

THIRD AMENDMENT TO COOPERATIVE AGREEMENT

THIS THIRD AMENDMENT TO COOPERATIVE AGREEMENT (the “**Third Amendment**”) to that certain Cooperative Agreement dated as of November 4, 1998, (the “**Cooperative Agreement**”), as amended in an Amendment to the Cooperative Agreement, dated June 7, 2017; and as further amended by a Second Amendment to Cooperative Agreement, dated as of December 19, 2017, by and between the **CITY AND COUNTY OF DENVER**, a municipal corporation of the State of Colorado (the “**City**”) and the **DENVER ZOOLOGICAL FOUNDATION, INC.**, a Colorado non-profit corporation (the “**Foundation**”), which may be individually referred to herein as a “**Party**” or jointly referred to as the “**Parties**”, is hereby made and entered into, effective as of the execution of this Third Amendment.

RECITALS

WHEREAS, pursuant to the Cooperative Agreement, the Foundation continues to maintain, administer, manage, operate and control that portion of City Park presently reserved for the use of the Denver Zoological Gardens (referred to and defined as the “**Facilities**” in the Cooperative Agreement); and

WHEREAS, the Parties have engaged in discussion regarding operations of the Facilities and approaches to improving and further supporting the operations; and

WHEREAS, the Parties agree that the terms and conditions set forth in this amendment are in the best interest of the City, the Foundation, and the general public to implement the changes set forth in this Third Amendment.

NOW, THEREFORE, in consideration of the mutual agreements contained in the Cooperative Agreement and this Third Amendment, and subject to the terms and conditions stated in the Cooperative Agreement and this Third Amendment, the Parties agree as follows:

1. The Charter of the City and County of Denver refers to the Manager of Parks and Recreation as the officer in full charge and control of the Department. Executive Order No. 140 orders that the Manager may use the alternate title “Executive Director” to also mean the officer in full charge and control of the Department. All references to “Manager”, defined in the Agreement, as amended, as the Manager of the Department of Parks and Recreation, shall also mean and include “Executive Director” as ordered by Executive Order No. 140.

2. Paragraph 2 of the Cooperative Agreement entitled “**TERM**” is amended to read as follows:

“This Agreement shall commence as of the effective date of this Agreement set out herein above and shall terminate on December 31, 2048, unless otherwise terminated or extended as provided herein. On December 31st of each ten (10) year period following the termination date of December 31, 2048, the term shall automatically and without further action be extended for a ten (10) year period, unless and until either the Foundation or the City, at its discretion, gives written notice by certified mail, return receipt requested, to the other of its election that this automatic extension shall cease. Such notice shall be signed by the Mayor of the City, or the Deputy Mayor as provided in Article I of the City Charter, or the Chairman of the Board of the Foundation, and shall state the termination date which date shall be December 31st of the then current year ten (10) year period. The Foundation and the City may amend this Agreement at any time to extend its term for such additional years as may be agreed upon by the Parties, provided that any such extension is approved and executed in the same manner as this Agreement.

3. Paragraph 4 of the Cooperative Agreement entitled “**STATUS AND AUTHORITY OF THE FOUNDATION**” is amended to add a subparagraph (e) to read as follows:

“(e) Along with the Foundation’s responsibilities and obligations to the City set forth herein, and to the extent the Foundation is acting as a fiduciary to the City, the Foundation shall take no action in conflict with City, state or federal law, rule or regulation; or that would adversely impact, compromise or undermine any Financing bond, certificate, or other financial obligation or security of the City, defined and further set forth in Paragraph 13A, or that results in a breach of any bond, certificate financing or security agreement of the City.”

4. Paragraph 9 of the Cooperative Agreement entitled “**CONSTRUCTION OF PERMANENT IMPROVEMENTS**” is amended at subparagraph (a) to read as follow:

“(a) Subject to the requirements of this subparagraph, the Foundation shall have the authority to make, or contract for, the following improvements at the Facilities: i) the repair or replacement of any existing improvement to the extent that the work does not require structural engineering or architectural design work of a structural nature; ii) the installation of any fixtures and nonstructural items purchasable through a catalog, including but not limited to fencing, railings, movable sheds, signs, bathroom fixtures, water fountains, and lighting; and iii) the design, construction, reconstruction, expansion, or remodeling of any wildlife exhibits or animal enclosures, including habitats, cages, holding pens, and similar facilities that are intended for the use and occupancy of animals and their keepers and not for the general public. The plans and specifications for any improvements proposed under this subparagraph and costing in excess of Two Hundred Fifty Thousand Dollars (\$250,000.00) (“Threshold Amount”) for the completed project shall be

submitted to the Manager for review and comment, subject to DPR policies and procedures, at least ten (10) days prior to the initiation of the project, unless emergency conditions necessitate immediate repair or replacement. The Threshold Amount can be adjusted in accordance with DPR policies and procedures, including the Zoo Project Review Procedures. Any adjustment may be based on the United States Department of Labor Statistics Consumer Price Index for All Urban Consumers, or other mutually agreeable method. If emergency conditions necessitate immediate repair or replacement, the Foundation shall take any reasonable measures necessary to mitigate the emergency and notify the Manager as soon as reasonably possible. If any new or significantly modified wildlife exhibit or animal enclosure has not been previously approved as part of a master plan or plan change, the plans and specifications for such improvement must be submitted to the Manager for review and approval at least thirty (30) days prior to the initiation of the project. Failure by the Manager to respond within the specified period shall be deemed a waiver by the City of the Manager's right to review the project. Such waiver shall not be deemed a waiver of the Manager's right to review subsequent projects under this subparagraph. The Foundation shall be solely responsible for assuring that any project initiated under this subparagraph is properly contracted and performed and that the work performed and materials used are in conformance with any applicable laws (local, state, and federal) that govern the performance of such work."

5. Paragraph 13 of the Cooperative Agreement entitled "**FUNDING**" is amended at subparagraph (h) to read as follows:

"(h) Bond funds as may be authorized by the people and issued by the City in the amounts and for the purposes stated in the authorization ordinance. The Foundation acknowledges, agrees and covenants to take such action and to avoid actions, as appropriate, to assure that fundraising activities comply with the requirements under the Financial Obligations, defined in Paragraph 13A."

6. The Cooperative Agreement is amended to add a Paragraph 13A entitled "**BOND AND OTHER FINANCING**" to read as follows:

"In accordance with certain applicable Financial Obligations, including but not limited to Bond Ordinance and Certificates of Participation (together, the "Financings"), which may create limitations or restrictions on the use of the Facilities, this Cooperative Agreement must be and has been approved by the City's Bond and Special Counsel, as set forth in the attached **Exhibit C**. It is understood that the use of the Facilities is restricted by the Ordinances approving the Financings, and by all applicable rules, regulations, statutes or ordinances promulgated by any federal, state or municipal entity having jurisdiction over the Financings or the City facilities. The Parties agree that the Financing Ordinances permit the terms of the Cooperative Agreement as written and that in compliance with the Financings, (a) The Foundation shall comply with this Cooperative Agreement, which allows compliance with all IRS regulations, and the Financial

Obligations, to the extent applicable to the Denver Zoological Gardens, and will take no action that would jeopardize the tax-exempt status of the Financing Ordinances or the documentation of such Financing Ordinances approved thereunder as contemplated by the Financial Obligations; (b) the City has obtained an opinion of and approval from Bond Counsel or Special Counsel that this Cooperative Agreement is in all respects in compliance with the Financial Obligations, as set forth in **Exhibit C**; (c) The Foundation agrees that in its activities and occupancy hereunder it will comply with all of the terms and conditions of this Cooperative Agreement which conforms with the Financings as those requirements are stated in this Cooperative Agreement and that it will take no action, nor fail to act in any manner, which would cause the City to breach or be in default under the Financings. The Foundation's agreements or contracts, including but not limited to concession agreements, concession contracts or naming rights, are subject to review by the Denver City Attorney's Office to determine if they are subject to approval by Bond Counsel or Special Counsel. All such agreements shall contain a provision that the Executive Director may require the Foundation to terminate such concession agreement if the concessionaire fails to comply with applicable law or the terms of this Agreement, or fails to comply with the terms and conditions of bonds or certificates regarding tax-exempt financing. Failure to make such correction within ninety (90) days may result in cancellation of the concession agreement. This subparagraph shall not apply to caterers or other concessions for private events held at the City's Denver Zoological Gardens to which the Foundation is not a party."

7. Paragraph 23 of the Cooperative Agreement entitled "**NON-DISCRIMINATION**" is amended to read as follows:

"The Foundation agrees to comply with all applicable laws concerning non-discrimination against persons because of their race, color, religion, national origin, gender, gender expression or gender identity, age, military status, sexual orientation, marital status, protective hairstyle, physical or mental disability in connection with membership on the board of trustees of the Foundation, access to any of the Facilities, and participation in any public program at the Facilities. In connection with the performance of work under this Agreement, the Foundation agrees not to refuse to hire, discharge, promote or demote, or to discriminate in matters of compensation against any person otherwise qualified, solely because of race, color, religion, national origin, ethnicity, citizenship, immigration status, gender, age, sexual orientation, gender identity, gender expression, marital status, source of income, military status, protective hairstyle, or disability. The Foundation shall insert the foregoing provision in all contracts, subcontracts, or agreements it may enter."

8. Electronic Signatures and Electronic Records: The Parties consent to the use of electronic signatures by the City. The Amendment 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

Amendment or 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 Amendment or 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.

9. Except as amended herein, the Cooperative Agreement is ratified and affirmed by the Parties and shall remain in full force and effect.

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[SIGNATURE PAGES TO FOLLOW]

Contract Control Number: PARKS-XC40345-03 / 202367337
Contractor Name: DENVER ZOOLOGICAL FOUNDATION, 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:
Contractor Name:

PARKS-XC40345-03 / 202367337
DENVER ZOOLOGICAL FOUNDATION, INC.

By: DocuSigned by:
Charles Wright
2A0081BA4E8B481..._____

Name: Charles wright
(please print)

Title: CFO
(please print)

ATTEST: [if required]

By: _____

Name: _____
(please print)

Title: _____
(please print)



Kutak Rock LLP
1801 California Street, Suite 3000, Denver, CO 80202-2652
office 303.297.2400

May 4, 2023

City and County of Denver
c/o Denver City Attorney's Office
1437 Bannock, Room 353
Denver, Colorado 80202

Re: Private Business Tests Review and Analysis: Third Amendment to Cooperative Agreement between the City and County of Denver and the Denver Zoological Foundation, Inc., relating to the Denver Zoological Gardens

Ladies and Gentlemen:

We have been advised that the City and County of Denver (the "City") intends to enter into a Third Amendment to Cooperative Agreement (the "Amendment") with the Denver Zoological Foundation, Inc. (the "Foundation"). The Amendment amends that certain Cooperative Agreement, dated as of November 4, 1998 (the "Original Cooperative Agreement"), as amended by an Amendment to the Cooperative Agreement, dated June 7, 2017, and a Second Amendment to Cooperative Agreement, dated as of December 19, 2017 (as so amended, the "Cooperative Agreement"). The Cooperative Agreement provides for maintenance, administration, management, operation and control by the Foundation of the portion of City Park presently reserved for the use of the Denver Zoological Gardens (the "Zoological Gardens"). The Cooperative Agreement provides for all or a portion of the revenues from the operation of the Zoological Gardens to be retained by the Foundation, in the manner and in the amount set forth in the Cooperative Agreement.

The City has represented to us that portions of the Zoological Gardens have been financed or refinanced by proceeds of the following federally tax-exempt bonds (collectively and to the extent outstanding as of the date hereof, the "Bonds"), in the amounts shown:

- (a) \$4,400,000 from the new money portion of the \$120,925,000 General Obligation Better Denver and Refunding Bonds, Series 2013A (the "Series 2013A Bonds");
- (b) \$10,000,000 from the \$35,000,000 General Obligation Auditorium Theatre and Zoo Bonds, Series 2003A, which were refunded by the refunding portion of the Series 2013A Bonds;

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- (c) A portion of the \$77,000,000 General Obligation Justice System Facilities and Zoo Bonds, Series 2005, which were refunded by the \$137,435,000 General Obligation Refunding Bonds, Series 2013B1 and Series 2013B2 (the "Series 2013B Bonds");
- (d) \$10,000,000 from the \$193,000,000 General Obligation Elevate Denver Bonds, Series 2018A (the "Series 2018A Bonds");
- (e) \$10,000,000 from the \$81,910,000 General Obligation Elevate Denver Bonds, Series 2019A (the "Series 2019A Bonds"); and
- (f) \$28,866,135 from the General Obligation Better Denver and Zoo Bonds, Series 2009A, refunded by the \$50,140,000 General Obligation Better Denver and Zoo Refunding Bonds, Series 2019B (the "Series 2019B Bonds").

The City has further represented to us that (1) neither the City nor any agency of the City (nor any other related person to the City) presently receives or expects for the foreseeable future to receive revenues from the Zoological Gardens, and (2) no portion of the repayment of the Bonds is secured, directly or indirectly, from revenues from, or other property interests in, the Zoological Gardens. We have not conducted any independent diligence and have not taken any steps to verify the accuracy of such representations.

The City has requested that we review, and we have reviewed, the Amendment to determine whether private business use generated by the Cooperative Agreement will exceed the private business use limitations applicable to the Bonds imposed by Section 141(b)(1) of the Internal Revenue Code of 1986 (the "Code") and, if the limitations are exceeded, whether the Bonds will meet the private security or payment test of Section 141(b)(2) of the Code.

Each issue of Bonds will meet the private business use test if more than ten percent of the proceeds of the issue (or five percent, with respect to unrelated or disproportionate uses) are to be used for private business use, as such term is used in Section 141(b)(1) of the Code. In general, a nongovernmental person is treated as a private business user of proceeds of an issue of Bonds and of the property financed by such Bonds as a result of ownership or actual or beneficial use of property pursuant to a lease, or a management or incentive payment contract, as set forth in Section 1.141-3(b) of the Treasury Regulations. Based on our review of the Amendment and the Cooperative Agreement, we are of the view that the use of the Zoological Gardens by the Foundation constitutes use under a management contract. In general, a facts and circumstances test determines whether use under a management contract results in private business use. Revenue Procedure 2017-13 sets forth safe harbors pursuant to which a management contract will not result in private business use. We advise that use of the Zoological Gardens by the Foundation as contemplated by the Amendment and the Cooperative Agreement may constitute private business use.

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With respect to the issue of Series 2018A Bonds, such private business use may not exceed the applicable ten percent private business use limitation. However, with respect to the Series 2013A Bonds, the Series 2013B Bonds, the Series 2019A Bonds and the Series 2019B Bonds, such private business use appears to exceed the applicable ten percent private business use limitation. For sake of administrability, we recommend the City conservatively treat use contemplated by the Amendment and the Cooperative Agreement as exceeding the private business use limitations of each issue of Bonds and, therefore, the City act to ensure no issue of the Bonds will meet the private security or payment test of Section 141(b)(2) of the Code.

Each issue of Bonds will meet the private security or payment test if the payment of debt service on more than ten percent of the proceeds of the issue (or five percent, with respect to unrelated or disproportionate uses) is directly or indirectly (i) secured by (A) any interest in property used or to be used for a private business use or (B) payments in respect of such property, or (ii) to be derived from payments in respect of property or borrowed money used or to be used for private business use. Based on our review and the representations made by the City as noted above in this letter relating to revenues of the Zoological Gardens and security for the Bonds, we are of the view that no issue of the Bonds will meet the private security or payment test. As a consequence, we are of the view that the execution and delivery of the Amendment will not adversely affect the excludability of interest on the Bonds from gross income for federal income tax purposes. We advise the City to annually track (i) any future receipt of revenues from the Zoological Gardens (whether received by the City, an agency of the City or any related person to the City) and (ii) changes in security for the Bonds, to ensure the private security or payment test is not met.

The scope of our engagement has not extended beyond the review of the Amendment and the Cooperative Agreement and the conclusions contained herein. The conclusions expressed herein are based on existing laws on the date hereof, and we express no opinion as of any subsequent date or with respect to any pending or future proposed or final Treasury Regulations and legislation. This letter has been prepared solely for your use and may not be relied on by any other person without our prior written consent.

Very truly yours,



Kutak Rock LLP

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