

Date..... December 17, 2012

HOLD HEARING FOR AMENDMENT OF VACATION ORDINANCE NO. 15, 014  
REGARDING RESERVATION OF UTILITY EASEMENTS ON VACATED BOTANICAL  
CENTER AND ADJACENT GROUNDS PROPERTY AND FOR AMENDMENT OF LEASE  
OF SUCH VACATED PROPERTY TO GREATER DES MOINES BOTANICAL GARDEN

WHEREAS, the City of Des Moines owns and operates the City of Des Moines Botanical Center, including adjacent greenhouses, located at 909 Robert D. Ray Drive, Des Moines, Iowa 50316-2897 ("Botanical Center"), and approximately 13.498 acres of grounds adjacent to the Botanical Center and between the Botanical Center and the Des Moines River, including the park drive known as Robert D. Ray Drive; and

WHEREAS, on May 9, 2011, by Roll Call No. 11-0822, the City Council approved the Lease Agreement in which the Greater Des Moines Botanical Garden corporation ("GDMBG") agreed to be responsible, at its cost, for \$7,500,000 in improvements, including expanded gardens on the grounds of the Botanical Center, by June 1, 2015, and to create an endowment of \$2,000,000 for operational expenses at the Botanical Center and grounds, and \$500,000 for construction related costs and operating costs during and immediately after construction as consideration for rent, for an initial period of 25 years, with two 25 year renewal options at the option of the GDMBG ("Lease Agreement"); and

WHEREAS, per the Lease Agreement, such improvements must be constructed in accordance with a Master Plan approved by the City Council; and

WHEREAS, on June 11, 2012, by Roll Call No. 12-0935, the City Council approved the conceptual Master Plan developed by GDMBG for construction of improvements in the Botanical Center and its grounds; and

WHEREAS, the Lease Agreement will commence on January 1, 2013; and

WHEREAS, Section IX.F of the Lease Agreement requires the City to install a fire hydrant and GDMBG has agreed to install the hydrant with the City to reimburse GDMBG for its cost up to \$18,5000; and

WHEREAS, Section IX.E of the Lease Agreement requires the City to remove the "Metro Net" shared communications system fiber spur connection and GDMBG desires to continue to use the current connection until approximately July 1, 2013 and the City desires to continue location of the Metro Net trunk fiber infrastructure on the leased premises and to relocate it at City expense; and

WHEREAS, City staff and GDMBG have negotiated an amendment to the Lease Agreement incorporating the above described terms, a copy of which is on file in the City Clerk's Office; and

Date December 17, 2012

WHEREAS, it is proposed that an ordinance amending Ordinance No.15,014, which vacated as parkland and right-of-way the below described Des Moines Botanical Center at 909 Robert D. Ray Drive and approximately 13.498 acres of real estate adjacent to the Botanical Center and lying between the Botanical Center and the Des Moines River, including the park drive known as Robert D. Ray Drive from north of the Interstate 235 bridge to East 6<sup>th</sup> Street, be amended by providing for a reservation of an easement for utilities with recorded easements and for the Metro Net shared communications system trunk fiber infrastructure:

BEGINNING AT THE INTERSECTION OF THE SOUTH RIGHT-OF-WAY LINE OF EAST UNIVERSITY AVENUE AND THE WEST RIGHT-OF-WAY LINE OF EAST 6<sup>TH</sup> STREET, BOTH RIGHTS-OF-WAY AS PRESENTLY ESTABLISHED; THENCE SOUTH ON THE SAID WEST RIGHT-OF-WAY LINE TO THE INTERSECTION WITH THE NORTH LINE OF LOT 5 OF RIVER HILLS PLAT FOUR, AN OFFICIAL PLAT; THENCE WEST ON THE SAID NORTH LINE TO THE NORTHWEST CORNER OF SAID LOT 5, ALSO BEING ON THE EAST LINE OF LOT 6 OF SAID RIVER HILLS PLAT FOUR; THENCE SOUTHERLY ON THE EAST LINE OF SAID LOT 6 TO A POINT WHICH IS 72.54 FEET NORTH OF THE SOUTHEAST CORNER OF SAID LOT 6, ALSO BEING ON THE NORTHERLY RIGHT-OF-WAY LINE OF INTERSTATE HIGHWAY I-235 AS SHOWN IN BOOK 9703 PAGE 595 OF THE CONVEYANCE QUIT CLAIM DEED IN THE POLK COUNTY RECORDERS OFFICE; THENCE SOUTHWESTERLY 91.06 FEET ALONG THE NORTHERLY RIGHT-OF-WAY LINE OF SAID I-235; THENCE WESTERLY ON THE NORTHERLY RIGHT-OF-WAY LINE OF SAID I-235 TO THE WESTERLY CURB LINE OF ROBERT D. RAY DRIVE, AS PRESENTLY ESTABLISHED; THENCE NORTHEASTERLY ALONG THE WESTERLY CURB LINE OF SAID ROBERT D. RAY DRIVE A DISTANCE OF 175 FEET; THENCE WESTERLY, PERPENDICULAR TO SAID WESTERLY CURB LINE, TO THE EASTERLY BANK OF THE DES MOINES RIVER; THENCE NORTHEASTERLY ALONG SAID EASTERLY BANK TO THE SOUTH RIGHT-OF-WAY LINE OF SAID EAST UNIVERSITY AVENUE; THENCE EAST ON THE SOUTH RIGHT-OF-WAY LINE OF SAID EAST UNIVERSITY AVENUE TO THE POINT OF BEGINNING, ALL NOW INCLUDED IN AND FORMING A PART OF THE CITY OF DES MOINES, POLK COUNTY, IOWA AND EXCEPT FOR A 20.0 FOOT WIDE STRIP OF LAND FOR THE RELOCATED ALIGNMENT OF THE MULTI-USE RECREATIONAL TRAIL.

WHEREAS, on December 3, 2012, by Roll Call No. 12-\_\_\_\_\_, it was duly resolved by the City Council that said proposed ordinance to amend Ordinance No. 15,014 and Lease Agreement amendment be set down for hearing on December 17, 2012, at 5:00 pm in the Council Chamber; and

WHEREAS, due notice of said proposal to amend such vacation ordinance and to amend such lease was given as provided by law, setting forth the time and place for hearing on said proposals; and

WHEREAS, in accordance with said notice, those interested in said proposed amendment of Ordinance No. 15, 014 and amendment of Lease Agreement, both for and against, have been given an opportunity to be heard with respect thereto and have presented their views to the City Council

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Des Moines, Iowa, that:

1. Upon due consideration of the facts and statements of interested persons, the objections to said proposed amendment to vacation ordinance and amendment of lease of such public real property as described above are hereby overruled and the hearing is closed.

Date December 17, 2012

2. The proposed amendment to Ordinance No. 15,014 is found to be in the public interest and be and is hereby adopted and approved.
3. The proposed amendment to the Lease, Operation, Management and Maintenance Agreement to change terms as described above relating to the Metro Net communication system fiber infrastructure, including relocation of such on the leased premises, and reimbursement to lessee Greater des Moines Botanical Garden for costs of the installation of a fire hydrant for up to \$18,500, be and is hereby approved.
4. The Mayor is authorized and directed to sign said lease amendment as identified above, and the City Clerk is authorized and directed to attest to the Mayor's signature.
5. Upon final passage of the ordinance amending Ordinance No. 15,014, the City Clerk is authorized and directed to forward the original of the lease amendment, together with a certified copy of this resolution and of the affidavit of publication of the notice of this hearing, to the Real Estate Division of the Engineering Department for the purpose of causing said documents to be recorded.
6. Upon execution of said lease amendment, the Real Estate Division of the Engineering Department is authorized and directed to forward the original of the said lease amendment, together with a certified copy of this resolution and of the affidavit of publication of the notice of this hearing, to the Polk County Recorder's Office for the purpose of causing said documents to be recorded.
7. Upon receipt of the recorded documents back from the Polk County Recorder, the Real Estate Division shall file the original of the lease amendment and send copies to the City Clerk, the Land Records Clerk and to the Greater Des Moines Botanical Garden.

(Council Communication 12-625)

Moved by \_\_\_\_\_ to adopt.

APPROVED AS TO FORM:

Ann DiDonato  
Ann DiDonato  
Assistant City Attorney

COUNCIL ACTION	YEAS	NAYS	PASS	ABSENT
COWNIE				
COLEMAN				
GRIESS				
HENSLEY				
MAHAFFEY				
MEYER				
MOORE				
TOTAL				
MOTION CARRIED			APPROVED	
_____ Mayor				

**CERTIFICATE**

I, DIANE RAUH, City Clerk of said City hereby certify that at a meeting of the City Council of said City of Des Moines, held on the above date, among other proceedings the above was adopted.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal the day and year first above written.

\_\_\_\_\_  
City Clerk

Date \_\_\_\_\_

Agenda Item 52A

Roll Call # \_\_\_\_\_

AMENDMENT TO  
BOTANICAL CENTER LEASE  
AND  
OPERATION, MANAGEMENT AND MAINTENANCE AGREEMENT  
BY AND BETWEEN  
THE CITY OF DES MOINES, IOWA  
AND  
THE GREATER DES MOINES BOTANICAL GARDEN

This AMENDMENT is made and entered into this \_\_\_\_ day of December, 2012, by and between the City of Des Moines (“CITY”) and Greater Des Moines Botanical Garden, an Iowa non-profit corporation, (“GDMBG”), to that Botanical Center Lease and Operation, Management and Maintenance Agreement, By and Between the CITY and GDMBG, dated May 9, 2011, (“the Lease Agreement”).

WHEREAS, on May 9, 2011, by Roll Call No. 11-0822, the City Council approved the Lease Agreement pursuant to which the CITY will lease the Botanical Center and related grounds and GDMBG agrees to be responsible to construct, at its cost, \$7,500,000 in improvements, including expanded gardens on the grounds of the Botanical Center, by June 1, 2015, and to create and fund an endowment of \$2,000,000 for operational expenses at the Botanical Center and grounds, and to fund \$500,000 for construction related costs and operating costs during and immediately after construction as consideration for rent, for an initial period of 25 years, with two 25 year renewal options at the option of the GDMBG; and

WHEREAS, per the Lease Agreement, such improvements must be constructed in accordance with a Master Plan approved by the City Council; and

WHEREAS, on June 11, 2012, by Roll Call No. 12-0935, the City Council approved the conceptual Master Plan developed by GDMBG for construction of improvements in the Botanical Center and its grounds; and

WHEREAS, the Lease Agreement will commence on January 1, 2013; and

WHEREAS, GDMBG and the City desire to amend certain terms of the Lease Agreement as described below.

NOW THEREFORE, for and in consideration of the mutual undertakings of the parties hereto, it is agreed as follows:

1. Section III.D. shall be deleted and replaced with the following:

D. UTILITIES

1. CORPORATION’S possession and use of the Leased Premises is specifically subject to any easements of record on the date of this Agreement. CITY shall not be responsible for the costs of any relocation of utility lines or utility improvements

for any improvements exterior to the Botanical Center and on the Grounds and Drive to be constructed over existing utility lines or other utility improvements, except for the relocation of the Metro Net fiber as described in this Section. CORPORATION'S possession and use of the Leased Premises is specifically subject to the existing sanitary sewer and storm sewer lines and related manholes and other appurtenances that exist on the Leased Premises as of the date of this Agreement and which will remain in place within the easement areas set forth in that certain Permanent Easement for Storm Water and Sanitary Sewer Right of Way reserved to the City of Des Moines, Iowa, dated April 25, 2011 and filed for record in the Office of the Recorder for Polk County, Iowa on May 16, 2011 in Book 13850 at Page 946-950, (the "Storm Water and Sanitary Sewer Easement"). CORPORATION shall comply with all the terms and conditions of the Storm Water and Sanitary Sewer Easement.

CORPORATION's possession and use of the Leased Premises also is specifically subject to a twenty foot easement that is hereby reserved by the CITY over, under, through and across the twenty foot wide utility corridor on the Leased Premises, substantially at the locations shown on the attached Exhibit G, (the "Utility Corridor"), or at such other location as shall be mutually agreed upon between the CITY and the CORPORATION, for installation, operation, maintenance, repair, replacement and removal of fiber and conduit and related facilities for the "Metro Net" trunk fiber operated under a Chapter 28E agreement between the CITY, the Des Moines Community School District, and the Iowa Telecommunication and Technology Commission (now known as the Iowa Communication Network "ICN"). CITY shall execute an easement document for the relocated Metro Net trunk fiber and will file such in the Polk County Recorder's Office. Such easement shall permit, for all activities related to the purpose of the CITY or its lessee, or other permitted parties, including but not limited to electric, gas, cable or telecommunications utilities, constructing, reconstructing, repairing, enlarging and maintaining utility equipment, and such future equipment as the CITY shall hereafter deem necessary for its use, together with the necessary appurtenances thereto, under, over and through said easement area. This easement shall further afford the CITY the right to grant such further easements within the easement area as the CITY shall deem necessary, prudent and appropriate to accommodate utilities and telecommunications facilities owned by third parties and public utilities, under such terms and conditions as the CITY shall deem prudent and appropriate. CORPORATION shall comply with all the terms and conditions of this easement. CITY hereby agrees to the location of electric, gas and telecommunications within the Metro Net easement area.

The CITY, at its expense, shall relocate the existing Metro Net fiber (but shall not be required to remove the conduit) and related facilities into this easement area, except that Section XI.E shall apply to the Metro Net spur connection fiber between the Botanical Center and the Metro Net trunk fiber. The CORPORATION and the CITY shall coordinate this relocation, in good faith, with the construction schedule for the CORPORATION to construct the improvements shown on the Conceptual Master Plan so as to not materially hinder such construction, subject to the CITY's reasonable ability to provide for such relocation within the time frame requested by CORPORATION, taking into account such factors as soil conditions, the ability of the CITY to procure

contractor services, and the need to minimize the amount of time that the Metro Net will not be operational. CORPORATION acknowledges that the Metro Net fiber provides essential services to the citizens of the greater Des Moines metro area, including dispatch services. In no event will the CITY be required to relocate the Metro Net trunk fiber to the Utility Corridor before grading and any other development is completed in the Utility Corridor, the frost has lifted, and construction conditions are generally considered favorable. CORPORATION is responsible to develop at its costs the Utility Corridor.

The Metro Net termination and connecting fiber equipment and boxes within the Botanical Center shall remain the property of the CITY and Metro Net consortium members and shall be removed by the CITY at the time that the spur fiber connection is removed or at the time that the Metro Net trunk fiber is relocated, at the discretion of the CITY.

CORPORATION shall, at no charge, permit the CITY or representatives of the appropriate utility company with an easement of record or license to be located on the Leased Premises to have access over, through and across the Leased Premises to inspect, service, maintain, construct, and repair the CITY sanitary sewer and storm sewer lines and related facilities, Metro Net fiber and related facilities, and any other utility lines or other utility improvements with an easement or license to be located on the Leased Premises. CORPORATION shall further make no claim or demand whatsoever against the CITY or other participating Metro Net entity for damages to the Leased Premises or to any Improvements constructed by CORPORATION over or immediately adjacent to the CITY sanitary sewer, CITY storm sewer, Metro Net fiber infrastructure that result from the existence of, or inspection, service, maintenance, construction or repair of such utility lines or other utility improvements. Although the CITY shall use reasonable care to avoid or minimize damage to the Improvements on the Leased Premises, the CORPORATION acknowledges the CITY inspection, service, maintenance, of the sanitary sewer lines, storm sewer lines and Metro Net fiber and appurtenant facilities may or is likely to result in damages to the Leased Premises, including landscaping, gardens, and other improvements and the Improvements.

2. In the event that any utility is entitled as a matter of law to any reimbursement from the CITY for its costs of relocation, the CORPORATION shall be responsible to pay all such costs, and the CORPORATION shall protect, defend, indemnify and hold harmless the CITY from any such liability to reimburse such utility company. The provisions of this Agreement govern matters between the CITY and the CORPORATION only and do not create and are not intended to create rights in any third party or in anyone as a third party beneficiary of this Agreement.

2. Section III.E.(d) of the Lease Agreement shall be amended by adding the following additional sentence at the end thereof to read:

Notwithstanding the foregoing, the CORPORATION may use, store and dispose of such Hazardous Substances as are commonly used in the operation of botanical gardens or offices and may store and use diesel fuel in the underground storage tank system located

on the Leased Premises, provided that all such usage, storage and disposal is in accordance with all applicable laws and regulations.

3. Section IX.E shall be amended by:

Deleting the second sentence of the first paragraph and replacing it with the following:

Use of two City fibers of the Metro Net spur connection fiber between the Botanical Center and the Metro Net trunk fiber currently in use at the Botanical Center shall continue until July 1, 2013, and may be discontinued by the CITY at an earlier date if the CORPORATION notifies the CITY before July 1, 2013 that it has internet service from another source. The CITY shall have the option to remove the Metro Net spur connection fiber at the time that the trunk fiber infrastructure is relocated to the Utility Corridor or to remove the spur connection fiber at the same time that the two City fibers are removed. City agrees that it shall remove the MetroNet spur connection fiber between the Botanical Center and the main MetroNet trunk fiber and any related facilities within ninety (90) days after the CORPORATION gives the CITY a written request to remove such fiber or within 90 days after July 1, 2013, whichever occurs first, subject to the CITY's ability to reasonably comply with a request for such early removal.

Deleting "but no later than the Lease Commencement date" from the third sentence in the first paragraph.

4. Section IX.F shall be amended by deleting the first sentence and replacing it with the following:

GDMBG shall install a fire hydrant and related water service within the Leased Premises in compliance with the approved site plan and Fire Department requirements. CITY agrees to reimburse GDMBG for the costs of such tenant improvement up to \$18,500.00 upon a completed installation approved by appropriate CITY staff and receipt of invoices for such installation costs.

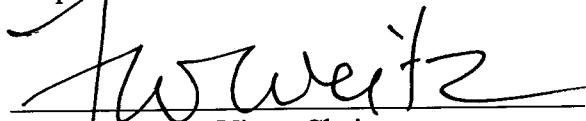
5. Except as modified above, all other terms of the Lease Agreement shall remain in effect.

IN WITNESS WHEREOF, the parties to this AMENDMENT have hereunto set their hands on this day and year as first above written.

City of Des Moines, Iowa

\_\_\_\_\_  
T.M. Franklin Cownie, Mayor

Greater Des Moines Botanical Garden  
Corporation

  
\_\_\_\_\_  
Fred W. Weitz, Vice - Chairperson

Attest:

\_\_\_\_\_  
Diane Rauh, City Clerk

Approved As To Form:

Ann DiDonato  
Ann DiDonato, Assistant City Attorney

STATE OF IOWA    )  
                                  ) ss.  
COUNTY OF POLK )

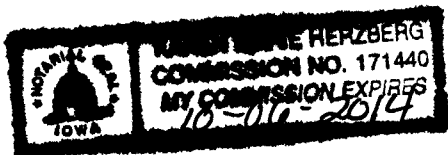
On this \_\_\_\_\_ day of December, 2012 before me, the undersigned, a Notary Public, personally appeared T. M. FRANKLIN COWNIE and DIANE RAUH, to me personally known, who, being by me duly sworn, did state that they are the MAYOR and CITY CLERK, respectively, of the City of Des Moines, Iowa; that the seal affixed to the foregoing instrument is the seal of the corporation, and that the instrument was signed and sealed on behalf of the corporation, by authority of its City Council, as contained in the Resolution adopted under Roll Call 12-\_\_\_\_\_, dated December \_\_, 2012, and that T. M. Franklin Cownie and Diane Rauh acknowledged the execution of the instrument to be the voluntary act and deed of the municipal corporation, by it voluntarily executed.

\_\_\_\_\_  
Notary Public in the State of Iowa

STATE OF IOWA    )  
                                  ) ss.  
COUNTY OF POLK )

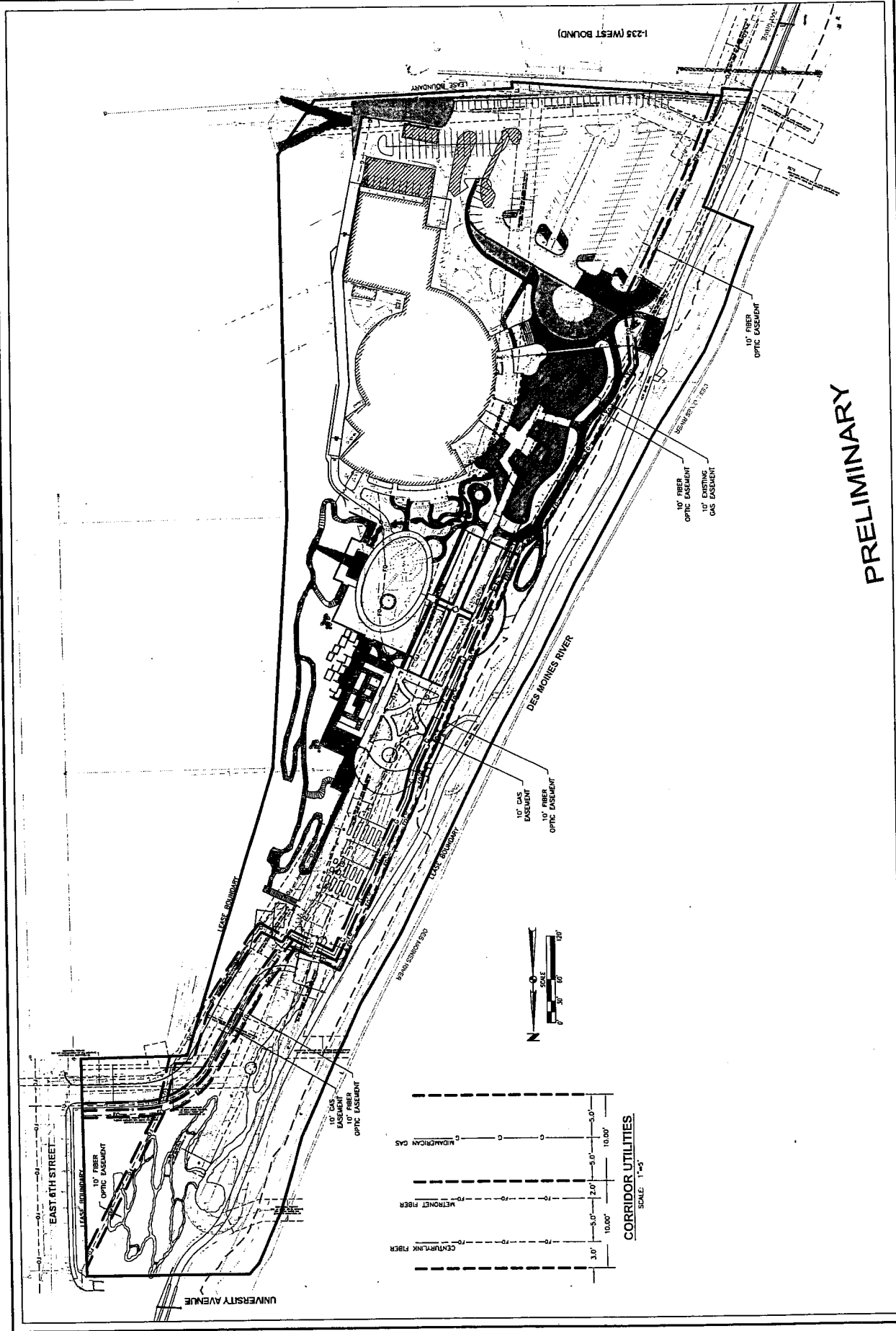
On this 30th day of November, 2012, before me, a notary public, personally appeared FRED W. WEITZ, who being by me duly sworn did say that he is the VICE-CHAIRPERSON of GREATER DES MOINES BOTANICAL GARDEN, an Iowa non-profit corporation, and that the foregoing instrument was signed on behalf of said corporation by authority of its board of directors, and he acknowledged the execution of the said instrument to be the voluntary act and deed of said corporation, by it voluntarily executed.

Karen Marie Herzberg  
Notary Public in the State of Iowa





Handwritten marks in the top left corner.



PRELIMINARY