

## **CITY COUNCIL AGENDA ITEM**

### **CITY OF SHORELINE, WASHINGTON**

**AGENDA TITLE:** Authorizing the City Manager to Execute a Five-Year Garden Service Agreement (#9659) Between the Kruckeberg Botanic Garden Foundation and the City of Shoreline

**DEPARTMENT:** Parks, Recreation and Cultural Services

**PRESENTED BY:** Eric Friedli, Director

**ACTION:**        ☐ Ordinance        ☐ Resolution        ☒ Motion  
                 ☐ Discussion        ☐ Public Hearing

**PROBLEM/ISSUE STATEMENT:**

The City currently has two agreements with the Kruckeberg Botanic Garden Foundation (KBGF), both of which expire on June 30, 2020. The Residence Service Agreement (#8604) was entered into in September 2016 after the death of Dr. Art Kruckeberg. The Residence Service Agreement was specific to the use of the house previously occupied by Dr. Kruckeberg. The Garden Service Agreement (#8182) was entered into in July 2015 and covered the use and maintenance of the garden and other buildings. The proposed Garden Service Agreement (Attachment A), which has a term of five years, combines the two agreements and covers the garden, residence, and other facilities and structures. The Service Agreement acknowledges the City and the Kruckeberg Botanic Garden Foundation (KBGF) have a shared goal of preserving, enhancing and encouraging public access to the Kruckeberg Botanic Garden.

The proposed Agreement includes provisions for maintenance, preservation and enhancement of the plant collection, and ensures the Garden remains an environmental and educational resource for all residents of Shoreline. The relationship between the City and KBGF warrants periodic review to ensure it meets the changing needs of the Foundation and the City. The KBGF and City staff entered into an extensive review of the existing Agreements in late-2019. That review resulted in a new Garden Service Agreement proposal that most accurately reflects current needs of the KBGF and requirements of the City. Tonight, Council is being asked to authorize the City Manager to execute this new Service Agreement between the KBGF and the City of Shoreline.

**RESOURCE/FINANCIAL IMPACT:**

The financial obligation of the City to the Foundation continues to be subject to biennial budget review and City Council approval. City funding provides resources to the Foundation to provide program and maintenance support for the Garden.

## **RECOMMENDATION**

Staff recommends that the City Council authorize the City Manager to execute the proposed five-year Garden Service Agreement between the Kruckeberg Botanic Garden Foundation and the City of Shoreline.

Approved By:        City Manager ***DT*** City Attorney ***MK***

## **BACKGROUND**

The Kruckeberg Botanic Garden was first begun in 1958 by Professor Arthur (Art) Rice Kruckeberg and his wife Mareen from a 4-acre plot and farmhouse in Richmond Beach. Art and Mareen grew nearly every plant from seed or cutting. They took an informal, naturalistic approach to design, combining northwest native plants with unusual and rarely cultivated species collected from the West coast of the country and around the world. The result is a unique Puget Sound Basin woodland garden. The garden contains more than 2,000 plant species and several of the trees on the property are the largest or rarest in the state.

In 1998, the Kruckeberg Botanic Garden Foundation (KBGF) was founded with the objective of conserving the garden. The KBGF was created to assist with the management of the plant collection, garden maintenance, and conduct tours and workshops. The KBGF is a designated tax-exempt 501(c) (3) organization that is governed by a Board of Directors.

To preserve the botanic garden for future generations to enjoy, Dr. Kruckeberg signed a Conservation Easement in 2003 that protects the property in perpetuity from development. The easement was originally held by the Dunn Historic Garden Trust's Board of Directors and the Cascade Land Conservancy. In 2016, the Conservation Easement was transferred to the KBGF.

The City purchased the 3.9-acre property in 2007. As part of the purchase and sale agreement the City entered into a Service Agreement with the KBGF and a Residential Lease Agreement with Dr. Kruckeberg.

In 2010, the City Council adopted a Master Plan for the Garden. The Garden Service Agreement was amended in 2011 to recognize the new Master Plan. After an extensive review of the Agreement in 2014, a new Garden Service Agreement (#8182) was executed in July 2015 to more accurately reflect the needs of the Foundation and requirements of the City. The current Garden Service Agreement will expire June 30, 2020.

Dr. Kruckeberg passed away in 2016 ending the Residential Lease Agreement. The KBGF and the City entered into the Residence Service Agreement (#8604). The termination of the Residential Service Agreement was established as June 30, 2020 to coincide with the end of the Garden Service Agreement with the intention that a single Garden Service Agreement would be developed to replace both.

## **DISCUSSION**

The relationship between the City and KBGF warrants periodic review to ensure it meets the changing needs of the Foundation and the City. The KBGF and City staff entered into an extensive review of the Agreement in 2019 that resulted in this new Garden Service Agreement (Attachment A) proposal that most accurately reflects current needs of the Foundation and requirements of the City.

Changes incorporated into the proposed agreement include the following, and can be seen in track changes version of the Agreement in Attachment B:

- Section 1.2 – Noting change in the Conservation Easement from the E.B. Dunn Historic Garden Trust to the Kruckeberg Botanic Garden Foundation.
- Section 2.1 – General Maintenance Responsibilities, added subsection G – Security Monitoring and subsection H-Emergency Notification.
- Section 2.2 – New Section – Clarify Use of Buildings.
- Section 2.3 – New Section – Assign Gate responsibility to the Foundation.
- Section 3.4 – New Section – Signage responsibility.
- Section 3.5 - Clarification of services to be provided by the City for the Maintenance of the Garden Facilities.
- Section 4.3 - Clarification of the Washington State Department of Labor & Industry reporting requirements regarding the intent to pay prevailing wages.
- Section 4.4 – Leasehold Excise Tax responsibility.
- Section 4.5 – States new reimbursement requests procedures.
- Section 7.2 and 7.3 – Clarifies contract termination with or without cause.
- Section 8 – New Section – Force Majeure detail and responsibilities.

While some of the terms of the proposed Services Agreement have been updated to keep pace with growth and development of the Garden, the financial obligation of the City to the Foundation continues to be subject to biennial budget review and City Council approval. City funding provides resources to the Foundation to provide program and maintenance support for the Garden.

The KBGF Board of Directors has reviewed and adopted the agreement.

### **RESOURCE/FINANCIAL IMPACT**

The financial obligation of the City to the Foundation continues to be subject to biennial budget review and City Council approval. City funding provides resources to the Foundation to provide program and maintenance support for the Garden.

### **RECOMMENDATION**

Staff recommends that the City Council authorize the City Manager to execute the proposed five-year Garden Service Agreement between the Kruckeberg Botanic Garden Foundation and the City of Shoreline.

### **ATTACHMENTS**

Attachment A: Proposed Kruckeberg Botanic Garden Service Agreement (#9659)

Attachment B: Comparison of 2015 Garden Service Agreement and proposed Garden Service Agreement – Tracked Changes

## **KRUCKEBERG BOTANIC GARDEN SERVICE AGREEMENT #9659**

This BOTANIC GARDEN SERVICE AGREEMENT ("Agreement") is made and entered into by and between KRUCKEBERG BOTANIC GARDEN FOUNDATION, a Washington nonprofit corporation, ("Foundation"), and the City of Shoreline ("City"), on the date provided below. The Foundation and the City may be each individually referred to as a "Party" and collectively as the "Parties."

### **1. Recitals**

- 1.1 The City is the owner of that certain real property located at 20312 15<sup>th</sup> Avenue N.W., Shoreline, King County, Washington, is more particularly described as follows ("Property"):

PARCEL 1 - S ½ OF THE NW ¼ OF THE NW ¼ OF THE NW ¼, LESS THE W 270 FEET THEREOF, SITUATED IN SEC. 1, TOWNSHIP 26 N, RANGE 3 E, W.M.

PARCEL 2 - W 270 FEET OF S ½ OF NW ¼ OF THE NW ¼ OF THE NW ¼, LESS N 176.47 FEET THEREOF, AND LESS COUNTY ROAD, SITUATED IN SEC. 1, TOWNSHIP 26 N, RANGE 3 E.W.M.

King County Tax Parcel Nos. 012603-9378 and 012603-9219

- 1.2 The Property is subject to a perpetual conservation easement originally held by the E.B. Dunn Historic Garden Trust and recorded with King County under Recording No. 20031017000833, which, among other things restricts the uses and activities on the Property ("Conservation Easement"). In 2016, the E.B. Dunn Historic Garden Trust assigned and conveyed all its rights, obligations, and interests in the Conservation Easement to the Kruckeberg Botanic Garden Foundation and recorded this act with King County under Recording No. 20161209000591.
- 1.3 The Property contains a unique, natural, Northwest garden created by Arthur R. Kruckeberg and Mareen Kruckeberg. By preserving and enhancing the native plant collection and introducing rare plant species, this unique collection of plants has been sustained in an undeveloped natural area ("Garden").
- 1.4 The Foundation's goal is to ensure the Kruckeberg Botanic Garden is dedicated to fostering and providing educational, cultural and aesthetic enrichment to the community and all who visit.
- 1.5 The Foundation is a publicly supported, tax-exempt nonprofit organization, qualified under Sections 501(c)(3) and 170(h) of the Internal Revenue Code of 1986, as amended ("Code"), and the regulations promulgated thereunder, and also qualified as a nonprofit nature conservancy corporation under RCW 64.04.130 and 84.34.250. Foundation is included in the "Cumulative List of Organizations described in Section 170(c) of the

Internal Revenue Code" published by the Internal Revenue Service.

- 1.6 The Parties have common goals of ensuring the perpetual maintenance of the Garden, protecting the Property from uses contrary to preservation of its botanic collections and providing to the general public passive aesthetic, cultural and educational opportunities relating to the Garden (hereafter "Goals").
- 1.7 The Foundation was formed specifically for the purpose of advancing the Goals. The terms and conditions of this Agreement are intended by the Parties to ensure fulfillment of the Goals and the Foundation is willing to maintain and operate the Garden for the City in exchange for certain benefits and payments.
- 1.8 In addition to the Garden, the Property contains: a single-family home and an accessory dwelling unit (the "Buildings"); a greenhouse currently used for propagation and maintained by the Foundation (the "Greenhouse"); sheds for tool and equipment storage, benches for display of plants and nursery work, elevated boardwalks and a pergola ("the Structures"); Public Art and a Parking Lot. All the above are collectively referred to herein as the "Garden Facilities."

Now, THEREFORE, in consideration of the mutual covenants, conditions, and promises contained in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged, and in order to maintain the Property, the Garden Facilities in their current condition or better, and to ensure the public receives access to the benefits and aesthetic values inherent in botanic gardens, the Parties agree as follows:

## 2. Foundation's Rights and Responsibilities

### 2.1 General Maintenance Responsibilities.

- A. Garden: The Foundation agrees to operate, maintain and improve the Garden so as to maintain and enhance a regionally significant botanic garden and collection of species native to lowland forests of the Puget Sound Basin, as well as non--native species compatible with the region, based on the botanic diversity, woodland setting, and naturalistic design of the Garden existing on the effective date of the City's Master Site Plan("Plan") that was approved on September 13, 2010. The Garden shall be maintained based on the Plan and the Guiding Principles in Attachment A. The Foundation shall conduct its services, including any Foundation plant propagation, in a manner that ensures public access consistent with the Conservation Easement and the Master Site Plan.
- B. Plant Collections. The Foundation shall maintain, enhance and develop the plant collections and nursery displays, and where appropriate add new specimens. Computer and other records pertaining to the botanic collection, including mapping plant locations shall be maintained and updated as necessary.
- C. Irrigation. The Foundation shall perform routine maintenance and repair of the irrigation system including winterization.
- D. Equipment Maintenance. The Foundation shall perform routine maintenance and

repair of site equipment that is used by the Foundation to maintain the Garden.

- E. Buildings, Greenhouse, and Parking Lot Use and Maintenance. The Foundation shall be responsible for routine maintenance of the Building, the Parking Lot, the Structures, and the Greenhouse. The Foundation shall be responsible for any maintenance or repair of the Greenhouse and Structures. For clarity, this obligation shall not extend to the maintenance or repair of the Building, utilities on the property, or the parking lot. The Foundation may make, after getting any required permits and written approval from the PRCS Director, non-structural modifications to the Building including but not limited to painting, plumbing and electrical systems.
  - F. Maintenance of Artwork. The Foundation shall be responsible for the cleaning and required maintenance and removal of temporary art installed as part of Foundation programming.
  - G. Security Monitoring. The Foundation shall routinely patrol the Property to ensure the Garden and its collections are properly secured. As necessary, the Foundation shall promptly notify the City of undesirable, dangerous, or questionable situations or conditions on the Property that might reasonable merit review by the City, but which are not of an emergency nature. Such notice shall be addressed to the City's Park Superintendent.
  - H. Emergency Notification. The Foundation shall immediately notify 911 emergency and the City's Customer Response Team if the Foundation becomes aware of any act of vandalism, fire, or any casualty, or other condition involving imminent danger or loss of life or injury to persons or to the public property in the Garden.
- 2.2 Use of the Buildings. The Foundation shall have use and occupancy of the Building for the purpose of providing the Foundation with office space, education space, private meeting space, storage space, and other uses related to operating and fundraising for the Foundation without prior approval of the City's Parks, Recreation, and Cultural Services (PRCS) Director.
- 2.3 Gates. The Foundation shall be responsible for opening and closing the gates to the Garden each day consistent with the hours of operation established by the PRCS Director.
- 2.4 Public Outreach and Education. The Foundation shall provide staff for supervision of volunteers, docent/steward training programs, garden tours, horticultural programs, lectures and other educational programs.
- 2.5 Use of Property for Events. The Foundation may use the Property for Foundation-sponsored events and programs without prior approval of the City consistent with Attachment B and as long as the events and programs do not conflict with City sponsored activities or limit reasonable public access.

- 2.6 Plant Propagation and Fundraising. In order to further support the Parties Goals, the Foundation may use existing Garden plant stock for on-site plant propagation for exclusive fundraising by the Foundation as long as the propagation does not damage existing plant stock or interfere with Garden aesthetics or public access. The Foundation may conduct ongoing plant sales and a larger annual plant sale event on the Property and the parties shall identify areas of the Property that may be secured from public access by the Foundation for these retail sale activities.
- 2.7 Work Plan. The Foundation shall prepare on or before July 15 of each year an annual work plan for the operation and maintenance of the Garden Facilities outlining a proposed schedule of activities, planned events, anticipated volume of visitors, and budget for the upcoming year. This plan shall include budget recommendations for City expenditures to enhance the Garden and include sustainability practices. The budget may include a line item request for funding for one-time equipment expenditures necessary to fulfill the responsibilities outlined in this Agreement.

### 3. City's Rights and Responsibilities

- 3.1 Waste Pickup. The City or the City's contractor shall haul garbage, yard debris and recyclables from the designated bins at the Garden. Upon request by the Foundation, the City may assist with annual spring and fall clean-up at the Garden by hauling away extra waste and debris upon written request to and approval by the PRCS Director. The Foundation shall be allowed to haul extra non-hazardous waste and debris to the City's disposal facility at Hamlin Park without prior approval from the PRCS Director.
- 3.2 City Support for Garden Maintenance. Upon request by the Foundation, City staff and equipment may be made available as resources allow. All requests shall be submitted in writing to the Parks Director.
- 3.3 Utilities for Garden Maintenance. The Foundation shall not be responsible for the payment of electrical, water, and sewer used for Garden maintenance. The City shall pay for the reasonable cost of utilities (electricity, gas, water, sewer, and garbage) for the Building.
- 3.4 Signage. The City shall maintain signage stating the name of the Garden and the hours of operation.
- 3.5 Maintenance
- A. Garden Facilities. The City shall be responsible for non-routine maintenance and repairs to the Buildings, Parking Lot, pathways and trails, and fences. City staff may make modifications to the irrigation system and shall be responsible for major maintenance to the irrigation system. The City shall maintain plumbing, heating and electrical systems and structural components of the Building including, but not limited to, the roofs, floors, walls, chimneys, fireplaces, foundations, and all other structural components, in reasonably good repair so as to be usable for the purposes intended by this Agreement.



- B. Artwork. The City shall be responsible for the cleaning and required maintenance of City-owned permanent artwork installed on the property.
- 3.6 Public Benefit. In consideration of the public benefit received by the citizens of Shoreline due to the Foundation's work at a City public park, the City shall provide the following:
- A. Printing. The City shall provide a printing allowance for marketing materials for the Garden, as determined by the annual budget. Additional printing requests may be submitted to the Parks Director.
  - B. Grant Writing / Other Fund-Raising Assistance. The City may provide grant writing research and assistance to the Foundation, as resources are available.
  - C. Marketing. Promotion of Garden and Class Registration. The City may market Garden activities in the Recreation Guide and advertise activities in the City *Currents* publication as space is available. In addition, the City may include Garden information on the City website. No fee shall be charged to the Foundation for marketing Garden-related activities such as activities aimed at increasing Garden awareness, use, or improvement.
  - D. Use of City Facilities for Foundation Meetings and Fundraising. Subject to prior scheduling approval from the City, the Foundation may use the City Hall facilities for monthly meetings, public workshops sponsored by the Foundation, and its annual fundraising event. No fee shall be charged for rental of the City Hall facilities. Use of City facilities must comply with the City's Rental Policies.

#### 4. Payments

- 4.1 Reimbursement for Services. The City shall pay to the Foundation a quarterly payment for services provided pursuant to this agreement. A Request for Reimbursement form and supporting quarterly report shall be completed and submitted to the PRCS Director within five (5) working days of completion of the quarter for which reimbursement is sought. The City shall reimburse the Foundation within thirty (30) calendar days of receiving the Request for Reimbursement form. The quarterly reimbursement shall be no more than twenty-five percent (25%) of the annual amount approved by the City Council in the biennial budget.
- 4.2 Prevailing Wage. The Foundation shall pay its personnel the State prevailing wages for laborers. The minimum prevailing wage rate paid for each year shall be the rate in effect on January 1 of each year. The Foundation shall file annually the Intent to Pay Prevailing Wages form and an Affidavit of Wages Paid form with the Department of Labor and Industries. At the request of the City, the Foundation shall share its payroll information with the City.
- 4.3 Leasehold Excise Tax. If Washington State requires the City to collect a Leasehold Excise Tax (LHET) because the Foundation has a leasehold interest in the Property and Garden Facilities, then the Foundation shall remain liable for the LHET; it may not be paid through

the provision of Public Services or by City reimbursement. For the purpose of calculating the LHET, the Taxable Rent is \$1,756.07 per month and the LHET tax rate in effect at the time of quarterly payment

- 4.4 Submittals. The Foundation shall send Requests for Reimbursement to the: City of Shoreline, Attn: Accounts Payable, 17500 Midvale Avenue N., Shoreline, WA 98133-4906 or email at [accountspayable@shorelinewa.gov](mailto:accountspayable@shorelinewa.gov).

5. Quarterly and Annual Meetings and Reports

- 5.1 Meetings. The parties shall meet once a quarter or more often if needed for progress/status reports and to manage issues as they arise.
- 5.2 Annual Report. An annual report shall be completed by the Foundation for presentation to the Parks, Recreation and Cultural Services Board and/or the City Council during the second quarter of the following year. This report shall include all revenues and expenditures for the year, annual Garden attendance figures, a listing of all classes and activities, and a listing of any Garden improvements.

6. Insurance and Indemnification

- 6.1 Property Insurance. The City shall provide property insurance covering the Property, including the Building, Greenhouse, and other accessory structures.
- 6.2 Liability Insurance. The Foundation shall obtain Commercial General Liability insurance covering premises, operations, independent contractor's liability and damages for personal injury and property damage with combined single limits not less than \$1,000,000. The City shall be named as an additional insured on this policy. The policy is to contain, or be endorsed to contain, provisions that (1) Foundation's insurance coverage shall be primary insurance with insurance or insurance pool coverage maintained by the City as excess of the Foundation's insurance; and (2) Foundation's insurance coverage shall not be cancelled except after thirty (30) days prior written notice to the City.
- 6.3 Indemnification.
- 6.3.1. The City shall defend, indemnify, and hold the Foundation, its directors, officers, officials, employees and volunteers harmless from any and all claims, injuries, damages, losses or suits including attorney fees resulting from the negligent, gross negligent and/or intentional acts, errors or omissions of the City, its agents or employees arising out of or in connection with the performance of this Agreement.
- 6.3.2. The Foundation shall defend, indemnify, and hold the City, its officers, officials, employees and volunteers harmless from any and all claims, injuries, damages, losses or suits including attorney fees resulting from the negligent, gross negligent and/or intentional acts, errors or omissions of the Foundation, its agents or employees arising out of or in connection with the performance of this Agreement.

6.3.3. It is further specifically and expressly understood that the indemnification provided herein constitutes the City and Foundation's waiver of immunity under Industrial Insurance, Title 51 RCW, solely for the purpose of this indemnification. This waiver has been mutually negotiated by the parties. The provisions of this section shall survive the expiration or termination of this Agreement.

## 7. Term and Termination

- 7.1 Term. The term of this Agreement shall be five (5) years starting on the Effective Date, unless earlier terminated as provided herein ("Term"). This Agreement may be extended in five (5) year increments by mutual agreement of the Parties with said agreement effectuated by a written amendment to this Agreement.
- 7.2 Termination for Cause. Either Party may terminate this Agreement for cause in the event that the other Party fails to fulfill its material obligations under this Agreement and the Dispute Resolution Process set forth in this section has failed to reach resolution. The Party wishing to terminate this Agreement for cause shall provide the other Party with written notice of its intent to terminate and shall give the other Party an opportunity to correct the failure to perform or breach within thirty (30) calendar days of the notice. If the failure or breach is not corrected or cured within the time period provided, then the non-breaching Party is free to file suit, seek any available legal remedy, or agree to alternative dispute resolution methods such as mediation. A Party may decline to participate in alternative dispute resolution for any reason or no reason. At all times prior to resolution of the dispute, the Parties shall continue to perform any undisputed obligations in the same manner and under the same terms as existed prior to the dispute.
- 7.3 Termination Without Cause. Either Party may terminate this Agreement without cause with not less than one hundred eighty (180) days written notice to the other party.
- 7.4 In the event this Agreement is terminated without cause by the City, the Foundation shall be entitled to a prorated payment of the quarterly allowance and reimbursable expenses incurred to the effective date of termination, less all payments previously made. This provision shall not prevent either party from seeking any legal remedies it may have for the violation or nonperformance of any of the provisions of this Agreement and any such charges due the City shall be deducted from the final payment due the Foundation. No payment shall be made by the City for any expenses incurred or work done following the effective date of termination unless authorized in advance in writing by the City.
- 7.5 Dissolution of Foundation. If the Foundation dissolves, liquidates otherwise ceases to operate as an organization or is otherwise unavailable to perform the scope of services, the City may, at its option, after written notice cancel this Agreement.
- 7.6 Documents. In the event of termination, all finished or unfinished documents, data, studies, worksheets, models and reports, or other material prepared by the Foundation pursuant to this Agreement shall be submitted to the City.

8. Force Majeure

Neither Party shall be liable to the other or deemed in breach or default for any failure or delay in performance under this Agreement during the time and to the extent its performance is prevented by reasons of Force Majeure. For the purposes of this Agreement, Force Majeure means an occurrence that is beyond the reasonable control of and without fault or negligence of the party claiming force majeure and which, by exercise of due diligence of such party, could not have been prevented or overcome. Force Majeure shall include natural disasters, including fire, flood, earthquake, windstorm, avalanche, mudslide, and other similar events; acts of war or civil unrest when an emergency has been declared by appropriate governmental officials; acts of civil or military authority; freight embargoes; epidemics; quarantine restrictions; labor strikes; boycotts; terrorist acts; riots; insurrections; explosions; and nuclear accidents. A Party claiming suspension or termination of its obligations due to force majeure shall give the other party prompt written notice, but no more than two (2) working days after the event, of the impediment and its effect on the ability to perform; failure to provide such notice shall preclude recovery under this provision.

9. Ownership of Documents

- 9.1 Ownership. All documents, data, drawings, specifications, software applications and other products or materials produced by the Foundation in connection with the services rendered under this Agreement shall be the property of the City whether the project for which they are made is executed or not. All such documents, products and materials shall be forwarded to the City at its request and may be used by the City as it sees fit. The City agrees that if the documents, products and materials prepared by the Foundation are used for purposes other than those intended by the Agreement, the City does so at its sole risk and agrees to hold the Foundation harmless for such use. All or portions of materials, products and documents produced under this Agreement may be used by the Foundation upon confirmation from the City that they are subject to disclosure under the Public Records Act.
- 9.2 Public Records. The Foundation acknowledges that the City is a public agency subject to Washington's Public Records Act, chapter 42.56 RCW, and that all documents produced by the Foundation in connection with the services rendered under this Agreement may be deemed a public record as defined in the Public Records Act and that if the City receives a public records request, unless a statute exempts disclosure, the City must disclose the record to the requestor.
- 9.3 Confidentiality. The Foundation shall preserve the confidentiality of all City documents and data that the City identifies in writing as confidential at the time of disclosure and is accessed for use in Foundation's work product.

10. Independent Contractor Relationship

- 10.1 The Foundation is retained by the City only for the purposes and to the extent set forth in this Agreement. The nature of the relationship between the Foundation and the City during the period of this Agreement shall be that of an independent contractor, not employee. The Foundation, not the City, shall have the power to control and direct the details, manner or means of services. Specifically, but not by means of limitation, the Foundation shall have no obligation to work any particular hours or particular schedule and shall retain the right to designate the means of performing the services covered by

this Agreement, and the Foundation shall be entitled to employ other workers at such compensation and on such other conditions as it may deem proper, provided, however, that any contract so made by the Foundation is to be paid by it alone, and that in employing such workers, it is acting individually and not as an agent for the City.

- 10.2 The City shall not be responsible for withholding or otherwise deducting federal income tax or Social Security or contributing to the State Industrial Insurance Program, or otherwise assuming the duties of an employer with respect to Foundation or any employee of the Foundation.

## 11. Notice

Unless otherwise directed in writing, all notices and reports shall be delivered to the Parties at the following addresses:

Foundation at: Kruckeberg Botanic Garden Foundation  
P.O. Box 60035  
Shoreline, WA 98160-0035  
or  
20312 15<sup>th</sup> Ave. NW  
Shoreline, WA 98177

City at:  
  
Shoreline PRCS Director  
17500 Midvale Ave. N  
Shoreline, WA 98133-4905

## 12. Miscellaneous Provisions

- 12.1 Entire Agreement. This Agreement contains the entire agreement between the Parties hereto and no other agreements, oral or otherwise, regarding the subject matter of this agreement, shall be deemed to exist or bind any of the parties hereto.
- 12.2 Effective Date. The Effective Date of this Agreement shall be when fully executed by both Parties.
- 12.3 Modification. This Agreement may be modified only by written agreement of the Parties.
- 12.4 Assignment. Parties may not assign their interests or duties under this Agreement without the prior written consent of the other Party.
- 12.5 Third Party Rights. Under no circumstances shall this Agreement create any third-party rights.
- 12.6 Authority. Any undersigned representative of a Party to this Agreement certifies that they are fully authorized to enter into the terms and conditions of this Agreement and to legally execute, and bind such party to, this Agreement.

- 12.7 Captions. The captions of this Agreement are for convenience and ease of reference only, and in no way define, limit, or describe the scope or intent of this Agreement.
- 12.8 Governing Law. This Agreement and the rights of the Parties shall be governed by and construed in accordance with the laws of the State of Washington.
- 12.9 Venue. Venue for any action to enforce this Agreement shall be King County Superior Court.
- 12.10 Nondiscrimination. In hiring or employment made possible or resulting from this Agreement, there shall be no unlawful discrimination against any employee or applicant for employment because of sex, age, (except minimum age and retirement provisions), race, color, creed, national origin, marital status, sexual orientation, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical handicap or the use of a trained dog guide or service animal by a person with a disability, unless based upon a bona fide occupational qualification. This requirement shall apply to but not be limited to the following: employment, advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. No person shall be denied or subjected to discrimination in receipt or the benefit of any services or activities made possible by or resulting from this Agreement on the grounds of sex, race, color, creed, national origin, age (except minimum age and retirement provisions), marital status, sexual orientation, honorably discharged veteran or military status, or in the presence of any sensory, mental or physical handicap, or the use of a trained dog guide or service animal by a person with a disability.
- 12.11 Severability. In case any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision of this Agreement, and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained in this Agreement.
- 12.12 Parties Bound. The terms and conditions of this Agreement, and any assignment thereof, shall be binding upon, and inure to the benefit of, the Parties and their respective personal representatives, heirs, successors, and assigns.
- 12.13 Authority to Execute. Each person executing this Agreement on behalf of a Party represents and warrants that he or she is fully authorized to execute and deliver this Agreement on behalf of the Party for which he or she is signing. The Parties hereby warrant to each other that each has full power and authority to enter into this Agreement and to undertake the actions contemplated herein and that this Agreement is enforceable in accordance with its terms.

IN WITNESS HEREOF, the Parties have executed this Agreement as of the dates provided  
below

KRUCKEBERG BOTANIC FGARDEN FOUNDATION

CITY OF SHORELINE

\_\_\_\_\_  
Katie Schielke, President

\_\_\_\_\_  
Debbie Tarry, City Manager

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

Approved as to form:

\_\_\_\_\_  
Margaret King, City Attorney

**ATTACHMENT A**

Guiding Principles for the Kruckeberg Botanic Garden

Arthur R. Kruckeberg

The founding principle of the Kruckeberg Botanic Garden was that plant diversity is one of the wonders of the natural world and that there is both scientific and educational value to presenting that diversity in a natural setting. The setting of the Garden is that of a remnant Puget Sound lowland ecosystem, with a matrix of native conifers and understory vegetation among which plants from this and other biomes are grown that complement the beauty and diversity of the native flora. Throughout the development of the Garden, plants, whether native or exotic, have been selected for their beauty and uniqueness, thus providing the added amenity of horticultural value for the plants in the collection.

In order to preserve this vision for the future of the Kruckeberg Botanic Garden, the following principles can serve as a guide to the future management of the Garden.

- The native flora of the Pacific Northwest (PNW) should always be a primary theme in the Garden and should be defined by the broad climatic zone that is shared by a contiguous region ranging from Northern California to parts of the northern Rockies west to Montana and north to British Columbia.
- The Garden should maintain a preference (though this need not be exclusive) for plants in naturally occurring form, including natural hybrids and varieties, over garden hybrids and cultivars. However, the overriding principle of diversity and the goal of having plants that complement naturally occurring forms permits the judicious selection of garden varieties.
- For plants not native to the PNW, plants from similar climatic zones and plants taxonomically related to our native flora should have preference. Due to the climatic similarity and biogeographic connection, East Asian plants are a strong preference. Secondarily, other cool temperate Mediterranean climates (e.g., Chile), will provide valuable components to the Garden.
- Represented in the Garden are several taxonomic groups and one specialized ecological habitat that are of particular interest to the founders and of particular value due to the diversity of these collections. These include the oaks (*Quercus* spp.), conifers (especially the diversity of unusual conifer families and genera), and the serpentine garden, which represents the founder's primary contributions to science. Other taxonomic groups that would fit well with the principles on which the Garden has been developed and might merit augmenting include maples (*Acer* spp.), witch hazels (*Hamamelidaceae*), and the hydrangea family (*Hydrangeaceae*). In addition, continued expansion of native woodland herbaceous perennials would be desirable and would permit increased biodiversity in a space-limited setting.



**ATTACHMENT A**

- While the woodland garden is a prominent theme in the Garden, the 'meadows' provide an important habitat to display sun-loving plants and special collections in rockeries, including the serpentine collection. An effort should be made to prevent over-planting the meadows with trees, in order to maintain the high light environment necessary for these collections and to preserve the vision of expansiveness of the open meadow.
- The Garden should continue to serve as a reserve for germplasm of rare and unusual plants from the PNW and elsewhere. The Garden should participate in native plant seed collection and support collaborations that bring appropriate new plants into the Garden from foreign locations. Propagation of the Garden's diversity by the MsK Nursery shall be perpetuated.
- The Garden should continue to be managed as the primary source material for the MsK Nursery. Where feasible, existing plants should be perpetuated from Garden collections.
- The Garden should take care to avoid the use of showy displays of cultivated plants for aesthetic purposes only.

**ATTACHMENT B**

The Foundation is required to seek City approval for the following types of events:

1. Events with 50 individuals or more.
2. Events with sound amplification devices.
3. Events where concessions are sold.
4. Events where liquor is sold.

## KRUCKEBERG BOTANIC GARDEN SERVICE AGREEMENT

This BOTANIC GARDEN SERVICE AGREEMENT ("Agreement") is made and entered into by and between KRUCKEBERG BOTANIC GARDEN FOUNDATION, a Washington nonprofit corporation, ~~having an address of P.O. Box 60035, Shoreline, WA 98160-0035~~ ("Foundation"), and the City of Shoreline ("City"), on the date provided below. The Foundation and the City may be each individually referred to as a "Party" and collectively as the "Parties."

### 1. Recitals

- 1.1 The City is the owner of that certain real property located at 20312 15<sup>th</sup> Avenue N.W., Shoreline, King County, Washington, is more particularly described as follows ("Property"):

PARCEL 1 - S ½ OF THE NW ¼ OF THE NW ¼ OF THE NW ¼, LESS THE W 270 FEET THEREOF, SITUATED IN SEC. 1, TOWNSHIP 26 N, RANGE 3 E, W.M.

PARCEL 2 - W 270 FEET OF S ½ OF NW ¼ OF THE NW ¼ OF THE NW ¼, LESS N 176.47 FEET THEREOF, AND LESS COUNTY ROAD, SITUATED IN SEC. 1, TOWNSHIP 26 N, RANGE 3 E.W.M.

King County Tax Parcel Nos. 012603-9378 and 012603-9219

~~1.2 The Property is subject to that certain perpetual conservation easement, granted by Arthur R. Kruckeberg to the E.B. Dunn Historic Garden Trust ("Dunn Garden Trust") on October 14, 2003 and recorded on October 17, 2003 at King County AF # 20031017000833, which, among other things, restricts the uses and activities on the Property ("Conservation Easement").~~

1.2 The Property is subject to a perpetual conservation easement originally held by the E.B. Dunn Historic Garden Trust and recorded with King County under Recording No. 20031017000833, which, among other things restricts the uses and activities on the Property ("Conservation Easement"). In 2016, the E.B. Dunn Historic Garden Trust assigned and conveyed all its rights, obligations, and interests in the Conservation Easement to the Kruckeberg Botanic Garden Foundation and recorded this act with King County under Recording No. 20161209000591.

~~1.2 The Property is subject to a perpetual conservation easement, granted by Arthur R. Kruckeberg to the E.B. Dunn Historic Garden Trust on October 14, 2003 and recorded on October 17, 2003 at King County AF# 20031017000833, which, among other things restricts the uses and activities on the Property ("Conservation Easement"). This easement was re-assigned by the E.B. Dunn Historic Garden Trust, a Washington State nonprofit, having a mailing address at PO Box 77126, Seattle, WA 98177 to the Kruckeberg Botanic Garden Foundation, a Washington State nonprofit, having a mailing address at PO Box 60035,~~

- 1.3 The Property contains a unique, natural, Northwest garden created by Arthur R. Kruckeberg and Mareen Kruckeberg. By preserving and enhancing the native plant collection and introducing rare plant species, this unique collection of plants has been sustained in an undeveloped natural area ("Garden").
- 1.4 The Foundation's goal is to ensure the Kruckeberg Botanic Garden is dedicated to fostering and providing educational, cultural and aesthetic enrichment to the community and all who visit.
- 1.5 The Foundation is a publicly supported, tax-exempt nonprofit organization, qualified under Sections 501(c)(3) and 170(h) of the Internal Revenue Code of 1986, as amended ("Code"), and the regulations promulgated thereunder, and also qualified as a nonprofit nature conservancy corporation under RCW 64.04.130 and 84.34.250. Foundation is included in the "Cumulative List of Organizations described in Section 170(c) of the Internal Revenue Code" published by the Internal Revenue Service.
- 1.6 The Parties have common goals of ensuring the perpetual maintenance of the Garden, protecting the Property from uses contrary to preservation of its botanic collections and providing to the general public passive aesthetic, cultural and educational opportunities relating to the Garden (hereafter "Goals").
- 1.7 The Foundation was formed specifically for the purpose of advancing the Goals. The terms and conditions of this Agreement are intended by the Parties to ensure fulfillment of the Goals and the Foundation is willing to maintain and operate the Garden for the City in exchange for certain benefits and payments.
- 1.8 In addition to the Garden, the Property contains: ~~residences which include~~ a single-family home ~~and (the "Home Building") and adjacent living quarters~~ an accessory dwelling unit (the "Buildings") (the "Cottage"), collectively referred to as the "Buildings"; a greenhouse currently used for propagation and maintained by the Foundation (the "Greenhouse"); sheds for tool and equipment storage, ~~and~~ benches for display of plants and nursery work, elevated boardwalks and a pergola ("the Structures"); Public Art and a Parking Lot. All the above are collectively referred to herein as the "Garden Facilities."

Now, THEREFORE, in consideration of the mutual covenants, conditions, and promises contained in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged, and in order to maintain the Property, the Garden Facilities in their current condition or better, and to ensure the public receives access to the benefits and aesthetic values inherent in botanic gardens, the Parties agree as follows:

## 2. Foundation's ~~Performance~~ Rights and Responsibilities

### 2.1 General Maintenance ~~Standards~~ Responsibilities.

- A. Garden. The Foundation agrees to operate, maintain and improve the Garden so as to maintain and enhance a regionally significant botanic garden and collection of species native to lowland forests of the Puget Sound Basin, as well as non--native species compatible with the region, based on the botanic diversity, woodland setting, and naturalistic design of the Garden existing on the effective date of the City's Master Site Plan("Plan") that was approved on September 13, 2010. The Garden shall be maintained based on the Plan and the Guiding Principles in Attachment A. The Foundation shall conduct its services, including any Foundation plant propagation, in a manner that ensures public access consistent with the Conservation Easement and the Master Site Plan.
- B. Plant Collections. The Foundation shall maintain, enhance and develop the plant collections and nursery displays, and where appropriate add new specimens. Computer and other records pertaining to the botanic collection, including mapping plant locations shall be maintained and updated as necessary.
- C. Irrigation. The Foundation shall perform routine maintenance and repair of the irrigation system including winterization.
- D. Equipment Maintenance. The Foundation shall perform routine maintenance and repair of site equipment that is used by the Foundation to maintain the Garden.
- E. Buildings, Greenhouse, and Parking Lot Use and Maintenance. The Foundation shall be responsible for routine maintenance of the the spaces used by the Foundation within the Buildings (the basement office, bathroom, and storage areas within the Home), the Parking Lot, the Structures, and the Greenhouse. The Foundation shall be responsible for any maintenance or repair of the Greenhouse and Structures. For clarity, this obligation shall not extend to the maintenance or repair of the Building, utilities on the property, or the parking lot. ~~The Foundation shall notify City representative of any major repair issues on the Property of which the Foundation becomes aware.~~ The Foundation may make, after getting any required permits and written approval from the PRCS Director, non-structural modifications to the Building including but not limited to painting, plumbing and electrical systems.
- F. Maintenance of Artwork. The Foundation shall be responsible for the cleaning and required maintenance and removal of temporary art installed as part of Foundation programming.
- G. Security Monitoring. The Foundation shall routinely patrol the Property to ensure the Garden and its collections are properly secured. As necessary, the Foundation shall promptly notify the City of undesirable, dangerous, or questionable situations or conditions on the Property that might reasonable merit review by the City, but which are not of an emergency nature. Such notice shall be addressed to the City's Park Superintendent.
- H. Emergency Notification. The Foundation shall immediately notify 911 emergency and the City's Customer Response Team if the Foundation becomes aware of any act of vandalism, fire, or any casualty, or other condition involving imminent danger or

loss of life or injury to persons or to the public property in the Garden.

~~The Foundation shall notify City representative of any major repair issues on the Property of which the Foundation becomes aware.~~

2.2 Use of the Buildings. The Foundation shall have use and occupancy of the Building for the purpose of providing the Foundation with office space, education space, private meeting space, storage space, and other uses related to operating and fundraising for the Foundation without prior approval of the City's Parks, Recreation, and Cultural Services (PRCS) Director.

2.3 Gates. The Foundation shall be responsible for opening and closing the gates to the Garden each day consistent with the hours of operation established by the PRCS Director.

2.2.4 Public Outreach and Education. The Foundation shall provide staff for supervision of volunteers, docent/steward training programs, garden tours, horticultural programs, lectures and other educational programs.

2.5 Use of Property for Fundraising Events. The Foundation may use the Property for Foundation- sponsored events and programs without prior approval of the City consistent with Attachment B and as long as the events and programs do not conflict with City sponsored activities or limit reasonable public access.

2.3.2.6 Plant Propagation and Fundraising. In order to further support the Parties Goals, the Foundation may use existing Garden plant stock for on-site plant propagation for exclusive fundraising by the Foundation as long as the propagation does not damage existing plant stock or interfere with Garden aesthetics or public access. The Foundation may conduct ongoing plant sales and a larger annual plant sale event on the Property and the parties shall identify areas of the Property that may be secured from public access by the Foundation for these retail sale activities.

2.4.2.7 Work Plan. The Foundation shall prepare on or before July 15 of each year an annual work plan for the operation and maintenance of the Garden Facilities outlining a proposed schedule of activities, planned events, anticipated volume of visitors, and budget for the upcoming year. This plan shall include budget recommendations for City expenditures to enhance the Garden and include sustainability practices. The budget may include a line item request for funding for one-time equipment expenditures necessary to fulfill the responsibilities outlined in this Agreement.

### 3. City's Performance Rights and Responsibilities

3.1 Waste Pickup. The City or the City's contractor shall haul garbage, yard debris and recyclables from the designated bins at the Garden. Upon request by the Foundation, the City may assist with annual spring and fall clean-up at the Garden by hauling away extra waste and debris upon written request to and approval by the PRCS Director. The Foundation shall be allowed to haul extra non-hazardous waste and debris to the City's disposal facility at Hamlin Park without prior approval from the PRCS Director.

3.2 City Support for Garden Maintenance. Upon request by the Foundation, City staff and equipment may be made available as resources allow. All requests shall be submitted in writing to the Parks Director.

3.3 Utilities for Garden Maintenance. The Foundation shall not be responsible for the payment of electrical, water, and sewer used for Garden maintenance. The City shall pay for the reasonable cost of utilities (electricity, gas, water, sewer, and garbage) for the Building.

3.3.4 Signage. The City shall maintain signage stating the name of the Garden and the hours of operation.

### 3.5 Maintenance

- A. Garden Facilities. The City shall be responsible for non-routine maintenance and repairs to the Buildings, Parking Lot, pathways and trails, and fences. City staff may make modifications to the irrigation system and shall be responsible for major maintenance to the irrigation system. The City shall maintain plumbing, heating and electrical systems and structural components of the Building including, but not limited to, the roofs, floors, walls, chimneys, fireplaces, foundations, and all other structural components, in reasonably good repair so as to be usable for the purposes intended by this Agreement. ~~City staff shall be responsible for spring irrigation system activation and fall winterization of irrigation and well equipment.~~
- B. Artwork. The City shall be responsible for the cleaning and required maintenance of City-owned permanent artwork installed on the property ~~unless by an amendment to this Agreement.~~

3.6 Public Benefit. In consideration of the public benefit received by the citizens of Shoreline due to the Foundation's work at a City public park, the City shall provide the following:

- ~~C.A.~~ Printing. The City shall provide a printing allowance for marketing materials for the Garden, as determined by the annual budget. Additional printing requests may be submitted to the Parks Director.
- ~~D.B.~~ Grant Writing / Other Fund-Raising Assistance. The City may provide grant writing research and assistance to the Foundation, as resources are available.
- ~~E.C.~~ Marketing. Promotion of Garden and Class Registration. The City may market Garden activities in the Recreation Guide and advertise activities in the City *Currents* publication as space is available. In addition, the City may include Garden information on the City website. ~~The City cable Channel 21 may be available for Garden information and City sponsored events and programs.~~ No fee shall be charged to the Foundation for marketing Garden-related activities such as activities aimed at increasing Garden awareness, use, or improvement. ~~No fee shall be charged to the Foundation for processing registration for activities and classes published in the Recreation Guide or for online registration for Foundation classes and events.~~

F.D. Use of City Facilities for Foundation Meetings and Fundraising. Subject to prior scheduling approval from the City, the Foundation may use the City Hall facilities for monthly meetings, public workshops sponsored by the Foundation, and its annual fundraising event. No fee shall be charged for rental of the City Hall facilities. Use of City facilities must comply with the City's Rental Policies.

#### 4. Payments

4.1 ~~Quarterly Allowance~~Reimbursement for Services. The City shall pay to the Foundation a quarterly ~~allowance payment~~ for services ~~for Garden maintenance and enhancement provided pursuant to this agreement~~. A Request for Reimbursement form and supporting quarterly report shall be completed and submitted to the PRCS Director within five (5) working days of completion of the quarter for which reimbursement is sought. The City shall reimburse the Foundation within ~~21~~thirty (30) calendar days of receiving the Request for Reimbursement form. The quarterly reimbursement shall be no more than twenty-five percent (25%) of the annual amount approved by the City Council in the biennial budget.

4.2 Prevailing Wage. The Foundation shall pay its personnel the State prevailing wages for laborers. The minimum prevailing wage rate paid for each year shall be the rate in effect on January 1 of each year. The Foundation shall file annually the Intent to Pay Prevailing Wages form and an Affidavit of Wages Paid form with the Department of Labor and Industries. At the request of the City, the Foundation shall share its payroll information with the City.

4.3 Leasehold Excise Tax. If Washington State requires the City to collect a Leasehold Excise Tax (LHET) because the Foundation has a leasehold interest in the Property and Garden Facilities, then the Foundation shall remain liable for the LHET; it may not be paid through the provision of Public Services or by City reimbursement. For the purpose of calculating the LHET, the Taxable Rent is \$1,756.07 per month and the LHET tax rate in effect at the time of quarterly payment

4.4 Submittals. The Foundation shall send Requests for Reimbursement to the: City of Shoreline, Attn: Accounts Payable, 17500 Midvale Avenue N., Shoreline, WA 98133-4906 or email at [accountspayable@shorelinewa.gov](mailto:accountspayable@shorelinewa.gov).

#### 5. ~~Implementation of Agreement~~Quarterly and Annual Meetings and Reports

5.1 Meetings. The parties shall meet once a quarter or more often if needed for progress/status reports and to manage issues as they arise.

5.2 Annual Report. An annual report shall be completed by the Foundation for presentation to the Parks, Recreation and Cultural Services Board and/or the City Council during the second quarter of the following year. This report shall include all revenues and expenditures for the year, annual Garden attendance figures, a listing of all classes and activities, and a listing of any Garden improvements.



## 6. Insurance and Indemnification

- 6.1 Property Insurance. The City shall provide property insurance covering the Property, including the Building, Greenhouse, and other accessory structurespremises.
- 6.2 Liability Insurance. The Foundation shall obtain Commercial General Liability insurance covering premises, operations, independent contractor's liability and damages for personal injury and property damage with combined single limits not less than \$1,000,000. The City shall be named as an additional insured on this policy. The policy is to contain, or be endorsed to contain, provisions that (1) Foundation's insurance coverage shall be primary insurance with insurance or insurance pool coverage maintained by the City as excess of the Foundation's insurance; and (2) Foundation's insurance coverage shall not be cancelled except after thirty (30) days prior written notice to the City.
- 6.3 Indemnification.
- 6.3.1. The City shall defend, indemnify, and hold the Foundation, its directors, officers, officials, employees and volunteers harmless from any and all claims, injuries, damages, losses or suits including attorney fees resulting from the negligent, gross negligent and/or intentional acts, errors or omissions of the City, its agents or employees arising out of or in connection with the performance of this Agreement.
- 6.3.2. The Foundation shall defend, indemnify, and hold the City, its officers, officials, employees and volunteers harmless from any and all claims, injuries, damages, losses or suits including attorney fees resulting from the negligent, gross negligent and/or intentional acts, errors or omissions of the Foundation, its agents or employees arising out of or in connection with the performance of this Agreement.
- 6.3.3. It is further specifically and expressly understood that the indemnification provided herein constitutes the City and Foundation's waiver of immunity under Industrial Insurance, Title 51 RCW, solely for the purpose of this indemnification. This waiver has been mutually negotiated by the parties. The provisions of this section shall survive the expiration or termination of this Agreement.

## 7. Term and Termination

- ~~7.1~~ Term. The term of this Agreement shall be five (5) years starting on the Effective Date, ~~with five 5-year options to extend by mutual agreement,~~ unless earlier terminated as provided herein ("Term"). This Agreement may be extended in five (5) year increments by mutual agreement of the Parties with said agreement effectuated by a written amendment to this Agreement.
- ~~7.2~~
- ~~7.3~~ Termination. ~~The Parties may terminate this Agreement with cause only after compliance with the dispute resolution process under Sections 8.1 and 8.2. In the event of such termination, all finished or unfinished documents, data, studies, worksheets,~~

~~models and reports, or other material prepared by the Foundation pursuant to this Agreement shall be submitted to the City.~~

#### 7.47.1

### Remedies

7.2 Termination for Cause. Either Party may terminate this Agreement for cause in the event that the other Party fails to fulfill its material obligations under this Agreement and the Dispute Resolution Process set forth in this section has failed to reach resolution. The Party wishing to terminate this Agreement for cause shall provide the other Party with written notice of its intent to terminate and shall give the other Party an opportunity to correct the failure to perform or breach within thirty (30) calendar days of the notice. If the failure or breach is not corrected or cured within the time period provided, then the non-breaching Party is free to file suit, seek any available legal remedy, or agree to alternative dispute resolution methods such as mediation. A Party may decline to participate in alternative dispute resolution for any reason or no reason. At all times prior to resolution of the dispute, the Parties shall continue to perform any undisputed obligations in the same manner and under the same terms as existed prior to the dispute.

~~7.5 Notice and Opportunity to Cure.~~ In the event either party fails to perform as required by this Agreement, written notice of the default shall be given, and the defaulting party shall have thirty (30) days from the date of receipt of the notice to cure the default or longer if circumstances warrant.

~~7.6 Dispute Resolution.~~ If the default is not cured after notice within the timeframe specified in Section 8.1, the parties shall enter into non-binding mediation with a mutually agreeable third party as the mediator. If such mediation is not successful, then the parties shall proceed to binding arbitration.

7.77.3 Termination Without Cause. ~~The Foundation~~ Either Party may ~~reserves the right to~~ terminate this Agreement without cause with not less than one hundred eighty (180) days written notice to the other party. ~~, or in the event the City fails to pay the Foundation's outstanding invoices within 30 days following notice of default.~~

7.87.4 In the event this Agreement is terminated without cause by the City, the Foundation shall be entitled to a prorated payment of the quarterly allowance and reimbursable expenses incurred to the effective date of termination, less all payments previously made. This provision shall not prevent either party from seeking any legal remedies it may have for the violation or nonperformance of any of the provisions of this Agreement and any such charges due the City shall be deducted from the final payment due the Foundation. No payment shall be made by the City for any expenses incurred or work done following the effective date of termination unless authorized in advance in writing by the City.

7.5 Dissolution of Foundation. If the Foundation dissolves, liquidates otherwise ceases to operate as an organization or is otherwise unavailable to perform the scope of services, the City may, at its option, after written notice cancel this Agreement.

7.6 Documents. In the event of termination, all finished or unfinished documents, data, studies, worksheets, models and reports, or other material prepared by the Foundation pursuant to this Agreement shall be submitted to the City.

## 8. Force Majeure

Neither Party shall be liable to the other or deemed in breach or default for any failure or delay in performance under this Agreement during the time and to the extent its performance is prevented by reasons of Force Majeure. For the purposes of this Agreement, Force Majeure means an occurrence that is beyond the reasonable control of and without fault or negligence of the party claiming force majeure and which, by exercise of due diligence of such party, could not have been prevented or overcome. Force Majeure shall include natural disasters, including fire, flood, earthquake, windstorm, avalanche, mudslide, and other similar events; acts of war or civil unrest when an emergency has been declared by appropriate governmental officials; acts of civil or military authority; freight embargoes; epidemics; quarantine restrictions; labor strikes; boycotts; terrorist acts; riots; insurrections; explosions; and nuclear accidents. A Party claiming suspension or termination of its obligations due to force majeure shall give the other party prompt written notice, but no more than two (2) working days after the event, of the impediment and its effect on the ability to perform; failure to provide such notice shall preclude recovery under this provision.

## 8.9. Ownership of Documents

8.19.1 Ownership. All documents, data, drawings, specifications, software applications and other products or materials produced by the Foundation in connection with the services rendered under this Agreement shall be the property of the City whether the project for which they are made is executed or not. All such documents, products and materials shall be forwarded to the City at its request and may be used by the City as it sees fit. The City agrees that if the documents, products and materials prepared by the Foundation are used for purposes other than those intended by the Agreement, the City does so at its sole risk and agrees to hold the Foundation harmless for such use. All or portions of materials, products and documents produced under this Agreement may be used by the Foundation upon confirmation from the City that they are subject to disclosure under the Public Records Act.

8.29.2 Public Records. The Foundation acknowledges that the City is a public agency subject to Washington's Public Records Act, chapter 42.56 RCW, and that all documents produced by the Foundation in connection with the services rendered under this Agreement may be deemed a public record as defined in the Public Records Act and that if the City receives a public records request, unless a statute exempts disclosure, the City must disclose the record to the requestor.

## 8.39.3

8.49.4 Confidentiality. The Foundation shall preserve the confidentiality of all City documents and data that the City identifies in writing as confidential at the time of disclosure and is accessed for use in Foundation's work product.

## 10. Independent Contractor Relationship

10.1 The Foundation is retained by the City only for the purposes and to the extent set forth in this Agreement. The nature of the relationship between the Foundation and the City during the period of this Agreement shall be that of an independent contractor, not employee. The Foundation, not the City, shall have the power to control and direct the

details, manner or means of services. Specifically, but not by means of limitation, the Foundation shall have no obligation to work any particular hours or particular schedule and shall retain the right to designate the means of performing the services covered by this Agreement, and the Foundation shall be entitled to employ other workers at such compensation and on such other conditions as it may deem proper, provided, however, that any contract so made by the Foundation is to be paid by it alone, and that in employing such workers, it is acting individually and not as an agent for the City.

- 10.2 The City shall not be responsible for withholding or otherwise deducting federal income tax or Social Security or contributing to the State Industrial Insurance Program, or otherwise assuming the duties of an employer with respect to Foundation or any employee of the Foundation.

## 11. Notice

Unless otherwise directed in writing, all notices and reports shall be delivered to the Parties at the following addresses:

Foundation at: Kruckeberg Botanic Garden Foundation  
P.O. Box 60035  
Shoreline, WA 98160-0035  
or  
20312 15<sup>th</sup> Ave. NW  
Shoreline, WA 98177

City at: Shoreline PRCS Director  
17500 Midvale Ave. N  
Shoreline, WA 98133-4905

## 12. Miscellaneous Provisions

- 12.1 Entire Agreement. This Agreement contains the entire agreement between the Parties hereto and no other agreements, oral or otherwise, regarding the subject matter of this agreement, shall be deemed to exist or bind any of the parties hereto.
- 12.2 Effective Date. The Effective Date of this Agreement shall be when fully executed by both Parties.
- 12.3 Modification. This Agreement may be modified only by written agreement of the Parties.
- 12.4 Assignment. Parties may not assign their interests or duties under this Agreement without the prior written consent of the other Party.
- 12.5 Third Party Rights. Under no circumstances shall this Agreement create any third party rights.
- 12.6 Authority. Any undersigned representative of a Party to this Agreement certifies that they are fully authorized to enter into the terms and conditions of this Agreement and to

legally execute, and bind such party to, this Agreement.

- 12.7 Captions. The captions of this Agreement are for convenience and ease of reference only, and in no way define, limit, or describe the scope or intent of this Agreement.
- 12.8 Governing Law. This Agreement and the rights of the Parties shall be governed by and construed in accordance with the laws of the State of Washington.
- 12.9 Venue. Venue for any action to enforce this Agreement shall be King County Superior Court, Washington.
- 12.10 Nondiscrimination. In hiring or employment made possible or resulting from this Agreement, there shall be no unlawful discrimination against any employee or applicant for employment because of sex, age, (except minimum age and retirement provisions), race, color, creed, national origin, marital status, sexual orientation, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical handicap or the use of a trained dog guide or service animal by a person with a disability, unless based upon a bona fide occupational qualification. This requirement shall apply to but not be limited to the following: employment, advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. No person shall be denied or subjected to discrimination in receipt or the benefit of any services or activities made possible by or resulting from this Agreement on the grounds of sex, race, color, creed, national origin, age (except minimum age and retirement provisions), marital status, sexual orientation, honorably discharged veteran or military status, or in the presence of any sensory, mental or physical handicap, or the use of a trained dog guide or service animal by a person with a disability.
- 12.11 Severability. In case any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision of this Agreement, and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained in this Agreement.
- 12.12 Parties Bound. The terms and conditions of this Agreement, and any assignment shall thereof, shall be binding upon, and inure to the benefit of, the Parties and their respective personal representatives, heirs, successors, and assigns.
- 12.1212.13 Authority to Execute. Each person executing this Agreement on behalf of a Party represents and warrants that he or she is fully authorized to execute and deliver this Agreement on behalf of the Party for which he or she is signing. The Parties hereby warrant to each other that each has full power and authority to enter into this Agreement and to undertake the actions contemplated herein and that this Agreement is enforceable in accordance with its terms

IN WITNESS HEREOF, the Parties have executed this Agreement as of the dates provided below

KRUCKEBERG BOTANIC FGARDEN FOUNDATION

CITY OF SHORELINE

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Katie Schielke, President

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Debbie Tarry, City Manager

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Date

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Date

Approved as to form:

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Margaret King, City Attorney