

MANAGEMENT AGREEMENT  
TCA GIFT SHOP

This MANAGEMENT AGREEMENT ("Agreement") is entered into this \_\_\_\_\_ day of February, 2010 (the "Commencement Date"), by and between the City of Tempe, an Arizona municipal corporation ("City"), and Friends of Tempe Center for the Arts, an Arizona nonprofit corporation (the "Friends").

- 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 City operates the Tempe Center for the Arts ("TCA") that includes space for a gift shop ("Gift Shop") on the premises.
- C. WHEREAS, the Friends desire to operate the Gift Shop to benefit the City and the Friends, and the City desires the assistance of the Friends for this purpose. The parties hereby set forth their agreement in writing to establish a process that will encourage and facilitate support of the TCA.

NOW, THEREFORE, in consideration of the mutual promises and covenants herein contained, and other valuable consideration, City and the Friends agree as follows:

1. Definitions. As used herein the following terms shall have the meanings indicated below:

a. "Gift Shop" means the interior space and interior walls of the three hundred sixty (360) square foot area within the TCA where the Gift Shop is located. Gift Shop excludes doors leading into the Gift Shop and the exterior walls and ceilings surrounding the Gift Shop. For purposes of this Agreement, Gift Shop may also mean a display, fixture(s) or other temporary structure, constructed or provided by Friends at its sole expense, as approved by City, for retail operation on City property of items commonly associated with a gift shop space, and only as permitted by City ordinances and for no other use during the term of this Agreement. Location of such display, fixture(s) or other temporary structure shall be determined by the City in its sole discretion, prior to each use and/or operation. See Exhibit A, attached hereto and incorporated herein by this reference.

b. "Operating Equipment and Supplies" means all furniture, furnishings and equipment required for the operation of the Gift Shop including computers, cash registers, fixtures, displays, as well as all consumable items used in the operation of the Gift Shop, such as cards, tape, packaging and all other similar items.

c. "Operating Standards" means (i) all statutes, laws, rules, regulations, orders and requirements imposed by City or any governmental body having jurisdiction over the Gift Shop relating to the operation of similar businesses (including without limitation those governing the use or manner of use of the Gift Shop, and requirements of the local Board of Fire Underwriters or any other body which may hereafter exercise similar functions), and (ii) then-current prudent business and management practices applicable to the operation, repair, maintenance and management of a Gift Shop comparable in size, character and location to the Gift Shop.

2. Management and Operation. City hereby grants to the Friends the sole and exclusive right to supervise and direct the management and operation of the Gift Shop in accordance with the Operating Standards, subject to this Agreement. The Friends shall operate the Gift Shop to City's reasonable satisfaction, in a businesslike and efficient manner consistent with the Operating Standards. City agrees that it will cooperate with the Friends in every reasonable and proper way to assist the Friends in performing its duties hereunder.

3. Term; Renewal. This Agreement shall commence on the Commencement Date and continue for an initial term of three (3) years unless sooner terminated as hereinafter provided. So long as the Friends is not then in default hereunder, this Agreement may be renewed by mutual agreement for two (2) renewal terms of one (1) year each unless either party gives written notice of non-renewal to the other no later than one hundred twenty (120) days prior to the end of any term.

4. City's Obligations. The Gift Shop will be located within the TCA, and will not be separately metered for utility services. City will maintain the TCA facility in a clean, neat and sanitary condition, not including janitorial and detail cleaning services inside the Gift Shop. The City also will maintain and repair structural elements of the Gift Shop (such as ceiling tiles and building-standard wiring), and provide regular maintenance of the structural elements of the Gift Shop consistent with its current practices for the balance of the TCA (such as window washing and painting the interior of the Gift Shop the same color as the balance of the TCA when such work is performed as part of normal maintenance of the TCA). City will reasonably furnish: (a) heat and air-conditioning to maintain the Gift Shop at a reasonably comfortable temperature during the TCA's normal operating hours; (b) local telephone service (note that said service does not include data transmission for point-of-sale system, bank transfers or other financial transactions); (c) electricity for lighting purposes, replacement of architectural light bulbs, as needed, and operation of ordinary appliances and equipment; (d) janitor and cleaning services to the area within the TCA surrounding the Gift Shop; (e) reasonable use of a fax machine (local use only) and copier to the extent such use is related to the operation of the Gift Shop; (f) use of such additional storage space up to fifty (50) square feet, as may be required for storing inventory and related items to the extent such space is reasonably available within the TCA; and (g) glass shelving, display cases, architectural and display lighting, and built-in sales counter, all currently existing at the Gift Shop, for use by the Friends. The Friends shall be responsible for payment of all other operating costs of the Gift Shop, including without limitation, payment for long distance telephone calls, internet connection and usage, and reimbursement to City for faxes

and copies that are unrelated to the operation of the Gift Shop, and heavier than normal usage of services, including electricity, and the fax machine and copier as determined by the City in its reasonable discretion. City will designate a contact person to handle communication, day-to-day consultation and long-term consultation, as needed. City's contact shall cooperate with the Friends to assist the Friends in complying with requirements set forth by law, regulations and/or City's risk management and solid waste criteria. The Friends acknowledge and agree that City shall not be liable in any way for any loss, cost, damage or inconvenience, caused by or incidental to the cessation or interruption of any of such services occasioned by fire, accident, strikes, necessary maintenance, alterations, or repairs, or any other causes beyond City's control, whether similar or dissimilar to the foregoing. Patrons of the Gift Shop shall have access to the TCA, including its lavatories; however, the Friends shall cooperate with TCA staff to ensure that patrons do not violate any use restrictions generally applicable to the TCA.

5. The Friends' Obligations. The Friends hereby represent and warrant to, and covenant with City, as follows:

a. The Friends acknowledge and agree to accept the Gift Shop in its present condition. Except as specifically provided in this Agreement, City has no obligation to construct, remodel, improve, repair, decorate or paint the Gift Shop or any part thereof.

b. The Friends shall manage, administer and operate the Gift Shop at its sole expense in accordance with this Agreement and the Operating Standards, and shall provide all Operating Equipment and Supplies necessary to the normal operation of the Gift Shop in accordance with the Operating Standards and this Agreement. The Gift Shop shall be used solely for the operation of a retail gift shop and hours of operation shall be mutually agreed upon by City and Friends based on the schedule of TCA events and programs. Friends shall be solely responsible for opening and closing the Gift Shop, operating the cash register, recording sales, cash handling, and any and all financial transactions conducted in the operation of the Gift Shop. Friends shall have access to the Gift Shop limited to those times when TCA and/or City staff are on TCA premises. Friends shall not be granted means of entry at times when no TCA and/or City staff are present at TCA. Friends shall provide regularly scheduled janitorial and detail cleaning of the Gift Shop and inventory at no cost to the City.

c. The Friends shall obtain and maintain in effect all licenses and permits required for the operation of the Gift Shop, and shall comply with any conditions stated in those licenses and permits. The Friends shall collect and pay any taxes associated with operation of the Gift Shop if applicable, including without limitation sales or transaction privilege taxes, workers' compensation and/or employment taxes, as applicable.

d. The Friends shall recruit, select, hire and coordinate all Gift Shop personnel, including volunteers. In addition Friends shall provide adequate personnel for the operation of the Gift Shop at no cost or expense to City at all times during Gift Shop's normal operating hours. In the event that any person is performing a service or duty for

the Gift Shop, regardless of whether said person is employed by or volunteering on behalf of the City, the Friends agree and acknowledge that Friends are solely responsible for any and all liability caused, created or contributed to by said person, including but not limited to property damage and/or bodily injuries, while in the course of undertaking such services or duties, however briefly or temporarily performed. Friends hereby agree to hold harmless and indemnify the City for any and all damages arising from or relating to such services or duties, regardless of the employment or volunteer status of such person. The amount and type of insurance, including worker's compensation coverage if applicable, shall in no way be construed as limiting the scope of indemnity in this paragraph. The Friends assume all costs, fees and expenses attendant to the staffing of and personnel used in the operations of the Gift Shop. All personnel, including volunteers of the Gift Shop shall be hired, employed and paid by the Friends. City shall not interfere with or give orders or instructions to any personnel employed at the Gift Shop, provided, however, that if City is reasonably dissatisfied with the performance and/or conduct of any of such personnel, City may request that appropriate action be taken by giving written notice to the Friends specifying with particularity the nature of the dissatisfaction, and requesting that appropriate action be taken. The Friends shall review the situation, and shall then take whatever action it deems appropriate, if any, based upon the Operating Standards for the Gift Shop. The Friends shall inform City in writing of its consideration of the matter and any action taken by the Friends in connection therewith. The Friends will use reasonable care to select qualified, competent and trustworthy personnel. The Friends warrant that its personnel and volunteers shall present a neat, well-groomed appearance, and act in a courteous and professional manner at all times.

e. The Friends agree that and warrant that it shall keep current and accurate schedules of its personnel and volunteers at all times that the Gift Shop is open, as well as any other time that personnel and volunteers of Friends are working on behalf of the Gift Shop. The Friends agree to provide copies of said schedules to the City upon request. The Friends acknowledge that documents provided to the City may be subject to Arizona law concerning public records.

f. The Friends may, at its sole cost and expense, conduct sales and marketing activities for the Gift Shop, including but not limited to, design and production of marketing materials, logo marks and other such associated materials. The City reserves the right to review and approve or disapprove any and all such materials prior to their use or display. All such materials shall be in accordance with the TCA graphics standards and, when applicable, shall specify the Gift Shop's location at the TCA.

g. The Friends shall, at its sole cost and expense, repair, replace and maintain the Gift Shop and the Operating Equipment and Supplies in a clean, neat and sanitary condition and shall keep the Operating Equipment and Supplies and every part thereof in good condition and repair during the term of this Agreement. In that regard, the Friends shall at its sole cost and expense, repair or replace, as necessary, any Operating

Equipment and Supplies that are consumed in the normal course of operations or that become worn or obsolete, including but not limited to, light bulbs for display lighting and non-architectural fixtures. All Operating Equipment and Supplies not provided by the City, and replacements thereof, shall constitute the property of the Friends.

h. Without City's prior written consent, the Friends shall not make any alterations, additions or improvements or remodel, redecorate or paint the Gift Shop, or any part thereof. Without City's prior written consent, the Friends shall not erect any signs outside the immediate area of the Gift Shop or on the exterior of the TCA. However, City agrees to cooperate to obtain signatures within TCA graphics standards for signage at the Gift Shop. City shall have the absolute right to grant or withhold its consent. Any alterations or improvements constructed at the Gift Shop shall become part of the TCA and constitute the property of City. If, at any time during the term of this Agreement, any repairs to or additions, changes or corrections in the Gift Shop (not relating to structural elements of the TCA building) are required by reason of any laws, ordinances, rules or regulations now or hereafter in force, the Friends shall make such repairs, additions, changes or corrections at its sole cost and expense. The Friends shall notify City if the cost of any repairs, additions, changes or corrections exceeds the Gift Shop's projected operating revenues for the next fiscal year. In that event, City and the Friends shall cooperate with each other to locate an alternate source of funding.

i. All property of any kind that may be at the Gift Shop shall be at the sole risk of the Friends or those claiming through or under the Friends.

j. The Friends shall not subject City, the TCA or the Gift Shop to any liability or lien for any reason, including, but not limited to, or on account of, any work done or improvements made or materials placed on or used in the Gift Shop. The Friends shall procure property insurance for any tenant improvements or betterments to the Gift Shop and shall have property coverage that extends to all personal property.

k. The Friends represents that it has full power and authority to execute this Agreement and to be bound by and perform the terms hereof. At all times during the term of this Agreement, the Friends shall maintain its status as a tax-exempt organization pursuant to Section 501(c)(3) of the Internal Revenue Code of 1986, as amended. Failure to maintain such tax exempt status shall result in termination of this Agreement.

l. The Friends shall not make or permit any use of the Gift Shop which would create a nuisance or would disturb the patrons of the TCA.

m. The Friends agree to familiarize Gift Shop employees with the safety procedures and regulations governing all parts of the TCA used by the Friends, within the scope and parameters of this Agreement. The Friends, in cooperation with the City, shall instruct employees on the building evacuation plan in the event of fire or other disaster including evacuating any persons with disabilities among them.

n. The Friends shall be solely responsible for the safety and well-being of Gift Shop employees, personnel, volunteers, and all other agents of the Friends, during operation of the Gift Shop. The Friends hereby warrant and agree to provide safeguards, protective equipment and such other services on the premises of the Gift Shop, as deemed necessary. The Friends assume full responsibility for protecting the Gift Shop from theft, robbery or pilferage, which includes keeping doors locked and other means of entry to the Gift Shop, if any, closed and secured. The Friends agree to cooperate in all security programs of the City, as affecting the Gift Shop.

o. 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.

p. The Friends warrant and agree to 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 applicable law.

q. The Friends hereby agree to immediately notify the City through the TCA contact person, by telephone within two (2) hours and in writing at the addresses set forth herein, of an event of loss, damage or destruction involving the Gift Shop or its space. In no event shall such time period for receipt of written notice exceed seventy two (72) hours from the time that the Friends become aware of such loss, damage or destruction.

r. The Friends shall supply display furniture and fixtures in addition to the existing fixtures at the Gift Shop, as needed for the successful operation of the Gift Shop. The Friends agree to maintain the furniture and fixtures in good condition and execute all repairs in a timely and safe manner, at its sole cost and expense.

s. The Friends will designate a contact person to handle communication, day-to-day consultation and long-term consultation, as needed. The Friends' contact shall cooperate with the City in the furtherance of this Agreement, and shall comply with all applicable requirements set forth by law, regulations and/or City's Risk Management and Solid Waste criteria. The TCA contact person shall be responsible for providing the Friends with risk management and solid waste criteria.

t. The Friends agree to provide signage for the Gift Shop at the TCA subject to prior City approval, in compliance with the Tempe City Code and TCA graphics standards.

u. The Friends agree to obtain and fund long-distance telephone service, if needed, and contract with a provider to supply high-speed internet connection for all Gift Shop operations at all times during the term of this Agreement.

v. The Friends agree to provide off-site storage for any and all inventory items, in excess of what may be reasonably and safely stored in the attached fifty (50) square foot Gift Shop storage room, at its sole cost and expense.

w. The Friends agree and warrant that it shall prepare an incident report upon any event of bodily injury and/or property damage, and provide the City with a copy of such report within twenty-four (24) hours of any incident. Such incident report shall include at a minimum: (a) Date of the incident; (b) Time of the incident; (c) Location of the incident; (d) Description of how the incident occurred; (e) Description of bodily injuries, if any, including type of injury involved; (f) Description of property damage, if any, and (g) Witnesses, if any; (h) Medical treatment rendered, if any; and (i) Report to Authorities, if any.

6. Mutual Covenants and Agreements. City and the Friends hereby covenant and agree with each other as follows:

a. Subject to the terms of this Agreement, the Friends shall have exclusive control and discretion in the operation of the Gift Shop, including but not limited to the selection of inventory available for sale at the Gift Shop; subject to City's curatorial discretion. City shall retain the right to periodically review the inventory and request in writing the removal of any items. Upon receipt of such request, a meeting will be held between the Gift Shop and the TCA to discuss the issue and to reach a mutual course of action. The Friends agree to remove the subject item(s) temporarily during the discussion period, upon receipt of such request by City. The Friends shall remove the requested item(s) within ten (10) days after the meeting if agreement cannot be satisfactorily reached.

b. If the fixtures constructed by the Friends within the Gift Shop or any part thereof, or any of the Friends' personal property, such as inventory, is damaged or destroyed by fire or other casualty so as to render the Gift Shop unfit for use and occupancy, the Friends will proceed, as expeditiously as may be practicable, to repair the damage, unless City decides not to repair or restore the TCA, in which event and at City's sole option, City may terminate this Agreement by giving the Friends ninety (90) days' written notice. The Friends agree that all proceeds from insurance policies maintained by it with respect to the Gift Shop excluding any proceeds attributable to the Friends' inventory or trade fixtures shall be paid to City and City agrees to apply such proceeds to reconstruction of the Gift Shop.

c. The Friends shall afford City, its accountants, employees, attorneys and agents, the right to enter upon any part of the Gift Shop at all reasonable times during the term of this Agreement for the purpose of examining, copying or making extracts of books and records of the Gift Shop or for any other purpose which City, in its discretion,

shall deem necessary or advisable, but the same shall be done with as little disruption to the business of the Gift Shop as possible.

d. The books and records reflecting Gift Shop operations shall be kept by the Friends and shall be maintained either at the Gift Shop or at the Friends' principal office, at the Friends' option. Within one hundred sixty (160) days after the end of each fiscal year, the Friends shall deliver or cause to be delivered to City an operating statement prepared in accordance with generally accepted accounting principles showing the results of operation of the Gift Shop during the preceding fiscal year. The Friends also shall provide any other financial statements or other information reasonably requested by City, within thirty (30) days after written request therefor.

e. All programming sponsored by the Friends at or within the Gift Shop must be approved in advance by the City through the TCA contact person.

f. The parties hereby agree to mutually endeavor to agree upon the name of the Gift Shop, and once agreed, the Friends shall obtain and file any and all necessary documents for the legal establishment of or registration of such name, at the Friends' sole cost and expense.

#### 7. Compensation.

In consideration of the operation and management of the Gift Shop by the Friends. The Friends agree to pay the City as follows:

a. Five percent (5%) of gross revenues of Gift Shop in each year of operation.

b. Payment shall be payable by the Friends to the City in the sum specified in Section 7.a. herein, in quarterly installments payable on the first (1<sup>st</sup>) day of each quarter, without prior demand and without offset or deduction, except as expressly provided in this Agreement. Friends shall pay the installment to the City at the following:

Cultural Facilities Administrator  
Tempe Center for the Arts  
700 West Rio Salado Parkway  
Tempe, AZ 85281

c. Friends shall prepare and keep true and accurate books of account and records for Gift Shop, in accordance with generally accepted accounting principles consistently applied, including all sales, tax, and other reports filed with governmental agencies; all purchases and receipts of merchandise; inventories and all sales and other transactions by Friends from which gross revenues can be determined.

d. For purposes of this Agreement, gross revenues shall mean: all charges, monies and payments, in whatever form, received or receivable by the Friends for any sales made or any services rendered on or at the Gift Shop, excluding the processing of memberships, sponsorships, donations, or other monies tendered to the Friends not related to an item for sale in the Gift Shop, whether collected or uncollected, whether for cash or credit, whether paid for or not, less sales taxes imposed by local, state or federal law which are stated to and paid by a purchaser of any item sold by the Friends or of any authorized service or activity of the Friends and payable directly to a taxing authority, service charges invoiced to and paid by a purchaser, gratuities and any legitimate refunds made to a purchaser as authorized according to procedures agreed to in writing by the Friends and City.

8. Cancellation Rights; Right of First Refusal.

a. Either party may terminate this Agreement at any time upon one hundred twenty (120) days' prior written notice to the other. The rights and obligations of City and the Friends under this Agreement shall cease on the date of termination except for those set forth in Sections 9 and 10 herein. In addition to any other rights of termination, City shall have the right to terminate this Agreement in accordance with Section 38-511 of the Arizona Revised Statutes, as amended.

b. Upon the expiration or termination of this Agreement, City shall have and the Friends hereby grant City a right of first refusal to acquire the fixtures, improvements, Operating Equipment and Supplies and other materials used in connection with the operation of the Gift Shop, at any time after notice of termination is given until the ninetieth (90<sup>th</sup>) day following the date of expiration or termination, at a price equal to such amount as the parties may agree; provided, that if in the exercise of good faith, the parties are unable to agree on a price within thirty (30) days after City notifies the Friends of its exercise, then the price shall be the fair market value as determined by an independent appraiser qualified to appraise similar assets.

9. Insurance Requirements. Prior to the Commencement Date, the Friends shall procure and maintain in effect insurance against claims for injuries (including death) to persons and for damages to property, which claims may arise from or in connection with the operation and management of the Gift Shop by the Friends, its agents, representatives, employees, volunteers, subcontractors, or sub-subcontractors.

a. The Friends shall maintain limits no less than:

i. Commercial General Liability: \$1,000,000 combined single limit per occurrence 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 and completed operations. The general aggregate limit shall apply separately to the activities contemplated by

this Agreement or the general aggregate shall be twice the required occurrence limit.

ii. 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.

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

iv. Property Insurance: Property insurance against all risks of loss to any tenant improvements or betterments and personal property for full replacement cost with no coinsurance penalty provision.

v. Fidelity Bond: A blanket fidelity bond covering all officers and employees, in an amount not less than \$7,500, with any deductible not to exceed \$1,000, including City as an additional obligee or loss payee as its interest may appear.

vi. Professional Liability: Professional liability insurance covering errors and omissions of the directors and officers, arising out of the services performed by the Friends or any person employed by Friends, with an unimpaired limit of not less than \$1,000,000 each claim and \$1,000,000 all claims. In the event the insurance policy is written on a "claims made" basis, coverage shall extend for two (2) years past completion and acceptance of services as evidenced by annual Certificates of Insurance.

b. Any deductibles or self-insured retentions must be declared and approved by City. At City's option, either the insurer shall reduce or eliminate any deductibles or self-insured retentions with respect to City, its officials, employees, and volunteers, or the Friends shall procure a bond guaranteeing payment of losses and related investigations, claims administration, and defense expenses.

c. The policies or self insurance certifications shall contain, or be endorsed to contain, the following provisions:

i. Commercial General Liability and Automobile Liability Coverage

(a) City, its officials, employees, and volunteers are to be covered as additional insureds as respects: liability arising out of activities performed by or on behalf of the Friends including the insured's general supervision of the Friends; products and completed operations of the Friends; premises owned, occupied or used by the Friends, or automobiles

owned, leased, hired or borrowed by the Friends. The coverage shall contain no special limitations on the scope of protection afforded to City, its officials, employees, or volunteers related to the Friends, its employees', agents', subcontractors', or sub-subcontractors' activities pursuant to this Agreement.

(b) The Friends' insurance coverage shall be primary as respects City, its officials, employees, and volunteers. Any insurance or self-insurance maintained by City, its officials, employees, or volunteers shall be excess of the Friends insurance and shall not contribute to it.

(c) Any failure to comply with reporting provisions of the policies shall not affect coverage provided to City, its officials, employees, or volunteers.

(d) Coverage shall state that the Friends' insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

ii. Workers' Compensation and Employers' Liability Coverage. The insurer shall agree to waive all rights of subrogation against City, its officials, employees and volunteers for losses arising from the activities performed by the Friends for City pursuant to this Agreement.

iii. All Coverages. Each insurance policy required by this Agreement shall be endorsed to state the coverage shall not be suspended, voided, and/or canceled by either party, reduced in coverage or in limits except after thirty (30) days prior written notice by certified mail, return receipt requested, has been given to City.

d. The Friends shall:

i. Prior to the Commencement Date, furnish City with certificates of insurance, in form and with insurers acceptable to City's Risk Manager (or designee) which shall clearly evidence all insurance required in this Agreement and provide that such insurance shall not be canceled, allowed to expire or be materially reduced in coverage except on thirty (30) days prior written notice to and approval by City, and in accord with the stated insurance requirements of this Exhibit. City shall not be obligated, however, to review same or to advise the Friends of any deficiencies in such policies and endorsements, and such receipt shall not relieve the Friends from, or be deemed a waiver of City's right to insist on, strict fulfillment of the Friends' obligations under this Agreement.

ii. Provide certified copies of endorsements and policies if requested by City in lieu of or in addition to certificates of insurance.

iii. Replace certificates, policies, and endorsements for any such insurance expiring prior to completion of services.

iv. Maintain such insurance throughout the term of this Agreement, including all renewals. If any required insurance lapses, and is not reinstated promptly, City may terminate this Agreement effective on the date of such lapse of insurance.

v. Place such insurance with insurers and agents licensed and authorized to do business in Arizona and having a "Best's" rating of no less than A-VII.

vi. Maintain such coverage continuously throughout the term of this Agreement and without lapse for a period of two years beyond the expiration or termination of this Agreement, if any of the required insurance is provided under a claims-made form, to the extent that occurrences during the term of the Agreement give rise to claims made after expiration of the Agreement, such claims shall be covered by such claims-made policies. Such extension of coverage shall be evidenced by annual certificates of insurance.

e. The Friends shall include all subcontractors and sub-subcontractors as insureds under its policies or shall furnish separate certificates and endorsements for each subcontractor and sub-subcontractor. All coverage for subcontractors and sub-subcontractors shall be subject to all of the requirements stated herein for the Friends.

f. The Friends shall have sole responsibility and control over the Gift Shop. The Friends shall be solely and completely responsible for the condition of the Gift Shop, including the safety of all persons (including employees and volunteers) and property at the Gift Shop. This requirement shall apply continuously and not be limited to normal hours of the Gift Shop. Safety provisions shall conform to all applicable federal (including OSHA), state, county, and local laws, ordinances, codes, and regulations. Where any of these are in conflict, the more stringent requirement shall be followed. The Friends' failure to thoroughly familiarize itself with the aforementioned safety provisions shall not relieve it from compliance with the obligations set forth therein.

10. Indemnity. To the fullest extent permitted by law, the Friends shall defend, indemnify and hold harmless City, its agents, officers, elected officials, employees and volunteers from and against all claims, damages, losses and expenses (including but not limited to attorney's fees, court costs, and the costs of appellate proceedings), arising out of, or alleged to have resulted in whole or in part from the negligent acts, errors, mistakes, omissions, work, services, or professional services of the Friends, its agents, employees, or any other person (not

City) for whose acts, errors, mistakes, omissions, work, services, or professional services the Friends may be legally liable in the performance of this Agreement. The Friends' duty to hold harmless and indemnify City, its agents, officers, officials, employees and volunteers shall arise in connection with any claim for damage, loss or expenses that is attributable to bodily injury, sickness, disease, death, or injury to, impairment, or destruction of any person or property, including loss of use resulting therefrom, caused by any negligent acts, errors, mistakes, omissions, work, services, or professional services in the performance of this Agreement in whole or in part by the Friends or any employee of the Friends, or any other person (not City) for whose negligent acts, errors, mistakes, omissions, work, or services the Friends may be legally liable. The amount and type of insurance coverage requirement set forth herein will in no way be construed as limiting the scope of indemnity in this paragraph. This provision shall survive the term of the Agreement.

Notwithstanding the foregoing, in no event shall the Friends be liable, or have any indemnification obligation to City, for any liabilities arising by reason of the gross negligence or willful acts of City, its agents, employees or volunteers.

11. Events of Default. It shall be an event of default hereunder (an "Event of Default") if any one or more of the following events shall occur:

a. City fails in any material respect to perform any of its obligations and agreements hereunder and such failure continues for a period of ten (10) business days after receipt of written notice from the Friends.

b. The Friends is dissolved; applies for or consents to the appointment of a receiver, trustee or liquidator of all or a substantial part of its assets; files a voluntary petition in bankruptcy or otherwise seeks to avail itself of any federal or state laws for the relief of debtors; admits in writing its inability to pay its debts as they become due; makes a general assignment for the benefit of creditors; or files a petition or an answer seeking reorganization or arrangement with creditors or to take advantage of any insolvency law or files an answer admitting the material allegations of any petition filed against it in any bankruptcy, reorganization or insolvency proceeding.

c. The Friends fail in the reasonable judgment of City to perform any of its obligations hereunder and such failure continues for a period of ten (10) business days after receipt of written notice from City.

d. The Friends abandon or discontinue operation of the Gift Shop for a period of four (4) consecutive days, without notice to the City, where such abandonment or discontinuance is not caused by the damage, destruction or closing of the Gift Shop.

e. Any person volunteering or employed by the Friends at the Gift Shop is convicted of any felony or any misdemeanor involving dishonesty or moral turpitude, and is not removed within five (5) days after the Friends receives notice of such conviction.

f. The Friends' failure to obtain and maintain any insurance coverage required to be maintained by it hereunder.

Upon the occurrence of an Event of Default, this Agreement shall terminate, and neither party shall have any further obligation or liability to the other except as otherwise provided herein.

12. The Friends' Obligations on Termination. Upon termination of this Agreement for any reason, the Friends shall (a) remove its own property from the Gift Shop within ten (10) days after expiration or written waiver of the City's right of first refusal; (b) surrender the Gift Shop to City, broom clean and in the same condition as when received, ordinary wear and tear excepted; (c) surrender (and assign, if permitted) to City all licenses, permits and/or other authorizations or property required for the operation of the Gift Shop in accordance with the directions of City and with applicable governmental laws, regulations, orders, or other provisions; (d) deliver to City possession of the Gift Shop, together with all keys to the Gift Shop, and if City has exercised its right of first refusal, possession of all equipment, improvements and supplies acquired by City. If City exercises its right of first refusal, any and all contracts, leases, licenses, warranties, guarantees, and other Operating Equipment and Supplies held in the Friends' name shall be assigned by the Friends to City and the Friends agrees to execute and deliver such instruments of assignment in connection therewith in such form and in such descriptions as may be from time to time requested by City after termination of this Agreement.

13. Notices. All notices which shall or may be given pursuant to this Agreement shall be in writing and transmitted by registered or certified mail, return receipt requested, addressed as follows:

To the Friends:	Friends of the TCA 700 W. Rio Salado Parkway Tempe, AZ 85281
To City:	City Manager City of Tempe 31 East Fifth Street Tempe, Arizona 85281
With a copy to:	Community Services Manager City of Tempe 3500 South Rural Road Tempe, Arizona 85282

City Attorney  
City of Tempe  
21 East 6<sup>th</sup> Street, Suite 201  
Tempe, Arizona 85281

Either party may designate any other address for this purpose by written notice to the other party in the manner described herein.

14. Further Actions. City and the Friends agree to execute all contracts, agreements and documents and to take all actions necessary to comply with the provisions of this Agreement and the intent hereof.

15. Assignment. The Friends shall not assign or in any manner sell or transfer any of its rights and interests in this Agreement, including without limitation, its right to operating revenues generated by the Gift Shop.

16. Binding Effect. This Agreement shall be binding on and shall inure to the benefit of the successors in interest and the permitted assigns of the parties.

17. Operation of Gift Shop. If at any time during the term hereof it becomes necessary in the reasonable opinion of the Friends or City, to cease operation of the Gift Shop to protect the Gift Shop and/or the health, safety and welfare of the guests and/or employees of the Gift Shop or the TCA for reasons of force majeure such as, but not limited to, acts of war, insurrections, civil strife and commotion, labor unrest, or acts of God, then in such event, upon written notice to the other, City or the Friends may close and cease operation of all or part of the Gift Shop, reopening and commencing operation when they deem that such may be done without jeopardy to the Gift Shop, its guests, employees and volunteers.

18. Amendments; Counterparts. This Agreement may be amended or modified only by a written agreement executed by both parties. This Agreement may be executed in one or more counterparts, all of which, when taken together, shall be deemed an original. The captions for each Article are intended for convenience only and are not intended to define, limit or describe the scope of any provision of this Agreement.

19. 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 to enforce the provisions of this Agreement. In the event of any legal action 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.

20. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Arizona. This Agreement has been made and entered into in Maricopa County, Arizona.

21. Waiver. No waiver by either party of any breach of any of the terms, covenants or conditions of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same for any other term, covenant or condition herein contained.

22. Severability. In the event that any phrase, clause, sentence, paragraph, section, article or other portion of this Agreement shall become illegal, null or void or against public policy, for any reason, or shall be held by any court of competent jurisdiction to be illegal, null or void or against public policy, the remaining portions of this Agreement shall not be affected thereby and shall remain in full force and effect to the fullest extent permitted by law.

23. Entire Agreement. This Agreement constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof and all prior and contemporaneous agreements, representations, negotiations and understandings of the parties hereto, oral or written, are hereby superseded and merged herein.

24. No Partnership or Joint Venture. In performing its duties under this Agreement, the Friends is an independent contractor and nothing in this Agreement or otherwise in the relationship of the parties shall render them partners or joint venturers.

25. Relationship of Parties. 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.

26. Conflicts of Interest. 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 in its sole discretion.

27. Legal Compliance. If applicable, the Friends agree and warrant 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 Friends' sole responsibility. The Friends hereby agree to indemnify, defend and hold City harmless for, from and against all losses and liabilities arising from any and all violations hereof.

28. No Discrimination. 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.

[SIGNATURE PAGE TO FOLLOW]

IN WITNESS WHEREOF, City has caused this Agreement to be duly executed in its name and behalf by its Mayor and its seal to be hereunto duly affixed and attested to by the City Clerk, and the Friends have executed and sealed the same on or as of the day and year first above written.

ATTEST:

“CITY”

THE CITY OF TEMPE, an Arizona municipal corporation

\_\_\_\_\_  
City Clerk

APPROVED AS TO FORM:

By \_\_\_\_\_  
Hugh Hallman, Mayor

\_\_\_\_\_  
City Attorney

FRIENDS OF THE TEMPE CENTER  
FOR THE ARTS

By:     *Sail B. Fisher*    

Its:     PRESIDENT

# EXHIBIT A Gift Shop Extension

