

**COLLABORATION, FUNDING AND MANAGEMENT AGREEMENT****BETWEEN****THE CITY OF MIAMI BEACH, FLORIDA****AND****THE SABRINA COHEN FOUNDATION, INC.****FOR****AN ADAPTIVE RECREATION CENTER**

THIS AGREEMENT, is made and executed on this 2nd day of November, 2017, by and between the CITY OF MIAMI BEACH, a municipal corporation organized and existing under the laws of the State of Florida ("City"), and THE SABRINA COHEN FOUNDATION, INC., d/b/a The Sabrina Cohen Foundation, a Florida not-for-profit corporation, whose principal office is located at 1800 Sunset Harbour Drive, #2406, Miami Beach, Florida, 33139 ("FOUNDATION") (each, a "Party," and collectively, the "Parties").

**RECITALS:**

**WHEREAS**, since 2015, the City has explored opportunities to provide greater access to the City's beaches to persons living with physical and cognitive disabilities, including through development of a wellness center on City-owned property; and

**WHEREAS**, the City is the owner of certain real property located at and around 5301 Collins Avenue, which includes City Fire Station 3, the parking lot areas east and south of Fire Station 3, Beach View Park, and associated facilities (the "Property"); and

**WHEREAS**, in an effort to provide enhanced recreational programming at Beach View Park and greater access to the City's beaches, the City desires to expand the footprint available for Beach View Park facilities, without reducing any existing Park greenspace, and to use a portion of the Property to provide expanded parks and recreation services to the public, including persons living with physical and cognitive disabilities, seniors living with disabilities,

and able-bodied individuals with temporary injuries; and

**WHEREAS**, the FOUNDATION is a Florida not-for-profit corporation of the State of Florida, that exists as a 501(c)(3) public charity under the Internal Revenue Code, and currently operates a successful adaptive beach day program within the City of Miami Beach, with accessible beach programming at or near Allison Park; and

**WHEREAS**, in view of the limited funding available to the City to support its City-wide parks and recreational needs, the FOUNDATION approached the City with a proposal to provide the necessary funding for the design, development, and construction of a City-owned adaptive recreational facility (hereinafter referred to as the "Adaptive Recreation Center" or "Center") which, once completed, will be used in accordance with this Agreement for the purposes specified herein, with the intent of providing an accessible access point to the beach, and beach programming for persons living with physical and cognitive disabilities, seniors living with disabilities, and able-bodied individuals with temporary injuries; and

**WHEREAS**, on March 22, 2017, Commissioner Joy Malakoff sponsored a referral to the Finance and Citywide Projects Committee ("Finance Committee"), for discussion of a possible agreement with the FOUNDATION for the Center at the Property; and

**WHEREAS**, on April 17, 2017, the City conducted a community outreach meeting to obtain public input as to the conceptual terms of the FOUNDATION's proposal; and

**WHEREAS**, on April 22, 2017, the Finance Committee discussed the FOUNDATION's proposal for the Center, obtained public input with respect to the FOUNDATION's proposal, and directed the Administration to work with the FOUNDATION to develop an agreement with respect thereto; and

**WHEREAS**, the City and the FOUNDATION prepared an agreement with the proposed terms for the FOUNDATION's funding of the design, development and construction costs for the Center, and management and operation thereof, which was presented to the City Commission at its July 26, 2017 meeting; and

**WHEREAS**, at the July 26, 2017 City Commission meeting, following public input and discussion, the Mayor and City Commission endorsed the concept for the Center at the Property, and referred the proposed Agreement to the Finance Committee for further review and comment; and

**WHEREAS**, at the July 28, 2017 Finance Committee meeting, the Finance Committee discussed the terms of the proposed Agreement, provided additional direction to the Administration and City Attorney's Office with regard to proposed terms for the Agreement, and provided the public with an additional opportunity to comment on the proposed Agreement; and

**WHEREAS**, at the September 20, 2017 Finance Committee meeting, the Finance Committee considered a revised draft of the proposed Agreement (incorporating the Finance Committee's July 28, 2017 comments, as well as other negotiated terms), heard additional public input and comment, and favorably recommended that the City Commission approve this Agreement; and

**WHEREAS**, following further public input, on October 31, 2017, the City Commission adopted Resolution No. 2017-30082, and approved this Agreement; and concluded that, subject to the FOUNDATION's obligation to cover the costs for the design, development and construction of the Center, the City is desirous of forging a partnership with FOUNDATION to manage the proposed Center on a portion of the Property, and has deemed that it would be in the City's best interest to utilize FOUNDATION's prior experience in developing adaptive beach programming in Miami Beach.

**NOW THEREFORE**, in consideration of the premises and the mutual covenants and conditions herein contained, it is agreed by the parties hereto as follows:

**SECTION 1. INCORPORATION OF RECITALS.** The above recitals are true and correct and are incorporated by reference as if fully set forth herein.

**SECTION 2. THE PREMISES; GRANT OF RIGHTS.**



2.1. The premises shall consist of a footprint of approximately (but not more than ) 5,000 square feet of land located east of 5301 Collins Avenue, on a portion of the Property described in Exhibit "A," attached hereto, and which shall contain a two-story building of up to a maximum (but no more than) 10,000 sq. ft., with a maximum (but not to exceed) height of twenty four (24) feet, and with the final precise location on the Property to be determined by, and subject to the final approval of, the City Commission, as part of the design development process outlined in Section 6 of this Agreement (the approved location/site of the Center on the Property shall hereinafter be referred to as the "Premises").

2.2. The City, as of the Possession Date (as defined in Section 3 herein), and provided that the FOUNDATION has (i) raised all of the funds required for the design, development, and construction of the Center, **and** (ii) timely and satisfactorily complied with all of its obligations pursuant to Sections 4, 5 and 6 of this Agreement, grants to FOUNDATION, and FOUNDATION accepts from the City, this Agreement for the exclusive use, management, coordination, and operation of the Center, for the Term (as defined in Section 3 herein), in conformance with the purposes stated herein, and subject to all the terms and conditions set forth herein. As of the Possession Date, and during the Term, FOUNDATION shall have the primary use and occupation of the Premises and the Center, and shall be responsible for the Center's management, operation, programming, and maintenance.

2.3. As of the Possession Date, FOUNDATION shall accept the Premises and the Center, in their "as is" condition, and, except as specifically provided herein, without any representations or warranties of any kind or nature whatsoever by City as to their respective condition or as to their use or occupancy which may be made thereof.

2.4. At no time shall the Premises or the Center include, nor reduce, any existing Beach View Park greenspace.

### **SECTION 3. EFFECTIVE DATE; POSSESSION DATE; TERM.**

3.1 This Agreement shall be effective on the date it is signed by both Parties



("Effective Date").

3.2 The term of this Agreement shall commence on the date of issuance of a final certificate of occupancy by the City of Miami Beach Building Department for the Center ("Possession Date"), and shall continue thereafter for a term of nine (9) years (the "Term").

3.3 Within thirty (30) days after the Possession Date, the City Manager and FOUNDATION shall execute a written memorandum, filed with the City Clerk, for the purpose of memorializing the Possession Date, the date of expiration of the Term, and the use period referenced in Section 5 of this Agreement.

#### **SECTION 4. DEVELOPMENT OF ADAPTIVE RECREATION CENTER.**

4.1. The FOUNDATION agrees to cover any and all hard and soft costs required for the design, development and construction of the Center including, without limitation, any permit fees or impact fees that may be required, and any and all furniture, fixtures and equipment required to manage and operate the Center for its intended purposes (Collectively, all such design, development, and construction costs shall be hereinafter referred to as the "Project Costs").

4.2. **THE FOUNDATION ACKNOWLEDGES THAT THE CITY HAS NOT IDENTIFIED OR APPROPRIATED ANY CITY (OR OTHER) FUNDS FOR THE DESIGN, DEVELOPMENT, AND CONSTRUCTION OF THE CENTER, OR FOR ANY PROGRAMMING, MANAGEMENT OR OPERATION COSTS AT THE CENTER. THE FOUNDATION FURTHER ACKNOWLEDGES AND AGREES THAT BY ENTERING INTO THIS AGREEMENT, THE CITY SHALL HAVE NO OBLIGATION TO CONTRIBUTE ANY FUNDS FOR THE PROJECT COSTS, OR FOR ANY PROGRAMMING, MANAGEMENT OR OPERATION COSTS. ANY CITY FUNDING COMMITMENTS WITH RESPECT THERETO SHALL REQUIRE PRIOR CITY COMMISSION APPROVAL, WHICH APPROVAL, IF GIVEN AT ALL, SHALL BE AT THE CITY COMMISSION'S SOLE DISCRETION.**

4.3. In order to permit the FOUNDATION time to engage in the necessary

fundraising, the City will not use the Premises or dedicate the Premises for any purpose other than its current use as a municipal surface parking lot, for the period of time provided in Section 7 hereof (during which time, the FOUNDATION shall be required to actively raise the necessary funds to cover the Project Costs).

4.4. Any funds the City accepts from the FOUNDATION for the Center shall be used exclusively to support the design, development and construction of the Center. Any donations transferred by the FOUNDATION to the City for the Center (the "Project Donations") shall be accounted for separately, in a restricted special revenue fund, and used solely by the City for payment of Project Costs.

4.5. The Parties acknowledge and agree that the Premises and Center shall be owned by the City, as a parks and recreation building under the auspices of the City's Parks and Recreation Department. At all times, City shall retain ownership of the Premises and the Center. With respect to furniture, fixtures and equipment, the FOUNDATION shall own any furniture, non-permanent fixtures, and equipment that is paid for with FOUNDATION funds. The City shall own all permanent fixtures, as well as any equipment, non-permanent fixtures and furniture paid for by the City, if any, as part of the City's Parks and Recreation Department asset inventory.

4.6. The City's Office of Grants Administration shall meet and work with the FOUNDATION in good faith to identify potential grant opportunities that may be available to either the City, the FOUNDATION, or both, in support of the design, development, and construction of the Center. The FOUNDATION shall otherwise be responsible for applying for any grants in support of the Center. With respect to grant opportunities that may only be available to the City (in its capacity as a public entity), the City, in good faith, may, at its sole discretion, apply for such grants, provided that the City shall have no obligation to apply for grants that require a City funding match, unless such grant application is approved by the City Commission, and which approval shall be at the City Commission's sole discretion. Except as

otherwise stated above, City's sole obligation pursuant to this subsection shall be to meet with the FOUNDATION to assist in identifying potential grant opportunities for the FOUNDATION to follow-up on, at its discretion.

4.7. The FOUNDATION agrees that, as part of its fundraising efforts, it will not accept any donation, grant, or other funds for the design, development or construction of the Center that contains any restriction or imposes any requirements on the City (other than the general restriction that any donation, grant, or other funds be applied for the design, development or construction of the Center); and, specifically, the FOUNDATION shall not accept any donation, grant or other funds that include, without limitation, any requirement of specific programming at the Center, any requirement that would involve the expenditure of public funds, or any limitation with respect to the City's selection of any manager/operator for the Center. All donations, grants, or other funding that require any interior or exterior naming rights shall be subject to the provisions of this Agreement, including Section 16 hereof, and the City's Naming Ordinance, as codified in Chapter 82, Article VI, Sections 82-501 through 82-505 of the City Code, as may be amended from time to time. The City's intent with respect to the foregoing is not to restrict the FOUNDATION's fundraising efforts, but rather to ensure that any funds transferred to the City for the design, development, and construction of the Center are strictly for the Project Costs, and do not include any additional use restrictions or other commitments that the City Commission has not previously approved.

#### **SECTION 5. APPROVED PERMITTED USES OF THE ADAPTIVE RECREATION CENTER.**

5.1. The City agrees that following the issuance of a final certificate of occupancy for the Center, the Center shall be used solely (i) as an adaptive recreation center serving persons living with physical and cognitive disabilities, seniors living with disabilities, and able-bodied individuals with temporary injuries; and (ii) for ancillary uses reasonably or logically connected thereto (such ancillary uses including, without limitation, strength, conditioning, cardio, resistance training, yoga, meditation, art and music classes, wellness programs or related



activities, charitable fundraisers, specialty sales [such as sunscreen lotion, towels, and the like], and the sale of food and non-alcoholic beverages), as well as supporting beach access and connectivity programs including, without limitation, adaptive surf and scuba, shoreline flotation and swimming programming (together, the uses in Section 5.1(i) and 5.1(ii) shall be defined as, and may hereinafter be referred to as, the "Approved Uses"). The Premises shall be used by FOUNDATION solely and exclusively for the Approved Uses, or such other uses as may be approved by the City Commission, as set forth in Section 5.2 below, and for no other purposes or uses whatsoever.

5.2. In the event that the FOUNDATION seeks to use the Premises for any use other than the Approved Uses, the FOUNDATION shall notify the City Manager of the proposed new use, in writing. If the City Manager determines that the proposed new use is not reasonably or logically connected to the Approved Uses, then each such proposed new use shall be subject to the prior written approval of the City Commission, which approval, if given at all, shall be at the City Commission's sole discretion, and which shall be memorialized as an amendment to this Agreement.

5.3. **In no event shall the Center be used as a hall for hire, banquet hall, or similar third-party venue rental, or for the sale of alcoholic beverages (provided, however, that the FOUNDATION may serve alcoholic beverages at charitable fund-raisers at the Premises from time to time).**

5.4. If the FOUNDATION uses the Premises or the Center for any purposes and/or uses not expressly approved in Section 5 herein, such use shall be considered a default under this Agreement and the City shall be entitled to all remedies, including termination of this Agreement (upon expiration of the applicable notice and cure period), as set forth in Section 27 herein. In addition, notwithstanding any other terms of this Agreement, the City shall be entitled to seek immediate relief, whether at law or equity, to restrain such improper use(s).

5.5. If at any time during the Term, the FOUNDATION or any successor organization

is not able to cover the operating, maintenance and programming costs for the Center, in the manner as contemplated herein, the City shall use good faith efforts to seek another qualified vendor to assume the maintenance and programming obligations described herein and, in the event that the City is unable to secure an agreement with another qualified vendor, the City shall assume control of the Center and shall use the Center for the most closely-related Parks Department purposes, as determined by the City Commission in its reasonable discretion, provided, however, that the Center building shall continue to serve as an accessible entry point to the beach. In determining the most "closely related" Parks Department purposes, the Parties agree that the City may use the Center for Parks Department programming, such as providing general wellness or recreational programming, in combination with beach accessibility (which may be satisfied, without limitation and by way of example only, by making available electric beach chairs at the Premises, and providing space within the Center for persons to temporarily store their wheelchairs while the electric beach chairs are in use).

5.6. Following the Possession Date, and for a period of forty (40) years thereafter, the City agrees that the Center building shall be used for the benefit of the public, for the Approved Uses and purposes as provided herein, pursuant to Sections 5.1 through 5.5 of this Agreement.

5.7. The provisions of this Section 5 shall specifically survive termination of this Agreement.

**SECTION 6. PROJECT ADMINISTRATION AND BUDGET FOR DESIGN, DEVELOPMENT AND CONSTRUCTION OF ADAPTIVE RECREATION CENTER.**

6.1. The budget of the Project Costs for the design, development, and construction of the Center shall be subject to the mutual agreement of the City and the FOUNDATION, and subject to final approval by the City Commission. The budget shall include a 10% contingency for the City to cover unforeseen circumstances and Project Costs, and the Center will be designed to this budget.

6.2. The design, development, and construction of the Center shall be administered as a City project in accordance with all City procurement and applicable laws, including, without limitation, LEED certification requirements, and the budget for the Center shall reflect such requirements. The City shall be responsible for entering into the contract with the architect-engineer, the construction contractor, and any ancillary professionals or other vendors required to complete the Center and related improvements, and the City's Capital Improvements Office shall serve as the contract administrator. Once the budget for the Project Costs is established, the FOUNDATION and City shall finalize the project schedule, outlining proposed timeframes for FOUNDATION's fund-raising efforts (based on the milestones set forth in Section 7 of this Agreement), and timeframes for the completion of Project-related deliverables.

a. No later than six (6) months following the Effective Date, the FOUNDATION, at its sole cost and expense, shall submit to the City Manager a preliminary draft concept design, and a proposed operating plan, with sufficient detail to enable the City to accurately estimate the Project Costs, including construction costs, FF&E costs, and the operation and maintenance costs of the Center ("Draft Concept Plan"). The Draft Concept Plan shall, at a minimum, include details with respect to the proposed design for the Center, including layout and siting, preliminary elevations, size of building footprint, height, and other improvements and appurtenances proposed upon the Premises. Upon the FOUNDATION's submission of the Draft Concept Plan to the City Manager, the City Manager shall have sixty (60) days to review and provide the FOUNDATION with any comments thereto, including comments with respect to a preliminary estimate of Project Costs.

b. Following the City Manager's review of the Draft Concept Plan and development of a preliminary estimate of the Project Costs, as outlined in this Section 6, the FOUNDATION may submit and seek City Commission approval of two (2) versions of its concept design, including: (i) a base concept design, with a proposed design and scope sufficient to meet the intended purposes of the Center (the "Base Concept Design"); and (ii) an



enhanced concept design, with additional design features or components that may be included if the FOUNDATION exceeds its fund-raising goals ("Enhanced Concept Design") (collectively, the Base Concept Design and the Enhanced Concept Design shall be referred to herein as the "Concept Plan"). At a minimum, the Concept Plan shall include landscaped, vegetative "green" roof elements, and shall ensure that no public access to the City's beach is blocked. In considering the FOUNDATION's proposed Concept Plan, the City Commission shall also consider the City Manager's comments or recommendations, if any, with respect to the proposed Concept Plan.

c. The Concept Plan shall be subject to approval by the Mayor and City Commission at a regularly noticed meeting, which approval shall not be unreasonably withheld. Should the City Commission decline to approve the Concept Plan, the City Commission may either grant the FOUNDATION additional time to submit a revised Concept Plan for its consideration, or the Commission may terminate this Agreement, at its sole discretion. In the event of termination of this Agreement pursuant to this subsection, each Party shall bear its own costs and expenses incurred in connection with this Agreement, and, except as otherwise stated in this Agreement, neither Party shall have any further liability to the other.

6.3. The design documents, including plans and specifications, for the Center, shall be developed consistent with the approved Concept Plan. During the design development period, the FOUNDATION agrees to provide City with input with respect to design development. The City agrees to provide full consideration to the FOUNDATION's input, particularly with respect to aspects of the design that may enhance the use of the Premises for its intended accessibility-related purposes. All design documents, plans and specifications shall be subject to City Manager's final approval, and all applicable governmental requirements, including regulatory approval by the Historic Preservation Board and agencies having jurisdiction over the Premises.

6.4. As part of the design development process, the City shall require the architect/engineer to provide an updated estimate of the construction costs, and the estimate of total Project Costs shall be adjusted accordingly, with the budget for the Center to be subject to City Commission approval. In the event the estimates to design/construct the Facility exceed available funds, or in the event cost overruns with respect to the Project Costs are anticipated or experienced during the construction of the Center, the City and the FOUNDATION shall work together to either identify additional funds or adjust the project scope, as necessary. Except for the expenditure of the funds received from the FOUNDATION for the Center, City shall have no obligation to expend any funds to design, construct, equip or operate the Center.

In the event the Center and related improvements are developed, designed and constructed for less than the amounts contributed by the FOUNDATION for Project Costs, then any unused Project Donations shall be returned to the FOUNDATION within 60 days following (i) the issuance of a Certificate of Occupancy and (ii) receipt of a certificate of final payment/release of all claims from the construction contractor.

6.5. The City Manager, at his or her discretion, may request the participation of a FOUNDATION representative on the evaluation committee for the architect/engineer or contractor for the project.

## **SECTION 7. MILESTONES**

7.1 The initial milestones for the project are as follows:

a. No later than six (6) months following the Effective Date, the FOUNDATION shall submit to the City Manager the Draft Concept Plan.

b. The FOUNDATION commits to the following fundraising schedule and deadlines, based on the estimated budget of Project Costs for the Base Concept Design:

(i) 25% of Project Costs raised (in cash, donation pledges and grant commitments) within twelve (12) months following the City Commission's approval of the

Concept Plan;

(ii) 50% of Project Costs raised (in cash, donation pledges and grant commitments) within twenty-four (24) months following the City Commission's approval of the Concept Plan; and

(iii) 100% of Project Costs raised (in cash, donation pledges and grant commitments) within thirty-six (36) months following the City Commission's approval of the Concept Plan.

7.2 The City shall not enter into any binding agreement with an architect/engineer for the design of the Center until all of the following events have occurred:

a. the FOUNDATION has transferred the funds sufficient to cover the total contract amount for architectural/engineering fees; and

b. the FOUNDATION has evidenced to the City's Financial Officer that it has received total donation pledges or grant commitments in an amount sufficient to cover the remaining Project Costs, and that such pledges and commitments are anticipated to be fulfilled within nine (9) months following execution of the agreement between City and the architect/engineer; and

c. any naming rights associated with donations or grants are approved pursuant to Section 16 herein and the City's Naming Ordinance, but only if such donation is (i) contingent upon naming rights being conferred, and (ii) if the amount of the donation is required for purposes of covering the total contract amount for architectural and engineering services for the Center.

d. The City's agreement with the architect for the Center shall be subject to the City Commission's prior approval.

e. City will initiate the design solicitation process to select the architect/engineer for the project, as referenced herein, within ninety (90) days following the



FOUNDATION's transfer of the funds required for design (currently estimated to be \$500,000), and satisfaction of the requirements of this Section 7.2 (and subsections thereof).

7.3 The City shall not enter into a binding agreement with a construction contractor for the Center until such time as all of the following events have occurred:

a. the FOUNDATION transfers the funds sufficient to cover the total estimated construction costs, and

b. any naming rights associated with donations or grants are approved pursuant to Section 16 herein and the City's Naming Ordinance, but only if such donation is (i) contingent upon naming rights being conferred, and (ii) if the amount of the donation is required for purposes of covering the total contract amount for the construction of the Center.

c. The City's agreement with the contractor for the Center shall be subject to the City Commission's prior approval.

d. City will initiate the construction bid process to select the contractor for the project, as referenced herein, on the later of (i) the date of completion of design; and ninety (90) days after the FOUNDATION has transferred the funds required for construction (currently estimated to be \$4 million) and satisfied the requirements of this Section 7.3 (and subsections thereof).

7.4 As provided in Section 29.4 of this Agreement, the City may terminate this Agreement for its convenience if the FOUNDATION has not contributed the total Project Costs to the City within three (3) years following the City Commission's approval of the Concept Plan, or if the FOUNDATION has not met any of the fund-raising milestones set forth in this Section 7 of this Agreement. Prior to exercising its right to terminate this Agreement for failure to achieve any of the fund-raising milestones provided in this Section 7, the City, through its City Manager, shall first provide the FOUNDATION with advance written notice of the City's intent to terminate

the Agreement for failure to achieve a fund-raising milestone, and a thirty (30) day opportunity to cure the fund-raising deficiency.

7.5 In the event the FOUNDATION and City agree upon a final Project budget in an amount other than \$4.5 million, the milestone amounts identified in this Section 7 shall be adjusted on a proportionate basis.

**SECTION 8. OPERATION AND MANAGEMENT OF THE ADAPTIVE RECREATION CENTER.**

8.1. From and after the Possession Date, and subject to the Approved Uses in Section 5 (as same may be amended from time to time), and the terms, limitations and required approvals contained in this Agreement, FOUNDATION is authorized and required, and shall have the exclusive right to:

- a. Manage and direct the Center and coordinate and supervise all Approved Uses thereof at the Premises;
- b. Maintain and provide for the day-to-day maintenance and housekeeping for the Premises;
- c. Supervise and direct all Center employees and personnel consistent with the provisions of this Agreement;
- d. Maintain and supervise detailed, accurate and complete financial and other records of all its activities under this Agreement in accordance with generally accepted accounting principles. All financial records maintained pursuant to this Agreement shall be retained by FOUNDATION as long as such records are required to be retained pursuant to Florida Public Records Law, and shall be made available upon reasonable notice by the City;
- e. Develop and implement programs and activities which support and promote the goals and priorities and Approved Uses, as set forth in Section 5; and
- f. Coordinate with the City for such public use of the Premises by the City, as set forth in Section 12.2 of the Agreement, which coordination and cooperation shall not be

unreasonably withheld. Such public uses of the Premises by the City shall be conducted pursuant to policies and procedures, which shall be established and mutually agreed upon by FOUNDATION and the City, within six (6) months of the Effective Date..

8.2. Opening Date. The FOUNDATION shall commence operations pursuant to this Agreement and shall open the Center to the general public within thirty (30) days following the Possession Date.

8.3. Hours of Operation. The City and FOUNDATION herein agree that the hours of operation for the Premises shall not exceed 8:00 AM to 9:00 PM, Monday through Sunday, with the final normal operating hours (within the parameters set forth herein) to be determined on mutual agreement of the City and FOUNDATION. The parties recognize and acknowledge that, under certain circumstances (e.g., community events, special programming, etc.), FOUNDATION will be permitted to extend its hours of operation, but in no event shall said hours be shortened without the prior written approval of the City Manager or his designee, which approval shall not be unreasonably withheld.

8.4. High Impact Citywide Events. Upon notice by the City Manager or his or her designee, the FOUNDATION agrees to close the Center for a maximum of fourteen (14) days per year, to accommodate City's parking needs during Citywide special events (such as the annual boat show). The City shall provide the Foundation with at least fourteen (14) days advance written notice, for the FOUNDATION to close the Center for a special event pursuant to this Section.

## **SECTION 9. REVENUE FROM ADAPTIVE RECREATION CENTER RELATED ACTIVITIES/FINANCIAL RECORDS AND REPORTS.**

9.1 Revenue from Premises-Related Activities. The City herein acknowledges that FOUNDATION may derive revenues from a portion of the uses it conducts at the Center, including, but not limited to, classes, wellness programs or related activities, charitable fundraisers for the FOUNDATION or Center, specialty sales (such as sunscreen lotion, towels,



Foundation-related merchandise, and the like), and the sale of food and non-alcoholic beverages. FOUNDATION herein acknowledges that all revenue generating uses conducted upon or from the Premises must be directly related to, consistent with, or used to help fund FOUNDATION's management, operation, and maintenance of the Premises and Center and, in the event that revenue(s) pertaining to the Premises exceed expenses during an annual accounting period, the City and FOUNDATION agree that such excess, if any, may also be applied by FOUNDATION to support the programming of FOUNDATION. Any revenue-generating uses conducted upon or from the Premises that are not consistent with the uses in this subsection, shall first be approved, in writing, by the City Manager or his designee, prior to commencement of same.

9.2 Financial Records and Reports. FOUNDATION shall keep on the Premises, or such other place within Miami Dade County, Florida, as approved by the City, true, accurate, and complete records and accounts of all receipts and expenses for any and all uses, services, programs, events, activities, and/or revenue generating activities/operations being conducted and/or transacted upon or from the Premises pursuant to this Agreement and shall give the City, or its designated representative, access during reasonable business hours to examine and audit such records and accounts. Throughout the term of this Agreement, no later than one hundred and twenty (120) days following the closing of FOUNDATION's fiscal year (October 1<sup>st</sup> – September 30<sup>th</sup>, which is also the City's fiscal year), FOUNDATION shall provide the City Manager or his designee, with an annual report of all activities and/or operations conducted pursuant to this Agreement for the prior year, along with audited financial statements. Said statements shall be certified as true, accurate and complete by FOUNDATION and by its certified public accountant.

## **SECTION 10. ANNUAL BUDGET AND FUNDING FOR THE ADAPTIVE RECREATION CENTER.**

10.1 THIS AGREEMENT IS MADE WITH THE EXPRESS CONSIDERATION, UNDERSTANDING AND AGREEMENT THAT THE FOUNDATION SHALL BE RESPONSIBLE FOR, AND WILL CONTRIBUTE THE FUNDS REQUIRED TO, DESIGN, DEVELOP, CONSTRUCT AND THEREAFTER OPERATE, MANAGE AND PROGRAM THE CENTER. FOUNDATION FURTHER ACKNOWLEDGES AND UNDERSTANDS THAT THE CITY SHALL IN NO WAY BE OBLIGATED TO SUPPLEMENT AND/OR OTHERWISE CONTRIBUTE ANY FUNDS FOR FOUNDATION'S DAY-TO-DAY OPERATION, MAINTENANCE AND/OR PROGRAMMING.

10.2 Annual Budget for the Adaptive Recreation Center. Throughout the Term of this Agreement, FOUNDATION shall prepare and present, by July 1<sup>st</sup> of each City fiscal year (October 1 - September 30<sup>th</sup>), a proposed, detailed line item annual operating budget for the Center, for review and approval by the City Manager and/or his designee, which approval shall not be unreasonably withheld. Said budget shall include a projected income and expense statement; projected year end balance sheet; statement of projected income sources; and application of funds. Additionally, the budget shall also include, but not be limited to, the following detailed projections:

- a. Gross revenues by categories from all revenue sources and revenue generating activities derived from the Center;
- b. Operating expenses of the Center;
- c. Administrative, labor and general expenses;
- d. Marketing, advertising and promotion expenses;
- e. Utility costs;
- f. Regular repairs and maintenance costs (to the extent such repairs and maintenance are the responsibility of FOUNDATION, as provided herein); and
- g. In addition to subsection (f) above, identify for the City, such long term capital repairs and maintenance of facility infrastructure (which the City is responsible for, as provided herein); in conjunction with this subsection (f) FOUNDATION agrees to allow the City and/or its designee access to the

Premises, as the City may deem necessary for the purpose of the City conducting its own facility assessment methodology (as is used by the City in assessing the condition of other City-owned structures).

10.3 Programmatic Plan. Accompanying FOUNDATION's proposed annual budget shall be the Center programmatic plan for the upcoming fiscal year, detailing the then-known (planned) activities, events, and operations, and the number of users anticipated. The annual programmatic plan, including, without limitation, with respect to proposed events at the Center, shall also be subject to the City Manager's or his designee's review and approval, which approval shall not be unreasonably withheld.

## **SECTION 11. MAINTENANCE, REPAIRS, AND ALTERATIONS.**

11.1 General Maintenance and Repair. FOUNDATION agrees to maintain the Center, and every part thereof, in good condition during the term of the Agreement, including the plumbing, doors and windows, and will not suffer or permit any strip or waste of the Center. Except as expressly provided in this Agreement, it is understood by the parties hereto that FOUNDATION shall not be responsible to pay for any costs related to capital repairs or other improvements or infrastructure that may be required after the Possession Date (i.e. including, but not limited to, roof, structural elements and infrastructure, HVAC, plumbing and sewer lines, major electrical, and similar capital improvements) for the Center or the Premises, or repairs, if any, that may be required to correct any construction-related deficiencies performed by any City contractors. Notwithstanding the preceding sentence, FOUNDATION shall provide the City with prompt notice of needed capital and/or infrastructure repairs that are deemed to be required, and the City shall have a reasonable time thereafter to commence said repairs, at City's cost and expense.

11.2 Day to Day Maintenance. FOUNDATION shall, at its sole cost and expense, to the satisfaction of the City, keep, maintain, and repair the Center, and all improvements, fixtures, and equipment thereon (except for those items the City is responsible for as set forth in subsection 11.1 above), in good, clean, and sanitary order. FOUNDATION assumes sole



responsibility and expense for day to day housekeeping, janitorial services, and routine maintenance of the interior of the Center, and all improvements, fixtures, and equipment thereon. This shall include, without limitation, daily removal of litter, garbage and debris generated by FOUNDATION's use of the Center, including all garbage disposal generated by its operations and activities. At City's option, FOUNDATION shall be required to obtain, and continuously maintain in good standing, at its expense, throughout the Term, a maintenance and repair contract, approved by the City Manager or his designee, , providing for the preventative maintenance and repair of all air conditioning units servicing the Premises.

FOUNDATION shall comply with all applicable State, Miami-Dade County, and City laws, codes, rules or other governmental requirements with regard to its obligations under this Section.

11.3 Alterations. In the event that FOUNDATION desires or deems it appropriate to make alterations, additions, or improvements to the Center after the Possession Date, it will submit plans for same to the City, for the prior written approval of the City Manager or his designee. No such alterations, improvements, or additions shall be made without the express written approval of the City Manager and, if approved, shall be made at FOUNDATION's sole cost and expense, and shall become the property of the City upon termination of this Agreement. FOUNDATION shall not have the right to create or permit the creation of any lien attaching to the City's interest in the Center or the Premises as a result of any such alterations, improvements, or additions.

11.4 Labor/Personnel/Materials/Equipment/Furnishings. FOUNDATION must provide and maintain, at its sole cost and expense, all labor, personnel, materials, equipment, and furnishings, as reasonably required, to operate the Center as an adaptive recreation center, in accordance with the Approved Uses set forth in Section 5 hereof. In the event any materials, equipment, and/or furnishings are lost, stolen, or damaged, they shall be promptly replaced or repaired (funding permitting) at the sole cost and expense of the FOUNDATION.

11.5 Orderly Operation. FOUNDATION shall have a neat and orderly operation at all times and shall be solely responsible for the necessary housekeeping services to properly maintain the Center. There shall be no living quarters nor shall anyone be permitted to live within the Center. FOUNDATION shall make the Center available for inspection during hours of operation by the City Manager or his authorized representative(s).

11.6 Security. FOUNDATION shall be responsible for and provide reasonable security measures which may be required to protect the Center and any of the materials, equipment, and furnishings thereon. Under no circumstances shall the City be responsible for any stolen or damaged materials, equipment, and furnishings, nor shall the City be responsible for any stolen or damaged personal property of FOUNDATION's employees, contractors, patrons, guests, invitees, and/or other third parties.

## **SECTION 12. ANNUAL REPORTS FOR USE OF PREMISES/CITY USE OF PREMISES.**

12.1 FOUNDATION shall provide an annual written report of the activities and events scheduled in and pertaining to the Center and, with each such report, shall report on the activities which actually occurred and the approximate number of persons participating in those activities during the previous year. Any revenue-generating activity(ies) conducted upon or from the Center must be in accordance with those provided in Section 9 of this Agreement (or, otherwise approved by the City in accordance therein). All revenues received by FOUNDATION in connection with uses conducted upon or from the Center shall be dedicated exclusively to help fund FOUNDATION's management, operation, and maintenance of the Center. In the event that revenue(s) pertaining to the Center exceed expenses during an annual accounting period, the City and FOUNDATION agree that such excess, if any, shall first be applied to provide for the programming and Approved Uses of the Center intended for the next fiscal year, then to offset any contributions previously made by the City (other than capital improvements as described in Section 11 of this Agreement), if any, and may then be applied by FOUNDATION to support the general programming of FOUNDATION. For purposes herein, "revenues" shall



also be deemed to include public/private grant funding, and unrestricted donations and contributions received by FOUNDATION specifically ear-marked toward the operation, management and programming of the Center. No portion of the net earnings resulting from the activities of FOUNDATION at the Center shall inure to the benefit of any private individual.

12.2 As provided in Section 5.3 of the Agreement, in no event shall the Center be used as a hall for hire, banquet hall, or similar third-party venue rental, or for the sale of alcoholic beverages (provided, however, that the FOUNDATION may serve alcoholic beverages at charitable fund-raisers or community events at the Center from time to time).

12.3 Notwithstanding the foregoing, the City Manager or his designee, shall have the absolute and final authority in overseeing FOUNDATION's activities with regard to this Agreement and its operation and management of the Center, such that the City is assured that the Center is being operated and utilized in accordance with the terms of this Agreement.

12.4 Use by the City. FOUNDATION and the City have agreed that the Center may be used by the City for wellness or other programming consistent with the Approved Uses and the requirements of Section 5. Consistent with this, the City shall have the right to use the Center, subject to availability, without the payment of any rental or use fee, except that direct out-of-pocket expenses incurred in connection with such uses (including reasonable expenses incurred by FOUNDATION in order to open and make the Premises available in connection with a City use thereof) shall be paid by the City. FOUNDATION and the City agree to develop mutually acceptable guidelines (such as advance notice requirements for any City use, to permit City's use of the Premises, in accordance with the terms herein, in a manner that does not unduly disrupt the FOUNDATION's operations or programming).

### **SECTION 13. ASSIGNMENT.**

FOUNDATION may not assign this Agreement, or any part thereof, without the prior written approval of the City Commission, which approval shall be given, if at all, at the sole discretion of the City Commission. Any assignment made in violation of this Section 13 shall be



null and void. This Agreement is made with the understanding that FOUNDATION shall at all times, throughout the term of this Agreement, remain a not-for-profit exempt corporation under the Internal Revenue Code. This Agreement shall automatically terminate in the event the Internal Revenue Service revokes the FOUNDATION's exempt public charity status.

**SECTION 14. USE OF THE ADAPTIVE RECREATION CENTER IS PRIMARY.**

The Center and the Premises shall exist for the use of the public, for the Approved Uses consistent with Section 5 and the terms of this Agreement, and the public's right to such use shall not be infringed upon by any act of the FOUNDATION or any third-party.

**SECTION 15. PERMITS; LICENSES; UTILITIES, TAXES; ASSESSMENTS.**

15.1 Licenses, Permits, Compliance with Laws. FOUNDATION shall pay any fees imposed by law for licenses or permits for any uses or activities of FOUNDATION upon the Center or under this Agreement. The FOUNDATION agrees to comply with all laws, ordinances, rules and governmental requirements that may be applicable to its performance under this Agreement, including, without limitation, laws or governmental requirements now in force or hereafter to be adopted by the City, Miami-Dade County, the State of Florida, and the U.S. Government.

15.2 Utilities. The FOUNDATION shall pay to the City, before delinquency any and all charges for utilities at or on the Center (including, but not limited to, water, electricity, gas, heating, cooling, sewer and telephone, trash collection, and other expenses associated with the operation of the Premises).

15.3 Procedure If Taxes Assessed. FOUNDATION agrees to and shall pay before delinquency all taxes and assessments of any kind assessed or levied upon the Center or the Premises by reason of this Agreement, or by reason of the business or other activities of FOUNDATION upon or in connection with the Center or the Premises. The Parties agree that the operation and uses of the Center and the Premises and those operations and uses convenient and necessary therefore, are for public purposes and, therefore, no ad valorem taxes

should be assessed by the Miami-Dade County Tax Appraiser. If, however, said taxes are assessed by said Property Tax Appraiser, FOUNDATION shall be responsible for payment of same.

#### **SECTION 16. SIGNAGE; NAMING RIGHTS**

16.1 FOUNDATION shall provide, at its sole cost and expense, required signs at all public approaches to the Center, as determined by FOUNDATION in its reasonable discretion, said signage containing substantially the following language:

[ ]

#### **OPERATED BY THE SABRINA COHEN FOUNDATION**

16.2 The FOUNDATION shall have the right to erect interior signage, including, without limitation, temporary interior signage (such as banners, which shall be subject to the City Manager's or designee's prior written approval which will not be unreasonably withheld) and exterior signage; provided, however, that in the case of permanent interior or exterior signage, the names affixed thereon (including, without limitation, any sponsor names) shall be subject to approval as required by the City's Naming Ordinance, as codified in Chapter 82, Article VI, Sections 82-501 through 82-505 of the City Code, as may be amended from time to time.

16.3 In no event may **any** interior or exterior signage include the names of any company selling the following types of products: guns, tobacco, alcohol, gambling, and medical marijuana.

16.4 All advertising, signage and postings shall be approved by the City and shall be subject to all applicable planning and zoning requirements of the City.

#### **SECTION 17. FORCE MAJEURE.**

17.1 The performance of any act by FOUNDATION or the City hereunder may be delayed or suspended at any time while, but only so long as, either Party is hindered in or prevented from performance by acts of God (including, without limitation, hurricanes), the

elements of war, rebellion, strikes, lockouts, fire, explosion or any other casualty or occurrence not due to FOUNDATION's or City's negligence and beyond the reasonable control of the Parties.

17.2 Premises Unusable. In the event a Force Majeure renders the Center or the Premises untenable, in whole or in part, as determined by City, the City may, at its sole option and discretion: (i) elect, as soon as practicable, to utilize the insurance proceeds to repair the damaged property; or (ii) elect not to repair or restore the damaged property and, in such event (and provided further that FOUNDATION does not elect, and/or does not comply with the procedures for FOUNDATION's repair of the Center using its own funds), this Agreement shall be terminated as of the date of said occurrence of damage or casualty. Notwithstanding the preceding sentence, in the event the (a) City elects not to restore or repair the damage; (b) FOUNDATION gives written notice to the City within sixty (60) days of the casualty that FOUNDATION is willing to undertake the repair the damage with its own or other available funds; (c) within twelve (12) months following such notice, FOUNDATION proves, to the City's sole satisfaction and discretion, that it has adequate funds immediately available to undertake the repair; and (d) the City and FOUNDATION, each acting in its reasonable discretion, agree within a reasonable time (but not to exceed six (6) months unless otherwise extended in writing by City Manager) after the City deems that FOUNDATION has demonstrated that it has adequate funds to undertake the repair, to the conditions, timing, plans, procedures, contractors, subcontractors, disbursement mechanisms and other matters with respect to the repair, then and in that event, FOUNDATION shall be entitled to effect the repair with its own funds; provided that FOUNDATION must complete any and all repairs and/or restoration no later than eighteen (18) months from the date of the City's approval of FOUNDATION's funding capability.

## **SECTION 18. INSPECTION.**



FOUNDATION agrees that the Center may be inspected at any time upon reasonable notice by authorized representatives of the City, or by any other State, County, Federal and/or municipal officer or agency having responsibilities for inspections of such operations and/or Center. FOUNDATION agrees to promptly undertake the correction of any deficiency cited by such inspectors on the Center, which is properly the responsibility of FOUNDATION pursuant to this Agreement. The City agrees to promptly undertake the correction of any deficiency cited by such inspectors on the Center, which is properly the responsibility of the City pursuant to this Agreement.

The City Manager or his designated representatives shall have the right to enter upon the Center at all reasonable times to examine the condition and use thereof; (including, without limitation, for the purpose of assessing the condition of the facility, as also referenced in subsection 10.2(g), provided, only, that such right shall be exercised in such manner so as not to interfere with FOUNDATION in the conduct of FOUNDATION's activities on the Center; and if the Center is damaged by fire, windstorm or by other casualty that causes the Center to be exposed to the elements, then the City may enter upon the Center to make emergency repairs; but if the City exercises its option to make emergency repairs, such act or acts shall not be deemed to excuse FOUNDATION from his obligation to keep the Center in repair. If City makes any emergency repairs pursuant to the terms hereof, FOUNDATION shall reimburse the City for all such repairs, to the extent said repairs are the obligation of the FOUNDATION under the terms of this Agreement, upon receipt by FOUNDATION of City's notice of repairs made and statement and proof of costs incurred.

#### **SECTION 19. WAIVER OF INTERFERENCE.**

FOUNDATION hereby waives all claims for compensation for loss or damage sustained by reasons of any interference with its operation and management of the Center by any public agency or official as a result of their enforcement of any laws or ordinances or of any of the rights reserved to the City herein. Any such interference shall not relieve FOUNDATION from

any obligation hereunder.

## **SECTION 20. INSURANCE.**

FOUNDATION shall maintain, at FOUNDATION's sole cost and expense, the following types of insurance coverage at all times throughout the Term of this Agreement:

- a. General liability insurance with not less than the following limits:

General aggregate	\$2,000,000
Personal and advertising (injury) (Per occurrence)	\$1,000,000 \$1,000,000
Fire damage	\$ 100,000
Medical Expense	\$ 5,000

- b. Workers Compensation Insurance shall be required under the Laws of the State of Florida.

- c. Automobile Insurance shall be provided covering all owned, leased, and hired vehicles and non-ownership liability for not less than the following limits (only if FOUNDATION provides transportation services):

Bodily Injury	\$1,000,000 per person
Bodily Injury	\$1,000,000 per accident
Property Damage	\$ 500,000 per accident

- d. Property Insurance (fire, windstorm, other perils) shall be the responsibility of the City in an amount not less than the final total Project Costs.

The policies of insurance referred to above shall not be subject to cancellation or changing coverage except upon at least thirty (30) days written notice to City and then subject to the prior written approval of City. FOUNDATION shall provide City with a Certificate of Insurance for each such policy, which shall name the City as an additional named insured. All such policies shall be obtained from companies authorized to do business in the State of Florida with an A.M. Best's Insurance Guide (latest edition) rating acceptable to the City's Risk

Manager, and any replacement or substitute company shall also be subject to the approval of the City's Risk Manager. Should FOUNDATION fail to obtain, maintain or renew the policies of insurance referred to above, in the required amounts, the City may, at its sole discretion, obtain such insurance, and any sums expended by City in obtaining said insurance, shall be repaid by FOUNDATION to City.

## **SECTION 21. INDEMNIFICATION.**

21.1 FOUNDATION shall indemnify, hold harmless and defend the City, its agents, servants and employees from and against any claim, demand or cause of action of whatsoever kind or nature to the extent arising out of any error, omission, or negligent act of FOUNDATION, its agents, servants or employees in connection with the performance of the FOUNDATION's obligations under this Agreement.

21.2 In addition, FOUNDATION shall indemnify, hold harmless and defend the City, its agents, servants and employees from and against any claim, demand or cause of action of whatever kind or nature arising out of any misconduct of FOUNDATION not included in subsection 21.1 above and for which the City, its agents, servants or employees are alleged to be liable. This subsection shall not apply, however, to any such liability as may be the result of the gross negligence or willful misconduct of the City, its agents, servants or employees.

21.3 Subrogation. The terms of insurance policies referred to in Section 20 shall preclude subrogation claims against FOUNDATION, the City and their respective officers, employees and agents.

21.4 The provisions of this Section 21 shall survive the termination and/or expiration of this Agreement.

## **SECTION 22. NO LIENS.**

FOUNDATION agrees that it will not suffer, or through its actions or anyone under its control or supervision, cause to be filed upon the Center or the Premises any lien or encumbrance of any kind. In the event any lien is filed, FOUNDATION agrees to cause such



lien to be discharged within thirty (30) days of receipt of notice from the City concerning the subject lien, and in accordance with the applicable law. If this is not accomplished, the City may automatically terminate this Agreement, without further notice to FOUNDATION.

## **SECTION 23. FOUNDATION EMPLOYEES AND MANAGERS.**

23.1 The City and FOUNDATION recognize that in the performance of this Agreement, it shall be necessary for FOUNDATION to retain qualified individuals to effectuate and optimize FOUNDATION's management and operation of the Center. FOUNDATION shall conduct background checks for its employees working at the Center, consistent with the criteria utilized by the City for evaluating applicants for employment. Any such individuals, whether employees, agents, independent contractors, volunteers, and/or other, retained by FOUNDATION for such purpose(s) shall not be deemed to be agents, employees, partners, joint venturers or associates of the City, and shall not obtain any rights or benefits under the civil service or pension ordinances of the City or any rights generally afforded classified or unclassified employees of the City; further they shall not be deemed entitled to the Florida Worker's Compensation benefits as employees of the City. Additionally, FOUNDATION, and/or any employees, agents, independent contractors, volunteers, and/or others, acting under the authority and/or with the permission of FOUNDATION for the purpose set forth herein, shall never have been convicted of any offense involving moral turpitude or a felony. Failure to comply with this provision shall constitute cause for the termination of this Agreement upon thirty (30) days written notice and opportunity to cure. FOUNDATION shall have an experienced manager or managers overseeing the Center at all times. Any criminal activity at the Center caused by or knowingly permitted by FOUNDATION shall result in automatic termination of this Agreement.

### **23.2 Contract Administration.**

- a. The City's contract administrator shall be the City Manager and/or his designee. FOUNDATION shall name a specific individual to serve as its contract administrator.

- b. The City's contract administrator shall have the authority to give all approvals for the City while administering this Agreement, with the exception of items which would require City Commission approval. The City's contract administrator:
  - (i) Shall be the liaison between the City and FOUNDATION on all matters relating to this Agreement.
  - (ii) Shall be responsible for ensuring that any information supplied by FOUNDATION is properly distributed to the appropriate City departments.
  - (iii) Shall be responsible for contract compliance by FOUNDATION (including, without limitation, FOUNDATION's activities, programming, operations, management, and maintenance of the Center).
- c. FOUNDATION shall name an individual who shall serve as the general manager of the Center and who:
  - (i) Shall be the liaison between the City and FOUNDATION on all matters relating to this Agreement.
  - (ii) Shall be responsible for the day-to-day management and operation of the Center.
  - (iii) Shall be responsible for providing supervision and direction to the Center's employees, agents, contractors, and/or volunteers.

23.3 "Key Person" Clause. The Parties acknowledge that, in recognition of the success of the FOUNDATION's adaptive beach days, and Ms. Sabrina Cohen's instrumental efforts with regard thereto, the City's selection of the FOUNDATION, and Ms. Sabrina Cohen's participation as part of the FOUNDATION's Board and/or management, is an integral and primary consideration for City's decision to approve this Agreement. Accordingly, the FOUNDATION shall exercise its best efforts to ensure the continuing, ongoing and active participation of Ms. Sabrina Cohen as part of the Adaptive Recreation Center project.

**SECTION 24. NO IMPROPER USE.**

FOUNDATION will not use, nor suffer or permit any person to use in any manner whatsoever, the Center or the Premises for any improper, immoral or offensive purpose, or for any purpose in violation of any Federal, State, County, or municipal ordinance, rule, order or

regulation, or of any governmental rule or regulation now in effect or hereafter enacted or adopted. FOUNDATION shall not use the Center or the Premises for any unlawful purpose and shall comply with all laws, permitting, and licensing requirements now in force or hereafter adopted, applicable to the Center or the Premises or the uses and activities conducted on the Center or the Premises. FOUNDATION agrees not to use the Center or the Premises for, or to permit operation of any offensive or dangerous activity, nuisance or anything against public policy. Except as may result from acts of force majeure, FOUNDATION agrees that it will not allow the Center or the Premises to become unoccupied or vacant. FOUNDATION shall take appropriate precautions to prevent fire on the Center or the Premises, maintaining existing fire detection devices and extinguishing equipment at all times.

**SECTION 25. NO DANGEROUS MATERIALS.**

FOUNDATION agrees not to use or permit in the Center or the Premises the storage of illuminating oils, oil lamps, turpentine, gasoline, benzine, naphtha, or other similar substances, or explosives or any kind, or any substance or thing prohibited in the standard policies of fire insurance companies in the State of Florida.

**SECTION 26. NO CLAIM AGAINST CITY OFFICERS, EMPLOYEES, INDIVIDUALS.**

It is expressly understood and agreed by and between the parties hereto that all individuals, employees, officers, and agents of the City are acting in a representative capacity and not for their own benefit; and that neither FOUNDATION, nor any of its employees, agents, contractors, volunteers and/or others, shall have any claim against them or any of them as individuals in any event whatsoever in conjunction with any acts or duties which are reasonably related to the performance of their duties.

**SECTION 27. DEFAULT AND TERMINATION.**

If either Party fails to perform in accordance with any of the terms and conditions of this Agreement, and such default is not cured within thirty (30) days after written notice is given, the non-defaulting Party shall have the right to terminate this Agreement and, as the case may be,



either vacate or re-enter the Center, without further notice or demand. At its option, either Party may also pursue any and all legal remedies available to seek redress for such default. The default and termination rights afforded the parties in this Section 27, shall in no way limit or otherwise preclude the City from exercising such other rights to terminate this Agreement, as may be expressly provided in other sections hereto.

**SECTION 28. PROCEDURE UPON EXPIRATION AND/OR TERMINATION BY CITY.**

28.1 FOUNDATION shall, on or before the last day of the term herein, or the sooner termination thereof, peaceably and quietly leave, surrender and yield unto the City, the Center, together with any and all fixtures located at or on the Center and used by FOUNDATION in the maintenance, management or operation of the Center, excluding any equipment, furnishings, appliances or other personal property which can be removed without material injury to the Premises, free of all liens, claims and encumbrances and rights of others, and broom-clean, together with all structural changes, alterations, additions, and improvements which may have been made upon the Center, in good order, condition and repair, reasonable wear and tear excepted, subject, however, to the subsequent provisions of this subsection. Any property which pursuant to the provisions of this subsection is removable by FOUNDATION on or at the Center upon the termination of this Agreement and is not so removed may, at the option of the City, be deemed abandoned by FOUNDATION, and either may be retained by the City as its property, or may be removed and disposed of by City, at the sole cost of the FOUNDATION, in such manner as the City may see fit. If the Center is not surrendered at the end of the term as provided in this subsection, FOUNDATION shall make good to the City all damages which the City shall suffer by reason thereof, and shall indemnify, the City against all claims made by a succeeding occupant (if any), so far as such delay is occasioned by the failure of FOUNDATION to surrender the Premises as and when herein required.

28.2 FOUNDATION covenants and agrees that it will not enter into agreements (whether express or implied) relating to the Center for a period of time beyond the stated

expiration date of this Agreement.

28.3 In the event of termination of this Agreement for any reason, if the City is still in possession or control of unexpended Project Donations then, along with its notice of termination (assuming the City is terminating) or, within thirty (30) days of receipt of a notice of termination from the FOUNDATION, the City shall provide the FOUNDATION with an accounting of the Project Donations, along with a check in an amount equal to the unexpended Project Donations in the CITY's possession or control.

**SECTION 29. TERMINATION FOR CONVENIENCE OR FOR LACK OF FUNDING.**

29.1. The FOUNDATION and the City, through its City Manager, shall each have the right to terminate this Agreement for convenience at any time prior to City's execution of the agreement with the architect/engineer for the design of the Center, with each Party to bear its own costs and fees.

29.2. The FOUNDATION and the City, through its City Manager, shall each have the right to terminate this Agreement for convenience without penalty or liability if, pursuant to Section 6 of this Agreement, the City and FOUNDATION are unable to agree on the final budget of the Project Costs for the design, development, and construction of the Center.

29.3. The FOUNDATION shall have the right to terminate this Agreement for its convenience if, as part of the design reviews for the Center, changes to the plans and specifications are required by the applicable City boards or agencies having jurisdiction, and such changes render the Center economically unfeasible.

29.4. If the FOUNDATION has not contributed the total Project Costs to the City within three (3) years following the City Commission's approval of the Concept Plan, or if the FOUNDATION has not met any of the milestones set forth in Section 7 of this Agreement, the City, through its City Manager, may terminate this Agreement for its convenience.

29.5. In the event that FOUNDATION has insufficient funding at any time during the Term, such that it can no longer manage and operate the Premises in accordance with the

goals and priorities and uses herein, then the City may, at its sole discretion: (i) supplement any lack or loss of funds in order to allow FOUNDATION to continue to manage and operate the Center; or (ii) terminate this Agreement for its convenience.

29.6. Any termination for convenience shall be effective upon thirty (30) days written notice to the other Party. In the event of a termination for convenience of this Agreement pursuant to this Section 29 or any subsection thereof, the procedure upon termination, as set forth in Section 28, shall govern and control, and, except as otherwise stated herein, neither Party shall have any liability or owe any further obligation to the other Party.

### **SECTION 30. NOTICES.**

All notices from the City to FOUNDATION shall be deemed duly served if mailed by registered or certified mail to FOUNDATION at the following address:

Sabrina Cohen Foundation, Inc.  
1800 Sunset Harbour Drive #2406  
Miami Beach, Florida 33139  
Attention:

All notices from FOUNDATION to the City shall be deemed duly served if mailed by registered or certified mail to City at the following address:

City of Miami Beach  
City Manager  
1700 Convention Center Drive  
Miami Beach, Florida 33139  
Attention: City Manager

with copies to: City of Miami Beach  
1700 Convention Center Drive, 3<sup>rd</sup> Floor  
Miami Beach, Florida 33139  
Attention: Asset Manager

FOUNDATION and the City may change the above mailing addressed at any time upon giving the other Party written notification. All notice under this Agreement must be in writing.

### **SECTION 31. NO DISCRIMINATION.**



The FOUNDATION agrees to comply with City of Miami Beach Human Rights Ordinance, as codified in Chapter 62 of the City Code, as may be amended from time to time, prohibiting discrimination in employment, housing, public accommodations, or public services, on the basis of actual or perceived race, color, national origin, religion, sex, intersexuality, sexual orientation, gender identity, familial and marital status, age, ancestry, height, weight, domestic partner status, labor organization membership, familial situation, political affiliation, or disability.. All facilities located on the Center shall be made available to the public, subject to the right of FOUNDATION to establish and enforce reasonable rules and regulations to provide for the safety, orderly operation and security of the facilities.

**SECTION 32. VENUE/WAIVER OF JURY TRIAL/DISPUTE MEDIATION.**

32.1 This Agreement shall be governed by, and construed in accordance with, the laws of the State of Florida, both substantive and remedial, without regard to principles of conflict of laws. The exclusive venue for any litigation arising out of this Agreement shall be Miami-Dade County, Florida, if in state court, and the U.S. District Court, Southern District of Florida, if in federal court. BY ENTERING INTO THIS AGREEMENT, CITY AND FOUNDATION EXPRESSLY WAIVE ANY RIGHTS EITHER PARTY MAY HAVE TO A TRIAL BY JURY OF ANY CIVIL LITIGATION RELATED TO, OR ARISING OUT OF, THIS AGREEMENT.

32.2 If a dispute arises out of, or related to, this Agreement, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association, or other similar alternative dispute resolution organization, person or source agreeable to the parties, before resorting to litigation or other dispute resolution procedure.

**SECTION 33. LIMITATION OF LIABILITY.**

The City desires to enter into this Agreement only if in so doing the City can place a limit on its liability for any cause of action for money damages due to an alleged breach by the City of

this Agreement, so that its liability for any such breach never exceeds the sum of \$10,000. Contractor hereby expresses his willingness to enter into this Agreement with Contractor's recovery from the City for any damage action for breach of contract to be limited to a maximum amount of \$10,000, less the amount of all funds actually paid by the City to Contractor pursuant to this Agreement.

Accordingly, and notwithstanding any other term or condition of this Agreement, Contractor hereby agrees that the City shall not be liable to the Contractor for damages in an amount in excess of \$10,000, which amount shall be reduced by the amount actually paid by the City to Contractor pursuant to this Agreement, for any action or claim for breach of contract arising out of the performance or non-performance of any obligations imposed upon the City by this Agreement. Nothing contained in this paragraph or elsewhere in this Agreement is in any way intended to be a waiver of the limitation placed upon the City's liability as set forth in Section 768.28, Florida Statutes.

#### **SECTION 34. MISCELLANEOUS PROVISIONS.**

34.1 City's Governmental Capacity. Nothing in this Agreement or in the parties' acts or omissions in connection herewith shall be deemed in any manner to waive, impair, limit or otherwise affect the authority of the City in the discharge of its police or governmental power.

34.2 Representation on FOUNDATION Board of Directors. The FOUNDATION agrees that the City Manager, or his or her designee, shall be a voting member of the FOUNDATION's Board of Directors ("Board"), as of the Effective Date, with voting power equivalent to 1/6th of the total members of the Board. For example, if the Board consists of six (6) members (including the City Manager or designee), the City Manager's (or designee's) vote shall be equivalent to one (1) vote; if the Board consists of twelve (12) members, the City Manager's vote shall be equivalent to two (2) votes; and so on.

34.3 Entire Agreement. This Agreement, together with the attachments hereto, contains all of the promises, agreements, conditions, inducements and understandings between

City and FOUNDATION concerning the operation and management of the Center, and there are no promises, agreements, conditions, understandings, inducements, warranties or representations, oral or written, express or implied, between them other than as expressly set forth herein and in such attachments thereto or as may be expressly contained in any enforceable written agreements or instruments executed simultaneously herewith by the parties hereto.

34.4 Waiver; Modification. No covenant, agreement, term or condition of this Agreement shall be changed, modified, altered, or waived except by a written instrument of change, modification, alteration, or waiver executed by City and FOUNDATION. No waiver of any default shall affect or alter this Agreement, but each and every covenant, agreement, term and condition of this Agreement shall continue in full force and effect with respect to any other then existing or subsequent default thereof.

34.5 Remedies Cumulative. Each right and remedy of either Party provided for in this Agreement shall be cumulative and shall be in addition to every other right or remedy provided for in this Agreement, or now or hereafter existing at law or in equity or by statute or otherwise (except as otherwise expressly limited by the terms of this Agreement), and the exercise or beginning of the exercise by a Party of any one or more of the rights or remedies provided for in this Agreement, or now or hereafter existing at law or in equity or by statute or otherwise (except as otherwise expressly limited by the terms of this Agreement), shall not preclude the simultaneous or later exercise by such Party of any or all other rights or remedies provided for in this Agreement or now or hereafter existing at law or in equity or by statute or otherwise (except as otherwise expressly limited by the terms of this Agreement).

34.6 Performance at Each Party's Sole Cost and Expense. Unless otherwise expressly provided in this Agreement, when either Party exercises any of its rights, or renders or performs any of its obligations hereunder, such Party shall do so at its sole cost and expense.

34.7 Time is of the Essence. Time is of the essence with respect to all matters in, and



requirements of, this Agreement as to both City and FOUNDATION including, but not limited to, the times within which the FOUNDATION must raise the Project Donations necessary for the design, development and construction of the Center, and the times within which the City must commence and complete construction of the Center.

34.8 No Representations. City and FOUNDATION have made no representations herein as to the condition of the Premises.

34.9 Partnership Disclaimer. FOUNDATION acknowledges, represents and confirms that it is an independent contractor in the performance of all activities, functions, duties and obligations pursuant to this Agreement.

The parties hereby acknowledge that it is not their intention to create between themselves a partnership, joint venture, tenancy-in-common, joint tenancy, co-ownership or agency relationship for the purpose of this Agreement, or for any other purpose whatsoever. Accordingly, notwithstanding any expressions or provisions contained herein, nothing in this Agreement, shall be construed or deemed to create, or to express an intent to create, a partnership, joint venture, tenancy-in-common, joint tenancy, co-ownership, or agency relationship of any kind or nature whatsoever between the parties hereto. The provisions of this Section 34.9 shall survive termination and/or expiration of this Agreement.

34.10 Not a Lease. It is expressly understood and agreed that no part of the Property or Center, or any part, parcel, building, structure, equipment or space is leased to FOUNDATION; that this Agreement is solely in the nature of a funding and management agreement, and is not a lease, and in no event shall this Agreement be construed to confer any legal or equitable interest of any kind whatsoever in the Center or the Premises. The FOUNDATION's license to operate and manage the Center shall continue only so long as this Agreement remains in effect, and provided further that FOUNDATION complies with the undertakings, provisions, agreements, stipulations and conditions of this Agreement.

34.11 No Third Party Rights. Nothing in this Agreement, express or implied, shall confer upon any person, other than the Parties hereto and their respective successors and assigns, any rights or remedies under or by reason of this Agreement.

**IN WITNESS WHEREOF**, the parties hereto have caused their names to be signed and their seals to be affixed; all as of this day and year first written above.

Attest:

781 10/31/17  
\_\_\_\_\_  
City Clerk



**CITY OF MIAMI BEACH**

\_\_\_\_\_  
Philip Levine, Mayor

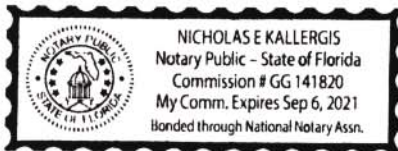
STATE OF FLORIDA           )  
  ) SS:  
COUNTY OF MIAMI-DADE    )

The foregoing instrument was acknowledged before me this 31<sup>st</sup> day of October, 2017, by Mayor Philip Levine and Rafael Granado, City Clerk, or their designees respectively, on behalf of the CITY OF MIAMI BEACH, known to me to be the persons described in and who executed the foregoing instrument, and acknowledged to and before me that they executed said instrument for the purposes therein expressed.

WITNESS my hand and official seal, this 31<sup>st</sup> day of October, 2017.

My Commission Expires:

Nicholas Kallergis  
Notary Public, State of Florida at Large  
Commission No.:




**APPROVED AS TO  
FORM & LANGUAGE  
& FOR EXECUTION**

Rafael Granado 10/31/17  
\_\_\_\_\_  
City Attorney Rafael Date

Attest:

SABRINA COHEN FOUNDATION, INC.

  
Name: ARYAN PATEL

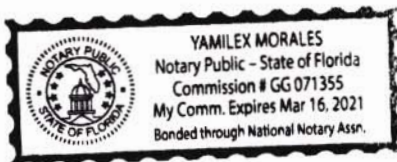
  
Sabrina Cohen, President

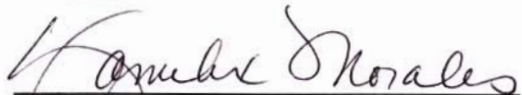
STATE OF FLORIDA       )  
                                      ) SS:  
COUNTY OF MIAMI-DADE )

The foregoing instrument was acknowledged before me this 2<sup>nd</sup> day of November, 2017, by Sabrina Cohen, on behalf of the Sabrina Cohen Foundation, Inc., known to me to be the person described in and who executed the foregoing instrument, and acknowledged to and before me that they executed said instrument for the purposes therein expressed.

WITNESS my hand and official seal, this 2<sup>nd</sup> day of November, 2017.

My Commission Expires:



  
Notary Public, State of Florida at Large  
Commission No.:

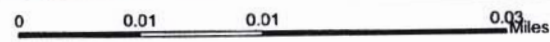


**EXHIBIT A**  
**[SKETCH OF PREMISES]**

# P72 Parking Lot Map



**TYPE**  
• PARKING SPACE 139



Samuel Corrao  
Engineering Architect  
Parking Administration  
09/11/2017