

**AGREEMENT BETWEEN THE CITY OF FRESNO AND
THE FRESNO CHAFFEE ZOO CORPORATION REGARDING THE
DESIGN AND CONSTRUCTION OF THE ROEDING PARK
REPLACEMENT POND**

This Agreement is made as of January 31, 2014, the Effective Date, by and between the City of Fresno ("City") and the Fresno Chaffee Zoo Corporation ("Zoo Corporation") with reference to the following facts, purposes and understandings respecting the Zoo Corporation's compliance with the Condition of Approval for Conditional Use Permit No. C-08-186, as amended by Conditional Use Permit No. C-13-018, to comply with Final Environmental Impact Report ("FEIR") Mitigation Measure No. 4.1(a) by constructing a Replacement Pond in the Roeding Regional Park ("the Project").

RECITALS

WHEREAS, on June 30, 2011 the City approved the Roeding Regional Park Facility Master Plan and Fresno Chaffee Zoo Facility Master Plan (together "Master Plans"), which provide for the expansion of the Fresno Chaffee Zoo of approximately 21 acres into existing passive park space within Roeding Park, and certified the related FEIR SCH No. 2008031002;

WHEREAS, on July 20, 2011 the City approved Conditional Use Permit No. C-08-186 to implement the Master plans, including the expansion of the Zoo; and,

WHEREAS, on November 7, 2013 and November 8, 2013 the City approved amendments to the Roeding Regional Park Facility Master Plan and the Fresno Chaffee Zoo Facility Master Plan to accommodate the adopted alignment for the California High Speed Rail on Golden State Boulevard; and,

WHEREAS, on November 20, 2013 the City approved Conditional Use Permit No. C-13-018 which served to amend Conditional Use Permit No. C-08-186 to, among other modifications, reflect the changes to the Roeding Regional Park Facility Master Plan and Fresno Chaffee Zoo Facility Master Plan approved by the City on November 7, 2013 and November 8, 2013; and,

WHEREAS, the first phase in the expansion of the Fresno Chaffee Zoo is to construct the African Savannah exhibit; and,

WHEREAS, the construction of the African Savannah exhibit requires the removal of four ponds currently located within the boundaries of this new exhibit; and,

WHEREAS, Condition of Approval No. 4 of CUP No. C-08-186 states, "Applicant shall be responsible for developing under this permit in full compliance with all the Mitigation Measures in the Mitigation Monitoring Program as approved by the City Council on June 30, 2011 . . .";

WHEREAS, Mitigation Measure No. 4.1(a) requires the construction of a pond feature ("Replacement Pond") to replace the four (4) ponds to be removed as part of the Zoo expansion; and,

WHEREAS, pursuant to Fresno Municipal Code, section 12-405-G, no building permits shall be issued until the Director of the Development and Resource Management Department ("DARM Director") is assured that all terms and conditions of any applicable special permit, such as Conditional Use Permit Nos. C-08-186 and C-13-018, shall be complied with; and,

WHEREAS, the Zoo Corporation is now requesting that the City issue the necessary building permits to allow for the construction of the African Savannah exhibit to proceed; and,

WHEREAS, the Zoo Corporation has agreed to enter into this Agreement with the City to provide the City with the necessary assurances that the Zoo Corporation will construct the Replacement Pond in compliance with Mitigation Measure 4.1(a) and in a timely manner and to indemnify and defend the City against any claims or litigation arising out of the Project, so that the DARM Director may authorize the issuance of the necessary building permits to proceed with the construction of the African Savannah exhibit.

AGREEMENT

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is acknowledged, the City and the Zoo Corporation agree as follows:

1. Design, Engineering and Construction of Replacement Pond. The Zoo Corporation shall be responsible to complete the design, engineering and construction of the Replacement Pond at the location identified in the revised site plan contained in the Roeding Regional Park Facility Master Plan approved by the City Council on November 7, 2013. The design of the Replacement Pond shall substantially conform to the design depicted in Exhibit "A" to this Agreement. Except for its location, the Replacement Pond shall fully comply with the requirements of Mitigation Measure 4.1(a) which states in relevant part:

Maintain the public recreational uses associated with the ponds by introducing a new pond feature in accordance with Mitigation Measure 4.8(a), which states that historic preservation design guidelines shall be preservation design guidelines shall be developed that address new design in the context of the contributing architectural and landscape features of the potential historic district. . . . The Zoo will consult with the California Department of Fish and Game ("CDFG") and will stock the pond feature with fish species recommended by CDFG.

Consistent with Section 13, subsection J of the Lease Agreement between the City and the Zoo Corporation, dated January 1, 2006, the Zoo Corporation shall be responsible for all of the costs associated with the design, engineering and construction of the Replacement Pond and shall ensure that the Replacement Pond is fully operational and capable of sustaining fish species recommended by the CDFG, to the reasonable satisfaction of the City Manager, at the time City accepts the Replacement Pond from the Zoo as fully constructed and operational. The City shall not be required to share in any of the costs associated with designing, engineering or constructing the Replacement Pond.

2. Indemnification. The Zoo Corporation shall indemnify, protect, defend, and hold harmless, the City, and/or any of its officials, officers, employees, agents, departments, agencies, and instrumentalities thereof, from any and all claims, demands, lawsuits, writs of mandamus, and other actions and proceedings (whether legal, equitable, declaratory, administrative or adjudicatory in nature), and alternative dispute resolution procedures (including, but limited to arbitrations, mediations, and other such procedures), (collectively "Actions"), brought against the City, and/or any

of its officials, officers, employees, agents, departments, agencies, and instrumentalities thereof, that challenge, attack, or seek to modify, set aside, void, or annul, the action of, or any approval by, the City and/or any of its officials, officers, employees, agents, departments, agencies, and instrumentalities thereof (including actions approved by the voters of the City), related to the Replacement Pond or the compliance with or implementation of Mitigation Measure 4.1(a) in FEIR SCH No. 2008031002 (i.e. the Project) , whether such Actions are brought under the California Environmental Quality Act, the Planning and Zoning Law, the Subdivisions Map Act, Code of Civil Procedure Section 1085 or 1094.5, or any other state, federal or local statute, law ordinance, rule, regulation, or any decision of a competent jurisdiction. Zoo's obligations under this Agreement shall apply regardless of whether the City or any of its officials, officers, employees, agents, departments, agencies, or instrumentalities are actively or passively negligent.

3. Timing of Completion of the Replacement Pond. The City shall not issue any Certificates of Occupancy related to the African Savannah exhibit, or any other new exhibit within the Fresno Chaffee Zoo expansion area, until such time as the Replacement Pond is fully constructed, operational and capable of sustaining fish species recommended by the CDFG, to the reasonable satisfaction of the City Manager.

4. Selection of Legal Counsel and Payment of Defense Costs. The Zoo Corporation and City agree that the City shall have the right to approve, which approval will not be unreasonably withheld, the legal counsel providing the City's defense, and that Zoo Corporation shall reimburse City for any reasonable costs and expenses directly and necessarily incurred by the City in the course of the defense respecting the Project. City shall promptly notify the Zoo Corporation of any Action brought at the Zoo Corporation's address set forth in Section 11 and City shall cooperate with the Zoo Corporation in the defense of the Action.

5. Payment of Award of Attorneys Fees. In the event a legal challenge to the Project is successful, and an award of attorneys fees is made to the challenger, the Zoo Corporation shall be responsible to pay the full amount of such an award.

6. State Law and Venue. This Agreement, and the rights and obligation of the parties hereto, shall be construed and enforced in accordance with the laws of the State of California. The venue for any litigation involving the interpretation or enforcement of any provision in this Agreement shall be the Fresno County Superior Court.

7. Entire Agreement; Modification and Amendment. This Agreement contains all of the agreements and understandings of the parties pertaining to the subject matter contained herein and supersedes all prior or contemporaneous agreements, representations and understandings of the parties. This Agreement cannot be amended or modified except by written agreement approved by the Zoo Corporation and the City.

8. Attorneys' Fees. If either party commences any action for the interpretation, enforcement, termination, cancellation or rescission of this Agreement, or for specific performance of the breach of this Agreement, the prevailing party shall be entitled to its reasonable attorneys' fees and litigation expenses and costs, and any judgment, order or decree rendered in such action, suit or proceeding or any binding alternative dispute resolution proceeding shall include an award thereof.

9. Validity of Agreement. If any provisions of this Agreement, or the application thereof to any person, party, transaction or circumstances, is held invalid, the remainder of this Agreement, or the application of such provision to other persons, parties, transactions, or circumstances, shall not be affected thereby.

10. Binding Upon Successors. This Agreement shall be binding upon and insure to the benefit of the heirs, administrators, executors, successors in interest and assigns of each of the parties to this Agreement. Any reference in this Agreement to a specifically named party shall be deemed to apply to any successor, heir, administrator, executor or assign of such party who has acquired an interest in compliance with the terms of this Agreement, or under law.

11. Notices. All notices and other communications required or permitted to be given by any Party to another Party pursuant to the terms of this Agreement shall be in writing and delivered pursuant to one of the following methods (a) Personal Delivery; (b) Facsimile; (c) Certified Mail for delivery at the address of the other Party as set forth below:

Zoo Corporation

Name: Fresno Chaffee Zoo Corporation
Attention to: Scott Barton, Executive Director
Address: 894 W Belmont
Fresno CA 93728

City

City of Fresno
Attention to: City Manager
Fresno City Hall
2600 Fresno Street
Fresno, California 93721

12. Survival of Agreement. This Agreement, and all of its terms, shall survive the invalidation or nullification of the City's approval or implementation of all or a portion of the Project and in such event the Zoo Corporation shall continue to be bound by its terms.

13. Waiver. The waiver by either party of a breach by the other of any provision of this Agreement shall not constitute a continuing waiver or a waiver of any subsequent breach of either the same or a different provision of this Agreement. No provisions of this Agreement may be waived unless in writing and signed by all parties to this Agreement. Waiver of any one provision herein shall not be deemed to be a waiver of any other provision herein.

IN WITNESS WHEREOF, this Agreement has been executed as of the date set forth in the opening paragraph of this Agreement.

CITY OF FRESNO
A Municipal Corporation

ZOO CORPORATION
Fresno Chaffee Zoo Corporation

BY: 
Bruce Rudd, City Manager

BY: 
Scott Barton, Executive Director

BY: _____

APPROVED AS TO FORM:
CITY ATTORNEY'S OFFICE

BY: 
JOHN W. FOX Special Counsel

YVONNE SPENCE, CMC
City Clerk

BY:  2/4/14
Deputy

POND DESIGN

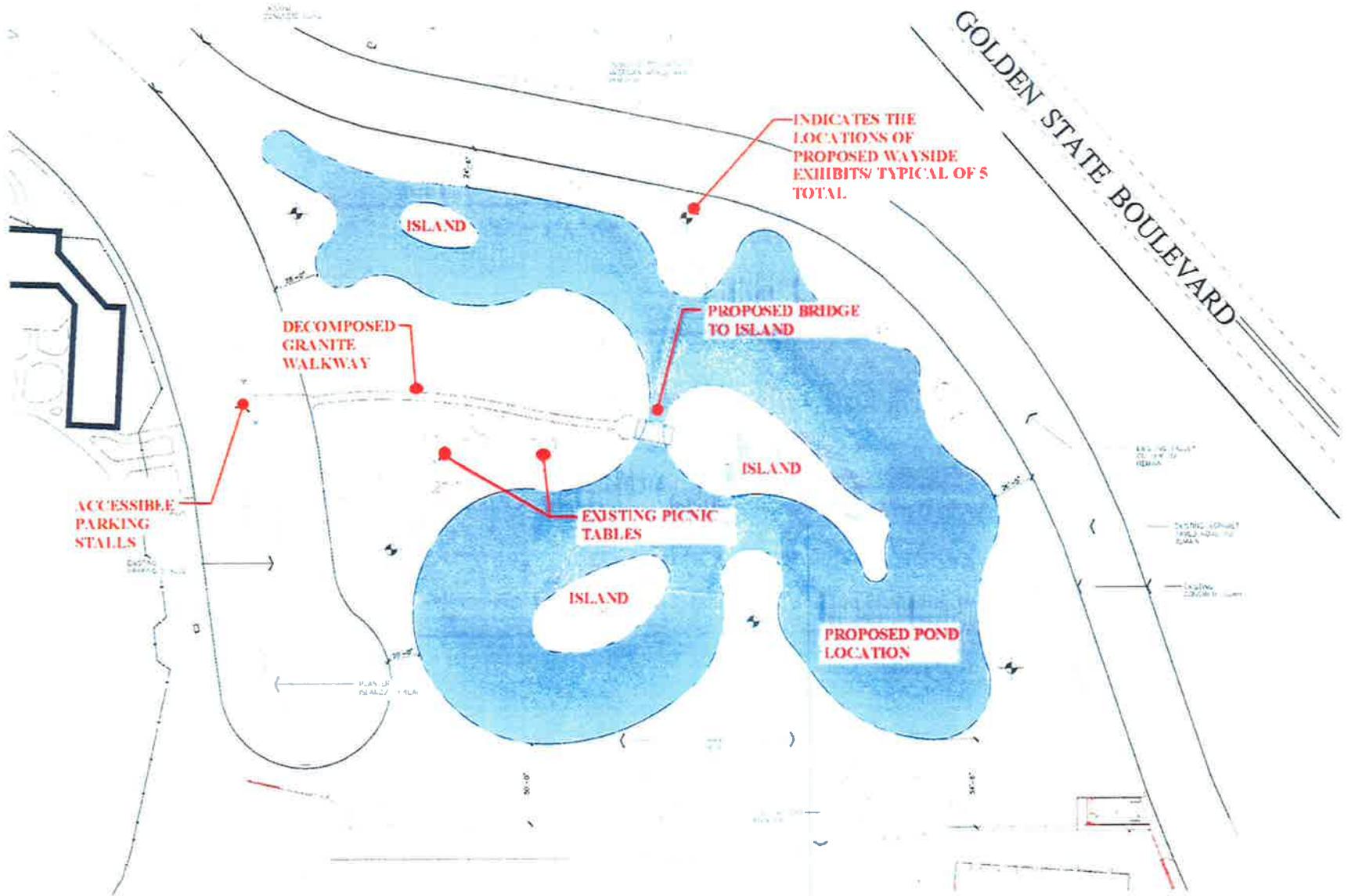


Exhibit A (page 1 of 3)

- CURRENT POND AREA = 99,350 S.F.
- CURRENT POND / PARK
RATIO = $99,350 \div 5,197,645 = 0.0191$
- PROPOSED POND AREA = 76,638 S.F.
- PROPOSED POND / PARK
RATIO = $76,638 \div 4,028,023 = 0.0190$

- **PROPOSED DESIGN FEATURES**

1. **CURVILINEAR FORM THAT REFLECTS THE CURRENT POND DESIGN**
2. **INCORPORATES EXISTING MATURE TREES AND MINIMIZES REMOVAL OF TREES**
3. **INCLUDES ISLANDS (ONE IS ACCESSIBLE)**
4. **INCORPORATES EXISTING PICNIC AREAS**
5. **WILL INCLUDE EXISTING CONCRETE BENCHES WHICH WILL BE RELOCATED**
6. **WAYSIDE EXHIBITS DOCUMENTING THE ORIGINAL PONDS WILL BE LOCATED AROUND THE NEW PONDS**