

MEMORANDUM OF UNDERSTANDING

BETWEEN THE

CITY OF FRESNO

AND

THE FRESNO METROPOLITAN MUSEUM OF ART AND SCIENCE

The City of Fresno, a California municipal corporation ("City"), and Fresno Metropolitan Museum of Art and Science, a California nonprofit corporation ("Met"), agree to the following and to complete necessary documentation and do other tasks necessary to implement the terms of this binding Memorandum of Understanding ("MOU").

Purpose and Scope of the MOU

The purpose of this MOU is for the City and the Met to approve substantive terms of various agreements that will implement the intentions of the parties as expressed herein. The parties intend to agree upon an arrangement that will allow the Met the opportunity to continue serving as an important institution within the City of Fresno, and at the same time protect the interests of the City and its citizens by securing and providing for repayment of obligations owed to the City.

Terms of the MOU

1. The Met will immediately execute and deliver deeds in the form requested by the City to the City or into escrow for all of the Met real property, subject to receipt and approval of the Met's counsel (See attached Exhibit A for a drawing of the museum building footprint, green space, identification of parcels and license to use, also subject to review and approval by the Met's counsel.)
2. It is understood that the Met likely will not be conveying property free and clear of mechanic's liens. The City will seek title insurance or other means of obtaining clear title, pursuant to the terms of the Chicago Title insurance policy issued in September 2007. The City may, but is not required to, take title on a parcel by parcel basis, in its sole discretion. The Met will remain fully responsible for any and all potential liabilities and responsibilities for any parcel until the City formally accepts the conveyance of each parcel. The Met shall not lease, encumber, or pledge any Met parcel prior to the City accepting the conveyance without prior written City approval, and then any such lease, encumbrance, or pledge shall be expressly subordinated to the City's interests. The Met shall not allow any new work of improvement that could potentially result in a new claim of a mechanic's lien to occur on Met property prior to or after the City accepting the conveyance without prior written City approval. The Met represents that there are no known environmental contamination issues on any of the Met owned parcels, except potentially on the "Ace Garage" parcel and the removed underground storage tanks from the parcel at corner of Van Ness and Stanislaus. The Met shall immediately supply written confirmation of environmental clearance and/or known contamination issues. The Met will assign to the City any and all warranties for improvements and fixtures on the Met property.

3. After taking title, the City will be free to sell or develop the parcels not representing the museum building footprint as the City deems appropriate. In addition to the museum building footprint, the Met will be granted a license to utilize, in exchange for the Met maintaining it, the green space in front of the building. The Met reserves a right of first refusal to repurchase the museum building footprint and two southerly parcels fronting Van Ness from the City.
4. All Met real estate will be appraised by the same appraiser previously used as of the date of the City taking title, and the fair market value of each parcel conveyed will be credited to the balance of the debt owed the City if and when title to each parcel is accepted by the City. If the Met desires, after receipt of the City's appraisal(s), within 30 days the Met may give the City written notice that the Met will seek its own independent fair market value appraisal, which the Met may obtain at the Met's expense. If the Met obtains its own appraisal, and the two appraisal figures for a parcel differ by more than ten percent, then the City and Met shall jointly select and pay for a third appraiser, who shall determine the value of that parcel. All appraisers shall have the MAI designation.
5. The Met acknowledges that it is in default of the approximate \$15 million loan presently owed to United Security Bank, and will be owed to the City upon the City paying pursuant to the terms of the loan guaranty, with the anticipated payment date of July 15, 2009. The parties will negotiate the terms of the approximate \$15 million loan repayment, and a new note will be executed for the balance; however, the terms of repayment of the note, other than the amount, interest rate (to be the City's actual cost of financing), and a final payment date, shall be deferred for 180 days following approval and execution of the note and related agreements. After applying credit for the value of real estate conveyed to and accepted by the City, the Met commits to repayment of the balance in full, with the understanding that payments may be deferred while the Met pays off trade creditors and mechanic's liens. If the City sells any of the Met property, any net appreciation realized at the time of sale over the appraised value at the time of conveyance to the City will be credited to any unpaid balance due, less carrying costs (as defined below) and transaction costs (reasonable City attorney fees, usual and customary broker fees, title insurance, closing costs, etc.) incurred by the City; additionally, should the City sell any Met property for less than fair value, then the Met shall be credited for the full net fair value at the time of the sale.
6. The City will not fund any mechanic's lien claims, operations expenses, or other debts of the Met, except as the City may find it necessary to protect its interests should Chicago Title not fund payment of any superior liens pursuant to the terms of the title insurance policy with Chicago Title. The Met represents that it has obtained grant funds and that the sum of \$884,000 has been paid to Harris and/or its subcontractors to reduce the Harris approximate \$2.1 million claim by \$884,000. The Met will supply written confirmation of that payment and credit acknowledged by Harris. Credit will be acknowledged for the mechanic's lien payment toward the Met's performance goals.
7. The Met will execute a lease with the City for the museum building, subject to the provisions of Paragraph 8, below. The lease term is to be negotiated, with an initial three year term, as well as an option to extend, provided Met financial performance goals are met and the Met is not in material default, for up to ten years initially. Lease payments will be deferred for a period of three years, with only agreed upon payments due during that time, as long as the Met performs as agreed and remains as a tenant in the building.

If during the initial ten years the Met relocates without City consent, then the full accrued amount of deferred rent would be due.

- a. **Lease Rates:** Base rent the first year to be \$1,000 (\$.02 per square foot) per month; rent the second year to be \$5,000 (\$.10 per square foot) per month; rent the third year to be \$10,000 (\$.20 per square foot) per month. See below for rent rates for years four through ten. The parties will negotiate the terms of any provisions for parking in separate parking agreements, with the understanding that comparable and adequate parking will be made available for the Met's purposes.
- b. **Lease Deferrals:** "City Carrying Costs" (all City actual financing, carrying, maintenance, insurance, reasonable attorney, accounting, and staff costs) will be calculated for the first three years, and the difference between the reduced rate rent paid by the Met and the City Carrying Costs shall be deferred during this "Deferral Period." Should the Met incur an uncured default all unpaid Deferred rent will become immediately due.
- c. **Responsibility for operating costs:** During the Lease Period, the Met is to pay for all capital, maintenance, utilities, and operational expenses, including, but not limited to, insurance, water, sewer and disposal, gas, electric, all maintenance, repairs, and improvements on building, and landscape maintenance. The leased premises shall be properly maintained to commercial and industry standards by the Met during the lease term. Prior to conclusion of the Deferral Period, the parties will negotiate the terms of payment for operating costs for subsequent periods. The City will have the right to inspect the premises on a quarterly basis.
- d. **Insurance:** Met to provide City with proof of insurance for a comprehensive insurance policy covering all improvements, furniture, fixtures and other personal assets and a liability policy of a minimum of \$2,000,000 naming City as additional insured, with a 12 month policy paid at least 30 days in advance; any lapse of insurance coverage shall be immediately cured, in any event no later than 30 days following notice of non-payment or other default under the terms of the insurance policy. Should for any reason the Met fail to procure continuous full insurance coverage on the leased premises, the City reserves the right to purchase insurance and pass the cost on to the Met, which shall be immediately due. City will be given prior written notice of any changes or lapses in terms of policy. Any lapse of required coverage shall be deemed a material default.
- e. **Performance standards for lease to be as follows, with failure to meet performance standards deemed a default under the lease:**
 - i. **At the end of the first six months:** the Met must demonstrate that it is increasing revenues, achieving maximum operating efficiencies, including utilization of the premises (subletting, etc.) and assets, and paying off debts. There must be a clear trend of rising revenues and a positive cash flow. Prior to execution of the workout agreement the Met will provide an industry standard benchmark for operating reserve and then timely make progress toward meeting that standard. The Met represents that its current monthly expenses total \$310,000 and there is outstanding trade debt of \$1.6 million. The Met will provide an updated exhibit to reflect trade and other debt existing at time of closing this transaction. No additional debt will be undertaken by Met, except in compliance with this MOU. Credit

- will be acknowledged by the City for the Met obtaining grant funds to pay down mechanics' lien claims and for reductions in trade debt from the recently received grant.
- ii. At the end of the one year: the Met must continue to generate sufficient revenue to maintain its operations by meeting agreed upon museum industry benchmarks. Trade debt must be reduced by 50%.
 - iii. At the end of the second year: the Met must continue to generate sufficient revenue to maintain operations and cover a rising lease rate. The Met must continue to generate sufficient revenue to maintain its operations by meeting agreed upon museum industry benchmarks. Trade debt must be completely paid off. Mechanic liens debt must be reduced by 50%.
 - iv. At the end of the third year: the Met must continue to generate stabilized revenues and operating expenses that continue to produce a positive cash flow. The cash flow analysis must also clearly demonstrate that the Met has the ability to now pay for lease obligations to the City. The Met must continue to demonstrate that it can generate sufficient revenue to maintain its operations by meeting agreed upon museum industry benchmarks. Mechanic liens completely paid off.
- f. Default: The Met's failure to meet any of the above described performance standards shall be considered a default in the lease giving the City the right to give 60 days' notice to cure to the Met, and then if not cured, the City may pursue all available legal remedies. However, in the event of uncured default by the Met, the City also reserves the right to offer alternatives to the Met concerning the duration, occupancy, or other lease terms.
 - g. Lease rates years 4-10: Conditioned upon the Met having met the above performance standards, beginning the fourth year, the basis for the lease rate will then be set at a rate that reimburses the City for all of the City's Carrying Costs going forward, plus one seventh of the accrued Deferred Rent to be paid each year of the balance of the seven years of the lease. City reserves right to renegotiate a shorter term if Met has not met all performance standards.
8. The City will be free to lease any agreed upon unused portion of the building as it deems appropriate, giving reasonable consideration to compatible uses, with the understanding that the Parties will cooperate in good faith to maximize utilization of the building.
 9. The City will cooperate to locate or secure adequate, comparable and accessible parking for the Met, as the City may find it necessary to sell or develop the Met parcels to recover its expenditures concerning the Met transaction.
 10. The Met will fully cooperate in the defense of the mechanics' liens claims, as well as the City's claim for coverage on the title insurance policy issued by Chicago Title, subject to the ethical rules and rules of professional responsibility applicable to the Met's counsel. The Met represents that it does not have funding to participate in the suits except as a witness.
 11. The Met acknowledges that should the City pay off superior mechanic's lien claims to protect the City's priority interests in its Deed of Trust or to obtain clear title to the Met

- real estate, the Met is ultimately responsible for repayment to the City, and the Met will execute documents that may be necessary to effectuate this acknowledgment.
12. The Met will use best efforts to raise money, including using all resources, endowments and similar funds, to pay the balance of the note, mechanics' liens, and the unsecured debt.
 13. The Met will provide to the City an updated written plan for its future operations and fundraising efforts, and fully update the City on Met finances on a monthly basis, including submission of the Met Fiscal Committee meeting minutes and supporting documents, or as significant events occur. The Met will be required to meet stated financial benchmark goals. The Met will immediately provide full, complete, and accurate disclosure to the City of all debts and claims that have been or may be asserted against the Met.
 14. As additional debt will impair the ability of the Met to pay the loan owed to the City, the Met will not incur any additional debt without prior written City Council approval. The City will not unreasonably withhold approval of the Met incurring additional debt, provided the debt is solely to finance or refinance existing trade debt or launch a fundraising campaign. Any Met proposal to incur additional debt not used for repayment of existing trade debt or mechanic liens shall be subject to renegotiation with a possible secured City position in Met assets such as art, exhibits and collections; provided that in any event, the Met will execute and deliver documents granting the City a security interest in all Met owned art, exhibits, and collections, which security interest will be recorded and/or perfected only in the event of an uncured default by the Met.
 15. The Met and City will cooperate in pursuit of any outstanding claims relating to the Met construction. If requested by the City, the Met will assign to the City any potential claim (in such event the City would fund its litigation costs) or net proceeds from a claim, at the City's discretion, and then will fully cooperate in the prosecution of such an action. The City shall decide whether to accept an assignment of claims or proceeds no later than 60 days after the Met gives written notice of the intent to pursue such claims, and the Met shall assign such claims within 60 days of the City giving written notice of intent to accept an assignment. Any net proceeds received by the City would first be applied to the Met's balance owed to the City.
 16. The City may, but is not required, to appoint a voting member of the Met's Board of Directors, or appoint a person to attend Board meetings as an ex officio, non-voting, member. The City will also have complete rights to inspection of all Met books, records, and documents.
 17. As the City may be required to pledge the Met property, including the museum building, as collateral for long term financing, the Met agrees to fully cooperate in those efforts, including a commercially reasonable and usual agreement to subordinate any lease or other agreements at the City's direction.
 18. It is anticipated that the following documents must be completed and approved to close the transaction and implement the terms of this MOU:
 - a. Workout agreement;
 - b. New promissory note;
 - c. Appraisal reports;
 - d. Deeds to each parcel;

- e. Building lease;
- f. Right of first refusal;
- g. Environmental (Phase 1) reports;
- h. Assignment of warranties;
- i. Parking lease or license;
- j. Title insurance;
- k. Met disclosures re: environmental, debts, financial status; board minutes, lien payments;
- l. Revised Met pro formas, fundraising plan, and performance standards;
- m. Subordination agreement(s);
- n. Assignment of claims and/or claim proceeds;
- o. Security instruments;
- p. Proof of insurance;
- q. Escrow instructions;
- r. Met Board resolution;
- s. Council resolution;
- t. Any and all such other documents that may be necessary to implement the terms of this MOU.

19. All notices, requests, determinations, or other correspondence required or allowed by law of this MOU to be provided by the parties shall be in writing and shall be deemed given 4 days following deposit in first-class mail postage prepaid (or an equal or better form of delivery) at the following addresses:

Andrew T. Souza
City Manager
2600 Fresno Street
Fresno, CA 93721

Executive Director
Fresno Metropolitan Museum of Art and Science
1515 Van Ness Avenue
Fresno, CA 93721

By giving notice, either party may change its address for these purposes.

The City contact for ordinary operational purposes shall be designated in writing by the City.

20. In the event of any material uncured breach of this MOU, the City will have a secured interest in all current Met assets including but not limited to, art, endowments and equipment. Met will provide the City with executed security instruments reflecting this remedy, however, such security instruments will not be recorded unless and until there should arise a material uncured breach by the Met.
21. In pursuit of this MOU the parties shall act in an independent capacity and not as an officer, agent, servant, employee, joint venturer, partner, or associate of the other party. Each party shall retain the right to administer this MOU so as to verify that the other party is performing its obligations in accordance with the terms and conditions hereof.

Each party shall comply with all applicable provisions of law and the rules and regulations, if any, of governmental authorities having jurisdiction over the subject matters herein.

22. No party shall assign, transfer or sub-contract this MOU nor their rights or duties under this MOU without the prior written consent of the other party. The MOU may be modified only by written amendment signed by the authorized agent of each party.
23. The parties acknowledge that each has read and understands the contents of this MOU and is fully authorized to execute it.
24. Each of the Parties shall bear its own costs and attorney's fees arising out of or related to this MOU.
25. Nothing in this MOU shall release, waive, relinquish or discharge any claims, demands, damages, rights of action or causes of action for the following:
 - a. any of the Parties' respective rights and obligations under this MOU;
 - b. any of the Parties' respective rights and obligations under any other agreement between the parties;
 - c. any of the Parties' respective rights and obligations relating to mechanic liens and contractor claims and notices of lien including with respect to pending litigation and with respect to City's pending tender on Chicago Title Company Claim No. 333651 regarding Policy No. CACT17710-7710-4450-0045015312-CTIC-2007-06, and trade claims relating to the Project, and any
 - d. other matter not expressly referenced herein.
26. Each of the Parties shall bear its own tax consequences, and not be responsible for the taxes of the other. The Parties each represent and warrant that it has sought independent counsel and expert advice in this regard.
27. It is expressly understood and agreed that this MOU may not be altered, amended, modified or otherwise changed in any respect whatever except by a writing duly executed by the undersigned and/or their respective authorized representatives.
28. The Parties each represent and warrant to each other party that:
 - a. it has the authority to execute this MOU; and
 - b. the execution, delivery and performance of this MOU does not require the consent or approval of any person, entity, governmental body, trust, trustor or other authority.
29. This MOU shall be binding upon and inure to the benefit of the Parties hereto, and their heirs, executors, administrators, legal representatives, beneficiaries, and successors.
30. This MOU may be executed in original or by facsimile signature and in counterparts. This MOU shall be deemed fully executed when each of the Parties has executed and possesses a counterpart, even if no single counterpart contains all signatures.
31. Upon request of any party hereto, the other party to this MOU shall take all reasonable actions, including execution of additional documents and agreements, necessary or appropriate to carry out the terms, conditions and intent of this MOU, and the Parties are authorized to take such actions.

32. Each of the Parties represents and warrants the following:
 - a. it has been represented by counsel of its own choice at each stage in the negotiation of this MOU;
 - b. it has relied on such counsel's advice throughout all of the negotiations which preceded the execution of this MOU;
 - c. such counsel has read and approved this MOU;
 - d. such counsel has advised such party concerning the validity and effectiveness of this MOU and the transactions to be consummated in accordance therewith; and
 - e. each of the Parties freely and voluntarily enters into this MOU.
33. The courts of the Fresno, California judicial district shall retain exclusive jurisdiction over the subject matter of this MOU to resolve any disputes between the Parties hereto, and to enforce the rights and duties specified hereunder.
34. This MOU shall be governed and construed in accordance with California law as applied to contracts entered into in California between California residents to be performed in California (without regard to choice of law principles).
35. This MOU shall be effective from and after its full execution by all of the Parties hereto.
36. This MOU shall be interpreted in such a manner as to make each provision valid and enforceable under California law. However, if any provision of this MOU shall be invalid, illegal or unenforceable, such provision shall be severable from the remainder of this MOU and the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.
37. The failure of the Parties at any time or times to require strict performance of any provision of this MOU shall not waive, affect or diminish any right of any of the Parties thereafter to demand strict compliance with and performance of this MOU. Any suspension or waiver by any of the Parties of any default by any other party to this MOU shall not suspend, waive or affect any other default under this MOU whether of the same or of a different type and whether having occurred prior or subsequent to the current waiver. Any waiver of any breach of any term or condition of this MOU shall not operate as a waiver of any other breach of that or of any other term or condition, nor shall failure to enforce a provision of this MOU operate as a waiver of such provision of this MOU or any other provision.
38. This MOU is the product of negotiation among the Parties hereto and represents the jointly conceived, bargained-for and agreed-upon language mutually determined by the Parties to express their intentions in entering into this MOU. Any ambiguity or uncertainty in this MOU shall equally be deemed to be caused by, or attributable to, all the Parties collectively. In any action or proceeding to enforce or interpret this MOU, this MOU shall be construed in a neutral manner, without regard to any presumption or rule requiring construction against any of the Parties who drafted or caused the drafting of this MOU.
39. In the event any action (whether or not in a court proceeding) shall be required to interpret, implement, modify, or enforce the terms and provisions of this MOU, or to declare rights under same, the prevailing party in such action shall recover from the

losing party all of its costs and fees, including, but not limited to, attorneys' fees and experts' fees.

40. The foregoing and the documents attached hereto/referenced herein constitutes the final and entire agreement of the Parties hereto and supersedes all prior negotiations, representations, understandings and agreements with respect to the subject matter of this MOU. There are no inducements, promises, representations, understandings, arrangements or agreements, either written or oral, between or among the Parties hereto relating to the subject matter of this MOU that are not fully expressed herein.

41. The Parties each represent and warrant that it has entered into this MOU freely and voluntarily, and that it has not relied on any inducements, promises, representations, understandings, arrangements or agreements, except for those expressly set forth in this MOU.

IN WITNESS WHEREOF, this MOU is executed as follows:

Dated: July, __, 2009

CITY OF FRESNO

Signature: _____

Andrew T. Souza
City Manager

Dated: July, 14, 2009

FRESNO METROPOLITAN MUSEUM OF ART AND SCIENCE

Signature: _____

Paul Gottlieb
President

Attest:

CITY CLERK:

Signature: _____

Print Name: _____

Dated: July __, 2009

Approved as to Form and Content:


Fresno City Attorney

Dated: July 14, 2009