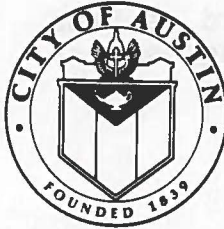


Who is keeping revenue
currently generated?
CoA #!



MEMORANDUM

L & F: add Financial
bond or ins.
ISSUE 1 to back cost if
contractor fails
to reduce financial
liability: contractor finan
inst.
ISSUE 2: Termination for
convenience - Remove

TO: Members of the Parks and Recreation Board

FROM: Prenis Williams, Acting Director
Parks and Recreation Department

DATE: January 5, 1990

SUBJECT: Umlauf Sculpture Garden Agreements

On February 28, 1989, during the regularly scheduled meeting of the Parks and Recreation Board, Mrs. Roberta Crenshaw, Member Emeritus of the Board, made a presentation on the progress of the Umlauf Sculpture Garden project. No action was requested of or taken by the Board at that time.

Charles Umlauf, a world renowned sculptor, and his wife, Angeline, have made a gift to the City of their current residence at 506 Barton Boulevard with its sculpture-filled garden and his studio. The couple have a life estate on the property, and conduct a limited number of tours by reservation.

Mrs. Crenshaw wants to build a public visitors center and new sculpture garden on land owned by the City and adjacent to the existing Umlauf property, in order to more fully expose the public to Mr. Umlauf's work, particularly while he is still alive and producing new work. She has organized the Umlauf Sculpture Garden, Inc. (USG), a non-profit organization, to raise funds not only for construction of the project, but also for an endowment for its operation, maintenance and further improvement. The USG will be responsible for construction and construction costs of the project.

After construction is completed, Mrs. Crenshaw wants to make a gift of the new facility to the City. Such a gift is unprecedented in the history of the Parks and Recreation Department in that it includes not only a new facility but also an endowment for its operation.

The Friends of the Umlauf Sculpture Garden (FUSG), a non-profit organization, will be responsible for operation, programming, staffing and managing the new facility and for all the attendant costs. Hours of operation, entrance and reservation fees and the annual operating budget for the new facility will be approved by the City. The City will pay no part of this operating budget. The City will be responsible only for basic grounds maintenance, subject to the City Council's annual approval of such duties in the annual operating budget of the Department.

PARD staff have been working with Mrs. Crenshaw and her advisors to bring this unique project to fruition. Final negotiations involve the approval and signing of the two attached legal agreements, a **Community Facilities Agreement** for construction of the facility and a **Maintenance, Operation and Improvements Agreement**. Both agreements have been through extensive review by all parties concerned and have received approval from their attorneys.

There are, however, two points which will be decided by the City Manager and the City Council. The first point has to do with the financial vulnerability of the City during the construction period. The second point is over whether to eliminate the "Termination for Convenience" clause in the Maintenance, Operation and Improvements Agreement.

At the beginning of the January 8th Board meeting, members will visit both the sculpture garden at the Umlauf home and the adjoining site where the new visitors center and sculpture garden are proposed for construction. Upon return to the Department, staff will briefly summarize the project and the two agreements, and the Board will be asked to approve the agreements.

The main points of each agreement follow.

Parties to the **Community Facilities Agreement** are the City, the **Umlauf Sculpture Garden, Inc. (USG)** and the **Austin Community Foundation for the Capital Area (Foundation)**.

- o A new public visitors center and sculpture garden will be constructed by USG, a non-profit organization, on land owned by the City and adjoining the existing Umlauf property. USG is the primary fund-raiser for the project.

- o A Construction Fund has been established with the Austin Community Foundation for all funds raised to pay the construction costs of the improvements. Construction costs, including overruns, will be the responsibility of the USG, except for \$179,395 which the Council has appropriated for drainage improvement and utility work at the site.

- o The Foundation agrees to guarantee all payments necessary for the faithful construction of the improvements, up to 15% above the estimated construction cost.

- o These improvements will be dedicated to the City, and will be open to the public. Hours of operation and fees will be approved by the City.

Parties to the Maintenance, Operation and Improvements Agreement are the City, the Friends of the Umlauf Sculpture Garden (FUSG) and the Austin Community Foundation for the Capital Area. This Agreement is Exhibit "D" to the Community Facilities Agreement.

- o An Umlauf Endowment Fund has been established with the Foundation for the purpose of providing financial support for the operation, maintenance and further improvement of the garden project. The Foundation will distribute income from the Fund to the Friends (FUSG) for the operation, maintenance and further improvement of the garden project.

- o Upon acceptance of the improvements by the City, the City will be responsible for basic grounds maintenance only, which is defined as mowing and trimming, litter pickup on the grounds and parking lot, routine forestry and horticultural services, and routine irrigation system repair.

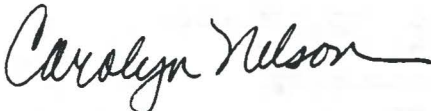
- o FUSG will be responsible for all other maintenance and operations, including but not limited to maintenance and repair of the visitors center and parking lot, staffing the visitors center, special security to

protect the center and outdoor sculptures, public information costs, utility costs, maintenance of insurance, maintenance of special water features, and major trail and irrigation system repair.

- o FUSG will submit two reports each year, one on the year just past and the other a plan for the upcoming year. The second report will be in the form of a budget and must be approved by the City.

- o Should the City, for any reason, assume the duties of operating and maintaining the facility, the Foundation will distribute income from the Endowment Fund to the City to pay for these costs.

RECOMMENDATION: Approve the Community Facilities Agreement and the Maintenance, Operation and Improvements Agreement, deferring to the decisions of the City Manager and City Council on the two outstanding points mentioned above.



for Prenis Williams, Acting Director
Parks and Recreation Department

PW:SC
Attachments

DRAFT: 1/5/90

COMMUNITY FACILITIES AGREEMENT BETWEEN
THE CITY OF AUSTIN AND
THE UMLAUF SCULPTURE GARDEN, INC.

This Community Facilities Agreement ("Agreement") is entered into by the City of Austin ("City"), acting by and through its authorized representative, Alicia Perez, Assistant City Manager; the Umlauf Sculpture Garden, Inc. ("USG"), acting by and through its authorized representative, Mrs. Roberta P. Crenshaw; and the Austin Community Foundation for the Capital Area, acting by and through its authorized representative, George More, President.

The USG, a charitable organization, wishes to fund the construction of certain improvements described in Exhibit "A," attached hereto and incorporated by reference for all purposes (the "Improvements"), in connection with and as part of the Umlauf Sculpture Garden, located at 605 Robert E. Lee Road, Austin, Texas (the "Garden").

A Construction Fund (Fund) has been established with the Austin Community Foundation (Foundation) for the purpose of paying the construction costs of the Improvements, under that certain document styled "The Meadows Foundation Grant Contract," referenced and incorporated herein.

The Improvements shall be donated to the City by USG.

Access to the Improvements shall be available to the public for the purpose of viewing the statuary donated by Charles and Angeline Umlauf to the City.

The purpose of this Agreement is to set forth the responsibilities of the City, the USG and the Foundation in the

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construction, renovation and payment of the Improvements.

The parties, therefore, in consideration of the mutual covenants expressed in the Agreement, agree as follows:

SECTION I
Term

The term of this Agreement shall be for a two (2) year period, commencing on the date of execution by all parties.

SECTION II
Services Performed by the USG

A. The USG agrees to construct the Improvements described in Exhibit "A". The Improvements shall be constructed according to construction documents approved by the Parks and Recreation Department, attached as Exhibit "B", and incorporated by reference for all purposes. The USG agrees to follow all City rules and regulations regarding permits and approvals relating to the construction of the Improvements.

B. The City grants unto the USG, its contractors, subcontractors, employees, agents, or assigns who are responsible for any construction of the Improvements, or any related activity, the right to enter upon the tract of land on which the Garden is located, described in Exhibit "C", attached and incorporated by reference for all purposes, and to conduct such construction activities as may be necessary to comply with the construction documents. This right of entry shall expire automatically, for the purposes stated in this Agreement, upon completion of the construction activities authorized by this Agreement.

C. The City, at its sole expense, retains the right to enter

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upon the tract of land described in Exhibit "C" to inspect and to exercise its rights or duties in order to protect persons, property or the public interest in this property.

SECTION III
Responsibilities and Costs

A. The total estimated cost of construction of the Improvements described in Exhibit "A" is \$550 - 580 K, payment of which shall be made by the USG. The parties acknowledge that the City may assume responsibility, at its discretion, of certain costs to assist in the construction of the Improvements.

B. Any increase or decrease in the actual construction costs of the Improvements, including cost increases, change orders, and overruns, shall be borne by the USG. Construction costs include, but are not limited to, labor costs, material costs, design costs, engineering costs, legal fees, inspection fees, insurance costs, and any other costs incurred in the construction of the Improvements.

C. The Foundation agrees to guarantee all payments necessary for the faithful construction of the Improvements, up to the estimated cost of construction set forth above, as adjusted for documented increases due to cost changes, change orders or cost overruns. The Foundation shall not be obligated to guarantee payments in excess of fifteen percent (15%) above the estimated cost of construction.

SECTION IV
Completion of Work

The USG shall complete work required on the Improvements on or before two (2) years from the date of signing. An extension

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of time to complete all work required by this Agreement may be granted by the City for good cause shown. All work shall be subject to the approval of the City and, if necessary, any other governmental entity having jurisdiction.

SECTION V
Ownership of Improvements

- A. Both during and after construction of the Improvements, the City will be entitled to inspect construction to ensure that it complies with the approved construction documents.
- B. Upon completion of the Improvements, the USG will deliver to the City written notice that the Improvements have been completed ("Completion Notice"). Within 60 days of receipt of the Completion Notice, the City shall respond to the USG by either submitting a list of items still requiring completion in accordance with the approved construction documents or accepting the Improvements.
- C. The USG shall execute all necessary documents, as shall reasonably be required by the City, to evidence the dedication of the Improvements to the City free and clear of all claims and liens. Acceptance of the Improvements shall be evidenced by a letter of acceptance from the City.

SECTION VI
Warranties

Upon completion and acceptance of the Improvements, the USG shall assign to the City, without further recourse against the USG, all warranties that the USG may have with respect to the Improvements.

SECTION VII
Maintenance, Operation and Further Improvements

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A. Upon acceptance of the Improvements by the City, responsibilities for maintenance and operation shall be governed by the agreement attached as Exhibit "D" and entitled "Umlauf Sculpture Garden Maintenance, Operation and Improvements Agreement."

B. The City, the USG and the Foundation contemplate that during the term of this agreement the parties may agree upon further improvements to be constructed by USG in connection with and as part of the Garden. Upon mutual written agreement by the parties as to such further improvements, such further improvements may be constructed pursuant to and in accordance with the provisions of this Agreement.

SECTION VIII Liability and Indemnification

A. The USG shall be responsible for any liability for accident or injury which occurs during construction of the Improvements as a result of, or related to, any construction activity, except as otherwise specified in this Agreement.

B. The USG shall indemnify and hold harmless the City, its employees, and agents against any claims, causes of action, personal injuries, or damages, including, but not limited to, reasonable attorneys' fees from, or in connection with, the negligent acts or omissions of the USG, its agents, employees, contractors, or subcontractors in the design and construction of the Improvements.

SECTION IX Insurance

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- A. The USG shall procure, and maintain in full force and effect for the duration of this Agreement, and until acceptance of the Improvements by the City, a minimum of \$1,000,000.00 general liability insurance with minimum limits of \$1,000,000.00 bodily injury and \$250,000.00 property damage limits for each occurrence, with the City named as an additional insured. The USG shall not begin construction of the Improvements until the USG has provided to the City a Certificate of Insurance for the amount required. The USG's insurance policy shall also require the insurance company to notify the City of any changes to the policy at least 30 days before such change becomes effective.
- B. The USG shall require the contractor who is responsible for constructing the Improvements to procure and maintain statutory limits of worker's compensation coverage and a minimum of \$100,000 employer's liability insurance for the duration of the construction contract.

SECTION X
Designation of City Representative

The City designates the Director of the Parks and Recreation Department (hereafter the "Director") as the representative authorized to act on the City's behalf with respect to the construction of the Improvements.

SECTION XI
Termination of Contract

A. Termination of Contract for Cause

(1) If the USG fails properly to fulfill its obligations under this Agreement in a timely manner, or if the USG violates any of the provisions of this Agreement, then the City shall

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notify the USG in writing (with a copy to the Foundation), of the specific violations of the contract. The USG shall have 60 days from receipt of this notice in which to cure any such violations. If the violation cannot reasonably be cured within this 60-day period, and the USG has diligently pursued such remedies as shall be reasonably necessary to cure such default, then the parties may agree in writing to an extension of the period in which the violation must be cured.

(2) If, however, the USG has not cured the violation as specified in the written notice or any extension within the time provided, then the City, at its sole option, shall have the right to terminate this Agreement. This termination shall be made by sending written notice of termination to the USG. This "Notice of Termination" shall be effective for all purposes when deposited in the U.S. Mail, postage prepaid, and mailed Certified Mail, Return Receipt requested. A copy of such notice shall be given to the Foundation in the same manner. Upon depositing the "Notice of Termination" with the U.S. Mail, as specified above, the City may take control and possession of any contract documents, rights, improvements, etc. without recourse by the USG.

(3) If the USG defaults under this Agreement, then the City shall assume all responsibility for the Improvements. The City shall then be liable for any claims, injuries, or losses resulting from the negligent acts or omissions of the City, its employees or agents as of the date of the "Notice of Termination."

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(4) Despite any other provisions in this Agreement to the contrary, if the City elects to terminate this Agreement and to accept the Improvements in their current state as of the date on which the City terminates this Agreement, then:

(a) the USG shall pay to the City the sum of money necessary to complete construction of the Improvements. This sum shall include any increases or decreases in the actual costs of the Improvements as described in Sections III.A. and III.B., including cost increases and decreases, change orders and overruns in effect as of the date of termination. Such sum shall be held and used by the City solely for the purpose of construction of the Improvements.

(b) if the USG is unable to pay such sum, then the Foundation shall pay to the City such sum as it is obligated to guarantee under Section III.C. above. Payments received by the City under this paragraph (b) shall be held and used by the City solely for the purpose of construction of the Improvements.

B. Termination of Contract Due to Inability to Perform

Either the City or the USG may terminate this Agreement if the other party fails substantially to perform according to its terms, through no fault of the party initiating the termination. Such termination procedure shall be the same as in Section XI.A., above.

SECTION XII
Miscellaneous Provisions

A. This Agreement constitutes the entire agreement between the

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parties. Any previous agreement, assertion, statement, understanding, or other commitment before the date of this contract, whether written or oral, shall have no force or effect. No agreement, assertion, statement, understanding, or other commitment during the term of this Agreement, or after the term of the Agreement, shall have any legal force or effect unless properly executed in writing by the parties and approved by the City Council.

B. Regardless of the actual drafter of this Agreement, this Agreement shall, in the event of any dispute over its meaning or application, be interpreted fairly and reasonably, and neither more strongly for or against any party.

C. This Agreement is made, and shall be construed and interpreted under the laws of the State of Texas and venue for any lawsuit concerning this Agreement shall lie in the City of Austin, Travis County, Texas.

D. All official communications and notices required to be made under this contract shall be deemed made if sent postage prepaid to the parties at the addresses listed below, unless otherwise specified elsewhere in this contract:

City of Austin
Director, Parks and Recreation Department
P.O. Box 1088
Austin, Texas 78767

Umlauf Sculpture Garden, Inc.
c/o Mrs. Roberta P. Crenshaw, President
1811 West 35th Street
Austin, Texas 78703

Austin Community Foundation for the Capital Area
c/o Richard G. Slaughter, Executive Director
P.O. Box 5159
Austin, Texas 78763

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E. The City, the UGS and the Foundation respectively, bind themselves, their successors in interest, assigns and legal representatives to this Agreement. Neither the USG nor the Foundation shall assign or transfer any interest in this Agreement without the prior written consent of the City.

SECTION XIII
Severability

If the final judgment of a court of competent jurisdiction invalidates any part of this Agreement, then the remaining parts of this Agreement shall remain in full effect.

SECTION XIV
Waiver

If at any time the City, its successors or assigns, fails to enforce this Agreement, whether or not any violations of it are known, such failure shall not constitute a waiver or estoppel of the right to enforce it.

SECTION XV
No Recourse

No recourse shall be had against any elected official, director, officer, attorney, agent, or employee of the City, of the UGS or of the Foundation whether in office on the effective date of this Agreement or after such date, for any claim based upon this Agreement.

The Agreement shall be effective on the date of execution by all parties. Witness our hands at the City of Austin, Travis County, Texas.

CITY OF AUSTIN

DRAFT: 1/5/90

By: _____
Alicia Perez
Assistant City Manager

Date: _____

UMLAUF SCULPTURE GARDEN, INC.

By: _____
Mrs. Roberta P. Crenshaw
President

Date: _____

AUSTIN COMMUNITY FOUNDATION FOR THE CAPITAL AREA

By: _____
George More
President

Date: _____

APPROVED AS TO FORM:

CITY OF AUSTIN

By: _____
Assistant City Attorney
Attorney for City of Austin

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RC:mr

defined as mowing and trimming, litter pickup on the grounds and parking lot, routine forestry and horticultural services, and routine irrigation system repair.

2. FUSG shall assume responsibility for all other maintenance and operations required by the Garden facilities, including but not limited to maintenance and repair of the visitors center and parking lot, staffing the visitors center, special security to protect the center and outdoor sculptures, public information costs, utility costs, maintenance of insurance, maintenance of special water features, and major trail and irrigation system repair.

3. FUSG shall manage, operate and program the Garden to exhibit the artistic works of Charles Umlauf and shall be responsible for staging artistic exhibits and events, and for scheduling the use of the facility for special meetings or events. FUSG shall operate the Garden on a fiscal cycle corresponding to that of the City's fiscal year. By March 1 of each year during which this agreement is in force, FUSG shall submit to the City for its approval a proposed plan for the upcoming fiscal year. The plan shall include such information as will enable the City to evaluate the overall operation and maintenance of the Garden and shall include information on operating expenses, staffing, capital improvements, programs, exhibits, events, revenues and the use of revenues.

4. After the close of each fiscal year and no later than the January following, FUSG shall submit an annual report for the preceding year on such forms as the City may supply or require. The report shall present information as to programs, exhibits or events conducted, attendance, revenues and expenditures and such other information as may be required by the City to assess the operation and maintenance of the Garden. The City shall have the right to examine during regular business hours all documents or records relating to the operation, maintenance or improvement of the Garden under this agreement.

5. The Garden shall be open to the public. The hours of operation and fees to be charged shall be determined by FUSG and shall be subject to annual approval by the City. Garden facilities shall be available to the City free of charge for up to thirty (30) days each year, provided that the City shall not take more than three (3) days consecutively nor more than six (6) days in any one month. Use of the facilities by the City shall not interfere with ongoing exhibits. Upon request by the City, FUSG shall meet with the City during December or such other month as may be agreed to schedule dates certain for use by the City.

EXHIBIT D

UMLAUF SCULPTURE GARDEN
MAINTENANCE, OPERATION AND IMPROVEMENTS AGREEMENT

I. RECITALS

The construction of the Umlauf Sculpture Garden (Garden) at 605 Robert E. Lee Road is a cooperative effort between the City of Austin and the Umlauf Sculpture Garden, Inc. (USG), a private support group founded for the primary purpose of constructing the Garden. The purpose of the Garden is to display the artistic works of Charles Umlauf for public enjoyment and education.

It is understood that USG will be solely responsible for constructing the Improvements on land owned by the City of Austin, and for dedicating the Improvements to the City. That understanding is the subject of the separate Umlauf Sculpture Garden Community Facilities Agreement of which this Agreement is Exhibit D.

It is furthermore understood that responsibility for maintenance, operation and further improvements at the Garden will be shared by the City of Austin and Friends of the Umlauf Sculpture Garden, Inc. (FUSG). It is acknowledged that an Umlauf Endowment Fund (Fund) has been established with the Austin Community Foundation (Foundation) for the purpose of providing financial support for the operation, maintenance and further improvement of the Garden under that certain document styled "Memorandum of Understanding Regarding Umlauf Endowment Fund," referenced and incorporated herein. The respective responsibilities of the parties are the subject of this Agreement.

II. TERM

The term of this agreement shall be for a period of up to ten (10) years from the date of execution. The Agreement may be extended for 2 additional periods of up to ten (10) years upon the consent of both parties.

III. RESPONSIBILITIES

A. Operation, Maintenance and Improvements

1. Upon acceptance of the Improvements by the City and subject to the City Council's annual approval of such duties in the annual operating budget of the Parks and Recreation Department, the City shall assume responsibility for basic grounds maintenance at the Garden. Basic grounds maintenance shall be

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6. FUSG shall assume responsibility for further improvements to the Garden. No improvements beyond routine repair or maintenance shall be constructed without the prior express written consent of the City.
7. FUSG shall require large groups of visitors to use shuttles or other transportation methods to avoid exceeding the limited capacity of the parking lot.
8. No works of art owned by the City shall be loaned to another entity by FUSG without permission of the City.
9. All publicity surrounding the use of the Garden facilities shall recognize the operation as a joint venture between the City of Austin Parks and Recreation Department and FUSG.
10. This agreement shall not be assigned without the express written consent of the City.

B. Financial

1. The Foundation agrees to distribute the income generated by the Fund, less the ordinary and usual expenses incurred by the Foundation in administering the Fund, to FUSG for the operation, maintenance and further improvement of the Garden.
2. FUSG shall have the right to use revenues generated from the operation of the Garden for purposes of meeting operational and maintenance expenses, and for the further improvement of the Garden. FUSG agrees to use its best efforts to augment and maintain the Fund at an amount sufficient to generate income to pay for the operation and maintenance and further improvement of the Garden. At such time as the Fund is capable of generating an annual income sufficient to cover operating and maintenance expenses, the City shall be entitled to an equitable portion of the revenues collected from the operation of the Garden. To the maximum extent feasible, the City shall use such revenues for cultural arts programs of the Parks and Recreation Department.
3. The Foundation shall provide the City with a quarterly accounting of the Fund coinciding with the City's fiscal year. The information provided shall include, but not be limited to, income, earnings, and expenditures.
4. Foundation and FUSG agree that in the event that FUSG breaches its obligations to operate and maintain the Garden or in the event that the City assumes the duties of operating or maintaining the Garden, there will be made available to the City the income from the Fund (less ordinary and usual expenses incurred by the Foundation in administering the Fund), provided notice and an opportunity to cure have been given under the terms of this agreement.

IV. TERMINATION

A. Termination for Cause

1. Either the City or FUSG may terminate this agreement should the other party fail to perform substantially as agreed through no fault. Should FUSG fail to properly fulfill its obligations under this Agreement in a timely manner, or if FUSG violates any of the provisions of this Agreement, then the City shall notify FUSG in writing (with a copy delivered to the Foundation which may rely on such notice) of the specific violations of the contract. FUSG shall have 60 days from receipt of this notice in which to cure any such violations. If the violation cannot reasonably be cured within this 60-day period, and FUSG has diligently pursued such remedies as shall be reasonably necessary to cure such default, then the parties may agree in writing to an extension of the period in which the violation must be cured.

2. If, however, FUSG has not cured the violation within the time provided as specified in the written notice or any extension of such time, then the City, at its sole option, shall have the right to terminate this Agreement. This termination shall be made by sending written notice of termination to FUSG. This "Notice of Termination" shall be effective for all purposes when deposited in the U.S. Mail, postage prepaid, and mailed certified mail, return receipt requested or when hand delivered to FUSG place of business. A copy of said notice shall be given the Foundation in the same manner. Upon hand delivering or depositing the "Notice of Termination" with the U.S. Mail, as specified above, the City may take control and possession of any funds or revenues derived from the operation of the Garden, contract documents, rights, and improvements related to the Garden facilities, without recourse by FUSG.

3. Should FUSG default under this Agreement, the City shall have the right to receive and use the income of the Fund to maintain, operate and further improve the Garden. Should the City assume responsibility for the Garden facilities, it shall then be liable for any claims, injuries, or losses resulting from the negligent acts or omissions of the City, its employees or agents as of the date of the "Notice of Termination."

B. Termination for Convenience

The City may terminate this contract for convenience upon six (6) months notice. Such termination shall be without prejudice to the City's right to receive Fund earnings for purposes of operating, maintaining or improving the Garden.

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V. INSURANCE

FUSG shall carry and maintain in effect liability and property damage insurance with the City of Austin named as an additional insured on the policy. FUSG shall maintain general liability insurance with minimum limits of \$500,000 bodily injury and \$100,000 property damage for each occurrence and \$500,000 contractual liability insurance. The City shall have the right to require increased coverages, as reasonably determined by the City's risk manager.

V. ADMINISTRATION

The Director of the Parks and Recreation Department shall be authorized to administer this contract on behalf of the City.

Executed this _____ day of _____, 19____.

City of Austin

By: _____
Its: _____

Friends of the Umlauf Sculpture Garden, Inc.

By: _____
Its: President

Austin Community Foundation

By: George More
Its: President

Approved as to form:

By: Iris J. Jones
Acting City Attorney

05JAN90

RC:mr