City of FRESNO **REPORT TO THE CITYCOUNCIL**

| AGENDA ITEM NO. 1 C |
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| COUNCIL MEETING 1/12/12 |
| APPROVED BY |
| DEPARTMENT DIRECTOR |
| CITY MANAGER |

January 12, 2012

**FROM:** BRUCE A. RUDD, Interim Director
Parks, After School, Recreation and Community Services Department

**BY:** PAUL A. MELIKIAN, Administrative & Finance Manager
Parks, After School, Recreation and Community Services Department

**SUBJECT:** Approval of an Agreement with Resources for Independence, Central Valley, Inc. to raise funds, establish partners, and develop an operational plan for the future Universally Accessible Park

## RECOMMENDATIONS

Staff recommends that the City Council approve the attached Memorandum of Understanding (MOU) with Resources for Independence Central Valley for the purpose of raising funds, establishing partners, and developing an operational plan for the Universally Accessible Park.

## EXECUTIVE SUMMARY

The Department is developing a future park site at 5770 W. Gettysburg (Polk & Gettysburg) into a universally accessible neighborhood park. The project is currently in plan check and will advertize bids next month, with a September/October 2012 completion date. The Department currently does not have the resources to operate or maintain new park spaces; therefore, creative solutions are necessary to ensure that the citizens of Fresno continue to receive the critical services of parks & recreation. Through collaboration with Council District 1, the Department has developed a relationship with Resources for Independence, Central Valley (RICV), an organization whose mission is "Encouraging people with disabilities to be in control of their lives and to live more independently through a diverse range of choices and opportunities". RICV wishes to take the lead effort in raising funds, establishing partners, and developing an operational plan for the Park.

RICV is an excellent choice for the project because their mission is closely related to the objectives of the universally accessible park, has staff with expertise in meeting the needs of the disabled community, and an extensive network of community partners and relationships that can be leveraged. RICV has expressed interest in having responsibility for the entire operation, programming, and maintenance of the Universally Accessible Park facility; and has already submitted a draft program plan. The eventual program plan, level of operations, and maintenance quality of the park will be directly affected by the success of this initial phase of raising funds and establishing partners; and would be covered under a separate long-term operational agreement.

This MOU has been reviewed by the City Attorney and Risk Management Offices.

## BACKGROUND

Under the terms of the MOU, the City will:

- Negotiate in good faith with RICV the terms of a long-term operational agreement for the Park.
- Use best efforts to advance the construction of the Park, however, nothing in this MOU shall bind future City action which may be necessary to fund and approve future development of the Park.

Resources for Independence, Central Valley will:

- Raise funds, establish partners and develop an operational plan for the Universally Accessible Park.
- Establish an Advisory Council of six to ten members that will assist in the RICV/UAP Initiative. The Advisory Council will hold monthly meetings, at minimum, to determine ongoing progress and scale up promotion and fund-raising efforts as needed.
- Appoint a Project Director to lead the Advisory Council and fund-raising efforts.
- Establish a Partner's Committee to solicit cash and in-kind support for the on-going operations of the Park (including program planning efforts). The Partner's Committee will hold bi-monthly meetings, at minimum, to establish a detailed plan for Park programming and supplement fundraising efforts.
- Hold all funds raised in a segregated RICV/UAP Initiative Trust Account.
- Establish a marketing/promotion plan to promote the Community Facilities District, general fundraising, and Park efforts.
- Endeavor to establish written agreements or letters of intent with community benefit organizations and other service and educational organizations to provide a full range of services to the public at the Park.
- Provide the City with a monthly activity report to include Advisory Council/Partner's Committee/ RICV/UAP Initiative meeting minutes, financial activity, including use of donation proceeds to fund campaign expenses; and fund-raising, marketing, and partnering efforts.
- Design and have ready for implementation an operational plan for the Park, designating specific responsibilities of all community partners and RICV staff involved in the operation of the Park and the RICV/UAP Initiative, including a detailed program plan and first quarter calendar submission to the City.

This MOU will be in effect for an initial term running through January 31, 2013, and may be administratively extended by the City Manager (or designee) for up to one additional year, ending January 31, 2014. The City will negotiate in good faith with RICV the terms of a long-term operational agreement for the Park, which would replace this Agreement once executed.

**FISCAL IMPACT**

No impact to the General Fund or any other City funds as a result of approving this Agreement. All funds raised by the RICV/UAP Initiative shall be held by RICV in a segregated RICV/UAP Initiative Trust Account. Funds will be used primarily for the future development, operation, and maintenance of the Park; however, RICV may use up to 10% of donated proceeds for costs pertaining to supporting the fund-raising campaign during the term of this Agreement.

Attachment: Agreement

MEMORANDUM OF UNDERSTANDING
With
Resources for Independence Central Valley
Regarding
Universally Accessible Park

This Memorandum of Understanding (MOU) is entered into this _____ day of January, 2012, by and between the CITY OF FRESNO, a municipal corporation, ("City"), and RESOURCES FOR INDEPENDENCE CENTRAL VALLEY, a California nonprofit public benefit corporation ("RICV").

WITNESS

WHEREAS, City owns a future park site at 5770 W. Gettysburg that it intends to develop into a universally accessible neighborhood park ("Park") to accommodate children and young adults with various disabilities; and

WHEREAS, the mission of RICV is to encourage people with disabilities to be in control of their lives and to live more independently through a diverse range of choices and opportunities; and

WHEREAS, RIVC's mission will be benefitted and advanced by the development of the Park; and

WHEREAS, the City and RICV now wish to enter into this MOU to work together in raising funds, establishing partners, and developing an operational plan for the Park ("RICV/UAP Initiative").

NOW, THEREFORE, in consideration of the above recitals, which recitals are contractual in nature, the mutual covenants herein contained and such other and further consideration as is hereby acknowledged, the parties agree as follows:

1. PARTICIPATING AGENCIES AND DESIGNATED CONTACT PERSONS

City Representative: Paul A. Melikian, Administrative & Finance Manager
Parks, After-school, Recreation and Community Services
1515 E. Divisadero St
Fresno, CA 93721
Tel: (559) 621-2900

RICV Representative: Robert Hand, Executive Director
3008 N. Fresno St
Fresno, CA 93703
Tel: (559) 221-2330

2. ROLES, CONTRIBUTIONS AND RESPONSIBILITIES

A. The City will:

(i) Negotiate in good faith with RICV the terms of a long-term operational agreement for the Park.

(ii) Use best efforts to advance the construction of the Park, however, nothing in this MOU shall bind future City action which may be necessary to fund and approve future development of the Park.

B. RICV will:

(i) Raise funds, establish partners and develop an operational plan for the Universally Accessible Park.

(ii) Establish an Advisory Council of six to ten members that will assist in the RICV/UAP Initiative. The Advisory Council will hold monthly meetings, at minimum, to determine ongoing progress and scale up promotion and fund-raising efforts as needed.

(iii) Appoint a Project Director to lead the Advisory Council and fund-raising efforts.

(iv) Establish a Partner's Committee to solicit cash and in-kind support for the on-going operations of the Park (including program planning efforts). The Partner's Committee will hold bi-monthly meetings, at minimum, to establish a detailed plan for Park programming and supplement fundraising efforts.

(v) Hold all funds raised in a segregated RICV/UAP Initiative Trust Account.

(vi) Establish a marketing/promotion plan to promote the Community Facilities District, general fundraising, and Park efforts.

(vii) Endeavor to establish written agreements or letters of intent with community benefit organizations and other service and educational organizations to provide a full range of services to the public at the Park.

(viii) Provide the City with a monthly activity report to include Advisory Council/Partner's Committee/RICV/UAP Initiative meeting minutes, financial activity, including use of donation proceeds to fund campaign expenses; and fund-raising, marketing, and partnering efforts.

(ix) Design and have ready for implementation an operational plan for the Park, designating specific responsibilities of all community partners and RICV staff involved in the operation of the Park and the RICV/UAP Initiative, including a detailed program plan and first quarter calendar submission to the City.

3. EFFECTIVENESS, DURATION AND TERMINATION

This MOU shall be effective as of the date first written above, and shall remain in effect for an initial term running through January 31, 2013. Thereafter, this MOU may be administratively extended by the City Manager (or designee) for up to one additional year, ending January 31, 2014. The City will negotiate in good faith with RICV the terms of a long-term operational agreement for the Park, which will replace this Agreement once executed.

Either party may at any time terminate this MOU (i) without cause at the party's convenience by giving not less than two months (sixty (60) days) prior written notice to the other party, or (ii) with cause upon written notice to the other party following the other party's failure to reasonably cure an event of non-performance hereunder following thirty (30) days written notice thereof. Termination shall be effective (the "Effective Date of Termination") as of the date specified in said notice of

termination. Upon such termination, all rights and obligations of each party under this MOU shall cease as of the Effective Date of Termination, except for those specific obligations that shall survive termination as set forth herein.

4. USE OF RICV/UAP INITIATIVE FUNDS

Funds raised by the RICV/UAP Initiative shall be held by RICV in a segregated RICV/UAP Initiative Trust Account. Funds will be used primarily for the future development, operation, and maintenance of the Park; however RICV may use up to 10% of donated proceeds for costs pertaining to supporting the fund-raising campaign during the term of this MOU. In the event that this MOU is terminated and the parties fail to enter into a long-term operational agreement, or either party defaults or otherwise becomes unable to perform under this MOU, RICV shall return remaining funds held in the RICV/UAP Initiative Trust Account to donors within 30 days of the Effective Date of Termination. Costs pertaining to supporting the fund-raising campaign during the term of this MOU shall not be returnable to donors, with each individual donation being proportionately assessed those costs. For example, if a total of $100,000 is raised, and $10,000 is spent to support the campaign (10%), then a donor of $1,000 would receive $900 back.

5. RECORDKEEPING AND PERFORMANCE DATA

Each party shall keep and maintain proper records and documentation sufficient to substantiate its contributions hereunder, and shall make such available for review and audit during normal operating hours upon the reasonable written request of the other party for a period of three (3) years following expiration or earlier termination of this MOU.

6. COMPLIANCE WITH GOVERNING LAW

Each party shall comply with all federal, state and local laws, rules and regulations in its pursuit hereof. No party in its performance of this MOU shall employ discriminatory practices on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, sexual orientation, ethnicity, status as a disabled veteran or veteran of the Vietnam era.

7. CAPACITY OF CITY AND RICV

Each party is acting in an independent capacity. Nothing in this MOU and nothing in the course of dealings between the parties hereunder shall be deemed to create any fiduciary relationship, trust, partnership, joint venture, agency or employment relationship, jointly and severally.

In addition and without limitation, each party shall be solely responsible for all matters relating to payment of its employees, including, but not limited to, compliance with applicable social security withholding, workers' compensation insurance, benefits and all other regulations governing such matters. Personnel supplied by City will not for any purpose be considered employees or agents of the RICV. The City assumes full responsibility for the actions of such personnel while they are performing services pursuant to this MOU, and shall be solely responsible for their supervision, daily direction and control, payment of salary (including withholding of income taxes and social security), disability benefits and the like, as applicable. Conversely, personnel supplied by RICV will not for any purpose be considered employees or agents of the City. RICV assumes full responsibility for the actions of such personnel while they are performing services pursuant to this MOU, and shall be solely responsible for their supervision, daily direction and control, payment of salary (including withholding of income taxes and social security), disability benefits and the like, as applicable.

The City and RICV agree and acknowledge that their relationship is strictly and solely that of an independent contractor to each other. The City's employees and/or agents are not entitled to any employee benefits or insurance, including without limitation any health care, worker's compensation, unemployment or disability benefits, to be provided by RICV. RICV agrees and acknowledges that RICV's employees and/or agents are not entitled to any employee benefits or insurance, including without limitation any health care, worker's compensation, unemployment or disability benefits, to be provided by the City.

The parties further agree and acknowledge that each party is solely responsible for determining the method and means by which it will fulfill its obligations hereunder. Each shall be solely responsible for payment of all sales, use, or other taxes assessed against or associated with the performance of each party's respective obligations or on the exercise of their rights under this MOU, including without limitation income, payroll or employment-related taxes and payments.

Neither party shall engage any person or entity to serve in any capacity, or incur any expense or obligation on behalf of the other without the prior written consent of both parties.

8. INDEMNIFICATION

RICV shall indemnify, hold harmless and defend City and each of its officers, officials, employees, agents and volunteers from any and all loss, liability, fines, penalties, forfeitures, costs and damages (whether in contract, tort or strict liability, including but not limited to personal injury, death at any time and property damage) incurred by RICV, CITY or any other person, and from any and all claims, demands and actions in law or equity (including attorney's fees and litigation expenses), arising or alleged to have arisen directly or indirectly from the negligent or intentional acts or omissions, or willful misconduct of RICV or any of its officers, officials, employees, agents or volunteers in the performance of this Agreement.

City shall indemnify, hold harmless and defend RICV and each of its officers, officials, employees, agents and volunteers from any and all loss, liability, fines, penalties, forfeitures, costs and damages (whether in contract, tort or strict liability, including but not limited to personal injury, death at any time and property damage) incurred by City, RICV or any other person, and from any and all claims, demands and actions in law or equity (including attorney's fees and litigation expenses), arising or alleged to have arisen directly or indirectly from the negligent or intentional acts or omissions, or willful misconduct of City or any of its officers, officials, employees, agents or volunteers in the performance of this Agreement; provided nothing herein shall constitute a waiver by City of governmental immunities including California Government Code section 810 et seq.

RICV agrees that this Agreement shall in no way act to abrogate or waive any immunities available to City under the Tort Claims Act of the State of California.

In the event of concurrent negligence on the part of RICV or any of its officers, officials, employees, agents or volunteers, and City or any of its officers, officials, employees, agents or volunteers, the liability for any and all such claims, demands and actions in law or equity for such losses, fines, penalties, forfeitures, costs and damages shall be apportioned under the State of California's theory of comparative negligence as presently established or as may be modified hereafter.

This section shall survive termination or expiration of this Agreement.

9. INSURANCE

Throughout the life of this License Agreement, RICV shall pay for and maintain in full force and effect all policy(ies) of insurance required hereunder with (an) insurance company(ies) either (1) admitted by the California Insurance Commissioner to do business in the State of California and rated not less than "A-VII" in Best's Insurance Rating Guide, or (2) authorized by the City's Risk Manager. The following policies of insurance are required:

A. COMMERCIAL GENERAL LIABILITY insurance which shall be at least as broad as Insurance Services Office (ISO) form CG 00 01 and shall include insurance for "bodily injury", "property damage" and "personal and advertising injury", including premises and operation, products and completed operations and contractual liability with limits of liability of not less than $1,000,000 per occurrence for bodily injury and property damage, $1,000,000 per occurrence for personal and advertising injury, $2,000,000 aggregate for products and completed operations, and $2,000,000 general aggregate.

B. COMMERCIAL AUTOMOBILE LIABILITY insurance which shall be at least as broad as the most current version of Insurance Services Office (ISO) form CA 00 01 and shall include coverage for "any auto" with limits of liability of not less than $1,000,000 per accident for bodily and property damage. Only required if automobiles are to be operated on City property.

C. WORKERS' COMPENSATION insurance as required under the California Labor Code.

D. EMPLOYERS' LIABILITY insurance with minimum limits of $1,000,000 each accident, $1,000,000 disease each employee and $1,000,000 disease policy limit.

E. COMMERCIAL CRIME insurance which shall be at least as broad as the most current version of Insurance Service Office (ISO) Crime and Fidelity Form CR 00 20 with limits of insurance of not less than $200,000.

In the event RICV purchases an Umbrella or Excess insurance policy(ies) to meet the minimum limits of insurance set forth above, this insurance policy(ies) shall "follow form" and afford no less coverage than the primary insurance policy(ies).

RICV shall be responsible for payment of any deductibles contained in any insurance policies required hereunder and RICV shall also be responsible for payment of any self-insured retentions. Any deductibles or self-insured retentions must be declared to, and approved by, the City's Risk Manager or his/her designee. At the option of the City's Risk Manager or his/her designee, either (i) the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects City, its officers, officials, employees, agents and volunteers; or (ii) RICV shall provide a financial guarantee, satisfactory to City's Risk Manager or his/her designee, guaranteeing payment of losses and related investigations, claim administration and defense expenses. At no time shall City be responsible for the payment of any deductibles or self-insured retentions.

The above described policies of insurance shall be endorsed to provide an unrestricted thirty (30) day written notice in favor of the City, of policy cancellation, change or reduction of coverage, except for the Workers' Compensation policy which shall provide a ten (10) day written notice of such cancellation, change or reduction of coverage. In the event any policies are due to expire during the term of this Agreement, a new certificate evidencing renewal of such policy shall be provided not less than fifteen (15) days prior to the expiration date of the expiring policy(ies). Upon issuance by the insurer, broker, or agent of a notice of cancellation, change or reduction in

coverage, RICV shall file with the City a certified copy of the new or renewal policy and certificates for such policy.

The General Liability and Automobile Liability insurance policies shall be written on an occurrence from and shall name the City, its officers, officials, agents, employees and volunteers as an additional insured. Such policy(ies) of insurance shall be endorsed so RICV's insurance shall be primary and no contribution shall be required of the City. The Crime insurance policy shall name the City as a joint loss payee .Any Workers' Compensation insurance policy shall contain a waiver of subrogation as to the City and each of its officers, officials, employees, agents and volunteers. RICV shall furnish the City with the certificate(s) and applicable endorsements for ALL required insurance prior to the City's execution of this License Agreement.

If at any time during the life of this Agreement or any extension, RICV fails to maintain any required insurance in full force and effect, all of RICV's activities under this Agreement shall be discontinued immediately, until notice is received by City that the required insurance has been restored to full force and effect and that the premiums therefore have been paid for a period satisfactory to City. Any failure to maintain the required insurance shall be sufficient cause for City to terminate this Agreement. No action taken by City pursuant to this section shall in any way relieve RICV Corporation of its responsibilities under this Agreement.

Upon request of City, RICV shall immediately furnish City with a complete copy of any insurance policy required under Agreement, including all endorsements, with said copy certified by the underwriter to be a true and correct copy of the original policy. This requirement shall survive expiration or termination of this Agreement.

The fact that insurance is obtained by RICV shall not be deemed to release or diminish the liability of RICV, including, without limitation, liability under the indemnification provisions of this Agreement. The duty to indemnify City and its officials, officers, employees, agents and volunteers shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation upon the amount of indemnification to be provided by RICV. Approval or purchase of any insurance contracts or policies shall in no way relieve from liability nor limit the liability of RICV or any of its officers, board members, employees, agents, volunteers, invitees, caters, concessionaires, suppliers, vendors, consultants, contractors or subcontractors.

If RICV should subcontract all or any portion of the services to be performed under this Agreement, RICV shall require each subcontractor to provide insurance protection in favor of City and each of its officers, officials, employees, agents and authorized volunteers in accordance with the terms of this section, except that any required certificates and applicable endorsements shall be on file with RICV and City prior to the commencement of any services by the subcontractor.

10. ATTORNEY'S FEES

If a party is required to commence any proceeding or legal action to enforce or interpret any term, covenant or condition of this MOU, the prevailing party in such proceeding or action shall be entitled to recover from the other party its/their reasonable attorney's fees and legal expenses.

11. NOTICES

Any notice required or intended to be given to a party under the terms of this MOU shall be in writing and shall be deemed to be duly delivered the earlier of (a) actual receipt by personal delivery to the representative (as defined herein), as the case may be, or in lieu of such personal

service, by way of Federal Express, DHL, or other similar courier addressed to such party at the appropriate address set forth herein, (b) the date of receipt by facsimile to the City Representative or the RICV Representative, or (c) three (3) business days after the date of mailing (postage pre-paid return receipt requested). Either party may change its address for the purpose of this Paragraph by giving written notice of such change to the other.

12. BINDING

Once this MOU is signed by all the parties, it shall be binding upon, and shall inure to the benefit of, the parties, and each party's respective heirs, successors, assigns, transferees, agents, servants, employees and representatives. The terms and conditions of this MOU, express or implied, exist only for the benefit of the parties to this MOU and their respective successors and assigns. No other person or entity will be deemed to be a third party beneficiary of this MOU.

13. ASSIGNMENT

There shall be no assignment by any party of its rights or obligations under this MOU without the prior written approval of the other party. Any attempted assignment by a party, its successors or assigns, shall be null and void unless approved in writing by the other party.

14. WAIVER

The waiver by any party of a breach by the other of any provision of this MOU shall not constitute a continuing waiver or a waiver of any subsequent breach of either the same or a different provision of this MOU.

No provisions of this MOU may be waived unless in writing and approved by and signed by all parties to this MOU. Waiver of any one provision herein shall not be deemed to be a waiver of any other provision herein.

No action or omission by either party shall constitute a breach of this MOU unless the injured party first notifies the other party of the purported breach in writing setting forth the alleged breach or default and said party does not cure the same within a reasonable period of time. The payment of any fee or compensation or performance of any obligation hereunder by either party shall not constitute a waiver of any breach by the other party or of any of the rights and remedies which either party may have as a result of such breach. No waiver by either party of breach of the MOU shall be implied from any failure by the other party to take action on account of such breach if such breach persists or is repeated. Waivers by either party of any covenant, term or condition contained herein shall not be construed as a waiver of any subsequent breach of the same covenant, term or condition.

15. GOVERNING LAW AND VENUE

This MOU shall be governed by, and construed and enforced in accordance with, the laws of the State of California. Venue for purposes of the filing of any action regarding the enforcement or interpretation of this MOU and any rights and duties hereunder shall be Fresno, California.

16. HEADINGS

The section headings in this MOU are for convenience and reference only and shall not be construed or held in any way to explain, modify or add to the interpretation or meaning of the provisions of this MOU.

17. SEVERABILITY

The provisions of this MOU are severable. The invalidity or unenforceability of any one provision in this MOU shall not affect the other provisions.

18. INTERPRETATION

The parties acknowledge that this MOU in its final form is the result of the combined efforts of the parties and that, should any provision of this MOU be found to be ambiguous in any way, such ambiguity shall not be resolved by construing this MOU in favor or against any party, but rather by construing the terms in accordance with their generally accepted meaning.

19. REPRESENTATIONS AND WARRANTIES

RICV represents and warrants that it is a duly authorized and existing California nonprofit corporation in good standing, and shall remain in good standing during the term of this MOU. Each party hereby represents and warrants to the other party, and agrees that it has the full power and authority to enter into this MOU and perform each of its obligations hereunder, and it is legally authorized and has obtained all necessary regulatory approvals for the execution, delivery, and performance of this MOU.

20. ENTIRE MOU

It is mutually understood and agreed that the foregoing constitutes the entire MOU between the parties. Any modifications or amendments to this MOU must be in writing signed by an authorized agent of each party.

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SIGNATURES APPEAR ON NEXT PAGE

IN WITNESS THEREOF, the parties have caused their authorized agents to execute this MOU as of the date first set forth above:

CITY OF FRESNO,
a municipal corporation

By: _____
Bruce Rudd, Interim Director /
Assistant City Manager
Parks, Recreation and Community Services Department

RESOURCES FOR INDEPENDENCE CENTRAL VALLEY,
a California nonprofit public benefit corporation

By: _____
Robert Hand, Executive Director

ATTEST

REBECCA E. KLISCH
City Clerk

BY:_____
Deputy

APPROVED AS TO FORM:
CITY ATTORNEY'S OFFICE

BY:_____
Katherine Doerr, Senior Deputy City Attorney