

<p><b>PROJECT: Development, Operation &amp; Maintenance of Mission Garden</b></p> <p><b>PARTIES: Friends of Tucson Birthplace, Pima County, City of Tucson</b></p> <p><b>TERM: Five (5) Years</b></p> <p><b>REVENUE CONTRACT</b></p> <p><b>AMOUNT: \$0</b></p>	
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**AGREEMENT FOR  
DEVELOPMENT, OPERATION AND MAINTENANCE  
OF MISSION GARDEN**

1. **Parties; Effective Date.** This Agreement for Development, Operation and Maintenance (“**Agreement**”) is entered into between PIMA COUNTY, a body politic and corporate of the State of Arizona (hereinafter “**County**”), the City of Tucson, a municipal corporation (hereinafter “**City**”) and FRIENDS OF TUCSON BIRTHPLACE, INC., an Arizona non-profit corporation (hereinafter “**Operator**” or “**FOTB**”). This Agreement shall be effective on the date it is signed by County, City, and Operator (the “**Effective Date**”). County, City and Operator are hereinafter individually a “**Party**” and collectively referred to as the “**Parties**.”

2. **Background and Purpose.**

2.1. In accordance with the intent of the May 20, 1997 special election, County purchased the land commonly known as Mission Garden, as provided in Question No.4 titled *Sonoran Desert Open Space and Historic Preservation*, Bond Project CH-28, the legal description and depiction of which are attached hereto as Exhibit **A** and **A-1** (the “**Premises**” or “**Mission Garden**”).

2.2. County and City entered into an Intergovernmental Agreement dated November 6, 2001, Pima County contract no. 01-04-T-129962-1101, City contract no. 0236-02, and recorded on November 14, 2001, at Docket 11675, Pages 2809 et seq. in the Office of the Pima County Recorder (the “**Terminated Agreement**”), the purpose of which was to preserve and protect the Premises for the future benefit of the Tucson community and greater Pima County as part of the Tucson Origins Heritage Park, and to grant the City and its agents a license to enter and use the Premises for that purpose. The Rio Nuevo Multipurpose Facilities District was a party to the Terminated Agreement, but the District is intentionally not a party to this Agreement.

2.3. The Terminated Agreement provided in section 4(a) that if construction of the Mission Garden portion of the Project was not completed within five (5) years of the effective date, the Terminated Agreement shall be void and City’s license to enter and occupy the Premises shall be automatically revoked. The construction was not

completed timely, and the Terminated Agreement is void and City's license to enter and occupy the Premises was automatically revoked.

2.4. County and City are authorized, pursuant to A.R.S. § 11-933, to enter into agreements for the operation of County public parks, as defined in A.R.S. § 11-931.

2.5. Operator is a 501(c)(3) nonprofit corporation organized under the laws of the State of Arizona engaged in the education of the general public and historic and cultural preservation. Operator desires to develop and operate the Premises (the "**Project**"), and City and County desire that the Operator develop and operate the Premises in accordance with the terms and conditions of this Agreement.

2.6. The development of the Premises was a part of the plans which were part of the Tucson Origins Heritage Park Mission Garden Master Plan construction documents dated March 27, 2008 (the "**Master Plan**") by Burns-Wald-Hopkins, Inc., and approved by City of Tucson Mayor and council.

2.7. Operator intends to institute a five-year development and planting schedule for the Premises that will initially be financed 100% by FOTB, including the City's Forestry Grant, subject to the terms and conditions of this Agreement.

2.8. The Parties desire to enter into this Agreement for the purpose of developing, preserving and protecting Mission Garden for the future benefit of the Tucson community and greater Pima County, in accordance with the terms and conditions of this Agreement. The Parties understand that a collaborative effort is required to develop, operate and maintain the Project for the public benefit. In furtherance of that effort, the Parties commit to exercise their rights and to perform their responsibilities in a spirit of cooperation, in accordance with the terms of this Agreement.

### 3. **Use of Premises.**

3.1. Pursuant to A.R.S. § 11-933, County and City do hereby enter into this Agreement with Operator to develop, operate, and maintain the Premises.

3.2. Operator shall develop the Premises into a historic cultural garden pursuant to plans approved by the Parties. The Premises will be developed in phases. Operator may install improvements to the Premises, including plants and landscaping, and other improvements (all improvements to the Premises are hereinafter referred to as the "**Improvements**") in accordance with the terms of this Agreement. The parties acknowledge that the phase I development of the Premises is anticipated to be completed in one year and the complete planting of phase I over a five (5) year period.

3.3. The Operator, City, and County agree to promote, operate and maintain the Premises as a public park for the educational and cultural purposes for the benefit of the general public.

3.4. Operator shall use the Premises only for the purposes set forth in this Agreement. In the event Operator desires to use the Premises for any other purpose, Operator must enter into a separate written agreement with City and County.

3.5. Operator shall have access to the Premises seven days a week, 24 hours a day. Operator shall have vehicular access on the Premises when necessary for development or maintenance of the Premises.

3.6. This Agreement is not a lease. Operator shall not have exclusive occupancy or control of the Premises.

3.7. During the term of this Agreement, City, County and Operator shall use the name "**Mission Garden**" when referring to the Premises. Upon termination of this Agreement, the name Mission Garden shall become the property of County, and Operator and City shall take all action necessary, if any, to transfer ownership of the name to County.

#### 4. **Term.**

4.1. Initial Term. The initial term of this Agreement (the "**Initial Term**") shall begin on the Effective Date, and shall end on the date that is five (5) years after the Effective Date (the "**Termination Date**").

4.2. Option Period. This Agreement may be renewed for two periods of five (5) years each (the "**First Option Period**" and the "**Second Option Period**") as follows:

4.2.1. Operator shall submit to the City and County written notice that Operator desires to extend the term for the First Option Period or Second Option Period, as applicable. The notice shall be submitted *no sooner than* one year prior to the (i) Termination Date to exercise the First Option Period, or (ii) the end of the first Option Period to exercise the Second Option Period, but *no later than* ninety (90) days prior to (i) the Termination Date to exercise the First Option Period, or (ii) the end of the first Option Period to exercise the Second Option Period,.

4.2.2. The City and County Administrators shall submit Operator's request to extend the term for the applicable Option Period to the City Council and County Board of Supervisors. Operator shall have the right to extend the term for the applicable Option Period unless:

4.2.2.1. Operator is in default of this Agreement; or

4.2.2.2. The City Council and the County Board of Supervisors determines that such renewal is not in the best interests of the City and County.

4.3. Right to Terminate. If in the judgment of either City or County or Operator, a Party does not perform in accordance with the conditions of this Agreement, or is

otherwise in material default of any provision of this Agreement, the Party claiming non-performance or default shall give written notice to the other Party specifying the nature of non-performance or default. A dissolution, bankruptcy, business stoppage, or transfer of a majority interest by or of Operator shall be considered a default. If the non-performance or default is not corrected within thirty (30) days after receipt of such written notice, or if the non-performing or defaulting party fails to diligently pursue remedies for corrections which require more than thirty (30) days to complete, the Party claiming non-performance or default may terminate this Agreement. In the event of the termination of this Agreement by County or City, Operator's right to operate the Premises shall immediately cease, and Operator shall immediately vacate the Premises.

4.4. City and County Right to Cure. In the event of the failure by Operator to comply in a proper and timely manner with any of its obligations as set forth in this Agreement, and Operator's failure to timely cure such failure as provided in Section 4.3 above (including notice and an opportunity to cure), City and County are hereby authorized to perform the same on behalf of Operator, and Operator shall pay to the performing party all of its reasonable and actual expenses in so performing Operator's obligations.

5. **Consideration.** Operator, City and County agree that Operator's compliance with the terms and conditions of this Agreement, including the development, maintenance and operation of the Premises, constitutes adequate consideration for this Agreement and no additional fees shall be due from Operator to City or County.

## 6. **Improvements to Premises.**

6.1. Improvements. Pursuant to the Master Plan, the phase I Improvements to the Premises shall consist of what is referred to as the Spanish Colonial Orchard & Vineyard (the "**Phase I Improvements**"). The Phase I Improvements shall include, but are not limited to, the following:

6.1.1. Operator will plant 100 trees within the first year funded in part or whole by the City's grant from the Arizona Forestry Division. All plantings shall be consistent with designs approved by City's Historic Preservation Office with assistance from the City's Historic Preservation Office Mission Garden advisory committee;

6.1.2. Operator shall install drip irrigation timer(s) and associated tubing/emitters connected to the main water line, and will maintain the electrical connection to the irrigation;

6.1.3. Operator will connect the water meter and pay the water bills for the Initial Term, which are beyond those expenses provided for by the current grant held by City;

6.1.4. Operator will build two ramadas and construct gravel pathways and assembly areas in order to service the Phase I Improvements; and

6.1.5. Operator shall construct temporary construction parking, which shall comply with the Americans with Disabilities Act.

6.2. Right to Construct. Operator shall have the right to make Improvements to the Premises in accordance with the terms of this Section 6.

6.3. Consent of City and County Required.

6.3.1. Operator may make Improvements to the Premises which were approved as part of the Master Plan and which have been approved by the City's and County's Historic Preservation Offices .

6.3.2. All plans prepared by Operator are subject to the approval of City's and County's Historic Preservation Offices.

6.3.3. Other than Improvements which were approved as part of the Master Plan, Operator may not make any Improvements to the Premises without obtaining the prior written consent of:

6.3.3.1. City and County if the cost of the Improvements is less than or equal to \$15,000.00;

6.3.3.2. City Manager and County Administrator or their designees if the cost of the Improvements is greater than \$15,000.00 and less than or equal to \$100,000.00; or

6.3.3.3. City Council and the County Board of Supervisors if the cost of the Improvements is more than \$100,000.00.

6.3.4. Operator shall provide City and County with prior written notice of any proposed new area of structure (the "**Notice of Improvements**"). The Notice of Improvements shall include written narratives or line drawings for the proposal. City and County shall not unduly delay its decision to accept the proposed Improvements.

6.3.5. City and County shall not unreasonably withhold consent to proposed Improvements; provided, however, it shall be reasonable for City and County to withhold consent if, among other reasons, the Improvements:

6.3.5.1. violate any of the terms and conditions of this Agreement;

6.3.5.2. adversely affect the integrity of any structural, mechanical, or electrical system of any portion of the Premises or affect the integrity of the Premises or its infrastructure;

6.3.5.3. result in City or County being required to perform any work that County could otherwise avoid or defer;

6.3.5.4. result in any soil disturbance within thirty (30) feet on either side of the El Paso Natural Gas pipeline; or

6.3.5.5. result in an increase in the premiums for any hazard or liability insurance carried by City or County or result in an increased risk of liability or pose a safety hazard.

6.4. City or County Liability for Approval of Improvements. City and County's review of the plans and specifications shall be solely for City and County's purposes and shall not imply that City or County has reviewed the plans and specifications for quality, design, laws, compliance or other like matters. Accordingly, notwithstanding that any construction drawings are reviewed by City and/or County architects, engineers, or consultants, City and County shall have no liability whatsoever in connection therewith and shall not be responsible for any omissions or errors contained in any construction drawings, and Operator's indemnity set forth in the Indemnification Clause of this Agreement shall specifically apply to the construction drawing. City and County's review shall be to determine that the proposed Improvements are consistent with the purposes of this Agreement.

6.5. Construction of Improvements. All Improvements shall comply with the applicable Building Code, as demonstrated through plans submitted for City and County approval. All construction contracts shall include an indemnification provision requiring the contractors to indemnify, defend and hold harmless Parties from all losses, claims, suits, demands, expenses, attorney's fees or actions of any kind or nature arising from the negligent or intentional acts, errors or omissions of the contractor or its agents, employees, or anyone acting under its direction or control. Operator shall cause said contractors to obtain insurance coverage of a type and amount acceptable to the City and County and to name City and County as additional insureds with respect to liability arising out of the performance of said contracts. Within thirty (30) days after completion of any Improvements, Operator shall deliver to City and County a complete and reproducible set of the plans and specifications of the Improvement as built.

6.6. Indemnification by Operator. Operator shall indemnify and defend City and County, its agents, employees, contractors and officers, against and hold them harmless from and against any and all claims, liabilities, losses, damage, costs and expenses (including, without limitation, reasonable attorney's fees) asserted against or suffered by them resulting from damage to Premises or injury to or the death of any person on the Premises arising out of Operator's negligence, willful misconduct or strict liability for activities of Operator, except to the degree caused by the willful or negligent act or omission or strict liability of City or County, or any employee or agent of City or County.

6.7. Indemnification by City. City shall indemnify, defend, and hold harmless County, its officers, employees, and agents from and against any and all suits, actions, legal administrative proceedings, claims, or demands, arising out (i) City's negligence, willful misconduct or strict liability, or that of its agents, employees, or anyone under its direction or control or on its behalf in connection with performance of this Agreement, except to the degree caused by the willful misconduct, negligence or strict liability of County, or any employee or agent of County, or (ii) any claim made by the Rio Nuevo Multipurpose Facilities District with respect to the Premises, provided that County shall be responsible for the costs of defending any claims or demands arising out of any suit, action or claim made by the Rio Nuevo Multipurpose Facilities District against County.

6.8. Property of County. All Improvements shall become the property of County at the time they are placed thereon, and shall be free and clear of all liens and encumbrances of every kind, and in good and operable condition.

## **7. Rights and Responsibilities of Operator.**

7.1. Marketing. Operator will produce informational material for the public explaining the development plan for the Premises.

7.2. Fundraising. Operator will use its best efforts to raise an additional \$250,000.00 for the 5-year period beginning on the Effective Date.

### **7.3. Plans.**

7.3.1. Within 12 months after the Effective Date, Operator will complete plans for the design, operation, maintenance, budget and funding for Phase II, or as funding becomes available.

7.3.2. Within 24 months after the Effective Date, Operator will complete plans for the design, operation, maintenance, budget and funding for Phase III, or as funding becomes available.

7.3.3. Within 36 months after the Effective Date, Operator will complete plans for the design, operation, maintenance, budget and funding for Phase IV, or as funding becomes available.

7.4. Educational Activities. Operator may conduct environmental and other educational activities at the Premises, including but not limited to: demonstrations, tours of the Premises, lectures, hands on learning, experiments, school visits with docent tours, and schools using the Premises for observation or research.

7.5. Permitted Events. Operator may conduct the following events on the Premises provided that all such events are open to the public: Garden/Park Tours; Plant/Art Shows; Fund-raisers, including but not limited to Plant Sales (all net profits to be used for Mission Garden improvements and gardening costs designated by

Operator); Workdays for Park/Gardens maintenance and improvements; Greenhouse activities (planting, care, propagation, etc.); Community Outreach Open Houses; Forums and Meetings; and an Annual Event such as a Plant Festival. Any event that qualifies as a Special Event (as defined below) must satisfy the requirements for Special Events.

7.6. Special Events. For purposes of this Agreement, a "**Special Event**" is an event which is beyond the normal scope of the operation of the Premises which is designed to attract larger numbers of people; or which may increase risk of injuries to persons at the Premises. Special Events do not include routine meetings and functions. Should Operator desire to conduct a Special Event, Operator shall give City and County a thirty (30) day advance written request, with a description of the Special Event, together with a traffic control plan for the roads leading to and from the Premises, and a safety and security plan for the Special Event. City and County may impose reasonable traffic, safety and noise restrictions on the planned activity to promote the health and safety of the participants and of the general public and City and County may designate approved parking areas. If requested by City and County, Operator shall submit a written general plan for traffic control, safety, security, and noise restrictions to City and County for approval. The plan, if approved, may be used by Operator without further approval; provided, however, such general plan shall be effective for no more than twenty-four (24) months before being subject to review and approval by the City and County again.

7.7. Prohibited Uses. Operator shall not install or use any of the following at the Premises: (i) fences or tall barriers; or (ii) invasive plants or trees.

7.8. Compliance with Laws. Operator shall not use the Premises, or permit anything to be done in, on, or about the Premises, which will in any way conflict with any federal, state, or local law, statute, ordinance or governmental rule or regulation now in force or which may hereafter be enacted or promulgated.

7.9. Parking and Access. Operator shall routinely have access to the Premises.

7.10. Volunteers. All volunteers working at the Premises under the direction of Operator shall execute a release of liability in a form acceptable to City and County prior to doing any work at the Premises. A copy of the release shall be delivered by Operator to City and County at the addresses provided in section 16.

7.11. Fees. Admission to the Premises shall be free to all members of the general public, except as otherwise approved by City and County for Special Events or at such time the Premises reach a state of development such that, with the City's and County's approval, admission fees are deemed appropriate.

7.12. Permits. If food is sold on the Premises, all applicable food permits must be obtained and all Pima County health regulations shall be complied with.

7.13. Maintenance of Premises. Except as otherwise provided in this Agreement, Operator shall be responsible for maintenance of the Premises, including but not limited to all Improvements. Operator shall:

7.13.1. cleanup after any use of the Premises by Operator, or Operator's agents, contractors, employees or volunteers;

7.13.2. be responsible for the care of the first 100 trees and other plantings in Phase I;

7.13.3. purchase the necessary equipment to care for the Premises;  
and

7.13.4. recruit and train a minimum of fifty (50) volunteers for garden maintenance and neighborhood watch.

7.14. Utilities. Operator shall pay the costs of all utility services on the Premises, including water. City and County shall have no liability to Operator if any utilities or services, whether or not furnished by City or County, are interrupted or terminated because of failures, necessary repairs, installation or improvements, or any other cause beyond County's or City's reasonable control, as applicable, nor shall any such termination relieve Operator of any of its obligations under this Agreement.

7.15. Signs. Operator may affix and maintain upon the Premises such signs as Operator deems appropriate; provided, however, such signs must first receive the written approval of City and County as to type, size, color, location, copy nature and display qualities. All signs shall at all times comply with the City Sign Code and shall be installed and maintained at Operator's sole cost. Operator shall pay all costs for construction, erection, installation, maintenance, and repair of any sign either currently in existence or to be erected or installed or otherwise placed on the Premises. Operator shall acknowledge the contribution of the City and County in providing the Premises to Operator in Operator's annual reports and appropriate publications.

7.16. Sustainability Plan. Operator shall haul away all materials and/or prepare and implement an integrated waste management plan to re-use, recycle, and/or compost any consumable materials utilized in the performance of this Agreement, and shall submit the plan for County review at least annually.

## **8. Rights and Responsibilities of City.**

8.1. Right of Entry. City shall have the right at all times to enter the Premises to inspect the Premises and perform its obligations under this Agreement.

8.2. Irrigation System. City will construct and connect the irrigation system for the initial planting area referred to in section 6.1.1.

8.3. Maintenance of the Waterline. City shall maintain the waterline to the Premises.

8.4. Graffiti Abatement. City shall provide graffiti abatement to the Premises for the term of this Agreement.

8.5. Security. City shall provide public safety services to the Premises during the term of this Agreement.

8.6. Marketing and Funding. City will actively participate with FOTB in identifying additional funding sources for the Initial Term, and shall actively promote and routinely publish information related to Mission Garden.

8.7. Porta-johns. City, through its Parks and Recreation Department, will request its current supplier of porta-johns to contract on comparable terms with Operator to provide and maintain porta-johns on the Premises at Operator's expense during this Agreement.

8.8. Approved Plans. City will make available to Operator copies of all approved plans and permits which were developed previously as part of the Master Plan.

## 9. **Rights and Responsibilities of County.**

9.1. Access. County shall have the right to access and inspect the Premises any time.

9.2. Title to Premises. This Agreement grants to Operator the right to perform all acts as specified herein but does not convey to Operator or City any fee title interest in the Premises. On termination of this Agreement, Operator's and City's right to enter the Premises for the purposes stated herein shall cease and title to the Premises shall remain vested in County.

9.3. Project Costs. County has no responsibility for any costs associated with the Project.

9.4. No Maintenance. County shall have no responsibility for the maintenance or care of the Premises or any Improvements thereon.

9.5. Marketing and Funding. County will actively participate with FOTB in identifying additional funding sources for the Initial Term, and shall actively promote and routinely publish information related to Mission Garden.

9.6. Ownership of Records. All existing and future records, data, research, findings, materials, images, discoveries, and synthesized or unsynthesized products or

byproducts originating from or relating to the Premises (collectively the “**Records and Products**”) are and shall be the property of County, provided that the proceeds of any sales from any such Records and Products shall be used exclusively for the benefit of Mission Garden.

## 10. **Environmental Compliance.**

10.1. Hazardous Material. As used herein, the term “**Hazardous Material**” means any hazardous or toxic substance, material or waste which is or becomes regulated by any local governmental authority, the State of Arizona or the United States Government. The term “Hazardous Material” includes, without limitation, any material or substance that is (i) petroleum or petroleum products; or (ii) defined as a Hazardous Material under A.R.S. § 26-301(8).

10.2. Hazardous Materials Prohibited; Clean Air Act. Operator and City shall not cause or grant permission for any Hazardous Material to be brought upon, kept, or used in or about the Premises by Operator, City, or their agents, employees, contractors or invitees, without the prior written consent of City and County, other than such reasonable quantities of Hazardous Materials which are necessary or useful to Operator’s business and will be used, kept and stored in a manner that complies with all laws regulating any such Hazardous Materials. Operator’s operations on the Premises shall comply with all applicable federal, state, and local environmental laws and regulations including applicable provisions of the Clean Air Act, 42 U.S.C. 7401 *et seq.* and Arizona Revised Statutes, Title 49, Chapter 3.

10.3. Indemnity. If Operator or City breaches the obligations stated in the preceding Section and such breach results in contamination of the Premises soil or ground water with Hazardous Materials then, except to the extent caused by County, its agents, employees, or contractors, Operator and City shall indemnify, protect, defend and hold County harmless from any and all claims, judgments, damages, penalties, fines, costs, expenses, liabilities or losses (including, without limitation, diminution in value of the Premises or any part thereof, damages for the loss or restriction on use of usable space or of any amenity of the Premises or any part thereof, damages arising from any adverse impact on marketing of space with respect to the Premises or any part thereof, and sums paid in settlement of claims, attorneys’ fees, consultant fees and expert fees) which arose or arises during or after the term of this Agreement as a result of such contamination. The foregoing obligation of Operator and City to indemnify, protect, defend and hold County harmless includes, without limitation, costs incurred in connection with any investigation of site conditions or any cleanup, remediation, removal, restoration or other response work required by any federal, state, or local governmental agency or political subdivision because of Hazardous Material present, as a result of a breach of this Section 10.3 by Operator or City.

10.4. Clean-Up. Without limiting the foregoing, if the presence of any Hazardous Material on or in the Premises, or the soil or ground water under or adjacent to the Premises caused or permitted by Operator or City, or their agents, employees,

contractors or invitees, results in any suspected contamination of the Premises, the soil or ground water under or adjacent to the Premises, Operator and/or City shall promptly notify City and County in writing and take all actions at its sole expense as are necessary to return the Premises, or such soil or ground water, to the condition existing prior to the introduction of any such Hazardous Material to the Premises, or to such soil or ground water; provided that County's approval of such actions shall first be obtained, which approval shall not be unreasonably withheld so long as such actions would not potentially have any material adverse long-term or short-term effect on the Premises. In effecting such a cleanup, Operator shall comply with all federal, state, and local laws and regulations. Operator and City shall provide City and County with copies of all reports, investigative data, and correspondence associated with the clean-up activities. City and County shall be adequately informed of and have the option of attending all meetings with regulatory agencies.

10.5. Pre-Existing Contamination; Contamination by City and County. County agrees that Operator and City shall not be liable for any contamination of the Premises that occurs prior to use of the Premises by Operator and/or City, or any contamination of the Premises that originates outside the Premises during the Term of this Agreement that is not caused by activities of Operator and/or City, except to the extent that such contamination is aggravated by any action of Operator and/or City. County shall take all actions at its sole expense as are necessary to return the Premises to the condition existing prior to the introduction of Hazardous Materials to the Premises in the event of any Hazardous Materials contamination to the Premises caused by County, its agents or employees, during the Term of this Agreement.

10.6. Notices Regarding Environmental Conditions. All of the Parties shall, within ten (10) business days following any party's receipt thereof, provide the other parties with a copy of (i) any notice from any local, state or federal governmental authority of any violation or administrative or judicial order or complaint having been filed or about to be filed in connection with the Premises alleging any violation of any local, state or federal environmental law or regulation or requiring any Party to take any action with respect to any release on or in the Premises or the soil or ground water under or adjacent to the Premises of Hazardous Material, or (ii) any notices from a federal, state or local governmental agency or private party alleging that either City, County or Operator may be liable or responsible for cleanup, remedial, removal, restoration or other response costs in connection with Hazardous Material on or in the Premises or the soil or ground water under or adjacent to the Premises or any damages caused by such release.

10.7. Survival. The Parties' obligations under this Section 10 shall survive the expiration or earlier termination of this Agreement and vacation of the Premises.

## 11. Insurance.

11.1. Insurance Requirements. Operator shall require each of its contractors to obtain and maintain, at such contractor's expense, at all times during the Improvements the following types and amounts of insurance:

11.1.1. *Commercial General Liability.* Coverage shall be at least as broad as ISO form CG 00 01 in an amount not less than \$1,000,000.00, covering the Premises, endorsed to include County and City as additional insureds with coverage at least as broad as ISO form CG 2010.

11.1.2. *Commercial General Automobile Liability.* Coverage shall be at least as broad as ISO form CA 00 01 in an amount not less than \$1,000,000.00 for vehicles actually used in the operations at the Premises (as compared to used for simple commuting).

11.1.3. *Workers' Compensation.* At such time Operator employs persons to work at the Premises, Operator shall provide coverage within the Statutory limits, with Employers' Liability coverage in an amount not less than \$1,000,000.00 per injury, illness, or disease.

11.2. Changes to Insurance Requirements. City and County retain the right to reasonably increase the limits or types of coverage from time to time as determined in the best interests of City's and County's Risk Management.

11.3. Injury Reports. Operator shall provide to City and County a report listing any incident involving injury to persons or damage to Premises occurring at the Premises that Operator has knowledge of, within ten (10) business days of the incident or when Operator has knowledge of the incident, whichever is later. If any such injury to persons requires emergency medical treatment, Operator shall contact City and County within one (1) business day of such incident. City and County shall have the right to investigate any incident involving injury to persons or Premises occurring at the Premises and Operator shall provide City and County with all information available to Operator about such incident.

11.4. Insurance Certificates. Operator shall provide City and County with current Certificates of Insurance which shall show County as an Additional Insured where required. All certificates of insurance must provide for guaranteed thirty (30) days written notice of cancellation, non-renewal or material change.

11.5. Waiver of Subrogation. Each party waives its claims and subrogation rights against the other for losses typically covered by Premises insurance coverage. The Contractor's insurance shall be primary insurance and non-contributory with respect to all other available sources.

11.6. Insurance on Activities. Operator shall not conduct any activity on the Premises which is not covered by the insurance policies provided pursuant to this Section 11 without first obtaining the written consent of City and County and without providing additional insurance covering the activity or event and with coverage limits and carriers acceptable to City and County. Operator shall not do or permit anything to be done in or about the Premises nor bring or keep anything therein which will in any way increase the existing rate of or affect any fire or other insurance upon the Premises or any of its contents or cause a cancellation of any insurance policy covering the Premises or any part thereof or any of its contents.

## 12. **Budget, Accounting; Records.**

12.1. Accounting Records. In connection with the operation of the Premises, Operator shall keep and maintain accounting records on a tax basis consistently applied and the same shall be open for inspection and audit by duly authorized representatives of City and County at all reasonable times.

12.2. Audits. City and County may require Operator to provide a financial audit at any time, at City's and County's expense, by providing written notice to Operator. Such notice shall specify the period to be covered by the audit, the type of audit and the time for completion and submission of the audit.

13. **Liens.** Operator and City, to the extent City caused or is responsible for such lien, shall pay all liens of contractors, subcontractors, mechanics, laborers or material providers, and Operator and City will indemnify County against all legal costs and charges, including counsel fees reasonably incurred in and about the defense of any suit resulting from Operator's or City's failure to perform the above. Operator and City are not the agent of County for any purpose whatsoever, and shall have no authority to create any liens for labor or material in County's interest in the Premises, and all material men, contractors, mechanics, and laborers are charged with notice that they must look to City or Operator only to secure the payment of all bills for any work done or material furnished during the term of this Agreement. Operator and City shall not purchase any materials, equipment or supplies on the credit of County. Operator and City shall not pledge in any manner the credit of County for material, stock or other items Operator or City purchases for use at the Premises.

14. **Independent Contractor Status.** The status of Operator shall be that of an independent contractor. Operator's employees and agents shall not be considered employees of City and County, shall not be entitled to receive any fringe benefits associated with regular employment and will not be subject to the provisions of the Pima County Merit System. To that end, Operator shall employ and direct such personnel as it requires to perform said services; secure any and all permits that may be required in order to perform the services herein contemplated; exercise full and complete authority over its personnel; comply with all workmen's compensation, employer's liability and other federal, state, county and municipal laws, ordinances, rules and regulations required of an employer performing services as herein contemplated; and make all

reports and remit all withholdings or other deductions from the compensation paid its personnel as may be required by federal, state, county or municipal laws, ordinances, rules or regulations. Operator agrees that all contractor personnel will comply with risk management and safety work rules promulgated by City and County.

15. **Exhibits.** The following Exhibits to this Agreement are fully incorporated herein as if set forth at length:

**Exhibit A** Description of the Premises  
**Exhibit A-1** Depiction of the Premises

16. **Notice.** Any notice required or permitted to be given under this Agreement shall be in writing and shall be mailed by first class, registered, certified or overnight mail, return receipt requested, postage prepaid, or transmitted by electronic mail, or hand delivered, addressed as follows:

If to City: Jonathan Mabry  
Historic Preservation Officer  
310 N. Commerce Park Loop  
Tucson, AZ 85726

If to County: Linda Mayro  
Office of Sustainability and Conservation  
201 N. Stone Ave., 6<sup>th</sup> Floor  
Tucson, AZ 85701

If to Operator: Roger Pfeuffer  
FOTB  
PO Box 1228  
Tucson, AZ. 85702

or such other address as either party from time to time shall designate by written notice to the other party. If mailed, all such notices shall be deemed received upon the expiration of seventy-two hours after deposit in the U.S. mail. Notice served personally or by electronic mail or facsimile shall be deemed served upon delivery thereof to the addressee. Rejection or other refusal to accept or the inability to deliver because of changed address of which no notice was given shall be deemed to be receipt of the notice, demand or request sent.

17. **Miscellaneous.**

17.1. Americans with Disabilities Act. Operator will comply will all applicable provisions of the Americans with Disabilities Act (Public Law 101-336, 42 U.S.C. 12101-12213) and all applicable federal regulations under the Act, including 28 CFR Parts 35 and 36.

17.2. Assignment. This Agreement may not be assigned by Operator or City without the prior written consent of County, which shall be at the sole discretion of County.

17.3. Attorney's Fees. In the event any action, suit or proceeding at law or in equity is instituted with respect to this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees, expenses and court costs incurred.

17.4. Attorney's Review. The Parties acknowledge that they have had an opportunity to consult with legal counsel regarding this Agreement, and that the terms of this Agreement are not to be construed against any party because that party drafted the Agreement, or construed in favor of a party because that party failed to understand the legal effect of the provisions of this Agreement. City's and County's attorneys are signing as to form only, and represents solely the interests of City and County. Each party shall bear the costs of their attorney incurred in connection with the negotiation and drafting of this Agreement.

17.5. Authority. The undersigned represent to each other that they have full power and authority to enter into this Agreement, and that all necessary actions have been taken to give full force and effect to this Agreement.

17.6. Binding Agreement. This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective successors and assigns, as permitted hereunder.

17.7. Compliance with Laws; Governing Law; Venue. Operator shall comply with all federal, state, and local laws, rules, regulations, standards, and Executive Orders, including without limitation those designated within this Agreement. The laws and regulations of the State of Arizona shall govern the rights of the Parties, the performance of this Agreement, and any disputes hereunder. Any action relating to this Agreement shall be brought in a court of the State of Arizona in Pima County. Any changes in the governing laws, rules, and regulations during the terms of this Agreement shall apply, but do not require an amendment.

17.8. Conflict of Interest. This Agreement is subject to cancellation within three (3) years after its execution pursuant to A.R.S. § 38-511 if any person significantly involved in initiating, negotiating, securing, drafting, or creating this Agreement on behalf of City and County is, at any time while this Agreement or any extension of the Agreement is in effect, an employee or agent of any other party to the Agreement with respect to the subject matter of the Agreement unless an arms length waiver of conflict is agreed to by the Parties.

17.9. Counterparts. This Agreement may be executed in separate counterparts, each of which shall be deemed to be an original, and all of which taken together constitute one and the same instrument.

17.10. Entire Agreement; Modification. This Agreement constitutes the entire agreement between the Parties and supersedes all agreements, representations, warranties, statements, promises, and understandings, whether oral or written, with respect to the subject matter thereof, and no party hereto shall be bound by or charged with any oral or written agreement, representations, warranties, statements, promises, or understandings not specifically set forth in this Agreement. This Agreement may not be amended, altered or modified except by a writing signed by all the Parties.

17.11. Legal Arizona Workers Act Compliance.

17.11.1. Operator hereby warrants that it will at all times during the term of this Agreement comply with all federal immigration laws applicable to Operator's employment of its employees, and with the requirements of A.R.S. § 23-214 (A) (together the "**State and Federal Immigration Laws**"). Operator shall further ensure that each subcontractor who performs any work for Operator under this Agreement likewise complies with the State and Federal Immigration Laws.

17.11.2. City and County shall have the right at any time to inspect the books and records of Operator and any subcontractor in order to verify such party's compliance with the State and Federal Immigration Laws.

17.11.3. Any breach of Operator's or any subcontractor's warranty of compliance with the State and Federal Immigration Laws, or of any other provision of this Section, shall be deemed to be a material breach of this Agreement subjecting Operator to penalties up to and including suspension or termination of this Agreement. If the breach is by a subcontractor, and the subcontract is suspended or terminated as a result, Operator shall be required to take such steps as may be necessary to either self-perform the services that would have been provided under the subcontract or retain a replacement subcontractor, (subject to County approval if MWBE preferences apply) as soon as possible so as not to delay project completion.

17.11.4. Operator shall advise each subcontractor of City's and County's rights, and the subcontractor's obligations, under this Section by including a provision in each subcontract substantially in the following form:

17.11.4.1. "Subcontractor hereby warrants that it will at all times during the term of this Agreement comply with all federal immigration laws applicable to subcontractor's employees, and with the requirements of A.R.S. § 23-214 (A). Subcontractor further agrees that County may inspect the subcontractor's books and records to insure that subcontractor is in compliance with these requirements. Any breach of this Section by subcontractor will be deemed to be a material breach of this Agreement subjecting subcontractor to penalties up to and including suspension or termination of this Agreement."

17.11.5. Any additional costs attributable directly or indirectly to remedial action under this Section shall be the responsibility of Operator. In the event

that remedial action under this Section results in delay to one or more tasks on the critical path of Operator's approved construction or critical milestones schedule, such period of delay shall be deemed excusable delay for which Operator shall be entitled to an extension of time, but not costs.

17.12. No Agency Created. Nothing contained in this Agreement shall create any partnership, joint venture, or agency relationship between the Parties.

17.13. No Personal Liability. No member, official or employee of City of Tucson or Pima County shall be personally liable to Operator, or any successor or assignee, (a) in the event of any default or breach by City of Tucson or Pima County, (b) for any amount which may become due to Operator or its successor or assign, or (c) pursuant to any obligation of City of Tucson or Pima County under the terms of this Agreement.

17.14. No Third-Party Beneficiaries. There are no third-party beneficiaries to this Agreement, and no person or entity not a party hereto shall have any right or cause of action hereunder.

17.15. Non-Appropriation of Funds. Notwithstanding any other provision in this Agreement, this Agreement may be terminated if for any reason, the Tucson City Council or Pima County Board of Supervisors does not appropriate sufficient monies for the purpose of maintaining this Agreement. In the event of such termination, City or County shall have no further obligations to Operator, other than for services rendered prior to termination.

17.16. Non-Discrimination. Operator agrees to comply with all provisions and requirements of Arizona Executive Order 2009-09 including flow down of all provisions and requirements to any subcontractors. Executive Order 2009-09 supersedes Executive Order 99-4 and amends Executive Order 75-5 and may be viewed and downloaded at the Governor of the State of Arizona's website [http://www.azgovernor.gov/dms/upload/EO\\_2009\\_09.pdf](http://www.azgovernor.gov/dms/upload/EO_2009_09.pdf), which is hereby incorporated into this Agreement as if set forth in full herein. During the performance of this Agreement, Operator shall not discriminate against any employee, client or any other individual in any way because of that person's age, race, creed, color, religion, sex, disability or national origin.

17.17. No Waiver. The failure of either party to insist on any one or more instances upon the full and complete performance of any of the terms and conditions of this Agreement to be performed on the part of the other, or to take any action permitted as a result thereof, shall not be construed as a waiver or relinquishment of the right to insist upon full and complete performance of the same, or any other covenant or condition, either in the past or in the future.

17.18. Scrutinized Business Operations. Pursuant to A.R.S. §§ 35-391.06 and 35-393.06, Operator hereby certifies that it does not have scrutinized business operations in Iran or Sudan. The submission of a false certification by Operator may

result in action up to and including termination of this Agreement.

17.19. Severability. Each provision of this Agreement stands alone, and any provision of this Agreement found to be prohibited by law shall be ineffective to the extent of such prohibition without invalidating the remainder of this Agreement.

This Agreement has been executed by the Parties on the dates set forth below.

**OPERATOR: FRIENDS OF TUCSON BIRTHPLACE:**

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Its

**PIMA COUNTY, a body politic and corporate of the State of Arizona:**

\_\_\_\_\_  
Chairman, Board of Supervisors

\_\_\_\_\_  
Date

ATTEST:

\_\_\_\_\_  
Robin Brigode, Clerk of Board

\_\_\_\_\_  
Date

APPROVED AS TO FORM:

\_\_\_\_\_  
Neil J. Konigsberg, Deputy County Attorney, Civil Division

**CITY OF TUCSON, a municipal corporation**

\_\_\_\_\_  
Mayor, City Council

\_\_\_\_\_  
Date

APPROVED AS TO FORM:

\_\_\_\_\_  
Principal Assistant City Attorney, City of Tucson