

APPENDIX 6

INDEMNIFICATION, RELEASE AND INSURANCE

1. Indemnification

Concessionaire shall promptly indemnify, defend, hold harmless the Fairmount Park Conservancy (the “**Conservancy**”) and the City of Philadelphia (the “**City**”) from and against all claims, suits, causes of actions, cost recovery actions, costs, interest and expenses, demands, judgments, liabilities, damages, liens, mechanics or materialmen’s liens and claims of lien (including reasonable attorney’s fees and costs) (individually, a “**Claim**” and collectively the “**Claims**”), arising in whole or in part from the Concessionaire’s or any of its contractors’ or subcontractors’, employees’, invitees’, agents’, successors’ and assigns’ entry onto and use of the Horticulture Center, including but not limited to property damage and personal injury (including death). In the event of any Claim, Concessionaire shall promptly defend the Claim on behalf of the Conservancy and the City, and Concessionaire shall pay, perform and discharge any judgment, order or decree entered or agreed to on account of the Claim. Concessionaire may not settle any Claim without the prior written approval of the Conservancy and the City. Despite the previous provisions of this Appendix 6 Paragraph 1, the Conservancy and City each have the right, but not the obligation, to defend itself with respect to a Claim and appoint its own counsel to defend the Claim. The provisions of this **Appendix 6** survive the expiration or sooner termination of the Concession Agreement.

2. Release

In consideration of the Concession and License given to the Concessionaire by Conservancy, Concessionaire, for itself and its officers, directors, employees, agents, sub-licensees, contractors and subcontractors, successors and assigns, and any person claiming by, through, or under them, or any of them (collectively, the “**Releasors**”), remises, quitclaims, releases and forever discharges the Conservancy and the City, and their respective officials, officers, directors, employees, boards, commissions, agents, successors and assigns (acting officially or otherwise) (collectively, the “**Releasees**”), from any and all, and all manner of, actions and causes of action, suits, claims, liabilities and demands whatsoever in law or in equity which the Concessionaire or any of the Releasors may have against the Conservancy, the City or any of the Releasees, relating in any way to any condition in, on, or about the Horticulture Center (including but not limited to the Horticulture Center Building) during the exercise of the Concession and License, the entry onto or use of the Horticulture Center pursuant to the Concession Agreement and the RFP, or relating in any way to the exercise of any rights or performance of any obligations under the Concession Agreement or the RFP.

3. Insurance

A. On or before the Commencement Date, the Concessionaire shall promptly procure

and throughout the Term shall maintain, at its sole cost and expense, the types and minimum limits of insurance coverage specified below. Concessionaire shall procure all insurance required below from reputable insurers who are acceptable to the Conservancy and the City and who are authorized to do business in the Commonwealth of Pennsylvania. Concessionaire shall cause the insurance policies to provide for at least thirty (30) days prior written notice to be given to the Conservancy and the City in the event coverage is materially changed, cancelled, non-renewed, or scheduled to lapse. All insurance required in this **Appendix 6** must be written on an “occurrence” basis and not a “claims-made” basis, unless otherwise noted below.

- i. Worker’s Compensation and Employers’ Liability
 - a. Workers Compensation – Statutory Limits;
 - b. Employers Liability:
\$100,000 Each Accident – Bodily Injury by Accident;
\$100,000 Each Employee – Bodily Injury by Disease;
\$500,000 Policy Limit – Bodily Injury by Disease;
 - c. Other states endorsement including Pennsylvania.
- ii. General Liability Insurance
 - a. Limits of Liability: \$1,000,000 per occurrence combined single limit for bodily injury (including death) and property damage liability; \$100,000 per occurrence for damage to rented premises; \$1,000,000 personal and advertising injury; and \$2,000,000 products and completed operations aggregate.
 - b. Coverage: Premises operations; blanket contractual liability; personal injury liability; products and completed operations; independent contractors; employees and volunteers as additional insureds; cross liability and broad form property damage (including completed operations) liability.
- iii. Auto Liability Insurance
 - a. Limits of Liability: \$1,000,000 per occurrence combined single limit for bodily injury (including death) and property damage liability.
 - b. Coverage: Owned, non-owned, hired, rented or leased vehicles.
- iv. Professional Liability Insurance (only applicable for Concessionaire’s architectural and engineering consultants)
 - a. Limit of Liability: \$1,000,000 per occurrence, with a deductible not to exceed \$50,000.
 - b. Coverage: Architectural and engineering services errors and omissions including liability assumed under contract.

- c. This coverage may be written on a “claims-made” basis provided that coverage for occurrences happening during the performance of the services required under this contract shall be maintained in full force and effect under the policy or “tail” coverage for a period of at least two (2) years after the completion of the services.

- v. Umbrella Liability Insurance at limits totaling \$5,000,000 per occurrence when combined with insurance required under i. through iii. above.

- vi. Liquor Liability Insurance
Limit of liability: \$2,000,000 per occurrence combined single limit for liability arising out of the manufacture, distribution, sale or service of alcoholic beverages, if applicable.

- vii. Property Insurance (“All Risk”)
Covering all improvements, betterments, equipment, trade fixtures, merchandise, business personal property and any other property in Concessionaire’s care, custody and control, or used by Concessionaire under the Concession Agreement and RFP, in an amount equal to the full replacement cost with no penalty for coinsurance. The City shall be named as loss payee.

- viii. Builders Risk/Installation Floater
During any period of construction, Concessionaire (or Concessionaire’s contractors or subcontractors) shall maintain “all risk” builder’s risk insurance in an amount equal to the anticipated completion value of the project under construction. The coverage shall remain in full force and effect during any period of construction or improvements.

- ix. Business Interruption Insurance
Concessionaire shall maintain coverage for loss of earnings, the annual Concession Fee (in an amount equal to annual Concession Fee for one year) and necessary continuing expenses due to interruptions of business operations.

- x. Conservancy and the City of Philadelphia, and their respective officials, officers, directors, employees and agents must be named as additional insureds on all policies required above except the Workers Compensation and Employers’ Liability. All such policies must include an endorsement stating that the coverage afforded the additional insureds is primary to any other coverage available to them.

- xi. Original certificates of insurance evidencing the required coverage and the Conservancy’s and City’s status as additional insureds must be delivered to (i) the Conservancy and (ii) the City of Philadelphia, Risk Manager, One Parkway Building, 14th Floor, 1515 Arch Street, Philadelphia, Pa 19102, Attention: Nella Goodwin, with a copy to the Commissioner of the Department of Parks and

- Recreation, and (iii) the Fairmount Park Conservancy, Executive Director, 1617 John F. Kennedy Boulevard, Suite 1670, Philadelphia, PA 19102, at least five (5) business days prior to entry onto the Horticulture Center by Concessionaire. Concessionaire must furnish copies of the original policies of all insurance required under this Agreement at any time within ten (10) days after written request by Conservancy.
- xii. Concessionaire and its contractors and subcontractors shall not permit any lapse in or termination or cancellation of the insurance coverage required under this **Appendix 6**, the RFP, and the Concession Agreement. Concessionaire must ensure that replacement coverage meeting the requirements of this **Appendix 6** are in effect prior to the expiration of the policy period.
 - xiii. If Concessionaire fails to procure and maintain such insurance, the Conservancy and the City are not limited in the proof of any damages which the Conservancy or the City may claim against the Concessionaire or any other person or entity to the amount of the insurance premium or premiums not paid or incurred and which would have been payable upon such insurance. The Conservancy and the City may also be entitled to recover damages from the Concessionaire for such breach, the uninsured amount of any loss, damages and expenses of suit and costs, including without limitation, reasonable collection fees, suffered or incurred during any period when Concessionaire, its contractors or subcontractors shall have failed or neglected to provide the insurance as required herein.

B. Self Insurance

The Concessionaire may not self-insure any of the coverage required under this **Appendix 6**, the RFP, or the Concession Agreement, without the prior written approval of the City's Risk Manager. In the event that the Concessionaire wants to self-insure any of the coverages listed above, it shall submit to the City's Risk Manager, prior to the Commencement Date, a certified copy of Concessionaire's most recent audited financial statement, and other evidence of its qualifications to act as self-insurer (e.g. state approval) as may be requested by the City's Risk Manager. If the City's Risk Manager approves the Concessionaire's proposed self-insurance, Concessionaire acknowledges and agrees that the Conservancy and City, and their respective officials, officers, directors, employees, agents, successors and assigns are entitled to receive the same coverages and benefits under Concessionaire's self-insurance program that they would have received had the insurance requirements been satisfied by a reputable carrier authorized to do business in the Commonwealth of Pennsylvania or otherwise acceptable to the City of Philadelphia. If at the time of the Commencement Date Concessionaire self-insures its workers' compensation and employers' liability coverage, Concessionaire may, in lieu of the foregoing, furnish the Conservancy and the City a current copy of the state certification form for self-insurance or a current copy of the State Insurance Commissioner's letter of approval, whichever is appropriate.

C. Insurance Not a Limit of Liability. The insurance requirements set forth in this

Appendix 6 do not modify, limit or reduce the Concessionaire's and its contractors and subcontractors indemnifications of the Conservancy and the City under this **Appendix 6**, the RFP, and the Concession Agreement, or limit any of their respective liability under this **Appendix 6**, the RFP, and the Concession Agreement to the limits of the policy(ies) of required insurance.

D. **Proceeds for Property Damage.** Concessionaire shall cause all proceeds of property damage and Builder's Risk policies to be payable to the City to use for the restoration or repair of the Horticulture Center.

E. **Waiver of Subrogation.** Concessionaire shall cause each policy of insurance required under this **Appendix 6**, excepting Worker's Compensation policies, to include a provision for a waiver of subrogation in favor of the Conservancy and the City.

F. **Fidelity Bond.** Concessionaire shall, at its sole cost and expense obtain and maintain during the Initial Term and any Renewal Term(s) of the Concession Agreement, a fidelity bond in an amount equal to \$100,000, covering Concessionaire's employees who have financial responsibilities related to the receipt and disbursement of funds under the Concession Agreement. In lieu of a fidelity bond, Concessionaire may obtain coverage for crime insurance with limits of \$100,000. The fidelity bond or crime insurance, whichever is obtained by Concessionaire, shall name the Conservancy and the City as a beneficiary. The Concessionaire shall submit evidence of the existence of the fidelity bond or crime insurance to the Conservancy and the City prior to Commencement Date.

G. **Increase in Insurance Amounts.** From time to time, but not more than once each year, the Conservancy or the City may, in its reasonable discretion, require the Concessionaire to obtain additional types and amounts of insurance, or either of them, than what Concessionaire is obligated to obtain and maintain under this **Appendix 6**, Paragraph 3.