



**BOARD OF SUPERVISORS AGENDA ITEM REPORT
CONTRACTS / AWARDS / GRANTS**

Award Contract Grant

Requested Board Meeting Date: 8/1/2017

* = Mandatory, information must be provided

or Procurement Director Award

***Contractor/Vendor Name/Grantor (DBA):**

Friends of Tucson's Birthplace, Inc. (FOTB) an Arizona 501(c)(3) non-profit corporation

***Project Title/Description:**

Development, Operation and Maintenance of Mission Garden

***Purpose:**

FOTB will develop, operate and maintain the Mission Garden as a County public park and historic cultural and educational garden pursuant to the approved 2016 Master Plan. The agreement is for five (5) years. There are two 5 year options, which are at the sole discretion of the Board of Supervisors.

***Procurement Method:**

Renewal of Agreement. County is authorized, pursuant to A.R.S. § 11-933, to enter into agreements for the operation of County public parks, as defined in A.R.S. § 11-931.

***Program Goals/Predicted Outcomes:**

Continued development, operation, and maintenance of the Mission Garden as a County public park for the ongoing educational and public benefit of residents and visitors and to preserve the archaeological and cultural significance of the site. Mission Garden is a re-creation of the Spanish Colonial walled garden that was part of Tucson's historic San Agustin Mission. Located on its original site west of downtown Tucson at the corner of Mission Road and Mission Lane, the Garden features heirloom Sonoran Desert-adapted fruit orchards and vegetable gardens interpreting 4,000 years of agriculture in Tucson.

***Public Benefit:**

FOTB will operate and maintain the Premises as a public park for educational, historical, and cultural purposes and programs for the benefit of the general public. Following the initial planting of the Spanish Colonial Heritage Fruit Tree Orchard, in February and March 2012, Mission Garden is expanding to interpret the timeline of our remarkable agricultural story – starting with the Early Agricultural period and continuing with Hohokam, Pre-contact and Post-contact O'odham, Spanish, Mexican, Territorial and Chinese, Yaqui, Anglo and Afro American farming. The Garden is a unique living agricultural museum that provides a singular outdoor learning experience for all who enter – students, residents, and tourists from around the world. The Garden is open to the public and offers special tours and education programs to area schools, as well as hosting a number of garden festivals to the public throughout the year.

***Metrics Available to Measure Performance:**

County will reimburse FOTB for operating costs in an amount not to exceed \$50,000.00 per year.

***Retroactive:**

NO

TO: COB 7-20-17 (1)
Vers.: 1
Pgs.: 28
ADDENDUM

JUL 20 17 PM 02:03 PC CLK OF BD

Contract / Award Information

Document Type: CT Department Code: PW Contract Number (i.e.,15-123): 18*019

Effective Date: 8/1/2017 Termination Date: 7/31/2022 Prior Contract Number (Synergen/CMS): _____

Expense Amount: \$* \$50,000 Revenue Amount: \$ _____

***Funding Source(s) required:**

Funding from General Fund? Yes No If Yes \$ \$50,000 % 100

Contract is fully or partially funded with Federal Funds? Yes No

***Is the Contract to a vendor or subrecipient? Vendor**

Were insurance or indemnity clauses modified? Yes No

If Yes, attach Risk's approval

Vendor is using a Social Security Number? Yes No

If Yes, attach the required form per Administrative Procedure 22-73.

Amendment / Revised Award Information

Document Type: _____ Department Code: _____ Contract Number (i.e.,15-123): _____

Amendment No.: _____ AMS Version No.: _____

Effective Date: _____ New Termination Date: _____

Prior Contract No. (Synergen/CMS): _____

Expense or Revenue Increase Decrease Amount This Amendment: \$ _____

Is there revenue included? Yes No If Yes \$ _____

***Funding Source(s) required:**

Funding from General Fund? Yes No If Yes \$ _____ % _____

Grant/Amendment Information (for grants acceptance and awards) Award Amendment

Document Type: _____ Department Code: _____ Grant Number (i.e.,15-123): _____

Effective Date: _____ Termination Date: _____ Amendment Number: _____

Match Amount: \$ _____ Revenue Amount: \$ _____

***All Funding Source(s) required:**

*Match funding from General Fund? Yes No If Yes \$ _____ % _____

*Match funding from other sources? Yes No If Yes \$ _____ % _____

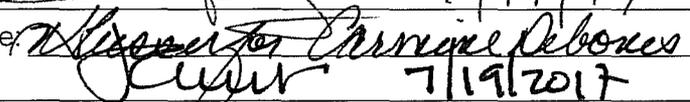
*Funding Source: _____

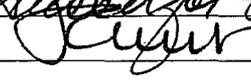
***If Federal funds are received, is funding coming directly from the Federal government or passed through other organization(s)?** _____

Contact: Neil J. Konigsberg

Department: Real Property Services Telephone: 724-6582

Department Director Signature/Date:  7/17/17

Deputy County Administrator Signature/Date:  7/19/17

County Administrator Signature/Date:  7/19/2017

(Required for Board Agenda/Addendum Items)

PROJECT: *Development, Operation & Maintenance of Mission Garden*

PARTIES: *Friends of Tucson Birthplace, Pima County*

TERM: *Five (5) Years*

REVENUE CONTRACT

AMOUNT: *Not to Exceed \$50,000 Annually*

CONTRACT

NO. CT-PW-18-019

AMENDMENT NO. _____

This number must appear on all invoices, correspondence and documents pertaining to this contract.

**AGREEMENT FOR
DEVELOPMENT, OPERATION AND MAINTENANCE
OF MISSION GARDEN**

1. **Parties; Effective Date.** This Agreement for Development, Operation and Maintenance ("**Agreement**") is entered into between PIMA COUNTY, a body politic and corporate of the State of Arizona (hereinafter "**County**"), and FRIENDS OF TUCSON BIRTHPLACE, INC., an Arizona non-profit corporation (hereinafter "**Operator**"). This Agreement is effective on the date it is signed by both County and Operator (the "**Effective Date**"). County and Operator are hereinafter individually a "**Party**" and collectively referred to as the "**Parties**."

2. **Background and Purpose**

2.1. In accordance with the intent of the May 20, 1997 special election, County purchased the land commonly known as Mission Garden (Parcel 116-23-090A), to preserve and protect its cultural significance and archaeological features as provided in Question No.4 titled *Sonoran Desert Open Space and Historic Preservation*, Bond Project CH-28, and in 2016, the Rio Nuevo District Board donated an adjacent area (Parcel 116-23-89D), the legal description and depiction of which are attached hereto as Exhibit **A** and **A-1** (the "**Premises**").

2.2. County is authorized, pursuant to A.R.S. § 11-933, to enter into agreements for the operation of County public parks, as defined in A.R.S. § 11-931.

2.3. Operator is a 501(c)(3) nonprofit corporation organized under the laws of the State of Arizona engaged in the education of the general public and historic and cultural preservation. Operator desires to develop and operate the Premises (the "**Project**"), and County desires that Operator develop, operate, and maintain the Premises in accordance with the terms and conditions of this Agreement.

2.4. The original concept for development of the Premises was a part of the plans prepared for the City of Tucson's Rio Nuevo efforts for the Tucson Origins Heritage Park Mission Garden Master Plan and construction documents dated March 27, 2008 (the "**Master Plan**") by Burns-Wald-Hopkins, Inc.

- 2.5. On December 6, 2011, the City of Tucson, Operator and County entered into a five-year Agreement for Development, Operation and Maintenance of the Premises for the purpose of developing the Premises into an historic cultural garden pursuant to plans approved by the City and County.
- 2.6. On February 7, 2013, the City of Tucson Mayor and Council and the Rio Nuevo District Board entered into a "Settlement Agreement," and in Section 7c of the Settlement Agreement, the Rio Nuevo Multipurpose Facilities District agreed to provide funding not to exceed \$1,100,000 for the completion of the Mission Garden project.
- 2.7. On April 7, 2015, the City of Tucson Mayor and Council adopted Resolution No. 22381 approving a separate Agreement among the Rio Nuevo Multipurpose Facilities District, the City of Tucson, and Friends of Tucson's Birthplace to expend the District funding of \$1,100,000 for the development and maintenance of the Premises in accordance with a revised Master Plan.
- 2.8. On April 19, 2016, County, the City of Tucson and Operator approved Amendment No.1 to the 2011 Agreement to: 1) modify the 2008 adopted Mission Garden Master Plan; 2) establish a fixed 40' wide easement for El Paso (Kinder Morgan) gas pipeline; and 3) approve the construction of the improvements funded by the Rio Nuevo District that began in August 2016.
- 2.9. The Parties desire to enter into a new Agreement for the purpose of the continued development, operation, and maintenance of the Premises as a County public park for the ongoing educational and public benefit of residents and visitors in greater Pima County and to preserve the archaeological and cultural significance of the site, in accordance with the terms and conditions of this Agreement.

3. Use of Premises.

- 3.1. Pursuant to A.R.S. § 11-933, County hereby enters into this Agreement with Operator to develop, operate, and maintain the Premises.
- 3.2. Operator will develop the Premises into a historic cultural garden pursuant to the approved 2016 Master Plan (**Exhibit B**). Operator may develop the Premises in phases. Operator may install improvements to the Premises, including plants and landscaping, and other improvements (all improvements to the Premises are hereinafter referred to as the "**Improvements**") in accordance with the terms of this Agreement. Phase I development of the Premises (including the Spanish Colonial orchard and other gardens and ramadas) was largely completed over the initial five (5) year period covered by the 2011 Agreement.
- 3.3. Operator will operate and maintain the Premises as a public park for educational, historical, and cultural purposes for the benefit of the general public.

- 3.4. Operator will use the Premises only for the purposes set forth in this Agreement. In the event Operator desires to use the Premises for any other purpose, Operator must enter into a separate written agreement with County.
- 3.5. Operator has access to the Premises seven (7) days a week, twenty-four (24) hours a day. Operator has vehicular access on the Premises when necessary for development or maintenance of the Premises.
- 3.6. This Agreement is not a lease. Operator does not have exclusive occupancy or control of the Premises.
- 3.7. During the term of this Agreement, County and Operator will use the name "**Mission Garden**" when referring to the Premises. Upon termination of this Agreement, the name Mission Garden becomes the property of County, and Operator will take any actions necessary to transfer ownership of the name to County.

4. Term.

- 4.1. Initial Term. The initial term of this Agreement (the "**Initial Term**") begins on the Effective Date, and ends on the date that is five (5) years after the Effective Date (the "**Termination Date**").
- 4.2. Option Period. The Parties may renew this Agreement for two additional periods of five (5) years each (the "**First Option Period**" and the "**Second Option Period**") as follows:
 - 4.2.1. Operator will submit to County written notice that Operator desires to extend the term for the First Option Period or Second Option Period, as applicable. Operator will submit the notice *no sooner than* one year prior to the (i) Termination Date to exercise the First Option Period, or (ii) the end of the first Option Period to exercise the Second Option Period; and *no later than* one hundred twenty (120) days prior to (i) the Termination Date to exercise the First Option Period, or (ii) the end of the first Option Period to exercise the Second Option Period, in order to allow County sufficient time to process a contract extension and allow continued operation of the Premises;
 - 4.2.2. The County Administrator will submit Operator's request to extend the term for the applicable Option Period to the County Board of Supervisors. The County Board of Supervisors will determine, in its sole discretion, whether such renewal is in the best interests of County.
- 4.3. Right to Terminate. If in the judgment of County or Operator, a Party does not perform in accordance with the conditions of this Agreement, or is otherwise in material default of any provision of this Agreement, the Party claiming non-performance or default will give written notice to the other Party specifying the

nature of non-performance or default. A dissolution, bankruptcy, business stoppage, or transfer of a majority interest by or of Operator is a default. If the non-performance or default is not corrected within thirty (30) days after receipt of such written notice, or if the non-performing or defaulting party fails to diligently pursue remedies for corrections, which require more than thirty (30) days to complete, the Party claiming non-performance or default may terminate this Agreement. In the event of the termination of this Agreement by County, Operator's right to operate the Premises immediately ceases and Operator will immediately vacate the Premises.

4.4. County Right to Cure. In the event of the failure by Operator to comply in a proper and timely manner with any of its obligations as set forth in this Agreement, and Operator's failure to timely cure such failure as provided in Section 4.3 above (including notice and an opportunity to cure), County is hereby authorized to perform the same on behalf of Operator, and County will reduce the funding allocation to Operator in the amount required to cover for all of County's reasonable and actual expenses in so performing Operator's obligations.

5. **Consideration.** Operator and County agree that Operator's compliance with the terms and conditions of this Agreement, including the development, maintenance and operation of the Premises, constitutes adequate consideration for this Agreement and no fees will be due from Operator to County.

6. **Improvements to Premises.**

6.1. Archaeological sensitivity. County obtained the Premises to protect its archaeological and cultural significance and integrity. Therefore, Operator will retain an archaeological services consultant to ensure avoidance of any unnecessary disturbance of archaeological features by siting all improvements in areas already subjected to archaeological mitigation (data recovery/excavation) and considered "cleared" for construction. The consultant will archaeologically monitor all construction to ensure any archaeological features discovered during construction are appropriately recorded and any human remains and funerary objects are appropriately treated and repatriated to tribal or other groups claiming affinity to the remains.

6.2. Improvements. Pursuant to the revised 2016 Master Plan, Improvements to the Premises will consist of construction, operation, and maintenance of the Administration and Kitchen buildings and restrooms, the recreated "casita," pathways, attendant utilities, and the addition of new plantings as shown on construction documents dated June 24, 2016 (the "**2016 Master Plan**") by Burns-Wald-Hopkins, Inc. These Improvements will include, but are not limited to, the following:

- 6.2.1. Operator will install and maintain drip irrigation timer(s) and associated tubing/emitters connected to the main water line, and will maintain the electrical connection to the irrigation;
- 6.2.2. Operator will connect one additional water meter and pay the water bills for the term of the Agreement. County may reimburse Operator's actual costs for water in accordance with Section 8.3 below;
- 6.2.3. Operator will install one new sewer connection and pay connection and sewer service costs for the term of the Agreement. County may reimburse Operator's actual costs for sewer service in accordance with Section 8.3 below;
- 6.2.4. Operator will install electrical service and pay connection and electrical service costs for the term of the Agreement. County may reimburse Operator's actual costs for electricity in accordance with Section 8.3 below;
- 6.2.5. Operator will construct, operate and maintain the Administration and Kitchen buildings, the "Casita," and restrooms, and construct pathways, the "acequia" corridor and assembly areas and ramadas in order to service the Improvements;
- 6.2.6. Operator will maintain public access to the Premises, which will comply with the Americans with Disabilities Act;
- 6.2.7. Operator will continue to install and plant additional tree and garden areas as agreed to by County and Operator.
- 6.2.8. Operator shall employ an archaeological consultant and pay the costs to monitor and record any cultural features encountered during construction, tree planting and trenching in all areas whether considered archaeologically cleared or not. County may reimburse Operator's actual costs archaeological services in accordance with Section 8.3 below;
- 6.3. Right to Construct. Operator may make Improvements to the Premises in accordance with the terms of this Section 6.
- 6.4. Consent of County Required.
 - 6.4.1. Operator may make Improvements to the Premises which were approved as part of the 2016 Master Plan.
 - 6.4.2. Other than Improvements which were approved as part of the revised 2016 Master Plan, Operator may not make any other Improvements to the Premises without obtaining the prior written consent of:

- 6.4.2.1. County Director of Sustainability and Conservation if the cost of the Improvements is less than or equal to \$15,000.00;
- 6.4.2.2. County Administrator or his designee if the cost of the Improvements is greater than \$15,000.00 and less than or equal to \$100,000.00; or
- 6.4.2.3. County Board of Supervisors if the cost of the Improvements is more than \$100,000.00.
- 6.4.3. Operator will provide County with written notice of any proposed new area of development or improvements (the "**Notice of Improvements**") at least 90 days prior to the desired start of such work to allow adequate review of the proposed improvements. The Notice of Improvements must include written narratives or line drawings for the proposal. County will not unduly delay its decision to accept the proposed Improvements.
- 6.4.4. County will not unreasonably withhold consent to proposed Improvements; provided, however, it is reasonable for County to withhold consent if, among other reasons, the Improvements:
 - 6.4.4.1. violate any of the terms and conditions of this Agreement;
 - 6.4.4.2. adversely affect the archaeological site integrity and cultural significance of the Premises;
 - 6.4.4.3. adversely affect any structural, mechanical, or electrical system of any portion of the Premises or affect the integrity of the Premises or its infrastructure;
 - 6.4.4.4. result in County being required to perform any work that County could otherwise avoid or defer;
 - 6.4.4.5. result in any soil disturbance within twenty (20) feet on either side of the El Paso (Kinder Morgan) Natural Gas pipeline; or
 - 6.4.4.6. result in an increase in the premiums for any hazard or liability insurance carried by County or result in an increased risk of liability or pose a safety hazard.
- 6.5. County Liability for Approval of Improvements. County's review of the plans and specifications are solely for County's purposes and do not imply that County has reviewed the plans and specifications for quality, design, laws, compliance or other like matters. Accordingly, notwithstanding that any construction drawings are reviewed by County architects, engineers, or consultants, County has no liability whatsoever in connection therewith and is not responsible for any

omissions or errors contained in any construction drawings, and Operator's indemnity set forth in the Indemnification Clause of this Agreement specifically applies to the construction drawings. County's review is to determine that the proposed Improvements are consistent with the purposes of this Agreement.

- 6.6. Construction of Improvements. All Improvements must comply with the applicable Building Code, as demonstrated through plans and permits submitted for County approval. All construction contracts must include an indemnification provision requiring the contractors to indemnify, defend and hold harmless County and Operator from all losses, claims, suits, demands, expenses, attorney's fees or actions of any kind or nature arising from the negligent or intentional acts, errors or omissions of the contractor or its agents, employees, or anyone acting under its direction or control. Operator will cause said contractors to obtain insurance coverage of a type and amount acceptable to County and to name County as additional insureds with respect to liability arising out of the performance of said contracts. Within thirty (30) days after completion of any Improvements, Operator shall deliver to County a complete and reproducible set of the plans and specifications of the Improvement as built.
- 6.7. Indemnification by Operator. Operator will indemnify and defend County, its agents, employees, contractors and officers, against and hold them harmless from and against any and all claims, liabilities, losses, damage, costs and expenses (including, without limitation, reasonable attorney's fees) asserted against or suffered by them resulting from damage to Premises or injury to or the death of any person on the Premises arising out of Operator's negligence, willful misconduct or strict liability for activities of Operator, except to the degree caused by the willful or negligent act or omission or strict liability of County, or any employee or agent of County.
- 6.8. Property of County. All Improvements become the property of County at the time they are placed thereon, and must be free and clear of all liens and encumbrances of every kind, and in good and operable condition.

7. Rights and Responsibilities of Operator.

- 7.1. Marketing. Operator will produce informational material for the public explaining the development plan for the Premises.
- 7.2. Fundraising. Operator will use its best efforts to raise additional funds to develop, operate and maintain the Premises for the initial Term and any renewal Term of this Agreement.
- 7.3. Operating Plan and Budget. Within 12 months after the Effective Date, Operator will complete a five-year Plan to complete the development and continue the operation, maintenance and programming of the Premises. The Plan shall include a cost estimate of funding needed to complete the Improvements and an

Annual Operating Budget to continue the operation, maintenance and programming of the Premises.

- 7.4. Educational Program Activities. Operator may conduct botanical, environmental, cultural, historical, and other educational activities at the Premises including but not limited to demonstrations, tours of the Premises, lectures, hands on learning, gardening, harvesting, food preparation, school visits with docent tours, and schools using the Premises for observation or research.
- 7.5. Permitted Events. Operator may conduct the following events on the Premises provided that all such events are open to the public: Garden/Park Tours; Plant/Art Shows; Fund-raisers, including but not limited to Plant Sales (all net profits to be used for Mission Garden improvements and gardening costs designated by Operator); Workdays for Park/Gardens maintenance and improvements; Greenhouse activities (planting, care, propagation, etc.); Community Outreach Open Houses; Forums and Meetings. Any event that qualifies as a Special Event (as defined below) must satisfy the requirements for Special Events.
- 7.6. Special Events. For purposes of this Agreement, a "**Special Event**" is an event, which is beyond the normal scope of the operation of the Premises, such as the Membrillo and Pomegranate festivals, and other events designed to attract larger numbers of people; or which may increase risk of injuries to persons at the Premises. Special Events do not include routine meetings and functions. Should Operator desire to conduct a Special Event, Operator will give County a thirty (30) day advance written request, with a description of the Special Event. Except as may be required for the purposes of approval of traffic and parking planning with the City of Tucson, the parties agree that the following Special Events, having become part of the traditional operation of the Garden and as such add to the cultural purpose for which the Garden was created, can be covered and approved under an annual programmatic permit: the San Isidro Festival, Membrillo and Pomegranate festivals, Tucson's Birthday Celebration, and the Agave Festival. Operator will give County thirty (30) day advance notice of each of the dates of the Special Events covered under the annual programmatic permit.
- 7.7. Prohibited Uses. Operator will not install, plant or use noxious, poisonous, or invasive plants or trees at the Premises.
- 7.8. Compliance with Laws. Operator will not use the Premises, or permit anything to be done in, on, or about the Premises, which will in any way conflict with any federal, state, or local law, statute, ordinance or governmental rule or regulation now in force or which may hereafter be enacted or promulgated.
- 7.9 Volunteers. All volunteers working at the Premises under the direction of Operator will execute a release of liability in a form acceptable to County prior

to doing any work at the Premises. Operator will deliver a copy of each release to County at the addresses in section 17.

- 7.10 Fees. Admission to the Premises must be free to all members of the public, except as otherwise approved by County for Special Events or at such time the Premises reach a state of development such that, with County's approval, admission fees are deemed appropriate.
- 7.11 Food sales. Food sales on the Premises are subject to obtaining applicable food permits and compliance with Pima County health regulations.
- 7.12 Maintenance of Premises. Except as otherwise provided in this Agreement, Operator is responsible for maintenance of the Premises, including but not limited to all Improvements. Operator will:
- 7.12.1 Remove trash and clean up after any use of the Premises by Operator, or Operator's agents, contractors, employees or volunteers;
 - 7.12.2 Care of the trees and other plantings;
 - 7.12.3 Purchase the necessary equipment to operate and care for the Premises; and
 - 7.12.4 Recruit and train a minimum of fifty (50) volunteers for garden maintenance and neighborhood watch.
- 7.13 Trash Removal/ Recycling Services. Operator will pay the costs of all trash removal and recycling services. County may reimburse Operator's actual costs for trash removal and recycling services in accordance with Section 8.3 below. County has no liability to Operator if any utilities or services, whether or not furnished by County, are interrupted or terminated because of failures, necessary repairs, installation or improvements, or any other cause beyond County's reasonable control, nor will any such termination relieve Operator of any of its obligations under this Agreement.
- 7.14 Signs. Operator may affix and maintain upon the Premises such signs as Operator deems appropriate; provided, however, such signs must first receive the written approval of County as to type, size, color, location, copy nature and display qualities. All signs will, at all times, comply with the City Sign Code and will be installed and maintained at Operator's sole cost. Operator will pay all costs for construction, erection, installation, maintenance, and repair of any sign either currently in existence or to be erected, installed, or otherwise placed on the Premises. Operator will acknowledge the contribution of County in providing the Premises to Operator in Operator's annual reports and appropriate publications.

7.15 Sustainability Plan. Operator will haul away all materials or prepare and implement an integrated waste management plan to re-use, recycle, and/or compost any consumable materials utilized in the performance of this Agreement, and will submit the plan for County review at least annually.

8. Rights and Responsibilities of County.

8.1. Access. County has the right to access and inspect the Premises any time.

8.2. Title to Premises. This Agreement grants to Operator the right to perform all acts as specified herein but does not convey to Operator any fee title interest in the Premises. On termination of this Agreement, Operator's right to enter the Premises for the purposes stated herein shall cease and title to the Premises shall remain vested in County.

8.3. Operating Costs. Subject to section 17.15 of this Agreement dealing with non-appropriation of funds, County will reimburse Operator for actual costs paid by Operator for utilities (water, sewer, electricity), trash removal, archaeological services, security system, phone, public access to internet, signs, plantings and soil amendments in an aggregate sum not to exceed \$50,000 annually for costs incurred in the County fiscal year beginning July 1. Commencing August, 2017 (for the period July 1 – July 31, 2017), Operator will submit, no more than once per month, actual invoices to County and proof of payment by Operator for reimbursement. Invoices shall be submitted to Sustainability & Conservation (520-724-6490) unless otherwise notified by County.. County has no responsibility for any cost reimbursement requests from Operator that exceed the amount of funding approved annually by the Board of Supervisors for the operation and maintenance of the Premises.

8.4. No Maintenance. County has no responsibility for the operation, maintenance, or care of the Premises or any Improvements thereon.

8.5. Marketing and Funding. County will actively participate with Operator in identifying additional funding sources for the Initial Term of this Agreement, and will actively promote and routinely publish information related to Mission Garden.

8.6. Ownership of Records. All existing and future records, data, research, findings, materials, images, discoveries, and synthesized or unsynthesized products or byproducts originating from or relating to the Premises (collectively the "**Records and Products**") are property of County, provided that County will use the net proceeds of any sales from any such Records and Products exclusively for the benefit of Mission Garden.

9. Environmental Compliance.

9.1. Hazardous Material. As used herein, the term "**Hazardous Material**" means any hazardous or toxic substance, material or waste, which is or becomes

regulated by any local governmental authority, the State of Arizona or the United States Government. The term "Hazardous Material" includes, without limitation, any material or substance that is (i) petroleum or petroleum products; or (ii) defined as a Hazardous Material under A.R.S. § 26-301(8).

- 9.2. Hazardous Materials Prohibited; Clean Air Act. Operator will not cause or grant permission for any Hazardous Material to be brought upon, kept, or used in or about the Premises by Operator or its agents, employees, contractors or invitees, without the prior written consent of County, other than such reasonable quantities of Hazardous Materials which are necessary or useful to Operator's business and will be used, kept and stored in a manner that complies with all laws regulating any such Hazardous Materials. Operator's operations on the Premises will comply with all applicable federal, state, and local environmental laws and regulations including applicable provisions of the Clean Air Act, 42 U.S.C. 7401 *et seq.* and Arizona Revised Statutes, Title 49, Chapter 3.
- 9.3. Indemnity. If Operator breaches the obligations stated in the preceding Section and such breach results in contamination of the Premises soil or ground water with Hazardous Materials then, except to the extent caused by County, its agents, employees, or contractors, Operator will indemnify, protect, defend and hold County harmless from any and all claims, judgments, damages, penalties, fines, costs, expenses, liabilities or losses (including, without limitation, diminution in value of the Premises or any part thereof, damages for the loss or restriction on use of usable space or of any amenity of the Premises or any part thereof, damages arising from any adverse impact on marketing of space with respect to the Premises or any part thereof, and sums paid in settlement of claims, attorneys' fees, consultant fees and expert fees) which arose or arises during or after the term of this Agreement as a result of such contamination. The foregoing obligation of Operator to indemnify, protect, defend and hold County harmless includes, without limitation, costs incurred in connection with any investigation of site conditions or any cleanup, remediation, removal, restoration or other response work required by any federal, state, or local governmental agency or political subdivision because of Hazardous Material present, as a result of a breach of this Section 9.3 by Operator.
- 9.4. Clean-Up. Without limiting the foregoing, if the presence of any Hazardous Material on or in the Premises, or the soil or ground water under or adjacent to the Premises caused or permitted by Operator, or its agents, employees, contractors or invitees, results in any suspected contamination of the Premises, the soil or ground water under or adjacent to the Premises, Operator will promptly notify County in writing and take all actions at its sole expense as are necessary to return the Premises, or such soil or ground water, to the condition existing prior to the introduction of any such Hazardous Material to the Premises, or to such soil or ground water; provided that County's approval of such actions will first be obtained, which approval shall not be unreasonably withheld so long as such actions would not potentially have any material adverse long-term

or short-term effect on the Premises. In effecting such a cleanup, Operator will comply with all federal, state, and local laws and regulations. Operator will provide County with copies of all reports, investigative data, and correspondence associated with the clean-up activities. County will be adequately informed of and have the option of attending all meetings with regulatory agencies.

9.5. Pre-Existing Contamination; Contamination by County. County agrees that Operator will not be liable for any contamination of the Premises that occurs prior to use of the Premises by Operator, or any contamination of the Premises that originates outside the Premises during the Term of this Agreement that is not caused by activities of Operator, except to the extent that such contamination is aggravated by any action of Operator. County will take all actions at its sole expense as are necessary to return the Premises to the condition existing prior to the introduction of Hazardous Materials to the Premises in the event of any Hazardous Materials contamination to the Premises caused by County, its agents or employees, during the Term of this Agreement.

9.6. Notices Regarding Environmental Conditions. Each Party will, within ten (10) business days following receipt thereof, provide the other party with a copy of (i) any notice from any local, state or federal governmental authority of any violation or administrative or judicial order or complaint having been filed or about to be filed in connection with the Premises alleging any violation of any local, state or federal environmental law or regulation or requiring any Party to take any action with respect to any release on or in the Premises or the soil or ground water under or adjacent to the Premises of Hazardous Material, or (ii) any notices from a federal, state or local governmental agency or private party alleging that either County or Operator may be liable or responsible for cleanup, remedial, removal, restoration or other response costs in connection with Hazardous Material on or in the Premises or the soil or ground water under or adjacent to the Premises or any damages caused by such release.

9.7. Survival. The Parties' obligations under this Section 9 survive the expiration or earlier termination of this Agreement and vacation of the Premises.

10. **Protection of Cultural Resources.**

10.1. Operator will comply with applicable federal, state and local laws, regulations, policies, rules, standards, procedures, and guidelines governing the protection of cultural resources.

10.2. Consistent with the Arizona Antiquities Act A.R.S. § 41-841 et seq. that protects cultural resources and human burials on State, county and municipal lands and other political subdivisions of the state, the County Board of Supervisors adopted County Policy C 3.17 regarding the protection and documentation of archaeological, historical, and other cultural resources that are on land owned by County or that may be affected by County projects or

ground disturbing activities by other entities on County-owned land. It is County's policy to conserve and protect cultural resources and to mitigate any on cultural resources.

- 10.3. Operator, its volunteers, contractors, subcontractors, and the visiting public are directed to not remove archaeological or historical materials and artifacts (including fragments) from, nor disturb such materials on, the Premises. Any violation of this direction requires a written report documenting the incident. The report must include a description of the incident and an analysis of why the incident occurred, detail any disciplinary action taken, and describe measures developed to prevent such incidents from recurring in the future.
- 10.4. Operator will consider cultural resources during the earliest stages of planning for any proposed improvements, so that any potential impacts can be identified and resolved through avoidance measures as addressed in Section 6.1 or mitigation. If avoidance is not possible, Operator will coordinate with County, which will determine appropriate treatment or mitigation. County must approve all cultural resource treatment or mitigation plans under County Administrative Procedure 34-1.
- 10.5. Operator will bear all costs for the preparation of a treatment/mitigation plan that may include monitoring or data recovery, State Antiquities Permit, Burial Permit, and Curation Agreement from the Arizona State Museum, as well as the cost of implementation of the approved treatment or mitigation plan. County may reimburse Operator's actual costs pursuant to Section 8.3.
- 10.6. In the event that Operator or its contractors, subcontractors, or volunteers damage cultural resources, County will assess the value of the damages and any necessary actions to mitigate the damages. Operator is responsible for all costs related to these damages and needed mitigation measures.
11. **Insurance.** Operator will procure and maintain at its own expense insurance policies (the "Required Insurance") satisfying the below requirements (the "Insurance Requirements") until all of its obligations under this Agreement have been met. The below Insurance Requirements are minimum requirements for this Agreement and in no way limit Operator's indemnity obligations under this Agreement. County in no way warrants that the required insurance is sufficient to protect Operator for liabilities that may arise from or relate to this Agreement. If necessary, Operator may obtain commercial umbrella or excess insurance to satisfy the Insurance Requirements.
 - 11.1. Insurance Coverages and Limits:
 - 11.1.1. Commercial General Liability (CGL): Occurrence Form covering liability arising from premises, independent contractors, personal injury, bodily injury, broad form contractual liability and products-completed operations with

minimum limits not less than \$2,000,000 Each Occurrence and \$2,000,000 General Aggregate.

11.1.2. Business Automobile Liability: Coverage for any owned, leased, hired, and/or non-owned autos assigned to or used in the performance of this Agreement with minimum limits not less than \$1,000,000 Each Accident.

11.1.3. Workers' Compensation (WC) and Employers' Liability: Workers' Compensation with Employers Liability limits of \$1,000,000 each accident and \$1,000,000 each employee – disease. Workers' Compensation statutory coverage is compulsory for employers of one or more employees.

11.2. Additional Coverage Requirements:

11.2.1. Claims Made Coverage: If any part of the Required Insurance is written on a claims-made basis, any policy retroactive date must precede the effective date of this Agreement, and Operator must maintain such coverage for a period of not less than three (3) years following Agreement expiration, termination or cancellation.

11.2.2. Insurer Financial Ratings: Coverage must be placed with insurers acceptable to the County with A.M. Best rating of not less than A-VII, unless otherwise approved by the County.

11.2.3. Additional Insured: The General Liability policy must be endorsed to include Pima County and all its related special districts, elected officials, officers, agents, employees and volunteers (collectively "County and its Agents") as additional insureds with respect to liability arising out of the activities performed by or on behalf of the Operator. The full policy limits and scope of protection must apply to the County and its Agents as an additional insured, even if they exceed the Insurance Requirements.

11.2.4. Waiver of Subrogation: Commercial General Liability and Workers' Compensation coverages must each contain a waiver of subrogation in favor of County and its Agents for losses arising from work performed by or on behalf of Operator.

11.2.5. Primary Insurance: The Required Insurance policies, with respect to any claims related to this Contract, must be primary and must treat any insurance carried by County as excess and not contributory insurance. The Required Insurance policies may not obligate the County to pay any portion of Operator's deductible or Self Insurance Retention (SIR).

11.2.6. Subcontractors: Operator must either (a) include all subcontractors as additional insureds under its Required Insurance policies, or (b) require each subcontractor to separately meet all Insurance Requirements and verify that each subcontractor has done so, Operator must furnish, if requested by

County, appropriate insurance certificates for each subcontractor. Operator must obtain County's approval of any subcontractor request to modify the Insurance Requirements as to that subcontractor.

11.3. Verification of Coverage:

11.3.1. Certificates: Insurer or Broker of Operator must evidence compliance with the Insurance Requirements by furnishing certificates of insurance executed by a duly authorized representative of each insurer. Each certificate must include:

- The Pima County tracking number for this Agreement, which is shown on the first page of the Agreement, and a project description, in the body of the Certificate,
- A notation of policy deductibles or SIRs relating to the specific policy, and
- Certificates must specify that the appropriate policies are endorsed to include additional insured and subrogation waiver endorsements for the County and its Agents.

11.3.2. Timing of Coverage: Each Required Insurance policy and appropriate endorsements must be in effect not less than 15 days prior to commencement of work under this Agreement.

11.3.3. Renewal Certificate: A renewal certificate must be provided to County not less than 15 days prior to the policy's expiration date, along with actual copies of the additional-insured and waiver-of-subrogation endorsements.

11.3.4. Policies: County reserves the right to, at any time, require complete copies of any or all Required Insurance policies.

11.3.5. Cancellation Notice: Operator must notify County in advance, in writing, if a Required Insurance policy will expire, be cancelled, be suspended, or be materially changed. The notice must be provided to the County by the earlier of (a) 30 days before the change will take effect, and (b) 2 business days after Operator receives notice of the change from its insurer. For cancellation for non-payment, Insurer must provide County with written notice ten (10) days prior to cancellation of policy.

11.4. Approval and Modifications: The Pima County Risk Manager may approve a modification of the Insurance Requirements without the necessity of a formal Agreement amendment, but the approval must be in writing. Neither the County's failure to receive a required insurance certificate or endorsement, the County's failure to object to a non-complying insurance certificate or endorsement, or the County's receipt of any other information from Operator,

its insurance broker(s) and/or insurer(s), constitutes a waiver of any of the Insurance Requirements.

11.5. Property Damage Insurance. Operator shall have no obligation under this Agreement to purchase property damage insurance on any of the buildings or structures on the Premises. If any structures or buildings on the Premises are substantially destroyed by fire or other casualty at any time during the term of this Agreement, then Operator may terminate this Agreement by written notice given to County within sixty (60) days after the date of such destruction, and Operator shall have no responsibility to repair any such damage.

12. **Indemnification.** To the fullest extent permitted by law, Operator will defend, indemnify, and hold harmless Pima County and any related taxing district, and the officials and employees of each of them (collectively, "Indemnitee") from and against any and all claims, actions, liabilities, losses, and expenses (including reasonable attorney fees) (collectively, "Claims") arising out of actual or alleged injury of any person (including death) or loss or damage to tangible or intangible property caused, or alleged to be caused, in whole or in part, by any act or omission of Operator or any of Operator's directors, officers, agents, employees, volunteers, or subcontractors. This indemnity includes any claim or amount arising or recovered under the Workers' Compensation Law or arising out of the failure of Operator to conform to any federal, state or local law, statute, ordinance, rule, regulation or court decree. The Indemnitee will, in all instances, except for Claims arising solely from the acts or omissions of the Indemnitee, be indemnified by Operator from and against any and all Claims. Operator is responsible for primary loss investigation, defense and judgment costs for any Claim to which this indemnity applies. This indemnity will survive the expiration or termination of this Agreement.

13. **Budget, Accounting; Records.**

13.1 Accounting Records. In connection with the operation of the Premises, Operator will keep and maintain accounting records on a tax basis consistently applied and the same will be open for inspection and audit by duly authorized representatives of County at all reasonable times.

13.2 Operating Cost Reimbursements: Operator will maintain records by County fiscal year (beginning July 1, 2017 to June 30, 2018) of all operating cost invoices, cost reimbursements requests to County and cost reimbursements paid to Operator by County.

13.3 Audits. County may require Operator to provide a financial audit at any time, at County's expense, by providing written notice to Operator. Such notice must specify the period to be covered by the audit, the type of audit and the time for completion and submission of the audit.

14. **Liens.** Operator will pay all liens of contractors, subcontractors, mechanics, laborers or material providers, and Operator will indemnify County against all legal

If to Operator: Roger Pfeuffer, or Chair
FOTB
PO Box 1228
Tucson, AZ. 85702

Or, such other address as either party from time to time shall designate by written notice to the other party. If mailed, all such notices are considered received upon the expiration of seventy-two hours after deposit in the U.S. mail. Notice served personally or by electronic mail or facsimile are considered served upon delivery thereof to the addressee. Rejection or other refusal to accept or the inability to deliver because of changed address of which no notice was given is considered receipt of the notice, demand or request sent.

18. Miscellaneous.

- 18.1. Americans with Disabilities Act. Operator will comply will all applicable provisions of the Americans with Disabilities Act (Public Law 101-336, 42 U.S.C. 12101-12213) and all applicable federal regulations under the Act, including 28 CFR Parts 35 and 36.
- 18.2. Assignment. Operator may not assign this Agreement without the prior written consent of County, which will be at the sole discretion of County.
- 18.3. Attorney's Fees. In the event any action, suit or proceeding at law or in equity is instituted with respect to this Agreement, the prevailing party is entitled to reasonable attorneys' fees, expenses and court costs incurred.
- 18.4. Attorney's Review. The Parties acknowledge that they have had an opportunity to consult with legal counsel regarding this Agreement, and that the terms of this Agreement are not to be construed against any party because that party drafted the Agreement, or construed in favor of a party because that party failed to understand the legal effect of the provisions of this Agreement. County's attorney is signing as to form only, and represents solely the interests of County. Each party will bear the costs of its attorney incurred in connection with the negotiation and drafting of this Agreement.
- 18.5. Authority. The undersigned represent to each other that they have full power and authority to enter into this Agreement, and that all necessary actions have been taken to give full force and effect to this Agreement.
- 18.6. Binding Agreement. This Agreement is binding upon and inures to the benefit of the Parties hereto and their respective successors and assigns, as permitted hereunder.
- 18.7. Compliance with Laws; Governing Law; Venue. Operator will comply with all federal, state, and local laws, rules, regulations, standards, and Executive

Orders, including without limitation those designated within this Agreement. The laws and regulations of the State of Arizona govern the rights of the Parties, the performance of this Agreement, and any disputes hereunder. Any action relating to this Agreement must be brought and maintained in a court of the State of Arizona in Pima County. Any changes in the governing laws, rules, and regulations during the terms of this Agreement apply, but do not require an amendment.

18.8. Conflict of Interest. This Agreement is subject to cancellation within three (3) years after its execution pursuant to A.R.S. § 38-511 if any person significantly involved in initiating, negotiating, securing, drafting, or creating this Agreement on behalf of County is, at any time while this Agreement or any extension of the Agreement is in effect, an employee or agent of any other party to the Agreement with respect to the subject matter of the Agreement.

18.9. Counterparts. This Agreement may be executed in separate counterparts, each of which is an original, and all of which taken together constitute one and the same instrument.

18.10. Entire Agreement; Modification. This Agreement constitutes the entire agreement between the Parties and supersedes all agreements, representations, warranties, statements, promises, and understandings, whether oral or written, with respect to the subject matter thereof, and no party hereto is bound by or charged with any oral or written agreement, representations, warranties, statements, promises, or understandings not specifically set forth in this Agreement. The Parties may amend this Agreement only by a writing signed by all Parties.

18.11. Legal Arizona Workers Act Compliance.

18.11.1. Operator hereby warrants that it will at all times during the term of this Agreement comply with all federal immigration laws applicable to Operator's employment of its employees, and with the requirements of A.R.S. § 23-214 (A) (together the "**State and Federal Immigration Laws**"). Operator shall further ensure that each subcontractor who performs any work for Operator under this Agreement likewise complies with the State and Federal Immigration Laws.

18.11.2. County has the right at any time to inspect the books and records of Operator and any subcontractor in order to verify such party's compliance with the State and Federal Immigration Laws.

18.11.3. Any breach of Operator's or any subcontractor's warranty of compliance with the State and Federal Immigration Laws, or of any other provision of this Section, is a material breach of this

Agreement subjecting Operator to penalties up to and including suspension or termination of this Agreement. If the breach is by a subcontractor, and the subcontract is suspended or terminated as a result, Operator shall be required to take such steps as may be necessary to either self-perform the services that would have been provided under the subcontract or retain a replacement subcontractor, (subject to County approval if MWBE preferences apply) as soon as possible so as not to delay project completion.

18.11.4. Operator shall advise each subcontractor of County's rights, and the subcontractor's obligations, under this Section by including a provision in each subcontract substantially in the following form:

18.11.4.1. "Subcontractor hereby warrants that it will at all times during the term of this Agreement comply with all federal immigration laws applicable to subcontractor's employees, and with the requirements of A.R.S. § 23-214 (A). Subcontractor further agrees that County may inspect the subcontractor's books and records to insure that subcontractor is in compliance with these requirements. Any breach of this Section by subcontractor is a material breach of this Agreement subjecting subcontractor to penalties up to and including suspension or termination of this Agreement."

18.11.5. Any additional costs attributable directly or indirectly to remedial action under this Section are the responsibility of Operator. In the event that remedial action under this Section results in delay to one or more tasks on the critical path of Operator's approved construction or critical milestones schedule, such period of delay shall be deemed excusable delay for which Operator shall be entitled to an extension of time, but not costs.

18.12. No Agency Created. Nothing contained in this Agreement creates any partnership, joint venture, or agency relationship between the Parties.

18.13. No Personal Liability. No member, official or employee of Pima County will be personally liable to Operator, or any successor or assignee, (a) in the event of any default or breach by Pima County, (b) for any amount which may become due to Operator or its successor or assign, or (c) pursuant to any obligation of Pima County under the terms of this Agreement.

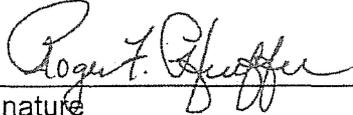
18.14. No Third-Party Beneficiaries. There are no third-party beneficiaries to this Agreement, and no person or entity not a party hereto shall have any right or cause of action hereunder.

- 18.15. Non-Appropriation of Funds. Notwithstanding any other provision in this Agreement, County may terminate this Agreement if, for any reason, the Pima County Board of Supervisors does not appropriate sufficient monies for the purpose of maintaining this Agreement. In the event of such termination, County will have no further obligations to Operator, other than for payment for services rendered prior to termination.
- 18.16. Non-Discrimination. Operator agrees to comply with all provisions and requirements of Arizona Executive Order 2009-09 which is hereby incorporated into this Agreement as if set forth in full herein including flow down of all provisions and requirements to any subcontractors. During the performance of this Agreement, Operator shall not discriminate against any employee, client or any other individual in any way because of that person's age, race, creed, color, religion, sex, disability or national origin.
- 18.17. No Waiver. The failure of either party to insist on any one or more instances upon the full and complete performance of any of the terms and conditions of this Agreement to be performed on the part of the other, or to take any action permitted as a result thereof, is not a waiver or relinquishment of the right to insist upon full and complete performance of the same, or any other covenant or condition, either in the past or in the future.
- 18.18. Severability. Each provision of this Agreement stands alone, and any provision of this Agreement found to be prohibited by law is ineffective to the extent of such prohibition without invalidating the remainder of this Agreement.

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The Parties have executed this Agreement on the dates set forth below.

OPERATOR: FRIENDS OF TUCSON BIRTHPLACE:

 _____ Signature	<u>7/12/17</u> _____ Date
Roger F. Pfeuffer _____ Print Name	Co-Chair, FOTB _____ Title

PIMA COUNTY, a body politic and corporate of the State of Arizona:

_____ Sharon Bronson, Chair, Board of Supervisors	_____ Date
--	---------------

ATTEST:

_____ Julie Castañeda, Clerk of Board	_____ Date
--	---------------

APPROVED AS TO FORM:

 _____ Tobin Rosen, Deputy County Attorney, Civil Division	<u>7/14/17</u> _____ Date
---	---------------------------------

APPROVED AS TO CONTENT:

 _____ Linda Mayro, Director, Office of Sustainability and Conservation
--

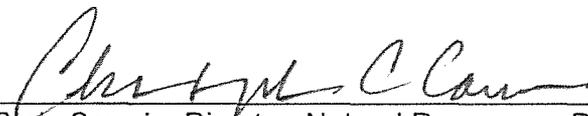
 _____ Chris Cawein, Director, Natural Resources, Parks and Recreation

Exhibit A

Mission Garden Parcel 116-23-090A

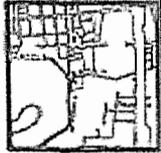
EXHIBIT A

LEGAL DESCRIPTION

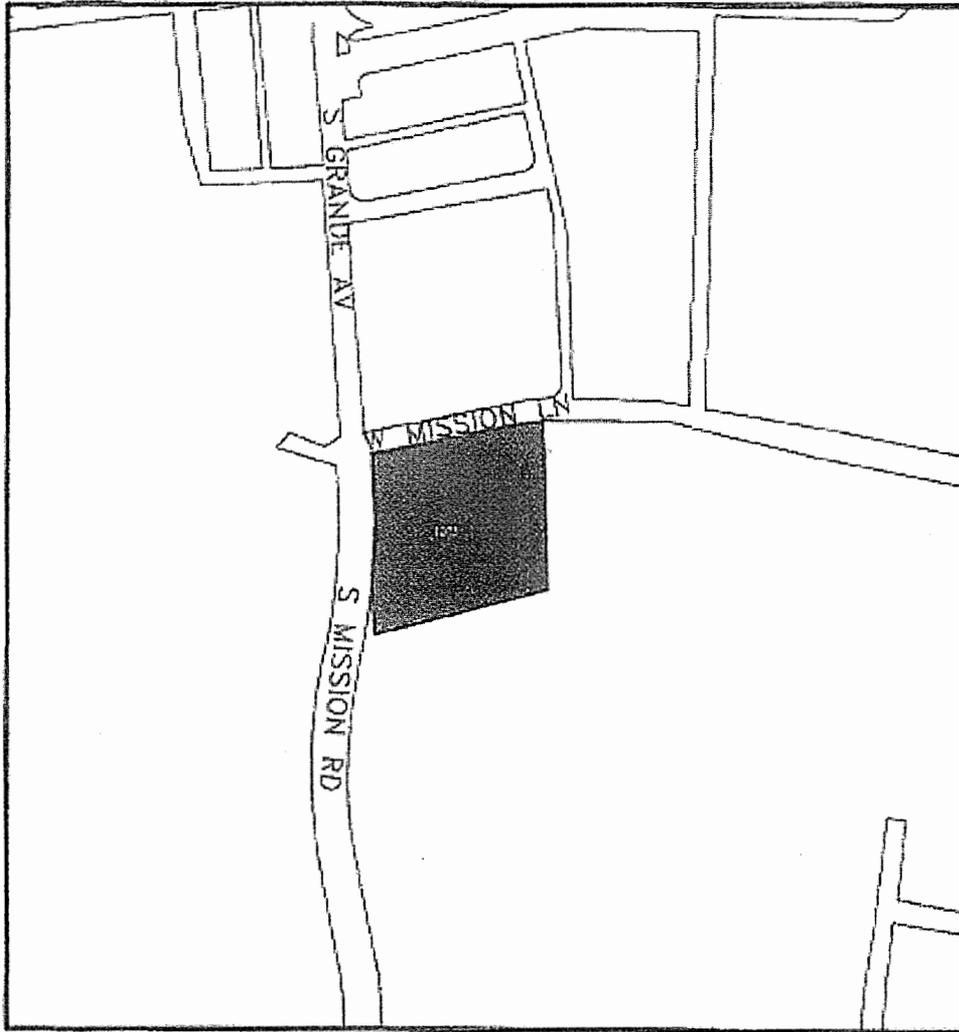
MISSION GARDENS

All of Lot 24 in Section 14, Township 14 South, Range 13 East, of the Gila and Salt River Base and Meridian, Pima County, Arizona, according to the office survey made by Theo E. White under Act of Congress, approved February 5, 1875.

IN SECTION 14, T14S, R13E



SEC 14
T14S
R13E
PIMA COUNTY, ARIZONA



116-23-090A



PIMA COUNTY DEPARTMENT OF TRANSPORTATION
ENGINEERING INFORMATION MANAGEMENT SECTION

DRAWING NOT TO SCALE

DRAWN BY: S. BUTLER

DATE: FEB 2010

Exhibit A-1

Mission Garden Parcel 116-23-080D

March 1, 2016

103010-H-001

W:\LEGALS\103010\Mission Garden Proposed additional parcel.doc



EXHIBIT "A" LEGAL DESCRIPTION

A portion of Lot 23 per the U.S. General Land Office plat of Section 14, officially filed 2-19-1876, lying within the Southeast quarter of Section 14, Township 14 South, Range 13 East, Gila and Salt River Meridian, Pima County, Arizona, further described as follows;

BEGINNING at the Northern most corner of said Lot 23, being common with the Northeast corner of Lot 24;

THENCE S 00°40'00" E (the basis of bearing for this description), along the East line of said Lot 24, a distance of 432.30 feet to the Southeast corner of said Lot 24

THENCE N 77°24'00" E, along the projected South line of said Lot 24, a distance of 59.06 feet;

THENCE leaving said projected line, N 02°48'48" W, a distance of 111.54 feet;

THENCE N 02°31'50" W, a distance of 75.83 feet;

THENCE N 09°33'38" E, a distance of 23.23 feet;

THENCE N 01°36'41" W, a distance of 24.93 feet;

THENCE N 16°32'55" W, a distance of 36.19 feet;

THENCE N 09°27'43" W, a distance of 46.79 feet;

THENCE N 00°46'05" W, a distance of 18.13 feet;

THENCE N 14°17'46" E, a distance of 17.71 feet;

THENCE N 28°12'11" E, a distance of 18.48 feet;

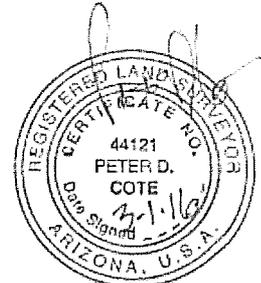
THENCE N 43°16'29" E, a distance of 66.23 feet to an angle point on the Northerly boundary of said lot 23;

THENCE N 87°46'55" W, along said Northerly line, a distance of 97.34 feet to the **POINT OF BEGINNING**.

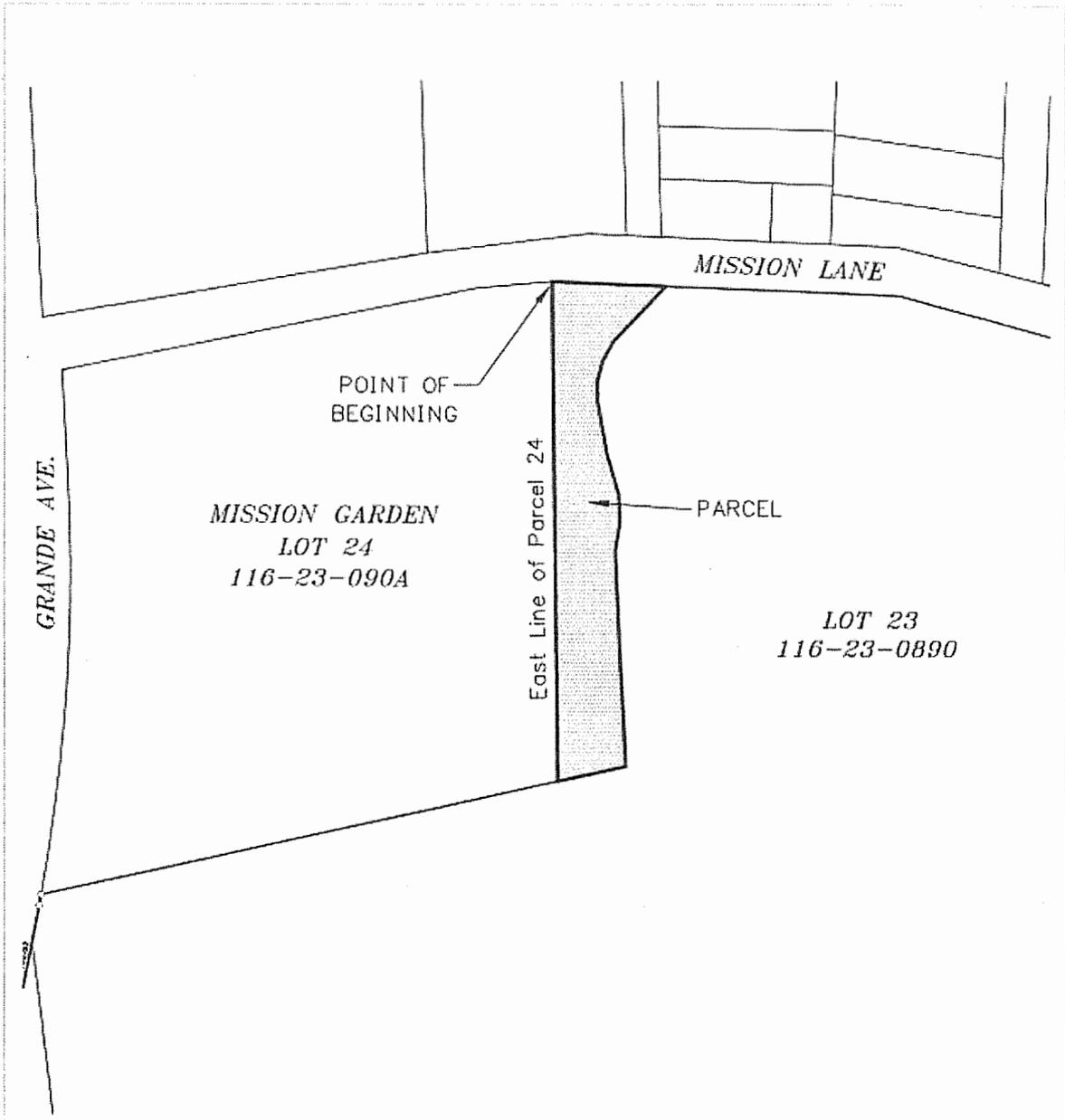
CONTAINING: 0.521 acres of land, more or less.

Prepared By:
THE WLB GROUP, INC.

Peter D. Cote, RLS 44121



EXPIRES 3-31-2018



DEPICTION OF EXHIBIT "A" TO ACCOMPANY
 DESCRIPTION OF
 A PORTION OF LOT 23
 SECTION 14, T-14-S, R-13-E, G.S.R.M.
 PIMA COUNTY, ARIZONA

WLB No. 103010-H001
 N:\103010\Survey\Mission Garden Additional Parcel.dwg



PAGE 3 OF 3

Exhibit B

2016 Mission Garden Master Plan

