

OPERATING AGREEMENT: RACINE ZOOLOGICAL GARDENS

This Agreement is made this ____ day of _____, 2012 by and between the CITY OF RACINE, a municipal corporation of the State of Wisconsin (the "City") and the RACINE ZOOLOGICAL SOCIETY, INC., a non-profit corporation (as described in Title 26 Sec. 501(c)(3) U.S. Code) (the "Society").

In consideration of the mutual promises hereinafter set forth and for other good and valuable consideration, the City and the Society agree as follows:

SECTION 1 - GENERAL STATEMENT OF AGREEMENT

1.01 **Intent.** The City is the owner of the Racine Zoological Gardens (the "Zoo"), which consists of approximately 28 acres of land located at 2131-2153 North Main Street, Racine, Wisconsin, and a parking lot on the southeast corner of N. Wisconsin Street and Walton Avenue, and which are more particularly described as parcels 05945 and 04522 as shown in the attached Exhibit A. The Society has operated the Zoo pursuant to an Operating Agreement dated effective January 1, 2001 and its successor agreements. Both parties wish to have the Society to continue operating the Zoo for a four-year term to begin on January 1, 2013 and to end on December 31, 2016.

1.02 **Understandings of the Parties.** The parties to this agreement are the City and the Society. The City owns the Zoo properties, including its animal collection. The Society manages the operations of the property, the care of the animal collection, and oversees other events that are held on the grounds of the Zoo. The Society provides substantial capital contributions to the improvement of the Zoo's physical assets and its animal collection—capital improvements that the City comes to own. The Society annually provides substantial operating funds necessary to make the Zoo an exemplary, accredited facility. The City is the clear, and continuing, beneficiary of these efforts of the Society. The Society appreciates the constructive history of its relationship with the City—one that dates to 1924. Both parties enter into this Agreement with the intent to make this relationship a continuing hallmark of public-private endeavors.

1.03 **Society Organization.** The Racine Zoological Society shall be a Wisconsin Non-stock Corporation. All corporate powers shall be exercised by or under the authority of, and the business and affairs of the Corporation managed under the direction of the Board of Directors. The Board of Directors shall be comprised of a diverse group of individuals limited to fifteen members, the majority of whom shall reside or be employed in the City of Racine. Four members of the board, including the Director of the Board of Parks, Recreation and Cultural Services, shall be appointed by the mayor of the City.

SECTION 2 - OPERATING CONTROL

2.01 **General Operating Control.** General operating control of the Zoo is hereby granted to the Society for the term of this Agreement. For purposes of this Agreement, the expression “general operating control” means the full power and authority to administer, control and manage the operations of the Zoo in all respects and in such a manner as will beneficially serve the interests of the Zoo as determined by the Society, except as limited by this agreement. Authority retained by the City under this Agreement shall be exercised by its Common Council and Board of Parks, Recreation and Cultural Services (PRCS) Commissioners or their successors and articulated in this agreement.

2.02 **Society Authority and Responsibilities.** The authority and responsibilities granted to the Society under this Agreement include, the following, except as noted:

- (a) The management, administration, and control of Zoo exhibitions.
- (b) The conduct of education programs and other public programs and functions relating to Zoo exhibitions.
- (c) The right to subcontract for the provision of services and to negotiate and enter into lease agreements, subject to such contractors and lessees maintaining proper insurance coverage relating to the contracted service.
- (d) The authority to schedule Zoo events by individuals, community groups, and other entities. The City reserves the right to continue existing City sponsored special events, which shall be scheduled in cooperation with the Society in such a way as not to interfere with the operation of the Zoo. This reservation of rights includes Racine Concert Band concerts and summer playground activities.
- (e) The authority to designate the uses to which the Zoo grounds and facilities may be put, subject to reserved City uses as set forth under Section 2.02(d).
- (f) The employment of all Zoo staff, excepting that the City has the right to participate in the recruitment, interviewing, hiring, and termination of the President/CEO. These personnel shall be deemed employees of the Society, which shall establish employee compensation, benefits, and shall determine other conditions of employment. In 2013, the Society shall have prepared a comprehensive long term plan for Human Resources management. Zoo personnel shall be trained to discharge duties relating to animal care and general Zoo operation and maintenance and shall be

trained to deal with the public in a courteous and helpful manner in a recreational setting. The Society shall comply with all applicable federal, state, and local employment laws.

(g) The performance of *regular maintenance* on Zoo structures and equipment owned by the City will be the sole responsibility of the Society. ("Regular maintenance" shall mean the set of activities that a reasonable custodian of an asset would undertake to make certain that a structure, an animal, or a piece of equipment, remains a functional capital component of Zoo operations. Examples would be these: painting of exposed wood surfaces, replacement of worn-out tires on vehicles, landscaping and tree trimming, and regular medical care for the animal collection.)

The Society may request assistance with regular maintenance from City Departments in situations in which the Society believes the Department may be able to perform the specific maintenance required with City personnel in a more cost efficient manner, subject to payment by the Society of the cost of materials associated with such work. The city may elect to perform some "regular" maintenance in situations where the city chooses to do so.

(h) The management and control over buildings and land described in Exhibit A. This management and control includes the public sidewalks and parkway panels adjacent to the land described in Exhibit A. The Society is responsible for grass cutting and watering, flower planting and watering, snow plowing, salting and sanding, trash removal, janitorial services and the furnishing of chemical supplies with respect to the real estate under its management and control. Snow and ice control in the N. Wisconsin St. parking lot shall be retained by the PRCS.

(i) The Society may make capital improvements to the real estate subject to City approval, which approval will not be unreasonably withheld, although legal title to the above-described real estate remains with the City. For purposes of this Agreement, capital improvement shall include the construction, demolition, removal, or major alteration of buildings, and major excavations or alterations in the contour of land. When entering into a contract for capital improvements, the Society shall designate one person, only, to be authorized to approve change orders for the contract. The Society is also authorized to perform ordinary and necessary landscaping. The removal of mature trees is subject to the City's approval, which approval will not be unreasonably withheld. The Society shall not place, permit, or cause to be placed or any liens or encumbrances on City owned real estate.

(j) The Society is responsible for obtaining necessary licenses and permits.

(k) The Society is responsible for soliciting contributions and Society memberships from the general public, which funds shall be used for the benefit of Zoo operations and capital improvements.

SECTION 3 - GENERAL INTENT

3.01 **Quality of Operation.** It is the intent of the parties that a quality zoo continues to be maintained and operated in the City for the recreational enjoyment of the general public. In addition to the rights and responsibilities enumerated in Section 2, the Society is authorized to perform such other functions as may be necessary for the operation of the Zoo for the benefit of the general public. The Society shall strive to maintain a standard of Zoo operations that comports with the requirements of accreditation under the Standards of the Association of Zoos and Aquariums. The operations of the Zoo by the Society shall further comply in all material respects with all applicable federal, state, and municipal laws and regulations.

SECTION 4 - CITY RESPONSIBILITIES

4.01 **City Functions.** During the term of this Agreement the City shall perform the following functions:

(a) The City shall be responsible for major Capital Improvements typically provided in a “landlord-tenant” relationship, except as limited by this agreement.

The Society may implement capital improvement projects, the cost of which is estimated to be less than the amount requiring public bidding under Wis. Stat. §62.15, and which are not jointly financed with City dollars, without pre-approval by the City.

The Society may implement capital improvement projects to be included in the City’s Capital Improvement Plan (“CIP”). Capital improvement projects that require public bidding shall be subject to City’s specific prior approval. City shall promptly review or cause to be reviewed capital improvement projects recommended to it by the Society.

Capital projects requiring City’s prior specific approval shall be submitted in writing to the City of Racine Common Council through the City Clerk, with a copy to the Director of PRCS and the

Facilities Manager, to be referred to the proper committee or commission for review. The City agrees that if such a capital improvement project is to be financed solely from Society funds, the approval of said project by the City will not be unreasonably withheld.

(b) The City shall retain title to the real estate, which is made the subject of this Agreement, and shall include all buildings and improvements thereon and shall retain these in its insurance coverage so as to protect the City's interest therein, such insurance to be as set forth in 9.02.

SECTION 5 - CITY SUBSIDY

5.01 **Subsidy**. The City acknowledges that the Society is not capable of providing all of the financial needs for Zoo operations. Therefore, the City agrees to pay a fixed sum toward those operations in addition to capital improvements referred in this agreement. The City shall contribute to the Society the sum of \$607,097 per year in operating years 2013 and 2014. In subsequent contract years, the city shall budget an amount not less than 90% of the 2013 amount. Notice of the budgeted amount will be communicated to the Society by November 1 each year. In 2013, the Society shall have prepared a comprehensive long term plan for financial sustainability.

5.02 **Payments/Financial Reporting**. All payments in support of operations shall be made, payable quarterly in the first month of each quarter, by the City to the Treasurer of the Society at an address or to a depository to be furnished in writing by the Society to the City Finance Director. The Society shall submit an annual audited financial report to the City by July 1 of each year, such report being for the preceding year. Failure to produce said report will result in suspension of quarterly payments pending receipt of the audit.

5.03 **Books and Records**. The Society shall provide to the City a copy of its annual operating budget in September of the preceding year. The Society further agrees that the City Finance Director may inspect the books and records of the Society relating to Zoo operations and may audit or cause to be audited these books and records. The Society shall further submit, when requested by City's Finance Director, statistical records relating to the use and activities of the Zoo.

SECTION 6 - TERM

6.01 **Term.** This Agreement is for a four year term from January 1, 2013 through December 31, 2016.

6.02 **Breach.** Either party may terminate this Agreement for a material breach of any of the terms and conditions of this Agreement. Such termination shall be effective ninety days after written termination notice is sent by one party to the other. The termination notice shall state the alleged breach of the Agreement that forms the basis of the termination notice. The notice shall further provide that unless the violation is corrected within a thirty day period, the Agreement shall terminate at the end of the ninety day period. The parties may mutually agree to terminate the contract at any time.

6.03 **Effect of Termination.** Upon termination, the general operating control of the Zoo shall be returned to the City effective on the date of termination. In addition, all equipment and supplies in the possession of the Society and owned by the City shall be returned to the City. It is further agreed that all capital improvements placed at the Zoo, whether at Society's expense or at the City's expense, shall become the property of the City on the date of termination.

6.04 **Suspension.** The City further reserves the right to suspend the Society's right under this Agreement to operate the Zoo if it determines that an emergency involving public health or safety or the health or safety of the Zoo animals exists. Such suspension shall be on such terms and conditions as may be prescribed by the Mayor of the City of Racine and shall be of such duration as to insure that public health and safety and the welfare of the Zoo animals are secure.

SECTION 7 - ZOO ANIMALS

7.01 **Custody of Animals.** The City has previously transferred custody and control of all animals on exhibit at the Zoo to the Society. This custody and control shall continue for the term of this Agreement. This transfer of custody and control is intended to be for the purpose of safekeeping of the Zoo animals and convenient operation of the Zoo by the Society. The Society agrees to accept said custody and control and, further, shall take and maintain a written inventory of said animals. The Society further agrees that it shall treat, keep and care for said animals to the best of its ability. The Society shall have the authority to sell or trade animals for the sole purpose of improving the exhibits at the Zoo and shall annually provide the City with a current inventory of said animals. The Society further agrees to maintain an inventory of animals in substantially the same number or increased numbers during the term of this Agreement so as to provide a suitable number of animal exhibits for the interest of the general public. The Society shall provide all care and maintenance for the animals at its expense.

SECTION 8 - CITY ACCESS

8.01 **Zoo Access.** The City shall at all times, through its authorized representatives, as designated by the Director of PRCS have access without restriction

to all parts of the Zoo. The Society shall keep the Zoo open to the general public during the term of this Agreement on a regular basis at such times as shall afford the general public an opportunity to have reasonable access thereto. The Society is authorized to make and enforce rules and regulations affecting public use of the Zoo as may be necessary to insure an orderly operation and in the interest of public health and safety, and the health and safety of the Zoo animals. The Society shall submit a current list of these rules and regulations to the City by January 15 of each year.

8.02 **Discrimination.** The Society agrees that its operation of the Zoo will not deny any person its use or otherwise discriminate against any persons, including any employee, or permit discrimination against any person or group of persons in any manner prohibited by applicable federal, state, or local law.

SECTION 9 - MISCELLANEOUS

9.01 **Notices.** All notices under this Agreement shall be sent in writing to the address of the parties as follows: The City's address is City of Racine, Office of the City Clerk, 730 Washington Avenue, Racine, Wisconsin 53403. The Society's address is 200 Gould Street, Racine, Wisconsin 53402. At the termination or expiration of this Agreement, control and operation of the Zoo shall revert to the City. The Society shall thereafter have a reasonable time within which to remove any equipment and other items of personal property that it owns.

9.02 **Insurance and Indemnification.**

(a) The City shall maintain property insurance at a level equal to or exceeding the value of all buildings, fixtures, and other insurable real property at the premises described in Exhibit A.

(b) Unless otherwise specified in this Agreement, the Society shall at its sole expense, maintain in effect at all times during the term of this Agreement, insurance coverage with limits not less than those set forth below with insurers and under forms of policies set forth below.

Worker's Compensation and Employers Liability Insurance

The Society shall cover or insure, under the applicable labor laws relating to Worker's Compensation insurance, all of its employees in accordance with the law in the State of Wisconsin. The Society shall provide statutory coverage for work related injuries and employer's liability insurance with limits of \$1,000,000 each accident, \$1,000,000 disease policy limit, and \$1,000,000 disease each employee.

Commercial General Liability and Automobile Liability Insurance

The Society shall provide and maintain the following commercial general liability and automobile liability insurance:

Coverage – Coverage for commercial general liability and automobile liability insurance shall be at least as broad as the following:

1. Insurance Services Office (ISO) Commercial General Liability Coverage (Occurrence Form CG0001)
2. Insurance Services Office (ISO) Business Auto Coverage (Form CA 0001), covering Symbol 1 (any vehicle)

Limits - The Society shall maintain limits no less than the following:

1. General Liability - One million dollars (\$1,000,000) per occurrence (\$2,000,000 general aggregate if applicable) for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to operation of the Zoo and to the premises described in Exhibit A (with the ISO CG 2503, or ISO CG 2504, or insurer's equivalent endorsement provided to the City) or the general aggregate shall be twice the required occurrence limit.
2. Automobile Liability - One million dollars (\$1,000,000) for bodily injury and property damage per occurrence limit covering all vehicles to be used in relationship to the Agreement.
3. Umbrella Liability - Two Million dollars (\$2,000,000) in calendar year 2013 for bodily injury, personal injury and property damage per occurrence in excess of coverage carried for Employers' Liability, Commercial General Liability and Automobile Liability as described above. This coverage will increase to Three Million dollars (\$3,000,000) in calendar year 2014, to Four Million dollars (\$4,000,000) in calendar year 2015, and to Five Million dollars (\$5,000,000) in 2016.
4. Liquor Liability - One million dollars (\$1,000,000) per claim and annual aggregate.

Required Provisions - The general liability and automobile liability policies are to contain, or be endorsed to contain, the following provisions:

1. The City its elected and appointed officials, officers, employees or authorized representatives or volunteers shall be given additional insured status (via ISO endorsement CG 2010, CG 2033, or insurer's equivalent for general liability coverage) as respects: liability arising out of activities performed by or on behalf of the Society; products and completed operations of the Society;

premises occupied or used by the Society; and vehicles owned, leased, hired or borrowed by the Society. The coverage shall contain no special limitations on the scope of protection afforded to the City, its elected and appointed officials, officers, employees or authorized representatives or volunteers.

2. For any claims related to the operation of the Zoo, the Society's insurance shall be primary insurance as respects the City, its elected and appointed officials, officers, employees or authorized representatives or volunteers. Any insurance, self-insurance, or other coverage maintained by the City, its elected and appointed officials, officers, employees, or authorized representatives or volunteers shall not contribute to it.

3. Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not affect coverage provided to the City, its elected and appointed officials, officers, employees or authorized representatives or volunteers.

4. The Society's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

5. Each insurance policy required by this agreement shall state, or be endorsed to state, that coverage shall not be canceled by the insurance carrier or the Society, except after 60 days, or 10 days for non-payment of premium, prior written notice by U.S. mail has been given to the City.

6. Such liability insurance shall indemnify the City against loss from liability imposed by law upon, or assumed under contract by, the Society for damages on account of such bodily injury (including death), property damage, personal injury, completed operations, and products liability.

7. The general liability policy shall cover bodily injury and property damage liability, owned and non-owned equipment, blanket contractual liability, completed operations liability, explosion, collapse, underground excavation, and removal of lateral support, and shall not contain exclusion for what is commonly referred to by the insurers as the "XCU" hazards. The automobile liability policy shall cover all owned, non-owned, and hired vehicles. All of the insurance shall be provided on policy forms and through companies satisfactory to the City, and shall have a minimum A.M. Best's rating of AVII.

Deductibles and Self-Insured Retentions - Any deductible or self-insured retention must be declared to and approved by the City. At

the option of the City, its elected and appointed officials, officers, employees, or authorized representatives or volunteers, the insurer shall either reduce or eliminate such deductibles or self-insured retentions.

Evidences of Insurance - Prior to execution of the agreement, the Society shall file with the City a certificate of insurance (Accord Form 25-S or equivalent) signed by the insurer's representative evidencing the coverage required by this agreement. Such evidence shall include an additional insured endorsement signed by the insurer's representative. Such evidence shall also include confirmation that coverage includes or has been modified to include all required provisions 1-5. The Society shall, upon demand of the City, deliver to the City such policy or policies of insurance and the receipts for payment of premiums thereon.

Continuation of Coverage - If any of the required coverages expire during the term of this agreement, the Society shall deliver the renewal certificate(s) including the general liability additional insured endorsement to the City, at least 30 days prior to the expiration date.

(c) To the fullest extent allowable by law, the Society hereby indemnifies and shall defend and hold harmless City, its elected and appointed officials, officers, employees, or authorized representatives or volunteers and each of them from and against any and all suits, actions, legal or administrative proceedings, claims, demands, damages, liabilities, interest, attorneys' fees, costs, and expenses of whatsoever kind or nature whether arising before, during, or after the operation of the Zoo and in any manner directly or indirectly caused, occasioned, or contributed to in whole or in part or claimed to be caused, occasioned, or contributed to in whole or in part, by reason of any act, omission, fault, or negligence, whether active or passive, of the Society its elected and appointed officials, officers, employees, or authorized representatives or volunteers and each of them in connection with or incident to the performance of this Agreement regardless if liability without fault is sought to be imposed on the City.

The Society's aforesaid indemnification and hold harmless agreement shall not be applicable to any liability caused by the sole fault, sole negligence, or willful misconduct of the City or the City's representatives. This indemnity provision shall survive the termination or expiration of this Agreement. In any and all claims against the City, or any of its elected and appointed officials, officers, employees, or authorized representatives or volunteers by an official, officer, or employee of the Society, or anyone for whose acts any of them may be liable, the indemnification obligation under this paragraph shall not be limited in any way by any limitation on

the amount or type of damages, compensation, or benefits payable by or for the Society under worker's compensation acts, disability benefit acts, or other employee benefit acts.

No provision of this indemnification clause shall give rise to any duties not otherwise provided for by this Agreement or by operation of law. No provision of this indemnification clause shall be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity that would otherwise exist as to City of under this or any other contract or any applicable law.

The Society shall reimburse City, or any of its elected and appointed officials, officers, employees, or authorized representatives or volunteers, for any and all legal expenses and costs incurred by each of them in connection therewith or in enforcing the indemnity herein provided. The Society's obligation to indemnify shall not be restricted to insurance proceeds, if any, received by City, or any of its directors, officers, employees or authorized representatives or volunteers and each of them.

9.03 **Assignability**. The Society is prohibited from assigning this Agreement or any portion thereof to any third persons without the prior written consent of the City.

9.04 **Severability**. In the event that any part or portion of this Agreement shall be declared invalid by a court of competent jurisdiction or is otherwise determined to be in violation of any law, it is agreed that the balance of this Agreement (exclusive of the section or portion determined to be invalid or unlawful) shall remain in full force and effect.

9.05 **Modification**. This Agreement may not be modified or added to by any agreement or representation that is not expressly set forth in this document. This Agreement may only be changed or modified by an agreement that is in writing and has been duly authorized and executed by both parties to this Agreement.

9.06 **Exhibits**. Exhibit A is expressly made a part of this Agreement.

9.07 **Captions**. Caption designations are for reference only. They shall not be deemed to interpret, modify, or in any way limit the meaning of this Agreement.

9.08 **Waiver**. The waiver by either party of nonperformance or any breach of any provision of this Agreement will not constitute a waiver of any subsequent nonperformance or other breach of the same or any other provision.

IN WITNESS WHEREOF, the parties have set their hands and seal on the date first written.

CITY OF RACINE

RACINE ZOOLOGICAL SOCIETY, INC.

John T. Dickert, Mayor

Gregory C. Mayer, Board Chair

Attest:

Janice Johnson-Martin, City Clerk

APPROVED AS TO FORM:

Robert K. Weber, City Attorney

Provisions have been made to pay the liability that will accrue hereunder.

David Brown, Finance Director