



# SEATTLE CITY COUNCIL

## Legislative Summary

CB 119648

Record No.: CB 119648

Type: Ordinance (Ord)

Status: Passed

Version: 1

Ord. no: Ord 125941

In Control: City Clerk

File Created: 08/16/2019

Final Action: 10/04/2019

**Title:** AN ORDINANCE relating to Seattle Parks and Recreation; authorizing the Superintendent to amend the existing ten-year lease with Seattle Children’s PlayGarden to add a third additional extended term of five years.

Date

Notes:

Filed with City Clerk:

Mayor's Signature:

Sponsors: Juarez

Vetoed by Mayor:

Veto Overridden:

Veto Sustained:

Attachments: Att A Ex 1 - Lease Agreement, Att A Ex 2 - Amendment 1 to Lease Agreement

Drafter: Joanne Orsucci

Filing Requirements/Dept Action:

### History of Legislative File

Legal Notice Published:

Yes

No

Ver- sion:	Acting Body:	Date:	Action:	Sent To:	Due Date:	Return Date:	Result:
1	City Clerk	09/03/2019	sent for review	Council President's Office			
1	Mayor	09/03/2019	Mayor's leg transmitted to Council	City Clerk			
1	Council President's Office	09/05/2019	sent for review	Civic Development, Public Assets, and Native Communities Committee			

Action Text: The Council Bill (CB) was sent for review. to the Civic Development, Public Assets, and Native Communities Committee

Legislative Summary Continued (CB 119648)

---

- 1 City Council 09/16/2019 referred Civic Development, Public Assets, and Native Communities Committee  
**Action Text:** The Council Bill (CB) was referred. to the Civic Development, Public Assets, and Native Communities Committee
- 1 Civic Development, Public Assets, and Native Communities Committee 09/18/2019 pass Pass  
**Action Text:** The Committee recommends that City Council pass the Council Bill (CB).  
In Favor: 3 Chair Juarez, Vice Chair Bagshaw, Member González  
Opposed: 0
- 1 City Council 09/23/2019 passed Pass  
**Action Text:** The Council Bill (CB) was passed by the following vote, and the President signed the Bill:  
**Notes:**  
*Councilmember O'Brien left the Council Chamber at 5:40 p.m.*  
  
In Favor: 6 Councilmember Bagshaw, Councilmember González , Council President Harrell, Councilmember Juarez, Councilmember Mosqueda, Councilmember Pacheco  
Opposed: 0  
Absent(NV): 3 Councilmember Herbold, Councilmember O'Brien, Councilmember Sawant
- 1 City Clerk 09/27/2019 submitted for Mayor's signature Mayor
- 1 Mayor 10/04/2019 Signed  
**Action Text:** The Council Bill (CB) was Signed.
- 1 Mayor 10/04/2019 returned City Clerk  
**Action Text:** The Council Bill (CB) was returned. to the City Clerk
- 1 City Clerk 10/04/2019 attested by City Clerk  
**Action Text:** The Ordinance (Ord) was attested by City Clerk.
-

**CITY OF SEATTLE**

**ORDINANCE** 125941

**COUNCIL BILL** 119648

AN ORDINANCE relating to Seattle Parks and Recreation; authorizing the Superintendent to amend the existing ten-year lease with Seattle Children's PlayGarden to add a third additional extended term of five years.

WHEREAS, Ordinance 122269, passed on October 9, 2006, authorized a ten-year lease with two additional five-year extensions with Seattle Children's PlayGarden (SCPG) for use of a portion of the Colman Playfield, and required SCPG to renovate the shelter house ("Shelter House") and construct a new recreational facility ("Garden House") on site to provide children of all abilities a safe, accessible, and adventurous place to play; and

WHEREAS, SCPG completed the Shelter House and Garden House and is now proposing a project to renovate the playground and has raised the funds needed; and

WHEREAS, SCPG has successfully raised 100 percent of the \$420,172 project budget, however \$305,550 of that funding is in jeopardy if SCPG is unable to show, via a lease agreement, that the organization has control of the site through 2030; and

WHEREAS, in 2016, after the original term of the lease expired, SCPG exercised its option to implement the first of the two five-year lease extensions; and

WHEREAS, the Department of Parks and Recreation desires to amend the existing lease by adding a third additional extended term of five years, thus allowing SCPG to remain eligible for a \$305,550 State grant that the organization was awarded; NOW,

THEREFORE,

**BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:**

1           Section 1. The Superintendent of Parks and Recreation (“Superintendent”) is authorized  
2 to execute, for and on behalf of The City of Seattle (“City”), an amendment to the ten-year lease  
3 with SCPG in substantially the form attached to this ordinance as Attachment A, or with such  
4 minor additions, modifications, or deletions as the Mayor or said Superintendent deems to be in  
5 the best interest of the City.

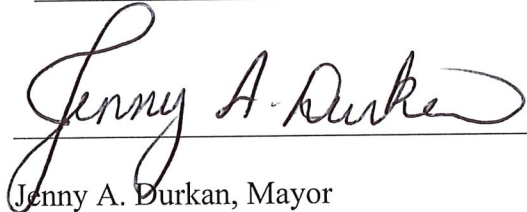
1 Section 2. This ordinance shall take effect and be in force 30 days after its approval by  
2 the Mayor, but if not approved and returned by the Mayor within ten days after presentation, it  
3 shall take effect as provided by Seattle Municipal Code Section 1.04.020.

4 Passed by the City Council the 23<sup>rd</sup> day of September, 2019,  
5 and signed by me in open session in authentication of its passage this 23<sup>rd</sup> day of  
6 September, 2019.

7 

8 President \_\_\_\_\_ of the City Council

9 Approved by me this 4<sup>th</sup> day of October, 2019.

10   
11 Jenny A. Durkan, Mayor

12 Filed by me this 4<sup>th</sup> day of OCTOBER, 2019.

13 

14 Monica Martinez Simmons, City Clerk

15 (Seal)

16 Attachments:

17 Attachment A – Amendment 2 to Lease Agreement (LA06-2551-013) between The City of  
18 Seattle Department of Parks and Recreation and Seattle Children's PlayGarden

19 Exhibit 1 – Lease Agreement

20 Exhibit 2 – Amendment 1 to Lease Agreement  
21

**AMENDMENT NO. 2**  
**LEASE AGREEMENT (LA06-2551-013) BETWEEN**  
**THE CITY OF SEATTLE DEPARTMENT OF**  
**PARKS AND RECREATION**  
**AND**  
**SEATTLE CHILDREN'S PLAYGARDEN**

Reference is made to that certain agreement designated as City of Seattle contract LA06-2551-013 and referred to as the Lease Agreement (Lease Agreement) between the City of Seattle Department of Parks and Recreation (SPR) and the Seattle Children's PlayGarden (PlayGarden) executed on November 14, 2006 and amended by Amendment No. 1 on May 29, 2013. The Lease Agreement is attached hereto as Exhibit 1 and Amendment No 1 is attached hereto as Exhibit 2 and both are incorporated by reference into this Amendment. In consideration of the terms, conditions, and covenants contained herein, both parties hereby acknowledged and agree to amend the Lease Agreement as follows:

1. **ARTICLE 2. "TERM"**, Section 2.1 "Term of Agreement", is hereby amended to add a third additional extended term of five (5) years and now reads:

2.1 Term of Agreement. Subject to the provisions of Section 2.2 and unless terminated earlier as provided herein, the term of this Agreement shall be ten (10) years, commencing on the date this Agreement is fully executed (the "Execution Date"). Provided PlayGarden is not in default and there is no event that with the giving of notice, the passage of time or both would constitute an event of default hereunder, PlayGarden shall have the option to renew this Agreement for three additional terms of five (5) years each upon the same terms and conditions except this right to extend the Term (each, an "Extended Term"). PlayGarden shall exercise each such option by giving the City a written notice of exercise neither more than twelve (12) months nor less than six (6) months before the expiration of the then-current Term. PlayGarden's failure to exercise its initial option to extend shall nullify the remaining option. As used in this Agreement, "Term" includes both the initial and Extended Terms.

Except to the extent specifically amended by this Amendment and Amendment No. 1, all of the terms, provisions, conditions, covenants, representations and warranties contained in the Lease Agreement shall remain in full force and effect and are hereby ratified and confirmed.

IN WITNESS WHEREOF, the parties hereto have caused this Lease Agreement to be executed  
by their respective representative:

**CITY:**

**LESSEE:**

**THE CITY OF SEATTLE**  
Department of Parks and Recreation

**SEATTLE CHILDREN’S PLAYGARDEN**  
A Washington non-profit corporation

By:

By:

Date: \_\_\_\_\_

Date: \_\_\_\_\_

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

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

Print Name: Jesús Aguirre

Print Name: \_\_\_\_\_

Title: Superintendent

Title: \_\_\_\_\_

Department of Parks and Recreation

Seattle Children’s PlayGarden

**NOTARY – SEATTLE CHILDREN’S PLAYGARDEN**

STATE OF WASHINGTON )

) ss:

COUNTY OF KING )

I certify that I know of or have satisfactory evidence that \_\_\_\_\_ signed  
this instrument, on oath stated he/she was authorized to execute the instrument and  
acknowledged it as the Director of Seattle Public Theater to be the free and voluntary act of  
such party for the uses and purposes mentioned in the instrument.

\_\_\_\_\_  
(Signature of Notary Public)

\_\_\_\_\_  
(Printed name)

Residing at: \_\_\_\_\_

My appointment expires: \_\_\_\_\_

**NOTARY - THE CITY OF SEATTLE**  
Department of Parks and Recreation

Jesús Aguirre, Superintendent, Parks and Recreation

STATE OF WASHINGTON    )  
  ) ss:  
COUNTY OF KING         )

I certify that I know or have satisfactory evidence that Jesús Aguirre signed this instrument, on oath stated that he was authorized to execute this instrument and acknowledged it as the Superintendent of the Department of Parks and Recreation of the City of Seattle to be the free and voluntary act of The City of Seattle for the uses and purposes mentioned in this instrument.

\_\_\_\_\_  
(Signature of Notary Public)

\_\_\_\_\_  
(Printed name)

Residing at: \_\_\_\_\_

My appointment expires: \_\_\_\_\_



**LEASE**  
**Between**  
**THE CITY OF SEATTLE**  
**Department of Parks and Recreation**  
**and**  
**SEATTLE CHILDREN'S PLAYGARDEN**

*LA06-2551-013*

THIS LEASE ("Agreement") is made and entered into by and between **THE CITY OF SEATTLE** ("the City"), a first class city of the State of Washington, acting by and through its Superintendent of the Department of Parks and Recreation ("Superintendent"), and **SEATTLE CHILDREN'S PLAYGARDEN**, a Washington nonprofit corporation ("PlayGarden").

WHEREAS, the Seattle Department of Parks and Recreation ("DPR") has jurisdiction over and manages Colman Playfield, including the shelter house thereon; and

WHEREAS, the DPR mission "to provide safe and welcoming opportunities to play, learn, contemplate, and build community" applies to all people including those with physical or mental impairments; and

WHEREAS, PlayGarden is a 501(c) (3) not-for-profit corporation established to create a naturalistic, interactive play area to meet the special needs of children with physical and mental impairments; and

WHEREAS, PlayGarden is committed to providing to the public, including individuals with physical or mental impairments, an environment and programs to enhance cognitive, social and motor development; and

WHEREAS, PlayGarden's intended use, operation and improvement of a portion of the south end of Colman Playfield, including providing a play garden intended primarily to serve children with physical and mental disabilities, meets DPR objectives; and

WHEREAS, PlayGarden and the City wish to enter into this Agreement for the purpose of setting forth the terms and conditions under which PlayGarden will occupy and use portions of Colman Playfield and adjacent area for the above-stated purposes, including terms and conditions related to the financing and construction of certain renovations and improvements to Colman Playfield.

NOW, THEREFORE, for and in consideration of the payment of rent, and in further consideration of and subject to the promises, terms, conditions and performances described herein, the parties agree as follows:

## ARTICLE 1. PREMISES

1.1 Premises Description. City hereby leases to PlayGarden and PlayGarden hereby leases from City the existing Colman Playfield shelter house ("Shelter House"). When constructed according to the provisions of this Agreement, "Garden House" building shall be included in PlayGarden's leasehold interest hereunder. The buildings, as from time to time constituted, are referred to as the "Premises." The Premises are situated upon a portion of the real property legally described as:

All those portions of Tract Sixteen (16) and Tract Eighteen (18), Seattle Homestead Association Five Acre Tracts, lying between the west margin of Twenty-fourth Avenue South produced, the east margin of Twenty-third Avenue South, produced, the north margin of Grand Street, produced, and the south margin of Massachusetts Street produced; all of which marginal lines are established by Ordinance No. 23038 of the City of Seattle, approved January 18, 1910.

The street address for the Premises is 1740 23<sup>rd</sup> Avenue South, Seattle, King County, Washington.

1.2 Nonexclusive License to Use Common Areas. Throughout the Term, PlayGarden may use the common areas of Colman Playfield as they are from time to time constituted, for ingress to and egress from the Premises. Such use shall be in common with all other visitors and users of Colman Playfield and subject to such rules and regulations as the Superintendent may promulgate. The City shall grant PlayGarden necessary access to grounds areas of Coleman Playfield to prepare plans and specifications for the construction of the Garden House and renovation of the Shelter House and, after such plans and specifications have been approved by the Superintendent, to construct the Garden House and the renovate the Shelter House.

1.3 Acceptance of Premises. PlayGarden acknowledges that it has examined the Premises, has had a reasonable opportunity to obtain inspections and reports of professionals regarding the same, and has determined, after such examination, that the Premises are suitable for the use and occupancy desired by PlayGarden. PlayGarden accepts the Premises in their condition as of the Execution Date AS IS, with all defects, and assumes all risk that one or more defects exist in the Premises. The City makes no warranties or representations of any kind, express or implied, with respect to the condition of the Premises or their suitability for PlayGarden's purposes other than as specified in this Agreement. PlayGarden agrees that any express or implied representations or warranties made by or on behalf of City prior to the Execution Date, unless expressly set forth in this Agreement, have been effectively revoked and withdrawn and have no force or effect whatsoever.

PlayGarden agrees that the City shall have no liability or obligation as a result of any defect or condition of the Premises, including without limitation latent defects, and PlayGarden does hereby waive and release the City from all losses, liabilities, claims (including claims arising under federal, state or local environmental laws), costs (including attorneys' fees), actions or damages of any sort whatsoever arising out of or relating to the condition of the Premises. The City shall have no obligation to undertake any repairs, maintenance or other work of any kind except as expressly set forth in this Agreement.

PlayGarden and the City acknowledge that this Article has been specifically bargained for and that the City would not be willing to permit PlayGarden to use and occupy the Premises on the terms and conditions set forth herein without PlayGarden's agreement to the terms of this Article.

## ARTICLE 2. TERM

2.1 Term of Agreement. Subject to the provisions of Section 2.2 and unless terminated earlier as provided herein, the term of this Agreement shall be ten (10) years, commencing on the date this Agreement is fully executed (the "Execution Date"). Provided PlayGarden is not in default and there is no event that with the giving of notice, the passage of time or both would constitute an event of default hereunder, PlayGarden shall have the option to renew this Agreement for two additional terms of five (5) years each upon the same terms and conditions except this right to extend the Term (each, an "Extended Term"). PlayGarden shall exercise each such option by giving the City a written notice of exercise neither more than twelve (12) months nor less than six (6) months before the expiration of the then-current Term. PlayGarden's failure to exercise its initial option to extend shall nullify the remaining option. As used in this Agreement, "Term" includes both the initial and Extended Terms.

2.2 Failure to Achieve Fund-Raising Thresholds. The parties acknowledge that this Agreement is expressly conditioned on PlayGarden demonstrating to the DPR finance director's (the "Finance Director") satisfaction, in that official's sole discretion, that PlayGarden has or will have, by December 31, 2007, sufficient funds to complete the renovation of the Shelter House and the construction of the Garden House in accordance with plans and specifications that have been approved prior to that date by the Superintendent (the "Initial Renovation"). When determining whether PlayGarden has or will raise such funds, the Finance Director shall take into account PlayGarden's assets, including amounts pledged in documented cash and in-kind donations to PlayGarden by third parties. If PlayGarden does not achieve its financial objective by December 31, 2007, then PlayGarden's rights under this Agreement shall cease and the parties shall have no further obligations with respect to one another

## ARTICLE 3. USE

3.1 Uses Authorized. PlayGarden shall use the Premises to provide classes and recreational opportunities with an emphasis on children and adults with physical and mental disabilities, and for such incidental purposes as administrative offices, fundraising activities and for occasional special events in direct support of PlayGarden's mission. In addition, and to the extent it does not conflict with the foregoing, PlayGarden may rent the Premises to the public for recreational and community uses on a short-term basis not to exceed three (3) days, unless the Superintendent approves a longer period. PlayGarden shall not use the Premises for any other purpose without the Superintendent's prior written consent.

3.2 Management and Operations Plan. PlayGarden shall prepare and submit to the Superintendent, for his or her approval, an annual management and operations plan. The first plan shall be due at least thirty (30) days before PlayGarden anticipates receiving a Certificate of Occupancy for either the Shelter House or the Garden House. Subsequent

plans shall be due on or before December 1st of each year throughout the Term. The management and operations plan shall include, among other items the Superintendent may request, a description of any events scheduled to occur during the following year; user fees/rental rates, if any, for programs and services offered at the Premises; a description of the number and types of animals on the Premises; a report detailing the dates and nature of public Garden House rentals during the then-current year; and the estimated budget for the following year. If the Superintendent disapproves of any plan or element therein or if PlayGarden alters its programming, PlayGarden shall submit an amended or updated plan within thirty (30) days of such disapproval or change.

3.3 Keys. Playgarden shall provide DPR staff with one set of keys to the Premises and such additional sets as DPR may from time to time reasonably request.

3.4 Parks Department Use. DPR shall have the right to use the Premises, at no charge, for DPR programs and events on an "as available" basis by contacting PlayGarden at least one (1) week in advance of the proposed use date.

3.5 Intoxicating Beverages. PlayGarden shall not permit intoxicating beverages of any kind to be used, sold, consumed or dispensed on Premises unless the Superintendent has approved such use, sale, consumption or dispensation, in writing, not less than fourteen (14) days before the anticipated date of such use, sale, consumption or dispensing, and PlayGarden complies with all applicable laws, ordinances, rules and regulations in connection therewith, as now or hereafter amended. The City acknowledges that PlayGarden may host special events, including fundraising events, on the Premises and may request the Superintendent to approve the consumption or dispensation of alcoholic beverages at such events, which approval shall not be unreasonably withheld in connection therewith. Prior to conducting any event at which alcoholic beverages are served, PlayGarden shall obtain insurance acceptable to the City's Risk Management Department for liquor/host liability.

#### **ARTICLE 4. RENT; REDUCTIONS AND OFFSETS THERETO; TAXES**

4.1 Base Rent. Beginning on the tenth (10<sup>th</sup>) day of the first month immediately following PlayGarden's receipt of an occupancy permit for the Shelter House and on the tenth day (10<sup>th</sup>) of each month thereafter during the Term (the "Rent Commencement Date"), PlayGarden shall pay the City monthly "Base Rent" in the amount of \$794.00 for the Shelter House. Beginning on the tenth (10<sup>th</sup>) day of the first month immediately following PlayGarden's receipt of an occupancy permit for the Garden House and on the tenth day (10<sup>th</sup>) of each month thereafter during the Term, PlayGarden shall pay the City additional monthly "Base Rent" in the amount of \$922.00 for the Garden House. The total combined monthly Base Rent is \$1,716.00 and will be adjusted pursuant to Section 4.4.

4.2 Additional Rent. PlayGarden shall pay the City annually, as "Additional Rent", ten percent (10%) of Gross Receipts that are derived from the use and occupation of the Premises for non-PlayGarden events, including merchandise sales. In this Agreement, the word "Rent" includes Base Rent and Additional Rent.

4.3 Definition of Gross Receipts. As used in this Agreement, Gross Receipts means the value proceeding or accruing from the sale to the public of all program services,

merchandise and business transactions of every kind occurring on the Premises without any deduction for costs of products sold, material used, labor, or other expenses whatsoever paid or accrued. The term "Gross Receipts" does not mean or include the amount of money refunded to, and not merely credited to the account of customers who return or do not accept merchandise or services sold by PlayGarden or any licensee or concessionaire; returns to shippers or manufacturers; any discount allowed by PlayGarden or any licensee or concessionaire to customers; the Washington State Sales Tax and any other tax imposed by any government agency directly on sales. All installment or credit sales shall be deemed to have been made for the full price on the date of sale regardless of when payment is received.

4.4 Adjustments to Base Rent. Beginning on the first anniversary of the Execution Date and on each anniversary date thereafter until the expiration or termination of this Agreement, Base Rent, for both the Shelter House and the Garden House, shall be adjusted upward, only, each year by the percentage change, if any, in the monthly Consumer Price Index ("CPI") for All Urban Consumers, United States Average for All Items (1982-84=100) published by the Bureau of Labor Statistics, United States Department of Labor from the monthly CPI published for the month that is two months prior to the first month of the preceding lease year to the monthly CPI published for the month that is two months prior to the first month of the current lease year, or if such monthly CPI has not been published, the most recently published month CPI. In the event of any change in the index base (1982-84=100) or other modification of the CPI, or in the event the CPI is discontinued, the parties shall mutually agree on a substitute index computed by an agency of the United States or such other entity as the parties may agree.

4.5 Capital Improvement Rental Offset. PlayGarden shall be entitled to an offset against Base Rent and Additional Rent during the Term of this Agreement in an amount equal to PlayGarden's expenditures for the Initial Renovation and other capital improvements to Premises when approved in advance by DPR (the "Capital Improvement Rental Offset"). Not later than three months after PlayGarden completes any renovation project, PlayGarden shall provide the Finance Director with an accounting of its costs associated with such renovation project, together with such supporting documentation as the Finance Director may reasonably request. The Finance Director shall verify the total amount of those costs and the cumulative unamortized amount of such approved expenditures shall constitute the amount of PlayGarden's Capital Improvement Rental Offset. The offset shall be credited against the Base Rent and Additional Rent due, in monthly installments, in such amounts as PlayGarden may determine. On or before the first day of the first month in which Base Rent is due and thereafter, on each anniversary of the Rent Commencement Date, PlayGarden shall report to the Finance Director the amount of the Capital Improvement Rental Offset it anticipates applying to that year's Base Rent. Upon termination or expiration of this Agreement, the amount of any unamortized Capital Improvement Rental Offset shall be deemed to have been donated to the City.

4.6 Public Program Rental Offset. Annually throughout the Term, PlayGarden may request an offset against Base Rent and Additional Rent equal to PlayGarden's costs to provide generally available discounts, scholarships, public programming for the then-current year, all of which shall be described in the annual Management and Operations Plan referred to in Paragraph 3.2 ("Public Program Rental Offset"). On or before December 31 of each year during the Term, PlayGarden shall submit to the Superintendent for that official's review

and approval, a report of activities that occurred on the Premises during that calendar year which PlayGarden believes qualify for Public Program Rental Offset. The amount of the Public Program Rental Offset for a given year shall rest in the Superintendent's sole discretion. If the Superintendent approves PlayGarden's request for a Public Program Rental Offset then such Public Program Rental Offset shall be credited against the Base Rent and Additional Rent and in twelve equal installments throughout the subsequent year.

4.7 Taxes. In addition to Rent, PlayGarden shall pay to DPR monthly leasehold excise taxes in accordance with Chapter 82.29A of the Revised Code of Washington. In addition, PlayGarden shall pay before their delinquency, all other taxes that may be due and payable with respect to property owned by and the activities of PlayGarden on the Premises.

4.8 Offset Inapplicable to Taxes. Unless otherwise permitted by applicable law, the reduction and offsetting of any Rent hereunder shall have no effect on the amount of any leasehold excise tax due and payable to the City or any other tax obligation of PlayGarden. Any leasehold excise tax payment shall be paid in cash or cash equivalents.

4.9 Rent and Leasehold Excise Tax Payment Date and Address. Rent and the monthly leasehold excise tax payments, if due, shall be remitted on or before the tenth (10th) calendar day of each month during the Term to the City at the address shown in Article 24 hereof, or to such other address as DPR may hereafter designate in writing.

4.10 Late and Refused Payments. If PlayGarden fails to pay the City any sum when due, such amount shall bear interest at the rate of 12% per annum. In addition, PlayGarden shall pay the City Twenty Dollars (\$20.00) for each check that is dishonored for any reason.

## **ARTICLE 5. UTILITIES AND SERVICES**

5.1 Utilities. On or before the Rent Commencement Date, PlayGarden shall be responsible for and shall ensure that all utility accounts associated with the Premises are transferred to PlayGarden and that such transfers remain in effect on and through the date on which PlayGarden surrenders the Premises. As part of the Initial Renovation, PlayGarden shall cause all utilities serving the Premises to be separately metered. PlayGarden shall pay, before delinquency, all charges incurred for or in connection with the providing of all utility services to or for the Premises.

5.2 City Not Liable for Utility Service Failures. The City shall not be liable, and PlayGarden hereby waives any claim against the City and shall hold the City harmless for the failure, for any reason whatsoever, of any utility service for the Premises.

## **ARTICLE 6. CARE OF PREMISES**

6.1 PlayGarden's Maintenance and Repair Obligation. Except as provided in Section 6.3, during the Term PlayGarden, at no cost to the City, shall provide all necessary cleaning and repairs to the interior and exterior of the Premises including, but not limited to, the heating, ventilation, electrical and mechanical systems; glass; boiler and plumbing; lighting; furniture, and to fixtures and equipment located within and on the Premises. By way of example, only, PlayGarden shall replace electrical sockets and light bulbs; repair holes

and paint walls; provide janitorial service for overall cleanliness; clean gutters and repair window frames as needed. All repairs and maintenance shall be in accordance with all applicable statutes, City ordinances, codes and directives or regulations of public authorities.

6.2 PlayGarden's General Cleaning and Janitorial Services Obligation. PlayGarden shall keep the Premises in a reasonably safe, sanitary and serviceable condition consistent with DPR standards for similar facilities, and shall provide all general cleaning and janitorial services as may be required in and for the Premises. PlayGarden shall be responsible for regular trash removal, recycling and litter pickup on and within the Premises.

6.3 Major Maintenance. The City shall provide and be responsible for all major maintenance for the structural elements of and building systems serving the Premises, including but not limited to the heating, ventilation, electrical and mechanical systems and the roof and exterior shell of each of the buildings, all at no cost to PlayGarden. The City shall endeavor to minimize the impact of any major maintenance activity on PlayGarden, but in no event shall the City be liable for any ensuing interruption in PlayGarden's activities.

6.4 Intrusion Alarm Installation Obligation. PlayGarden may provide and install on the Premises, at no cost to the City, an intrusion alarm system approved by DPR, which approval shall not be unreasonably withheld, conditioned or delayed.

6.5 Fire Suppression Systems Installation Obligation. PlayGarden shall install in all areas where cooking is to occur, hoods, vents and fire suppression systems that have been approved by the Washington Survey and Rating Bureau and shall comply with all applicable fire and safety codes and regulations.

6.6 Joint Annual Inspection of Premises; Remedial Action Obligation. PlayGarden and DPR shall jointly inspect the Premises annually. PlayGarden shall take any and all actions that the Superintendent may specify as necessary to maintain and operate the Premises consistent with this Article 6 and such DPR building standards as are then in effect. DPR shall notify PlayGarden ninety (90) days in advance of the Rent Commencement Date of any applicable standards and of any proposed DPR standards changes that may impact PlayGarden's obligations under this Agreement.

6.7 Remedy Upon Failure to Maintain Premises. If PlayGarden fails to maintain the Premises in accordance with this Article 6 and applicable DPR standards, DPR may instruct PlayGarden to undertake such work as is reasonably required to so maintain the Premises. If PlayGarden fails to commence such work within ten (10) calendar days after the date of the notice and to diligently prosecute it to completion, then the City shall have the right, at its option and in addition to all other remedies, to undertake such work and to invoice PlayGarden for the City's costs incurred in connection therewith. City shall have no liability to PlayGarden for any damage, inconvenience, or interference with the PlayGarden's use of the Premises as a result of the City's performing any work that resulted from PlayGarden's failure to maintain the Premises.

## **ARTICLE 7. ALTERATIONS OR IMPROVEMENTS**

PlayGarden shall not make any alteration, addition, renovation or improvement in or to

the Premises that would require a construction or other type of permit from the City of Seattle Department of Planning and Development, without first obtaining DPR's prior written consent, which consent shall not be unreasonably withheld, conditioned or delayed. After obtaining the Superintendent's consent, PlayGarden may make, at its sole cost and expense, the approved alterations, additions, renovations, or improvements at such time as the parties may agree. PlayGarden shall ensure that such work conforms to the approved plans and specifications and is performed in accordance with all laws, rules, regulations, ordinances and requirements of governmental agencies, offices and boards having jurisdiction. If the Superintendent requests, PlayGarden or its contractor, if any, shall post a bond or other security and obtain such insurance as shall be reasonably satisfactory to the City to protect the City against liens and claims arising from work performed by or for PlayGarden. All work performed shall be done in a workmanlike manner and with materials (when not specifically described in the specifications approved by the City) of the quality and appearance customary in the trade for first-class construction of the type of building contemplated.

When PlayGarden determines that the work of any renovation is substantially complete, it shall so notify the Superintendent who will inspect the work and certify either that it is or is not in apparent conformity with the approved plans and specifications therefor. If the Superintendent reasonably determines that the work does not conform to the approved plans and specifications or is otherwise deficient, then PlayGarden shall cause its contractor to correct the work to the Superintendent's satisfaction. Upon final completion, all rights, title and interest of PlayGarden in the improvements made to and in any fixtures installed in the Premises (other than trade fixtures) shall vest in the City, without any action of either party hereto, except that upon the Superintendent's request, PlayGarden shall provide the City with a deed or bill of sale for such improvements and/or fixtures.

At the Superintendent's option, PlayGarden shall assign to the City or shall itself, during the Term, enforce the terms of any warranties applicable to the work.

## **ARTICLE 8. OPERATION AND SERVICES**

8.1 PlayGarden shall ensure that all supplies and materials are appropriately stored and secured in such a way as to not inconvenience or conflict with other uses and users of the other portions of Colman Playfield.

## **ARTICLE 9. INDEMNIFICATION AND INSURANCE**

### **9.1 Indemnification.**

PlayGarden does hereby release and, to the fullest extent permitted by law, shall defend, indemnify, and hold the City and its employees and agents harmless from all losses, liabilities, claims (including claims arising under federal, state or local environmental laws), costs (including attorneys' fees), actions or damages of any sort whatsoever arising out of PlayGarden's use and occupancy of the Premises and the common areas of Colman Playfield in connection with this Agreement. PlayGarden shall further indemnify, defend, and hold the City harmless from all claims, liabilities, costs, attorneys' fees and expenses arising from any breach or default in the performance of any obligation to be performed by PlayGarden under the terms of this Agreement or from any violation of law. In furtherance of these obligations, and only with respect to the City, its employees and agents,



PlayGarden waives any immunity it may have under any industrial insurance, worker's compensation, disability, employee benefit or similar laws. PlayGarden acknowledges that the foregoing waiver of immunity was mutually negotiated.

9.2 Survival of Indemnification Obligation. The indemnification obligations of PlayGarden hereunder shall survive the expiration or earlier termination of this Agreement.

9.3 Insurance to be Secured by PlayGarden. Prior to the commencement of any activity on the Premises under this Agreement, PlayGarden shall secure and shall thereafter maintain in full force and effect at no expense to City, insurance as specified below.

9.3.1 Commercial General Liability (CGL) Insurance, including:

- Premises/Operations
- Products/Completed Operations
- Personal/Advertising Injury
- Contractual
- Fire/Tenant Legal
- Employers Liability/Stop Gap

with a minimum limit of liability of \$2,000,000 each occurrence combined single limit bodily injury and property damage, except:

- \$1,000,000 each offense as respects Personal/Advertising Injury
- \$ 100,000 each occurrence as respects Fire/Tenant Legal
- \$1,000,000 each accident/employee as respects Employers Liability/Stop Gap.

The limits of liability required herein may be evidenced by primary insurance or any combination of primary and excess/umbrella liability insurance.

9.3.2 Automobile Liability insurance, including coverage for owned, non-owned, leased or hired vehicles as appropriate with a minimum limit of liability of \$1,000,000 each occurrence combined single limit bodily injury and property damage.

9.3.3 Workers Compensation insurance in compliance with Title 51 of the Revised Code of Washington (RCW).

9.3.4 Except as provided in Subsection 9.3.5, at all times during the Term of this Agreement, PlayGarden shall maintain in full force and effect "all risks" property insurance, including earthquake and flood, on the Premises structures on a replacement cost basis. The deductible, payment of which shall be PlayGarden's sole responsibility, shall be a maximum of \$5,000 each loss. Such property insurance shall include PlayGarden's business personal property and the improvements arising out of the renovation of the Premises. The placement and storage of business personal property in the Premises shall be the responsibility and at the sole risk of PlayGarden.

9.3.5 During such time as PlayGarden is engaged in renovation of the

Premises, PlayGarden shall maintain, or cause its contractor to maintain, in full force and effect and at no cost to the City, builder's risk property insurance, including earthquake and flood, on a replacement cost basis, subject to a maximum deductible of \$25,000 each loss. In the event of a claim, PlayGarden shall be responsible for paying any deductible under the policy except that PlayGarden may require that any contractor pay all or a portion of the deductible to which the contractor caused or contributed to the loss or damage claimed.

9.4 Terms and Conditions. (Not Applicable to Workers Compensation Insurance)

9.4.1 Insurance shall be issued by an insurer rated A - VII or higher in the A.M. Best's Key Rating Guide and licensed to do business in the State of Washington or issued as a surplus lines by a Washington State licensed Surplus lines broker under the provisions of chapter 48.15 RCW, and is subject to the City's approval as to insurer, form and coverage.

9.4.2 Liability insurance shall include the City of Seattle as an additional insured on a primary and non-contributory basis with all insurance and self-insurance the City maintains and shall protect the City from claims and risks in connection with activities PlayGarden undertakes pursuant to this Agreement, or its use and occupancy of the Premises.

9.4.3. As respects property insurance (including builder's risk property insurance), PlayGarden shall cause the insurer to name the City of Seattle as an additional insured as its interests may appear and as a loss payee, and to waive subrogation in favor of the City.

9.4.4 Any liability deductible of more than Five Thousand Dollars (\$5,000) is subject to the City's approval.

9.4.5 The City may amend the requirements for coverage and/or limits upon sixty (60) days' notice and with reasonable justification.

9.4.6 Insurance shall not be cancelled without written notice of such cancellation being hand-delivered or mailed to the City not less than forty-five (45) days prior to the cancellation date, except thirty (30) days as respects insurance procured under the provisions of chapter 48.15 RCW (Surplus Lines) and ten (10) days as respects cancellation for non-payment of premium.

9.5 Evidence of Insurance. Certification of insurance coverage required under this Agreement shall be delivered to each of the following prior to any use or occupancy of the Premises under this Agreement:

Magnuson Park  
c/o Manager  
6310 NE 74<sup>th</sup> Street; Suite 109E  
Seattle, WA 98115

The City of Seattle  
Risk Management Division  
P O Box 94669  
Seattle, WA 98124-4669

A copy of the actual additional insured endorsement or blanket additional insured policy wording to the CGL insurance must be attached to document the City's additional insured

status.

9.6 Insurance to be Secured by PlayGarden's Contractor. Prior to the commencement of any construction activity on the Premises under this Agreement, PlayGarden shall cause its prime contractor(s) to secure and thereafter maintain in full force and effect for the period of construction, insurance as specified below.

9.6.1 Commercial General Liability (CGL) Insurance, including:

- Premises/Operations
- Products/Completed Operations
- Personal/Advertising Injury
- Contractual
- Fire/Tenant Legal
- Employers Liability/Stop Gap
- 

with a minimum limit of liability of \$2,000,000 each occurrence combined single limit bodily injury and property damage, except:

- \$1,000,000 each offense as respects Personal/Advertising Injury
- \$ 100,000 each occurrence as respects Fire/Tenant Legal
- \$1,000,000 each accident/employee as respects Employers Liability/Stop Gap.

9.6.2 Automobile Liability Insurance, including coverage for owned, non-owned, leased or hired vehicles as appropriate with a minimum limit of liability of \$1,000,000 each occurrence combined single limit bodily injury and property damage.

9.6.3 Workers Compensation insurance in compliance with Title 51 of the Revised Code of Washington (RCW).

9.6.4. CGL and Automobile Liability insurance, which shall include the City of Seattle as an additional insured on a primary and non-contributory basis with all insurance and self-insurance the City maintains and shall protect the City from claims and risks in connection with activities performed by all contractors.

9.6.5 Insurance certification shall be provided to the City as specified in Section 9.5 (Evidence of Insurance).

9.6.6 PlayGarden hereby waives any and all rights of subrogation against the City for losses covered by insurance and will have its insurer endorse any policy required under this Agreement, to provide for such waiver.

## ARTICLE 10. DAMAGE OR DESTRUCTION

If fire or other casualty damages the Premises, the party insuring the Premises shall make all insurance proceeds payable as a result of such casualty available to repair the damage. The policyholder shall adjust the loss and PlayGarden, with the Superintendent's

advice and concurrence and in accordance with approved construction documents, shall promptly commence such repairs as will restore the Premises to their condition immediately preceding the casualty as nearly as reasonably possible, provided that neither party shall be required to spend more than the available insurance proceeds plus any deductible. Notwithstanding the foregoing, if (i) more than fifty percent (50%) of the square footage of a Building is damaged as a result of casualty; or (ii) repair and restoration cannot reasonably be completed within eighteen (18) months from the date of the casualty; or (iii) the casualty occurs during the second Extended Term, if any, then either party may terminate this Agreement upon 30 days' written notice to the City, specifying the effective date of such termination, and in such event, any insurance proceeds shall be paid to the City. From the date of the casualty through completion of repairs, Rent shall be abated in the proportion that the untenable portion of the Premises bears to the whole thereof, as determined by the City, unless the casualty results from the gross negligence or willful misconduct of PlayGarden or any of its officers, contractors, agents or employees or from PlayGarden's breach of this Agreement, in which event there shall be no abatement. In the event of a casualty, the City shall neither be liable to PlayGarden for damages to PlayGarden's personal property nor damages, compensation or other sums for inconvenience, loss of business or disruption arising from any repairs to or restoration of any portion of the Premises.

## **ARTICLE 11. COMPLIANCE WITH LAW**

11.1 General Requirements. PlayGarden, at no cost to the City, shall comply with all applicable laws of the United States and the State of Washington; the Charter and Municipal Code of The City of Seattle; and rules, regulations, orders and directives of their administrative agencies, as such laws, codes, rules, regulations, orders and directives now exist or are hereafter enacted or promulgated. Whenever PlayGarden is informed of any violation of any such law, code, rule, regulation, order or directive committed by it or any of its officers, employees, contractors, subcontractors or agents, PlayGarden shall promptly, and shall use its best efforts to promptly cause its officers, employees, contractors, subcontractors and agents, correct such violation.

11.2 Licenses and Other Authorizations. PlayGarden, at no cost to the City, shall secure and maintain in full force and effect during the term of this Agreement, all required licenses, permits and similar legal authorizations, and comply with all requirements thereof, and, upon request, shall submit to DPR evidence of PlayGarden's satisfaction of all such requirements. PlayGarden shall be responsible for the payment of all fees and charges incurred in obtaining any required permits or other governmental approvals and, if required by law, for obtaining a certificate of occupancy prior to the use or occupancy of any portion of the Buildings that are altered, added, renovated or improved.

11.3 Equality of Treatment. PlayGarden shall comply with all applicable equal employment opportunity and nondiscrimination laws of the United States, the State of Washington, and The City of Seattle, including but not limited to Chapters 14.04, 14.10 and 20.42 of the Seattle Municipal Code, as they may be amended from time to time, and rules, regulations, orders and directives of the associated administrative agencies and their officers.

11.4 Americans with Disabilities Act Compliance. PlayGarden, at no cost to the City,

shall comply with all requirements of the Americans With Disabilities Act, as now or hereafter amended, and all rules and regulations implementing the same.

11.5 Lead-Based Paint and Asbestos Containing Materials. PlayGarden shall comply with all applicable laws and regulations with regard to use and disposal of lead-based paint and asbestos containing materials.

## ARTICLE 12. ENVIRONMENTAL PROTECTION.

PlayGarden shall indemnify, hold harmless and defend the City from any costs, expenses, liabilities, fines, or penalties (including attorneys fees) resulting from discharges, emissions, spills, storage or disposal of Hazardous Substances on or from the Premises or any violation of any environmental law by PlayGarden, in each case occurring during the Term of this Agreement, or any other action by PlayGarden or any of its agents, licensees or invitees giving rise to City liability, civil or criminal, or responsibility under Federal, state or local environmental laws. PlayGarden's obligations hereunder shall apply whenever the City incurs costs or liabilities for PlayGarden's actions. This indemnity shall not apply to any Hazardous Substances in, on, under or about the Premises as of the date of this Agreement nor to any such materials that migrate onto or flow under the Premises during the term of this Agreement.

"Hazardous Substance" means any hazardous, toxic, or dangerous waste, substance or material, including petroleum products, or any contaminant, pollutant or chemical defined or identified in any Federal, state or local environmental regulation as posing a potential risk to human health or the environment.

PlayGarden understands and agrees that flammable or Hazardous Substances, including explosives, petroleum products, paint, solvents, and resins in excess of amounts used for routine maintenance and cleaning or for gardening purposes are not allowed on the Premises without the express written permission of the City. In the event written permission to store the preceding materials is granted by the City, PlayGarden shall dispose of such materials in accordance with all applicable laws.

Prior to initiating any process requiring the use, storage or generation of Hazardous Substances on the Premises other than those permitted to be on the Premises by the preceding paragraph, PlayGarden covenants and agrees to obtain the City's prior approval. The use, storage and generation of all Hazardous Substances shall be in accordance with all applicable laws.

PlayGarden agrees to cooperate in any environmental audits conducted by the City's staff or independent third parties. PlayGarden agrees to provide the City with notice of every known governmental environmental inspection of the Premises, and to provide the City with notice of any violation of any environmental laws and order to clean up contamination received by PlayGarden, in each case within ten (10) days after the receipt thereof by PlayGarden. PlayGarden agrees to permit the City to participate in all settlement or abatement discussions. In the event PlayGarden fails to take any remedial measures as stated in any final and unappealable administrative or judicial order or decree signed by a state, federal, or local regulatory agency within 90 days of such order or decree, the City may elect to perform such work, and PlayGarden covenants and agrees to reimburse the

City for all actual direct and indirect costs associated with the City's work.

To the extent required by law, PlayGarden further agrees to retain any and all liabilities arising from the off-site disposal, handling, treatment, storage, or transportation of any Hazardous Substances, including petroleum products, removed from the Premises.

City shall indemnify, hold harmless and defend the PlayGarden from any costs, expenses, liabilities, fines, or penalties (including attorneys fees) resulting from discharges, emissions, spills, storage or disposal of Hazardous Substances on or from the Premises or any violation of any environmental law by City, in each case occurring prior to the term of this Agreement.

The indemnities, other duties, and obligations provided for in this Article shall survive the expiration or termination of this Agreement.

### **ARTICLE 13. LIENS AND ENCUMBRANCES**

PlayGarden shall keep the Premises free and clear of any liens and encumbrances arising out of or resulting from its use and occupancy of the Premises. If, because of any act or omission of PlayGarden or its agents or contractors, any mechanic's or other lien or order for payment of money shall be filed against the Premises or the improvements, PlayGarden shall promptly notify the City of the same and, at PlayGarden's sole expense, cause the same to be discharged or bonded within thirty (30) days after the date of such filing. At the City's request, PlayGarden shall furnish the City with written proof of payment of any item that would or might reasonably constitute the basis for such a lien on the Premises if not paid.

### **ARTICLE 14. RECORDS, BOOKS AND DOCUMENTS FOR CITY ACCESS AND AUDIT**

14.1 PlayGarden to Maintain Books and Records. PlayGarden shall maintain its books, records and documents in accordance with generally accepted accounting procedures and practices, and in such a manner as to sufficiently and properly reflect all direct and indirect costs of any nature expended in the performance of this Agreement. These records shall be subject at all reasonable times to inspection, review, copying or audit in King County by personnel duly authorized by the DPR, City, the Office of the State Auditor, and other officials so authorized by law, rule, regulation, or contract. Within one hundred twenty (120) days after the end of each of PlayGarden's fiscal years during the term of this Agreement, PlayGarden shall submit to DPR a financial report for its operations at the Premises prepared by an independent certified public accounting firm.

14.2 Audit Right to be Ensured by PlayGarden in Subordinate Use Agreements. PlayGarden shall ensure that the inspection, audit and copying rights described in Section 14.1 is a condition of any license, contract or other arrangement under which any person who is not an employee of PlayGarden, or any other entity, is permitted to carry on a business in, on or from the Premises.

14.3 Over and Under-payments. In the event that through any audit PlayGarden is found to have made any overpayment or underpayment hereunder, the Superintendent shall notify PlayGarden of the amount of the overpayment or underpayment. Any overpayment shall be a credit against any fees and charges subsequently due or shall be refunded to

PlayGarden, at its option; underpayments shall be immediately due and payable and shall be delinquent if not paid within ten (10) days after the date of such notice.

14.4 Retention of Records. PlayGarden shall retain all books, records, documents, and other material relevant to this Agreement for five (5) years, and make them available for inspection by persons authorized under this Agreement at such times as the City may require up to four (4) years after the termination of this Agreement. The provisions of this Article shall survive the expiration or earlier termination of this Agreement.

#### **ARTICLE 15. KEYS; ACCESS**

PlayGarden shall maintain keys to the Premises and may distribute keys to users as appropriate. DPR will retain two sets of keys to the Premises. PlayGarden shall provide DPR with two copies of the key to any new lock or bolt installed on any exterior door. PlayGarden shall inform DPR of any access code for use with any alarm or security device installed in the Premises.

DPR shall have the right to inspect the Premises at all reasonable times.

#### **ARTICLE 16. SIGNS OR ADVERTISING**

16.1 Signs. PlayGarden shall have the right to install signs on the exterior of the Premises upon advance written approval from DPR and the Seattle Department of Planning and Development, in accordance with the provisions of SMC 23.55.022.

16.2 No Other Signage on Premises. Except in accordance Section 16.1, PlayGarden shall not inscribe, post, place, or in any manner display any sign, notice, picture, poster, or any advertising matter whatsoever anywhere on the Premises or Colman Playfield. PlayGarden shall remove all signs at the expiration or earlier termination of this Agreement and repair any damage to the Premises caused by the placement or removal of such signs. Notwithstanding the foregoing, PlayGarden shall be permitted to place temporary signage for special events at DPR-approved locations so long as such signs do not remain in place for more than seven (7) days immediately preceding each such event.

#### **ARTICLE 17. WASTEFUL AND DANGEROUS USE**

PlayGarden shall not commit or suffer any waste upon the Premises and shall not do or permit to be done in or about the Premises anything that is inconsistent with this Agreement or the Park Code as now existing or hereafter amended, or any activity that is inconsistent with the use authorized by this Agreement or that will be dangerous to life or limb or that will increase any insurance rate upon the Premises unless PlayGarden pays any increase.

#### **ARTICLE 18. INSOLVENCY**

Either (i) the appointment of a receiver to take possession of all or any part of PlayGarden's assets or (ii) PlayGarden's general assignment for the benefit of creditors, if such appointment, or assignment continues for a period of ninety (90) days, or (iii) if PlayGarden files for protection under any insolvency or bankruptcy act, the same shall

constitute a breach of this Agreement by PlayGarden, and DPR may, at its election and without notice, terminate this Agreement and in that event, DPR shall be entitled to immediate possession of the Premises.

## ARTICLE 19. ASSIGNMENTS AND TRANSFERS

19.1 No Mortgaging or Transferring of Agreement or PlayGarden's Interest Therein. Except as provided in Section 3.4, above, PlayGarden shall not lease, transfer, assign, mortgage, hypothecate or convey this Agreement or any interest therein, in whole or in part, or lease or license use or occupancy of the Premises or any part thereof or any of the rights or privileges or any portion of the Premises granted under this Agreement to any other person, firm or corporation without the Superintendent's prior written authorization, which authorization may be granted, withheld, or conditioned in each instance in the sole discretion of the Superintendent. This prohibition against transfers and assignments includes any transfer or assignment by operation of law. The rights and privileges granted hereunder, and the Premises, are not assignable or transferable by any process or proceedings in any court, or by attachment, execution, proceedings in insolvency or bankruptcy, either voluntary or involuntary, or receivership proceedings. Any assignee approved by the DPR must accept and assume in writing all the terms and conditions of this Agreement to be kept and performed by PlayGarden. Any transfer of this Agreement from PlayGarden by merger, consolidation, transfer of assets, or liquidation shall constitute an assignment for purposes of this Agreement. DPR's consent to any assignment or transfer shall not operate as a waiver of the necessity for consent to any subsequent assignment or transfer, and the terms of such consent shall be binding upon any person or entity using or occupying the Premises by, under, or through PlayGarden.

## ARTICLE 20. TERMINATION

20.1 Defaults in Performance Constitute Material Breach. If a party defaults in its performance of any of the terms, provisions, covenants, and agreements under this Agreement, the non-defaulting party may declare such default to constitute a material breach of this Agreement.

### 20.2 Process for Termination of Agreement.

20.2.1 For Cause. Either party may terminate this Agreement in the event that the other party has materially breached this Agreement and such breach has not been corrected to the reasonable satisfaction of the non-breaching party within thirty (30) days after notice of breach has been provided to such other party; provided, however, that if the nature of such party's obligation is such that more than thirty (30) days are required for such correction, then such party shall not be in default if it commences performance within such thirty (30) day period and thereafter diligently prosecutes the same to completion.

20.2.2 For Reasons Beyond the Control of the Parties. Either party may terminate this Agreement without recourse by the other party where performance is rendered impossible or impracticable for reasons beyond such party's reasonable control, such as but not limited to: acts of Nature; war or warlike operations; civil commotion; riot; labor dispute including strike, walkout, or lockout; sabotage; or superior governmental regulation or control, and where such event is reasonably likely to continue for a period of ninety (90) days or more.



20.3 Notice of Termination. Notice of termination pursuant to Subsections 20.2.1 and 20.2.2 shall be in writing, and shall be given by the party terminating this Agreement to the other party not less than five (5) days prior to the effective date of termination.

20.4 Re-entry by City Upon Termination. Upon the termination of this Agreement, the City may re-enter the Premises using such force as permitted by law. Notwithstanding such re-entry and anything to the contrary in this Agreement, in the event of the termination of this Agreement because of PlayGarden's material breach thereof, PlayGarden's liability for the Base and Additional Rent provided herein shall not be extinguished for the balance of the term of this Agreement, PlayGarden's right to apply the Capital Improvement Offset shall cease.

20.5 Superintendent to Determine for City Existence of PlayGarden's Breach. The Superintendent shall have the right to determine, on the City's behalf, whether or not PlayGarden has defaulted in the performance of its obligations hereunder or has otherwise materially breached any of the terms and conditions of this Agreement.

## **ARTICLE 21. CITY'S CONTROL OF PROPERTY OUTSIDE PREMISES**

All common and other facilities provided by the City outside the Premises, including parking areas, are subject to the City's exclusive control and management. Accordingly, the City may do any and all of the following (among other activities in support of DPR or other municipal objectives) without incurring any liability whatsoever to PlayGarden. DPR shall provide PlayGarden with 30 days' written notice for any permanent changes to Colman Playfield directly impacting PlayGarden operations:

21.1 Change of Vicinity. Increase, reduce, or change in any manner whatsoever the number, dimensions and locations of the walks, buildings, and parking areas in the vicinity of the Premises.

21.2 Traffic Regulation. Regulate all traffic in the vicinity of the Premises, including the operation and parking of vehicles of PlayGarden and its invitees, employees, and patrons in such vicinity.

21.3 Display of Promotional Materials. Erect, display and remove promotional exhibits and materials and permit special events on property adjacent to the Premises.

21.4 Change of Businesses. Change the size, number, and type and identity of concessions, stores, businesses, and operations being conducted or undertaken in the vicinity of the Premises.

## **ARTICLE 22. ANIMALS**

Subject to the provisions of Section 3.2, PlayGarden shall be permitted to have on the Premises any animals that it deems necessary or advisable for programmatic purposes, including, but not limited to, dogs, fish, rabbits, chickens and frogs, provided PlayGarden complies with all applicable laws and regulations with respect thereto.



25.5 Applicable Law. This Agreement shall be construed and interpreted in accordance with Washington law.

25.6 Jurisdiction and Venue. The jurisdiction and venue for any action between the parties arising out of this Agreement shall be in the Superior Court of the State of Washington for King County.

25.7 No Partnership or Joint Venture Created. The City does not by this Agreement, in any way or for any purpose, become a partner or joint venturer of PlayGarden in the conduct of its business or otherwise.

25.8 Remedies Cumulative. Each party's rights under this Agreement are cumulative; failure on the part of a party to exercise promptly any rights given hereunder shall not operate to forfeit any such rights. Each party shall also have any other remedy given by law. The use of one remedy shall not be taken to exclude or waive the right to use another.

25.9 Amendments. No modification of this Agreement shall be binding upon the City or PlayGarden unless reduced to writing and signed by an authorized representative of each of the parties hereto.

25.10 Force Majeure. With the exception of monetary obligations, which shall in no event be excused, any delay in or failure of performance by City or PlayGarden shall not constitute a default hereunder if and to the extent the cause for such delay or failure of performance was unforeseen and beyond the control of the party ("Force Majeure").

25.11 No Third Party Rights. No term or provision of this Agreement is intended to be, or shall be, for the benefit of any person, firm, organization or corporation that is not a party hereto nor shall any person, firm, organization or corporation other than a party hereto have any right or cause of action hereunder.

25.12 Effectiveness of Agreement. This Agreement shall not become effective until (a) the Agreement has been approved by the Seattle City Council, (b) the Agreement has been executed by an authorized representative of each party and (c) the Finance Director has determined that PlayGarden has or will raise sufficient funds to complete the renovations to the Premises in accordance with the Plans, as described in Section 2.2.

25.13 No Waivers. No action other than a written document from a party specifically so stating shall constitute a waiver by such party of any particular breach, default or noncompliance of this Agreement by the other party, nor shall such document waive any failure by the other party to fully comply with any other term or condition of this Agreement, irrespective of any knowledge any officer or employee of the party may have of such breach, default or noncompliance. A party's failure to insist upon full performance of any provision of this Agreement shall not be deemed to constitute consent to or acceptance of such incomplete performance in the future.

25.14 Consent. Whenever the City's consent or approval in writing is required under this Agreement, PlayGarden must obtain such consent or approval in writing expressly for purposes of this Agreement, regardless of whether a consent or approval shall

have been granted by the City in its regulatory, public utility, or other capacity unless such consent or approval expressly refers to this Agreement.

No permission, consent, or approval by a party contained herein or given pursuant to this Agreement is, or shall be construed as, a representation or assurance that the matter consented to or approved complies with applicable laws, regulations, ordinances or codes, nor shall any such consent or approval be construed to authorize any failure to comply with any of the foregoing.

25.15 Entire Agreement. This Agreement and all exhibits pertaining to it constitute the entire agreement and understanding of the parties with respect to this matter and supersedes all prior oral or written understandings, agreements, promises or other undertakings between the parties regarding the subject matter hereof. The parties to this Agreement acknowledge that it is a negotiated agreement, that they have had the opportunity to have this Agreement reviewed by their respective legal counsel, and that the terms and conditions of the Agreement are not to be construed against either party on the basis of such party's preparation of the same.

**SEATTLE CHILDREN'S PLAYGARDEN**

Chloris Kern  
Chair of the Board of Directors

11-3-06  
Date

Lizabeth Bullard  
Secretary Executive Director

11/3/06  
Date

**THE CITY OF SEATTLE**

Kenneth R. Bounds  
Kenneth R. Bounds, Superintendent  
Department of Parks and Recreation

11/14/06  
Date

IN WITNESS WHEREOF, the parties have executed this contract:

**PLAYGARDEN**

STATE OF WASHINGTON )

) ss:

COUNTY OF KING )

I certify that I know of or have satisfactory evidence that Liz Bullard, the Executive Director of the foregoing named non-profit corporation, signed this instrument, and on oath stated the she was authorized to execute the instrument and acknowledged it as the free and voluntary act of such non-profit corporation for the uses and purposes mentioned in the instrument.

Brook Candace Self  
(Signature of Notary Public)

Dated: 11/3/06

BROOK CANDACE SELF

(Printed name)

Residing at: Woodinville

My appointment expires: 9/19/10

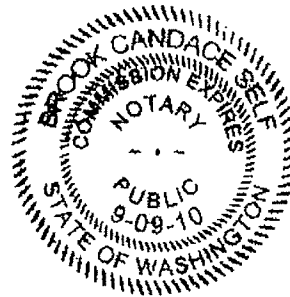




EXHIBIT 2

**AMENDMENT NO. 1**  
**TO**  
**THE LEASE AGREEMENT (LA06-2551-013)**  
**BETWEEN**  
**THE CITY OF SEATTLE DEPARTMENT OF PARKS AND RECREATION**  
**AND**  
**SEATTLE CHILDREN'S PLAYGARDEN**  
**FOR THE DESIGN AND CONSTRUCTION OF A PERMANENT ART INSTALLATION AND**  
**CONSTRUCTION OF A TREE FORT DECK AND ARBOR**  
**AT COLMAN PARK**

Reference is made to that certain agreement referred to as the Lease Agreement (Lease) between the City of Seattle Department of Parks and Recreation (Parks) and the Seattle Children's PlayGarden. In consideration of the terms, conditions, and covenants contained herein, both parties hereby acknowledged and agree to amend the Lease as follows:

1. In compliance with Article 7. "ALTERATIONS OR IMPROVEMENTS", and Section 25.9 "Amendments", Parks and Seattle Children's PlayGarden agree to amend the Lease Agreement to include the following terms for the permanent art installation project and the construction of the Tree Fort Deck and Arbor project:

**TRIMPIN ARTWORK PROJECT**

**Artwork Title:** "A Musical Fence", by Trimpin

**Name of Artist:** Trimpin

**Date of Installation:** May 2013

**Location:** COLMAN PLAYGROUND, 1740 23rd Ave S., Seattle

**Mission of the Art Organization:** This artwork is being generated by Trimpin, a kinetic artist, in partnership with Seattle Children's PlayGarden and the community. This is a collaborative effort to create a place where children with physical and cognitive impairments can create musical sounds and be able to see the cause and effect of sound production.

**Description of Artwork:** This project includes the design, creation and installation of a musical fence artwork at the Seattle Children's Playground. The design for this sculpture came out of a workshop facilitated by the artist Trimpin, for teenagers with special needs, funded by the Nesholm Family Foundation in the summer of 2011. A key feature is the capability for children with physical and cognitive impairments to create musical sounds, and be able to see the cause and effect of sound production. Artist Trimpin is a world renowned kinetic sculptor, sound artist and composer.

**Attachment A:** A detailed description of the Art Proposal, including materials, color, location, picture or rendition, dimensions of artwork, footprint and installation details.

## **TREE FORT DECK AND ARBOR PROJECT**

**Description of Project:** The Tree Fort Deck and Arbor involves the construction of timber structures. The "tree fort deck" is an elevated deck off the south side of the building that is set among some trees to give people a sense of being in the trees, and some views. The arbor is a wood structure to be constructed near the play area to create a dappled shade, and may have grape vines on it.

**Date of Installation:** March to May 2013

### **TERM:**

This agreement shall commence upon signing and continue in effect until terminated at the mutual consent of both parties. Either party may terminate this agreement by sending a 60 days written notification to the other party of its intent to terminate.

### **PROJECT TERM:**

The Artwork is expected to be a permanent installation.

### **RESPONSIBILITIES OF SEATTLE PARKS AND RECREATION:**

1. Parks will support, when feasible and appropriate, the events and activities implemented under this agreement.
2. Parks will provide a project manager as a point contact during artwork installation and construction of the tree fort deck and arbor.

### **RESPONSIBILITIES OF THE SERVICE PROVIDER/ARTIST/CONTRACTOR:**

1. The service Provider/artist/contractor will be responsible for leaving Seattle Parks and Recreation property in the same condition (or better) than before the art installation.
2. The service Provider/artist/contractor will be responsible for any damages to Seattle Parks and Recreation property caused by the installation.

### **OWNERSHIP:**

The Musical Fence artwork shall remain the personal property of Seattle Children's PlayGarden subject to the conditions of this agreement. A use fee will not be required for the artwork to remain on Parks property as long as all routine maintenance and insurance is provided by Seattle Children's PlayGarden for the life of the installation.

The Tree Fort Deck and Arbor shall remain Parks property.

### **MAINTENANCE:**

All maintenance responsibilities will reside with Seattle Children's PlayGarden. While Seattle Children's PlayGarden will provide for any needed maintenance or repair, this may include Parks staff performing the work. Seattle Children's PlayGarden maintenance responsibilities include, but are not limited to, the following:

1. Repair and maintenance of the art piece(s) the tree fort deck and arbor on an as needed basis.



2. Graffiti removal on an as needed basis – Parks strives for a consistent service level of six business days, 24 hours for hate/racist/vulgar graffiti, and ten business days for structures where special equipment has to be used.
3. Cleaning on an as needed basis.

Seattle Children's PlayGarden shall inform the Seattle Parks and Recreation Jobline at 684-7250 or PKS\_work\_order\_desk@seattle.gov and the Central Parks Crew Chief at 684-4750 if the service Provider/artist/contractor requires access during installation or maintenance activities to the site. If there are safety concerns that arise, Seattle Parks and Recreation may request repairs by the artist, who must employ reasonable efforts to complete as promptly as possible. All costs for repairs and maintenance of the artwork will be borne by Seattle Children's PlayGarden.

#### ACKNOWLEDGEMENT:

The service Provider/artist/contractor will provide prominent acknowledgement of Seattle Parks and Recreation and the Department of Neighborhoods in all publicity and promotional materials, including but not limited to brochures, press releases, programs, posters, flyers and advertisements. Logos for display on materials will be provided upon request.

#### INSURANCE:

At all times during the installation, exhibition or removal of the artwork and construction of the tree fort deck and arbor, the service provider/artist/contractor shall maintain Commercial General Liability (CGL) insurance with a minimum limit of liability of \$1,000,000 each occurrence combined single limit bodily injury and property damage. The insurance shall include "the City of Seattle" ("City") as an additional insured for primary and non-contributory limits of liability. Evidence of insurance, including an actual copy of the CGL additional insured policy provision, shall be provided to Seattle Parks and Recreation upon request.

The artwork shall be installed, exhibited or removed at the sole risk of the service provider/artist, who waives its rights of recovery for any damage to or destruction of the artwork in favor of the City. If the artwork is insured for physical damage, the service Provider/artist/contractor shall, in addition, provide an insurer's waiver of subrogation in favor of the City.

#### INDEMNIFICATION AND LIABILITY:

To the fullest extent permitted by law, the service Provider/artist/contractor shall indemnify the City for and against any and all liability, claims, damages, costs or expenses (including reasonable attorney's fees and costs and all other litigation expenses when incurred and whether incurred in defense of actual litigation or in reasonable anticipation of litigation) to the extent caused by the acts or omissions of the service provider/artist, or any of its officers, employees, agents, contractors, or volunteers on or about the Premises, or from any violation of law. If any suit or action is brought against the City, the service provider/artist, upon notice of the commencement thereof, shall defend the same, at no cost and expense to the City, and promptly satisfy any final judgment adverse to the City or the service Provider/artist/contractor jointly; provided, that if the City determines that one or more principles of governmental or public law are involved, the City retains the right to participate in such action.

## COPYRIGHT:

### City's Right to Reproduce Images

The service Provider/artist/contractor shall retain the copyright and all other intellectual property rights to the artwork, provided that the CITY is hereby granted an irrevocable, non-exclusive, royalty free license to graphically reproduce (through photography or otherwise) the image of the artwork, including but not limited to, the artwork proposal and all preliminary studies, models and maquettes thereof that have been delivered to and accepted by Seattle Parks and Recreation, and to authorize third parties to graphically reproduce (through photography or otherwise) any and all of the same, as are desired by the City, for municipal (e.g., education, public information, etc.) purposes. On each such municipal reproduction, the ARTIST shall be acknowledged, using designations provided by the provider/artist, to be the creator of the original artwork thereof, provided that reproductions of any preliminary studies, models and maquettes shall not be identified as or represented to be the finished artwork.

The rights granted by this provision shall survive the expiration or earlier termination of this Agreement.

## MATERIAL CHANGES TO ARTWORK:

### A. Visual Artists Rights Act (VARA). Installation or Integration of Any Work of Visual Art at a City of Seattle park.

1. Reservation of Rights by City; Prohibition Against Installation or Integration of Any Work of Visual Art on property owned by Seattle Parks and Recreation without Superintendent's prior express written consent. The City reserves to and for itself the right to approve or disapprove of the installation or integration on or into the Premises of any "work of visual art," as that term is defined in 17 U.S.C. Section 101, as now existing or as later amended, and to approve or disapprove of each and every agreement regarding any such installation or integration on or into the Premises of a work of visual art. The service Provider/artist/contractor shall not, without the prior, express, written consent of the Superintendent, install on or integrate into, or permit any other person or entity to install on or integrate into, any portion of the Premises any "work of visual art". The Superintendent's consent to the installation of any such art work may be granted, granted upon one or more conditions, or withheld in the Superintendent's discretion. The City of Seattle agrees that the art has been approved and the artists can install the artwork listed on Attachment A. The service Provider/artist/contractor may request additions to or changes to Attachment A, to which City of Seattle will respond in a timely fashion and will need to approve or reject the proposed changes
2. The service provider/artist's Indemnification of City Against Liability under Visual Artists Rights Act of 1990. If the Superintendent has not given such official's consent to the installation or integration of any work of visual art on or into the Premises, the service Provider/artist/contractor shall indemnify, protect, defend, and hold the City harmless, at service provider/artist's expense, in a lawsuit or other judicial action, and pay to City of Seattle the amount of any adverse judgment from the lawsuit or judicial action, for any and all third party claims (including attorneys' fees and costs) arising as a consequence of the installation or integration by service provider or artists engaged under written agreement by service Provider/artist/contractor during the term of this Agreement of that work of visual art on or into any portion of property belonging to Seattle Parks and Recreation. This indemnification obligation shall exist regardless of whether service Provider/artist/contractor has consented to or has prior knowledge of such installation or integration. The indemnification obligation of this subsection shall survive the expiration or

earlier termination of this agreement. The City of Seattle must give the service Provider/artist/contractor prompt notice of the third party claim.

3. If the service Provider/artist/contractors the person who originally created the artwork (the "author" for VARA purposes), he or she hereby consents to the installation of the artwork in the City's building, structure, facility, or other Seattle Parks and Recreation property, he or she acknowledges that such installation may subject the artwork to destruction, distortion, mutilation, or other modification by reason of its removal from that location.
4. If the service Provider/artist/contractors not the author of the artwork, and if the author of the artwork is a party to this Agreement, the author of the artwork hereby consents to the installation of the artwork in the City's building, structure, facility, or other premises. He or she acknowledges that such installation may subject the artwork to destruction, distortion, mutilation, or other modification by reason of its removal from that location.

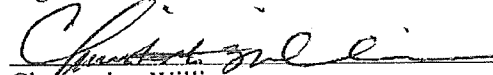
B. City's right to remove or relocate artwork. Service provider/artist, and the author, if the author is a party to this Agreement, acknowledges that the City of Seattle reserves the right to manage its buildings, facilities, and public sites for public purposes, and in doing so, may determine that it is necessary to relocate or remove the artwork (in whole but not in part) and/or modify the site in/on which it is located. The City of Seattle and service provider/artist, and the author, if the author is a party to this Agreement, agree that the City of Seattle Department of Parks and Recreation has the authority to relocate or remove the artwork and/or substantially modify its site within its own discretion; should this need arise, the City of Seattle Department of Parks and Recreation will provide the service provider/artist, and the author, whether the author is a party to this Agreement or not, a minimum of 90 days notice prior to removal or relocation. If the department deems a safety risk to property or person, the department may remove the artwork without notification, and service Provider/artist/contractor hereby waives any and all VARA rights he or she may have regarding its removal. Seattle Parks and Recreation will work with the service provider/artist, and the author, if the author is a party to this Agreement, on an alternative location at the park if relocation is desired by all parties, subject to the author's right to remove the artwork pursuant to 17 U.S.C. Section 113(d)(2).

This document contains the entire agreement between the parties regarding its subject matter. Except as to Attachment A, as described above, this Agreement cannot be modified except in writing signed by all parties. All notices under this Agreement must be in writing and addressed to the locations indicated in the signature block below, and will be considered received 3 business days after the notice is sent.

Signed:

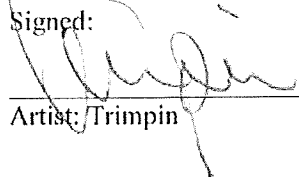
  
Liz Bullard, Executive Director, SCP  
5/29/13  
Date

Signed:

  
Christopher Williams  
Acting Superintendent, Seattle Parks & Recreation  
Date

Address for Notices:  
100 Dexter Avenue North  
Seattle, WA 98109

Signed:

  
Artist: Trimpin  
5/29/13  
Date

## ATTACHMENT A

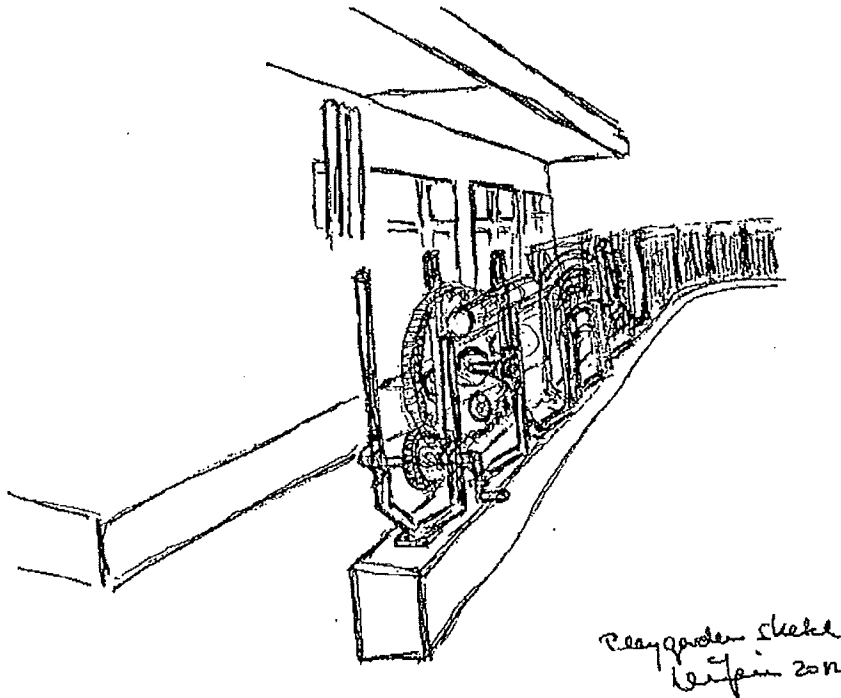
Trimpin envisions this sculpture will be a series of interactive musical events that will allow visitors to observe and participate in the mechanical production of musical sounds. Sometimes an action by the visitor will create a short melody, or visitors may use paddles or hands to make tones on tuned metal tubes or plates. There may be a metal ball that rolls down a series of xylophone like plates and is returned to the start position by moving a handle. Unlike many of his pieces that incorporate electronics, this will be a mechanical piece.

The artist is very sensitive to this being a public outdoor setting near children, and the need for safety, longevity, and low maintenance. Component parts will largely be powder coated metal (welded by certified welding fabricators), , and aircraft cable.

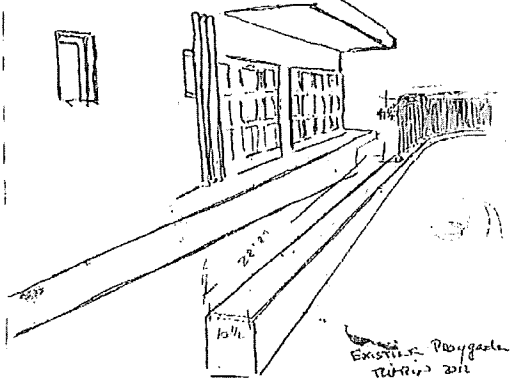
The overall concept is a framework made from giant tuning forks that will start at approximately 6-ft tall and reduce height (in a tuned scale) down to meet the existing fence height at the far end of the wall. Between each set of tuning forks there will be a musical "event" or feature. The frame will be anchored to the existing concrete wall with (4) ½"-5/8" concrete anchors.

A small area of turf adjacent to the wall will be replaced by some sort of hard surface pathway to support the interactive use of the sculpture. A few irrigation heads will need to be relocated.

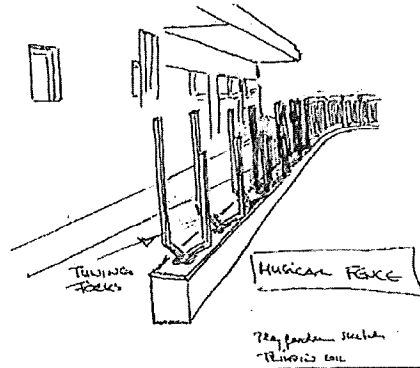
Concept sketch:



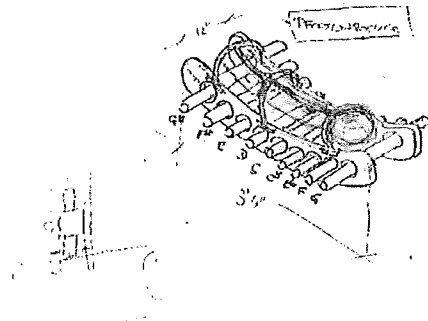
Concept sketches:



Existing wall



Wall with "tuning fork" framework

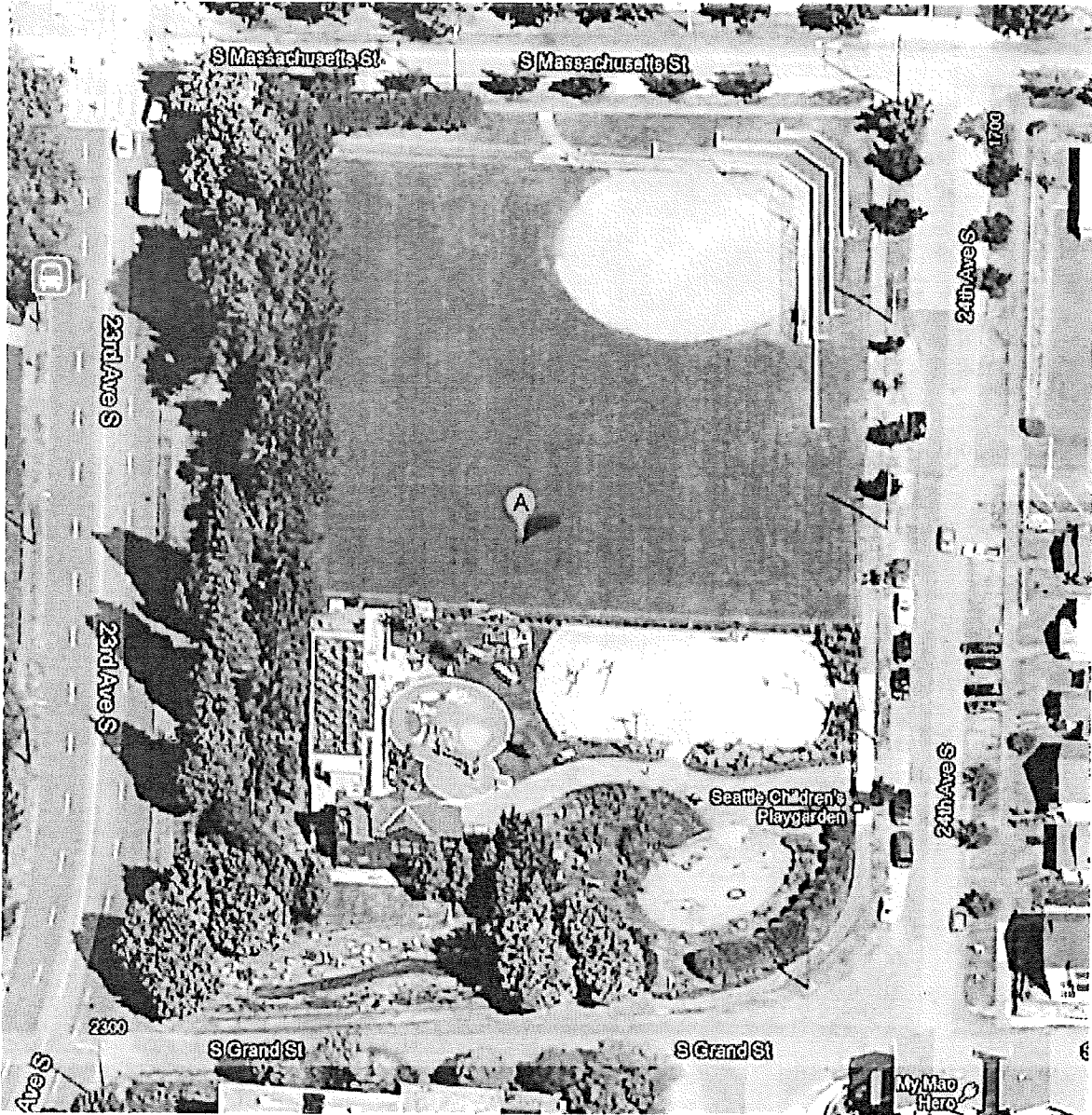


Example of musical "instrument"



Fabricated frame "tuning forks"

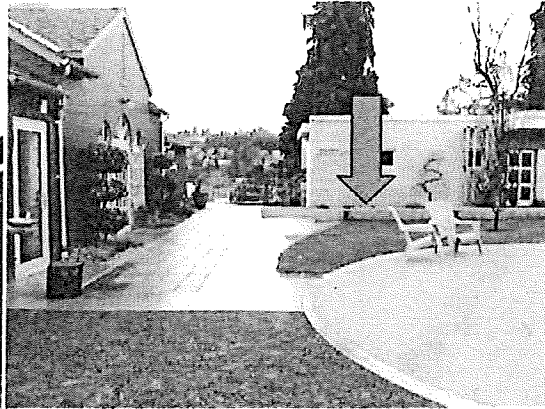
Location on site:



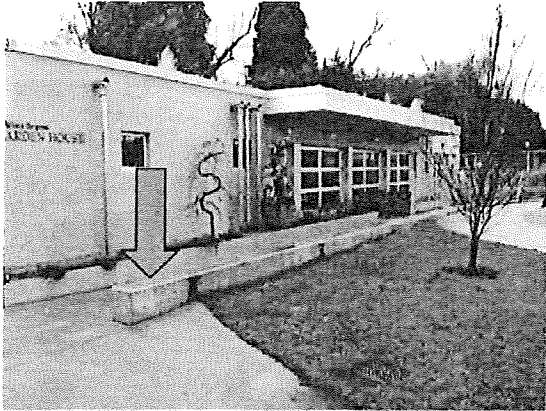
Site Context Photos



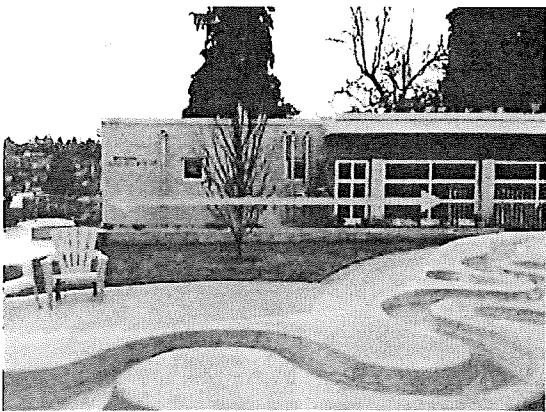
View from sidewalk entry



Close in view by buildings



“Tuning fork” frame will sit atop concrete wall, with descending heights to meet existing fence height at far end.





# Bongoberry Quintet

