

THIRD AMENDED AND RESTATED OPERATING AGREEMENT
[Living Coast Discovery Center, Chula Vista]

This THIRD AMENDED AND RESTATED OPERATING AGREEMENT [Living Coast Discovery Center, Chula Vista] (“Third Amended Agreement”), is entered into effective as of July 1, 2020 (“Effective Date”), by and between the CITY OF CHULA VISTA, a chartered municipal corporation (“City”), and LIVING COAST DISCOVERY CENTER, a California non-profit corporation (“Operator”). Individually, the City and Operator may be referred to herein as “Party” and collectively as “Parties.” This Third Amended Agreement is made with reference to the following facts:

RECITALS

- A. The Chula Vista Nature Center (“CVNC”) is a world-class zoological institution and attraction with hands-on exhibits and live animal displays, which emphasize the importance of natural coastal marsh resources and their delicate ecosystem balance. The CVNC is located at 1000 Gunpowder Point Drive, Chula Vista, CA on approximately 3.3 acres of land (“Nature Center Land”) on Gunpowder Point within the Sweetwater Marsh National Wildlife Refuge on land owned by the U.S. Fish and Wildlife Service (“USFWS”).
- B. The CVNC was opened to the public in July of 1987. Initially, the CVNC was operated by the Bayfront Conservancy Trust (“BCT”), a nonprofit corporation formed for that purpose. Thereafter, the City, Redevelopment Agency and the BCT oversaw significant improvements to the CVNC. The City ultimately assumed direct control of the CVNC, and in 2002 the City created an official Nature Center department to manage CVNC operations.
- C. The Operator was initially formed as The Environmental Legacy Fund, a California non profit corporation qualified as a tax exempt public charity for purposes of assisting with fundraising for CVNC operations and to organize and support volunteer efforts at the facility. On or about June 16, 1997, the Operator changed its name to the Chula Vista Nature Center Foundation, and then in 2012 changed its name, and the name of the CVNC to the Living Coast Discovery Center (the “LCDC”).
- D. On April 28, 2009, the City Council authorized City staff to pursue a public-private partnership and operating Agreement with the Operator for the operation and management of the LCDC, along with two conceptual funding plans as a basis for negotiations.
- E. After a series of meetings, negotiations and interim agreements, effective February 6, 2010, the Parties agreed on the terms and conditions for the initial grant by City and Redevelopment Agency to Operator of a license to manage and control LCDC operations, pursuant to a formal “Operating Agreement.”
- F. Since then, the Parties have agreed to modify and/or extend the Operating Agreement as follows: (1) On or about November 23, 2010, the Parties agreed to amend the Operating

Agreement in order to extend the term until June 30, 2012; (2) Effective July 1, 2012 the Parties entered into a new Operating Agreement for a period of 1 year, ending June 30, 2013; (3) On June 11, 2013, the Parties entered into that certain First Amendment to extend the Operating Agreement until June 30, 2014; (4) on or about June 19, 2014 the City Manager agreed to extend the Operating Agreement until September 30, 2014; On October 1, 2014, the Parties entered into that certain Amended and Restated Operating Agreement for the term ending December 31, 2015; and on February 4, 2016 the City Manager extended the term to June 30, 2017 under the Article 3.2 of the Operating Agreement; (5) On July 1, 2017, the Parties entered into the Second Amended and Restated Operating Agreement for the term ending December 31, 2018; in June 2019 the City Manager extended the term to June 30, 2020 under the Article 3.2 of the Operating Agreement.

- G. In order to further extend the Operating Agreement, and to update certain provisions thereof, the Parties now desire to enter into this Third Amendment and Restated Operating Agreement.

NOW, THEREFORE, in consideration of the above Recitals, the mutual covenants contained herein and for other good and valuable consideration, the receipt and sufficiency of which the Parties hereby acknowledge, the Parties hereby agree as follows:

ARTICLE I. GRANT OF LICENSE

1.1. **Grant of License for Nature Center Operations.** As of the Effective Date, and subject to the various terms and conditions of this Third Amended Agreement, City hereby grants to Operator the exclusive license to operate the LCDC (the “LCDC License”). Except as otherwise expressly provided herein and/or to the extent necessary for City to perform and satisfy its obligations under this Third Amended Agreement, the LCDC License shall include exclusive access to, possession of, and control over the following LCDC assets and programs:

- a. Land and Improvements. Operator shall have exclusive access to and control over the Nature Center Land and improvements thereon used in the operation of the LCDC (collectively, the “LCDC Land and Improvements”). A description of the LCDC Land and Improvements is attached hereto as **Exhibit A**. Operator’s use and control of the LCDC Land and Improvements shall be subject to any and all (1) City reserved rights expressly provided for in this Third Amended Agreement; and (2) leases, easements, liens, restrictions and requirements existing with respect thereto as of the Effective Date (collectively, the “LCDC Requirements”).
- b. Management of Day to Day Operations. Except as otherwise specifically provided herein, Operator shall have exclusive authority, responsibility and control over the day to day operations of the LCDC including, without limitation, the following matters: (1) Hours of Operation; (2) Staffing Levels; (3) Hiring, supervision, and termination of employees and volunteers; (4) Marketing; (5) Admissions Rates and Policies; (6) Fundraising; (7) Educational Programs; (8) Custodial Maintenance of the Land and Improvements, and other maintenance not expressly assumed by City as provided in

Section 6.2, below; (9) Gift Store Operations; (10) Third-party use of LCDC facilities; (11) Food Service; (12) Concessions; (13) Third-party contracts for supplies or services; (14) Presentation, standards of care and disposition of LCDC Wildlife; (15) Arrangement, Modification and Construction of Exhibits; and (16) modification of LCDC Permits and Contracts.

- i. Marketing. Any and all marketing and advertising activities for the Living Coast Discovery Center shall contain an addition to the logo, as either a “Logo Descriptor” or “Tagline,” with the words “at Chula Vista”.

- c. City Assignment of Use Rights to LCDC Land and Improvements. To the extent necessary or appropriate for the operation of the LCDC by Operator, City hereby assigns to Operator respective rights to (1) use of the LCDC Land and Improvements, (2) the LCDC Permits and Contracts, and (3) the LCDC Wildlife (collectively, the “LCDC Assets”). Notwithstanding the foregoing, City shall retain a residual interest in and/or ownership of, as the case may be, the underlying rights and title to the LCDC Assets (excluding the LCDC fauna) such that upon the expiration or other termination of this Third Amended Agreement, unless otherwise agreed between the parties, total ownership and control of the LCDC Assets (excluding the LCDC fauna) shall revert to the City.

ARTICLE II. TRANSFER OF TITLE OF TANGIBLE ASSETS

- 2.1 **Wildlife (Flora and Fauna).** Operator shall have exclusive possession and control over any and all flora and fauna (the ownership of such fauna has been previously transferred to the Operator, pursuant to the February 6, 2010 Operating Agreement) located at the LCDC as of the Effective Date (“LCDC Wildlife”); such possession and control shall include, without limitation, the exclusive right and authority to sell, transfer, trade, loan or otherwise dispose of the LCDC Wildlife in Operator’s sole discretion and consistent with practices of the National Association of Zoos and Aquariums as same may be updated from time to time. Notwithstanding the foregoing, prior to any determination that any of the fauna shall be euthanized for reasons other than terminal illness or injury, the Operator shall inform the City in writing of its intention to do so and provide the City with the option to refer the care of fauna to another agency. Funds for such disposition and transfer for care to other agency shall be drawn from the Contingency Fund identified in Article IV, Section 4.3.

- 2.2 **Fixtures, Furnishings, Equipment and Supplies.** Operator shall have exclusive possession and control over all fixtures, furnishings, inventory, office and maintenance equipment and supplies (“LCDC FF&E”) that were transferred from the City to the Operator pursuant to the February 6, 2010 Operating Agreement between the City and the Nature Center Foundation, including the vehicles transferred from the City to the Operator on June 6, 2015.

ARTICLE III. TERM OF AGREEMENT

3.1 **Term.** The initial term of this Third Amended Agreement (“Initial Term”) shall commence on the Effective Date and shall expire on December 31, 2021 (“Expiration Date”), unless earlier terminated pursuant to ARTICLE X, herein.

3.2 **Extension of Term.** Operator shall be entitled to an automatic extension of the Initial Term until June 30, 2023 (the “Extended Term”) if, prior to the expiration of the Initial Term, Operator demonstrates to the City Manager, acting in his/her sole discretion, that Operator has, since the Effective Date: (a) established and funded a separate operational reserve fund for LCDC operations with a minimum unencumbered balance of \$100,000; (b) established and documented 27 new partnerships, collaborations, and/or programs that increase, in the aggregate, LCDC net revenues; (c) maintained or augmented LCDC Board membership; (d) over a 12 month period, maintained LCDC general attendance equal to or greater than the previous 12 month period; and (e) complied with all material terms and conditions of this Third Amended Agreement. The Initial Term may also be extended by mutual written agreement of the Parties.

ARTICLE IV. FUNDING AND USE OF REVENUE

4.1 **LCDC Revenues.** Any and all revenues generated through LCDC operations and/or fundraising (“LCDC Revenue”) during the Term shall be retained by Operator and solely applied to LCDC operational costs and/or development.

4.2 **Operator Management and Funding.** During the Initial Term or any extension thereof, the Operator shall manage and finance all of the LCDC operations in a manner consistent with and that fully satisfies Operator’s obligations under the terms of this Third Amended Agreement. In the event that LCDC Revenue is insufficient by itself to cover the operation of the LCDC under this Third Amended Agreement, the Operator shall be responsible for funding any operational deficit out of its own funds.

4.3 **Operator’s Special Reserve for Disposition of Fauna.** Operator shall maintain throughout the Term of this Third Amended Agreement a special contingency reserve account in the minimum amount of \$10,000. This account shall be dedicated exclusively towards funding any and all activities Operator deems necessary for the transfer, or other appropriate disposition, of the LCDC fauna to the extent such disposition becomes necessary pursuant to the terms of Article X hereof. Operator shall not withdraw funds from the contingency reserve account for any purpose other than that identified above and shall obtain prior written consent from the City to withdraw such funds. An inventory of the LCDC fauna at the LCDC as of the Effective Date is attached hereto as Exhibit “B”. Operator agrees to update this Exhibit and provide a copy to City from time to time, as warranted, no less frequently than every 12 months.

4.4 **Joint Fundraising Efforts.** The Parties agree to exercise their combined best efforts to solicit and secure additional funding to support LCDC operations and development. Fundraising efforts shall be coordinated through Operator’s Director of Development pursuant to Operator’s approved fundraising plans and policies.

ARTICLE V. ADDITIONAL OPERATOR COVENANTS

- 5.1 **Use Covenant.** During the Initial Term and any mutually agreed upon extension thereof, Operator covenants and agrees for itself, and its successors and assigns, that Operator shall operate the LCDC as a zoological institution and attraction with hands-on exhibits and live animal displays, which emphasize the importance of natural coastal marsh resources and their delicate ecosystem balance. To the extent practical, and to the extent consistent with both the LCDC Requirements and the LCDC Permits and Contracts, Operator shall also operate the LCDC consistent with the standards established by the National Association of Zoos and Aquariums as same may be updated from time to time (collectively, the “Nature Center Use”). Without City’s prior written approval, Operator shall not seek entitlements or permits for the operation or redevelopment of the LCDC property for other than the Nature Center Use. Operator shall conduct the Nature Center Use in compliance with any and all applicable federal, state and local laws and regulations and the LCDC Permits and Contracts and consistent with the purpose of the LCDC License.
- 5.2 **Operator’s Non Profit Status and Management Ownership Structure.** During the Initial Term of this Third Amended Agreement (and thereafter if extended), unless otherwise approved by the City, the Operator shall continue to operate as a California non profit corporation that is qualified as a tax exempt public charity pursuant to Internal Revenue Code Section 501(c)(3) and California Revenue and Taxation Code Section 23701d. City shall have the right to appoint one (1) Director to Operator’s Board whenever the Board is comprise of fifteen (15) Directors or less, and two (2) Directors whenever the Board is comprised of sixteen (16) Directors or more; provided however, City agrees not to exercise its appointment right(s) hereunder in any manner that triggers application of the Ralph M. Brown Act to Operator’s Board meetings.
- 5.3 **City Access for Special Events.** Operator shall grant City free access to and use of LCDC facilities for up to sixteen (16) separate events (including meetings) per calendar year. City events shall be scheduled in accordance with Operator’s normal scheduling procedures so as not to interfere with normal LCDC operations or other scheduled events. Events shall be for a maximum of one day each. Operator shall waive its standard facility charges for City events covered by this Section, but reserves the right to charge for any special services provided or costs incurred (for example, staff overtime or charges for extended bus service hours).
- 5.4 **Admissions.** Operator shall provide City with fifty (50) admission passes per year for use by City in any manner consistent with City policies and law.
- 5.5 **No Modifications Without City Approval.** Operator shall not make any modifications to the LCDC Improvements without City’s prior written approval, which such approval shall not be unreasonably withheld or delayed. This shall include even minor modifications (e.g., sink faucets) as such modifications can raise issues with ongoing maintenance. Any modifications to the LCDC Improvements exceeding \$10,000 in cost (excluding the installation or removal of temporary exhibits) shall require City's prior written approval, which such approval may be granted or denied in City's sole discretion.

ARTICLE VI. ADDITIONAL CITY COVENANTS

- 6.1 **Approvals of Other Agencies.** City has obtained any and all approvals from the applicable governing authorities or contracting parties that are necessary or appropriate to allow Operator's use of the LCDC Permits and Contracts.
- a. City's Failure to Obtain Approval of Related Agencies. In the event that after City's good faith efforts to obtain approvals of Related Agencies for the transfer of City obligations with respect to the LCDC, which failure would subject the City to financial or other liability, this contract shall be deemed invalid, and the Parties shall reenter good faith negotiations to establish a method to accomplish the goals of this Third Amended Agreement.
- 6.2 **City "In-Kind" Services and Supplies.** City agrees to provide certain "in-kind" services and supplies to Operator to assist with LCDC operations during the Initial Term either at no cost or at an agreed upon rate of reimbursement. A list of such services and supplies, corresponding reimbursement rate(s), if any, standards of performance, and schedules for delivery, is attached hereto as Exhibit C. Additional "in kind" services not listed may be provided by City on terms to be negotiated.
- 6.3 **Compliance with Permits and Contracts.** City shall take no action with respect to the LCDC Permits and Contracts that would cause any violation thereof or default thereunder, or that would cause the LCDC to lose its accreditation with the American Association of Museums. City shall immediately notify Operator in writing of any notice of violation or default under any LCDC permit or contract, with sufficient notice to allow Operator to take the necessary steps to cure same.
- 6.4 **Deferred Maintenance Items.** Parties agree to ongoing discussions regarding the condition of the LCDC improvements, and those items of Deferred Maintenance agreed to by the Parties shall be included in the City's Capital Improvement Program, as same may be updated from time to time (the "Deferred Maintenance Work"). City intends to implement Deferred Maintenance Work as funding allows and following consideration of City priorities, as determined in City's sole discretion. Any such work implemented by the City shall be done in accordance with industry standards and shall be subject to Operator's prior reasonable approval and acceptance.
- 6.5 **Payment of Debt Service on LCDC Improvements.** City shall continue to pay debt service to Bank of New York to finance amounts loaned to City for construction of certain of the LCDC Improvements, and shall strictly comply with any and all covenants and agreements entered into in connection therewith.
- 6.6 **Payment of Utilities and Shuttle Bus Fuel.** Upon receipt of utility bills for electric, water, propane and telecommunications, City shall remit payment for such utilities directly to the utility operator in the amount of the invoice for the utility services used for the operation and maintenance of the LCDC during the term of this Agreement. In addition, City shall

pay for Shuttle Bus fuel costs. Operator shall be responsible for all other utility costs, including propane gas and water removal. City's commitment to pay Utilities and Shuttle Bus fuel costs as provided in this Section shall not exceed \$80,608 per year ("Maximum Payment Amount"). Any costs/expenses in excess of this Maximum Payment Amount shall be the obligation of Operator. Once the City has met its commitment, it shall bill Operator for all costs and expenses that exceed the Maximum Payment amount, Operator shall remit payment in full to the City, within 30 days of the City submitting its invoice to Operator for such costs and expenses.

ARTICLE VII. INSURANCE

7.1 Insurance. Operator's Obligation. Prior to the execution of this Third Amended Agreement, Operator shall (i) obtain, and upon the City's request provide to the City, insurance certificates reflecting evidence of all insurance required in Section 7.1(a); (ii) obtain City approval of each company or companies; and (iii) confirm that all policies contain the specific provisions required by section 7.1

- a. Types of Insurance. At all times during the term of this Third Amended Agreement, Operator shall maintain insurance coverage as follows:
 - i. **Commercial General Liability.** Operator shall provide at its expense a policy or policies of Commercial General Liability [CGL] Insurance written on an ISO Occurrence form CG 00 01 07 98 or an equivalent form providing coverage at least as broad and which shall cover liability including, personal injury and advertising injury, bodily injury, property damage, and liability assumed under an insured's contract (including the tort liability of another assumed in a business contract). There shall be no endorsement or modification of the CGL Insurance limiting the scope of coverage for either "insured vs. insured" claims or contractual liability. Operator shall maintain the same or equivalent CGL Insurance as described herein for at least ten (10) years following termination of this Third Amended Agreement. All costs of defense shall be outside the policy limits. The Policy shall provide for coverage in amounts not less than three million dollars (\$3,000,000) general aggregate limit, one million (\$1,000,000) per occurrence for Bodily Injury, Personal Injury, or Property Damage, and five hundred thousand (\$500,000) sublimit for "Damage to Rented Premises," one million (\$1,000,000) of liquor liability coverage, and a \$5 million excess liability policy;
 - ii. **Commercial Automobile Liability.** For all of Operator's automobiles used in conjunction with the Project including owned, hired and non-owned automobiles, Operator shall keep in full force and effect, a policy or policies of Commercial Automobile Liability Insurance written on an ISO form CA 00 01 12 90 or a later version of this form or equivalent form providing coverage at least as broad in the amount of one million dollars (\$1,000,000) combined single limit per occurrence, covering bodily injury and property damage for owned, non-owned and hired automobiles ["Any Auto"]. All costs of defense shall be outside the policy.

iii. **Excess Liability.** Operator shall provide Excess Liability Insurance affording three million dollars (\$3,000,000) or any other amount agree to and approved by the City's Risk Management Department, in excess of General Liability and Employer's Liability limits afforded on primary policies. The coverage will be subject to the same terms, conditions, and exclusions found in the primary policies.

iii. **Worker's Compensation.** For all of Operator's employees who are subject to this Third Amended Agreement and to the extent required by the State of California, Operator shall keep in full force and effect, a Workers' Compensation Insurance and Employers' Liability Insurance to protect Operator against all claims under applicable state workers' compensation laws. The City, its elected officials, and employees will not be responsible for any claims in law or equity occasioned by the failure of the Operator to comply with the requirements of this section. That policy shall provide at least the statutory minimums of one million (\$1,000,000) for Bodily Injury by Accident for each accident, one million dollars (\$1,000,000) for Bodily Injury by Disease each employee, and a one million dollars (\$1,000,000) for Bodily Injury by Disease policy limit.

A. Prior to the execution of the Third Amended Agreement by the City, the Operator shall file the following signed certification:

"I am aware of the provisions of Section 3700 of the Labor Code which requires every employer to be insured against liability for worker's compensation or to undertake self-insurance, in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of the Contract."

b. **Rating Requirements.** Except for State Compensation Insurance Fund, all insurance required by express provision of this Third Amended Agreement shall be carried only by responsible insurance companies that have been given at least an "A" or "A-" and "V" rating by AM BEST, that are authorized by the California Insurance Commissioner to do business in the State of California, and that have been approved by the City.

i. **Non-Admitted Carriers.** The City will accept insurance provided by non-admitted, "surplus lines" carriers only if the carrier is authorized to do business in the State of California and is included on the List of Eligible Surplus Lines Insurers [LESLI list] with a current AM BEST rating of no less than A:X.

c. **Endorsements Required.** Each policy required under Section 7.3 of this Third Amended Agreement shall expressly provide, and an endorsement shall be submitted to the City, that:

i. **Additional Insureds.** Except as to Workers Compensation, the City and its respective elected officials, officers, employees, agents, and representatives shall be named as additional insureds.

- ii. **Primary and Non-Contributory.** The policies are primary and non-contributing to any insurance or self-insurance that may be carried by the City of Chula Vista, its elected officials, officers, employees, agents, and representatives with respect to operations, including the completed operations if appropriate, of the Named Insured. Any insurance maintained by the City of Chula Vista and its elected officials, officers, employees, agents, and representatives shall be in excess of Operator's insurance and shall not contribute to it.
- iii. **Waiver of Subrogation.** Operator's insurer will provide a Waiver of Subrogation in favor of the City for each required policy providing coverage for the term required by this Third Amended Agreement.
- iv. **Written Notice.** Except as provided for under California law, the policies cannot be canceled, non-renewed or materially changed except after thirty (30) calendar days prior written notice by Operator to the City by certified mail, as reflected in an endorsement which shall be submitted to the City, except for non-payment of premium, in which case ten (10) Calendar Days' notice shall be provided.
 - A. The words "will endeavor" and "but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents, or representatives" shall be deleted from all certificates.
- d. **Additional Insurance.** Operator may obtain additional insurance not required by this Third Amended Agreement. If the contractor maintains higher limits than the minimums shown above, the Entity requires and shall be entitled to coverage for the higher limits maintained by the contractor.

Deductibles/Self Insured Retentions. All deductibles and self-insurance retentions on any policy shall be the responsibility of Operator. Deductibles and self-insurance retentions shall be disclosed to and approved by the City at the time the evidence of insurance is provided. At the option of the City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officers, officials, employees and volunteers; or the Operator shall provide a financial guarantee satisfactory to the City guaranteeing payment of losses and related investigations, claim administration and defense expenses.

- e. **Policy Changes.** Operator shall not modify any policy or endorsement thereto which increases the City's exposure to loss for the duration of this Third Amended Agreement.
- f. **Reservation of Rights.** The City reserves the right, from time to time, to review the Operator's insurance coverage, limits, deductible and self-insured retentions to determine if they are acceptable to the City.
- g. **Not a Limitation of Other Obligations.** Insurance provisions under this section shall not be construed to limit the Operator's obligations under this Third Amended Agreement, including Indemnity.

- h. **Material Breach.** Failure to maintain, renew, or provide evidence of renewal during the term of this Third Amended Agreement may be treated by the City as a material breach of contract.

7.2 Insurance – City’s Obligation.

- a. Self Insure: City is self-insured and will provide evidence to the extent requested by the Operator.

ARTICLE VIII. INDEMNITY

- 8.1 **Indemnity Defense and Hold Harmless.** To the maximum extent allowed by law, Operator shall defend, indemnify, protect and hold harmless the City its elected and appointed officers, employees, volunteers, and agents (collectively “Indemnified Parties”), from and against any and all claims, demands, causes of action, costs, expenses, liability, loss, damage or injury, in law or equity, to property or persons, including wrongful death, in any manner arising out of or incident to any alleged acts, omissions, negligence, or willful misconduct of Operator, its officials, officers, employees, agents, and contractors, arising out of or in connection with the operation of LCDC. This indemnity provision does not include any claims, damages, liability, costs and expenses (including without limitations, attorneys’ fees) arising from the sole negligence or sole willful misconduct of one or more of the Indemnified Parties. Also covered is liability arising from, connected with, caused by or claimed to be caused by the active or passive negligent acts or omissions of the Indemnified Parties, which may be in combination with the active or passive negligent acts or omissions of the Operator, its employees, agents or officers, or any third party.
- 8.2 **Costs of Defense and Award.** Included in the obligations in Section 8.1 is the Operator’s obligation to defend, at Operator’s own cost, expense and risk, any and all aforesaid suits, actions or other legal proceedings of every kind that may be brought or instituted against the Indemnified Parties. Operator shall pay and satisfy any judgment, award or decree that may be rendered against the Indemnified Parties, for any and all legal expense and cost incurred by each of them in connection therewith.
- 8.3 **Insurance Proceeds.** Operator’s obligation to indemnify shall not be restricted to insurance proceeds, if any, received by the Indemnified Parties.
- 8.4 **Enforcement Costs.** Operator agrees to pay any and all costs Indemnified Parties incur enforcing the indemnity and defense provisions set forth in this Article VIII.
- 8.5 **City’s Indemnity Obligation.** City shall have reciprocal obligations to defend, indemnify and hold Operator, its officers, employees, and agents harmless with respect to claims, damages, liability, costs and expenses (including without limitation, attorneys’ fees) arising from the sole negligence or sole willful misconduct of the Indemnified Parties), including the related obligations contained in Sections 8.2 through 8.4. .

8.6 **Survival.** A Party's obligations under this Article VIII shall survive the termination of this Third Amended Agreement.

ARTICLE IX. REPORTING

9.1 **Periodic Reports and Meetings.** Operator shall provide City with quarterly periodic financial reports and shall meet and confer with City staff from time to time to review operational issues not specifically addressed by this Third Amended Agreement. In the event that Operator anticipates an operating deficit that may affect the continued operation of the LCDC, Operator shall immediately arrange to meet and confer with the City to determine how such deficits may be appropriately addressed.

9.2 **Accounting Requirements and Financial Reports.**

a. Books and Records. At all times during the term, Operator shall maintain full and adequate records and accounts for any and all LCDC revenues and expenditures in a manner that complies with Generally Accepted Accounting Principles. Such records, and any and all related ledgers, books of accounts, invoices, vouchers, cancelled checks, and other records or documents shall be made available to the City, or its designees, upon five (5) days prior written notice. City to keep all donors and grant information confidential. Operator shall provide such assistance as may be reasonably required in the course of such inspection. The City further reserves the right to examine and re-examine said books, records and data during the four (4) year period following termination of this Third Amended Agreement or completion of all work hereunder, and Operator shall in no event dispose of, destroy, alter, or mutilate said books, records, accounts, and data in any manner whatsoever during that time period

b. Financial Reports. Commencing on March 1, and quarterly thereafter, Operator shall provide City with a report of its financial condition in a form reasonably satisfactory to the City's Finance Director. The reports should include Profit and Loss Statement, Balance Sheet and Statement of Cash Flows. The quarterly financial reports should include year-to-date information for the quarters ending on September 30, December 31, March 31 and June 30 of each fiscal year. In addition, Operator shall notify the City manager within thirty (30) days of the occurrence of any event that has or is expected to have a material impact on LCDC operations or Operator's financial condition.

c. Required Audits. Every other fiscal year, Operator shall engage an independent, licensed, certified public accountant, reasonably approved by City to conduct a financial audit of Operator's books and records. The audit shall be prepared at Operator's cost and provided to City by no later than November 1 of the audit year.

ARTICLE X. TERMINATION

10.1 **Termination for Breach.** Either party may terminate this Third Amended Agreement earlier than the natural expiration date if the other party has materially defaulted in its obligations

and the terminating party has provided the defaulting party with written notification of such determination, and the defaulting party has refused to cure the default within thirty (30) days of such notice. If the default is such that the cure will require longer than 30 days, the time for cure will be extended for the period of time reasonably necessary to complete the required work, provided, however, the defaulting party must promptly begin the required cure and diligently prosecute same to completion.

10.2 Natural Termination of this Agreement. In the event that either party elects **not** to extend this Third Amended Agreement past the Initial Term, upon thirty (30) days written notice from City, Operator, at its sole cost, shall take all necessary and appropriate steps necessary to transfer LCDC fauna to another qualified institution for continued care and maintenance. LCDC fauna that Operator determines cannot reasonably be transferred shall be otherwise disposed of as Operator deems appropriate and in a manner that is consistent with industry standards, provided, however, in no event shall Operator euthanize any animals, unless and until the Operator has informed the City in writing of its intention to do so and provided the City with the option of taking control of the care thereof. Title to LCDC FF&E transferred from the City to Operator pursuant to the February 6, 2010 Operating Agreement shall be transferred back to the City.

10.3 Injunctive Relief. If the Operator commits a breach or actions that suggest an anticipatory breach of any of the covenants contained in this Third Amended Agreement, and such occurrence or actions remain uncorrected for a period of thirty (30) days or more following written notice describing such breach, City and its successors and assigns, without regard to whether City or its successors and assigns are an owner of any land or interest therein to which these covenants relate, may institute and prosecute any proceedings at law or in equity to abate, prevent or enjoin any such violation or attempted violation or to compel specific performance by Operator of its obligations hereunder. No delay in enforcing the provisions hereof as to any breach or violation shall impair, damage or waive the right of any party entitled to enforce the provisions hereof or to obtain relief against or recover for the continuation or repetition of such breach or violations or any similar breach or violation hereof at any later time.

a. Additional Time for Cure. In the event that the breach cannot be cured within the 30 day timeframe identified above, Operator shall immediately notify City in writing of its inability to cure, describing the reason for the inability to cure, and provide a date by which the cure shall be accomplished. If the City deems such explanation of the delay reasonable, it shall provide Operator with additional time to cure such breach and a second notice with the date by which the cure shall be accomplished.

10.4 Additional Remedies. In addition to the termination rights contained in Sections 10.1, 10.2, and 10.3 hereof, City and Operator shall each have any other remedies available at law, equity, or other proper proceedings.

ARTICLE XI. NOTICE

11.1 Notices. Unless otherwise specifically permitted by this Third Amended Agreement, all notices or other communications required or permitted under this Third Amended Agreement shall be in writing, and shall be personally delivered; sent by registered or certified mail, postage prepaid, return receipt requested; or sent by facsimile, provided that the telecopy cover sheet contain a notation of the date and time of transmission, and shall be deemed received: (a) if personally delivered, upon the date of delivery to the address of the person to receive such notice, (b) if mailed in accordance with the provisions of this paragraph, two (2) business days after the date placed in the United States mail, (c) if mailed other than in accordance with the provisions of this paragraph or mailed from outside the United States, upon the date of delivery to the address of the person to receive such notice, or (d) if given by facsimile during business hours when delivered can be confirmed, when delivered. Notices shall be given at the following addresses:

If to City: The City of Chula Vista
 Attn: City Manager
 276 Fourth Avenue
 Chula Vista, CA 91910
 Fax: (619) 409-5884

With a copy to: City Attorney [same address]

If to OPERATOR: Living Coast Discovery Center
 Attn: Executive Director
 1000 Gunpowder Point Drive
 Chula Vista, CA 91910-1201
 Fax: (619) 409-5910

With Copy to: William L. Fischbeck, Esq.
 Fischbeck & Oberndorfer
 5464 Grossmont Center Drive, Suite 300
 La Mesa, CA 91942
 Fax: (619) 464-6471

ARTICLE XII. MISCELLANEOUS PROVISIONS

12.1 Headings. All article headings are for convenience only and shall not affect the interpretation of this Third Amended Agreement.

12.2 Gender & Number. Whenever the context requires, the use herein of (i) the neuter gender includes the masculine and the feminine genders and (ii) the singular number includes the plural number.

- 12.3 **Reference to Paragraphs.** Each reference in this Third Amended Agreement to a section refers, unless otherwise stated, to a section in this Third Amended Agreement.
- 12.4 **Incorporation of Recitals.** All recitals herein are incorporated into this Third Amended Agreement and are made a part hereof.
- 12.5 **Covenants and Conditions.** All provisions of this Third Amended Agreement expressed as either covenants or conditions on the part of the City or the Operator, shall be deemed to be both covenants and conditions.
- 12.6 **Integration.** This Third Amended Agreement and the Exhibits and references incorporated into this Third Amended Agreement fully express all understandings of the Parties concerning the matters covered in this Third Amended Agreement. No change, alteration, or modification of the terms or conditions of this Third Amended Agreement, and no verbal understanding of the Parties, their officers, agents, or employees shall be valid unless made in the form of a written change agreed to in writing by both Parties or an amendment to this Third Amended Agreement agreed to by both Parties. All prior negotiations and agreements are merged into this Third Amended Agreement.
- 12.7 **Severability.** If any portion of this Third Amended Agreement shall be held by a court of competent jurisdiction to be invalid, void or otherwise unenforceable, the remaining provisions shall remain enforceable to the fullest extent permitted by law if enforcement would not frustrate the overall intent of the parties (as such intent is manifested by all provisions of the Third Amended Agreement, including such invalid, void or otherwise unenforceable portion).
- 12.8 **Drafting Ambiguities.** The Parties agree that they are aware that they have the right to be advised by counsel with respect to the negotiations, terms and conditions of this Third Amended Agreement, and the decision of whether or not to seek advice of counsel with respect to this Third Amended Agreement is a decision which is the sole responsibility of each Party. This Third Amended Agreement shall not be construed in favor of or against either Party by reason of the extent to which each Party participated in the drafting of the Third Amended Agreement.
- 12.9 **Conflicts Between Terms.** If an apparent conflict or inconsistency exists between the main body of this Third Amended Agreement and the Exhibits, the main body of this Third Amended Agreement shall control. If a conflict exists between an applicable federal, state, or local law, rule, regulation, order, or code and this Third Amended Agreement, the law, rule, regulation, order, or code shall control. Varying degrees of stringency among the main body of this Third Amended Agreement, the Exhibits, and laws, rules, regulations, orders, or codes are not deemed conflicts, and the most stringent requirement shall control. Each Party shall notify the other immediately upon the identification of any apparent conflict or inconsistency concerning this Third Amended Agreement.
- 12.10 **Prompt Performance.** Time is of the essence of each covenant and condition set forth in this Third Amended Agreement.

12.11 **Good Faith Performance.** The parties shall cooperate with each other in good faith, and assist each other in the performance of the provisions of this Third Amended Agreement.

12.12 **Further Assurances.** City and Operator each agree to execute and deliver such additional documents as may be required to effectuate the purposes of this Third Amended Agreement.

12.13 **Exhibits.** Each of the following Exhibits is attached hereto and incorporated herein by this reference:

Exhibit A – LCDC Land and Improvements

Exhibit B - LCDC Fauna Inventory

Exhibit C – City “In-Kind” Services

12.14 **Conflict of Interest.**

- a. No member, official or employee of City or Operator shall have any personal interest, direct or indirect, in this Third Amended Agreement, nor shall any such member, official or employee participate in any decision relating to the Third Amended Agreement which affects his or her personal interests, those of his/her immediate family, or the interests of any corporation, partnership or association in which he or she is, directly or indirectly, interested.
- b. Operator warrants that it has not paid or given, and will not pay or give, any third person any money or other consideration for obtaining this Third Amended Agreement.

12.15 **Non-liability of City Officials and Employees.** No member, official or employee of City shall be personally liable to Operator or any successor in interest in the event of any default or breach by City or for any promise which may become due to Operator or successor or on any obligation under the terms of this Third Amended Agreement.

12.16 **Compliance with Law.** City and Operator agree to comply with all the requirements now in force, or which may hereafter be in force, of all municipal, county, state and federal authorities, pertaining to the ownership and operation of the LCDC all improvements constructed thereon and all operations conducted thereon.

12.17 **Jurisdiction and Venue.** The venue for any suit or proceeding concerning this Third Amended Agreement, the interpretation or application of any of its terms, or any related disputes shall be in the County of San Diego, State of California.

- 12.18 **Municipal Powers.** Nothing contained in this Third Amended Agreement shall be construed as a limitation upon the powers of the City as a chartered city of the State of California.
- 12.19 **Attorneys' Fees.** Should any litigation (including any proceedings in a bankruptcy) or arbitration be commenced between the parties hereto or their representatives concerning any provision of this Third Amended Agreement or the rights and duties of any person or entity hereunder, the party or parties prevailing in such litigation or arbitration shall be entitled, in addition to such other relief as may be granted, to the attorneys' fees and court or arbitration costs incurred by reason of such litigation or arbitration, including attorneys' fees and experts' fees incurred in preparation for or investigation of any matter relating to such litigation or arbitration.
- 12.20 **Administrative Claims Requirements and Procedures.** No suit or arbitration shall be brought arising out of this Third Amended Agreement, against the City unless a claim has first been presented in writing and filed with the City and acted upon by the City in accordance with the procedures set forth in Chapter 1.34 of the Chula Vista Municipal Code, as same may from time to time be amended, the provisions of which are incorporated by this reference as if fully set forth herein, and such policies and procedures used by the City in the implementation of same. Upon request by City, Operator shall meet and confer in good faith with City for the purpose of resolving any dispute over the terms of this Third Amended Agreement.
- 12.21 **No Third Party Beneficiaries.** The parties to this Third Amended Agreement acknowledge and agree that the provisions of this Third Amended Agreement are for the sole benefit of City and Operator and not for the benefit, directly or indirectly, of any other person or entity, except as otherwise expressly provided herein.
- 12.22 **Successors in Interest.** This Third Amended Agreement and all rights and obligations created by this Third Amended Agreement shall be in force and effect whether or not any Parties to the Third Amended Agreement have been succeeded by another entity, and all rights and obligations created by this Agreement shall be vested and binding on any Party's successor in interest.
- 12.23 **No Partnership.** Nothing contained in this Third Amended Agreement shall be deemed or construed to create a partnership, joint venture or any other similar relationship between the parties hereto or cause City to be responsible in any way for the debts or obligations of Operator or any other person.
- 12.24 **Approval.** Except as otherwise expressly provide in this Third Amended Agreement, where the consent or approval of a Party is required or necessary under this Third Amended Agreement, the consent or approval shall not be unreasonably withheld.
- 12.25 **Assignments.**

- a. City Approval Required. The qualifications and identity of the Operator are of particular concern to City. Operator recognizes that it is because of such qualifications and identity that City is entering into this Third Amended Agreement with Operator. Therefore, no voluntary or involuntary successor in interest of Operator shall acquire any rights or powers under this Third Amended Agreement except with the prior written approval of City in its sole discretion. Any purported assignment in violation of this Section shall be void.
- b. Permitted Transfers. Notwithstanding anything in this Third Amended Agreement to the contrary, Operator may, without the prior written approval of City, assign or otherwise transfer its interest in this Third Amended Agreement and its rights and powers under this Third Amended Agreement (a "Permitted Transfer") to any holding company, corporation, association or entity which is or becomes a parent, subsidiary or affiliate of Operator provided that Operator retains substantial management and control thereof, or to any successor of Operator by reason of change of name, merger, consolidation, reorganization, dissolution, lender acquisition or sale of Operator interests or assets, provided that, the transferee assumes the rights and powers of Operator under this Third Amended Agreement.

12.26 **Condition Precedent.** It is understood that as a condition precedent to any action to approve this Third Amended Agreement, City must consider and adopt the appropriate resolution. Said resolution must contain the findings required by law. City agrees to use due diligence in processing the matter to hearing before the City Council.

12.27 **No Waiver.** No failure of either Party to insist upon the strict performance by the other of any covenant, term or condition of this Third Amended Agreement, nor any failure to exercise any right or remedy consequent upon a breach of any covenant, term, or condition of this Third Amended Agreement, shall constitute a waiver of any such breach of such covenant, term or condition. No waiver of any breach shall affect or alter this Third Amended Agreement, and each and every covenant, condition, and term hereof shall continue in full force and effect to any existing or subsequent breach.

12.28 **Signing Authority.** Each party represents that the persons executing this Third Amended Agreement on behalf thereof have full authority to do so and to bind such parties to perform pursuant to the terms and conditions of this Third Amended Agreement. Concurrently with Operator's submission of this Third Amended Agreement to the City for execution, Operator will submit to City a copy of documents evidencing the due formation and nature of Operator and the signatory's authority to sign on behalf of Operator.

12.29 **Counterparts.** This Third Amended Agreement may be signed in multiple counterparts with the same force and effect as if all original signatures appeared on one copy; and in the event this Third Amended Agreement is signed in counterparts, each counterpart shall be deemed an original and all of the counterparts shall be deemed to be one agreement.

[NEXT PAGE IS SIGNATURE PAGE]

**SIGNATURE PAGE
TO THIRD AMENDED AND RESTATED OPERATING AGREEMENT
[Living Coast Discovery Center, Chula Vista]**

IN WITNESS WHEREOF, the parties have executed this Third Amended Agreement as of the date first set forth above.

CITY:

THE CITY OF CHULA VISTA

By: _____
Mary Casillas Salas, Mayor

Attest:

APPROVED AS TO FORM:

Kerry Bigelow, City Clerk


Glen R Googins
City Attorney

OPERATOR:

LIVING COAST DISCOVERY CENTER

By: 

Robert Kilpatrick, Board Chair

By: 

Ben Vallejos, Executive Director

Exhibit "A"

LCDC Land and Improvements

[to be inserted]

Exhibit - "B"

LCDC Fauna Inventory

[to be inserted]

Exhibit - "C"

City "In Kind" Services

Maintenance of Facilities

City, through its Public Works Department, at its sole cost, shall provide maintenance services and materials for LCDC facilities, infrastructure, built-in exhibits, and life support equipment in order to keep such items in operating condition in a manner commensurate with the provision of such services and materials to other City facilities, with a target of maintaining the LCDC in accordance with industry standards for similar facilities or better ("Routine Maintenance"). City's obligations hereunder shall exclude the maintenance and repair work required for (a) temporary exhibits, (b) custodial maintenance and repair of any and all exhibit exteriors, and exhibit contents; (c) the coded entrance gate; and (d) any new improvements or facilities installed by Operator during the term except where Operator's installation and City's maintenance thereof is approved in writing by City in advance in accordance with Section 5.5 of the Third Amended Agreement.

In addition to Routine Maintenance, City's obligations hereunder shall include the obligation to repair or replace, as necessary, any failed infrastructure or life support equipment item necessary for the full and lawful operation of the LCDC and the preservation and exhibit of LCDC Wildlife ("Key Facility Repair or Replacement "). City commits to expending up to \$40,000 annually in labor and materials toward Key Facility Repair or Replacement during the term of the Third Amended Agreement, with any additional City funding subject to City approval in its sole discretion. Operator shall be responsible, subject to City's prior reasonable approval, for any Key Facility Repair or Replacement work it decides is necessary above and beyond City's commitment hereunder.

With the exception of the Key Facility Repair or Replacement obligation, the above described services and standards may be subject to modification in the event City budget related issues materially affect the standards upon which such services are delivered to City's other facilities. Prior to implementing any such modifications in services, including any initial modification of service required below the standard of services existing as of the Effective Date, City agrees to provide Operator reasonable notice of such change and to reasonably consider Operator's input regarding same, with the shared objective of maintaining the highest possible LCDC physical appearance, condition and functionality.

Transit Services

City shall be responsible for the cost of fuel for shuttle vehicles related to LCDC transit operations during the term of the Third Amended Agreement, subject to the Maximum Payment Amount. Operator shall be solely responsible for the provision of transit services at the center.

IT Services

City, through its ITS Department, at its sole cost, shall provide Operator support services for LCDC telecommunications and computing systems (excluding telephone and data transmission services provided by outside vendors or contractors) for all currently installed IT related systems at the LCDC. Any additional hardware/software needs (upgrades/replacement) will be charged to the LCDC at the cost to acquire such hardware/software if the ITS Department can accommodate the implementation of the hardware/software upgrades/replacement.

The above described services may be subject to modification in the event City budget related issues materially affect the standards upon which such services are delivered to City's other facilities. Prior to implementing any modifications in services, including any initial modification of service required below the standard of services as the Effective Date, City agrees to provide Operator reasonable notice of such change.

CPR Training

City shall continue to provide CPR training to LCDC employees and volunteers, but at the discounted rate of \$10 per trainee.