

## ENVIRONMENTAL LAW & JUSTICE PROJECT

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### Summary of Issues and Recommendations for 2019 Community Garden License

#### Introduction

The New York Environmental Law and Justice Project (NYELJP) is a non-profit public interest organization based in Manhattan which counsels and represents groups and individuals concerned with the preservation and improvement of community environmental conditions. NYELJP has been retained by the New York City Community Garden Coalition (NYCCGC) to advocate for a fair and mutually beneficial Community Garden License Agreement between the New York City Parks Department (Parks) and community gardens.

The 2019 Community Garden License Agreement (License) and GreenThumb Gardeners' Handbook (Handbook) seem to reveal a lack of trust of community gardeners by Parks, despite gardeners' decades of responsible stewardship. The License and Handbook contain additional requirements which are burdensome for both gardeners and GreenThumb and which will hinder the community outreach and engagement that is a hallmark of community gardens in New York City. The Handbook now contains substantive requirements, noncompliance with which could lead to termination of gardeners' licenses. Further, these substantive requirements at times conflict with the terms of the License, creating uncertainty.

Community gardeners are voluntary stewards of Parks-owned land, who maintain beautiful oases in the city, at their own expense, to serve the public. Community gardens have historically put land abandoned by the City into productive use that enriches the City's environment and culture. Assuming 100 acres of community gardens throughout the City, with four gardeners per acre working 35 hours per week at a Parks gardener salary, community gardens provide \$14,560,000 worth of labor per year to maintain Parks-owned land. This figure does not account for additional services, such as the Director of each garden's management function; the value of environmental benefits of green spaces in the City, such as erosion control and heat abatement; or of the value of gardens as community-building and cultural institutions. The License should provide a straightforward delineation of both gardeners' and Parks' obligations to each other, recognizing the voluntary nature of community gardening, valuable service provided by gardeners, and history of responsible operation of community gardens. The License and Handbook should respect the autonomy and individuality of each garden to foster a diverse array of community gardens throughout the City.

Below are specific issues with License and Handbook terms, followed by NYELJP's recommendations to correct these issues. In a separate document, NYELJP has suggested changes to the License to implement these recommendations. NYELJP and NYCCGC look forward to a productive dialogue on these issues.

#### **1. Issue: Identity of Parties: The term "Licensee" is not defined in the License or Handbook.**

"Licensee" is used throughout the License and once in the Handbook, but the term is not defined. It is unclear how much personal liability the signatory to the license will be subject to. While the

most natural reading would limit “licensee” to the garden as an entity, it is unclear how this will be applied in practice.

The relationship between Parks and GreenThumb is not clear in the License agreement, and “City” is used once without an introduction.

Recommendations:

- 1a. Clarify identities and relationship between entities in the very beginning of the license; replace reference to City with specific responsible party.
- 2a. Add a definition of “licensee” in Section 16.F that clarifies that the signatory to the license is not themselves the licensee and note throughout that the Primary Contact Person and Secondary Contact Person are not personally liable under the License.

**2. Issue: One-sided License & Termination provisions: Several provisions of the licensee allow undefined discretion of Parks, risking arbitrary decision-making and giving Parks a “free way out” to close community gardens. The License is unbalanced in favor of Parks.**

Section 5.B. of the license provides, “Licensee agrees to perform the following activities to the reasonable satisfaction of the Commissioner.” While the language is largely unchanged from 2014 (only replacing “Green Thumb” with “Commissioner”), taken with other provisions expanding Parks’ discretion and with inconsistencies between the Handbook and License, what counts as “reasonable satisfaction” could be problematic.

Section 7’s termination procedures are more detailed and confusing than the generalized language in the Handbook on p.20. Section 7.D provides that the license “is terminable at will by the Commissioner in his or her discretion at any time, upon sixty (60) days written notice, and Licensee shall have no recourse of any nature whatsoever by reason of such termination.” This provision is clearly one-sided and gives Parks a “free way out” to oust gardens, even if they comply with all requirements. It is noted that this section has not changed from the 2014 license, but with new provisions seems more threatening.

Section 1, again existing language from 2014, provides that the License may be renewed “at the discretion of the Commissioner.”

While gardeners are using Parks premises and therefore have obligations to Parks, gardeners are also providing an important service to Parks and the City as a whole. Community gardeners voluntarily steward over 100 acres of Parks-owned land at no charge. The license agreement should recognize gardeners as equals in a mutually beneficial relationship.

Recommendations:

- 2a. Remove redundant provisions in Section 1 and clarify that only current default or prior termination will cause the Commissioner to deny to renew a license.
- 2b. Clarify termination timeline in Section 7 and revise Handbook to explain this process. Remove Section 7.D. Add language to Section 1 providing that the license will be renewed unless the community garden program ends or the licensee defaults on its obligations under the license. Add a grace period to correct noncompliance before a notice of default is issued. Provide more specificity as to what triggers the accelerated default process to only address the most

serious instances of noncompliance. Add an appeals process so gardens can appeal a termination or an initial finding of noncompliance. Entities found violating serious environmental standards are entitled to an appeal of enforcement actions, and permits are subject to an appeals process; it makes sense to allow the same for people who voluntarily commit their time to stewarding NYC Parks land.

2c. Add a section to the License entitled “Licensor/ Parks Obligations.” This section should include everything from the Handbook that Parks/GT has promised to do (provide support, materials, etc.) and explicitly provide that Parks will only initiate the termination process for good cause (and not as a pretext for reclaiming control of land for sale or development). Adding this section could go a long way in making the license more mutual.

### **3. Issue: The GreenThumb Handbook:**

**3(i): Contents of the GreenThumb Handbook are treated by the License as requirements, rather than guidelines, but there are inconsistencies between the two and internally within the Handbook. There are sections of the Handbook with detailed requirements that are not flagged in the license, which could lead to inadvertent noncompliance.**

See License Sections 5.B(iii) and (vii), F, K(i) &(iii). There are inconsistencies between the license and different sections of the Handbook. For example:

Events: License Section 5.B(vii) and Handbook p.17 seem to imply that gardens need only inform GreenThumb of their planned 2 required community events, but p. 52 of the Handbook requires explicit approval from GreenThumb. The Handbook also sets forth a schedule for informing GreenThumb of planned events quarterly, but this requirement is not referenced anywhere in the license. While there was concern about the timeline of permit approvals, the Handbook on p. 52 does not seem to require that permits be in-hand before GT will approve an event.

Animals: The License only provides that animals other than dogs may reside in the Garden provided all laws and regulations are followed. The Handbook contains detailed requirements, including a requirement to get approval from the GreenThumb Outreach Coordinator, for chicken coops and beehives. The License is silent, and Handbook inconsistent, on feeding feral cats: page 36 provides that “gardens may prohibit feeding of feral cats at their discretion in their bylaws” but page 45 provides that it is a violation to feed any wild *or stray* animal.

Dogs in the garden: The Handbook explicitly prohibits gardens from excluding dogs on page 36, but this is not mentioned in the License. Gardeners should be able to decide as a group whether dogs should be allowed in gardens; there is particular concern about risks of bites by poorly-behaved dogs and health risks of dog waste in vegetable gardens. The requirement to allow dogs seems counter to Parks’ goal of reducing its liability with respect to injuries in the gardens.

Debris: Section 6.F of the license prohibits accumulation of debris in the garden. However, it is worded so generally that it could be interpreted to conflict with various sections of the Handbook (waste management, delivery of bulk materials from GT or greening partners).

Permits: Page 52-3 of the Handbook and Section 5(vii) of the License require gardeners to obtain all required permits before an event. There is concern that this will be construed to require gardens to obtain a \$25 Parks Events Permit for any event held in the garden, while the License and Handbook only explicitly require prior GreenThumb approval for events. Gardeners are concerned that not obtaining the \$25 permit, which has never been required before, will be treated as a violation subjecting gardens to the threat of termination of their licenses.

The Handbook contains detailed requirements for hosting volunteer groups (p. 62), gardens allowing contractors to do work in the garden (p. 28), and works of art and performances (p.57) that are not indicated by the License.

CSAs: The Handbook only allows selling produce that was produced in the garden, effectively banning CSAs involving upstate farmers and other city gardeners, which many gardens have been running without issue for years.

**3(ii): Changes to the Handbook: The License seems to imply at Section 5.B(iii) that gardens are responsible for keeping up with any changes to the Handbook and communicating them to members, but there is no mechanism for GreenThumb to notify gardeners of changes.**

Because there are a number of substantive requirements contained in the Handbook, there is concern that gardeners will inadvertently be out of compliance should requirements change without their knowledge.

Recommendations:

3a. Where the License and Handbook conflict, or the Handbook conflicts with itself, Parks must revise. Where the Handbook contains detailed requirements, noncompliance with which will be treated as a violation, the License should point to the specific section(s) or page(s) of the Handbook where the requirements are located to ensure gardeners are not blindsided by new requirements. Parks/GreenThumb must clearly indicate which provisions are requirements and which are guidelines.

The status of community gardens as not “parkland” needs to be spelled out in the License, Handbook, and Parks regulations to differentiate between private parties using city parkland for events and the ongoing, mutually beneficial stewardship of Parks-owned property through maintaining community gardens.

The Handbook should be revised to allow gardens to choose whether to permit dogs.

The Handbook should be revised to permit selling produce not grown in the garden.

3b. The License should contain a provision stating whether the License or Handbook requirements govern where the two conflict. The License should include a notice-and-comment process for updates to the Handbook. Gardeners should not have to constantly check the GreenThumb website to know what is expected of them.

**4. Issue: Warranty: Section 4 seems to excuse Parks from any responsibility for contamination in garden soils even though Parks has better resources and access to records of the land's previous use.**

Parks should warrant the garden for use as a garden. As written, it seems to make gardens responsible for any contamination in the soil and resulting adverse effects.

**5. Issue: Waiting list: Section 5.B.(vi) requires approval to either to keep a waiting list or of the actual waiting list (either way, it is unclear why requiring GreenThumb approval is warranted). However, the Handbook on p. 17 requires complete list of members and contact information to be provided to GT annually, which they say is "used internally" and "will never [be shared]."**

There is no indication in the license that a membership list needs to be provided. There are concerns about members' privacy and fears about immigrants being targeted. While partial membership lists were requested in the past to confirm that gardens had at least 10 members, approval of a waiting list has never been required. Gardeners want to know why GreenThumb needs this information.

Recommendations:

5a. Remove the requirement to provide a membership list from the Handbook and requirement to get approval from GT for a waiting list from the Handbook and License.

5b. If Recommendation 4b is not feasible, include the assurance that membership information will never be shared outside of GreenThumb in the License. GreenThumb must provide an explanation in writing why this information is needed by GreenThumb and what they use it for.

**6. Issue: Temporary structures: The License and Handbook require GreenThumb approval for temporary structures, which can be onerous to gardeners.**

The Handbook on p. 26 includes NYC standards but lists examples of substantial structures like sheds, gazebos, etc. Section 28-111.1 of NYC building code does not require a permit for "the erection and use of temporary platforms, reviewing stands, outdoor bandstands and similar miscellaneous structures that cover an area less than 120 square feet (11.16 m<sup>2</sup>), including connecting areas or spaces with a common means of egress or entrance, for not more than 30 days. "

Recommendations:

6a. The License and Handbook should exclude from the requirement to obtain GreenThumb approval any temporary structure that does not require a permit under Section 28-111.1 of the NYC building code. If other entities are allowed to construct such structures with no oversight, gardeners voluntarily stewarding public land for a public benefit should be entitled to the same.

6b. If Recommendation 6a is not feasible, GT should employ a self-certification process for approval of temporary structures that do not require a permit under the NYC Building Code. Again, developers are allowed to self-certify for large projects; stewards of small community gardens should be given the same treatment. Gardens should be able to submit a self-certification

form that their temporary structure meets the NYC building code requirements; submission of this certification to GreenThumb should constitute notice to and approval from GreenThumb.

6c. GreenThumb/ Parks must explain in writing what is considered a “temporary structure” that requires approval.

**7. Issue: Audits: Section 6.K(iv) and the Handbook provide that Parks can audit financials for any reason. The Handbook on p. 71 additionally provides that financial reports must be shared with membership “regularly.”**

While some gardeners see the value in this provision, it is worded very generally and could be very invasive, particularly if gardeners are using personal accounts to fund garden activities. “Regularly” is not defined in the Handbook. GreenThumb/Parks does not fund community gardens directly, so it is unclear why an audit by GreenThumb would be warranted. Further, while sharing financial reports with membership is reasonable, the License does not give notice of what seems like a substantive requirement in the Handbook, which could leave gardens unaware of their obligations.

Recommendations:

7a. The License should be amended to only allow audits for good cause (where there is reason to believe garden funds are being used for personal or private gain). There should be an appeals process for gardeners to object to an audit. If failure to provide members with financial reports “regularly” constitutes a violation of the License, the License should explicitly indicate that financial reports are required to be shared with members and prescribe a schedule.

**8. Issue: Assumption of Risk: It is unclear what gardens’ obligations are under License Section 10 and the Handbook does not clarify. Requirement to clear snow, ice, garbage could leave gardens open to personal injury liability despite sidewalks being City-owned.**

While clearly intended to limit Parks’ liability for personal injuries in community gardens, the requirement to “instruct” members as to risks is vague. The section on Assumption of Risk in the Handbook just echoes the License with no additional clarification.

Section 5(C)(ii) imposes requirements on gardens to clear City-owned sidewalks, which could be construed to leave gardens liable for any injury resulting from sidewalks obstructed by snow, ice, garbage, and the like. Gardeners tend to voluntarily keep sidewalks clear out of consideration for their members and visitors, but should not be bound to perform garbage and snow removal services.

Recommendation:

8a. Clarify License Section 10 and the Handbook to describe what counts as instructing members.

8b. Delete Section 5(C)(ii).

**9. Issue: Posting the License: Section 5(b)(viii) requires the Licensee to “prominently post a copy of this License;” this seems infeasible for a 12-page document,**

The preamble to the new license seems to say that keeping the signed License in an accessible area and informing members of its location meets this requirement, but the contract term itself does not suggest that.

Recommendation:

9a. This term should say what Parks means and require the signed License to be accessible to members.

**10. Issue: GreenThumb access to storage sheds: Section 5.C(v) and the Handbook at p. 17 require gardens to allow GT access to storage sheds, which seems unnecessary and invasive.**

Members keep personally-provided items in the shed. No one is afraid of what GreenThumb will find, but it feels invasive and disrespectful.

Recommendation:

10a. The License and Handbook should be revised to require a garden member to be present if GreenThumb wishes to access sheds.

**11. Issue: Sections 6.G and 19 prohibit assignment of the license.**

New Section 6.G is redundant with Section 19. While Section 19 language from 2014 and probably standard boilerplate language in many City contracts, it can be improved to give gardeners more rights and promote the preservation of community gardens.

Recommendation:

11a. Delete Section 6.G. Revise Section 19 to allow assignment of the license to another community garden group to allow gardens to remain gardens even if the group currently occupying the space wants to step away.

**12. Issue: Section 6.J: Abandonment is not defined.**

While abandonment is grounds for termination of the License, it is not defined, leaving gardeners uncertain of their obligations.

Recommendation:

12a. Define “abandonment” in Section 6.J.

**13. Issue: Fire hazards: Section 6.L does not make an exception for barbecues/grills.**

A number of gardens have grills that they have used without incident.

Recommendation:

13a. Revise Section 6.L to explicitly allow use of barbecues/grills in gardens.

**14. Issue: Danger/public nuisance: Sections 6.M is redundant with other sections.**

Section 6.M addresses concerns better handled in other sections. For example, fire hazards are specifically addressed in Section 6.L and Section 6.N more specifically identifies undesirable conditions.

Recommendation:

14a. Delete Section 6.M

**15. Issue: Irrelevant sections: A number of provisions seem more suited to contracts between City agencies and paid contractors, rather than to a license between Parks and voluntary community gardeners.**

Section 15, Waiver of Jury Trial, and Sections 16.B-16.E and 16.G do not seem to apply to a program involving community volunteers stewarding Parks' land.

Recommendation:

15a. Delete Section 15 and Section 16.B-16.E and 16.G from the license.

**16. Issue: Unannounced inspections: Several provisions in the license allow unannounced access and inspections by Parks/GreenThumb.**

Sections 5.C(v) and 8.B allow GreenThumb and others unfettered access gardens with no notice to gardeners.

Recommendation:

16a. Revise Sections 5.C(v) and 8.B to require written notice, sent electronically by email or text, to the garden group at least three business days prior to GreenThumb or Parks accessing/inspecting the garden.