

## LEASE AGREEMENT

This Lease Agreement is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_ 2017, by and between the City of Key West, a municipal corporation, (“Lessor”), and the Key West Botanical Garden Society, Inc., a not-for-profit corporation organized under the laws of the State of Florida and a 501 (c)(3) exempt organization (“Lessee”) D/B/A Key West Tropical Forest & Botanical Garden.

### WITNESSETH

Lessor hereby leases to Lessee, and Lessee hereby leases from Lessor, real property located in Key West, Florida, hereinafter referred to as the “Premises,” and more particularly described in Attachment “A”, attached hereto and made part hereof, subject to the terms and provisions hereinafter set forth. The Premises are located at 5210 College Road on Stock Island, Key West, Florida. Lessee understands and expressly agrees that the Lessor may utilize any other property in the North Stock Island area, without objection by the Lessee, for the purposes of locating, constructing and/or operating affordable workforce housing and/or a temporary overnight shelter, whether or not the same is located on property adjacent to or in proximity to the Premises.

#### **1. Term.**

The term of this lease shall be ten (10) years, commencing as of the effective date of this Lease Agreement. The effective date shall be the date the last party executes the Lease. Lessee shall have a right of renewal in accordance with City of Key West Ordinances.

#### **2. Rent.**

Lessor and Lessee agree that the Lease represents a public benefit pursuant to Section 2-941(c) of the Key West Code of Ordinances, and therefore the rental amount shall be One Dollar (\$1.00) per year, payable to the Lessor upon each anniversary date of this Lease.

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

Lessee shall lease the Premises exclusively for use as a botanical garden and arboretum, providing public access, public recreation, and wildlife habitat. Further,

- a. Lessee’s use of the premises shall be consistent with the restrictions contained in the

Grant Award Agreement between the Lessor and Florida Communities Trust as recorded in Official Records Book 2136, Page 2457, of the Public Records of Monroe County, Florida more particularly described in Attachment "B", attached hereto and made part hereof;

- b. Lessee's use of the Premises shall be consistent with those restrictions contained in the Grant of Conservation Easement between the Lessor and the Monroe County Comprehensive Plan Land Authority as recorded in Official Records Book 2136, Page 2469, of the Public Records of Monroe County, Florida more particularly described in Attachment "C", attached hereto and made part hereof;
- c. Lessee's use of the Premises shall be consistent the management plan approved by Florida Communities Trust more particularly described in Attachment "D", attached hereto and made part hereof;
- d. Lessee's use of the Premises shall be consistent with City of Key West Ordinance No. 06-11 more particularly described in Attachment "E", attached hereto and made part hereof;
- e. Lessee's use shall comply with all of its' obligations pursuant to City Resolution 15-365 for the partial use of 5205 College Road to establish a canoe/kayak launch/landing area more particularly described in Attachment "F", attached hereto and made part hereof;
- f. Lessee expressly acknowledges the existence of and agrees to abide by the easement in favor of Monroe County for ingress, egress, and the operation of utilities over the property described in Attachment "G", attached hereto.

Lessee agrees to comply with all other applicable laws, codes, ordinances, rules and regulations of Lessor, or other governmental agencies, as existing and as may be promulgated during the term hereof. Lessee shall not use or permit any person to use in any manner whatsoever the property, or the building or improvements hereafter constructed or placed on the leased property, nor any portion thereof, for any purpose calculated to injure the reputation of the Premises or of the neighboring property, nor for any purpose or use in violation of the laws of the United States, or of the State of Florida, or of the Ordinances of the City of Key West, Florida.

#### **4. Liaison Committee.**

(a) There is hereby created a City of Key West Botanical Garden Liaison Committee (“Liaison Committee”) for overseeing activities at the Premises in conformance with Lessor’s ordinances governing the activities of the Key West Tree Commission, chapter 110 of the Code of Ordinances.

(b) *Members.* The Liaison Committee shall consist of one member who shall be appointed by the Lessor’s Tree Commission. That member shall be a Tree Commissioner, shall not be the Chair of the Tree Commission, and shall not be an employee of the Lessor. A second member shall be appointed by the Lessee. That member shall be a Director of the Lessee, but neither be the Chairperson of the governing board of the Lessee nor an employee of the Lessee. These two members shall appoint a third member to the Liaison Committee. All Liaison Committee members shall have a term of one year or, in the event of a replacement, the expired portion thereof. In the event of a vacancy of the third member existing in excess of ten calendar days, the Mayor of the City of Key West shall have the right to appoint a person to fill that vacancy. The Tree Commission and the Lessee shall each also appoint one person as an alternate for duty when the member is not available. The alternate members of the Liaison Committee must meet the same qualifications as the primary members.

(c) *Voting and Quorum.* All decisions of the Liaison Committee shall require an affirmative vote of at least two members. The quorum for any meeting shall be two members while a third member may participate and vote telephonically. In all events, a vote is required to be made by the Tree Commissioner. All meetings shall be held pursuant to a 48-hour written notice, which shall be posted in the City Clerk’s office and the office of the Botanical Garden Society. This notice shall be ported timely by the Chair of the Liaison Committee.

(d) *Chair.* The members shall appoint a Chair of the Liaison Committee. The Chair shall preserve the procedural requirements of the Liaison Committee. To the greatest extent possible, discussions of any pending matters shall include all three members. It is also the responsibility of the Chair to keep any notes, official records, and handle the secretarial aspects of Committee. The Chair shall file copies of all official reports and documents with the Lessor’s landscape division.

(e) *Responsibilities.* All permitting responsibilities of the Lessor’s Tree Commission pursuant to Chapter 110 of the Key West Code of Ordinances are delegated to the Liaison Committee. The lessee shall submit all permit applications, on a form developed by the Liaison Committee for the planting, transplanting, and/or removal of trees. A decision of

the Liaison Committee shall either be to grant or deny the permit. The Liaison Committee shall endeavor to respond to all such requests within a period not to exceed five business days. All permits shall be signed by the member representing the Tree Commission.

(f) *Reporting.* The Committee shall meet quarterly with the Tree Commission, and at additional times at the request of the Tree Commission, for the purpose of advising the Tree Commission of the Lessee's activities and for the purpose of receiving advice from the Tree Commission. At least once per year, the Liaison Committee shall file a report with the City Commission to advise the City Commission of activities at the Botanical Garden.

(g) *Review.* Representatives of the Lessee and the City of Key West Tree Commission shall meet to review the progress of the Liaison Committee and its delegated responsibilities, and prepare a report to the City Commission. In the event the parties determine to terminate the Liaison Committee, then the permitting role of the Key West Tree Commission shall be restored. In such event, then the City Attorney shall prepare the necessary and appropriate amendments to the Lease and to City Ordinance No. 06-11.

(h) *Understanding.* The parties understand and agree that the Liaison Committee is permitted to act only with respect to the Lessee and the Key West Tree Commission regarding permit applications for the planting, transplanting, and removal of trees located on the Premises under the lease at 5210 College Road on Stock Island, Key West, Florida. This is the only allowed use of such a liaison committee within the city of Key West.

## **5. Husbandry Report**

No less than annually, the Lessee shall file a Husbandry Report with the Lessor which shall describe changes to the plantings of the Botanical Garden that have occurred since the prior Husbandry Report as well as Husbandry Reports for the coming year.

## **6. Utilities.**

Lessee shall be responsible for payment of all utilities furnished to the Premises, including, but not limited to, electric, gas, water, sewer, trash, garbage, and solid waste collection service. Furthermore, Lessee shall be responsible for payment of telephone bills and janitorial services.

## **7. Maintenance.**

The Lessee expressly agrees herein to be responsible for maintenance of the Premises in all aspects, in a clean, safe condition, and to return the Premises to the Lessor at the termination or

expiration of the Lease in the same condition as exists at the execution of this agreement, excepting normal wear and tear.

**8. Taxes.**

As the Premises are municipal-owned property leased to a not-for-profit organization, the parties anticipate that no ad valorem taxes are to be paid. In the event ad valorem taxes become due for whatever reason, they shall be the responsibility of Lessee.

**9. Right of Entry/Liaison.**

Lessor may enter the leased property at any reasonable time for the purpose of inspecting the Premises.

**10. Assignment or Subletting.**

Lessee shall not assign this lease nor sublet the Premises without the consent by Resolution of the Key West City Commission. Such consent may be arbitrarily and unreasonably withheld and is within the absolute discretion of the City Commission.

**11. Responsibility for Damage.**

Lessee agrees that it shall bear full responsibility for all damage to its personal property and other contents not affixed to Premises.

**12. Default/Termination.**

If Lessee shall fail to comply with the Grant Award Agreement or the management plan referred to herein above, or if Lessee shall fail to perform the terms and conditions agreed upon in this Lease and shall remain in such default for a period of thirty (30) days from the date Lessee receives written notice of default by Lessor, then Lessor, at its sole option, may immediately terminate this Lease Agreement. Further, in the event the Lessee files or declares bankruptcy or for reorganization under the bankruptcy laws of the United States, then Lessor, at its sole option, may immediately terminate this Lease Agreement. In addition, in the event the Lessee corporation is dissolved, voluntarily or otherwise, or ceases to exist for any reason, then Lessor, at its sole option, may immediately terminate this Lease Agree To the fullest extent permitted by law, Licensee expressly agrees to indemnify and hold harmless the City of Key West and their respective officers, directors, agents, and employees (herein called the "indemnitees") from any and all liability for

damages, including, if allowed by law, reasonable attorney's fees and court costs, such legal expenses to include costs incurred in establishing the indemnification and other rights agreed to in this Paragraph, to persons or property caused in whole or in part by any act, omission, or default by Licensee or its subcontractors, material men, or agents of any tier or their employees, arising out of this Agreement or its performance, including any such damages caused in whole or in part by any act, omission, or default of any indemnitee, but specifically excluding any claims of, or damages against an indemnitee resulting from such indemnitee's gross negligence, or the willful, wanton or intentional misconduct of such indemnitee or for statutory violation or punitive damages except and to the extent the statutory violation or punitive damages are caused by or result from the acts or omissions of Licensee or its subcontractors, material men, or agents of any tier or their respective employees. The provisions of this indemnification provision shall survive the expiration or earlier termination of this License Agreement. Nothing herein is intended to waive the immunity afforded to City pursuant to Florida Law, including section 768.28, Florida Statutes.

### **13. Insurance and Indemnification.**

*Insurance.* At Lessee's sole cost and expense, Lessee will secure, pay for, and file with the Lessor, during the entire Term hereof, an occurrence form commercial general liability policy, covering the Premises and the operations of Lessee and any person conducting business in, on or about the Premises in a at least the following minimum amounts with specification amounts to prevail if greater than minimum amount indicated. Notwithstanding any other provision of this Lease, Lessee shall provide the minimum limits of liability coverage as follows:

Commercial General Liability	\$2,000,000	Aggregate
	\$2,000,000	Products Aggregate
	\$1,000,000	Any One Occurrence
	\$1,000,000	Personal Injury
	\$300,000	Fire Damage/Legal

Lessee shall also procure the following insurance coverage:

- (i) "All risk" property insurance, including theft coverage, written at replacement cost value and a replacement cost endorsement insuring Lessee's improvements and betterments, fixtures, furnishings, equipment and any other property belonging to Lessee.

(ii) Workers compensation coverage as required by the provisions of Florida statute.

Any consignment agreement used by Lessee must provide that consignor acknowledge that the Lessor does not have any liability whatsoever for any damage which may be done to items left in the Premises on consignment. The Lessee must provide the Lessor with a copy of any consignment agreement used by Lessee regarding Premises. Lessor shall not be responsible for damage to any property belonging to Lessee or consignor. Lessee completely indemnifies the Lessor with regard to any claims made by any consignor for any reason.

If the Lessee sells or serves alcoholic beverages, the Lessee shall be required to maintain full liquor liability coverage with minimum limits of \$1,000,000.00. If the Lessee utilizes the services of a caterer and the caterer will be providing, selling, and/or serving alcoholic beverages, the Lessor will honor evidence from the caterer that they have the required coverage in full force and effect and the coverage names the City of Key West as an additional insured.

From time to time during this Lease, at Lessor's request, Lessee shall (i) procure, pay for and keep in full force and effect such other insurance as Lessor shall require and (ii) increase the limits of such insurance as Lessor may reasonably require.

Any general liability or other policy insuring the Lessor does not provide any contributing or excess coverage for Lessee. The policies Lessee procures for Lessee's exposure are the only coverage available to Lessee.

Lessee shall furnish an original Certificate of Insurance indicating, and such policy providing coverage, to Lessor named as "Additional Insured" on a PRIMARY and NON-CONTRIBUTORY basis utilizing an ISO standard endorsement at least as broad as CG 2010 (11/85) or its equivalent, INCLUDING A "Waiver of Subrogation" clause in favor of Lessor on all policies. Lessee will maintain the General Liability coverage summarized above with coverage continuing in full force including the "additional insured" endorsement until at least 3 years beyond the termination of this Lease.

Lessee's insurance policies shall be endorsed to give 30 days written notice to Lessor in the event of cancellation or material change, using form CG 02 24, or its equivalent.

All policies of insurance required to be carried by Lessee pursuant to this Lease shall be written by responsible insurance companies authorized to do business in Florida with an AM Best rating of A-VI or better. Any such insurance required to be carried by Lessee hereunder may be furnished by Lessee under any blanket policy carried by it or under a separate policy therefore. Certificates shall be delivered to Lessor prior to the commencement of the Term of this Lease and, upon renewals, but not less than sixty (60) days prior to the expiration of such coverage. In the event Lessee shall fail to procure such insurance, Lessor may, at its option, procure the same for the account of Lessee, and the cost thereof shall be paid to Lessor as an additional charge upon receipt by Lessee of bills therefore, together with an administrative fee equal to fifteen (15%) percent to cover the cost of the Lessor's efforts to procure such policy.

Certificates of Insurance submitted to Lessor will not be accepted without copies of the endorsements being requested. This includes additional insured endorsements, cancellation/material change notice endorsements, and waivers of subrogation. Copies of USL&H Act and Jones Act endorsements will also be required if necessary. **PLEASE ADVISE YOUR INSURANCE AGENT ACCORDINGLY.**

*Indemnification.* Lessee does hereby agree to indemnify, defend, and save Lessor, its respective officers, directors, agents and employees harmless from and against any and all liability for any injury to or death of any person or persons or damage to property (including adjoining property for environmental damage) in any way arising out of or connected with the conditions, use or occupancy of the Demised Premises, or in any way arising out of the activities of Lessee, its agents, employees, licensees or invitees on the Demised Premises and/or the building, including reasonable attorney's fees and court costs incurred by Lessor in connection therewith, such legal expenses to include costs incurred in establishing the indemnification and other rights agreed to in this Paragraph, excepting, however, only liability caused by Lessor's gross negligence in its failure to perform any of Lessor's covenants, obligations or agreements of this Lease. Nothing herein is intended to waive the sovereign immunity afforded to City pursuant to Florida law, including section 768.28, Florida Statutes.

The indemnification obligations under this Section shall not be restricted in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for Lessee under Workers' Compensation acts, disability benefits acts, or other employee benefits acts, and shall extend to and include any actions brought by or in the name of any employee of Lessee or of any third party to



whom Lessee may subcontract work. This indemnification shall continue beyond the date of termination of the Agreement.

**14. Mechanics' Liens.**

Lessee agrees that there shall be no mechanics' liens imposed upon any buildings or improvements which may be upon the Premises, or at any time be put upon the Premises, and that in case of any mechanics' liens the Lessee shall pay off such liens within thirty (30) days of written notice thereof. Failure to do so shall be a breach of this Lease.

**15. Hours of Operation/Personnel/Admission Fee**

Lessee herein expressly agrees to be responsible for opening and closing the Premises and insuring public access generally in a manner approved by the Liaison Committee. The Lessee shall staff the Premises with persons not employed by the City of Key West. The parties herein specifically acknowledge that employment by the Lessee shall not constitute employment by the City of Key West, and the Lessee's employees shall not be entitled to benefits enjoyed by employees of the City of Key West. Lessee may charge the public a fee for admission to be used for operations and for construction of additional facilities.

**16. Financial Reports.**

The Lessee herein expressly agrees to provide a copy of its annual Form 990 return to the Liaison Committee no later than 60 days of its filing with IRS.

**17. Major Specimen Inventory**

A "major specimen" is a tree or plant of unusual stature obtained as a result of either the rarity of the species or its size or condition. Lessee shall maintain an inventory of such Major Specimens. The inventory shall be included with the annual husbandry report to be filed with the Lessor. The inventory shall indicate the location of all such major specimens. The Lessor shall have the right to request that certain individual Major Specimens be added to the inventory report but shall not have the right to request that classes of Major Specimens be added to the inventory report. The Lessee shall have sole authority to determine what specimens to add to the Premises. Lessee shall determine the form and methodology for the inventory. Should the Lessor desire a higher level of inventory specificity than Lessee provides, then Lessor may perform whatever additional inventory analysis it deems necessary.

## **18. Grant Writing**

Lessor agrees that its contractual or in-house grant writer, if any, shall be available to and assist the Lessee in preparing grant proposals to other governmental entities. All such grant proposals shall reflect the Lessor's ownership of the premises.

## **19. Capital Improvements**

(a) Prior to the commencement of any capital improvements, Lessee shall file with both the Liaison Committee and the City Manager a full description of the proposed capital improvements, with plans where appropriate. Additionally, the Lessee shall file with the City Manager a funding plan for the completion of same. The funding plan shall require the prior approval of the City Manager only who shall review the funding plan to determine that there are sufficient funds to pay contractors so that liens for unpaid work shall not be placed against the Premises. Permit applications to effectuate all such capital improvements shall require the signature of the City Manager's office. The approvals of the City Manager set forth in this subparagraph shall not be unreasonably withheld.

(b) It is acknowledged that most capital improvement projects will be undertaken in phases; that applications for and funding plans for phases shall be limited to the particular phase for which approval is being sought; and that each phase shall be reviewed and determined individually.

## **20. Key West Tree Commission.**

The parties understand and agree, pursuant to Ordinance No. 06-11, that the Botanical Garden is not subject to the permitting requirements of the Key West Tree Commission.

## **21. Special Events**

The parties understand that the Lessee intends to use the premises for special events, including but not limited to, Botanical Garden fundraisers and weddings. Lessee shall not require Lessor permission for such special events, except that the Lessee may apply to the City Commission for a noise control permit pursuant to the terms of Section 6-86, Key West Code of Ordinances. The sale, possession or drinking of alcoholic beverages on the Premises shall be limited to special events only, in accordance with the laws of the State of Florida and City of Key West.

**22. Notices.**

Any notice that either party to this Lease is required to send to the other under any statutes, decision, or rule or law, under any provision of this Lease, or which either desires to send or give to the other, shall be in writing and may be served personally or be enclosed in a sealed, post-paid envelope and be sent by registered or certified United States mail to:

Lessor: City Manager  
City of Key West  
1300 White Street  
Key West, FL 33040

Lessee: Executive Director  
Key West Botanical Garden Society, Inc.  
5210 College Road  
Key West, FL 33040

**23. Non-Discrimination.**

Lessee represents and warrants that it will not discriminate against any person for any reason because of race, color, religion, sex, national origin, ancestry or desirability.

**24. Severability.**

If any provision of this Lease shall be held by a court of competent jurisdiction to be invalid or unenforceable, the remaining provisions shall not be impaired thereby, but such remaining provisions shall be interpreted and enforced so to achieve, as near as may be, the purpose of this Lease to the extent permitted by law.

**25. Entire Agreement.**

This Lease Agreement sets forth the entire agreement between the parties. No amendment or modification may be made unless reduced to writing executed by the parties.

**26. Disclaimer and Waiver of Lien Right**

The Lessee expressly agrees that it will include a disclaimer in all contracts, grant applications and other relevant documents with third parties that states the following:

Disclaimer and Waiver of Lien Right. It is acknowledged and agreed between the parties hereto that the Key West Botanical Garden Society, Inc. ("KWBGS") is a Florida corporation wholly and completely independent from the City of Key West; that KWBGS operates its primary activities on land leased from the City of Key West; that the activities contemplated by this contract/grant may involve improvement either to or located on land leased from the City of Key West; that the City of Key West is not a party to this contract/grant, has not been involved in the negotiations establishing the contract/grant, and is not liable for obligations of KWBGS under this contract/grant in any way whatsoever either directly or indirectly, and therefore the parties hereto agree that neither of them will in any way look to the City of Key West, its officers or employees to fulfill obligations under this contract/grant and that the parties hereto waive any right to place a lien upon the property of the City of Key West for the fulfillment of any obligations under this contract/grant.

**IN WITNESS WHEREOF**, Lessee and Lessor have caused this instrument to be executed as of the date first written by their respective officers or parties.

Attest:

**Lessor: City of Key West, Florida**  
a municipal corporation

\_\_\_\_\_  
Cheryl Smith, City Clerk

\_\_\_\_\_  
Craig Cates, Mayor

Witness:

**Key West Botanical Garden Society, Inc.**

  
\_\_\_\_\_  
Print: MARLENE WILBERGER

By:   
\_\_\_\_\_  
Bernhard Rasch, President

11/29/2017