

AN ORDINANCE 2015-01-29-0062

**AUTHORIZING A SUBLEASE AGREEMENT WITH THE SAN ANTONIO MUSEUM ASSOCIATION D/B/A THE WITTE MUSEUM (WITTE) FOR A PORTION OF PROPERTY OWNED BY THE WITTE FOR USE AS A CENTRAL PLANT PROVIDING HEATING AND COOLING SERVICES TO THE WITTE CAMPUS AND APPROVING AMENDMENT NO. 5 TO THE CITY'S MASTER LEASE AGREEMENT.**

\* \* \* \* \*

**WHEREAS**, the San Antonio Museum Association d/b/a The Witte Museum (Witte) is a non-profit organization whose mission is to promote lifelong learning through innovative exhibitions, programs and collections in natural history, science and South Texas heritage; and

**WHEREAS**, the Witte, which first opened in 1923, has an average of 350,000 visitors annually including approximately 150,000 school aged children; and

**WHEREAS**, the established Witte Master Plan includes expansion in three main phases: 1) South Texas Heritage Center and the Witte Research Center; 2) the new Witte; and 3) World of Water; and

**WHEREAS**, Phase I is complete, and Phase II, the new Witte, is currently under construction and includes renovations and additions to the existing City-owned facility leased to the Witte through 2062, which serves as the main building with gallery space; and

**WHEREAS**, to facilitate the vision of the Master Plan including renovations and upgrades to the main building, the Witte will consolidate its physical utilities plant on a portion of land privately-owned by the Witte Title Company adjacent to the City's property; and

**WHEREAS**, this will provide heating and cooling services to the main Witte campus including the South Texas Heritage Center; and

**WHEREAS**, in order to maintain the City's interest in heating and cooling services to the publicly owned museum space, the Witte will sublease the central plant to the City to coincide with its City Master Lease Agreement; **NOW THEREFORE:**

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:**

**SECTION 1.** The City Manager or her designee, or the Director of the Department of Parks and Recreation or his designee, is authorized to execute a Sublease Agreement with the San Antonio

Museum Association d/b/a The Witte Museum (Witte) for a portion of property owned by the Witte for use as a central plant providing heating and cooling services to the Witte campus. A copy of the agreement, in substantially final form, is attached hereto and incorporated herein for all purposes as **Attachment I**.

**SECTION 2.** The City Manager or her designee, or the Director of the Department of Parks and Recreation or his designee, is authorized to execute amendment No. 5 to the City's Master Lease Agreement with the San Antonio Museum Association d/b/a The Witte Museum (Witte). A copy of the amendment, in substantially final form, is attached hereto and incorporated herein for all purposes as **Attachment II**.

**SECTION 3.** The financial allocations in this Ordinance are subject to approval by the Director of Finance, City of San Antonio. The Director of Finance may, subject to concurrence by the City Manager or the City Manager's designee, correct allocations to specific SAP Fund Numbers, SAP Project Definitions, SAP WBS Elements, SAP Internal Orders, SAP Fund Centers, SAP Cost Centers, SAP Functional Areas, SAP Funds Reservation Document Numbers, and SAP GL Accounts as necessary to carry out the purpose of this Ordinance.

**SECTION 4.** This ordinance is effective immediately upon the receipt of eight affirmative votes; otherwise, it is effective ten days after passage.

PASSED AND APPROVED this 29th day of January, 2015.

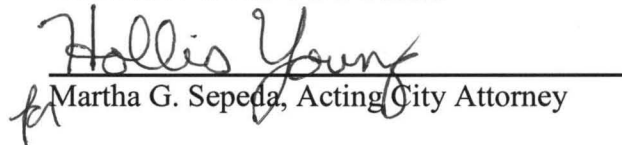


M A Y O R  
Ivy R. Taylor

ATTEST:

  
Lencia M. Vacek, City Clerk

APPROVED AS TO FORM:

  
Martha G. Sepeda, Acting City Attorney

<b>Agenda Item:</b>	11 ( in consent vote: 5, 6, 7, 8, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 21, 22, 23, 27 )						
<b>Date:</b>	01/29/2015						
<b>Time:</b>	11:23:36 AM						
<b>Vote Type:</b>	Motion to Approve						
<b>Description:</b>	An Ordinance authorizing a Sublease Agreement with the San Antonio Museum Association d/b/a The Witte Museum for a portion of property owned by the Witte for use as a central plant providing heating and cooling services to the Witte campus and approving Amendment No. 5 to the City's Master Lease Agreement. [Gloria Hurtado, Assistant City Manager; Xavier D. Urrutia, Director, Parks & Recreation].						
<b>Result:</b>	Passed						
Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Ivy R. Taylor	Mayor		x				
Roberto C. Trevino	District 1		x				
Alan Warrick	District 2		x				
Rebecca Viagran	District 3		x				
Rey Saldaña	District 4		x				
Shirley Gonzales	District 5		x				
Ray Lopez	District 6		x				x
Cris Medina	District 7		x				
Ron Nirenberg	District 8		x				
Joe Krier	District 9		x				
Michael Gallagher	District 10		x			x	

**SUBLEASE AGREEMENT PROVIDING FOR A LEASE OF PROPERTY FROM THE WITTE MUSEUM TO THE CITY OF SAN ANTONIO FOR USE AS CENTRAL PLANT**

This Sublease Agreement providing for a Lease of Property from The Witte Museum to the City of San Antonio for its use as a Central Plant (the "Agreement") is made in duplicate originals and entered into by and between The WITTE MUSEUM, a Texas not-for-profit corporation (hereinafter called "WITTE"), acting by and through its designated officers pursuant to its bylaws or a resolution of its Board of Directors and the CITY OF SAN ANTONIO (hereinafter called "CITY"), acting by and through its City Manager pursuant to City Ordinance No. \_\_\_\_\_, passed and approved on \_\_\_\_\_.

**I. BASIC INFORMATION, DEFINITIONS**

Authorizing Ordinance:

Landlord ("WITTE"): The WITTE MUSEUM

WITTE's Address: The Witte Museum  
3801 Broadway  
San Antonio, Texas 78209  
(Attention: President & CEO)

Tenant ("CITY"): City of San Antonio

CITY's Address: P.O. Box 839966  
San Antonio, Texas 78283-3966  
(Attention: Director, Parks and Recreation Department)

Premises: Tract A below, including improvements and personal property thereon and with all appurtenances thereto.

Tract A: A. 2.32 acre portion of the B. Naylor Morton Research and Collections Center, just south of The Witte Museum Main campus, which Tract A is more particularly described in Exhibit A. This Tract A shall not include any portion of the existing Building currently known as the B. Naylor Morton Research and Collections Center.

Permitted Use: Construction, operation, and maintenance of a central plant consisting of chillers and related equipment with the capacity to service the South Texas Heritage Center and the Parkside Building and other activities incidental to the foregoing and for no other uses.

Term: Commencing on \_\_\_\_\_, 2014 and expiring on \_\_\_\_\_

shall occur according to the provisions hereinafter set forth.

Rent: \$1 a year

Binding Date: This Agreement is binding on the parties on the later of (i) the effective date of the Authorizing Ordinance or (ii) the later of the signatures of the two parties.

Master Lease: WITTE's interest in the Premises is derived pursuant to a certain Net Lease by and between The Witte Title Holding Company, a Texas not-for-profit corporation, as landlord, and The Witte Museum, a Texas not-for-profit corporation, as tenant, dated as of November 1, 2012 (the "Net Lease") and this Agreement is subject to the terms and provisions of the Net Lease

## **II. Term**

2.1 WITTE hereby leases and lets unto CITY and CITY hereby accepts the Premises, as reflected in Exhibit A, subject to the terms of this Agreement and the Net Lease. CITY shall, for so long as the terms hereof shall not have expired, peacefully and exclusively enjoy the Premises and WITTE hereby covenants said quiet possession unto the CITY, subject only to the terms hereof, including the reservation of the use of the Premises by WITTE set forth in Section XX hereof.

2.2 The term of this Agreement shall commence \_\_\_\_\_, 2014 and shall continue until December 1, 2042, unless earlier termination or renewal shall occur according to the provisions hereinafter set forth.

## **III. RENT**

3.1 WITTE acknowledges receipt in full of all rent due under this Agreement for the full Term. WITTE also agrees and acknowledges that additional consideration for the Agreement is being provided by CITY hereunder in the form of CITY's agreement to reserve a license for the use the Premises in support of the Witte Museum pursuant to Section XX hereof.

## **IV. PERMITTED USE**

4.1 The Premises are herein leased to the CITY for the Permitted Use set forth in Section I hereof, and for no other purpose.

4.2 CITY agrees not to use the Premises or any improvements or equipment situated upon said premises, or any part thereof, for any purpose which violates the provisions of the Net Lease or any valid and applicable law, regulation, or ordinance of the United States, the State of Texas or the City of San Antonio.

#### **V. CITY'S AFFIRMATIVE PROMISES**

5.1 CITY promises that it will:

- 5.1.1 Accept the Premises in their present condition "AS IS," the Premises, when improvements have been completed and equipment installed, will be suitable for the Permitted Use.
- 5.1.2 Obey all applicable laws relating to the use, condition, and occupancy of the Premises.
- 5.1.3 Permit WITTE's agents, representatives, contractors, and employees to enter on the Premises at reasonable and necessary times, upon reasonably sufficient notice, for the purposes of audit, inspection, maintenance, repair, and operation, or for any other reasonable purpose.

#### **VI. CITY'S NEGATIVE PROMISES**

6.1 CITY promises that it will not:

- 6.1.1 Use the Premises for any purpose other than the Permitted Use, as set forth in Sec. IV., Permitted Use.
- 6.1.2 Create a nuisance.
- 6.1.3 Permit waste.
- 6.1.4 Allow a lien to be placed on the Premises.
- 6.1.5 Assign this Agreement or allow same to be assigned by operation of law or otherwise, or sublet the Premises or any part thereof without the prior written consent of WITTE.

#### **VII. WITTE'S PROMISES**

7.1 WITTE promises that it will

7.1.1 Lease to CITY the Premises for the entire Term, beginning on the Commencement Date, subject to the license reserved in Section XX hereof.

### **VIII. QUIET ENJOYMENT**

8.1 WITTE must not cause any conditions, restrictions, easements, liens, or encumbrances, except those already in existence as of the date hereof, to affect the Premises at any time during the Term without prior written consent of CITY.

### **IX. INSURANCE**

9.1 CITY will self-insure as it deems advisable against property loss. As a political subdivision of the State of Texas, CITY is subject to the Texas Tort Claims Act, and the obligations of CITY and the rights of persons claiming against CITY are subject to that Act.

9.2 Prior to the commencement of any activities under this Agreement, WITTE shall furnish a completed Certificate of Insurance to the CITY's Director, Parks and Recreation Department and City Clerk's Office, which shall be completed by an agent authorized to bind the named underwriter(s) and their company to the coverage, limits, and termination provisions shown thereon, and which shall furnish and contain all required information referenced or indicated thereon. The CITY shall have no duty to pay or perform under this Agreement until such certificate shall have been delivered to the CITY's Director, Parks and Recreation Department and the City Clerk's Office, and no officer or employee shall have authority to waive this requirement.

9.3 The CITY reserves the right to review the insurance requirements of this section during the effective period of this Agreement and any extension or renewal hereof and to modify insurance coverage and their limits when reasonably deemed necessary and prudent by the CITY's Risk Manager based upon changes in statutory law, court decisions, or circumstances surrounding this Agreement, but in no instance will the CITY allow modification whereupon the CITY may incur increased risk.

9.4 As WITTE's financial integrity is of interest to the CITY, therefore, subject to WITTE's right to maintain reasonable deductibles in such amounts as are approved by the CITY, WITTE shall obtain and maintain in full force and effect for the duration of this Agreement, and any extension hereof, at WITTE's sole expense insurance coverage written on an occurrence basis, by companies authorized and admitted to do business in the State of Texas and rated A- or better by A.M. Best Company and/or otherwise acceptable to the CITY's Risk Manager, in the following types and amounts:

TYPE	AMOUNTS
1. Workers' Compensation	Statutory Limits
2. Employers' Liability	\$500,000/\$500,000/\$500,000
3. Broad form Commercial General Liability Insurance to include coverage for the following: <ul style="list-style-type: none"> <li>a. Premises operations</li> <li>b. Independent Contractors*</li> <li>c. Products/completed operations</li> <li>d. Personal Injury</li> <li>e. Contractual Liability</li> <li>f. Damage to property rented by WITTE *if applicable</li> </ul>	For Bodily Injury and Property Damage of \$1,000,000 per occurrence;  \$2,000,000 General Aggregate, or its equivalent in Umbrella or Excess Liability Coverage  f. \$100,000
4. Business Automobile Liability <ul style="list-style-type: none"> <li>a. Owned/leased vehicles</li> <li>b. Non-owned vehicles</li> </ul>	Combined Single Limit for Bodily Injury and Property Damage of \$1,000,000 per occurrence

9.5 The CITY shall be entitled, upon request and without expense, to receive copies of the policies and all endorsements thereto as they apply to the limits required by the CITY, and may make a reasonable request for deletion, revision, or modification of particular policy terms, conditions, limitations or exclusions (except where policy provisions are established by law or regulation binding upon either of the parties hereto or the underwriter of any such policies). Upon such request by the CITY, the WITTE shall exercise reasonable efforts to accomplish such changes in policy coverage, and shall pay the cost thereof.

9.6 WITTE agrees that with respect to the above required insurance, all insurance Agreements and Certificate(s) of Insurance will contain the following required provisions:

9.6.1 Name the CITY and its officers, employees, and elected representatives as additional insureds as respects operations and activities of, or on behalf of, the named insured performed under Agreement with the CITY, with the exception of the workers' compensation and professional liability policies;

9.6.2 Provide for an endorsement that the "other insurance" clause shall not apply to the City of San Antonio where the CITY is an additional insured shown on the policy;



9.7 WITTE shall notify the CITY in the event of any notice of cancellation, nonrenewal or material change in coverage and shall give such notices not less than thirty (30) days prior to the change, or ten (10) days' notice for cancellation due to non-payment of premiums, which notice must be accompanied by a replacement Certificate of Insurance. All notices shall be given to the CITY at the following address:

City of San Antonio  
Director, Parks and Recreation Department  
P.O. Box 839966  
San Antonio, Texas 78283-3966

City of San Antonio  
City Clerk's Office  
P.O. Box 839966  
San Antonio, Texas 78283-3966

9.8 If WITTE fails to maintain the aforementioned insurance, or fails to secure and maintain the aforementioned endorsements, the CITY may obtain such insurance, and seek reimbursement from WITTE for the amount of the premiums for such insurance however, procuring of said insurance by the CITY is an alternative to other remedies the CITY may have, and is not the exclusive remedy for failure of WITTE to maintain said insurance or secure such endorsement.

9.9 Except as set forth in Section X below, nothing herein contained shall be construed as limiting in any way the extent to which WITTE may be held responsible for payments of damages to persons or property resulting from WITTE's or its subcontractors' performance of the work covered under this Agreement.

## X. INDEMNITY

10.1 WITTE covenants and agrees to FULLY INDEMNIFY, DEFEND and HOLD HARMLESS, the CITY and the elected officials, employees, officers, directors, volunteers and representatives of the CITY, individually and collectively, from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, penalties, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal or bodily injury, death and property damage, made upon the CITY directly or indirectly arising, out of, resulting from or related to WITTE'S activities under this Agreement, including any acts or omissions of WITTE, any agent, officer, director, representative, employee, WITTE or subcontractor of WITTE, and their respective officers, agents employees, directors and representatives while in the exercise of the rights or performance of the duties under this Agreement. The indemnity provided for in this paragraph shall not apply to any liability resulting from the negligence of CITY, its officers or employees, in instances where such negligence causes personal injury, death, or property damage. IN THE EVENT WITTE AND CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT

JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS FOR THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.

10.2 The provisions of this INDEMNITY are solely for the benefit of the parties hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity. WITTE shall advise the CITY in writing within twenty-four (24) hours of any claim or demand against the CITY or WITTE known to WITTE related to or arising out of WITTE's activities under this Agreement and shall see to the investigation and defense of such claim or demand at WITTE's cost. The CITY shall have the right, at its option and at its own expense, to participate in such defense without relieving WITTE of any of its obligations under this paragraph.

10.3 Defense Counsel - CITY shall have the right to select or to approve defense counsel to be retained by WITTE in fulfilling its obligation hereunder to defend and indemnify CITY, unless such right is expressly waived by CITY in writing. WITTE shall retain CITY approved defense counsel within seven (7) business days of CITY's written notice that CITY is invoking its right to indemnification under this Agreement. If WITTE fails to retain Counsel within such time period, CITY shall have the right to retain defense counsel on its own behalf, and WITTE shall be liable for all costs incurred by CITY. CITY shall also have the right, at its option, to be represented by advisory counsel of its own selection and at its own expense, without waiving the foregoing.

10.4 Employee Litigation - In any and all claims against any party indemnified hereunder by any employee of WITTE, any subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation herein provided shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for WITTE or any subcontractor under worker's compensation or other employee benefit acts.

## **XI. MAINTENANCE AND REPAIR**

11.1 WITTE shall pay or cause to be paid any all charges for water, heat, gas, electricity, sewers, and any and all other utilities used by WITTE on the Premises throughout the term of this Agreement and any extensions thereof, including any connection fees.

11.2 WITTE shall be strictly responsible for the condition of the Premises and shall maintain the Premises in a safe, clean, neat, and sanitary condition. CITY shall have the right at reasonable times to make inspections of Premises and to insure that fire, safety, access, and sanitation regulations and other provisions contained in this Agreement are adhered to by WITTE.

## **XII. CASUALTY/TOTAL OR PARTIAL DESTRUCTION**

12.1 All risk of loss is allocated to WITTE, and upon the occurrence of any casualty, WITTE shall be responsible for the repair and restoration of the Premises to substantially its condition prior to the occurrence of the casualty, and WITTE shall be entitled to the proceeds of any insurance proceeds attributable to such casualty. CITY shall have no obligation under this Agreement to repair or rebuild the Premises in the event of casualty.

## **XIII. CONDEMNATION/SUBSTANTIAL OR PARTIAL TAKING**

13.1 In the event the entire Premises shall be appropriated or taken under the power of eminent domain by any public or quasi-public authority, this Agreement shall terminate and expire as of the date of such taking, and both WITTE and CITY shall thereupon be released from any liability thereafter accruing hereunder. In the event more than fifty percent (50%) of the Premises is taken under the power of eminent domain by any public or quasi-public authority, or if by reason of any appropriation or taking, regardless of the amount so taken, the remainder of the Premises is not practicably usable, as reasonably determined by CITY, for the purposes for which the Premises are leased, then CITY shall have the right to terminate this Agreement as of the date CITY is required to vacate the portion of the Premises so taken upon giving written notice of such election to WITTE within thirty (30) days after the date of such taking. In the event of such termination, both WITTE and CITY shall thereupon be released from any liability thereafter accruing hereunder.

13.2 Should a partial or temporary taking occur which does not result in a termination of this Agreement, then CITY shall remain in that part of the Premises not so taken and the rent payable hereunder shall be prorated accordingly.

13.3 CITY and WITTE shall each be entitled to receive and retain such separate awards and portions of lump sum awards as may be allocated to their respective interests in any condemnation proceeding. The termination of this Agreement under the provisions of this section shall not affect the rights of the respective parties to such awards.

13.4 Notwithstanding the foregoing, CITY and any agency or authority created by or otherwise connected with the CITY covenants not to initiate or otherwise participate

or support any appropriation of all or any portion of the Premises by power of eminent domain.

13.5 Any condemnation proceeds awarded shall be allocated among WITTE and CITY pro-rata to the value of each parties' property, which is subject to the taking.

#### **XIV. WARRANTY DISCLAIMER**

14.1 There are no implied warranties of merchantability, of fitness for a particular purpose, or of any other kind arising of this lease, and there are no warranties that extend beyond those expressly stated in this Agreement. Without limitation, this Agreement contains no express or implied warranty that the Premises have no latent defects or that the Premises are or will remain suitable for CITY'S purposes.

14.2 CITY acknowledges it had ample opportunity to perform due diligence regarding the Premises and accepts the Premises in their present, as-is, condition.

#### **XV. TAXES AND LICENSES**

15.1 WITTE shall pay, on or before their respective due dates or within the time allowed by law where WITTE has lawfully contested the payment to the appropriate collecting authority, all Federal, State, and local taxes and fees which are now or may hereafter be levied upon WITTE, the business conducted by WITTE on the Premises, the Premises itself, or any of WITTE's property used in connection with the Premises. WITTE shall maintain in current status all Federal, State, and local licenses and permits required for the operation and maintenance of the Premises and the business conducted by WITTE in connection with the Premises.

#### **XVI. DISPUTE RESOLUTION**

16.1 Before bringing any action arising out of this Agreement, including an action for declaratory relief but not an action specifically excepted below, the disputants must first submit in good faith to mediation. The parties may not assert limitations, laches, waiver, or estoppels based upon attempts to mediate.

16.2 Filing suit on a claim that should be mediated hereunder waives the filer's right to demand mediation. However, one party's waiver does not affect another party's right. A defendant does not waive mediation for so long as, within a reasonable time after appearing, the defendant gives written notice to the plaintiff or its counsel of intent to require compliance with this paragraph.

16.3 Mediation must be conducted in San Antonio, Bexar County, Texas.

16.4 The party desiring relief has the burden to initiate mediation. Waiting for another party to initiate mediation does not waive the right to mediation.

16.5 If the parties can otherwise agree on a mediator, they may do so. Alternatively, either party may petition any court of competent jurisdiction to appoint a mediator. The only predicate issues the court need consider before appointing a mediator are whether (i) the copy of this Agreement before the court is authentic and (ii) this Agreement was duly signed and delivered by all parties to be bound to mediate. If neither of those issues is denied under oath, the court may appoint a mediator upon motion, without trial.

16.6 Mediator fees must be borne equally.

16.7 The parties need not mediate before going to court (1) for either party to seek emergency injunctive relief, or (2) for WITTE to seek forcible entry and detainer relief against CITY.

#### **XVII. CONFLICT OF INTEREST**

17.1 WITTE acknowledges that it is informed that the Charter of the City of San Antonio and its Ethics Code prohibit a City officer or employee, as those terms are defined in the Ethics Code, from having a financial interest in any contract with the CITY or any CITY agency such as CITY owned utilities. An officer or employee has a "prohibited financial interest" in a contract with the CITY or in the sale to the CITY of land, materials, supplies or service, if any of the following individual(s) or entities is a party to the contract or sale: a CITY officer or employee; his parent, child or spouse; a business entity in which the officer or employee, or his parent, child or spouse owns ten (10) percent or more of the voting stock or shares of the business entity, or ten (10) percent or more of the fair market value of the business entity; a business entity in which any individual or entity above listed is a subcontractor on a CITY contract, a partner or a parent or subsidiary business entity.

17.2 Pursuant to the subsection above, WITTE warrants and certifies, and this Agreement is made in reliance thereon, that it, its officers, employees and agents are neither officers nor employees of the CITY. WITTE further warrants and certifies that it has tendered to the CITY a Discretionary Contracts Disclosure Statement in compliance with the CITY's Ethics Code.

#### **XVIII. DEFAULT AND REMEDIES**

18.1 In addition to any other events of default enumerated elsewhere in this Agreement, the following events shall be deemed to be events of default by CITY under this Agreement:

18.1.1 If CITY uses or permits the Premises to be used other than for the Permitted Use, as set forth in Sec. IV., or if CITY otherwise materially breaches its obligations under this Agreement, WITTE will give CITY thirty (30) days' notice and opportunity to cure. If cure requires CITY to restore the Premises after damage or pursue a course of action that similarly may require more than thirty (30) days, the cure period shall be extended for the time reasonably necessary to accomplish the cure. CITY's failure to cure timely is an Event of Default.

18.2 In addition to any other events of default enumerated elsewhere in this Agreement, the following events shall be deemed to be events of default by WITTE under this Agreement:

18.2.1 The taking by a court of jurisdiction of Premises pursuant to proceedings under the provisions of any Federal or State reorganization code or act; or

18.2.2 If the estate hereby created shall be taken by execution or by other process of laws; or;

18.2.3 If WITTE shall neglect or fail to perform or observe any of the terms, provisions, conditions, or covenants herein contained and on WITTE's part to be performed or in any way observed and if such neglect or failure should continue for a period of thirty (30) days after receipt by WITTE of written notice of such neglect or failure; or if, under the thirty (30) day default events, "more than thirty (30) days shall be required because of the nature of the default, if WITTE shall fail within said thirty (30) day period to commence and thereafter diligently proceed to cure default.

18.3 Further, the right is expressly reserved to CITY, acting through the City Council, to terminate this Agreement for the following, which are hereby agreed also deemed to be contingencies which are a condition of default:

18.3.1 In the event this Agreement is determined to be inconsistent with the Permitted Use outlined in Sec. IV. hereof; or

18.3.2 In the event the use of the Premises shall have been deemed a nuisance by a court of competent jurisdiction.

18.4 *Remedies for Default by CITY.* Upon the occurrence of an event of default by CITY as provided in subsection 18.1, WITTE may at its option declare this Agreement, and all rights and interest created by it, to be terminated upon ten (10) days prior written notice, this notice being additional to the cure notice of subsection 18.1.1. Upon WITTE

electing to terminate, this Agreement shall cease and come to an end as if that were the day originally fixed herein for the expiration of the term hereof.

*18.5 Remedies for Default by WITTE.*

18.5.1 If WITTE defaults as provided in subsection 18.2, CITY may terminate this Agreement and all CITY's rights under it upon ten (10) days prior written notice, this notice being additional to the cure notice of subsection 18.2.3. Upon CITY electing to terminate, this Agreement shall cease and come to an end as if that were the day originally fixed herein for the expiration of the term hereof.

18.5.2 Termination is not CITY's exclusive remedy in the event of WITTE's default as provided in subsection 18.2. All rights, options, and remedies of CITY contained in this Agreement shall be cumulative of the other, and CITY shall have the right to pursue any one or all of such remedies or any other remedy or relief available at law or in equity, whether or not stated in this Agreement. No waiver by CITY of a breach of any of the covenants, conditions, or restrictions of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same or any other covenant, condition, or restriction herein contained.

18.6 If proceedings shall at any time be commenced for recovery of possession as aforesaid and compromise and settlement shall be *effected* either before or after judgment whereby CITY shall be permitted to retain possession of the Premises, then such proceeding shall not constitute a waiver of any condition or agreement contained herein or of any subsequent breach thereof or of this Agreement.

18.7 Upon termination or expiration of this Agreement, CITY shall quit and peacefully surrender the Premises to WITTE. The WITTE, upon or at any time after such termination or expiration, may without further notice, enter upon and re-enter the Premises, possess and repossess itself thereof, by summary proceedings, ejectment or otherwise, and may dispossess CITY and remove CITY and all other persons and property from the Premises. However, WITTE may not use force in removing CITY or persons who may be occupying Premises or any part thereof. WITTE may be liable for prosecution or any claim of damages arising from its re-entry and repossession of the Premises.

18.7.1 The word "re-enter" as used in this Agreement is not restricted to its technical legal meaning.

18.8 In no event shall this Agreement or CITY'S use of the Premises be terminated prior to the final payment or defeasement of the bonds issued by CITY to pay for the improvements on the Premises. As long as such bonds have not been paid, the CITY's failure to perform any required actions under this Agreement shall give rise to WITTE's right, upon 60 days written notice to CITY, to undertake to perform any such actions and to receive reimbursement from CITY for the cost of performing such actions.

18.8.1 This subsection, 18.8, entirely supersedes and supplants all other provisions in this Agreement.

### **XIX. SURRENDER OF PREMISES**

19.1 No act or thing done by WITTE or its agents during the term hereby granted shall be deemed an acceptance of a surrender of the Premises and no agreement to accept a surrender of the Premises shall be valid unless the same be made in writing and signed by both Parties.

### **XX. RESERVATION AND LICENSE FOR WITTE'S USE OF PREMISES**

20.1 Notwithstanding anything herein to the contrary, the WITTE hereby reserves a license to exclusively construct, operate, and maintain the central plant, chillers, and related improvements and equipment located on the Premises for so long as that certain San Antonio Museum Association, d/b/a The Witte Museum Lease with Operating Standards by and between the CITY and the WITTE passed and approved on August 28, 1997 pursuant to Ordinance No. 86520, (as the same has been subsequently amended, the "City Lease") is in effect.

20.2 In the event that the City Lease expires, or is otherwise terminated, the license hereby granted in Section 20.1 shall be automatically revoked on the date the City Lease expires or is otherwise terminated.

### **XXI. NOTICES**

21.1 Notices to CITY required or appropriate under this Agreement shall be deemed sufficient if in writing and mailed, registered or certified mail, postage prepaid, addressed to:

**CITY CLERK  
P.O. Box 839966  
San Antonio, Texas 78283-3966**

and to the:



**Director**  
**Department of Parks and Recreation**  
**P.O. Box 839966**  
**San Antonio, Texas 78283-3966**

or to such other address as may have been designated in writing by the City Manager of the City of San Antonio from time to time and shall be presumed delivered as of the third day after the date WITTE mails such notice.

21.2 Notices to WITTE shall be deemed sufficient if in writing and mailed, registered or certified mail, postage prepaid, addressed to WITTE at the address designated as follows:

**PRESIDENT & CEO**  
**The Witte Museum**  
**3801 Broadway**  
**San Antonio, Texas 78209**

and shall be presumed delivered as of the third day after the date the CITY mails such notice.

#### **XXII. TEXAS LAW TO APPLY**

This Agreement is entered into in San Antonio, Bexar County State of Texas and its construction and the rights, remedies, and obligations arising under this Agreement are governed by the Laws of the State of Texas. The Texas conflicts of law rules must not be used to apply the laws of a jurisdiction other than Texas. Both parties' obligations under this Agreement are performable in San Antonio, Bexar County, Texas, and venue for any action arising under this Agreement is only in Bexar County, Texas.

#### **XXIII. SEVERABILITY**

If any part of this Agreement is found invalid or unenforceable, the finding does not affect the remainder.

#### **XXIV. PARTIES BOUND**

This Agreement shall be binding upon and inure to the benefit of the parties hereto only and shall terminate upon the dissolution of WITTE or its assignees.

#### **XXV. NO THIRD PARTY RIGHTS**

This Agreement is not intended, nor shall it be construed to create any third party beneficiary rights in any person who is not a party hereto, unless otherwise expressly herein provided.

**XXVI. APPROVAL BY CITY**

Whenever this Agreement calls for approval by CITY, unless otherwise explained herein, such approval shall be evidenced by the written approval of the Director of Parks and Recreation of the City of San Antonio or his designee.

**XXVII. INTEGRATION**

**This Written Agreement Represents the Final Agreement between the Parties and May Not be Contradicted by Evidence of Prior, Contemporaneous, or Subsequent Oral Agreements of the Parties. There are No Oral Agreements between the Parties.**

**XXVIII. AMENDMENTS**

This Agreement, together with the authorizing ordinance, constitutes the entire agreement between the parties. No amendment, modification, or alteration of the terms of this Agreement shall be binding unless the same is in writing, dated subsequent to the date hereof, and duly executed by the parties hereto.

**XXIX. RELATIONSHIP OF PARTIES**

Nothing contained in this Agreement shall be deemed or construed by the parties hereto or any third party as creating the relationship of principal and agent, partners, joint venturers, or any other similar such relationship between the parties hereto. It is understood and agreed that neither the method of computation of rent, nor any other provision contained herein, nor any acts of the parties hereto create a relationship other than the relationship of sublessor and sublessee.

**XXX. GENDER**

Words of any gender used in this Agreement shall be held and construed to include any other gender, and word in the singular number shall be held to include the plural, unless the context otherwise requires.

**XXXI. CAPTIONS**

The captions contained in this Agreement are for convenience of reference only and in no way limit or enlarge the terms and conditions hereof.

**XXXII. INCORPORATION OF EXHIBITS**

All exhibits to this Agreement are incorporated into it for all purposes as if fully set forth.

### **XXXIII. AUTHORITY**

The signer of this Agreement for WITTE represents, warrants, assures and guarantees that she has full legal authority to execute this Agreement on behalf of WITTE and to bind WITTE to all of the terms, conditions, provisions and obligations herein contained.

### **XXXIV. COUNTERPARTS**

This Agreement may be executed in multiple counterparts, each of which is an original, whether or not all parties sign the same document. Regardless of their number, counterparts constitute only one agreement. In making proof of this Agreement, one need not produce or account for more counterparts than necessary to show execution by or on behalf of all parties.

### **XXXV. SUBORDINATION AND ATTORNMENT**

35.1 This Agreement shall be subject and subordinate to (i) any Fee Mortgage at any time upon the Premises, and (ii) that certain Leasehold Deed of Trust, Security Agreement, Sub-CDE 15, LLC, a Delaware limited liability company, and NDC New Markets Investments LXXVI, LLC, a Delaware limited liability company, dated as of the date hereof (the "Leasehold Mortgage").

35.2 If the holder of a fee Mortgage or the Leasehold Mortgage shall succeed to the rights of Landlord under this Agreement, whether through possession or foreclosure action or otherwise, then Tenant shall attorn to and recognize such successor-Landlord as Tenant's Landlord under this Agreement. Upon such attornment, this Lease shall continue in full force and effect as, or as if it were, a direct lease between the successor-Landlord and Tenant upon all of the terms, conditions, and covenants as are set forth in this Lease and shall be applicable after such attornment. The foregoing subordination and attornment provisions shall be self-operative and no further instruments shall be required to effect such subordination and/or attornment, provided, however, that Tenant hereby agrees to execute, if the same is required, any and all instruments in writing which may be required by Landlord or a Fee Mortgagee to confirm such subordination and attornment provisions.

*(REST OF PAGE HAS BEEN LEFT INTENTIONALLY BLANK)*

EXECUTED and AGREED to as of \_\_\_\_\_, 2015.

**LESSEE:**

**CITY OF SAN ANTONIO,  
A Texas Municipal Corporation**

By: \_\_\_\_\_  
Name:  
Title:


**ATTEST:**

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

**APPROVED AS TO FORM:**  
  
\_\_\_\_\_  
City Attorney

**LESSOR:**

**The WITTE MUSEUM**

  
\_\_\_\_\_  
Signature

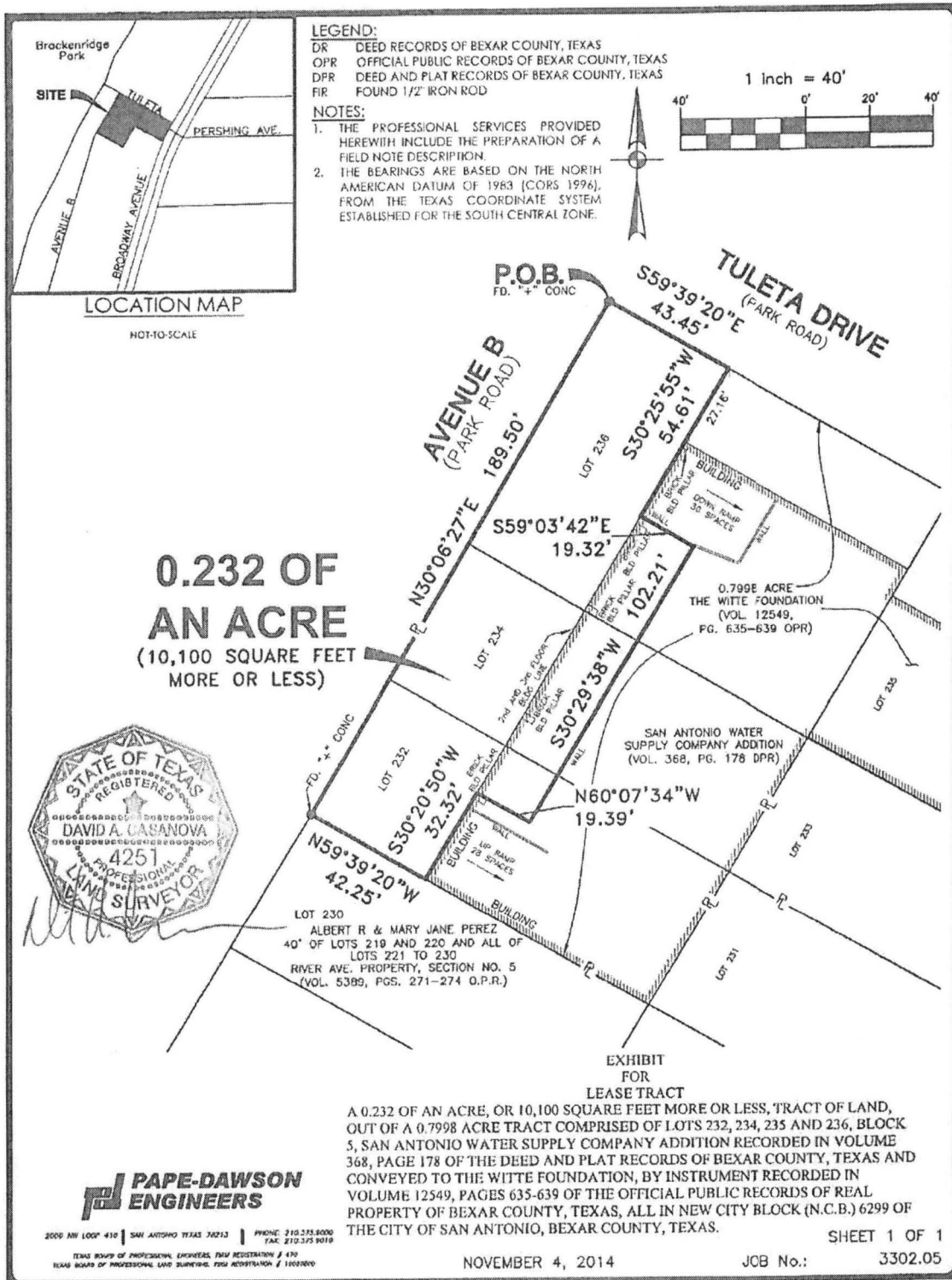
\_\_\_\_\_  
**Printed Name: Marise McDermott**

**Title: President & CEO**

**Address: 3801 Broadway  
San Antonio, Teas 78209**

**Area Code/Telephone No.: (210) 357-1900**

**EXHIBIT "A"**  
Legal Description of Premises





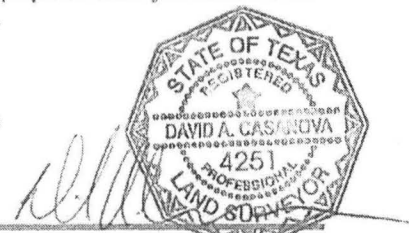
LAND DEVELOPMENT ENVIRONMENTAL TRANSPORTATION WATER RESOURCES SURVEYING

FIELDNOTE DESCRIPTION
FOR A
LEASE TRACT

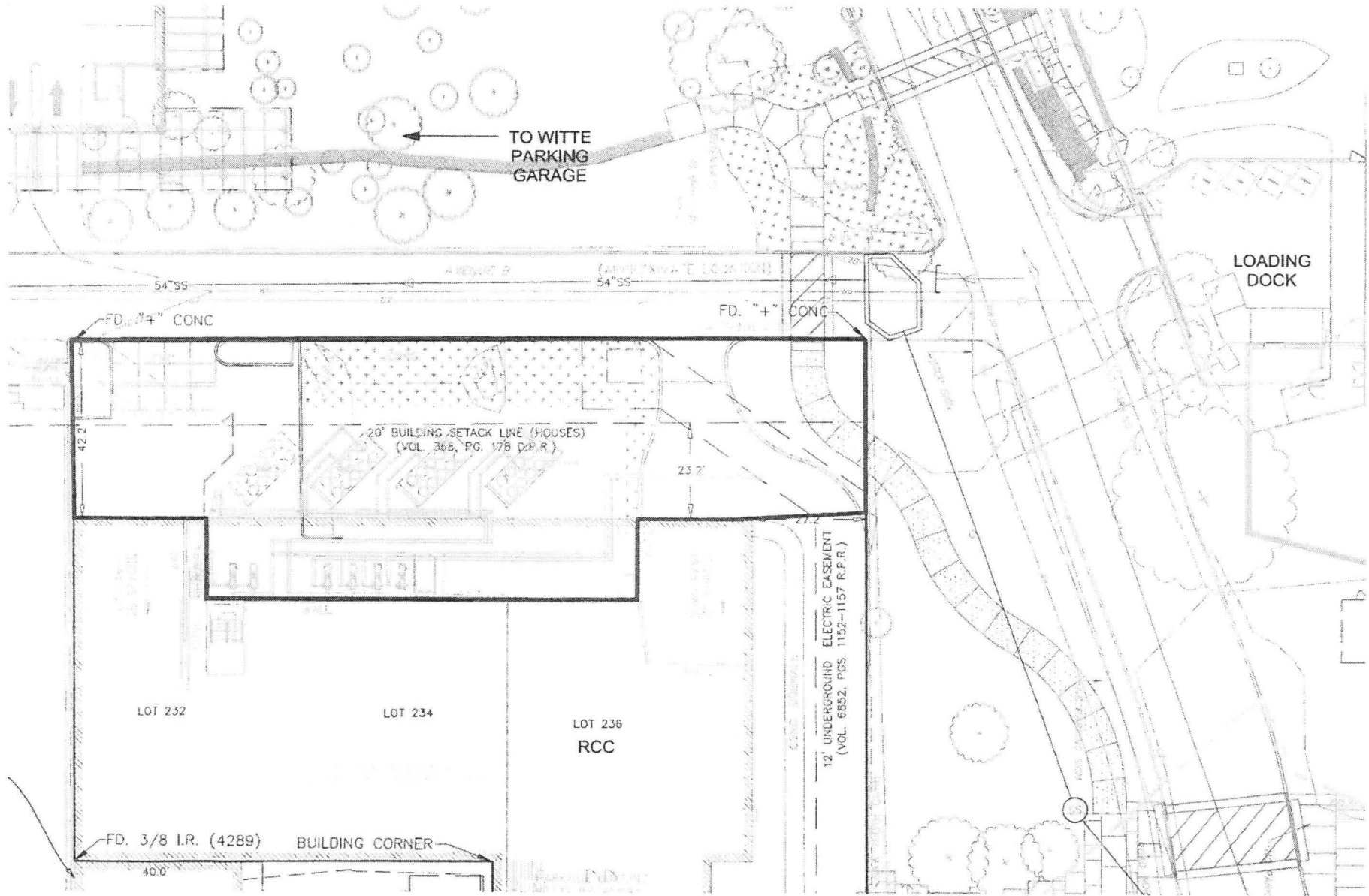
A 0.232 of an acre, or 10,100 square feet more or less, tract of land, out of a 0.7998 acre tract comprised of Lots 232, 234, 235 and 236, Block 5, San Antonio Water Supply Company Addition recorded in Volume 368, Page 178 of the Deed and Plat Records of Bexar County, Texas and conveyed to The Witte Foundation, by instrument recorded in Volume 12549, Pages 635-639 of the Official Public Records of Real Property of Bexar County, Texas, all in New City Block (N.C.B.) 6299 of the City of San Antonio, Bexar County, Texas. Said 0.232 of an acre tract being more fully described as follows, with bearings based on the Texas Coordinate System established for the South Central Zone from the North American Datum of 1983 NAD 83 (NA2011) epoch 2010.00;

- BEGINNING: At a found "+" in concrete at the north corner of said Lot 236;
THENCE: S 59°39'20" E, along and with the northeast line of said Lot 236, a distance of 43.45 feet to a point;
THENCE: S 30°28'21" W, departing the northeast line of said Lot 236, over and across said Lots 236, 234 and 232, passing an existing building corner at a distance of 27.16 feet and continuing along said building for a total distance of 54.61 feet to the southwest face of a wall;
THENCE: S 59°03'42" E, departing the building face, along said wall, a distance of 19.32 feet to the northwest face of a wall;
THENCE: S 30°29'38" W, along and with said wall, a distance of 102.21 feet to a point;
THENCE: N 60°07'34" W, departing the said wall, a distance of 19.39 feet to a north corner of a brick Building Pillar at the building face;
THENCE: S 30°20'50" W, along and with existing building line, a distance of 32.32 feet to the northeast line of Lot 230 of said San Antonio Water Supply Company Addition, and the southwest line of said Lot 232;
THENCE: N 59°39'20" W, along and with the northeast line of said Lot 230, the southwest line of said Lot 232, a distance of 42.25 feet to a found "+" in concrete at the northwest corner of said Lot 232, the north corner of said Lot 230;
THENCE: N 30°06'27" E, along and with the northwest line of said 232, Lot 234 and Lot 236, a distance of 189.50 feet to the POINT OF BEGINNING, and containing 0.232 of an acre in the City of San Antonio, Bexar County, Texas. Said tract being described in accordance with an exhibit prepared under job number 3302-05 by Pape-Dawson Engineers, Inc.

PREPARED BY: Pape-Dawson Engineers, Inc.
DATE: November 4, 2014
JOB NO. 3302-05
DOC. ID. NACIVIL\3302-05\WORD\3302-05 FN-0.232 AC.docx
TBPE Firm Registration #470
TBPLS Firm Registration #100288-00



SAN ANTONIO / AUSTIN HOUSTON / FORT WORTH / DALLAS 2000 NW Loop 410 San Antonio, Texas 78243 P 210.375.9000 F 210.375.9010 www.pape-dawson.com



**AMENDMENT NO. 5 TO  
WITTE MUSEUM LEASE WITH OPERATING STANDARDS**

This Amendment No. 5 (“Amendment”) to Witte Museum Lease with Operating Standards is by and between the City of San Antonio, a Texas municipal corporation (“City”), acting by and through its City Manager or her designee, pursuant to Ordinance No. \_\_\_\_\_ passed and approved on \_\_\_\_\_, \_\_\_\_\_, 2015, and The Witte Museum, a Texas not-for-profit corporation, (“Witte”).

WHEREAS, pursuant to Ordinance No. 86520, passed and approved on August 28, 1997, City and Witte entered into a Witte Museum Lease with Operating Standards (“Original Lease”) for the property located at 3801 Broadway, for a term beginning September 8, 1997 and ending on September 7, 2007, with the Original Lease and all amendments thereto being herein referred to as the “Witte Museum Lease Agreement.”; and

WHEREAS, pursuant to Ordinance No. 97698, passed and approved on May 29, 2003, the Original Lease was amended to expand the Premises to include Pioneer Hall and to extend the term until September 7, 2022; and

WHEREAS, pursuant to Ordinance No. 2007-05-31-0620, passed and approved on May 31, 2007, the Original Lease was further amended to modify the Premises and to provide for two, twenty-five year mutual renewal options; and

WHEREAS, pursuant to Ordinance No. 2012-05-31-0396, passed and approved on May 31, 2012, the Lease was amended to modify the process for increases in general admission fees; and

WHEREAS, pursuant to Ordinance No. 2012-09-13-0703, passed and approved on September 13, 2012, a portion of the property in the Original Lease was assigned to the Witte Title Co., as documented in the “Partial Assignment and Assumption of Lease Agreement” (“the Assignment”), and the Original Lease was amended to incorporate the terms of the Assignment; and

WHEREAS, the Witte has determined that preferred location to construct a central plant for new mechanical chillers, which are needed for the Witte’s future expansion, is on an approximately 2.32 acre parcel as more particularly described on Exhibit C attached hereto and incorporated herein (“Central Plant Site”) on a portion of the property leased by the Witte Title Holding Company, a Texas not-for-profit corporation, as landlord, to the Witte, as tenant, on the west portion of the B. Naylor Morton Research and Collections Center, just south of the existing Witte Museum campus; and

WHEREAS, the Witte has agreed to sublease the Central Plant Site to the City under a separate sublease agreement (“Central Plant Site Lease”) and the City has agreed to accept the sublease of such property and to simultaneously amend the Witte Museum Lease Agreement to add as a condition to any future renewals of the Witte Museum Lease Agreement, that the City shall be granted a legally binding right to utilize the Central Plant Site through and including December, 2072); and



WHEREAS, entering into this Amendment to the Original Lease to accomplish these goals is in the best interests of the City and Witte, NOW THEREFORE,

In consideration of the mutual covenants and agreements set forth below, City and Witte agree to amend the Original Lease as follows:

1. ARTICLE I. TERM, is amended by adding section 1.3 as follows:

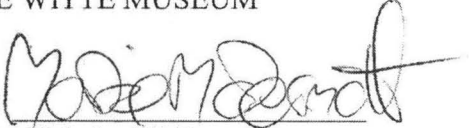
“1.3 The City’s approval of the twenty-five (25) year renewal options pursuant to Section 1.2 above is contingent upon the City securing a legally binding right from the date hereof through December, 2072, to utilize that certain central plant with mechanical chillers which are, or will be, installed on the tract described on Exhibit “C” attached hereto to serve the South Texas Heritage Building portion of the Premises.”

2. EXHIBIT C. The attached Exhibit C is hereby added to the Witte Museum Lease Agreement as Exhibit C.

Except as modified herein, all terms and conditions contained in the Witte Museum Lease Agreement entered into under the authority of Ordinance No. 86520, as amended, shall remain in full force and effect.

Executed this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

THE WITTE MUSEUM

By:   
Name: Marise McDermott  
Title: President & CEO

CITY OF SAN ANTONIO

\_\_\_\_\_  
City Manager

Approved as to Form:

\_\_\_\_\_  
City Attorney

ATTEST:

---

Leticia M. Vacek  
City Clerk

---

Date

**EXHIBIT "C"**

Legal Description of Central Plant Site