a Force Majeure Delay, for sixty (60) consecutive days, such event shall be deemed a “Construction Stoppage.” Effective as of the Final Completion Date, Developer hereby transfers, assigns and conveys to County all right, title and interest in and to such structures, alterations, additions, improvements and/or other personal property or fixtures installed on the Premises by the Developer as part of the Project (including generic signage permanently affixed to the Premises), free and clear of all liens, claims and encumbrances.

4. SCOPE OF WORK: County agrees to use reasonable efforts to assist the Developer in its efforts to furnish a children’s garden for the Gardens. Using reasonable efforts shall not impose on County any obligation to budget or pay for the improvements to the Gardens but may require County staff time and advisory support. County shall not be responsible for securing any required approvals, zoning changes, building permits or other required authorizations from regulatory or governmental agencies, but County agrees to assist the Developer in obtaining rezoning, licenses, permits or approvals, at the Developer’s sole cost and expense.

5. BUDGET: The Developer has submitted a preliminary budget to the County for the Project. The total preliminary budget is approximately \$1.7 to \$2 million.

6. CONDITIONS TO CONSTRUCTION; CONSTRUCTION:

a) Costs. All costs associated with the furnishing and installation of the Children’s Garden as contemplated hereby, including disconnection and/or hookup of Utilities in conjunction therewith, shall be the responsibility of the Developer. “Utilities” shall include sewer, water, gas, and electricity.

b) Plan Approval; Permits. Prior to the start of any construction or renovation of the Premises, the Developer shall submit detailed construction plans and specifications (the “Plans”) to the then serving Milwaukee County Parks Executive Director or his or her designee (the “Parks Director”) and the Architecture and Engineering Section of the Milwaukee County Department of Administrative Services for review and approval. Submittals shall include, but not be limited to, shop drawings containing product information, and materials and products shall be subject to approval by the Parks Director. The Plans will be consistent with the Proposal. Any Material Alteration to the Plans must be approved by the Parks Director. “Material Alteration” means any change to the equipment type, location, or construction materials, or any change to the borders and extent of the Children’s Garden as provided for in the Plans. Material Alteration does not include an alteration required by any municipality or other governmental agency or otherwise required by law, or an alteration required due to shortages or unavailability of materials (though substitute must be of comparable quality). The Developer shall procure and pay the fees for all appropriate federal, state, and local licenses and permits required for its activities hereunder. Prior to the start of any construction or renovation of the

Premises, the Developer shall obtain, and be in compliance with, all necessary permits and licenses from the appropriate governmental authorities including applying for a Right of Entry permit, which is required by County for all utility and construction-related work on parkland.

c) Contractor Approval. Prior to the start of any construction or renovation of the Premises, the Developer shall submit a list of the contractors that the Developer proposes to use to complete construction of the Project, together with proposed contracts, to the Park Director for review and approval. The contractors and contracts approved by the Parks Director are referred to herein as the “Contractors” and “Contracts,” respectively.

d) Final Budget Approval. Prior to the start of any construction or renovation of the Premises, and based upon the Contracts, the Developer and the Parks Director shall agree upon a final budget for completion of the Project (the “Final Budget”).

e) Proof of Financial Wherewithal. Prior to the start of any construction or renovation of the Premises, the Developer shall provide to the Parks Director a letter from the Developer’s banking institution stating that the Developer has on deposit with such banking institution cash in excess of one hundred ten percent (110%) of the Final Budget amount.

f) Construction Standards. All development and landscaping shall be completed in a first-class manner and consistent with the standards then in effect established for other work in Milwaukee County Parks. Any and all alterations, additions and improvements shall be made in compliance with all statutes, laws, ordinances, rules, and regulations then in effect of any governmental authority having jurisdiction over the Premises. The Developer shall also indemnify and hold the County harmless from and against all statutory liens or claims of liens of any Contractor, subcontractor, laborer or any other party which may arise in connection with any alteration, addition or improvement to the Premises undertaken by or on behalf of the Developer. Except as provided in the Plans as approved by the Parks Director, and/or any alteration thereto that does not constitute a Material Alteration, the Developer shall not make any alterations or additions to the Premises without the prior written consent of the Parks Director, except in the event of an emergency, when such consent shall not be required, provided that notice shall be given as soon as reasonably possible thereafter.

g) Builder's Risk. The Developer or its general contractor shall provide Builder's Risk insurance coverage on a completed value form insuring for special perils, with Milwaukee County as additional insured and loss payee on the insurance certificate. Coverage is during construction period and is intended to terminate on the Final Completion Date. Prior to the start of any construction or renovation, the Developer shall supply the Parks Director with written evidence of Builder's Risk insurance for review and approval. The Parks Director shall provide a written response to the Developer within thirty (30) days of receiving written evidence of the Developer’s Builder's Risk insurance documents.

h) Workforce Goals – Targeted Business Enterprise Participation. The Developer shall use good faith efforts to ensure that Targeted Business Enterprises (“TBE”) have an equal opportunity to receive and participate in the Project and shall require that its Contractors do the same. The Developer shall utilize good faith efforts to achieve a minimum goal of 25 percent TBE participation for Project costs relating to the hard construction costs and a minimum goal of 17 percent TBE participation for Project costs relating to professional services.

Achievement of the foregoing TBE goals may be impacted by the actual available workforce across and within certain trades at the time of construction.

i) Licensed Tradespersons. The Developer agrees that all renovations and improvements shall be performed by fully licensed Contractors and subcontractors who shall utilize industry standard supplies, equipment, and construction methods in the performance of their duties. The Developer shall require its Contractors and all subcontractors, if any, to obtain and maintain adequate insurance coverages with liability limits not less than that required of the Developer hereunder. The Developer shall have responsibility to enforce compliance with these insurance requirements and provide evidence of insurance for any Contractor or subcontractor as acceptable to the Parks Director.

j) Construction Documents. The Developer agrees that within sixty (60) days after Substantial Completion, the Developer shall provide to the Parks Director a complete set of construction documents to be included as a minimum: (a) as-built drawings; (b) a copy of all work orders and change orders; (c) a copy of all lien-waivers; (d) operation manuals or cut sheet drawings of any mechanical fixtures or equipment which was installed; (e) manufacturer's warranties or extended warranties; (f) a copy of all construction permits and signed drawings; (g) Hales Corner's final occupancy permits, if applicable.

k) Removal of Equipment and Supplies. Before the Final Completion Date, the Developer shall remove, at its costs, all of its equipment, supplies, and related items from the Premises and shall restore any areas adjacent to the Premises used by the Developer as a construction staging area to a parklike condition to the reasonable satisfaction of the Parks Director. Damage caused to the Premises and/or any adjacent areas of County Property by any removal of personal property will be promptly (that is, within ten (10) business days) repaired by the Developer. If for any reason the Developer does not comply in a timely manner with its obligations under this paragraph, then the County may remove, dispose of, or retain such property and make such repairs as the County sees fit. It is mutually agreed that the County may recover from the Developer any and all reasonable costs, as determined by the County, related to this Section. The Developer agrees to surrender the Premises and any areas adjacent to the Premises used by the Developer as a construction staging area in good condition, subject to ordinary wear and tear and casualty.

l) Nondiscrimination and Affirmative Action. In construction of the Project and performance of its duties and obligations hereunder, the Developer shall require that its Contractors shall not discriminate against any employee or applicant for employment based on race, color, national origin or ancestry, age, sex, sexual orientation, gender identity and gender expression, disability, marital status, family status, lawful source of income, or status as a victim of domestic abuse, sexual assault or stalking which shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation and selection for training, including apprenticeships. The Developer will require that its Contractors shall post in conspicuous places, accessible to employees, notices setting forth the provisions of the foregoing nondiscriminatory clause. The Developer will require that its Contractors shall strive to implement the principles of equal employment opportunities through an effective affirmative action program, which program shall have as its objective to increase the utilization of women,

minorities and handicap persons, and other protected groups in construction of the Children's Garden.

7. MAINTENANCE AGREEMENT: Upon the execution hereof, the Developer and the Parks Director shall enter into good faith negotiations with respect to a Maintenance Agreement. It is anticipated that the Maintenance Agreement will: (A) include a list of all maintenance tasks required to operate and maintain the Children's Garden, and shall divide those tasks into two categories, tasks to be performed by Developer and tasks to be performed by the County; (B) provide for the Developer to perform the tasks in the first category and reimburse the County for the tasks in the second category for a period of not less than twenty (20) years; (C) enable the Developer to extend the term of the Maintenance Agreement for three ten year periods if all terms of the Maintenance Agreement are being met at the time of the extension, subject to appropriate repricing in light of changed market conditions; (D) enable the Developer and County to extend the Maintenance Agreement indefinitely by agreement of the Parties after the initial twenty (20) year term and any renewals; and (E) provide some arrangement to ensure the County with respect to the Developers financial ability to fund its obligations under the Maintenance Agreement. Any other provision hereof to the contrary notwithstanding, no construction shall begin hereunder unless and until the Developer and Parks Director have entered into a mutually satisfactory Maintenance Agreement, and the Parties obligations hereunder shall be null and void if the Developer and Parks Director have not entered into a mutually agreeable Maintenance Agreement by April 30, 2021.

8. COUNTY AGREEMENTS: For as long as the Developer funds maintenance of the Children's Garden as contemplated by the Maintenance Agreement, the County agrees that except as the Developer may otherwise agree from time to time in writing:

a) Name. The Children's Garden shall be known as "Margie's Garden." The County shall make reasonable good faith efforts to refer to the Children's Garden as "Margie's Garden" in all County publications, hard copy and digital, when reference is made to the Children's Garden. Without limitation to the foregoing, the County shall not grant any other naming rights with respect to the Children's Garden and/or any element thereof.

b) Commercial Activities. The County shall not allow any commercial activities on the Premises, including, by way of example and not by way of limitation, any ice cream stand or gift shop.

c) No Admission Fee. The County shall not charge any additional admission fee for entry and/or access to the Children's Garden other than the published admission fee to the Gardens.

d) Private Events. The County shall not allow the Children's Garden to be used for private events or fund-raising activities, subject to the provisions of the Maintenance Agreement

e) Material Alteration. The County shall not redesign, redevelop and/or modify the Children's Garden in a way that would materially alter the Children's Garden and/or any visitor's experience of the Children's Garden and/or reallocate any portion of the Premises

for a purpose other than the Children's Garden, subject to the provisions in the Maintenance Agreement.

9. DEFAULTS AND REMEDIES:

a) Events of Default by the Developer. Any one or more of the following events are hereby defined as, declared to be, and constitute an "Event of Default" by the Developer for purposes of this Agreement: (a) a Construction Stoppage (as defined in Section 3 hereof) by the Developer, subject to extension for Force Majeure Delays; (b) the Developer fails to commence construction of the Children's Garden by the Project Commencement Date subject to extension for Force Majeure Delays; (c) the Substantial Completion Date, has not occurred within eighteen (18) months after the Project Commencement Date, subject to extension for Force Majeure Delays or (d) the failure of the Developer to perform any other term, condition or covenant to be performed or observed by the Developer, subject to extension for Force Majeure Delays. In the event an Event of Default by the Developer shall occur, the County shall send written notice to the Developer (the "Default Notice") specifying the nature of the Event of Default in detail, and the Developer shall have thirty (30) days after receipt of the Default Notice to cure such Event of Default. In the event that the Developer does not cure such Event of Default within such thirty (30) day period (or such other reasonable time as necessary if such Event of Default cannot be cured within thirty (30) days and the Developer, upon receipt of Default Notice, promptly commences the process of curing such Event of Default and diligently and continuously pursues such cure to completion), the County may pursue any available remedy against the Developer, either at law or in equity, including, without limitation, the right to pursue specific performance and collect actual damages (but not consequential damages) for the Developer's failure to perform (including, without limitation, the cost to restore the site to its previous condition, the damages, if any, related to, or arising out of, the infrastructure related to the Property and the cost of financing used to construct such infrastructure, and any guaranty thereof, any costs associated with overtime or additional labor forces in order to timely construct the Project, and other outside fees, including reasonable attorneys' fees).

The Developer agrees that damages will not be an adequate remedy at law and that the County shall have the right to an injunction or other judgment of specific performance to enforce any provision in this Agreement, the County ordinances or any other State or Federal law. Venue for such action shall be Wisconsin State Court with venue in Milwaukee County. The County shall be entitled to its reasonable attorneys' fees in any action, in which it prevails, to enforce such provisions of this Agreement, including the actual costs of Milwaukee County Corporation Counsel's office if it is the attorney for the County or reasonable attorney fees for other attorneys that may be hired by the County.

b) Rights and Remedies Cumulative. Except as otherwise expressly stated in this Agreement, the rights and remedies of the Parties are cumulative, and the exercise by any Party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times of any other rights or remedies for the same default or any other default by the other party.

10. COMPLIANCE WITH LAWS: While furnishing and installing the Children's Garden, the Developer shall, at the Developer's expense, promptly comply with all laws, rules, and regulations made by any governmental authority having jurisdiction over the Developer's

use of the Premises pertaining to: (a) accessibility, ensuring that the Premises and environs are fully accessible pursuant to the American with Disabilities Act of 1990 and the Architectural Barriers Act of 1968 and such accessibility is approved by the Milwaukee County Office of Persons with Disabilities; and (b) the Developer's activities on the Premises.

11. CLEANLINESS OF SURROUNDING AREAS: The Developer shall be responsible for the collection and removal of all trash, litter and garbage associated with its activities. The Developer shall be responsible for maintaining the areas surrounding the Premises during construction in a state of cleanliness to prevent injuries to the public. The Developer agrees not to store or accumulate unused or excess materials, supplies, or equipment which may create a hazard to the public or result in unsightly surroundings.

12. NAMING RIGHTS: The Developer shall not sell, advertise, promise, allow, or issue naming rights to any portion of the Premises without the prior written authorization of the Parks Director.

13. COUNTY RIGHTS OF ACCESS AND AUDIT: Until that date three (3) years after the Final Completion Date, upon reasonable notice and at reasonable times, the Developer shall allow the County Audit Services Division and department contract administrators (collectively referred to as "Designated Personnel") to audit, examine and make copies of any and all records of the Developer related to furnishing and installing the Children's Garden and/or its compliance with the terms hereof. The Contractors and all subcontractors, if any, performing work on behalf of the Developer hereunder, will be bound by the same terms and responsibilities as the Developer. All Contracts or other agreements for work performed on behalf of the Developer under this Agreement will include written notice that the Contractors and all subcontractors, if any, understand and will comply with such terms. The Developer, on behalf of itself, the Contractors and all subcontractors, if any, hereby acknowledges (A) that Section 34.09 of Chapter 34 of the Milwaukee County Code of General Ordinances authorizes the County Comptroller to audit all functions of County Government and Section 34.095 of Chapter 34 of the Milwaukee County Code of General Ordinances authorizes the Comptroller's Audit Services Division to investigate allegations of fraud, waste, and abuse involving County Government and (B) that, subject to the terms and conditions hereof, the Developer, the Contractors and all subcontractors, if any, are subject to the terms thereof in connection with their activities related to the Project, to the extent such activities involve County Government.

14. INSURANCE:

a) The Developer agrees to maintain policies of insurance and proof of financial responsibility to cover such costs as may arise from claims for damages to property of and/or claims which may arise out of or result from the Developer's activities, by whomever performed, in such coverage and amounts as required and approved by the Parks Director. Acceptable proof of such coverage shall be furnished to the Parks Director prior to commencement of any construction or renovation of the Premises under this Agreement. A certificate of insurance shall be submitted for review for each successive period of coverage through the Final Completion Date, unless otherwise specified by the Parks Director, in the minimum amounts: General Liability \$1,000,000 per occurrence \$2,000,000 general aggregate, Workers' Compensation Statutory limit and Employer's Liability \$100,000/\$500,000/ \$100,000. Milwaukee County shall be named as an additional insured on the General Liability policy. A

waiver of subrogation shall be afforded to Milwaukee County on the Workers' Compensation policy. A thirty (30) day written notice of cancellation or non-renewal shall be afforded to Milwaukee County. All Carriers must be approved to do business in the State of Wisconsin and be A rated or better per AM Best's Rating Guide. Milwaukee County assumes no responsibility for any loss or damages to the Developer's personal property while in use or stored on the Premises.

b) The Developer shall cause the Contractors and all subcontractors, if any, to have and maintain in connection with any work being performed under this Agreement insurance policies with at least the following coverages and limits (Limits can be obtained through Umbrella and/or Excess policies that follow form to the underlying policy) listed below. Acceptable proof of such coverage shall be furnished to the Parks Director prior to commencement of activities under this agreement by the Contractor or subcontractor, if any.

<u>Type of Coverage</u>	<u>Minimum Limits</u>
Wisconsin Workers' Compensation and Employer's Liability & Disease	Statutory/Waiver of Subrogation \$100,000/\$500,000/\$100,000
General Liability Bodily Injury and Property Damage to include: Personal Injury, Fire, Products and Completed Operations	\$5,000,000 Per Occurrence \$5,000,000 General Aggregate
Automobile Liability – Bodily Injury & Property Damage All Autos	\$1,000,000 Per Accident
Professional Liability (If applicable, required for Construction Managers, Architects, Engineers and Designers)	\$2,000,000 Per Occurrence \$2,000,000 General Aggregate
Contractor's Pollution Liability (If applicable, required for employed general contractor)	\$1,000,000 Per Occurrence

The Developer shall cause the Contractors, and all subcontractors, if any, to name Milwaukee County as an additional insured on the General, Automobile, Employer's and Contractor's Pollution Liability policies and provide a waiver of subrogation in favor of Milwaukee County on the Workers' Compensation and Contractor's Pollution Liability policies

as respects to the services provided in this agreement. All Carriers must be approved to do business in the State of Wisconsin and be A rated or better per AM Best's Rating Guide. Certificates of insurance shall be submitted for review to the Parks Director for each successive period of coverage through the Final Completion Date. A thirty (30) day written notice of cancellation or non-renewal shall be afforded to Milwaukee County. Any deviations or waiver of required coverages or minimums shall be submitted in writing and must be approved by the Milwaukee County Risk Manager.

15. INDEMNIFICATION: To the fullest extent permitted by law, the Developer shall indemnify the County for, and hold it harmless from all liability, claims and demands on account of personal injuries, property damage and loss of any kind whatsoever, including workers' compensation claims, which arise out of or are in any manner connected to the Premises, based on any injury, damage or loss being caused by any wrongful, whether intentional or negligent, acts or omissions of the Developer, its agents, or employees prior to the Final Completion Date. The Developer shall, at its own expense, investigate all claims and demands, attend to their settlement or disposition, defend all actions based thereon and pay all charges of attorneys and other costs and expenses arising from any such injury, damage or loss, claim, demand or action. Milwaukee County's liability shall be limited by Wis. Stats. § 345.05(3) for automobile and for § 893.80(3) general liability.

16. ENVIRONMENTAL INDEMNIFICATION: The Developer 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 the Developer or its agents prior to the Final Completion Date and/or (b) Hazardous Materials whose presence pre-exists the commencement of any improvements made by the Developer, located in the Premises, that are discovered or disturbed as a result of the Developer's activities on, at, or near the Premises prior to the Final Completion Date. The Developer shall indemnify, defend and hold the County harmless from any liability, cost, damage, claim or injury (including reasonable attorney fees) arising therefrom. "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. The foregoing notwithstanding, "Hazardous Substance" shall not include any material included as part of any product specifically identified in the Plans that is not, as of the Effective Date, defined as a "Hazardous Material" in any federal, state or local statute, regulation, ordinance, order, action or policy.

17. ASSIGNMENT AND SUBLETTING: The Developer 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.

18. TERMINATION: The County may terminate this Agreement: (a) if the Developer fails to cure any default as defined in Section 9 hereof; or (b) if the Developer 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 proceeding under any federal or state bankruptcy law, 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 Developer's assets or the Developer's interest in this Agreement. The Developer may terminate this Agreement at its sole and absolute discretion upon one hundred eighty (180) days' prior notice to County.

19. FORCE MAJEURE: Notwithstanding anything to the contrary contained in this Agreement, neither the Developer nor the County shall be considered in breach or default of its obligations with respect to the construction of the Children's Garden (including the Project Commencement Date, Construction Stoppage or the Substantial Completion Date) or the construction of any items of the infrastructure, as the case may be, in the event that a delay in the performance of such obligations is due to causes which were beyond its reasonable control, such as adverse weather conditions, strikes, acts of God, acts of a public enemy, acts of any governmental authorities (including the County in the case of the Developer), fire, flood, epidemics, embargoes or shortages of material from all reasonable sources, which shall not in any event include any economic hardship or delay due to the condition of the economy or real estate market ("Force Majeure Delay"). In the event of a Force Majeure Delay, the time for performance of the affected obligation shall be extended for the period of the Force Majeure Delay; provided, however, the delayed Party shall promptly deliver written notice to the other Party of the cause thereof. Failure to deliver written notice of such delay, with back up documentation if appropriate, shall constitute a waiver of the delayed Party's right to claim an extension of its time period because of the Force Majeure Delay.

20. PARTNERSHIP: Nothing contained herein shall be deemed or construed by the Parties, nor by any third party, as creating the relationship of principal and agent or of partnership, or of joint venture by the Parties, it being understood and agreed that no provision contained in this Agreement nor any acts of the parties hereto shall be deemed to create any relationship other than that defined in this Agreement.

21. NOTICES: All notices with respect to this Agreement shall be in writing, and e-mail shall constitute writing for the purposes of the foregoing. Except as otherwise expressly provided in this Agreement, a notice shall be deemed duly given and received upon delivery, if delivered by hand or by e-mail, or after posting via US Mail, to the Party addressed as follows:

To Developer:
Tim Kezman

To County: Milwaukee County Parks
Executive Director
9480 Watertown Plank Rd.
Wauwatosa, WI 53226
guy.smith@milwaukeecountywi.gov

With a copy to:
DeWitt LLP
Attention: John F. Gaebler, Esq.
13845 Bishop's Drive, Suite 300
Brookfield, WI 53005-6617
jfg@dewittllp.com

Either Party may designate a new address for purposes of this Agreement by written notice to the other Party. To the extent the Developer is required to provide notice to any agent of the County other than the Parks Director, when providing notice to any such agent, the Developer may request an address for such notice from the Parks Director which the Parks Director shall promptly provide, and upon which the Developer may rely for all purposes hereof.

22. WAIVERS: Waiver by the County or the Developer of any breach of any term, covenant or condition herein shall not be deemed to be a waiver of any future breach of the same or any other term, covenant or condition of this Agreement.

23. SEVERABILITY: Any provision of this Agreement which shall prove to be invalid, void or illegal shall in no way affect, impair or invalidate any other provision hereof and the remaining provisions hereof shall nevertheless remain in full force and effect.

24. ENTIRE AGREEMENT AND AMENDMENTS: This Agreement, including exhibits, and all documents referenced herein, contains all the covenants and agreements between the County and the Developer relating in any manner to development and maintenance of the Children's Garden and other matters set forth in this Agreement. No prior oral agreements or understandings pertaining thereto shall be valid or of any force or effect, and the covenants and agreements of this Agreement shall not be altered, modified or amended except in writing signed by the County and the Developer. The County and the Developer reserve the right to modify and amend this Agreement without the joinder or approval of any other party.

25. AUTHORITY: The Developer hereby acknowledges and agrees that it is a validly formed and existing corporation formed in the State of Wisconsin. The undersigned signatory has the requisite power and authority, statutory and otherwise, to enter into and perform this Agreement pursuant to its terms and conditions without any further notice or consent from any person or entity. Promptly following request by the County, the Developer shall deliver copies of its corporate resolution or other authorizing documentation demonstrating that it has the power and authority to enter into this Agreement. The County hereby acknowledges and agrees that the undersigned signatories have the requisite power and authority, statutory or otherwise, to enter into and perform this Agreement, pursuant to its terms and

conditions without any further notice or consent from any person or entity. Promptly following request by the Developer, the County shall deliver copies of its authorizing documentation demonstrating that it has the power and authority to enter into this Agreement.

26. RULES OF CONSTRUCTION: Unless the context clearly indicates to the contrary, the following rules shall apply to the construction of this Agreement:

- a) Words importing the singular number shall include the plural number and vice versa.
- b) The captions and headings herein are solely for convenience of reference only and shall not constitute a part of this Agreement nor shall they affect its meaning, construction or effect.
- c) Words of the masculine gender shall be deemed and construed to include correlative words of the feminine and masculine genders, and words of the neuter gender shall be deemed and construed to include correlative words of the masculine and feminine genders.
- d) The laws of the State of Wisconsin shall govern this Agreement.
- e) Since both parties to this Agreement have had adequate opportunity to review and negotiate its terms, in no event shall this Agreement be construed against the drafter.

Signature page follows

This Page Reserved for DocuSign Signatures

EXHIBIT A



new eden
LANDSCAPE
ARCHITECTURE

Milwaukee, Wisconsin
Phone (414) 530-1080 newedenlandscape.com

MARGIE'S GARDEN
at Boerner Botanical Garden
9400 Boerner Drive
Hales Corners, WI 53130

Margie's Smile,
LLC

Overall
Site
Landscape
Plan

Concept Plan

REVISIONS:

PROJECT #: 19021-FBB-CH
SCALE: 1" = 20'-0"
DATE: 07-28-2020
DRWN BY: JO CHKD BY: RS
SHEET:

1 SITE LANDSCAPE PLAN
L100 SCALE: 1" = 20'-0"

PAVEMENT LEGEND:

CONCRETE	
STABILIZED AGGREGATE	
BONDED RUBBER MULCH	
POURED IN PLACE PLAYGROUND SURFACING	

CALL DIGGERS HOTLINE
1-800-242-8511
TOLL FREE

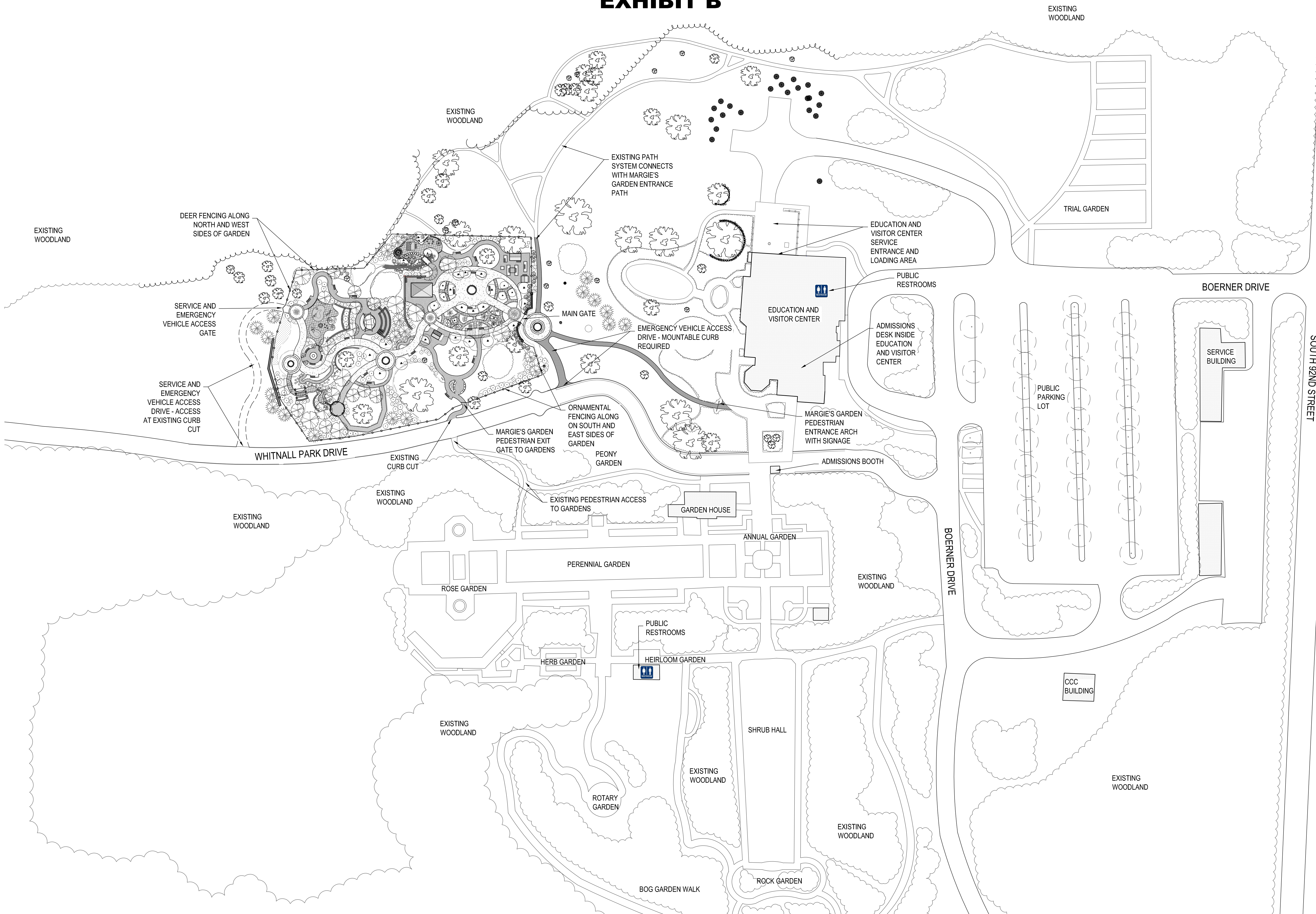
SCALE IN FEET
0 20 40

NORTH



L100

EXHIBIT B



new eden

LANDSCAPE ARCHITECTURE

Milwaukee, Wisconsin
Phone (414) 530-1080 newedenlandscape.com

MARGIE'S GARDEN

at Boerner Botanical Garden
9400 Boerner Drive
Hales Corners, WI 53130

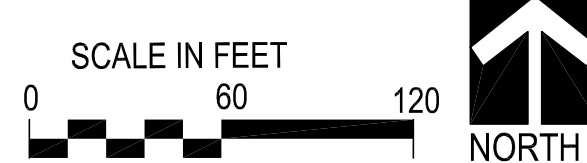
Margie's Smile, LLC

Location Map

REVISIONS:

PROJECT #: 19021-FBB-CH
SCALE: 1" = 60'-0"
DATE: 09-17-2020
DRWN BY: JO CHKD BY: RS
SHEET:

L001



1 LOCATION MAP
SCALE: 1" = 60'-0"
L001

