

Staff Summary Report



Council Meeting Date: June 11, 2009

Agenda Item Number: _____

SUBJECT: Request approval of an Agreement with Friends of Tempe Center for the Arts for an initial term of ten (10) years, with an optional renewal term of ten (10) years.

DOCUMENT NAME: 20090611csdf 01 TEMPE ARTS CENTER (0109-19)

SUPPORTING DOCUMENTS: Yes

COMMENTS: N/A

PREPARED BY: Don Fassinger, Cultural Facilities Administrator, 480-350-2881

REVIEWED BY: Tom Canasi, Community Services Manager, 480-350-5305
Kathy Berzins, Interim Community Services Manager, 480-350-5464
Adrienne Richwine, Deputy Community Services Manager, 480-350-5237

LEGAL REVIEW BY: Andrew Ching, City Attorney, 480-350-8575
Judith Morgan, Assistant City Attorney, 480-350-8779

DEPARTMENT APPROVAL: Tom Canasi, Community Services Manager, 480-350-5305

FISCAL NOTE: Agreement will incur no cost to city.

RECOMMENDATION: Approve Agreement with Friends of TCA.

ADDITIONAL INFO: Friends of Tempe Center for the Arts (FTCA) was organized and is operated as a tax-exempt charitable organization under IRC 501(c)(3) to support the capital, operating and programming purposes of the TCA. Through generous financial support from FTCA, programs at the TCA which have been made available to the community include LakeShore Jazz @ TCA, Performance with a View, Arts Career Day for high school students, Gallery exhibition opening receptions and educational programs associated with visual art exhibitions. Many of these programs are provided to the public free of charge.

FTCA desires to enter into a ten-year agreement with one ten-year option to ensure the support and participation of the parties in private sector fund-raising efforts for the TCA, and to establish a process that will encourage and facilitate support of the TCA.

**Agreement Between the City of Tempe
and the Friends of Tempe Center for the Arts**

This Agreement (hereinafter "Agreement") is made and entered into this _____ day of _____ by and between the City of Tempe (hereinafter "City"), a municipal corporation, and the Friends of Tempe Center for the Arts (hereinafter "Friends"), a non-profit Arizona Corporation.

A. WHEREAS, the Friends was formed, organized, and is operated for public charitable purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code, as amended, to support the capital, operating, and programming purposes of the Tempe Center for the Arts.

B. WHEREAS, the Friends activities, on behalf of the City, include, marketing of fund-raising activities for the benefit of the Tempe Center for the Arts including accepting by gift, bequest, devise, purchase, lease or otherwise money, securities and other forms of real and personal property (hereinafter "donations") and exclude Tempe Center for the Arts operations.

C. WHEREAS the City and the Friends wish to ensure the support and participation of the parties in private sector fundraising efforts for the Tempe Center for the Arts in accordance with the specified principles that are the basis for their joint activities, and the City and the Friends desire to enter into this Agreement to establish a process that will encourage and facilitate support of the Tempe Center for the Arts (hereinafter "TCA").

NOW, THEREFORE, for and in consideration of the mutual covenants and promises of the parties hereto and upon the express terms and conditions hereinafter set forth, it is agreed by and between the parties as follows:

I. RESPONSIBILITIES: The City and the Friends each have the following responsibilities:

A. City Responsibilities:

1. The City hereby designates, and agrees to acknowledge, in its publications and media materials when and where applicable, the Friends as the City's fund-raising organization for the Tempe Center for the Arts, as defined in B. above.

2. All donations received by the City from the Friends shall be identified as Friends-funded TCA monies and shall be deposited into the TCA accounts as designated by the Friends and Community Services Manager or designee certifying that funds from the donations were utilized for the purpose(s) intended. Upon reasonable request, the City shall provide to the Friends a copy of all documents and records relating

to this provision. The Community Services Manager or designee will follow City approved funding guidelines, policies, and procedures.

3. The City agrees to permit the Friends to use its distinctive trademarked name "The City of Tempe," and the name, "Tempe Center for the Arts," and all derivatives thereof in accordance with the TCA Graphics Standards, following the City's prior review and approval, at its sole discretion.

4. The City agrees to provide at its sole discretion and in consultation with the Friends, office facilities as available, telephone systems and services excluding long distance service, utilities, and such other services on the premises of the TCA as approved by the City's Community Services Manager (hereinafter "Community Services") and items which are necessary or required from time to time to implement the fund-raising activities of the Friends in accordance with funds available through the Community Services Department/Cultural Services Division budget.

5. The Community Services Manager shall provide one (1) representative as an ex officio non-voting member of the Friends' board of directors as approved by the Friends' board.

6. The City agrees to make reasonable efforts to arrange for the TCA Gift Shop to sell Friends merchandise and to accept cash sales tendered in the TCA gift shop of Friends merchandise.

7. The City agrees to process cash and credit card payments and donations made to the Friends into a City account designated for the Friends and to generate a check to the Friends on a monthly basis for any balance in the City account at no cost to the Friends other than applicable bank fees assessed to credit card transactions.

8. The City agrees to provide the use of TCA facilities as it is or becomes available as determined by City in its sole discretion, to the Friends for official Friends sponsored meetings (subject to availability), events, receptions, and similar mutually agreed upon activities at no additional cost other than reimbursement of all applicable staff/equipment costs and other expenses.

B. Friends Responsibilities:

1. The Friends shall be organized and operated for the primary purpose of supporting the TCA and its programs and said purpose shall be as stated in the Friends' articles of incorporation. When requested and approved by the City, the Friends may enter into a contract with a third party to purchase goods and services for the benefit of the City using the Friends' funds held on behalf of the City. The Friends shall be organized and maintained as an Arizona non-profit corporation and maintain its federal and state tax-exempt status for the term of this Agreement. If the Friends changes its corporate charter or bylaws changing the primary purpose of its organization from supporting the TCA and its programs, ceases to operate as a tax-exempt entity pursuant to

26 USCA §501(c)(3) or otherwise loses its tax exempt status, this Agreement shall be terminated. Termination shall take place upon such event(s) as set forth in Article VIII herein. Immediately upon termination, all assets but none of the liabilities held by the Friends on behalf of the City for the benefit of the TCA shall be transferred to the City in accordance with Article VIII (D) of this Agreement. In no event shall City be responsible for any debts, liabilities or obligations of Friends.

2. The Friends shall receive, deposit, hold, account for, improve, invest and manage any donations in accordance with the purposes, terms, distribution requirements and other circumstances set forth in this Agreement.

3. The Friends shall operate under its own name, seal and logotype; and the City hereby recognizes the Friend's right to use its own corporate or separate entity name in accordance with the TCA Graphics Standards.

4. The Friends shall use sound and prudent financial and business practices, follow generally accepted accounting practices for non-profit organizations and shall correctly report all required financial and other information as required by and in accordance with the law.

II. RECORDS:

A. The Friends and the City shall cooperate with the other party's auditor(s) in carrying out its auditing function and within thirty (30) business days of a request, make the following books or records available to one another and its agents at the requesting party's expense.

1. Corporate records including, but not limited to, articles of incorporation, by-laws, amendments, annual reports submitted to the Corporation Commission, balance, income, and cash flow statements and any and all budgets prepared in connection with this Agreement, the minutes of all regular and special meetings of the Friends' board of directors after approval of the minutes by the board and any and all policies and procedures developed by the Friends in connection with this Agreement and copies of all tax records including Internal Revenue Code Form 990, except portions that the Friends is permitted to withhold from public disclosure under the Internal Revenue Code.

2. Complete results of the annual audit or review from a certified public accounting firm of the Friend's financial statements, the audit report(s), management letter(s), and any responses thereto relating to any and all financial documents in connection with donations raised on behalf of the TCA.

3. Friends, its agent, auditor or administrative entity shall retain for a period of five (5) years consistent with City's record-retention policies and practices, any and all records of Friends as referenced in Article II herein. Friends or its administrative entity shall provide City reasonable access thereto, to enable review and preparation of

financial statements, tax returns and for any reasonable business purpose as determined by City.

III. CONFLICT OF INTEREST; SEPARATE IDENTITIES OF PARTIES:

A. All persons acting in connection with the Friends, who are not on the City's payroll, shall not be considered employees or volunteers of the City. It is the intention of the parties hereto that the Friends shall be acting as an independent entity, and no other relation, including agency, shall be created or deemed to be created by this Agreement. Nothing contained in this Agreement shall be construed to make the City or the Friends partners or joint venturers, or to render either the City or the Friends liable for any of the debts or obligations of the other, or to create any agency relationship by or between them. Neither party may contract for or incur debts on behalf of the other except as provided in this Agreement. When obtaining donations, the Friends shall take appropriate actions to communicate the nature of the relationship between the City and the Friends as set forth in this Agreement.

B. This Agreement is subject to the provisions of Arizona Revised Statutes, §38-511, and the City may terminate this Agreement if any person significantly involved in initiating, negotiating, drafting, securing or obtaining this Agreement for or on behalf of the City becomes an employee in any capacity of any other party to this Agreement or consultant to any other party to this Agreement with reference to the subject matter of this Agreement during the Term of this Agreement.

C. City employees may not receive or accept supplemental compensation, bonuses or incentive payments from the Friends without the prior written approval of the City. The City and its employees are subject to State of Arizona conflicts of interest laws and the City's conflict of interest policies. City employees with issues concerning conflict of interest(s) involving the Friends are required to advise their administrative superior of the matter, and the City shall determine its resolution.

D. The Friends shall adopt a conflict of interest policy in its by-laws to state that any director, officer or employee of the Friends having a substantial interest in any Friends transaction may not be involved or participate in the decision whether the Friends should enter into the transaction unless, prior to involvement or participation in the decision, the interest is disclosed and formally recorded. For purposes of this provision, "substantial interest" does not include unrestricted cash donations by a director, officer or employee to the Friends.

IV. TCA FUNDING ACTIVITIES:

The City of Tempe Community Services Department and the Friends through their designated representatives shall meet at least annually on a date mutually convenient to both parties to discuss funds that may be made available for distribution to the TCA. The parties' representatives shall make their recommendations regarding the amount and

purpose of funds available for distribution for TCA use to the Friends board and City of Tempe Cultural Services Department.

V. COMPETITIVE BUSINESS ACTIVITIES:

Nothing contained in this Agreement shall in any way preclude the City from engaging in other fund raising activities. No party to this Agreement shall attempt to redirect donations or funds received by or intended for the other, whether in connection with the performance of their obligations pursuant to this Agreement or outside of the Agreement. Neither party shall interfere or conflict with, or attempt to change, affect or alter, any decision of any prospective donor as to whether the intended donation is to be received by either the City, Friends or any other affiliated entities.

VI. SOLICITATION MATERIAL:

For fund-raising events where the net proceeds are to be deposited with the Friends, the event publicity and related materials shall conspicuously state the funds shall be used for the TCA or for other tax exempt organizations that support the TCA, or, with respect to endowment funds, for other purposes relating to the TCA, as determined by the Friends. All such materials shall be reviewed by the City prior to distribution.

VII. INDEMNIFICATION AND INSURANCE:

A. The Friends shall indemnify, defend and save harmless the City, its employees, officers and directors, from any and all alleged claims, demands, suits, actions, proceedings, loss, cost and damages of every kind and description, including any attorney's fees or litigation expenses, which may be brought or made against or incurred by the City, its employees, officers and directors, on account of loss of or damage to any property or for injuries to or death of any person caused by, arising out of, or contributed to, in whole or in part, by reason of any act or omission, professional error, fault, mistake or negligence of the Friends, its employees, agents or representatives, in connection with or incident to the performance of this Agreement. The Friends' obligation under this paragraph does not extend to any liability ultimately determined by law or judicial order to have been caused by the negligence or willful misconduct of the City, or its employees, officers and directors. The Friends shall require any subcontractor to indemnify and defend the City, its employees, officers and directors, by inserting indemnity and defense language substantially similar to this paragraph, in any subcontract agreement or arrangement the Friends enter into related to its responsibilities under this Agreement. This provision shall survive the Term of this Agreement.

B. The City shall indemnify, defend and hold harmless the Friends, its employees, officers and directors, from any and all alleged claims, actions and damages brought or made against the Friends, its employees, officers and directors, on account of loss of or damage to any property or for injuries to or death of any person caused by, the gross negligence or willful misconduct of the City, its agents or employees, in connection with or incident to the performance of this Agreement. The City's obligation under this paragraph does not extend to any liability ultimately determined by law or judicial order

to have been caused by the negligence or willful misconduct of the Friends, or its employees, officers and directors.

C. Insurance. Prior to commencing any work or services under this Agreement, the Friends shall procure and maintain for the duration of the Agreement insurance against claims for injuries to persons and damages to property, which may arise from or in connection with the performance under this Agreement of the Friends, its agents, representatives, employees, or subcontractors, as follows:

1. Commercial General Liability: \$1,000,000 combined single limit per occurrence with a \$2,000,000 general aggregate, for bodily injury and property damage, including coverage for contractual liability (including defense expense coverage for additional insureds), personal injury, broad form property damage, products, completed operations, and product liability.

2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage, including coverage for owned, hired, and non-owned vehicles as applicable.

3. Workers' Compensation and Employers Liability: Workers' compensation and employers liability statutory limits as required by the State of Arizona.

4. In the event of acquisition of a special events liquor license: Bodily injury or damages, fatal or non-fatal, including liquor liability insurance coverage to two or more persons for any one accident to the extent of \$2,000,000 combined single limit.

5. Fire insurance with standard extended and "all risk" property coverage provisions and vandalism and malicious mischief endorsement in an amount equal to the replacement value of the equipment and additional Equipment.

6. The City, its officers, agents, employees and volunteers shall be named as an additional insured with respect to matters covered by this Agreement as its interest may appear, and such coverage shall be primary to any insurance carried by City. The Friends will deliver to City certificates of such insurance within (30) thirty days of the execution hereof. All such policies of insurance shall be non-cancelable without thirty (30) days prior written notice to City.

7. Such worker's compensation, employer's liability, fidelity bonds or similar insurance as may be required by law. The City reserves the right to evaluate and revise the above insurance requirements throughout the course of this Agreement to meet any changes in the insurance market and risks associated with the performance of this Agreement.

VIII. TERM OF AGREEMENT; TERMINATION OR DEFAULT OF AGREEMENT:

A. The term of this Agreement ("Term") shall commence on the ___ day of _____, 20___ for a period of ten (10) years and expire on the ___ day of _____, 20___. The Term of this Agreement may be extended every ten (10) years pursuant to a separate amendment to this Agreement.

B. If any party or parties should default in the performance of their respective obligations under this Agreement, the party not in default shall provide written notice of the default and the party or parties in default shall have a reasonable time in which to cure the default. If a cure is not timely completed, the party not in default shall be entitled to remedy the default using any right or remedy at law or equity that is available, including bringing any suit or proceeding to enforce the provisions of this Agreement. The prevailing party or parties shall be entitled to their reasonable attorney's fees and costs incurred in such action. Upon termination of this Agreement all assets held by the Friends on behalf of the City for the benefit of the TCA shall be transferred to the City as set forth in Article VIII (D) of this Agreement and pursuant to the provisions of 26 USCA §501(c)(3) of the Internal Revenue Code, as amended. Friends agree to cooperate in such transfer, including execution of any and all documents as reasonably required by the City.

C. Without default, either party may terminate this Agreement in whole or in part upon mutual agreement of the parties. Further, either party may terminate this Agreement upon ninety (90) days written notice to the other party. In addition, City may terminate this Agreement at any time, in its discretion. The City may terminate this Agreement for default, breach, non-performance or convenience, or abandon any portion of this Agreement for which services have not been fully or adequately performed by Friends.

D. Upon the termination of this Agreement or upon dissolution of the Friends all assets held by the Friends on behalf of the City for the benefit of the TCA shall be transferred to the City and deposited by the City into a restricted account to be used for support of the TCA. In no event shall any donor, trustee, director, officer or individual be entitled to any distribution or division of the remaining assets held by the Friends on behalf of the City for the benefit of the TCA. Any and all personal property including office equipment, computers, and unused supplies and other equipment purchased with City monies shall remain with or be transferred to the City.

E. Upon termination as set forth herein or as referenced in Article I.B.1, Friends or its administrative entity shall retain all related records for a period of five (5) years following dissolution of the Friends, as set forth in Article II.A.3 herein.

IX. MISCELLANEOUS:

A. Notice. All notices required or permitted hereunder shall be in writing and shall be either personally delivered, sent by registered or certified mail (return receipt requested) or sent by facsimile and in each case addressed as follows (or to such other address as the parties shall provide in writing to the other parties in accordance herewith):

If to the City: Community Services Manager
 City of Tempe
 3500 South Rural Road
 Tempe, AZ 85282
 Fax: 480-350-5055

If to the Friends: President
 Friends of Tempe Center for the Arts
 700 W Rio Salado Parkway
 Tempe, AZ 85281
 Fax: 480-350-2828

B. Entire Agreement. This Agreement shall constitute the entire understanding between the parties with respect to the subject matter hereof and supersedes all prior agreements whether written or oral and cannot be modified or amended unless by a written instrument signed by the parties.

C. Amendments. Any amendments or alternative or supplementary provisions to this Agreement must be made in writing and duly executed by an authorized representative or agent of each of the parties hereto.

D. Severability. The invalidity of any provision contained herein or portion of a provision shall not affect the validity of any other provision contained herein or the remaining portion of the applicable provision.

E. Indulgences Not Considered Waivers. Failure or delay by the City or the Friends in exercising any right or option arising out of a breach or noncompliance with this Agreement by either party shall not be deemed a waiver of any right or option by either party with respect to any subsequent or deliberate breach or noncompliance, or the continuance of any existing breach or noncompliance.

F. Assignments. No party may assign this Agreement or any rights herein without express written consent of the other parties.

G. Successors and Assigns: This Agreement shall inure to the benefit of and be binding upon the parties hereto and their successors and permitted assigns.

H Captions; Title. The title captions, articles, and paragraph titles of this Agreement are for reference and convenience only and shall not be deemed to limit, construe or affect the meaning of the Agreement, articles or paragraphs.

I. Dispute Resolution. In the event of a dispute between the parties to this Agreement regarding a provision of this Agreement, a party's performance of its obligations as stated in the Agreement or any other matter governed by the terms of this Agreement, the parties will meet in good faith to attempt to resolve the dispute. If the parties fail to resolve the dispute, each party shall be entitled to utilize any and all rights and remedies at law or in equity, in its reasonable discretion, including but not limited to, bringing a suit or proceeding arising out of this Agreement, the prevailing party shall be entitled to recover its reasonable attorney's fees and costs incurred in such legal action or proceeding.

J. Governing Law. This Agreement shall be governed by the laws of the State of Arizona. Any litigation between the parties regarding this Agreement or the performance of any of the obligations contained in this Agreement shall be initiated in Maricopa County, Arizona.

K. Cooperation of the Parties. The parties agree to cooperate in good faith to reasonably complete the obligations set forth in this Agreement.

L. No Third Party Beneficiaries. This Agreement is solely for the benefit of the parties signing it and does not create nor shall it be construed to create rights in other parties. No parties outside of this Agreement may enforce the terms and conditions of this Agreement.

M. Nothing in this Agreement shall be construed to make the Friends either a public or quasi-public entity, department or agency of the State of Arizona or the City, or to subject the Friends to rules, regulations, laws or policies or procedures which are imposed upon or are applicable to public agencies, entities or departments, or to provide any right to the public (except the City as provided for herein) which the public may have with respect to any state or public entity, department or agency.

N. Neither this Agreement nor the performance of the parties' obligations hereunder shall subject the Friends to the State of Arizona public records act, Arizona Revised Statutes, §39-101 *et seq.*, audit by the State of Arizona Auditor General, State of Arizona conflicts of interest laws Arizona Revised Statutes, §38-501 *et seq.*, or any other laws, regulations or policies applicable to the City.

O. If applicable, the Friends agrees and warrants that it will comply with any and all applicable governmental restrictions, regulations and rules of duly constituted authorities having jurisdiction insofar as the performance of the work and services pursuant to the Agreement, and all applicable safety laws, rules and regulations, including but not limited to, the Fair Labor Standards Act, the Walsh-Healey Act, and the Arizona Fair and Legal Employment Act. A breach of this warranty is a material breach

of this Agreement and may result in termination. City retains the right to inspect the documents of any and all contractors and subcontractors performing work and/or services pursuant to the Agreement. Any and all costs associated with City inspection are the Friend's sole responsibility. The Friends hereby agrees to indemnify, defend and hold City harmless for, from and against all losses and liabilities arising from any and all violations hereof.

P. City is an equal opportunity, affirmative action employer. The Friends hereby covenant that it shall not discriminate unlawfully against any employee or applicant for employment, nor shall it deny the benefits of this Contract, to any person on the basis of race, color, national origin, physical or mental disability, age, sex or veteran status. The Friends covenant and agree that it will comply in all respects with the applicable provisions of the Executive Order 11246, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Vietnam Era Veterans' Readjustment Assistance Act, the Rehabilitation Act, and any other applicable state and federal statutes governing equal opportunity.

CITY OF TEMPE, an Arizona Municipal Corporation

Date: _____

By: _____
Mayor

FRIENDS OF TEMPE CENTER FOR THE ARTS, an Arizona Non-Profit Corporation

Date: _____

By: David B. Fisher
Its: PRESIDENT

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney