

RESOLUTION NO. 06-180

A RESOLUTION OF THE CITY COMMISSION OF THE CITY OF KEY WEST, FLORIDA, APPROVING THE ATTACHED LEASE BETWEEN THE CITY AND THE KEY WEST BOTANICAL GARDEN SOCIETY, INC. FOR THE OPERATION OF THE KEY WEST BOTANICAL GARDEN; PROVIDING FOR AN EFFECTIVE DATE

WHEREAS, pursuant to Section 2-941(c) of the Code of Ordinances, the City finds that a not-for-profit botanical garden is a public benefit, justifying a lease that is below market rate;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COMMISSION OF THE CITY OF KEY WEST, FLORIDA, AS FOLLOWS:

Section 1: That the attached lease for the Key West Botanical Garden is hereby approved.

Section 2: That this Resolution shall go into effect immediately upon its passage and adoption and authentication by the signature of the presiding officer and the Clerk of the Commission.

Passed and adopted by the City Commission at a meeting held this 16th day of May, 2006.

Authenticated by the presiding officer and Clerk of the Commission on June 12, 2006.

Filed with the Clerk June 12, 2006.


MORGAN McPHERSON, MAYOR

ATTEST:


CHERYL SMITH, CITY CLERK



THE CITY OF KEY WEST

POST OFFICE BOX 1409
KEY WEST, FLORIDA 33041-1409
WWW.KEYWESTCITY.COM

MEMORANDUM

TO: Mayor and Members of the City Commission

FROM: Robert Tischenkel ^{RT}
City Attorney

DATE: May 2, 2006

RE: Botanical Garden Society Lease

Attached is the new Lease (and Exhibits) between the City and the Botanical Garden Society. It replaces a Memorandum of Understanding from the early 1990s that has become obsolete in light of the City's purchase of the "Botanical Garden Addition." The Lease contemplates its expiration in the event of the sale of the property to the Lessee.

The annual rental of \$1.00 per year makes this a below-market rate Lease that, according to section 2-941(c) of the Code of Ordinances, must be approved by a supermajority vote. Also, a "public benefit" to the Lease must be shown on the record.

Representatives of the Botanical Garden Society and the Key West Tree Commission and its staff met twice during April to resolve their differences and to address a proposal for limiting the Tree Commission's authority in Botanical Garden permitting applications. The result of those meetings is found in Paragraph 4 which establishes a Liaison Committee. This

committee of three persons will stand in the place of the Tree Commission and make all approvals for the planting, transplanting and removal of trees. The purpose of the committee is to provide flexibility and faster decision-making for a garden whose function at its specific location mirrors that of the Tree Commission – the care and preservation of trees. The committee is required to meet quarterly with the Tree Commission and to file an annual report with the City Commission. The Lease provides that the parties will undertake a review of the committee after one year.

Because the Florida Communities Trust grant and accompanying Management Plan anticipate development on the property, particularly on the Addition, the Lease involves the City Manager in an approval process of the proposed capital improvements to the Premises.

While much of this Lease contains standard clauses, there are several that are particular to the current and future management of the Botanical Garden – see paragraphs 5, 17, 19 and 20.

LEASE AGREEMENT

This Lease Agreement is made and entered into this 7th day of May, 2007 ~~2006~~, 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").

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 Exhibit "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.

1. Term; Purchase of Premises.

(a) 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.

(b) The parties understand and agree that the Lessee is making efforts to raise funds to purchase the Premises from the Lessor. The Lessee shall complete the purchase within twenty-four (24) months from the effective date of this Lease; providing, however, the following understandings: (1) a purchase of the Premises by Lessee is subject to referendum in accordance with section 7.03 of the City of Key West Charter; (2) the City Commission of the Lessor has no obligation hereunder to

sell the Premises or call for a referendum in support of a proposed sale; and (3) pursuant to section 2-931 to 2-937 of the Code of Ordinances, the Lessor makes no guarantee that the Lessee would be the successful bidder of the Premises in the event of voter approval of a sale. To assist the Lessee in its fundraising efforts, concurrent with this lease approval the Lessor's City Commission will adopt a Resolution expressing its intention to authorize a sale of the Premises.

(c) Upon a sale of the Premises to the Lessee, and final execution of all documents of conveyance, this Lease shall expire automatically.

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's Finance Department upon each anniversary date of this Lease. Lessee may prepay the rent for all or a portion of the entire term of the 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. Lessee's use of the premises shall be consistent with those restrictions contained in the Grant Award Agreement between the Lessor and Florida Communities Trust ("FCT") as recorded in Official Records Book 2136, Page 2457, of the Public Records of Monroe County, Florida. Further, 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. Further, Lessee's use of the Premises shall be consistent the management plan approved by Florida Communities Trust. Finally, Lessee's use of the Premises shall be consistent with City of Key West Ordinance No. 06-

11. Copies of these documents are attached hereto, incorporated by reference, and more particularly

described as Exhibit “B”, Exhibit “C”, Exhibit “D” and Exhibit “E”, respectively. Further, 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 Exhibit “F”, attached hereto. Further, 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 (the “Liaison Committee”) for the purpose of overseeing activities at the Premises in conformance with the 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 shall 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 at the office of the Botanical Garden Society, shall be open to the public, and shall be held pursuant to 48-hour written notice, which shall be posted at the City Clerk's Office and the office of the Botanical Garden Society. This notice shall be posted 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 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, to 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.* On or soon after the first anniversary of the execution of this Lease, 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 this Lease and to 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 plans for the upcoming 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, garbage, stormwater and solid waste collection service. Furthermore, Lessee shall be responsible for payment of telephone bills and janitorial services.

7. Maintenance.

The Lessee expressly agrees to be responsible for maintenance of the buildings and other structures on the Premises in a clean, safe condition, and to return all such buildings and structures to the Lessor at the termination or expiration of the Lease in good and habitable condition, excepting normal wear and tear. The parties understand and agree that subsequent to the execution of this Lease, Lessee will be undertaking additional improvements to such buildings and structures to which Lessee's maintenance obligations hereunder shall also apply.

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.

Lessor may enter the Premises 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.

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 (Exhibit B) or the management plan (Exhibit D) 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 Agreement.

13. Insurance and Indemnification.

Lessee shall indemnify and hold harmless the Lessor, its employees and agents, from all suits, claims, actions and judgments as a result of or arising from the loss of or damage to property or the injury or death to person arising out of the use of the Premises as provided herein during the term of this Lease, by reason of any act or failure to act by the Lessee, its employers, officers, agents or members, excluding liability arising from the negligence of the Lessor. This indemnification shall survive the expiration or termination of this lease.

Lessee agrees to provide at its expense comprehensive commercial general liability insurance in the amount of One Million Dollars (\$1,000,000.00) per occurrence insuring itself and Lessor against all claims of damages or injury to persons or property arising for any reason out of Lessee's tenancy or use of the Premises, or arising out of its activities related to the lease use, or otherwise

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 satisfy 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/No Admission Fee.

Lessee herein expressly agrees to be responsible for opening and closing the Premises and ensuring public access. 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 shall not charge the public a fee for admission, but may accept donations at the entrance.

16. Financial Reports; FCT Reports.

(a) The Lessee expressly agrees to provide a copy of its annual Form 990 return to the Lessor within sixty (60) days of its filing with IRS.

(b) The Lessee expressly agrees to assist the Lessor in the timely preparation and submission of FCT's annual stewardship report, as well as any other report or documentation required by the FCT pursuant to Exhibit B.

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 Major 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 from time to time to assist the Lessee in preparing grant proposals. 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 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 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. No capital improvements shall be undertaken without the prior written consent of the City Manager. All permit applications shall reflect the Lessor's ownership of the property and shall be signed by 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. Special Events

The parties understand that the Lessee intends to use the Premises for special events, including, but not limited to, Botanical Garden Society 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 the City of Key West.

21. 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
525 Angela Street
Key West, FL 33040

Lessee: Executive Director
Key West Botanical Garden Society, Inc.
PO Box 2436
Key West, FL 33045

22. Non-Discrimination.

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

23. 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.

24. Revocation of Memorandum of Understanding.

The parties have operated pursuant to a Memorandum of Understanding, adopted in City of Key West Resolution No. 91-322 (as amended) and executed on September 13, 1991. The parties understand and agree that this Lease shall operate to replace and thereby revoke this Memorandum of Understanding.

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.

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
Cheryl Smith
Cheryl Smith, City Clerk

City of Key West, Florida
a municipal corporation

Morgan McPherson
Morgan McPherson, Mayor

Signed in presence of:

Morgan P. Harrison

Key West Botanical Garden Society, Inc.

By: *Peter Rysman*
Carolann Sharkey, Chairman of the Board
PETER RYSMAN, PRESIDENT