

July 1, 2004

GOVERNMENT AFFAIRS
COMMITTEE
REPORT NO. 9

ALL MEMBERS PRESENT, EXCEPT LEGISLATOR DEBENEDETTI. CHAIRMAN HOLT PRESENT AS EX-OFFICIO MEMBER.

1. RESOLVED, that the following items are hereby received and filed.
 - a. Item Page -2004 (Comm. 7M-9)
ERIE COUNTY ASSOCIATION OF TAX RECEIVERS: Letter Re: Centralized Regional Tax Collection System.
(5-0) Legislator DeBenedetti absent. Chairman Holt present as Ex-Officio Member.
 - b. Item Page -2004 (Comm. 8M-14)
TOWN OF LANCASTER: Copy of Letter to Legislator Marinelli Re: Govern Tax Collection System.
(5-0) Legislator DeBenedetti absent. Chairman Holt present as Ex-Officio Member.
 - c. Item Page -2004 (Comm. 9D-11)
COUNTY ATTORNEY: Response to Request for Info Re: Individuals & Firms Who Lobby on Behalf of Erie County.
(5-0) Legislator DeBenedetti absent. Chairman Holt present as Ex-Officio Member.
 - d. Item Page -2004 (Comm. 10D-1)
DISS – FLEET SERVICES: 1st Quarter Review.
(5-0) Legislator DeBenedetti absent. Chairman Holt present as Ex-Officio Member.
 - e. Item Page -2004 (Comm. 13D-13)
SOCIAL SERVICES: Response to Questions Re: Intermunicipal Agreement Between Erie County & City of Buffalo for Buffalo Park Maintenance & Operation.
(5-0) Legislator DeBenedetti absent. Chairman Holt present as Ex-Officio Member.
 - f. Item Page -2004 (Comm. 13D-16)
PARKS: Intermunicipal Cooperation Agreement for Operation, Management & Improvement of City of Buffalo Parklands.
(5-0) Legislator DeBenedetti absent. Chairman Holt present as Ex-Officio Member.
 - g. Item Page -2004 (Comm. 13D-17)
DEP: Fact Sheet – City – County Intermunicipal Cooperation Agreement for Operation, Management & Improvement of City Parks.
(5-0) Legislator DeBenedetti absent. Chairman Holt present as Ex-Officio Member.

- h. Item Page -2004 (Comm. 13E-44)
SMITH: Letter to Commissioner Helfer Re: Proposed Intermunicipal Agreement for Buffalo Parks Maintenance & Operation.
 (5-0) Legislator DeBenedetti absent. Chairman Holt present as Ex-Officio Member.
- i. Item Page -2004 (Comm. 13M-12)
VARIOUS COUNTY RESIDENTS: Written Testimony Re: Proposed Intermunicipal Agreement for EC to Assume Operation & Maintenance of Buffalo Parks.
 (5-0) Legislator DeBenedetti absent. Chairman Holt present as Ex-Officio Member.
- j. Item Page -2004 (Comm. 13M-13)
OLMSTED PARKS CONSERVANCY: Letter to Legislator Marinelli Re: Governance.
 (5-0) Legislator DeBenedetti absent. Chairman Holt present as Ex-Officio Member.
- k. Item Page -2004 (Intro. 13-14)
MARINELLI: Inter-Municipal Cooperation Agreement for the Management & Operation of City of Buffalo's Parks System & Agreement with Olmsted Conservancy.
 (5-0) Legislator DeBenedetti absent. Chairman Holt present as Ex-Officio Member.

2. Item Page -2003 (Comm. 25E-16)
COUNTY EXECUTIVE

WHEREAS, the Division of Information and Support Services proposes to create a Centralized Tax Collection System using Govern software, and

WHEREAS, the Division of Information and Support Services will seek the participation of all county municipalities to use a Centralized Regional Tax Collection System, and

WHEREAS, the Division of Information and Support Services will support and maintain this Centralized Tax Collection System from the Rath Building Data Center, and

WHEREAS, the Division of Information and Support Services will provide this application via Citrix thin client technology, and

WHEREAS, the Division of Information and Support Services is requesting authorization to purchase the hardware, software and services necessary to implement a Centralized Tax Collection System. This includes servers, server licenses, Citrix licenses, network equipment and consulting services,

NOW, THEREFORE, BE IT

RESOLVED, that the Division of Information and Support Services is authorized to provide a Centralized Regional Tax Collection System from the Rath Building Data Center, and be it further

WHEREAS, the private equity firms interested in purchasing Verizon access lines will likely seek to cut maintenance, investment and workforce costs in order to generate the maximum possible cash flow, and

WHEREAS, it is within the statutory power of the Public Service commission to block the sale of Verizon if it is not in the public's best interest,

NOW, THEREFORE, BE IT

RESOLVED, that the Erie County Legislature is committed to assuring quality telecommunication services for all citizens, and be it further

RESOLVED, this Honorable Body calls upon the Public Service Commission to use its statutory power to undertake and perform its due diligence in investigating the possible sale of Verizon access lines and by blocking the sale of Verizon's telephone networks if it is not in the best interest of consumers and business in New York State, and be it further

RESOLVED, that this Honorable Body asks the Public Service Commission to reevaluate the current regulatory structure for telecommunications in New York State with an emphasis on providing incentives for the maintenance and enhancement of our telecommunication infrastructure, and be it further

RESOLVED, that certified copies of this resolution be forwarded to New York State Governor George E. Pataki, New York State Senate Majority Leader Joseph L. Bruno, New York State Assembly Speaker Sheldon Silver, the Western New York Delegation to the New York State Legislature and Public Service Commission President

Fiscal Impact: NONE

(5-0) Legislator DeBenedetti absent. Chairman Holt present as Ex-Officio Member.

4. Item Page -2004 (Intro. 11-2)
MINORITY CAUCUS

WHEREAS, there is currently an act to before the New York State Senate and Assembly (S. 6220/A. 3483) to amend the civil practice law and rules, in relation to equalizing the treatment of collateral sources in tort actions, and

WHEREAS, this bill would apply the same standard used in cases against private employers to cases against public employers, and

WHEREAS, the bill would also allow collateral sources to offset damage awards for future costs or expenses in actions against public employers in order to prevent double recoveries, and

WHEREAS, the necessity of this bill arose from an anomaly created by the Court of Appeals' decision in Iazzetti V. City of New York, 94 N.Y.2d 183 (1999), which denied a public employer (and no other defendant) the benefit of any collateral source offset, including accident

disability pension benefits subsidized by the employer, against future economic damages awarded to employees in tort actions brought against a public employer, and

WHEREAS, the court decision is incongruous with the application of laws for private employers, where plaintiffs who are employed by private companies are not lawfully able to double compensation for the same economic loss, and

WHEREAS, the bill currently before the New York State Assembly and Senate (S. 6220/A. 3483) will prevent double recoveries and equalize the treatment of collateral sources in tort actions against public defendants by applying the same standard used in cases against private defendants,

NOW, THEREFORE, BE IT

RESOLVED, that this Honorable Body asks the New York State Legislature to approve and the Governor to sign into law Senate Bill 6220 and Assembly Bill 3483, which will protect public employers from double recoveries and allow collateral sources to offset damage awards for future costs or expenses in tort actions brought against a public employer, and be it further

RESOLVED, that certified copies of this resolution be forwarded to New York State Governor George E. Pataki, New York State Senate Majority Leader Joseph L. Bruno, New York State Assembly Speaker Sheldon Silver, the Western New York delegation of the New York State Legislature and County Attorney Frederick A. Wolf.

Fiscal Impact: Positive

(5-0) Legislator DeBenedetti absent. Chairman Holt present as Ex-Officio Member.

5. Item Page -2004 (Comm. 15E-31)

COUNTY EXECUTIVE

WHEREAS, County records from various departments, including the County Clerk, are stored in a variety of locations, including downtown office buildings, the County Records Center on the grounds of Erie County Medical Center; and

WHEREAS, these locations are running out of functional space to store and retrieve records; and

WHEREAS, the operation of a central and regional records management system providing storage and retrievals services with respect to all records is in the best interest of the citizens of Erie County; and

WHEREAS, there is interest on behalf of willing partners to further explore the opportunities to participate in such a regional records facility; and

WHEREAS, on November 13, 2003, the Erie County Legislature approved Comm. 18E-31, appropriating \$100,000 from the 2003 Regionalism/Economic Development Fund for a feasibility study of a Regional Records Center; and

WHEREAS, on May 23, 2004, the Erie County Legislature approved Comm. 10E-17, which authorized a further appropriation of \$12,000 from the 2003 Regionalism/ Economic Development Fund and authorized the selection of a consultant for a feasibility study of a Regional Records Center,

NOW, THEREFORE, BE IT

RESOLVED, that the Erie County Executive is hereby authorized to enter into contracts, in amounts not to exceed \$112,000, from available balances in the Regionalism/Economic Development Fund to initiate the work needed to analyze the feasibility of creating a Regional Records Center; and be it further

RESOLVED, that the source of funds for this study shall be \$112,000 from the Regionalism/Economic Development Fund which was re-appropriated in Cost Center 1335010, G/L 516000 and shall be transferred to G/L 516020, Professional Service Contracts, in the same Cost Center, to be further designated as follows:

Regional Records Center	\$112,000
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and be it further

RESOLVED, that the Clerk of the Legislature be directed to send certified copies of this resolution to the County Executive; the Director of the Division of Budget, Management and Finance; the Commissioner of the Department of Environment and Planning; and the County Comptroller.

(5-0) Legislator DeBenedetti absent. Chairman Holt present as Ex-Officio Member.

6. Item Page -2004 (Comm. 15E-51)

COUNTY EXECUTIVE

WHEREAS, with the attention of the nation switching to Homeland Security since the incident of 9/11/01, the County has been evaluating its facilities and positions, and

WHEREAS, one weakness found is in the position of Watch Attendants that are located in almost all County buildings, and

WHEREAS, to expand the duties of that position and give those employees a more significant presence in the building, upgrading the position one grade to a Building Guard is required, and

WHEREAS, the Department of Public Works desires to add five (5) Building Guard positions for this purpose staged throughout the year as the necessary equipment is added to the buildings,

NOW, THEREFORE, BE IT,

RESOLVED, that the Erie County Legislature authorizes the addition of five (5) Building Guards (Job Grade 4) positions, and be it further,

RESOLVED, that the funding for these new positions will come from savings generated from not filling five existing Watch Attendant positions, and be it further,

RESOLVED, that two certified copies of this resolution be forwarded to the Department of Public Works, Office of the Commissioner, and one copy each to the County Executive, the Commissioner of Personnel, the Director of Budget, Management and Finance, and to the Office of the Comptroller.

(5-0) Legislator DeBenedetti absent. Chairman Holt present as Ex-Officio Member.

AS AMENDED

7. Item Page -2004 (Comm. 15E-55)

COUNTY EXECUTIVE

WHEREAS, since 1981 when Erie County assumed ownership from the City of Buffalo of the 11.4- acre South Park Conservatory site, located in historic Frederick Law Olmsted designed South Park, and renamed it the Buffalo and Erie County Botanical Gardens, Erie County has invested millions of dollars in the historic rehabilitation of this unique structure and has provided staff funds for the horticultural staff and building systems personnel; and

WHEREAS, this extraordinary County investment has been greatly enhanced by the efforts of the Buffalo and Erie County Botanical Gardens Society (Society) that has been the sole provider of public programs and services at this cultural facility, and in the last few years, the Society has increasingly demonstrated to Erie County that it has the capability to manage the Botanical Gardens including managerial responsibility for the horticultural collection, and it is expected that by transferring these management responsibilities based on fair County compensation to the Society, that public programs and services, as well as the horticultural visitor experience will be significantly enhanced; and

WHEREAS, there are several successful local, state and national publicly-owned/not-for profit managed organizational precedents for transitioning the management of this County-owned cultural resource from Erie County to the not-for-profit Buffalo and Erie County Botanical Gardens Society, and such examples include the Buffalo Zoological Society's management of the Buffalo Zoo, as well as not-for-profit management of the Brooklyn Botanic Gardens, the New York Botanical Gardens, and the Phipps Conservatory in Pittsburgh, Pennsylvania; and

WHEREAS, this asset and management transfer to the Botanical Gardens Society, as specified in the "Erie County – Buffalo and Erie County Botanical Gardens Society Asset Transfer and Management Agreement", is intended to enable the Botanical Gardens to become a major cultural tourism destination, and it is believed that the potential of Erie County's significant capital and management investment in the Botanical Gardens to date will be maximized as a result of this asset and management transfer,

NOW, THEREFORE, BE IT

RESOLVED, that the County Executive is hereby granted the authority to execute an "Erie County – Buffalo and Erie County Botanical Gardens Society Asset Transfer and Management Agreement", subject to approval as to form by the County Attorney; and be it further

RESOLVED, that the Erie County Legislature hereby finds that there is a necessity that the special services and skills that the Buffalo and Erie County Botanical Gardens Society will provide under the terms of this agreement must be provided immediately and hereby waives any requirement for procuring proposals for the provision of such services pursuant to Erie County Administrative Code section 19.08; and be it further

RESOLVED, that 2004 County funds, in the amount of \$150,000, as stipulated in this agreement, shall be provided to the Buffalo and Erie County Botanical Gardens Society for the operation of the Botanical Gardens for the remainder of Erie County's 2004 fiscal year; and be it further

RESOLVED, that the source of funds, in the amount of \$150,000 for this agreement, were re-appropriated in the Regionalism/Economic Development Fund in Cost Center 1335010, and these funds shall be transferred to Cost Center 1335010, Extraordinary Aid, to be further designated as follows:

Buffalo and Erie County Botanical Gardens Society, Inc.	
Asset Transfer and Management Agreement	\$150,000

and be it further

RESOLVED, that certified copies of this resolution be sent to the County Executive; the County Comptroller; Director of the Division of Budget, Management and Finance; the Commissioner of the Department of Parks, Recreation and Forestry; the Commissioner of the Department of Public Works; the Commissioner of the Department of Environment and Planning; and to Carole Kociela, Executive Director, Buffalo and Erie County Botanical Gardens Society, 2655 South Park Avenue, Buffalo, New York 14218.

ASSET TRANSFER AND MANAGEMENT AGREEMENT

This Asset Transfer and Management Agreement ("Agreement") dated as of the _____ day of _____, 2004, by and among the **Buffalo and Erie County Botanical Gardens Society, Inc.**, a New York not-for-profit corporation with an address at 2451 South Park Avenue, Buffalo, New York 14218 ("Society") and the **County of Erie**, a municipality with an address at 95 Franklin Street, Buffalo, New York 14202 ("County").

W I T N E S S E T H:

WHEREAS, the Society and the County (collectively, "Parties") wish to collaborate in the implementation of a plan for the ownership, governance, maintenance and operation of the Buffalo and Erie County Botanical Gardens located at 2451 South Park Avenue, Buffalo, New York 14218 (SBL# 142.05-1-1.2) and the horticultural collection located there (collectively, "Gardens"); and

WHEREAS, the Society authored a proposal for such plan entitled, “*Proposed Plan, A Public-Private Partnership for the Ownership and Operation of the Buffalo and Erie County Botanical Gardens, March 2003*” (“Proposed Plan”) which is attached hereto and incorporated herein by reference; and

WHEREAS, the Parties wish that the Society attract non-governmental funding, manage the horticultural collection and fulfill the requirements of accrediting organizations; and

WHEREAS, in order to further implement the Proposed Plan, the County wishes to contract with the Society to manage the 11.4+ acres of real estate, including all improvements constructed thereon, located at 2655 South Park Avenue (“Premises”) for the sole purposes of operating the Gardens for the education and recreation of the residents of and visitors to Erie County and the conservation of plant species; and

WHEREAS, the Parties wish that the Society manage and operate the Gardens and own the horticultural collection and the Personality (as hereinafter defined), for a period of twenty-five (25) years or until such earlier termination of the Agreement.

NOW THEREFORE, in consideration of the premises and mutual representations, warranties and covenants contained herein, the parties agree as follows:

A. REPRESENTATIONS AND WARRANTIES

1. County’s Representations. The County represents and warrants to the Society as follows:

- (a) Authority to Operate Gardens. The County has full power and authority to own, operate and contract for management of its assets, including, without limitation, the Gardens as presently owned, operated and managed and to carry on its business as now and heretofore conducted;
- (b) Authority Relative to Agreement. The execution, delivery and performance of this Agreement by the County has been duly and effectively authorized by all necessary action, and this Agreement constitutes a legal, valid and binding obligation of the County enforceable against it in accordance with its terms;
- (c) Title to Subject Assets. The County has good and marketable title to all of the Subject Assets (as hereinafter defined), subject to no mortgage, pledge, lien, judgment, conditional sale agreement, security interest, encumbrance or other charge. The County has not granted a license or other right to any third party to use any of the Subject Assets; and
- (d) Effect of Agreement. The execution, delivery and performance of this Agreement by the County and the consummation by it of the transactions contemplated hereby (i) does not require any filing with, or the consent, waiver, approval, license or authorization of, any person, government agency or public or regulatory authority, other than the required approval of this Agreement by the Erie County legislature; (ii) does not violate, with or

without the giving of notice or the passage of time, any provision of law applicable to the County; (iii) does not conflict with or result in a breach of any contract, license, or other agreement or instrument, or any order, judgment, decree, statute, regulation or any other restriction of any kind or character, to which the County is a party or by which the County or any of the Subject Assets may be bound; and (iv) does not result in the creation of any liability, lien, encumbrance, claim or other restriction upon any of the Subject Assets.

2. Society's Representations. The Society represents and warrants to the County as follows:

- (a) Corporate. The Society is a not-for-profit corporation duly organized, validly existing and in good standing under the laws of New York and has full power and authority to own and operate its assets as presently owned and operated and to carry on its business as now and heretofore conducted;
- (b) Authority Relative to Agreement. The execution, delivery and performance of this Agreement by the Society, has been duly and effectively authorized by all necessary corporate action, and this Agreement constitutes a legal, valid and binding obligation of the Society enforceable against it in accordance with its respective terms; and
- (c) Effect of Agreement. The execution, delivery and performance of this Agreement by the Society and the consummation by it of the transactions contemplated hereby (i) does not require the consent, waiver, approval, license or authorization of any person or public authority; (ii) does not violate, with or without the giving of notice or the passage of time, any provision of law applicable to the Society; (iii) does not conflict with or result in a breach of the Society's Certificate of Incorporation or Bylaws or any mortgage, deed of trust, license, indenture or other agreement, or any order, judgment, decree, statute, regulation or any other restriction of any kind or character, to which the Society is a party; and (iv) does not result in the creation of any lien, charge or encumbrance upon any of the property or assets of the Society.

B. TRANSFER OF ASSETS

Transfer of Assets. The County hereby transfers, conveys and assigns to the Society, to be held for the benefit of the residents of the County of Erie pursuant solely to the terms and conditions of this Agreement, good and marketable title, free and clear of all liens, liabilities, security interests, encumbrances, licenses, claims and other restrictions, in and to the following:

- (a) the horticultural collection located at the Premises, including, without limitation, all plantings and lawns, whether located within or without buildings on the Premises (collectively, the "Collection"); and
- (b) all equipment, supplies and other personal property presently located on the Premises as more fully described on Schedule A attached hereto ("Personalty").

The foregoing assets are sometimes referred to in this Agreement as the “Subject Assets.” The County is conveying the Subject Assets to the Society in consideration of the Society’s performance pursuant to the terms of this Agreement. Other than the obligations of the Society set forth in this Agreement, there shall be no additional consideration of any kind due to the County from the Society for the Subject Assets.

C. GOVERNANCE: CERTAIN COVENANTS OF THE SOCIETY

1. Society Corporate Status. The Society shall at all times during the term of this Agreement maintain its status in good standing as a not-for-profit corporation organized in the State of New York which is tax exempt in accordance with Section 501(c)(3) of the Internal Revenue Code.
2. Society Board Composition. At all times during the term of this Agreement, the Erie County Executive, the County Parks Commissioner, and the Chairman of the Erie County Legislature shall be ex-officio, voting members of the Board of Directors of the Society. The Erie County Executive and the Erie County Legislature Chairman may no more frequently than annually designate an individual representative to act in his/her respective stead, provided that upon the resignation, termination, death or inability of the representative to serve on the Board of Directors of the Society, the appointing official may designate a replacement representative at any time.
3. Historic Status of Premises. During the term of this Agreement, the Society shall comply with all obligations applicable to the Premises relating to its status as an “Historic Site” listed on the National Register of Historic Places and the New York State Register of Historic Places.
4. Olmsted Park Historic Site Status. During the term of this Agreement, the Society shall cooperate with the County, the City of Buffalo, the City of Lackawanna, the New York State Office of Parks, Recreation and Historic Preservation and the Olmsted Conservancy with respect to the making of capital improvements to the Premises and the operations of the Gardens in order to preserve and enhance its status as an “Historic Site” within an Olmsted Park.
5. Society Board Member Selection. The Society shall be governed by a Board of Directors selected without regard to race, creed, religion, gender, disability or national origin, but who shall also reflect the diverse backgrounds and talents required to operate botanical gardens.

D. MANAGEMET OF THE PREMISES

1. Premises. The County hereby engages the Society to manage the Premises for the purpose of operating the Gardens in accordance with this Agreement.
2. Term. The term of this Agreement shall be for twenty-five (25) years and shall begin as of 12:01 a.m. on August 16, 2004 and shall end at midnight on August 15, 2029 unless sooner terminated as herein provided in Section F of this Agreement.
3. Taxes. The County represents and warrants that the Premises are currently exempt from all real property taxes and ad valorem assessments. In the event that the Society changes the use of the Premises or makes any improvements to the Premises that would not be eligible for this exemption,

the Society shall pay all real property taxes and assessments relating to the Premises resulting from the actions of the Society. The Society shall pay all taxes assessed against or payable with respect to the Personalty during the term hereof.

4. Use. The Society shall use and occupy the Premises solely in order to operate the Gardens as described herein.

5. Compliance with Laws. The Society shall fully comply with all federal, state and local laws, statutes, orders and regulations, including, without limitation, all environmental laws, all health and safety laws, the Social Security Act, and all regulations promulgated by the U.S. Department of Health & Human Services, the New York State Department of Health, the U.S. Environmental Protection Agency and the New York State Department of Environmental Conservation which are applicable to the Premises.

6. Assignment and Subletting. The Society shall not assign this Agreement, or subcontract any substantial part of its duties and obligations to manage the Premises or operate the Gardens, without the County's prior written consent.

7. Default by the Society. Any of the following events shall constitute a breach of, and a default under this Agreement by the Society: (a) if the Society fails or refuses to perform, observe or comply with any term, covenant or condition of this Agreement within sixty (60) days after written notice from the County; (b) if the Society shall make an assignment for the benefit of its creditors; (c) if any bankruptcy, dissolution, reorganization, composition, extension, arrangement or insolvency proceedings shall be commenced by or against the Society; (d) if the Society's interest in this Agreement or the Gardens is encumbered in any material respect or taken by attachment, lien, execution or other legal process, other than as may be specially permitted by the terms and conditions of this Agreement; or (e) if any receiver or trustee shall be appointed for the Society's property.

8. Remedies of the County. Upon or at any time after the happening and during the continuation of any one or more of the events listed in Section D.8., the Society shall be in default under this Agreement and the County may terminate this Agreement in accordance with Section F.

9. Condition of Premises. The Society shall perform daily and routine maintenance and repair necessary to maintain the Premises and operate the Gardens in a clean and safe condition suitable for use by the Society or the public, as appropriate, in a manner consistent with its intended purpose (such maintenance and repairs referred to herein as "Non-Capital Repairs"). The County shall perform all maintenance and repairs to the Premises other than Non-Capital Repairs, including, without limitation, any structural repairs to the buildings on the Premises (such maintenance and repairs referred to herein as "Capital Repairs"). Nothing in this Section D.10. shall be interpreted to substitute for or obviate the County's obligations to fund the Society and undertake capital improvements as provided herein after receipt, if any, of insurance proceeds or indemnification by the Society if applicable.

10. Utilities. The County shall provide to the Premises, or cause to be provided to the Premises, all electric service, City of Buffalo water service, natural gas service and/or heating fuel oil necessary for the operation of the Gardens, all without cost to the Society.

E. MAINTENANCE AND OPERATION OF PREMISES

1. Society's Rights and Obligations.

- (a) Operation and Management of Gardens. The Society shall be solely responsible for the operation and management of the Gardens in a manner consistent with the standards of the American Association of Museums ("AAM") for accredited botanical gardens of its size and type and in accordance with the Proposed Plan. In order to fulfill the requirements of the AAM and other accrediting organizations, the Society shall also have the exclusive right, to be exercisable in its sole discretion, to acquire, propagate, remove, replace, substitute or eliminate specimens as best practice standards for the operation of a botanical gardens of this size and type shall dictate.
- (b) Management and Staff Personnel. Other than as provided in Section E.2.(a), all management and staff personnel for the operation of the Gardens shall be employees of the Society. All such management and staff personnel shall be hired without regard to race, creed, religion, gender, disability or national origin. Other than the limitation in the preceding sentence, the Society shall have the exclusive right, exercisable in its sole discretion subject to the terms and conditions of this Agreement, to make employment decisions with respect to the size, composition and organization of all management and staff personnel including, without limitation, salary and benefits.
- (d) Contributions. The Society shall use its best efforts to seek contributions and grants from other governmental sources, foundations, corporations and individuals to support the operations of the Gardens, to implement the Proposed Plan, and to provide funding for the capital projects described in Section E.2.(b). The Society acknowledges that the funding being provided by the County pursuant to this Agreement is insufficient to meet the full operational budgetary needs of the Society for the performance by the Society of the terms and conditions of this Agreement and the Society assumes the duty and obligation to raise additional funds from outside sources to meet its budgetary needs.

The Society shall have the right to name the entire Gardens or any portion thereof in recognition of financial contributions or grants to the Society or the Gardens, provided that such naming is not publicly offensive. To be binding after the termination of this Agreement, the naming of any portion of the Gardens shall be subject to the approval of the County, which approval shall not be unreasonably withheld. To be binding during the term of this Agreement or after the termination of this Agreement, the naming of the entire Gardens shall be subject to the approval of the County, which approval shall not be unreasonably withheld, and such other approvals, including the approval of the City of Buffalo, if necessary. All naming rights, sale of any of the Collection, and admission revenue earned from operation of the Gardens by the Society shall be used exclusively for operation and improvement of the Gardens.

- (d) Fundraising. The Society may sell memberships, seek named program sponsorships, charge admission fees and undertake such other marketing and revenue generating activities as it shall deem necessary or advisable to support financially the operations of the Gardens in a manner consistent with the standards of the AAM for accredited botanical Gardens of its size and type and the Proposed Plan.
- (e) Society Improvements. The Society shall use its best efforts to improve and expand its exhibits and programs adhering to the standards of the AAM for accredited botanical gardens of its size and type and the Proposed Plan.
- (f) Financial Statements. The Society shall provide to the County Executive and the County Comptroller copies of its audited financial statements on an annual basis.
- (g) Inventory. At the commencement of the Agreement and at least bi-annually thereafter, the Society shall cause there to be prepared an inventory of the Personalty and the capital improvements to the Premises. A copy of each inventory shall be sent to the County Executive and the County Comptroller within thirty (30) days of its preparation.
- (h) Insurance. The Society shall, at all times during the term of this Agreement, maintain comprehensive liability, automobile liability and excess liability insurance in amounts as required and approved by the County Attorney and naming the County as an additional insured party on such insurance policies. The Society shall insure the horticultural collection against loss but shall not be responsible for insuring the improvements that are part of the Premises.
- (i) Society's Indemnification. The Society shall indemnify, defend and hold harmless the County from all claims, lawsuits, costs, damages or injuries to persons or property, including, without limitation (1) those relating to pollution, hazardous waste and materials, and other conditions of the Premises attributable to the operation or improvement of the Premises by the Society; and (2) those arising out of the contractual duties and responsibilities of the Society, except to the extent that such liability is attributable to the acts, omission, or negligence of the County or its officers, employees, agents or contractors.

2. County's Rights and Obligations.

- (a) HVAC Systems Conversion. Within forty-eight (48) months of the execution of this Agreement by the Parties, the County shall, at its sole expense, convert all buildings on the Premises to "smart" buildings for the purposes of controlling and operating all HVAC systems. Throughout the term of this Agreement, the County shall provide, at its sole expense, properly licensed and qualified personnel to operate the HVAC systems whether currently existing or any replacement(s) thereof.
- (b) Capital Improvements. The County shall, within the limits of a series of capital budgets adopted by the County during the period from 2005 through and including 2013, fund and undertake a total of \$9 million of capital improvements to the buildings on the

Premises, consistent with the Proposed Plan or as may otherwise be agreed to by the County and the Society, which are necessary to operate the Gardens in a manner consistent with the standards of the AAM for accredited botanical gardens of its size and type and the Proposed Plan. Any such capital improvements made by the County shall remain the property of the County, but shall be considered part of the Premises and Gardens for purposes of the Society's responsibilities under this Agreement.

- (c) County Employees. The County shall, at its sole expense, be responsible for negotiating revisions to all collective bargaining agreements to which it is a party insofar as such agreements relate to County employees currently working at the Gardens or on the Premises for the purpose of transferring or making other work assignments for such employees who shall remain part of the collective bargaining units. No personnel employed by the Society for the operation of the Gardens shall be members of such collective bargaining units or be governed by said collective bargaining agreements.
- (d) Funding from the County. Beginning August 16, 2004, the County shall provide funding to the Society for the operation of the Gardens for a minimum term of five (5) fiscal years, in the amount of Four Hundred Fifty Thousand Dollars (\$450,000) per annum payable in quarterly installments of \$112,500 at the beginning of each fiscal quarter, provided, however, that the first installment for the remainder of the 2004 fiscal year shall be One Hundred Fifty Thousand dollars (\$150,000) payable on or before August 16, 2004. The next quarterly payment shall be due on January 15, 2005. Such funding shall be in addition to the funding for Capital Repairs described in Section D.10. hereof and capital improvements described in Section E.2.(b) hereof. The sums payable pursuant hereto shall be exclusive of any Public Benefit Grants or Cultural Funding Grants which may be granted by the County pursuant to application made by the Society in accordance with the County's procedures for same and subject to the County's discretionary approval and appropriation with respect thereto or any other monies due, expenses incurred or other financial obligations borne by the County pursuant to the terms of this Agreement.
- (e) Insurance. The County represents, and the Society recognizes, that the County is self-insured and that the Premises and the Gardens fall within the County's self-insurance plan. The County shall cause any and all contractors and vendors who shall perform work or services for the County, at the Gardens, for which the County requires liability insurance, to name the Society as an additional insured party on such insurance policies. The County shall require that all such contractors and vendors provide evidence of such insurance to the Society prior to the commencement of work or services at the Gardens.
- (f) County's Indemnification. To the extent permitted by New York State law, the County shall indemnify, hold harmless and defend the Society from all claims, lawsuits, costs, damages or injuries to persons or property, including, without limitation (1) those relating to pollution, hazardous waste and materials, and other conditions of the Premises as of the execution of this Agreement or as improved by the County; and (2) those arising out of the contractual duties and responsibilities of the County, except to the

extent that such liability is attributable to the actions, omission, or negligence of the Society or its officers, employees, directors, agents or contractors.

F. TERMINATION

Termination.

- (a) This Agreement may be terminated prior to the expiration of the term hereof upon either Party's material breach of this Agreement, which breach has not been cured within sixty (60) days after the breaching Party's receipt of written notice from the non-breaching Party.
- (b) Upon the expiration, or earlier termination of this Agreement as described in subsection (a) of this Section F., the Society shall convey to the County good and marketable title, free and clear of all liens, liabilities, security interests, encumbrances, licenses, claims and other restrictions, in and to the following:
 - (1) the then existing Collection, as the same may be modified as provided for in this Agreement;
 - (2) the then existing Personalty, as the same may be modified in accordance with the Society's right set forth herein to remove or replace items of Personalty as necessary for the safe and efficient operation of the Gardens and which replacement items shall also be transferred to the County upon the expiration or earlier termination of this Agreement. Notwithstanding the foregoing, equipment, supplies and other personal property currently owned or hereafter acquired by the Society which are not replacements for Personalty existing on the date hereof shall remain the property of the Society and shall not be conveyed to the County; and
 - (3) any capital improvements made to the Premises whether by the Society, the County or any third party during the Term of the Agreement.

G. MISCELLANEOUS

1. Entire Agreement. This Agreement (including the Proposed Plan) constitutes the entire agreement and supersedes all prior agreements and understandings, both written and oral, between the parties hereto with respect to the subject matter hereof. To the extent there is a conflict between this Agreement and the Proposed Plan, however, the terms of this Agreement shall be controlling.
2. Assignment to Third Parties. Neither this Agreement nor any of the rights or duties hereunder shall be assigned or delegated by either of the Parties without the prior written consent of the other Party, and any attempted assignment or delegation without such consent shall be void.
3. Modifications. Any amendment, change or modification of this Agreement shall be void unless in writing and signed by the Parties hereto.

4. Expenses. The Parties shall each bear, respectively, the costs and expenses incurred by them or on their behalf in connection with the negotiation, execution and closing of this Agreement and the transactions contemplated hereby. Notwithstanding the foregoing, sale or transfer taxes, if any, applicable to the transfers of the Subject Assets shall be borne by the County.

5. No Assumption of Liabilities. Except as expressly provided in this Agreement, neither Party shall assume any liability or obligation of the other Party of any nature, whether accrued, absolute, contingent or otherwise.

6. Survival. The representations, warranties, covenants, agreements and obligations of the Parties made in Sections B, E.1(i), E.2(f), E.1(c), F(b), and G.5 shall survive the termination of this Agreement.

7. Governing Law. This Agreement shall be governed, construed and enforced in accordance with New York law without regard to principles of conflicts of law.

8. Further Assurances. From time to time after the closing of the transactions contemplated herein, the County will execute all such instruments and take all such actions as the Society shall reasonably request in order to more effectively convey and transfer to the Society good and marketable title to the Subject Assets and in order to confirm the Society’s right to occupy and use the Premises.

9. Notices. Any notices or other communications required or permitted to be given pursuant to this Agreement shall be deemed to have been effectively made and given if in writing and delivered personally or sent by certified mail, postage prepaid, addressed in accordance with the addresses set forth in the preamble of this Agreement.

IN WITNESS WHEREOF, each of the parties hereto have duly executed this Agreement as of the date first written above.

APPROVED AS TO FORM

APPROVED AS TO CONTENT

FREDRICK A. WOLF, County Attorney

LAWRENCE D. JASINSKI, Commissioner

By: _____

LAURENCE K. RUBIN, Commissioner

Dated: _____

Doc. No. _____

**BUFFALO AND ERIE COUNTY
BOTANICAL GARDENS SOCIETY, INC.**

COUNTY OF ERIE

By: _____

By: _____

Name: _____

Name: JOEL A. GIAMBRA

Title: _____

Title: County Executive

Schedule A

Personalty

Buffalo and Erie County Botanical Gardens -Erie County Equipment List June 25, 2004

1	Chevy 2500 Cargo Truck-1998
1	Chevy 3500 Dump Truck-1995
1	Gas Chainsaw
1	Electric Fogger
1	Diesel Lawnmower
1	Gas Lawnmower – Self-propelled
2	Gas Lawnmower – push type
1	Electric Lawnmower – Push type
2	Rototiller
1	Snowblower
1	Soil Shredder
1	Electric Sprayer – Large
3	Weedwackers - gasoline
1	Shop Vac 16 gal.

Buffalo and Erie County Botanical Gardens – Erie County Inventory of tools and small items
June 25, 2004

12	Benches
14	Trash cans
2	Podiums
6	Dinosaur topiaries
13	Thermometers
20	Decorative clay planters
2	Bonsai benches
1	Statuary
2	Finials
2	Pedestals with gazing balls

4	Cherub statues
1	Mirror
25	Hoses
7	fire extinguishers
4	Fountains
2	Lead dolphin fountains
1	Small fountain in Orchid House
1	Bubbler fountain
10	Tubs with pumps
	Hand tools
3	Snow shovels
11	Leaf rakes
5	Floor squeegees
10	Push brooms
2	Manure forks
3	Digging forks
20	Shovels
1	Sickle
3	Hand saw
2	Corn brooms
	Trowels
	Pruners
3	Loppers
1	Hedge shear
1	Leaf vacuum
6	Pick axe
2	Axe
1	Sledge hammer
2	Hose carts with hose
3	Rubbermaid carts
1	pruning saw
2	pole saws
2	mops & buckets
2	fish nets
26	large wire hanging baskets
24	small hanging wire hanging baskets
7	wood sculptures
5	smokers outposts
1	bike rack
4	tarps
4	wheel barrels
2	steel carts
1	leaf blower
12	school lockers
8	metal cabinets

3	extension ladders 6, 15, 25 & roof ladder
2	live traps
2	sieves
1	trolley cart
6	transformers
6	clamp lights on poles
3	flatbeds
11	stage spotlights
	Christmas and Easter Decorations
1	charcoal grill
2	refrigerators
1	microwave
1	coffee maker
1	ball cart
1	metal coatrack
8	light fixtures
1	safe
1	gas power blower
1	ultra quiet fan nutone
2	Scott's hand held spreaders
1	bernz o matic torch
16	blue flood lights
18	3/4 hose mender
9	hand pruners
1	roll nylon grass string
2	grape scissors
1	chainsaw 24" gas
3	pairs of rubber gloves
14	pairs of latex gloves
4	knife and tool sharpeners
3	green hard hats
7	water wands
1	indoor timer
2	outside timers
3	15' light duty extension cords
2	iron rakes
1	gas powered pole trimmer
1	mulch fork
1	pony spade
1	forked spade
10	pointed hoes
2	aluminum landscape rakes
2	3 gallon spray tank's hand pump
2	handheld high compression sprayers
1	fish tank

(5-0) Legislator DeBenedetti absent. Chairman Holt present as Ex-Officio Member.

LYNN M. MARINELLI
CHAIRPERSON