

GARDEN IN A BOX PROGRAM AGREEMENT

THIS Garden In A Box Program Agreement (“Agreement”) is made this 13th day of February, 2018, by and between Resource Central and the Town of Erie (“Erie”) individually referred to as a “Party,” or collectively as “Parties.”

Recitals

1. WHEREAS many people are interested in the concept of a low-water landscape;
2. WHEREAS those interested in the concept of a low-water landscape are often overwhelmed by the plant selection and design of such a landscape;
3. WHEREAS those interested in the concept of a low-water landscape have limited time and money to invest in the process of planning and designing such a landscape; and
4. WHEREAS in order to provide its residents with an easy and affordable way to learn about and install low-water landscapes, Erie wishes to engage Resource Central to organize and conduct the Garden In A Box Program (“Program”) for the term specified in Section III in partnership with Erie.

NOW THEREFORE, in consideration of the terms and conditions contained herein and other good and valuable consideration, the Parties agree as follows:

I. Program Obligations:

A. Resource Central Obligations

Resource Central shall provide the services described in the Garden In A Box Program Scope and Conditions of Work, attached hereto as Attachment A (“Services”).

B. Erie Obligations

1. Publicity. Erie shall be responsible for publicizing the availability of the Program to its Customers in one or more rounds of marketing. Efforts to publicize the Program to its Customers may include but are not limited to advertising mediums such as Erie’s website, social media, bill inserts, newsletter and direct mailing. If only one round will take place, the marketing must be in the form of a water bill insert.

Resource Central will develop a marketing “Toolkit” containing these advertisement mediums and individual advertisement components for Erie to use. Erie and Resource Central will create a mutually agreed upon timeline, known as the “Marketing Calendar” which will state the dates on which both Erie and Resource Central will disseminate the chosen advertisements. Advertising content may be created by either Resource Central or Erie, however Erie must use the “Toolkit” components (i.e. verbiage, logos,

photographs) for Program advertisements and all efforts must be approved by Resource Central prior to publishing.

In the event that a sufficient number of requests exist, as determined by Resource Central, and all rounds of advertising have not been completed, Resource Central may waive the requirement that Erie conduct an additional advertising round. Resource Central shall provide Erie with notice of any such waiver.

3. Complete and Submit Signed Agreement and Attachments. Erie shall submit to Resource Central a signed copy of the Agreement and the Attachments no later than February 20th, 2018.

II. Price, Payment Amount, and Billing Procedure

- A. Payment of Program Price. Erie shall pay Resource Central the Base Program Price, pursuant to the Garden In A Box Program Payment Schedule and Terms, attached hereto as Attachment B.

III. Term

- A. Term of Agreement. The Term of this Agreement commences on the Effective Date and terminates on December 31, 2018 or on the date the Agreement is earlier terminated, as provided herein.

IV. General Provisions

- A. Record Keeping Requirements. Resource Central and Erie shall maintain all records, documents, communications, and other material that pertain to this Agreement (“Records”) for a period of three (3) years from the date of final payment under this Agreement, unless Resource Central or Erie requests that the records be retained for a longer period. Resource Central and Erie each shall provide access to such Records to the other during normal business hours for review and copying.
- B. No Delegation. Except as otherwise provided, the Parties’ duties and obligations shall not be assigned, delegated, or subcontracted except with the express prior written consent of the other Party. All subcontractors shall be subject to the requirements of this Agreement.
- C. Indemnification. To the extent allowed by law, Erie, on behalf of itself and its successors and assigns, agrees to indemnify, defend, and hold harmless the Resource Central, its officers, directors, and employees from and against losses, liabilities, expenses, and costs, including, without limitation, reasonable attorney’s fees and costs, arising out of (i) the negligent performance under this Agreement by Erie or any person employed by Erie; or (ii) any injury to persons or property to the proportional extent caused by the negligent or intentional acts or omissions of Erie or any person employed by Erie.

Resource Central shall hold harmless and indemnify Erie, its officers, directors, and employees from and against losses, liabilities, expenses, and costs, including, without limitation, reasonable attorney's fees and costs, arising out of (i) the negligent performance of Services under this Agreement by Resource Central or any person employed by Resource Central; or (ii) any injury to persons or property to the proportional extent caused by the negligent or intentional acts or omissions of Resource Central or any person employed by Resource Central.

- D. No Third Party Rights. Except as otherwise provided, this Agreement shall inure to the benefit of, and be binding only upon, the Parties hereto and their respective successors and assigns. No third party beneficiary rights or benefits of any kind are expressly or impliedly provided herein.
- E. Designated Representatives. For the purpose of this Agreement, the persons named below are designated the representatives of the Parties. Unless otherwise provided in this Agreement, all notice required to be given by the Parties shall be given either by hand delivery or e-mail, with confirmed receipt, or by registered or certified mail to the representative named below. The Parties may designate in writing a new or substitute representative:

For Resource Central:

Neal Lurie
President
Resource Central
2639 Spruce Street,
Boulder, CO 80302
Office: 303-999-3820, ext 202
Fax: 303-440-0703
E-mail: nlurie@ResourceCentral.org

For Erie:

Todd Fessenden
Public Works Director
Town of Erie
645 Holbrook Street
PO Box 750
Erie, CO 80516
Office: 303-926-2895
Email: tfessenden@erieco.gov

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- F. Default and Remedies. In the event either Party fails to comply with this Agreement, the other Party shall provide notice specifying the breach, and the breaching party shall be allowed thirty (30) days to cure, or such longer period if the cure will require additional time and so long as the breaching party is diligently acting to complete the cure. In the event the breaching party fails to cure the breach, within the time allowed hereunder, the non-breaching party shall have all remedies available in law or in equity.
- G. Modifications. This Agreement is intended as the complete integration of understanding between the Parties. Both Parties may make modifications to this Agreement as needed, provided that no modification may be made to the number of gardens requested by Erie, as specified in the Payment Schedule and Terms, and guaranteed to be provided by Resource Central. Such modification shall not

be effective until it is accepted in writing by a legally authorized representative of each Party.

- H. Severability. The terms of this Agreement are severable, and should any term or provision hereof be declared invalid or become inoperative for any reason, such invalidity or failure shall not affect the validity of any other term or provision hereof. The waiver of any breach of a term hereof shall not be construed as a waiver of any other term or the same term upon subsequent breach.
- I. Exhibits. All exhibits hereto shall be deemed incorporated herein by reference.
- J. Independent Contractor. Resource Central shall perform the Services under this Agreement as an independent contractor and the parties do not intend, nor shall it be construed that Resource Central or any Resource Central subcontractor or employee is an employee of Erie for any purposes whatsoever.
- K. Employee Financial Interest. The Parties aver that to their knowledge, no employee of Erie has any personal or beneficial interest whatsoever in the service or property described herein.
- L. Representations and Warranties. Resource Central and Erie each make the following specific representations and warranties, each of which was relied on by the other in entering into this Agreement.
 - 1. Legal Authority – Signatory. Each Party warrants that it possesses the legal authority to enter into this Agreement and that it has taken all actions required by its procedures, by-laws, and applicable laws to exercise that authority, and to lawfully authorize its undersigned signatory to execute this Agreement, or any part thereof, and to bind itself to its terms. If requested by the other Party, each Party shall provide the other with proof of its authority to enter into this Agreement within 15 days of receiving such request.
 - 2. Compliance with Laws. Resource Central shall at all times observe and comply with all laws, ordinances, and regulations of the state, federal, local, and city government, except as explicitly provided herein, which may, in any manner, affect the performance of the Agreement as well as the requirements of any agreements, permits, or other contracts between Resource Central and third parties governing the performance of the Services hereunder and disclosed to Resource Central.
- M. Choice of Law. Colorado law, and rules and regulations issued pursuant thereto, shall be applied in the interpretation, execution, and enforcement of this Agreement. Any provision included or incorporated herein by reference which conflicts with said laws, rules, and regulations shall be null and void. Any provision incorporated herein by reference which purports to negate this provision in whole or in part shall not be valid or enforceable or available in any action at law, whether by way of complaint, defense, or otherwise. Any provision rendered null and void by the operation of this provision shall not invalidate the remainder of this

Agreement, to the extent capable of execution. Venue shall be in the District Court, Boulder County, Colorado.

- N. Force Majeure: A “Force Majeure” event may make it impossible for Resource Central to perform its obligations under this Agreement. As used in this Agreement, Force Majeure means acts of God; acts of the public enemy; acts of any governmental entity in its sovereign or contractual capacity; fires; flood; epidemic; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather which make it impossible to perform the obligations imposed by this Agreement. If a Force Majeure event occurs that affects Resource Central’s ability to perform, Resource Central shall provide written notice to Erie within 24 hours of learning about the event. Such an event shall excuse Resource Central from performing its obligations under this Agreement. However, such an event shall not excuse Erie’s obligation to pay the Base Program Price and the cost of any additional units. In no event shall Force Majeure act to extend the Term of Agreement unless otherwise agreed by the Parties in writing.
- O. Intellectual Property Rights. Resource Central shall retain ownership of all data generated pursuant to the Program, and it may use that data to generate reports summarizing the Program to educate the public, including policy makers, green industry partners, and homeowners. This report and any data collected may also be presented to Resource Central partners.
- P. Termination. Resource Central may terminate this Agreement with or without cause by providing thirty (30) days advance notice to Erie. Such termination by Resource Central shall not affect Erie’s obligation to compensate Resource Central for work completed pursuant to this Agreement, up to and including the date of termination specified in such notice.

IN WITNESS WHEREOF, each Party has executed this Memorandum of Agreement or caused it to be executed on its behalf by its duly authorized representatives.

Resource Central

Town of Erie

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

Date: _____

Date: _____

ATTACHMENT A
Garden In A Box Program
Scope of Work

GARDEN IN A BOX PROGRAM
SCOPE OF WORK

I. Scope of Work

A. Design and Ordering of Gardens

1. Garden Design. Resource Central shall work with landscape designers to create at least 3 xeric garden designs, which shall be made available to Erie residents. Once those designs have been completed, Resource Central shall work with nurseries to secure plants. If necessary, Resource Central shall select appropriate substitute plants.

The gardens shall be assembled into kits, which shall include a design layout (including Resource Central's "Plant by Number" design), a variety of xeric plants, and helpful tips about xeric gardening, including planting and maintenance instructions for all of the plants. ("Gardens In A Box")

2. Ordering. Erie shall order, and Resource Central shall provide, a minimum of eighty (80) Gardens In A Box for the spring garden sale season. Subject to availability, Resource Central shall order additional gardens as specified by Erie.

Resource Central shall have the number of Gardens In A Box ordered by Erie available for Erie residents to order at the rate specified in section I.A.1 of the Payment Schedule and Terms.

B. Marketing, Customer Service, and Sales

1. Marketing of Program. Resource Central may design and pay for the placement of advertisements in a local newspaper, and write and disseminate press releases and public service announcements publicizing the Program. Resource Central shall also design and pay for a garden catalog relating to the Program, which Erie may make available to its customers.
2. Customer Service. Resource Central shall handle all incoming phone-calls and e-mails regarding the Program and respond to all questions.
3. Sales. Resource Central shall create and manage an online retail platform. Resource Central shall also process orders and take payment via cash, check, and credit card.

C. Distribution of Gardens In A Box

1. Garden In A Box Assembly. Resource Central shall organize and handle delivery of all plants, which shall be pre-packaged according to the designs developed by Resource Central.
2. Training of Erie Staff. Resource Central shall train Erie staff, if Erie elects to provide staff to aid in the distribution.
3. Distribution. Resource Central shall conduct at least one (1) distribution within 15 miles of the Erie service area, at a mutually agreed upon location(s). Before the distribution(s), Resource

Central staff and volunteers shall prepare and organize all plants required for the distribution(s). Resource Central shall organize volunteers to help distribute Gardens In A Box at each requested distribution location. Resource Central shall provide at least one of its staff members and one volunteer to conduct the distribution(s). Resource Central staff and/or volunteer(s) shall confirm that customers have pre-ordered and pre-paid for their Garden In A Box. Resource Central staff and/or volunteer(s) shall then assist customers in retrieving their requested Garden In A Box. At that time, Resource Central staff and/or volunteer(s) shall give the customer the planting and care guides for their requested Garden In A Box.

4. Undistributed Plants. If, after a distribution is completed, there remain undelivered Gardens In A Box, Resource Central shall make all reasonable efforts to include those Gardens In A Box in a later distribution requested by Erie, if any. If no future distribution is planned, Resource Central shall make all reasonable efforts to sell any remaining plants individually. Regardless of Resource Central's ability to sell undistributed Gardens In A Box or individual plants, Erie is still obligated to pay the Base Program Price and any additional charges associated with Erie requested number of Gardens In A Box, as specified in the Payment Schedule and Terms, attached hereto as Attachment B.
5. Time of Distributions. All distributions requested by Erie shall be conducted during the period from May 1st, 2018 to June 10th, 2018.

D. Program Updates

1. Bi-Weekly Updates. During peak garden sales season, between March 1st, 2018 and June 1st, 2018, Resource Central shall provide to Erie updates about the Program on at least a bi-weekly basis.
2. Updates Upon Request. Updates shall also be provided to Erie within seven (7) days of any request.
3. Contents of Updates. Both regularly scheduled and requested updates shall include a summary of Resource Central's progress in meeting its obligations under the Agreement. This includes the number of gardens distributed at the time of the update, and the percentage of the gardens requested by Erie that this represents.

E. Post-Distribution Activities

1. Customer Satisfaction Surveys. After the Program Term has ended, Resource Central shall conduct a customer satisfaction survey of all customers purchasing Gardens In A Box.
2. Final Report. Resource Central shall also compile information about the Program. The survey results and the Program information shall be included in a final report detailing the Program results. Resource Central shall provide Erie with this report by December 31, 2018.

ATTACHMENT B
Garden In A Box Program
Payment Schedule and Terms

GARDEN IN A BOX PROGRAM
PAYMENT SCHEDULE AND TERMS

I. Payment Terms

A. Base Program Price

1. Price Charged to Erie's Residents. Six garden designs shall be made available for Erie's residents to choose from. The six options shall cost \$84-\$134 for water customers of Erie. Resource Central shall make all good faith efforts to keep the price charged to Erie's residents below retail cost.
2. Price Charged to Erie. To make the Garden In A Box Program available to Erie in the spring of 2018, Erie shall pay a base program price of \$4,800 ("Base Program Price").
3. Services Included in Base Program Price. The Base Program Price covers a portion of Resource Central's costs associated with managing and organizing the program as outlined in the Garden In A Box Scope of Work. In addition, the Base Program Price includes eighty (80) discounts of \$25 each for customers purchasing gardens during the spring season, March-June, 2018, who receive water through service provided by Erie. The Base Program Price also includes one (1) distribution within 15 miles of the Erie service area at mutually agreed upon location.

B. A la Carte Prices

1. Additional Gardens and Distributions. Subject to availability, Erie may order more gardens than the eighty (80) gardens included in the Base Program Price and will pay for the additional \$25 discounts.

C. Liability for Cost of Unsold Gardens.

1. Costs Associated with Garden Order. Erie shall not be liable for the costs associated with unsold gardens that are part of the order of eighty (80) gardens.
2. No Refund. Resource Central shall not provide a refund to Erie for any unsold gardens.

II. Payment Schedule and Invoicing

- A. Invoicing. Resource Central shall bill Erie for all work completed pursuant to the Agreement. Payment shall be due within thirty (30) days of the date the invoice is issued by Resource Central. Said invoice shall be issued upon Erie's submission to Resource Central of a signed version of the Agreement.
- B. Payment Deadlines. For purposes of these payment deadlines, a payment shall be deemed to have been made upon the date of its actual receipt by Resource Central.