

630321-6

RESOLUTION

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

That W. T. Williams, Jr., City Manager, be and he is hereby authorized and directed to enter into a lease agreement, on behalf of the City of Austin, with Warren Beaman, Jr., and Thomas H. Perkins, in accordance with the terms and provisions of a certain agreement exhibited to the City Council; and,

BE IT FURTHER RESOLVED:

That the City Clerk is hereby directed to file a copy of said agreement in the permanent records of her office without recordation in the Minutes of the City Council.

ADOPTED: March 21, 1963. ATTEST: \_\_\_\_\_  
City Clerk

01MAY63  
:oce

THE STATE OF TEXAS  
COUNTY OF TRAVIS

( )  
( )  
( )

KNOW ALL MEN BY THESE PRESENTS:

This lease agreement entered into on the day hereinafter written by and between the City of Austin, acting by and through its duly authorized officers, hereinafter referred to as Lessor, and Thomas H. Perkins, and Warren M. Beaman, II, hereinafter referred to as Lessees:

W I T N E S S E T H :

That Lessor does by these presents lease and demise unto Lessees that certain tract or parcel of land locally known as the Stroborg Tract, together with Lots 7 and 8, running on Berkman Street, which tracts are described by metes and bounds on Exhibit "A" which is attached hereto and made a part hereof the same as if copied herein in full for the purpose of building and maintaining an aquatic garden and presenting water shows and related activities only.

I.

The primary terms of this lease shall be for a period of fifty (50) years beginning on the 1st day of \_\_\_\_\_, 1963, and ending on the \_\_\_\_\_ day of \_\_\_\_\_, 2013.

Lessor gives and grants unto Lessees an exclusive option to extend the term of this agreement and lease upon all the same terms and conditions of the primary lease herein stated for five (5) additional ten (10) year periods; provided however, that the City has the right to terminate the lease prior to the exercise of any option herein granted or at the termination of any option period by giving notice to the Lessees not less than two (2) years prior to the expiration of any term of its decision to cancel the lease effective the last day of that term. Lessees shall give unto Lessor not less than one (1) years notice in writing of their intent to exercise each option provided herein.

II.

The Lessees shall pay rental to Lessor in accordance with the following:

A. Rental at the rate of Fifty Dollars (\$50) per month plus percentage rental from the date this lease is executed through the month of May, 1964, such rental to be payable on or before the 10th day of each month, the first months rent having been paid on this date.

B. Rental at the rate of One Hundred Dollars (\$100) per month plus percentage rental from the 1st day of June, 1964, throughout the life of said

contract, the first such payment to be made on or before the 10th day of July, 1964, with a like payment to be made on or before the same day of each succeeding month throughout the term of this lease and <sup>any</sup> extension thereof.

**C. Percentage rental:**

(1) An amount equal to two and four tenths per cent (2.4%) of all gross receipts from merchandise sold, including but not limited to food and beverages, throughout the term of this lease and any extension thereof; and,

(2) An amount equal to eight per cent (8%) of all other gross receipts which may be earned from the activities conducted on the leased premises throughout the term of this lease and any extension thereof.

*changed to 5*

**D. Records:** Lessees shall keep during the term full, complete and true records of all receipts in a manner and form satisfactory to Lessor and shall permit Lessor or Lessor's representatives to examine or audit the records at any and all reasonable times, and shall, upon Lessor's request, explain the methods of keeping the records. All such records shall be preserved for a period of not less than three (3) years after the period to which they pertain.

**E. Monthly statements:** On or before the 20th day of \_\_\_\_\_, the first month after the Lessees open for business, and on or before the 20th day of each and every calendar month during the remainder of the term, Lessees shall prepare and deliver to Lessor at the place then fixed for the payment of rent, a sworn statement of all receipts during the preceding calendar month. With each such monthly statement, Lessees shall pay to Lessor the rental and the percentage rental for the preceding month.

**F. Annual Statements:** On or before the last day of \_\_\_\_\_, 19\_\_\_\_, and on or before the same day of each year during the remainder of the term, an annual statement, sworn to by Lessees or Lessees' authorized representative, showing all receipts during the year of the term ended on the last day of the last previous month. If Section (A) or any other provision of this lease, or the enforcement thereof by Lessor, requires accounting for all receipts and the payment of percentage rental for any period more than one month but less than twelve (12) months, such shorter period shall be treated as one year for the purposes of an annual statement and the statement shall be delivered

to Lessor within fifteen (15) days after termination of such shorter period. With each such annual statement or statement for a shorter period, Lessees shall pay to Lessor any and all sums due hereunder.

G. Failure to Deliver Statements: If Lessees fail to prepare and deliver promptly any monthly, annual or other statement required by the percentage rental provisions, Lessor may elect to treat Lessees' omission as a substantive breach of this lease entitling Lessor to terminate this lease and Lessees' right to possession of the premises, or to make an audit of all books and records of Lessees, including Lessees' bank accounts, which in any way pertain to or show gross admission receipts, and to prepare the statement or statements which Lessees failed to prepare and deliver. Such audit shall be made and such statement or statements shall be prepared by a certified public accountant to be selected by Lessor. That statement or statements, so prepared, shall be conclusive on Lessees, and Lessees shall pay all expenses of the audit and other services.

H. Conduct of Business: Lessees shall, during the entire term, continuously use the demised premises for the purpose stated in this lease, carrying on therein Lessees' business undertaking diligently, assiduously and energetically. Lessees shall keep the premises open and available for business activity therein from April 1, through September 30, of each year and at such other times within Lessees' sole discretion, except when prevented by strikes, fire, casualty or other causes beyond Lessees' reasonable control.

I. Limitation: By this lease, Lessor does not acquire any right, title or interest in or to any property of Lessees except such rights as are specifically stated in the lease. Lessor is not and never shall be liable to any creditor of Lessees or to any claimant against the estate or property of Lessees for any debt, loss, contract or other obligation of Lessees. The relationship between Lessor and Lessees is solely that of landlord and tenant, and is not and never shall be deemed a partnership or joint venture.

### III.

The Lessees hereby covenant and agree:

A. That they will pay the said rent at the times and in the manner aforesaid except as herein provided.

B. That they will pay all taxes which shall be assessed and levied against any improvements or personal property that the Lessees may place upon said premises during the term of this lease.

C. That they will during the said term insure and keep insured in their name with the Lessor as alternate payee, all items of personal property placed thereon as well as any permanent improvements they place thereon, and in the event of fire or other destruction, it is agreed that the Fire Inspector for the City of Austin will appraise the damage and, if the Fire Inspector concludes said damage to the permanent improvements is less than fifty per cent (50%), Lessees will, at their expense, restore the permanent improvements on the leasehold to the condition that they were prior to such destruction and will do so with reasonable diligence. If such destruction to the permanent improvements is greater than fifty per cent (50%), the Lessees shall have the option to restore the permanent improvements on the leasehold to the condition that they were prior to such destruction. If the Lessees elect to restore said improvements, Lessees shall notify Lessor within thirty (30) days from the date of such destruction of its election and if they elect to restore, shall do so with reasonable diligence. If the Lessees do not elect to restore within thirty (30) days from the date of destruction, the lease shall terminate thirty (30) days from the date of such destruction.

D. That they will pay promptly all gas, electric, and water charges which may become payable during the term of this lease.

E. That they will save harmless and indemnify the Lessor from and against all loss, liability or expense that might be incurred by reason of any accident upon the premises and agree to obtain and retain public liability insurance with a minimum coverage of One Hundred Thousand Dollars (\$100,000) per person and Three Hundred Thousand Dollars (\$300,000) per accident with said insurance being obtained from a company or companies acceptable to Lessor and the said insurance certificates covering the above described policies shall be furnished to Lessor.

F. That they will not make or suffer any unlawful, improper or offensive use of the premises or any use or occupancy thereof contrary to any law of the State or any Ordinance of the said City now or hereafter made or which will be injurious to any person or property; provided however, that it is expressly understood by Lessor that Lessees will and are hereby given the right to operate

motor boats on the lagoon now covering the Stroborg Tract.

G. That they will not assign, underlet or part with the possession of the whole or any part of the premises without first obtaining the written consent of the Lessor; provided however, that Lessor hereby expressly grants unto Lessees the right to assign this lease to Austin Aquatic Gardens, Inc., a corporation to be formed for the further development and operation of this tract, only for the specific purposes authorized in Paragraph I.

H. That the Lessor at all reasonable times may enter the premises.

I. That at the expiration of said term, they will peaceably yield up to the Lessor the premises and all permanent additions placed thereon, in good repair, reasonable use and wear and damage by fire or other unavoidable casualties accepted therefrom.

J. That all property of any kind that may be placed on the premises during the term of this lease shall be at the risk of the Lessees and the Lessor shall not be liable to Lessees or any other person for any injury, loss or damage to property.

#### IV.

The Lessees covenant and agree that in addition to the consideration set forth in Paragraph II hereof, they do hereby agree and obligate themselves to construct the herein named improvements on the Stroborg portion of the leased premises. The construction of said improvements will commence within twelve (12) months from the date this lease is executed by both parties hereto and will be completed within thirty (30) months after this lease is executed by the parties hereto.

In the event the construction is not commenced within twelve (12) months from the date executed, and/or in the event the construction is commenced and improvements are not completed within thirty (30) months from the date this lease agreement is executed, then and in that event, this lease will terminate ipso facto and be of no further force and effect and in such event any construction commenced thereon or improvements placed thereon, will become the property of Lessor.

Among other improvements to be placed upon said tract of ground within thirty (30) months from the date this lease is executed are as follows:

1. Masonary and steel building on the South boundary line of the Stroborg

Tract facing North consisting of not less than Three Thousand (3,000) square feet.

2. Walkways around the perimeter of the lagoon.

3. Lining the perimeter of the lagoon with colorful blooming plants, which improvements shall represent an investment of not less than One Hundred Thousand Dollars (\$100,000).

V.

In the event of default in any of the covenants contained herein, Lessor may enforce the performance of this lease in any mode provided by law. This lease may be forfeited at Lessor's discretion because of such default if such default continues for a period of fifteen (15) days after Lessor notifies Lessees of such default and its intention to declare the lease forfeited. Such notice to be sent to the Lessees by mail to the Lease premises; and thereupon (unless the Lessees shall have completely removed or cured said defect) this lease shall cease and come to an end as if that were the date originally fixed herein for the expiration of the term hereof and Lessor's attorney shall have the right without further notice or demand to Lessees to re-enter and remove all persons and Lessees' property therefrom without being guilty of any manner of trespass.

VI.

It is agreed and understood that Lessor may withdraw from the terms and provisions of this lease the property described in Exhibit "B" and attached hereto and made a part hereof the same as if copied herein in full in the event it determines such property is necessary for the construction of streets or roadways. In the event Lessor wishes to withdraw said property, it must give the Lessees twelve (12) months notice of its intent. Further, it is agreed that Lessees may remove all improvements placed on such property.

VII.

In the event the Lessees shall become bankrupt or shall make involuntary assignment for the benefit of creditors, or in the event a receiver of the Lessees shall be appointed, then, at the option of Lessor and upon five (5) days notice to Lessees, this lease shall cease and come to an end and the Lessor may accelerate the payments due under the terms hereof and shall be considered a preferred creditor as to any amount due and owing. In the event it is impossible because of the provisions of this lease to determine what fair rental would be, it is hereby agreed by and between the parties hereto that the Lessor

should be paid the sum of Fifteen Hundred Dollars (\$1,500.00) per month for any rental to be paid under this particular paragraph of this lease.

VIII.

The provisions of the Statutes of the State of Texas in regard to the landlord's lien are hereby made a part of this contract, and in addition, Lessees hereby give and grant to Lessor an express lien on the Personal property of Lessees contained on said premises for the purpose of more fully securing the payment of the rent as above provided.

IX.

The Lessees hereby waive any cause of action they may have against the City from time to time for damages caused to the leased premises because of the lowering or raising of the water level of Town Lake.

X.

Reclamation of the leased premises, except as provided in Paragraph VI hereof, shall be at the sole discretion of the City Council of the City of Austin and shall be reclaimed only if the premises are needed for the convenience and necessity of the public, and then the Lessees shall be compensated for their loss in accordance with the following formula, to-wit:

- a. If reclaimed on or before five (5) years from the date this lease is executed: Ten (10) times the Gross Income of the Enterprise before taxes, or depreciated book value of the assets of the Enterprise whichever is greater.
- b. If reclaimed after five (5) years from the date this lease is executed: eight (8) times the Gross Income of the Enterprise before taxes, or depreciated book value of the assets of the Enterprise whichever is greater.
- c. If reclaimed after ten (10) years from the date this lease is executed but on or before fifteen (15) years from the date this lease is executed: six (6) times the Gross Income of the Enterprise before taxes, or depreciated book value of the assets of the Enterprise whichever is greater.
- d. If reclaimed after fifteen (15) years from the date this lease is executed: two (2) times the Gross Income of the Enterprise before taxes, or nine and five tenths (9.5) times the net income of



the Enterprise, or depreciated book value of the assets, whichever is greater.

XI.

It is further agreed that the Lessor will provide space for not less than five hundred (500) parking spaces either directly South of the Stroborg tract or on the Sand Beach Reserve or on a tract West of and Adjacent to the Stroborg tract. Further, Lessees are hereby given the right to place improvements in the area directly South of the Stroborg tract for the purpose of beautifying this area.

Lessees will construct and pay for such beautification improvements to be constructed on the area directly South of the Stroborg tract, and the Lessor will reimburse Lessees in full for such beautification improvements where the cost, location and design of such improvements have been previously approved in writing by Lessor; such reimbursement to be paid by the Lessees' withholding from the consideration to be paid Lessor an amount equal to twenty per cent (20%) of the total consideration paid Lessor each month after the Enterprise commences operation, until said improvements are paid for in full.

Further, in the event Lessor acquires fee title to the Sand Beach Reserve, Lessor will lease the same to Lessees for a period of time concurrent with the terms of this lease for the sum of One Hundred Dollars (\$100) per year.

XII.

Lessor covenants to provide Lessees with a means of ingress and egress to the South boundary line of the Stroborg tract, sufficient to allow automobiles to reach the South line of the Stroborg tract, during the term of this lease.

XIII.

Notices specified in the aforementioned paragraphs will be by certified mail, return receipt requested, at the following address unless changed by written instrument: City of Austin, \_\_\_\_\_, Thomas H. Perkins and Warren M. Beeman, II, \_\_\_\_\_.

IN WITNESS WHEREOF the parties have subscribed their names hereto in triplicate on this the \_\_\_\_ day of \_\_\_\_\_, 1963.

CITY OF AUSTIN, LESSOR

By: \_\_\_\_\_

W. T. Williams  
City Manager

ATTEST:

\_\_\_\_\_  
City Clerk

\_\_\_\_\_  
Thomas H. Perkins, Lessee

\_\_\_\_\_  
Warren M. Beaman, II, Lessee

Corporate Acknowledgement

THE STATE OF TEXAS       ()  
COUNTY OF TRAVIS       ()

Before me, the undersigned authority in and for said County and State, on this day personally appeared W. T. Williams, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed and in the capacity therein stated.

Given under my hand and seal of office this the \_\_\_\_\_ day of \_\_\_\_\_, 1963.

(L. S.)

Notary Public in and for Travis  
County, Texas

Single Acknowledgment

THE STATE OF TEXAS       ()  
COUNTY OF TRAVIS       ()

Before me, the undersigned authority in and for said County and State, on this day personally appeared Thomas H. Perkins and Warren M. Bagman, II, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this the \_\_\_\_\_ day of \_\_\_\_\_, 1963.

(L. S.)

Notary Public in and for Travis  
County, Texas

Joint Acknowledgment

THE STATE OF TEXAS       ()  
COUNTY OF \_\_\_\_\_       ()

Before me, the undersigned authority in and for said County and State, on this day personally appeared \_\_\_\_\_ and \_\_\_\_\_, his wife, both known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they each executed the same for the purposes and consideration therein expressed, and the said \_\_\_\_\_, wife of the said \_\_\_\_\_, having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said \_\_\_\_\_, acknowledged such instrument to be her act and deed, and she declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

Given under my hand and seal of office this the \_\_\_\_\_ day of \_\_\_\_\_, 196  .

(L. S.)

Notary Public in and for \_\_\_\_\_  
County, Texas

Wife's Separate Acknowledgment

THE STATE OF TEXAS       ()  
COUNTY OF \_\_\_\_\_       ()

Before me, the undersigned authority in and for said County and State, on this day personally appeared \_\_\_\_\_, wife of \_\_\_\_\_, known to me to be the person whose name is subscribed to the foregoing instrument, and having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said \_\_\_\_\_, acknowledged such instrument to be her act and deed, and she declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

Given under my hand and seal of office this the \_\_\_\_\_ day of \_\_\_\_\_, 196  .

(L. S.)

Notary Public \_\_\_\_\_ County, Texas