



Agenda Item #: _____

Staff Report

City of Manhattan Beach

TO: Honorable Mayor Tell and Members of the City Council

THROUGH: David N. Carmany, City Manager

FROM: Richard Gill, Parks and Recreation Director
Eve Kelso, Recreation Services Manager

DATE: December 6, 2011

SUBJECT: Approval to Renew the License Agreement for the Manhattan Beach Botanical Garden between the City of Manhattan Beach and the Manhattan Beach Botanical Garden Nonprofit Corporation.

RECOMMENDATION:

Staff recommends that the City Council consider the approval of the License Agreement, dated December 6, 2011, for the Manhattan Beach Botanical Garden between the City of Manhattan Beach and the Manhattan Beach Botanical Garden Nonprofit Corporation.

FISCAL IMPLICATION:

There are no fiscal implications associated with the recommended action.

BACKGROUND:

The Manhattan Beach Botanical Garden nonprofit corporation has maintained the 2/3 acre parcel of land on the west end of Polliwog Park since 1992. Manhattan Beach Botanical Garden is a non-profit public education organization dedicated to promoting Earth-friendly gardening techniques, encouraging the use of drought-tolerant plants including California natives, and conserving our natural resources. Their mission is to promote Earth-friendly gardening for the conservation of water, wildlife and the well-being of our community.

The last agreement was created in 2008 and expired this year.

Polliwog Park is owned by the Manhattan Beach School District and leased to the City under an existing agreement until March 24, 2019.

DISCUSSION:

This Agreement shall be for approximately seven years and shall continue in effect until the 31st day of January, 2019, at which time the City and Manhattan Beach Botanical Garden may review the existing Agreement, and renew or modify the Agreement as appropriate. One change to the agreement is the term of approximately seven years, as opposed to the three year term from the previous agreement. The term concludes two months prior to the expiration of the Polliwog Park

Agenda Item #: _____

Agreement between the School District and the City of Manhattan Beach. The term of notice, for either agency to terminate the agreement, also changed from 15 to 30 days, which is more appropriate for an agreement of this type. There were also changes in the indemnification clause as recommended by our City Attorney for the City of Manhattan Beach.

Attachment: License Agreement between the City of Manhattan Beach and
Manhattan Beach Botanical Garden

cc: Manhattan Beach Botanical Garden

**LICENSE AGREEMENT BETWEEN THE CITY OF MANHATTAN BEACH AND
MANHATTAN BEACH BOTANICAL GARDEN**

THIS AGREEMENT is made and entered into on this 6th of December, 2011, by and between the City of Manhattan Beach, a municipal corporation ("CITY") and the Manhattan Beach Botanical Garden, a California non-profit corporation ("MBBG").

RECITALS

A. CITY is the lessee of certain real property commonly known as Polliwog Park located at 1601 Manhattan Beach Boulevard ("Polliwog Park") pursuant to an agreement between the City of Manhattan Beach and the Manhattan Beach Unified School District ("Use Agreement");

B. The Use Agreement allows the City to license portion of Polliwog Park for educational and recreational activities;

C. MBBG has an interest to continue its development, operation and maintenance of a botanical garden at Polliwog Park;

D. The CITY and MBBG are desirous of entering into a license agreement to allow MBBG's activities as a botanical garden to continue at Polliwog Park as long as MBBG accepts responsibility for maintaining the property;

NOW, THEREFORE, in consideration of the foregoing recitals and the mutual promises and undertakings contained herein and for other good and valuable consideration, the adequacy of which is hereby acknowledged, the parties hereby mutually agree as follows:

1. License.

A. CITY hereby grants to MBBG for the term of this Agreement a non-exclusive and revocable license to use a 2/3 of an acre portion of the west side of Polliwog Park as is more particularly described on Exhibit A attached hereto and incorporated herein ("Property") solely for use as a botanical garden to be known as the "Manhattan Beach Botanical Garden." Except as otherwise provided herein, no other use of the Property is permitted. CITY further grants to MBBG the right of ingress and egress onto the Property and the right to plant and cultivate whatever plant life MBBG chooses and the ability to hold special events on the Property, including fund raising events and the collection of donations, subject to the CITY'S rules, regulations and ordinances pertaining to such activities at Polliwog Park.

B. MBBG warrants that it has inspected the Property and accepts the use of the Property under this agreement "as is" without any warranties, express or implied. CITY makes no representations, covenants, warranties or promises that the Property is fit for any particular purpose or use, including the use for which this license is made and MBBG is not relying on any such representation, covenant, warranty or promise.

2. Term.

The term of this license is for a period of approximately seven years beginning on the date of execution and terminating on January 31, 2019 or until this agreement is terminated by the parties. Either party may terminate this Agreement at any time, with or without cause, upon thirty days written notice to the other.

3. Limitations of Rights.

A. This Agreement and the rights granted to MBBG hereunder are personal to MBBG and MBBG shall not assign or transfer (whether voluntarily or involuntarily) this Agreement in whole or in part, or permit any other person or entity to use the rights or privileges hereby conveyed, without the prior written consent of CITY, which may be withheld in CITY'S sole discretion. Any attempted act in violation of the foregoing shall be void and without effect and give CITY the right to immediately terminate this Agreement.

B. This Agreement does not constitute a sale, lease or any transaction other than a license and MBBG shall not acquire any rights whatsoever based upon the uses permitted herein excepting those rights specifically delineated herein.

C. MBBG shall have no right to use the property in any way except as specifically set forth herein. If MBBG fails to make such use of the Property as a botanical garden, as determined by CITY in its sole discretion, the CITY has the right to immediately terminate this Agreement.

D. CITY retains full possession of the Property and MBBG shall not acquire any interest temporary, permanent, irrevocable, possessory or otherwise by reason of this Agreement, or by exercise of the permission given herein. MBBG will make no claim to any such interest. Any violation of this provision provides the CITY with the right to immediately terminate this Agreement.

4. Obligations of MBBG.

A. General Maintenance of Botanical Garden. MBBG shall conduct the following maintenance activities at the Property:

(1) MBBG shall be responsible for the maintenance of the botanical garden at the Property Maintenance activities and tasks shall include but is not limited to maintaining all plant material (including trees), maintaining compost piles, maintaining the irrigation system in a good and workman like manner, conducting weed abatement and pest management

(2) MBBG may occasionally hire landscape professionals to assist with maintenance activities if the work is beyond the scope of MBBG's volunteers. MBBG shall ensure that said landscape professionals maintains insurance which complies with the provisions of this Agreement, names the City of Manhattan Beach as an additional insured on said polic(ies)

and executes an indemnification in favor of the City in the form provided to MBBG by the CITY.

(3) MBBG shall be responsible for litter abatement, cleaning of walkways and reporting graffiti and vandalism to the Manhattan Beach Public Works Department (310-802-5303) within 24 hours.

(4) The cost of all maintenance of the Property as set forth herein shall be borne solely by MBBG. The City will communicate in writing any concerns regarding Property maintenance to the MBBG Maintenance Director or the MBBG President. MBBG shall address these concerns within 15 working days unless the concern is emergency in nature, in which case MBBG shall take immediate action. If MBBG fails or refuses to comply with this provision, the City has the right to enter the Property and commence and/or complete the work to remedy the concern and MBBG shall be liable to the CITY for any and all costs and expenses incurred by the CITY in connection with such work.

B. Property Repairs and Financial Responsibility

(1) MBBG shall keep the Property and any improvements thereon in good condition and repair and shall repair all occurrences of minor vandalism at the Property at its sole cost and expense. If there is any other damage at the Property that is not considered minor by MBBG, MBBG shall discuss the remedy with the Director of Public Works prior to any repair. Notwithstanding any provision of this Agreement, the City's financial responsibility is limited to the repair of fences and utility service lines.

(2) MBBG shall use reasonable care to avoid damaging the Property or any adjacent property owned by CITY as a result of MBBG's activities on the Property. MBBG shall repair, promptly upon detection, at MBBG's sole cost and expense, the Property or any adjacent property owned by CITY, and any damage specifically caused, directly or indirectly, by MBBG or any agent, employee, licensee, or invitee of MBBG ("MBBG Representatives") to such Property or adjacent CITY Property. MBBG is not, however, obligated to repair any damage which is not caused by the actions of MBBG or any MBBG Representatives.

C. Operation of the Manhattan Beach Botanical Garden.

(1) The botanical garden maintained by MBBG on the Property shall be open to the public. Hours of operation of the botanical garden shall be subject to the approval of the Director of Parks and Recreation or his or her designee. Any change in hours shall require the consent of the City through the Director of Parks and Recreation.

(2) Street parking will continue to be used for parking during normal hours of operation.

(3) Special events may be held at the Property subject to the prior approval of the Director of Parks and Recreation or his or her designee who may impose conditions on the

conduct of any such event and subject to any rules, regulations and ordinances pertaining to such activities

(4) MBBG may construct such improvements as walkways and planters on the property at its own expense with the prior approval of the Director of Parks and Recreation or his or her designee. Improvements such as walkways shall be constructed to the City's standards for like improvements as directed by the City's Director of Public Works. Any improvements are deemed property of MBBG during the term of this Agreement and MBBG shall be responsible for maintenance and repair thereof.

(5) On termination of this Agreement, MBBG shall have the right to remove any improvements in a manner acceptable to the Director of Parks and Recreation or his or her designee. Any improvements not removed by MBBG within 30 days shall become the property of the City.

(6) The City shall continue to provide and maintain water and power to the Property at no cost to MBBG. The City will continue to maintain and have jurisdiction over the utility shed (which warehouses the City's utilities) located on the southwest corner of the Property and City has the right to enter the Property at any time without permission of MBBG to access the utility shed and conduct activities related thereto. MBBG shall own and maintain a tool shed, with composting toilet on the premises.

(7) Any pesticide or herbicide applications and disposals will be made in accordance with all federal, state, county and local laws. MBBG will dispose of all pesticides, herbicides and any other toxic substances declared to be either a health or environmental hazard, as well as all materials contaminated by such substances, including but not limited to, containers, clothing and equipment, in the manner prescribed by law.

(8) MBBG shall not engage in, or permit any other party to engage in, any activity on the Property that violates federal, state or local laws, rules or regulations pertaining to hazardous, toxic or infectious materials and/or waste. MBBG shall indemnify and hold CITY, its directors, officers, agents and employees, its successors and assigns (collectively, "CITY Representatives"), harmless from any and all claims, loss, damage, actions, causes of action, expenses and/or liability arising from leaks of, spills of, and/or contamination by or from hazardous materials as defined by applicable laws or regulations, which may occur during and after the Agreement term, and are attributable to the actions of, or failure to act by, MBBG or any of MBBG's employees, representatives, contractors, volunteers, invitees.

5. Insurance

A. MBBG shall have no rights under this Agreement until it has obtained City approved insurance. Before beginning work hereunder, during the term of this Agreement MBBG shall maintain the insurance coverages required in this Section. MBBG's insurance shall comply with all items specified by this Agreement. All insurance policies used to satisfy the requirements imposed hereunder shall be issued by insurers authorized to do business in the State of California. Insurers shall have a current A.M. Best's rating of not less than A-VII unless otherwise approved by City.

B. MBBG shall maintain the types of coverages and limits indicated below:

(1) **Commercial General Liability Insurance** – a policy for occurrence coverage, including all coverages provided by and to the extent afforded by Insurance Services Office Form CG 0001 ed. 11/88 or 11/85, with no special limitations affecting CITY. The limit for all coverages under this policy shall be no less than one million dollars (\$1,000,000) per occurrence. CITY, its employees, officials and agents, shall be added as additional insureds by endorsement to the policy. The insurer shall agree to provide the CITY with thirty (30) days prior written notice of any cancellation, non-renewal or material change in coverage. The policy shall contain no provision that would make this policy excess over, contributory with, or invalidated by the existence of any insurance, self-insurance or other risk financing program maintained by the City. In the event the policy contains such an “other insurance” clause, the policy shall be modified by endorsement to show that it is primary for any claim arising out of the work performed under this Agreement. The City of Manhattan Beach Insurance Endorsement Form No. 1 (General Liability) must be executed by the applicable insurance underwriters.

(2) **Commercial Auto Liability Insurance** – a policy including all coverages provided by and to the extent afforded by Insurance Services Office form CA 0001, ed. 12/93, including Symbol 1 (any auto) with no special limitations affecting the City. The limit for bodily injury and property damage liability shall be no less than one million dollars (\$1,000,000) per accident. CITY, its employees, officials and agents, shall be added as additional insureds by endorsement to the policy. The insurer shall agree to provide the City with thirty (30) days prior written notice of any cancellation, non-renewal or material change in coverage. The policy shall contain no provision that would make this policy excess over, contributory with, or invalidated by the existence of any insurance, self-insurance or other risk financing program maintained by CITY. In the event the policy contains such an “other insurance” clause, the policy shall be modified by endorsement to show that it is primary for any claim arising out of the work performed under this Agreement. The City of Manhattan Beach Insurance Endorsement Form No. 2 (Auto) must be executed by the applicable insurance underwriters.

C. The procuring of such required policies of insurance shall not be construed to limit MBBG’s liability hereunder, nor to fulfill the indemnification provisions and requirements of this Agreement. There shall be no recourse against CITY for payment of premiums or other amounts with respect thereto. CITY shall notify MBBG in writing of changes in the insurance requirements. If MBBG does not deposit copies of acceptable insurance policies with City incorporating such changes within sixty (60) days of receipt of such notice, the CITY shall have the right to cancel this Agreement.

D. Any deductibles or self-insured retentions must be declared to and approved by CITY. Any deductible exceeding an amount acceptable to City shall be subject to the following changes: (1) either the insurer shall eliminate, or reduce, such deductibles or self-insured retentions with respect to City and its officials, employees and agents (with additional premium, if any, to be paid by MBBG); or (2) MBBG shall provide satisfactory financial guarantee for payment of losses and related investigations, claim administration and defense expenses.

E. MBBG shall furnish CITY with original endorsements effecting coverage required by this Agreement. The endorsements are to be signed by a person authorized by the insurer to bind coverage on its behalf. All endorsements are to be received and approved by CITY before work commences. Not less than fifteen (15) days prior to the expiration date of any policy of insurance required by this Agreement, MBBG shall deliver to CITY a binder or certificate of insurance with respect to each renewal policy, bearing a notation evidencing payment of the premium therefore, or accompanied by other proof of payment satisfactory to CITY.

6. Taxes.

MBBG acknowledges that its rights under this agreement may constitute a taxable interest under California law. MBBG hereby agrees to be responsible for payment in full of any property or other taxes in connection with the activities and operation of the Property, which may be assessed against the interests granted hereunder and hereby indemnifies and releases CITY from any obligation or liability for such taxes. MBBG's failure to promptly pay any such taxes prior to their due date shall be considered a material breach of this Agreement and grounds for termination thereof upon forty-eight hours notice.

7. Indemnification.

MBBG agrees to indemnify, defend, and hold harmless CITY and its elective or appointed officials, officers, agents, attorneys and employees from any and all claims, liabilities, expenses, or damages of any nature, including attorneys' fees and costs arising out of, or in any way connected with performance of, the Agreement by MBBG, MBBG'S agents, officers, employees, subcontractors, volunteers, or independent contractor(s) hired by MBBG. This indemnity shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation upon the amount of indemnification to be provided by MBBG. The obligations of this paragraph shall survive the termination of this Agreement.

8. Miscellaneous Provisions.

A. All notices required under this agreement shall be served by placing said notice, postage prepaid, in the United States mail and addressed as follows:

MBBG as follows:
Manhattan Beach Botanical Garden Board of Directors
P. O. Box 1156, Manhattan Beach, CA 90267-1156
Phone: (310) 546-1354

CITY as follows:
Richard Gill, Director of Parks and Recreation
City of Manhattan Beach

1400 Highland Avenue
Manhattan Beach, CA 90266

(with a copy to): City Attorney
City of Manhattan Beach
1400 Highland Avenue
Manhattan Beach, CA 90266

Any notices, demands and written communications by mail shall be conclusively deemed to have been received by the addressee on the day received if by personal delivery or two days after the deposit thereof in the United States mail, postage prepaid.

B. This Agreement constitutes the entire agreement between the parties and supersedes any other agreements, oral or written. No promises, other than those included in this Agreement, shall be valid. This Agreement may be modified only by a written agreement executed by City and MBBG.

C. This Agreement shall be construed in accordance with the laws of the State of California. Any action commenced about this Agreement shall be filed in the County of Los Angeles.

D. Invalidation of any provision contained herein or the application thereof to any person or entity by judgment or court order shall in no way affect any of the other covenants, conditions, restrictions, or provisions hereof, or the application thereof to any other person or entity, and the same shall remain in full force and effect.

E. This Agreement supersedes any and all other agreements, either oral or in writing, between the parties with respect to the subject matter herein. Each party to this Agreement acknowledges that representations by any party not embodied herein, and any other agreements, statements or promises concerning the subject matter of this Agreement, not contained in this Agreement, shall not be valid and binding. Any modification of this Agreement will be effective only if it is in writing signed by the parties. Any issue with respect to the interpretation or construction of this Agreement is to be resolved without resorting to the presumption that ambiguities should be construed against the drafter.

F. In the event that either party commences any legal action or proceeding to enforce or interpret the provisions of this Agreement, the prevailing party in such action shall be entitled to reasonable attorney's fees, costs and necessary disbursements, in addition to such other relief as may be sought and awarded.

IN WITNESS THEREOF, the parties hereto have executed this Agreement on the day and year first shown above.

City of Manhattan Beach

David Carmany, City Manager

ATTEST:

Liza Tamura, City Clerk

APPROVED AS TO FORM:

Roxanne M. Diaz, City Attorney

Manhattan Beach Botanical Garden,
A California Non-Profit Corporation

By _____

By _____