14-387
10/9/2014

CITY OF FRESNO
City Clerk's Office (Original)

LEASE AGREEMENT
CITY OF FRESNO HISTORIC WATER TOWER

THIS LEASE AGREEMENT (hereinafter referred to as "Lease"), made and entered into effective November 1, 2014, (the "Effective Date"), by and between the CITY OF FRESNO, CALIFORNIA, a municipal corporation, (hereinafter referred to as "City"), and The FRESNO ARTS COUNCIL, a California nonprofit corporation, hereinafter called "Tenant."

WITNESSETH

WHEREAS, City owns the property commonly known as Fresno and "O" Streets , Fresno, California, (the "Leased Premises"), commonly described as the Historic Water Tower; and

WHEREAS, The Fresno Arts Council is a nonprofit corporation who proposes to lease the Historic Water Tower and operate it as an art gallery, gift shop and visitor's center; and

WHEREAS, the City will receive no rent from Tenant, however, Tenant will pay all operating expenses, including utilities, janitorial, and minor maintenance. The City will continue to provide regular janitorial services at the nearby restrooms and surrounding landscape areas; and

WHEREAS, the City deems it advantageous to the public to rent the Leased Premises to Tenant because of the Water Tower's historical and architectural significance and the educational opportunities associated therewith.

NOW, THEREFORE, IN CONSIDERATION OF THE MUTUAL COVENANTS CONTAINED HEREIN, THE PARTIES HERETO AGREE AS FOLLOWS:

SECTION 1: DESCRIPTION OF LEASED PREMISES. City leases to Tenant "as is," in its existing physical condition and without warranty, the area commonly described as the Historic Water Tower located at Fresno and "O" Street, Fresno, California, for the purpose of maintaining and operating the Water Tower as an art gallery, visitor's center and gift shop for the benefit of the general public.

SECTION 2: TERM OF LEASE. The Initial Term of this Lease shall be from the Effective Date through November 1, 2017, with the two one year extensions optional. The parties understand and agree that, during the term of this Lease, the City will actively market the Historic Water Tower in an effort to secure a market rate tenant. At the end of the Initial Term, Tenant shall have a first right of refusal to match the terms of any lease offer secured through the City's marketing efforts. City shall provide any such offer to Tenant in writing not less than thirty (30) days prior to the end of the Initial Term, and Tenant shall have ten (10) days from receipt thereof to confirm in writing Tenant's intent to match the terms of the offer. In the event that the Water Tower is sold to another party and that party

does not desire to assume the Lease, the City may terminate this Lease upon providing Tenant with two months' written notice prior to the date of termination.

SECTION 3: TERMINATION OF LEASE. Notwithstanding any other termination provisions existing herein, in the event that Tenant fails to maintain and operate said premises for the principal purposes for which the same are hereby demised, or fails to maintain reasonable and adequate supervision and maintenance of said premises, or Tenant fails to perform any provision of this Lease, or to comply with any requirement of law or any requirement imposed on Tenant or the Leased Premises by any duly authorized governmental agency or political subdivision, relating to the Tenant's use or occupancy of the Leased Premises, and further fails to remedy any such faults or defects within ten (10) days after written notice to do so from City, then City may elect to terminate and cancel this Lease as to some or all of the Leased Premises, in the City's discretion.

In addition to the foregoing, either party may terminate this lease for any reason upon thirty (30) days' written notice to the other.

SECTION 4: RENT. No rent will be paid by Tenant in recognition of their ongoing financial investment in the maintenance and upkeep of the facility, and valuable benefit the operation of the Historic Water Tower Visitor's Center brings to the community.

SECTION 5: USE OF THE LEASED PREMISES. Tenant shall not use or permit the Leased Premises or any part thereof, to be used other than for an art gallery, visitor's center and gift shop, and such additional uses as may be approved in advance by City in writing, provided that such use is consistent with operating and maintaining the Historic Water Tower as Visitor's Center for the benefit of the general public. Except as expressly provided elsewhere in this Lease, programming and all operating costs shall be solely the responsibility of Tenant. Tenant shall have exclusive responsibility and control of programming, hiring of staff, establishing hours of operation, and providing written material for tourism-related purposes. Tenant shall not be permitted to rent the Water Tower to other entities or individuals as a venue for special events or other functions as a means of raising funds to support the mission of the Tenant. Tenant shall have the right to post such signs as are necessary and usual in the conduct of its activities in and upon the Leased Premises, so long as such signs conform to the regulations of the Fresno Municipal Code.

SECTION 6: REVENUE. Tenant may retain revenues generated by the Leased Premises, including but not limited to fund-raising revenues, and donations.

SECTION 7: RECORDS. Tenant shall maintain adequate records of all visitors to the Tower and other activities carried on by it on the Leased Premises. All such records shall be available for inspection by authorized employees of the City at any reasonable time, and Tenant shall furnish to City upon request above information concerning any operation or operations conducted by it on the Leased Premises, including but not limited to attendance numbers.

SECTION 8: ANNUAL REPORTING. City and Tenant agree to meet at least once annually to discuss the following items, which Tenant agrees to provide on an annual basis within 90 days after the close of each annual period:

A. A report of the Leased Premises activities in connection with the operation of the Leased Premises.
B. A financial statement which includes a balance sheet detailing all assets and liabilities associated with the Leased Premises, and an income statement detailing all revenue and expenses during the year for the Water Tower operations.
C. Tenant shall provide a list of Board members and contact information annually and contact information whenever there is a change to membership immediately.
D. A report of membership and ongoing fundraising activities associated with the Leased Premises.
E. Provide proof of active corporate status.
F. Proof of insurance as required in Section 17 of this Lease.

SECTION 9: UTILITIES. Tenant shall pay for its electrical, heating, and air-conditioning requirements at the Leased Premises during the term of this Lease. Tenant shall be responsible for its own telephone and security service. City shall furnish all water for lavatory and other purposes without charge. City shall supply to Tenant its reasonable waste disposal requirements by providing a complete and proper arrangement for the sanitary handling and disposal of all trash, garbage, and refuse without charge.

SECTION 10: ALTERATIONS AND IMPROVEMENTS. Tenant agrees not to make any alterations or improvements to the Leased Premises without first receiving City's written approval thereof. Any contract that Tenant enters into to construct improvements shall contain insurance, indemnity, release and assignment provisions acceptable to the City. Except as may be otherwise authorized in writing, any such permanent structural alterations or improvements shall be and remain the property of the City, subject to Tenant's use therefor during the term of this Lease. Upon expiration of the term of this Lease, or any renewal thereof, or upon the earlier termination thereof, all furnishings and artifacts placed upon the Leased Premises by Tenant shall, at the option of Tenant, become the property of Tenant except as otherwise provided by this Lease.

SECTION 11: REPAIRS AND MAINTENANCE. Tenant agrees that it will, at its own cost and expense, keep the Leased Premises and each and every part thereof, excluding lavatory, in good condition and repair during the term of this Lease, and make all cosmetic repairs to the interior of the Leased Premises as the necessity thereof exists, except as otherwise provided in this Section. City agrees to perform and/or provide the following, subject to the terms of this Section and subject to available funding to furnish adequate irrigation water for the upkeep and maintenance of any trees, shrubs and grass within the leased area;

a. Mow and edge all lawns within the leased area;
b. Trim and fertilize the trees and shrubs located within the leased area and to replace any trees thereon;

c. Make interior and exterior structural repairs which are necessary for the health, welfare and safety of the public as determined by the City, except as otherwise set forth herein;
d. Maintain exterior lighting; and
e. Make all major repairs to plumbing, heating, furnace and air-conditioner.

Tenant shall, at all times, cooperate with City to keep the Leased Premises in a neat, clean and orderly condition, and shall prevent the accumulation of and shall maintain the Leased Premises free from any refuse or waste materials which might constitute a fire hazard or public or private nuisance. Tenant shall also make all structural and non-structural repairs occasioned by the fault of Tenant or its agents. Tenant agrees to provide for all necessary maintenance inside the Water Tower and shall also furnish necessary janitorial care therein.

City's obligation to perform any obligation under this Lease shall be contingent upon the appropriation of funds by the City's governing body sufficient to provide such services or payment during City's respective fiscal year (July 1 through June 30). The performance of obligations shall be funded only from current funds, budgeted and appropriated, on deposit in a reserve fund, or otherwise legally available for funding such services or other Leased Premises costs. This Lease shall not create an immediate debt for funding all service obligations throughout the term of the Lease, and is not a pledge of City's full faith and credit. During its annual budgeting process, City shall consider, and will use best efforts to appropriate funding to meet its estimated costs under this Lease for the fiscal year under consideration.

SECTION 12: GIFTS TO CITY. During the duration of this Lease, persons may elect to give certain items to the City or Tenant for display in the Water Tower. If any such item is given to the City, Tenant shall permit and cooperate in the display of such items. City and Tenant shall exercise reasonable and good faith judgment in accepting only those items that are consistent with the theme of the Water Tower, Visitor's Center and for which there is adequate space. City and Tenant shall consult with one another prior to acceptance of any such gift.

SECTION 13: SURRENDER. At the expiration of the life of this Lease or any prior termination thereof, Tenant agrees to quietly and peacefully surrender possession of said Leased Premises to the City in a neat and clean condition. City will not be responsible for any equipment and/or supplies left on the Leased Premises.

SECTION 14: DEFAULT. If any default is made in the performance of or compliance with any other term or condition hereof, this Lease, at the option of City or Tenant, shall terminate and be forfeited. City or Tenant shall give ten (10) days written notice of any default or breach. If, within ten (10) days of receipt of such notice, the default or breach has not been remedied to the City's or Tenant's satisfaction or City or Tenant has failed to take action reasonably likely to effect such correction within a reasonable time, then this Lease shall be terminated and forfeited.

SECTION 15: ABANDONMENT. If at any time during the term of this Lease, Tenant abandons the Leased Premises or any part thereof, City may, at its option, enter the Leased Premises by any means without being liable for any prosecution therefore and without becoming liable to Tenant for damages or for any payment of any kind whatever, and may, at its discretion, relet the Leased Premises, or any part thereof, for the whole or any part of the then unexpired term, and may receive and collect all rent payable by virtue of such reletting. If City's right of re-entry is exercised following abandonment of the Leased Premises by Tenant, then City may consider any personal property belonging to Tenant and left on the Leased Premises to also have been abandoned, in which case City may dispose of all such personal property in any manner City shall deem proper and is hereby relieved of all liability for doing so.

SECTION 16: DESTRUCTION OF LEASED PREMISES. If, during the term of this Lease, the Water Tower or a substantial portion thereof, shall be destroyed by fire or the elements or any other cause, then this Lease shall terminate at the option of either party and become null and void from the date of notice of termination. In the event the exercise of this option by either party, Tenant shall immediately surrender the premises to City and this Lease shall thereupon terminate.

SECTION 17: INDEMNIFICATION AND INSURANCE Notwithstanding any provision of the Agreement to the contrary, and without limiting Tenant's indemnification, Tenant shall secure and maintain, at its sole cost and expense, during the term of this Agreement, a comprehensive general liability and property damage policy using an occurrence policy form with combined single limits of not less than one million dollars ($1,000,000.00), with no aggregate limit.

The City shall be named as an additional insured on the policies by endorsement that shall be attached to this Agreement as proof of insurance. The insurance provided under Tenant's policies shall be primary, and any insurance maintained by the City shall apply, in excess of, and not contributory with, the insurance required under the terms of this Agreement.

Tenant shall indemnify, defend and hold harmless the City, its officers, agents employees and members of its governing board, from and against any and all claims, demands, losses, judgments, liabilities, causes of action and expense, including attorney fees and costs, of any kind or nature the District may sustain or incur or which may be imposed upon it for injury to or death of any person, or damage to property, or for any other act(s) of commission or omission arising out of or in any manner related to or connected with Tenant's (including it officers, agents and employees) performance of or failure to perform the terms of this Agreement. Tenant's occupancy, maintenance and use of the Leased Premises shall be at Tenant's sole risk and expense, Tenant accepts all risk relating to Tenant's: (i) occupancy, maintenance and/or use of the Leased Premises; and (ii) the performance of, or failure to perform, this Lease. City shall not be liable to Tenant for, and Tenant hereby waives and releases City from, any and all loss, liability, fines, penalties, forfeitures, costs or damages resulting from or attributable to an occurrence on or about the Leased Premises in any way related to the Tenant's operations and activities. Tenant shall immediately notify City of any occurrence on the Lease Premises resulting in injury or death to any person or damage to property of any person.

The provisions of this Section shall survive termination or expiration of this Lease.

Tenant's Insurance: Throughout the life of this Lease, Tenant shall pay for and maintain in full force and effect all policies of insurance required hereunder with an insurance company(ies) either (i) 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 (ii) authorized by City's Risk Manager. The following policies of insurance are required:

(i) COMMERCIAL GENERAL LIABILITY insurance which shall be at least as broad as the most current version of Insurance Services Offices (ISO) Commercial General Liability Coverage Form CG 00 01 and include insurance for "bodily injury," "property damage" and "personal and advertising injury" with coverage for premises and operation, products and completed operations, and contractual liability with limits of liability of not less than $1,000,000 per occurrence and $2,000,000 aggregate for bodily injury and property damage; $1,000,000 per occurrence for personal and advertising injury; and $2,000,000 aggregate for products and completed operations.

(ii) LIQUOR LIABILITY insurance which shall be at least as broad as the most current version of Insurance Services Office (ISO) Liquor Liability Coverage Form CG 00 33, and include insurance for "bodily injury," and "property damage" with limits of liability of not less than $1,000,000 per occurrence and $2,000,000 aggregate for bodily injury and property damage. Only required if alcoholic beverages are to be sold, served or furnished on the Leased Premises.

(iii) WORKERS' COMPENSATION insurance as required under the California Labor Code.

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

Tenant shall be responsible for payment of any deductibles contained in any insurance policies required hereunder and Tenant shall also be responsible for payment of any self-insured retentions.

<u>All policies of insurance</u> required hereunder shall be endorsed to provide that the coverage shall not be cancelled, non-renewed, reduced in coverage or in limits except after 30 calendar day written notice has been given to City. Upon issuance by the insurer, broker, or agent of a notice of cancellation, non-renewal, or reduction in coverage or in limits, Tenant shall furnish City with a new certificate and applicable endorsements for such policy(ies). In the event any policy is due to expire during the work to be performed for City, Tenant shall provide a new certificate, and applicable endorsements, evidencing renewal of such policy not less than 15 calendar days prior to the expiration date of the expiring policy.

The General Liability and Liquor Liability insurance policies shall be written on an occurrence form and shall name City, its officers, officials, agents, employees and

volunteers as an additional insured. Such policy(ies) of insurance shall be endorsed so Tenant's insurance shall be primary and no contribution shall be required of City. Any Workers' Compensation insurance policy shall contain a waiver of subrogation as to City, its officers, officials, agents, employees and volunteers. Tenant shall have furnished City with the certificate(s) and applicable endorsements for ALL required insurance prior to City's execution of the Lease.

If at any time during the life of the Lease or any extension, Tenant fails to maintain any required insurance in full force and effect, all Tenant's activities under this Lease 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 Lease. No action taken by City pursuant to this section shall in any way relieve Tenant of its responsibilities under this Lease.

The fact that insurance is obtained by Tenant shall not be deemed to release or diminish the liability of Tenant, including, without limitation, liability under the indemnity provisions of this Lease. The duty to indemnify City and its officers, officials, 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 Tenant. Approval or purchase of any insurance contracts or policies shall in no way relieve from liability nor limit the liability of Tenant, or any of its board, officers, employees, agents, volunteers, invitees, suppliers, vendors, consultants, contractors or subcontractors.

Upon request of City, Tenant shall immediately furnish City with a complete copy of any insurance policy required under this Lease, 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 Lease.

Tenant and its insurers hereby waives all rights of recovery against City and its officers, officials, employees, agents and volunteers, on account of injury, loss by or damage to the Tenant or any of its board, officers, employees, agents, volunteers, invitees, suppliers, vendors, consultants, contractors or subcontractors, or its property or the property of others under its care, custody and control. Tenant shall give notice to its insurers that this waiver of subrogation is contained in this Lease. This requirement shall survive termination or expiration of this Lease.

SECTION 18: OBSERVATION OF GOVERNMENTAL REGULATIONS. Tenant agrees, during the life of this Lease, to comply with and conform to all rules, regulations and ordinances of the City of Fresno and County of Fresno and all laws of the State of California and the United States, and all orders of any governmental agency which shall be applicable to Tenant's use of the facilities or to the Tenant's use of the said Leased Premises or the business thereon being conducted by Tenant. Nothing in this Lease shall be construed as a limitation on the City's police power.

Tenant acknowledges that Tenant, not the City, is responsible for determining applicability of and complying with all local, state and federal laws. The City makes no express or implied representation as to the applicability or inapplicability of any such laws to this Lease or the parties' respective rights or obligations hereunder.

SECTION 19: PROPERTY TAXES. Tenant acknowledges that any possessory property interest arising by entering this Lease may be subject to property taxation and that Tenant shall pay and property taxes levied on such interest. NOTIFICATION TO TENANT PURSUANT TO CALIFORNIA REVENUE AND TAXATION CODE SECTION 107.6: A POSSESSORY INTEREST SUBJECT TO PROPERTY TAXATION MAY BE CREATED BY ENTERING INTO THIS LEASE AND TENANT MAY BE SUBJECT TO THE PAYMENT OF PROPERTY TAXES LEVIED ON SUCH INTEREST.

SECTION 20: CONDITIONS PRECEDENT. Prior to the City's execution of this Lease, Tenant shall provide to City current proof of its good corporate standing with the California Secretary of State, and proof of its current IRS section 501(c)(3) status.

SECTION 21: INSPECTION BY THE CITY. The City or any of its authorized officers and employees shall, at all reasonable times, have the right to enter upon the Leased Premises, either in person or by nominee, for the purpose of inspecting said Leased Premises to ascertain that the Leased Premises and the covenants of this Lease are being kept, observed and performed.

SECTION 22: RIGHT TO ASSIGN AND SUBLET. Tenant shall not make any assignment or sub-lease in whole or in part of this Lease without first receiving the written consent and approval of the City. Consent to one or more assignment or sub-lease shall not constitute a waiver of the City's rights under this section for further or other assignments or sub-leases.

SECTION 23: SUCCESSORS AND ASSIGNS BOUND. This Lease shall extend to and bind the heirs, executors, administrators, and assigns of the respective parties hereto.

SECTION 24: MISCELLANEOUS.

A. This Lease shall be construed and enforced in accordance with the laws of the State of California and venue shall be in Fresno County.
B. The City represents that it has the right to lease the Leased Premises described herein, together with all, rights, licenses, services and privileges herein granted and has power and authority to enter into this Lease by virtue of and under its Charter and all applicable laws. The Tenant represents and warrants that it is a duly authorized and existing California not for profit corporation, in good standing; that it shall remain in good standing, and its authority to enter this Lease and its signatory is authorized to execute.
C. No waiver by the City or the Tenant of any breach of any provision of this Lease shall be deemed for any purpose to be a waiver of any breach of any other provision hereof or of a continuing or subsequent breach of the same provision.
D. In the event any covenant, condition or provision herein contained is held to be invalid by final judgment of any Court of competent jurisdiction, the invalidity of such

covenant, condition or provision shall not in any way affect any of the other covenants, conditions or provisions herein contained.

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

F. Upon execution of this Lease, all other existing leases between City and Tenant for the Leased Premises shall terminate.

G. All notices required herein shall be in writing and shall be given by registered or certified mail, postage prepaid, and addressed to the City or Tenant at their respective addresses as provided on the signature page of this Lease.

H. It is the intention of the parties hereto to act reasonably in fulfilling their respective obligations and exercising their authority under this Lease.

I. In pursuit of this Lease 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.

J. This Lease includes any exhibits and attachments referenced and incorporated in it. This Lease contains the entire agreement between the parties relating to the transaction contemplated by this Lease and supersedes all prior or contemporaneous agreements, understanding, representation and statements, whether oral or written.

K. This Lease may be modified only by a written amendment signed by the parties' respective authorized agent.

L. Venue for any dispute arising under or based upon this contract shall be in a competent court with jurisdiction located in the County of Fresno.

The rest of this page is intentionally left blank.
Signatures appear on the next page.

IN WITNESS WHEREOF, the parties hereto have set their hands the day first above written.

CITY OF FRESNO,
a Municipal Corporation

By: Renena Smith
Assistant City Manager

FRESNO ARTS COUNCIL,
a California Non-Profit Corporation

By: Lilia Gonzalez Chavez

Title: Executive Director

ATTEST:

Yvonne Spence, C.M.C.
City Clerk

Cindy Bruer 3/23/15
By: Deputy

APPROVED AS TO FORM:
Douglas T. Sloan
City Attorney

3/19/15
By: Katherine B. Doerr Date
Supervising Deputy

ADDRESS OF CITY
City of Fresno
City Manager's Office
2600 Fresno Street
Fresno, CA 93721

ADDRESS OF TENANT
245 Van Ness Avenue
Fresno CA 93721

Exhibit A

Fresno St
Old Fresno Water Tower
B. F. Sisk Courthouse
O St
Mariposa St
Google