

FOURTH AMENDMENT TO COOPERATIVE AGREEMENT

THIS FOURTH AMENDMENT TO COOPERATIVE AGREEMENT (“**Fourth Amendment**”) to that certain Cooperative Agreement dated as of April 5, 1991, by and between the **CITY AND COUNTY OF DENVER**, a municipal corporation of the State of Colorado (the “**City**”) and **DENVER BOTANIC GARDENS, INC.**, a Colorado nonprofit corporation (the “**Foundation**”), as amended in a First Amendment to Cooperative Agreement, dated June 26, 1995, further amended in a Second Amendment to Cooperative Agreement, dated July 26, 2005, and further amended in a Third Amendment to Cooperative Agreement, dated November 12, 2008 (collectively, including the Fourth Amendment, referred to herein as the “**Cooperative Agreement**”), is hereby made and entered into on February 16, 2017.

W I T N E S S E T H:

WHEREAS, the parties have entered into the Cooperative Agreement pursuant to which the Foundation has established and presently maintains, manages, operates and controls certain Facilities (as defined in the Cooperative Agreement) for the use and benefit of the public, including the botanic garden and arboretum located at Ninth Avenue and York Street, Denver, Colorado (the “**Botanic Gardens**”);

WHEREAS, the City and the Foundation have undertaken certain arrangements for financing and construction of a parking facility to be located on a portion of the Facilities legally described in **Exhibit A** attached hereto (the “**Premises**”); and

WHEREAS, at the request of the Foundation, the City has undertaken a Lease Purchase Agreement dated November 12, 2008, with the Denver Botanic Gardens Parking Facility Leasing Trust 2008B (“**2008B Trust**”), recorded in the records of the City Clerk (the “**2008B Lease**”) to allow for the creation of and lease back to the City of the Premises and the ultimately constructed parking facility on the Premises (the “**Parking Facility**”).

WHEREAS, the 2008B Lease transaction has been determined to be amended and restated in its entirety in order to effect savings available from a refinancing of the 2008B Lease payments and the advance refunding of the 2008B Trust’s Certificates.

WHEREAS, the 2008B Trust has been renamed the Denver Botanic Gardens Parking Facility Leasing Trust 2017A ((The “**2017A Trust**”), 2017A and the City has undertaken a Lease Purchase Agreement No. 2017A (amends and restates the 2008B Lease) dated February 16, 2017,

recorded in the records of the City Clerk (the "2017A Lease") and pursuant to the terms of the 2017A Lease, subject to annual appropriation, the City has agreed to a schedule of lease payments for the Parking Facility, which schedule is incorporated herein by reference;

WHEREAS, to support annual lease payments on the Parking Facility, the Foundation has agreed to the schedule of lease payments and to reimburse the City annually for the schedule of payments under the 2017A Lease as provided herein;

WHEREAS, the parties desire to further amend the Cooperative Agreement by this Fourth Amendment, for the purpose of clarifying the Foundation's rights and responsibilities with respect to the funding for the Parking Facility and the future operation of the Premises;

NOW, THEREFORE, in consideration of the premises and mutual promises and covenants made herein and in the Cooperative Agreement, the parties hereto agree as follows:

I. That Denver Botanic Gardens Parking Facility Leasing Trust 2008 (the "Trust") has been renamed Denver Botanic Gardens Parking Facility Leasing Trust 2017A (the "2017A Trust") and all references to "the Trust" are hereby amended to read "the 2017A Trust as may be amended".

II. That section 1 of the Cooperative Agreement at subsection (e), is hereby amended to read as follows:

1. PURPOSE.

* * * *

(e) Other Agreements. In order to effectuate the financing, construction, and operation of the Parking Facility, the City has entered into agreements setting forth conditions, requirements, rights and obligations on the part of the City with respect to the Premises. The Foundation acknowledges that it has received and fully read these agreements and hereby agrees and covenants to take or avoid actions, as appropriate, to assure that the agreements are fully complied with by the Foundation and no default or breach is caused by the Foundation under these agreements. These agreements are:

(1) The Lease Purchase Agreement dated as of November 12, 2008, between Denver Botanic Gardens Parking Facility Leasing Trust 2008 and the City and County of Denver, amended by the Lease Purchase Agreement dated as of February 16, 2017, between Denver Botanic Gardens Parking Facility Leasing Trust 2017A and the City and County of Denver (the "2017A Lease"), as may be further amended; and

(2) The License and Access Agreement dated as of November 12, 2008, amended by the License and Access Agreement No.2017A (amends and restates 2008B License and Access Agreement) as may be further amended, between the Denver Botanic Gardens Parking Facility Leasing Trust 2017A and the City and County of Denver (the “2017A License Agreement”).

The City hereby assigns to the Foundation, and the Foundation hereby accepts, the rights and obligations of the City under the 2017A License Agreement, as may be further amended, for the purposes of installing and operating a garden on the Parking Facility in accordance with the License and Access Agreement.”

III. That section 40 of the Cooperative Agreement at subsection (d), is hereby amended to read as follows:

“40. SPECIAL PROVISIONS RELATING TO SECTIONS 37, 38, AND 39 OF THIS FOURTH AMENDMENT.

* * * *

(d) Reporting & Audits: With respect to sections 37, 38, and 39 of this Fourth Amendment:

(1) The Foundation shall provide, or cause its agents and contractors to provide, to the City Auditor documentation of expenditures for the Project, in form and detail sufficient to enable the Auditor to perform his responsibilities under the Charter and ordinances of the City. Such documentation shall include periodic invoices evidencing the work performed and the payroll reporting requirements contained in DRMC Section 20-76(d).

(2) The Foundation agrees that any duly authorized representative of the City, including the Auditor, shall, until the expiration of three (3) years after completion of the Project, have access to and the right to examine any directly pertinent books, documents, papers and records of the Foundation involving transactions related to this Fourth Amendment, including revenue and expenditure data, required by the City’s Department of Finance.”

(3) The Foundation shall provide, or cause its agents and contractors to provide, all documentation necessary to comply or assist in the City’s compliance with the obligations of the Tax Compliance Certificate. For so long as the 2017A Lease, as may be amended, remains outstanding the Foundation shall file a true and accurate Schedule K, or its equivalent, as part of the Foundation’s annual Federal tax returns.

(4) For so long as the 2017A Lease, as may be amended, remains outstanding, the Foundation shall provide, or cause its agents and contractors to provide, annual financial information, including a CPA prepared fiscal year audit no later than 180 days following the Foundation's fiscal year end to the Trustee of the 2017A Trust.

IV. That section 25.5 of the Cooperative Agreement is hereby amended to read as follows:

"25.5 FOUNDATION INSURANCE.

(a) General Conditions. The Foundation agrees to secure, at or before the time of execution of this Third Amendment, the insurance described in clauses (f) through (j) of this section 25.5 covering all operations, goods or services provided pursuant to this Cooperative Agreement, including this Third Amendment. The Foundation may utilize the City's annual appropriation as provided in section 9(a) of this Cooperative Agreement or any other funding source under section 9 of this Cooperative Agreement, to the extent such expenditure is authorized under said section 9, to pay the premium and other costs of the required insurance coverage. The Foundation shall keep the required insurance coverage in force at all times during the Term of this Cooperative Agreement, or any extension thereof, and other period prescribed by law. The required insurance shall be underwritten by an insurer licensed or authorized to do business in Colorado and rated by A.M. Best Company as "A"VIII or better. Each policy shall contain a valid provision or endorsement stating "Should any of the above-described policies be canceled before the expiration date thereof, the issuing company shall send written notice to 1) Denver Risk Management, 201 West Colfax Avenue, Dept. 1105, Denver, Colorado 80202, 2) the Denver Manager of Parks and Recreation, 201 West Colfax Avenue, Dept. 601, Denver, Colorado 80202, and 3) with respect to the Parking Facility on the Premises, the UMB Bank, n.a., as Trustee for the Denver Botanic Gardens Parking Facility Leasing Trust 2008 (the "Trustee"), 1670 Broadway, Denver, Colorado 80202, with all notices to be sent by certified mail, return receipt requested. Such written notice shall be sent thirty (30) days prior to such cancellation unless due to non-payment of premiums for which notice shall be sent ten (10) days prior." In addition, with respect to the Parking Facility on the Premises, the Foundation shall send separate notice of any cancellation or reduction in coverage, below the amounts specified in this section 25.5, to the Trustee and the City by certified mail, return receipt requested. If any policy is in excess of a deductible or self-insured retention, the City must be notified by the

Foundation. The Foundation shall be responsible for the payment of any deductible or self-insured retention. The insurance coverages specified in this Agreement are the minimum requirements, and these requirements do not lessen or limit the liability of the Foundation. The Foundation shall maintain, at its own expense, any additional kinds or amounts of insurance that it may deem necessary to cover its obligations and liabilities under this Agreement or as otherwise required by law.

(b) Proof of Insurance. The Foundation shall provide a copy of this Third Amendment to its insurance agent or broker. The Foundation shall provide certificate(s) of insurance of all required insurance to the Trustee, Denver Risk Management, and the Denver Manager of Parks and Recreation at the addresses specified above. The Foundation shall provide all related endorsements to Denver Risk Management. The Foundation will provide a copy of the insurance policy(ies) if requested.

(c) Additional Insureds. For commercial general liability, auto liability, garage liability and garage keeper's legal liability, the Foundation's insurer shall name the City as an additional insured.

(d) Waiver of Subrogation: For all coverages, the Foundation's insurer shall waive subrogation rights against the City.

(e) Sub-consultants: All sub-consultants, subcontractors, independent contractors, suppliers or other entities providing goods or services required by this Agreement shall be subject to all of the requirements herein and shall procure and maintain the same coverages required of the Foundation. The Foundation shall include all such sub-consultants, subcontractors, independent contractors, suppliers or other entities as insureds under its policies or shall ensure that all subconsultants maintain the required coverages. The Foundation agrees to provide proof of insurance for all such subcontractors, independent contractors, suppliers or other entities upon request by the City.

(f) Workers' Compensation/Employer's Liability Insurance: The Foundation shall maintain the coverage as required by statute for each work location and shall maintain Employer's Liability insurance with limits of \$100,000 for each bodily injury occurrence claim, \$100,000 for each bodily injury caused by disease claim, and \$500,000 aggregate for all bodily injuries caused by disease claims. In the alternative, the Foundation may self insure for worker's compensation insurance provided that such self insurance is approved by the Colorado

Department of Labor's Division of Worker's Compensation and written proof of such approval has been provided to the Trustee and the City. The Foundation expressly represents to the City, as a material representation upon which the City is relying in entering into this Third Amendment, that none of the Foundation's officers or employees who may be eligible under any statute or law to reject Workers' Compensation Insurance shall effect such rejection during any part of the term of this Agreement, and that any such rejections previously effected, have been revoked as of the date Foundation executes this Third Amendment.

(g) Commercial General Liability. Foundation shall maintain limits of \$1,000,000 for each occurrence claim, \$1,000,000 for each personal and advertising injury claim, \$2,000,000 products and completed operations for each occurrence, and \$2,000,000 policy aggregate. Aggregate limits must be "per project" or "per location," if applicable under this Agreement.

(h) Automobile Liability. Foundation shall maintain limits of \$1,000,000 combined single limit for all vehicles operating on City property and elsewhere.

(i) Garage Keeper's Legal Liability Insurance. Garage keeper's legal liability insurance (if applicable) insuring any and all automobiles that are parked at the Premises by the Foundation's attendants or for which a bailment otherwise is created, with limits of liability not less than \$1,000,000 per occurrence.

(j) Additional Provisions.

(1) For general liability, the policy must provide the following:

(a) If any aggregate limit is reduce by twenty-five percent (25%) or more by paid or reserved claims, the Foundation shall notify the City within ten (10) days and reinstate the aggregates required;

(b) Unlimited defense costs in excess of policy limits;

(c) Contractual liability covering the indemnification provisions of this Cooperative Agreement;

(d) A severability of interests provision;

(e) A provision that coverage is primary; and

(f) A provision that coverage is non-contributory with other coverage or self-insurance provided by the City.

(2) For general liability, if the policy is a claims-made policy, then the retroactive date must be on or before the contract date or the first date when any goods or services were provided to the City, whichever is earlier.

(3) For general liability, the policy must not contain an exclusion for injury or damage from mold, fungus, or other biological pathogens.

V. That a new section 41 of the Cooperative Agreement is hereby added to read as follows:

“41. **ELECTRONIC SIGNATURES AND ELECTRONIC RECORDS.** Foundation consents to the use of electronic signatures by the City. The Agreement, and any other documents requiring a signature hereunder, may be signed electronically by the City in the manner specified by the City. The Parties agree not to deny the legal effect or enforceability of the Agreement solely because it is in electronic form or because an electronic record was used in its formation. The Parties agree not to object to the admissibility of the Agreement in the form of an electronic record, or a paper copy of an electronic document, or a paper copy of a document bearing an electronic signature, on the ground that it is an electronic record or electronic signature or that it is not in its original form or is not an original.

Remainder of page left intentionally blank.

Signatures follow.

Contract Control Number: PARKS-XC1X002-04

Contractor Name: Denver Botanic Gardens, Inc.

IN WITNESS WHEREOF, the parties have set their hands and affixed their seals at Denver, Colorado as of

SEAL

CITY AND COUNTY OF DENVER

ATTEST:

By _____

APPROVED AS TO FORM:

REGISTERED AND COUNTERSIGNED:

Attorney for the City and County of
Denver

By _____

By _____

By _____



Contract Control Number: PARKS-XC1X002-04

Contractor Name: Denver Botanic Gardens, Inc.

By: _____

Name: _____
 (please print)

Title: _____
 (please print)

ATTEST: [if required]

By: _____

Name: _____
 (please print)

Title: _____
 (please print)



Exhibit A

The Premises

A PARCEL OF LAND LOCATED IN THE NORTHWEST QUARTER OF THE SOUTHWEST QUARTER OF SECTION 1, AND THE NORTHEAST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 2, TOWNSHIP 4 SOUTH, RANGE 68 WEST OF THE 6TH PRINCIPAL MERIDIAN, CITY AND COUNTY OF DENVER, STATE OF COLORADO, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHWEST CORNER OF BLOCK 66, E.F. HALLACK'S SECOND ADDITION TO DENVER, ACCORDING TO THE SUBDIVISION PLAT RECORDED IN ENGINEERING BOOK 02 AT PAGE 012, JUNE 1, 1887 OF THE RECORDS OF THE CITY AND COUNTY OF DENVER

(ORIGINALLY RECORDED AT BOOK 4, PAGE 34 CLERK RECORD NUMBER 403 OF ARAPAHOE COUNTY, COLORADO) AND CONSIDERING THE NORTH LINE OF SAID BLOCK 66 TO BEAR NORTH 89°48'49" EAST WITH ALL BEARINGS CONTAINED HEREIN BEING RELATIVE THERETO; THENCE SOUTH 00°11'11" EAST, ALONG THE WEST LINE OF SAID BLOCK 66, A DISTANCE OF 125.00 FEET TO THE SOUTHWEST CORNER OF LOT 36 OF SAID BLOCK 66, ALSO BEING THE POINT OF BEGINNING;

THENCE SOUTH 52°33'39" EAST, A DISTANCE OF 280.99 FEET TO A POINT ON THE EASTERLY LINE OF AN UNPLATTED PARCEL OF LAND AS DESCRIBED UNDER "ALSO" IN THE SUPPLEMENTARY AGREEMENT DATED AUGUST 28, 1958 ON FILE WITH THE CITY CLERK. EXECUTION AUTHORIZED BY ORDINANCE NO. 304, SERIES 1958, SAID POINT BEING ON A CURVE;

THENCE ALONG SAID EASTERLY LINE ALONG THE ARC OF A NON-TANGENT CURVE TO THE RIGHT HAVING A CENTRAL ANGLE OF 07°23'18", A RADIUS OF 379.30 FEET, AN ARC LENGTH OF 48.91 FEET AND THE CHORD OF WHICH BEARS SOUTH 31°08'08" WEST, A DISTANCE OF 48.88 FEET;

THENCE CONTINUEING ALONG SAID WESTERLY RIGHT-OF-WAY SOUTH 34°49'47" WEST, A DISTANCE OF 36.04 FEET;

THENCE SOUTH 10°10'13" EAST, A DISTANCE OF 12.73 FEET;

THENCE SOUTH 34°49'47" WEST, A DISTANCE OF 19.13 FEET TO A POINT OF CURVATURE;

THENCE ALONG THE ARC OF A CURVE TO THE LEFT HAVING A CENTRAL ANGLE OF 35°33'00", A RADIUS OF 430.30 FEET, AND AN ARC LENGTH OF 266.99 FEET, AND THE CHORD OF WHICH BEARS SOUTH 17°03'17" WEST, A DISTANCE OF 262.72 FEET;

THENCE SOUTH 00°43'13" EAST, A DISTANCE OF 117.44 FEET;

THENCE SOUTH 44°16'47" WEST, A DISTANCE OF 12.73 FEET TO A POINT ON THE WESTERLY RIGHT-OF-WAY LINE OF JOSEPHINE STREET ACCORDING TO THE BOUNDARY SURVEY FOR BOTANICAL GARDENS PREPARED BY ASPEN SURVEYING, INC., DATED 08-18-1995, AND CITY AND COUNTY OF DENVER PUBLIC WORKS ENGINEERING AGENCY BOUNDARY SURVEY DATED 8-25-71, SURVEY BOOK NO. 012;

THENCE SOUTH 00°43'13" EAST, ALONG SAID WESTERLY RIGHT-OF-WAY LINE, A DISTANCE OF 30.00 FEET;

THENCE NORTH 86°18'22" WEST, A DISTANCE OF 82.63 FEET TO A POINT ON THE EASTERLY RIGHT-OF-WAY LINE OF YORK STREET AS RECORDED IN BOOK 5225 AT PAGE 188;

THENCE NORTH 00°10'19" WEST, ALONG SAID EASTERLY RIGHT-OF-WAY LINE, A DISTANCE OF 10.00 FEET;

THENCE NORTH 45°10'19" WEST, A DISTANCE OF 28.28 FEET;

THENCE NORTH 00°10'19" WEST, A DISTANCE OF 381.02 FEET;

THENCE NORTH 44°49'41" EAST, A DISTANCE OF 28.28 FEET TO A POINT ON SAID EASTERLY RIGHT-OF-WAY LINE;

THENCE NORTH 00°10'19" WEST, ALONG SAID EASTERLY RIGHT-OF-WAY LINE, A DISTANCE OF 187.49 FEET TO THE SOUTHWESTERLY CORNER OF SAID BLOCK 66;

THENCE NORTH 00°11'11" WEST, ALONG THE WESTERLY LINE OF SAID BLOCK 66 AND THE EASTERLY RIGHT-OF-WAY LINE OF YORK STREET, A DISTANCE OF 54.35 FEET TO THE POINT OF BEGINNING;

SAID PARCEL CONTAINS A CALCULATED AREA OF 88,723 SQUARE FEET, OR 2.037 ACRES,
MORE OR LESS.

Exhibit B
Board Resolution

(separate document on next 2 pages)

**FORM OF RESOLUTION TO AUTHORIZE
ENTRY INTO FOURTH AMENDMENT TO
THE COOPERATIVE AGREEMENT BETWEEN
THE CITY AND COUNTY OF DENVER
AND
DENVER BOTANIC GARDENS, INC.**

WHEREAS, the **CITY AND COUNTY OF DENVER**, a municipal corporation of the State of Colorado (the "City") and **DENVER BOTANIC GARDENS, INC.**, a Colorado nonprofit corporation (the "Foundation"), have previously entered into a Cooperative Agreement dated April 5, 1991, amended in a First Amendment to Cooperative Agreement, dated June 26, 1995, further amended in a Second Amendment to Cooperative Agreement, dated July 26, 2005, and further amended in a Third Amendment to Cooperative Agreement, dated November 12, 2008, and now propose to enter into a Fourth Amendment to the Cooperative Agreement (collectively, including the Fourth Amendment, referred to herein as the "**Cooperative Agreement**"); and

WHEREAS, the parties have entered into the Cooperative Agreement pursuant to which the Foundation has established and presently maintains, manages, operates and controls certain Facilities (as defined in the Cooperative Agreement) for the use and benefit of the public, including the botanic garden and arboretum located at Ninth Avenue and York Street, Denver, Colorado (the "**Botanic Gardens**"); and

WHEREAS, the City and the Foundation have undertaken certain arrangements for financing and construction of a parking facility to be located on a portion of the Facilities described in Exhibit A attached to the Third Amendment (the "**Premises**"); and

WHEREAS, at the request of the Foundation, the City has undertaken a Lease Purchase Agreement dated November 12, 2008, recorded in the records of the City Clerk (the "**2008B Lease**") to allow for the creation of and lease back to the City of the Premises and the parking facility on the Premises (the "**Parking Facility**"). Pursuant to the terms of the 2008B Lease, subject to annual appropriation, the City has agreed to a schedule of lease payments for the Parking Facility, which schedule was incorporated herein by reference;

WHEREAS, the 2008B Lease transaction has been determined to be amended and restated in its entirety in order to effect savings available from a refinancing of the 2008B Lease payments and the advance refunding of the 2008B Trust's Certificates.

WHEREAS, the 2008B Trust has been renamed the Denver Botanic Gardens Parking Facility Leasing Trust 2017A ((The "2017A Trust"), 2017A and the City has undertaken a Lease Purchase Agreement No. 2017A (amends and restates the 2008B Lease) dated February 16, 2017, recorded in the records of the City Clerk (the "2017A Lease") and pursuant to the terms of the 2017A Lease, subject to annual appropriation, the City has agreed to a schedule of lease payments for the Parking Facility, which schedule is incorporated herein by reference;

WHEREAS, to support annual lease payments on the Parking Facility, the Foundation has agreed to the schedule of lease payments and to reimburse the City annually for the schedule of payments under the 2017A Lease as provided herein;

NOW, THEREFORE, LET IT BE RESOLVED, that the Board of Trustees of the Foundation hereby authorizes the Chief Executive Officer of the Foundation to enter into said Fourth Amendment to Cooperative Agreement and deliver such other instruments and obligations of every kind to continue the Supplemental Lease Payment Fund as described in Section 38(b) of the Third Amendment, to continue make future deposits as may be required by the 2017A Lease in the Primary Lease Payment Fund as described in Section 38(a) of the Third Amendment and the Supplemental Lease Payment Fund as described in Section 38(b), and to perform any and all other acts which may be appropriate or necessary under the Fourth Amendment.

IN WITNESS WHEREOF, the undersigned have executed this Resolution to Authorize as of and effective _____, 2017.

CHAIRMAN OF THE BOARD
Denver Botanic Gardens, Inc.

SECRETARY OF THE BOARD
Denver Botanic Gardens, Inc.

Richard Clark

Patricia Lepiani