

CITY OF CHARLOTTESVILLE, VIRGINIA
CITY COUNCIL AGENDA



Agenda Date:	September 20, 2021
Action Required:	Proposed Ordinance (First Reading) –Public Hearing on Second Reading
Presenter:	Charles P. Boyles, II, City Manager Representative of Botanical Garden of the Piedmont
Staff Contact:	Lisa Robertson, City Attorney
Title:	Lease of City Park Land for a Botanical Garden

Background:

Over the past decade, City Council has been discussing and planning botanical garden to be established within McIntire Park, on the eastern side. The documentation previously approved at the Council level to authorize this project are the following:

Council Approvals

September 2012	Master Plan, McIntire Park East
September 2013	Resolution for City Partnership With McIntire Botanical Garden, Inc.
December 2014	Conceptual Design (“Schematic Park Plan”), East McIntire Park
March 2015	Council approved Final Conceptual Design, East McIntire Park
March 2015	MOU between City and “McIntire Botanical Garden”
September 2017	Final Site Plan Approval—East McIntire Park

Discussion: among the key provisions of the Proposed Lease are the following:

Section 1: years ago, City Council’s discussions were with McIntire Botanical Garden, Inc. A new entity has been formed (Botanical Garden of the Piedmont). Both are nonprofit, charitable organizations.

Section 2: an illustration labeled “Exhibit A” is attached to the Ordinance/ Proposed Lease. The illustration gives Council a good idea of the general boundaries of the lease. This is not the type of detailed property description that would be suitable to be recorded in the land records; however, the more formal property description will be prepared later as part of a written “deed” of lease (or lease memorandum) that will be recorded in the City’s land records.

Section 5: the proposed term of the Lease is 40 years. That is the maximum lease term allowed by state law for property owned by a municipality. *See* Va. Code §15.2-2100(B).

Section 6: City Council may offer the Lease at a nominal rent, because the Lessee is a charitable/nonprofit organization to which the City may make gifts and donations, pursuant to Virginia Code

§15.2-953.

Section 7(B): At the request of the Department of Utilities, and the Department of Parks & Recreation, the Proposed Lease expressly reserves to the City a right to place its own public facilities within the leased area, after notice to the Lessee. This provision is especially important, because the City is planning to establish a pedestrian trail section in a corner of the leased area, generally in the location of what is shown on the 2015 Final Conceptual Design as a paved plaza. (Staff does not want to have to negotiate an easement in favor of the City, on City-owned property; this lease provision should allow a more informal interaction between the parties, allowing Public Facilities to be placed in locations needed for the public utilities or trail systems via informal arrangements).

Section 8: Botanical Garden of the Piedmont is allowed a five-year period (60 months) to commence construction of the Botanical Garden, and an additional three years to complete construction (see Section 8(D)).

Sections 13(a) and Section 22(a)(i): please note that this Proposed Lease requires the City to purchase the Botanical Garden improvements from the City, upon the expiration/termination of the Lease. Previously, within the March 2015 MOU approved by a prior Council, it was specified that “*All facilities developed or funded by MBG shall be donated to, and become the property of, the City upon being issued a certificate of occupancy.*” However, the 2015 MOU also stated that it should be regarded as a “living” document, to be reviewed and updated at specified intervals, or by mutual agreement of the parties. Staff has no objection to the proposal for City Council to modify this provision of the 2015 MOU; the City Attorney’s Office confirms that the Land Lease—and not an MOU—should finalize the parties’ agreement as to whether or not the Lessee will receive compensation for its improvements at the end of the Lease, *see* Va. Code §15.2-2100(B).

Section 28: the Proposed Lease specifies that the relationship between the parties is that of landlord tenant only. This is somewhat inconsistent from the 2013 Resolution that identified the relationship between the parties as being a “partnership”. At this time staff recommends the language set forth within the Proposed Lease.

Note: March 2015 MOU: City staff as well as the Botanical Garden of the Piedmont believe that much of the content within the 2015 MOU is currently suitable. At this time, the City is not in a position to make substantial financial/ capital funding commitments. Going forward the City and the Botanical Garden of the Piedmont will need to revisit what their financial and operational relationships will be, and set those out within a Use Agreement that does not need to be recorded within the land records and therefore can be updated to remain consistent with budget cycles and Capital Improvements Planning processes. (The Proposed Lease set out within the attached Ordinance only addresses matters that relate to the leasehold interest in the park property, and which are typical of provisions within a long-term lease). Having an approved lease will allow BGP to move forward with fundraising efforts.

Budgetary Impact: According to the Department of Parks & Recreation: the current CIP account for East McIntire includes some funding to complete trail and bridge projects but not enough to complete improvements such as a picnic shelter, full trail, parking lot construction, etc.. No funding is currently allocated in the City’s CIP for projects specific to the botanical garden.

Alignment with Council Vision Areas and Strategic Plan: Yes, reference City Council Agenda Memo, March 16, 2014 (attached)

City Manager Recommendation: The City Manager recommends approval of the attached Resolution, to authorize a long term lease of land within McIntire Park to the Piedmont Botanical Garden.

Community Engagement: yes, reference City Council Agenda Memo, March 16, 2014 (attached)

Attachments:

- Proposed Ordinance Setting Terms and Conditions for a Long Term Lease of Park Land
- City Council Agenda Memo, March 16, 2014, with attachments

ORDINANCE
APPROVING A LONG -TERM LEASE OF A PORTION OF MCINTIRE PARK TO
THE BOTANICAL GARDEN OF THE PIEDMONT

WHEREAS the Botanical Garden of the Piedmont is a Virginia non-profit corporation whose mission is: to provide a place where persons may engage in nature; to educate and inspire through the beauty and importance of plants; to advance sustainability within the Charlottesville community; and to promote human and environmental well-being; in these aspects, the Botanical Garden of the Piedmont is a nonprofit formed to provide services to residents of the City of Charlottesville and to beautify and maintain the community; and

WHEREAS on September 4, 2012 the Charlottesville City Council approved a Master Plan for McIntire Park East, including approximately 11.5 acres for: a botanical garden, a family activity area, parking, and a path connecting these areas to the rest of McIntire Park; and

WHEREAS on September 16, 2013, the Charlottesville City Council approved a public-private partnership between the City and the McIntire Botanical Garden (now known as the Botanical Garden of the Piedmont) to design, develop, and maintain a botanical garden; and

WHEREAS on March 16, 2015 the Charlottesville City Council approved a schematic design plan for McIntire Park East, including a botanical garden; and

WHEREAS since 2015 McIntire Botanical Garden/ Botanical Garden of the Piedmont has worked with the City Parks and Recreation Department to improve the botanical garden site and prepare for the design and development of a botanical garden; and

WHEREAS to commence implementation of the planned botanical garden, the Botanical Garden of the Piedmont desires to enter into a long term lease of a certain portion of the City-owned property, consisting of approximately 12 acres of land owned by the City of Charlottesville within the public property known as McIntire Park; and,

WHEREAS this proposed lease has been publicly duly advertised and this Council has conducted a public hearing and has otherwise satisfied the requirements of Virginia Code §§ 15.2-953, 15.2-1800 and 15.2-2100;

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF CHARLOTTESVILLE that a lease for a term of forty (40) years is hereby granted to the Botanical Garden of the Piedmont, upon the covenants and agreements set forth following below, and the City Manager is hereby authorized to execute such lease on behalf of the City of Charlottesville, in a final format approved by the City Attorney and suitable for recordation in the land records of the Circuit Court for the City of Charlottesville:

APPROVED COVENANTS AND AGREEMENTS FOR A LONG TERM LEASE

1. Lessee.

The City will lease a portion of McIntire Park to **BOTANICAL GARDEN OF THE PIEDMONT**, a non-profit corporation authorized to do business in the Commonwealth of Virginia (hereafter "Lessee").

2. Leased Premises.

The City hereby leases and demises to Lessee, and Lessee hereby leases from City, certain real property, consisting of approximately 11.5 acres of land in the northeast corner of McIntire Park, which property is more particularly identified within **Exhibit A** attached hereto (hereafter the "Leased Premises"). The parties shall share the cost of obtaining a survey plat identifying the boundaries of the Leased Premises, which survey plat shall be made an exhibit to the Lease executed by the parties' designated agents.

3. Authority of City

The City has authority to enter into this Lease, pursuant to Virginia Code §§15.2-953, 15.2-1800 and 15.2-2100.

4. Suitability; as-is condition

(A) City makes no representation or warranty as to the condition or suitability of the Leased Premises for the Lessee's intended purposes. If Lessee determines after the Commencement Date that the Leased Premises are not suitable for its intended use, Lessee may terminate this Lease upon giving written notice to the City, and neither party shall have any further rights or obligations hereunder. In the event of such termination Lessee shall deliver possession of the Leased Premises to the City and, at its own expense, Lessee shall restore the Leased Premises to the condition in which they existed prior to any changes or alterations made prior to such termination.

(B) Lessee accepts the Leased Premises in their "as is" condition, subject to all existing utilities and all easements of record, and further subject to the following:

(i) City shall remove steel beams on the Leased Premises within 60 days after the Commencement Date; and

(ii) following the Commencement Date, if Lessee desires the removal and disposal of any buildings, structures or improvements existing on the Leased Premises, Lessee shall give written notice to the City thirty days in advance of the proposed removal, and City shall have thirty (30) days from the date of such notice to object and request reconsideration. In the

event that the City does not object, Lessee may remove and dispose of the items at its sole cost and expense. If the City notes an objection, the parties shall negotiate a mutually acceptable resolution, consistent with the Master Plan and the Schematic Design Plan for McIntire Park East.

5. Term.

This Lease shall be effective for a term of forty (40) years, commencing on the date as of which this Lease has been executed by both the City Manager and a duly authorized agent of the Lessee (“Commencement Date”).

6. Rent.

Lessee shall pay to the City nominal rent at the rate of \$1.00 per year, the receipt of which is hereby acknowledged.

7. Use.

(A) Lessee shall and occupy the Leased Premises only for the purposes of constructing, operating and maintaining a botanical garden, including appurtenant buildings, structures, improvements, fixtures and personal property, in accordance with the Schematic Design Plan approved by City Council in 2015 for the area within the Leased Premises (hereinafter, collectively, the “Botanical Garden”). All references within this Lease to the “Leased Premises” shall mean and include all buildings, structures, fixtures, equipment and improvements which Lessee has brought, placed or constructed upon the Leased Premises.

(B) City reserves the right to install, operate, and maintain a public pedestrian trail, a stream restoration project, as well as water, sewer, gas, stormwater or other utilities (“Public Facilities”), within the area of the Leased Premises. Lessee shall be allowed to review near-final construction plans for the pedestrian trail before the plans are finalized, and the City shall incorporate Lessee’s reasonable comments and suggestions which are consistent with the Master Plan and Schematic Design Plan. City shall repair ground cover, but not pavement, that may be disturbed by the City’s installation, operation or maintenance of its Public Facilities. All utilities required specifically for or in connection with Botanical Garden shall be depicted on the final site plan approved for the Botanical Garden, and installation of the required utilities shall be performed by the Lessee prior to, or concurrently with, installation or construction of the Botanical Garden.

(C) The parties may, from time to time, establish or amend a written Use Agreement, setting forth matters relating to the operation of the Botanical Garden, the City’s shared or joint use of any facilities, or any financial contributions or obligations of the City relative to the Botanical Garden operation. No provisions in any such Use Agreement, as amended, shall be deemed or construed as an amendment of this Lease.

(D) The Leased Premises, including the Botanical Garden, shall be open to the general public during hours specified within Section 18-1 of the Charlottesville City Code for McIntire Park. During such hours, the Botanical Garden shall not exclude members of the public from the Leased Premises, except as follows:

(i) Notwithstanding the foregoing, Lessee may allow portions of the Botanical Garden to be used for weddings, meetings, or other private events, during which time the rest of the Botanical Garden will remain open to the general public. Additionally, Lessee is hereby granted the right and privilege to conduct up to 12 private events per calendar year which advance Lessee's mission, during which Lessee or others shall have the privilege of exclusive use of the entire Leased Premises; and

(ii) Lessee may restrict or prohibit public access to any portion of the Leased Premises that is a work zone for construction or land disturbing activities being conducted by Lessor or its contractors.

The City reserves the right to amend City Code §18-1, to establish hours specific to the Botanical Garden, once the Botanical Garden has been established and is in operation.

(E) Lessee shall obtain the City's approval of a written signage plan for all external signs within the Botanical Garden. No external signs shall be installed on the Leased Premises, other than those designated within the City-approved signage plan.

8. Construction of Botanical Garden.

(A) Lessee shall commence construction of the Botanical Garden within sixty (60) months of the Commencement Date specified in Section 4, above, and shall promptly give City written notice of the date on which construction commenced ("Commencement Notice"). If City does not receive the Commencement Notice within said 60-month period, this Lease shall automatically terminate, without notice from City. Notwithstanding the foregoing, City may grant an extension of the 60-month period, upon receipt of a written request from Lessee prior to the effective date of termination. If good cause is demonstrated within Lessee's written extension request, the City's agreement to the extension shall not unreasonably be withheld.

(B) Construction plans for construction of the Botanical Garden shall be in substantial conformity with:

(i) the Master Plan for McIntire Park East, approved by City Council in September 2012, and

(ii) the Final Conceptual Design Plan for McIntire Park East, approved by City Council in March 2015.

The City Manager, the Director of Parks and Recreation, and the City's Parks and Recreation Advisory Committee shall be allowed to review near-final construction plans before the plans are finalized, and Lessee shall incorporate their reasonable comments and suggestions which are consistent with the Master Plan and Schematic Design Plan.

Final construction plans shall include measures by which Lessee and its contractors shall minimize disruption to McIntire Park and the uses and activities occurring within the park outside of the Leased Premises. Measures may include, but shall not necessarily be limited to, restricted hours of construction or land-disturbing activity; alternative parking or traffic arrangements; sound dampening measures; or tree protection measures. Lessee's construction plans shall also provide reasonable parking and roadway improvements to accommodate the construction and operation of the Botanical Garden. The City's Director of Parks and Recreation, after consultation with the City Manager, may issue a written directive requiring unreasonably disruptive construction activities to immediately be stopped; thereafter, the period during which such disruptive land disturbing or construction activities are required to be stopped shall not be considered as good cause for any extension(s) of time requested in accordance with this Lease.

(C) Lessee shall not commence any land disturbing or construction activity, unless and until all required governmental permits and approvals for such activity(ies) have been obtained from the Commonwealth of Virginia, the City of Charlottesville, and Albemarle County, as may be required. Lessee shall be responsible for all costs and expenses associated with obtaining such approvals. Such permits and approvals include, but are not necessarily limited to, rezoning or special use permit, final site plans, erosion and sediment control plans, stormwater management plans, a state construction general permit, permits required by the Uniform Statewide Building Code or the Virginia State Fire Prevention Code, and any amendments or modifications of such permits and approvals. As evidenced by the signature of the City Manager to this Lease, the City Manager shall constitute the City's authorization for any required permit application(s) to be submitted to any governmental authority relative to any area(s) of land owned by the City.

(D) The Lessee may complete construction in phases, beginning with construction of the Core Components, which will consist of a parking area, a section of the Botanical Garden, and woodland trails. Construction of the Core Components shall be completed (i.e., open for public use) within ninety-six (96) months of the Commencement Date specified in Section 5, above, or within thirty-six (36) months of the date of the Commencement Notice referenced in Section 7(A), above, whichever first occurs, provided, however, that:

(i) upon written request given to City promptly following the occurrence of any event that will preclude Lessee from meeting this deadline, City may extend the time for completion. The City shall not unreasonably refuse to grant one or more requested extensions, but shall not be required to extend the completion period by more than twenty-four (24) months; and

(ii) if the Botanical Garden is not completed within the time required by this Section 8(D), including authorized extensions, this Lease shall terminate thirty (30) days after the date on which written notice is given by City to Lessee. Lessee shall promptly complete all land disturbing and construction activities underway at the time of any such termination notice and shall surrender the Leased Premises in accordance with Section 22, following below, at the end of the 30-day notice period.

9. Financial Assurances.

(A) Prior to the commencement of any land disturbing activity or construction in or upon the Leased Premises, Lessee shall have entered into a written contract with one or more licensed and bonded Class A contractor(s), and shall have secured performance and payment bonds for the entire amount of the contract(s). Lessee shall require said contractor(s) to have and maintain commercial general liability insurance throughout any period(s) in which work is being performed by said contractor(s).

(B) Additionally, prior to the commencement of any land disturbing activity or construction, Lessee shall provide to the City:

- (i) a written financial plan demonstrating Lessee's ability to adequately finance the costs of construction of the Botanical Garden, and
- (ii) a five-year capital and operational budget demonstrating Lessee's ability to complete the Botanical Garden and commence its operation in accordance with the requirements of this Lease.

10. Maintenance; operation; repair.

(A) Lessee shall, at its own cost and expense, keep the Leased Premises, and the interior and exterior of all buildings and structures therein, in a clean, attractive condition. Lessee shall not commit or allow any waste or damage to be committed in or to portion any of the Leased Premises. Lessee shall provide janitorial services, trash removal, and any other services necessary to satisfy the requirements of this paragraph.

(B) Lessee shall be responsible for all costs and expenses associated with ongoing maintenance, operation, and repair of buildings, structures and improvements within the Botanical Garden, including, but not limited to, building roof, doors, windows, mechanical, utility and electrical systems, and exterior landscaping and pavement.

(C) Lessee shall give written notice to the City's Director of Parks and Recreation in advance of using any pesticides, cleaners, fertilizers, or other similar products within the Leased Premises, and upon receipt of such notice the Director will promptly advise Lessee of City policies regarding the use of such products on or within City-owned buildings or property. Upon

being notified of City policies, Lessee shall comply with the requirements of the policies. Lessee shall be responsible for determining any federal or state laws or regulations that may apply to the use or application of such products, prior to using or applying them, and Lessee shall indemnify and hold the City harmless from any fines or penalties incurred by the City as a result of Lessee's failure to comply with federal or state laws or regulations.

(D) Lessee shall maintain and repair the Leased Premises in compliance with applicable governmental laws, regulations, and ordinances, regulating the use, occupancy, or maintenance of the Leased Premises and any buildings and structures located thereon, including, without limitation, Virginia Uniform Statewide Building Code and the Virginia Statewide Fire Prevention Code, and the Code of the City of Charlottesville (1990) as amended.

11. Utilities.

Lessee shall provide and pay for all lights, electricity, heat, water and sewer, and internet services for the Leased Premises and the Botanical Garden. All utility services shall be separately metered or billed solely in Lessee's name.

12. Taxes.

Local taxes shall be imposed on the leasehold interest of Lessee, if Lessee is not exempt from the payment of real estate taxes pursuant to Chapter 36 of Title 58.1 of the Code of Virginia (Virginia Code sections 58.1-3600 *et seq.*).

13. Title; liens.

(A) Upon the expiration or earlier termination of this Lease, and upon payment by the City to Lessee of the amount required under Section 22(A)(i), following below, title to the Leased Premises and all buildings, structures and improvements therein located, shall be and remain with the City. Lessee shall promptly and in good faith execute any written instruments or documents necessary to transfer its title or ownership interest(s) to City.

(B) Lessee shall not subject the City's interest in the Leased Premises to any mechanic's or materialman's liens, or other lien of any kind. Lessee shall not allow a lien or claim of any kind arising out of Lessee's actions, to be filed or claimed against City's interest in the Leased Premises. If any such lien or claim is filed or otherwise claimed, Lessee shall cause the Leased Premises to be released within 120 days later Lessee is given written notice from Lessor that a claim has been filed. Lessee will cause such release either by paying to the court the amount necessary to relieve and release the Leased Premises from the lien or claim, or in any manner which, as a matter of law, will result in releasing the Lessor and its title from the lien or claim within the 120-day period.

14. Damage; destruction.

(A) Lessee shall give City prompt written notice of any damage or destruction of the Leased Premises, or any portion thereof.

(B) In the event the Leased Premises or Botanical Gardens are damaged by fire or other casualty covered by Lessee's insurance, and such damage can be repaired within twelve (12) months, and provided that the occurrence of such casualty is not within the last five (5) years of the Term of this Lease, Lessee covenants and agrees to repair the damage, whereupon this Lease shall remain in full force and effect. If such casualty occurs within the last five (5) years of the Term of this Lease, or if the damage cannot be repaired within twelve (12) months, City shall have the right within sixty (60) days after such damage to terminate this Lease.

(C) City shall not be required to repair any injury or damage resulting from fire or other cause, or to make any repairs or replacements of Lessee's leasehold improvements, fixtures or personal property, except that caused by the negligence or willful misconduct of the City or its employees and agents, to the extent provided by law.

15. Indemnification.

Lessee shall indemnify and hold the City and officers, officials, and employees harmless from and against any and all liability, loss, claim, suit, damage, charge, or expense suffered, sustained, incurred or in any way to be subjected to, on account of death of or injury to any person and for damage to, loss of, and destruction of any property whatsoever, which arises out of, results from, or is in any way connected with actions taken in the performance of the Lessee's obligations under this Lease, or which occurs as a consequence of any negligence or misconduct of the Lessee or any of its contractors, subcontractors, or employees in the exercise of Lessee's rights or privileges, or the performance of Lessee's obligations, under this Lease. The City, to the extent provided by law, shall be responsible for the negligent acts, omissions, or misconduct of its agent or employees.

16. Assignment.

Lessee shall have no right to assign or sublease, in any manner or fashion, any of its rights, privileges, or interest accruing to it under this Lease to any other individual or entity without the prior written consent of the City. The City's consent shall not unreasonably be withheld, in the event Lessee proposes an assignment to a successor charitable organization, if the assignee demonstrates to the City's satisfaction that it is in all respects capable of performing Lessee's obligations hereunder.

17. Nondiscrimination.

Lessee shall not discriminate against any person in its membership, programs, or employment relating to the use or operation of the Botanical Garden, on the grounds of race,

religion, color, gender, sexual orientation, national origin, disability, financial circumstances, or any other basis prohibited by law.

18. Drug-Free Workplace.

In its use and operation of the Botanical Garden, Lessee shall provide a drug-free workplace for its Lessee's employees, and shall provide notification of this workplace policy to its employees and applicants for employment. For the purposes of this Paragraph, "drug-free workplace" means a workplace where employees are prohibited from engaging in the unlawful manufacture, sale, distribution dispensation, possession, or use of any controlled substance.

19. Insurance.

Prior to commencing any construction of the Botanical Garden, the Lessee, at its sole cost and expense, shall secure and maintain throughout the term of this Lease, the following types of insurance coverage:

(A) Workers' Compensation insurance, as may be required pursuant to the provisions of Chapter 8 (Section 65.2-800 *et seq.*) of Title 65.2 of the Code of Virginia, 1950, as amended;

(B) Commercial General Liability Insurance: \$1,000,000.00 general aggregate limit (other than products/completed operations); \$1,000,000.00 aggregate limit products/completed operations; \$1,000,000.00 personal injury and advertising injury limit liability; \$1,000,000.00 each occurrence limit; Builder's Risk Insurance: \$1,000,000.00; Automobile Liability, \$1,000,000.00; \$100,000.00 fire damage limit (any one fire); and \$10,000.00 medical expenses limit (any one person);

(C) Fire and Extended Coverages, providing coverage against loss, damage, or destruction by fire and such other hazards, under policies of insurance commonly referred to and known as "extended coverage";

(D) Each insurance policy required by this paragraph shall be written or endorsed so as to preclude the exercise of the right of subrogation against the City and, with the exception of Workers' Compensation Insurance, shall name the City as an additional insured. Each insurance policy required by this paragraph also shall be endorsed to include the following clause: Should any of the insurance policies be canceled before the expiration date thereof, the issuing insurance company will endeavor to mail written notice of such cancellation to the City at least 10 days in advance. Upon receipt of any notice, verbal or written, that the said insurance is subject to cancellation, the Lessee shall immediately (within five business days) notify the City. In the event Lessee fails to comply with the requirements of this section, the City shall have the right to require the Lessee to suspend use of the Botanical Garden until such time as the requirements of this paragraph are met.

(E) The Lessee shall provide the City with one or more certificate(s) of insurance confirming the insurance required by this Lease. The Workers' Compensation Insurance and Commercial General Liability Insurance certification shall be provided to the City by the Lessee upon the Commencement Date of this Lease, then again (without demand) on or before the expiration date of any policy and upon request by the City, on each anniversary of the Commencement Date of this Lease. The Fire and Extended Coverages certificate shall be provided to the City by the Lessee prior to the commencement of construction of the Botanical Garden, then again (without demand) on or before the expiration date of any policy and, upon request by the City, on each subsequent anniversary of the Commencement Date of this Lease. Upon demand by the City, Lessee shall furnish copies of the Lessee's insurance policies, together with the required endorsements as provided herein.

(F) The required insurance coverages, and the required limits of the insurance may be reviewed by the parties and amended from time to time by mutual agreement.

20. Annual Report; Financial Records.

(A) Lessee shall submit an annual written report to the Charlottesville City Council and the Charlottesville City Manager, by December 15 of each year that includes:

- (i) income and expense report for the preceding year,
- (ii) progress report for construction/ improvements within the Leased Premises,
- (iii) available information regarding number of visitors, and other information related to utilization of the Botanical Garden, as may be deemed by the parties to be useful or informative.

(B) Lessee shall keep and maintain books and records pertaining to the Leased Premises and Botanical Garden and amounts expended by it in connection with this Lease, in accordance with generally accepted accounting practices. Upon request, the City shall be entitled, at its own expense, to obtain an audit of such books and records. Upon receipt of notice that the City desires an audit, the Lessee shall make its books and records available to the City and its auditor(s), and the Lessee shall cooperate with the audit.

21. Default.

(A) If at any time Lessee fails to perform any covenant under this Lease, City may declare the Lease terminated, as provided in Section 21, by giving thirty (30) days' advance written notice of termination to Lessee, and shall have all other remedies provided by law and this instrument, including, without limitation, a right of specific performance and the right, at City's option, to re-let the Leased Premises, in whole or in part, to others. At the end of the 30-day period, City may reenter upon the Leased Premises.

(B) Lessee will be liable to City for all court costs and reasonable attorney's fees, in the event City incurs such costs and fees in order to obtain possession of the Leased Premises, or in the enforcement of any covenant, condition or agreement herein contained, whether through an action initiated in a court of law or otherwise.

22. Expiration or Termination of Lease.

(A) Upon the expiration or earlier termination of the Lease, and upon payment by the City to Lessee of the amount required in paragraph (i), below, the Lessee shall surrender the Leased Premises to the City, as provided in Section 23 of this Lease.

(i) The City shall compensate the Lessee in the amount of ninety percent (90%) of fair market value of the Botanical Garden, including appurtenant buildings, structures, improvements, and fixtures (without adjustment for the status of the underlying real estate), at the time of Lease termination. The parties shall mutually determine such fair market value. If for any reason the parties are unable to agree upon a price, the following procedure shall apply: The City and the Lessee shall each select one qualified individual as an appraiser at each party's own expense. Said two appraisers shall determine the fair market value of the Botanical Garden, including appurtenant buildings, structures, improvements, and fixtures (without adjustment for the status of the underlying real estate), taking into consideration such factors as are generally considered in valuing similar facilities. If said appraisers are unable to mutually agree upon a fair market value within thirty (30) days after their appointment, they shall select a third qualified appraiser and the two of the three appraisals closest in value shall be averaged, and that average shall be binding on the parties.

(B) If this Lease has not been earlier terminated, Lessee and City shall confer in Year 38 of the term of this Lease, and shall determine whether there is mutual agreement for a new lease; if so, the parties shall negotiate in good faith the terms for a new Lease so that the new lease may be advertised in accordance with Va. Code 15.2-2100 and, if approved, so that the new lease may take effect without interruption in Lessee's possession.

23. Surrender.

(A) Upon the expiration or earlier termination of the Lease, and upon payment by the City to Lessee of the amount required under Section 21, the Lessee shall quit and peaceably surrender to City possession of the Leased Premises in good order and condition, except for ordinary wear and tear, free and clear of any liens or encumbrances. The surrender of this Lease shall not work a merger and shall, at the option of the City, terminate all or any existing subleases or may, at the option of the City, operate as an assignment to it of any or all such subleases.

(B) Upon the expiration or earlier termination of this Lease, Lessee shall remove all of its personal property from within the Leased Premises, and shall, at its sole cost and expense, repair any damage caused by such removal. Personal property which has not been removed prior to the date of termination shall become the property of the City, and the City shall have the right to dispose of such property in its sole discretion.

24. Abandonment.

If the Lessee abandons or discontinues its use or occupancy of the Leased Premises for a period of six (6) months, City may declare the Lease terminated, as provided in Section 21. Upon payment by the City to Lessee of the amount required under Section 21, Lessee shall surrender the Botanical Garden as provided in Section 22. Any period of time in which use of the Botanical Garden is temporarily discontinued, for the sole purpose of maintenance or casualty repairs shall not be included in the 6-month period.

25. Eminent Domain.

In the event of any taking by eminent domain, partial or total, the City shall be entitled to receive that part of the total condemnation award or compensation for the taking which is equal or attributable to the value of the unimproved land taken, and the Lessee shall be entitled to receive the part of the award or compensation which is equal or attributable to the value of the Botanical Garden. If the taking is such that sufficient area remains for the Lessee to continue its normal operations, then the Lease shall terminate only as to the part of the premises and Botanical Garden so taken, but shall remain in effect with respect to the part of the premises not taken.

26. Right of Entry.

City or its agents may enter upon the Leased Premises at all reasonable times to examine their condition and use, so long as that right is exercised during regular business hours in a manner that does not interfere with the Lessee in the conduct of its business within the Leased Premises.

27. Non-waiver.

No failure on the part of the City to enforce any of the terms or conditions set forth in this Lease shall be construed as or deemed to be a waiver of the right to enforce such terms or conditions. No waiver of a breach of any covenant in this Lease shall be construed as a waiver of any succeeding breach of the same covenant. No delay or failure by either party to exercise any right under this Lease, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

28. Landlord and tenant relationship.

The relationship between the parties to this Lease is that of landlord and tenant only.

29. Notices.

(A) All notices given in connection with this Lease shall be in accordance with its terms. Notice shall be given by first class mail, postage prepaid, deposited in the United States Postal Service, or by prepaid overnight delivery service requiring acknowledgement of receipt. In addition to said delivery method(s), any written notices required or permitted by this Lease may also be sent by electronic mail (email); if email is used, the sender shall retain sufficient proof of the electronic delivery, which may be an electronic receipt of delivery, a confirmation that the notice was sent by facsimile, or a certificate of service prepared by the sender confirming electronic delivery.

(B) All notices given under this Lease shall be addressed as follows:

(i) City's designated representative to receive all notices and correspondence regarding this Lease is the City Manager, said notices and correspondence to be given to the following address: P.O. Box 911, Charlottesville, Virginia 22902 (mail), or City Hall, 605 East Main Street, Second Floor, Charlottesville, Virginia, 22902 (delivery); and

(ii) Lessee's designated representative to receive all notices and correspondence regarding this Lease is its Executive Director, said notices and correspondence to be given to the following address: P.O. Box 6224, Charlottesville, Virginia 22906 (mail, or _____ - (delivery).

(iii) Either party may change its designated representative or address(es) by giving written notice to the other party as provided in this paragraph.

30. Modification.

(A) No modification, release, discharge or waiver of any provision of this Lease shall be of any force, effect or value unless set forth in writing and approved by the parties hereto in the same manner as this Lease. Notwithstanding the foregoing provisions of this paragraph, the City Manager is hereby authorized to act as City Council's agent for purposes of approving modifications of the provisions of Section 19.

(B) The Term of this Lease may not be extended. This provision shall not preclude the parties from entering into a new lease, the term of which may commence following the expiration or earlier termination of this Lease, subject to the requirements of Virginia Code §15.2-2100.

31. Time of Essence.

In all instances in which a party is required by this Lease to pay any sum or do any act on or within a specific time period, the parties expressly declare that time is the essence as to the such payment or action.

32. Persons Bound.

The covenants, agreements, terms, provisions, and conditions of this Lease shall bind and inure to the benefit the respective parties hereto and to their respective representatives, successors, and, where permitted by this Lease, their assigns.

33. Entire Agreement.

This Lease contains the entire agreement between the parties as of this date, and it supersedes all prior agreements and understandings of the parties, whether verbal or written, as to matters that are set forth within this Agreement. There are no collateral agreements, stipulations, promises or undertakings whatsoever upon the respective parties, in any way touching the subject matter of this instrument, which are not expressly contained herein. The execution hereof has not been induced by either party by representations, promises or understandings other than those expressly set forth herein.

34. Recordation of lease instrument.

The terms and conditions set forth within this Ordinance shall be set forth within a written instrument signed by the parties' duly authorized agents and suitable for recordation among the land records of the Charlottesville Circuit Court, in accordance with Virginia Code §17.1-227. Alternatively, in lieu of recordation of said written instrument, a memorandum of lease may be recorded, as provided in Virginia Code §55.1-1601.

35. Headings.

Headings in this Lease are for convenience only and shall not be used in the interpretation or construction of its provisions.

36. Interpretation.

In the event of any conflict, discrepancy, or inconsistency between this instrument and any other documents which have been incorporated into this document by reference or made exhibits or attachments hereto, then the provisions set forth within the body of this document shall govern the parties' intent.

37. Severability.

In the event that any term, provision, or condition of this Lease, or the application thereof to any person or circumstances, shall be held by a court of competent jurisdiction to be invalid or

unenforceable, the remainder of this Lease, and the application of any term, provision, or condition contained herein to any person or circumstances other than those to which it has been held invalid or unenforceable, shall not be affected thereby.

38. Governing law.

This Lease shall be governed, construed, and enforced by and in accordance with the laws of the Commonwealth of Virginia. Any suit or controversy arising under this Lease shall be brought within the General District or Circuit Court for the City of Charlottesville, Virginia.

39. Authorized signatures.

(A) The Charlottesville City Council authorizes the Charlottesville City Manager as its agent to execute the Lease on behalf of the City of Charlottesville and to bind the City hereto.

(B) The authority of the individual who executes this Lease as the agent of the Lessee, to bind the Lessee to the covenants and agreements herein stated, is set forth within a duly adopted resolution of the Lessee, a copy of which shall be provided to the City before the Lease is signed by the City's agent.

EXHIBIT A

Proposed Botanical Garden Leasehold Boundary

NOTE: The leasehold extends to & includes all buildings & structures that currently exist or may be established after the Commencement Date.



RESOLUTION
ESTABLISHING a PARTNERSHIP between the
CITY OF CHARLOTTESVILLE
And
MCINTIRE BOTANICAL GARDEN, INC.

WHEREAS, the City of Charlottesville (the City) has completed its Park Master Planning Process for the east side of McIntire Park (McIntire East); and

WHEREAS, the City Council adopted a Master Plan for McIntire East in September 2012; and

WHEREAS, the City has identified the McIntire Botanical Garden, Inc. (MBG), a 501©(3) corporation, as its partner in the design, development, and operation of a botanical garden in McIntire East; and

WHEREAS, a public-private partnership between the City and MBG will help fund the garden, allow it to remain free to the public, and provide inspirational gardening ideas and educational programs that aligns with the natural resource education goals of the City.

WHEREAS, the City with the support and assistance of MBG has advertised for and employed a professional landscape architecture firm to produce a detailed and long term Landscape Master Plan for McIntire East and expects to review and adopt such plan shortly; and

WHEREAS, the full intended use and thus development of McIntire Park East must await the completion of the construction of McIntire Road Extended and Route 250 Interchange and the closing of the remaining sand green golf holes before December 31, 2016; and

WHEREAS, MBG can provide a unique array of support to the development of the botanical garden in McIntire East, including but not limited to: fundraising and grants solicitation; recruitment and management of volunteers; design and horticultural expertise; and

WHEREAS, an agreement to create a public-private partnership between the City and MBG is a prerequisite to MBG's ability to begin its work to identify and gather these resources and supplement the City's resources to implement McIntire East's design and development;

NOW, THEREFORE BE IT RESOLVED, the City resolves to create a public-private partnership between the City and the McIntire Botanical Garden to design, develop and maintain a botanical garden in McIntire East to be formalized with a Memorandum of

Understanding between the two parties at such time that the Landscape Master Plan is completed and approved by City Council.

STIPULATIONS OF RESOLUTION:

The planning, design and actual creation of the botanical garden in McIntire East will be a long-term community effort requiring flexibility and cooperation between the City and MBG. Areas of responsibility to be determined under an MOU agreement would include, but not be limited to the following:

- Routine and ongoing preventive maintenance;
- Management of and construction of Capital Projects;
- HR, Insurance Risk Management Services, et.al.;
- Construction and maintenance of access parking;
- Hiring and supervision of botanical garden staff and volunteers;
- Promotion of the Garden as a community activity;
- Fundraising and grant seeking for Capital Projects;
- Volunteer recruitment, training and management;
- Horticultural and plant collection expertise;
- Nature and plant education;
- Environmental stewardship education;
- Maintenance of Garden website;
- Establishment of partnerships with groups such as tree stewards, garden clubs, master gardeners, native plant societies, etc., to maintain and promote Garden.
- Daily operations of indoor facilities that may be included in the park

Approved by Council
September 16, 2013



Clerk of Council

CITY OF CHARLOTTESVILLE, VIRGINIA
CITY COUNCIL AGENDA



Agenda Date:	March 16, 2014
Action Required:	Action
Presenter:	Brian Daly, Director, Parks and Recreation Steve Kelly, ASLA, Mahan Rykiel
Staff Contacts:	Brian Daly, Director, Parks and Recreation Doug Ehman, Manger, Parks Division
Title:	McIntire Park East Conceptual Design Approval

Background:

Staff and community members, along with the design team from Mahan Rykiel from Baltimore, Maryland have been working for a number of months on the conceptual designs for the east side of McIntire Park, consistent with the Adopted Master Plan. These designs have evolved over the last several months through community discussion and are at the point of development where City Council approval is requested.

Discussion:

The Master Plan for the east side of McIntire Park was approved by City Council in September of 2012. The design team has worked collaboratively with staff, the McIntire Botanical Garden and the community to activate formally those amenities and uses shown in the Master Plan. Specifically, a network of trails, a family area, the botanical garden core area, picnic shelters connectivity throughout the park and a landscape typology that is representative of the piedmont.

Alignment with Council Vision Areas and Strategic Plan:

The initiative supports City Council's "Green City" vision. It contributes to Goal 2 of the Strategic Plan: Be a safe, equitable, thriving, and beautiful community, and objective 2.5, to provide natural and historic resources stewardship.

Community Engagement:

The design team is comprised of staff, Mahan Rykiel architects, representatives from the McIntire Botanical Garden, PLACE design task force and the Tree Commission. Additionally, several community design open houses have been held over the past several months, specifically March 20, June 3 and September 4, 2014. All of the sessions were held at the Carver Recreation Center. City Council considered and commented on the conceptual design during public session

on December 1, 2014. A final community open house on the final concept design presented tonight was held February 19, 2015 at the Parks and Recreation offices on the Downtown Mall.

Additionally, as directed by a City Council resolution staff and the McIntire Botanical Garden have worked together to develop a draft Memorandum of Understanding regarding the future management, maintenance and operations of the botanical garden elements in McIntire Park. A draft of this MOU is attached for review and consideration. It is important to acknowledge that this MOU will be an evolutionary document, changing and expanding over time as elements of the garden are implemented.

Budgetary Impact:

Fiscal impact for the implementation of the Master Plan has been considered in the FY16-20 Capital Improvement Program. The requested funds in the CIP represent staff's best estimates at this time for implementation of the master plan over time.

Recommendation:

Staff recommends Council approve the conceptual design and direct staff to move forward with the completion of the design development and construction documents for the project(s).

Alternatives:

No alternatives are offered at this time.

Attachments:

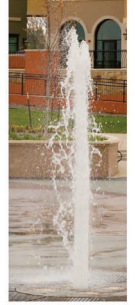
Attachment 1	December 1, 2014 Conceptual Design
Attachment 2	February 19, 2015 Final Conceptual Design
Attachment 3	Draft MOU between City and McIntire Botanical Garden

ATTACHMENT 1 - DECEMBER 1 2014 CONCEPTUAL DESIGN

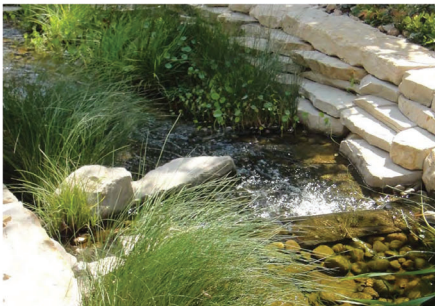


ATTACHMENT 2 - MARCH 16 2015 FINAL CONCEPTUAL DESIGN





FUTURE FOUNTAIN OPTIONS



NATURE PLAY STREAM



EXISTING STREAM

PROPOSED STREAM RESTORATION PRECEDENTS

DRAFT MEMORANDUM OF AGREEMENT
MCINTIRE BOTANICAL GARDEN AND THE CITY OF CHARLOTTESVILLE
March 2, 2015

BACKGROUND

In 2013 the City Council passed a resolution establishing a partnership between the City and the McIntire Botanical Garden to design, develop and maintain a botanical garden in McIntire East to be formalized with a Memorandum of Understanding between the parties at such time that the Landscape Master Plan is completed and approved by City Council.

PURPOSE

This memorandum shall assign and identify the various responsibilities in the relationship between the City of Charlottesville (City) and the McIntire Botanical Garden, Inc. (MBG) for the design, development and management of the new botanical garden (garden) at East McIntire Park and ancillary facilities.

GENERAL GUIDELINES

This MOU is intended to be a living document, reviewed and updated at routine intervals herein defined that guides the relationship between the City and MBG in the long-term implementation and management of the botanical garden within McIntire Park.

All facilities developed or funded by MBG shall be donated to, and become the property of, the City upon being issued a certificate of occupancy.

RESPONSIBILITIES OF THE CITY:

The City shall be responsible for the following activities within the garden area;

- Approval of all designs and construction documents;
- Administration and coordination of all construction and development activity;
- Providing, subject to available funding, core infrastructure facilities further defined as pedestrian, bicycle and maintenance trails, potable and irrigation water per approved plans, wastewater collection per approved plans and maintenance/support facilities and connections to other sections of the park;
- Providing, subject to available funding, a base level of maintenance which includes general cleanup, mulching where appropriate, basic pruning, establishment watering and pest control activities consistent with a basic Integrated Pest Management program.
- The City and MBG will work together to develop appropriate wildlife conflict resolution strategies.
- The city will allow events at the garden area to extend beyond the park operating hours for special events; subject to approval by the Director of Parks and Recreation or their designee.

ATTACHMENT 3 – DRAFT MOU BETWEEN CITY AND MCINTIRE BOTANICAL GARDEN

The City shall be responsible for the following activities regarding the visitor's center/educational building in a collaborative effort with MBG for design and development of a space utilization plan with the City having final approval of the design of the visitor's center/educational building:

- Developing all design and construction plans;
- Ensuring that necessary infrastructure and support facilities for the visitor's center/educational building are developed concurrent with, or prior to, the facility's development;
- Assumption of normal operating expenses such as utilities, custodial and routine repairs and maintenance activity.

RESPONSIBILITIES OF THE MBG:

MBG shall be responsible for the following activities within the garden area in a collaborative effort with the City which shall have final approval:

- MBG will promote and stimulate interest and community awareness in the activities of the botanical gardens, consistent with the Vision Statement of the MBG.
- Design of the garden area to include visitor and maintenance access, plant collections, thematic displays, irrigation, utility or ancillary structure siting as necessary;
- Development of necessary construction documents;
- Securing of funding for the development of the garden areas exclusive of those facilities to be provided by the City;
- Development and implementation of appropriate and necessary collection curatorial policies and inventory documentation and controls;
- Providing docent and educational programs and facilities to interpret the garden area;
- Development of a volunteer cadre to serve in the garden;
- Funding any maintenance above the base level provided by the City.
- Arranging appropriate liability coverage and/or waivers for MBG volunteers and/or staff who perform maintenance or program activity within the park. (Subject to review by the City Attorney)
- MBG operates on a fiscal year beginning on July 1 and ending on June 30. MBG will therefore provide an annual report to the City within three months of the end of each fiscal year to include major achievements and activities, a financial summary and report of operations and goals for the next year.

MBG shall be responsible for the following activities within the visitor's center/educational building:

- Securing of funding for the development, equipping and furnishing of the visitor's center/educational building.

Regardless of the method of generation, all revenues generated by MBG shall remain with MBG for the sole and exclusive benefit of the garden in McIntire Park. Beginning with Fiscal Year 2016, MBG shall provide a record of audit by a qualified, independent auditor, to the Director

ATTACHMENT 3 – DRAFT MOU BETWEEN CITY AND MCINTIRE BOTANICAL GARDEN

of Parks and Recreation for funds received and expended for any fiscal year by November 1 of the following fiscal year. This document shall be a public record.

ROUTINE REVIEW AND REFINEMENT

Review and amendment or modification of this agreement shall take place under one or more of the following circumstances:

- At intervals of not less than two (2) years;
- At the mutual agreement of both parties;
- Not less than one hundred twenty (120) days prior to opening of a significant component with any modifications being in place not less than sixty (60) days prior.

DRAFT