



Memorandum

TO: HONORABLE MAYOR, CITY
COUNCIL AND AGENCY BOARD

FROM: Debra Figone
Harry S. Mavrogenes

SUBJECT: SEE BELOW

DATE: December 1, 2009

COUNCIL DISTRICT: City-Wide

**SUBJECT: MEMORANDUM OF UNDERSTANDING OF GENERAL TERMS AND
CONDITIONS FOR AN AGREEMENT FOR USE OF THE HP PAVILION
AT SAN JOSE BY A NBA FRANCHISE**

RECOMMENDATION

Approval of a Memorandum of Understanding (MOU) by the City and Redevelopment Agency with San Jose Arena Management, LLC (Arena Manager) that sets forth general terms and the respective roles and responsibilities of the City and Arena Manager in their efforts to attract a National Basketball Association (NBA) franchise to locate in San Jose.

BACKGROUND

The Arena Management Agreement ("AMA") of October 1991 between the City and the Arena Manager expressed the mutual desire to attract a NBA franchise to play its home games at the HP Pavilion at San Jose. Along with the Sharks National Hockey League franchise, attracting a second major franchise such as a NBA team was viewed as a potential opportunity that would enhance the long term success of the building, and provide additional economic benefit for the Downtown.

Over the years there have been efforts to secure a NBA tenant. In 1995 an unsuccessful attempt was made to have the Golden State Warriors relocate to San Jose. The Warriors ultimately agreed to a long-term extension to play in Oakland that required extensive renovation of the Oakland facility. As a result, the Warriors played their 1996/97 season in San Jose. In 2007, the Arena Manager made a strong, but unsuccessful, bid to bring the Seattle SuperSonics to the Arena. Over the past few years, there have been inquiries from other NBA franchises.

San Jose offers a good building, excellent building management, a dynamic regional economy, a great fan base and a vibrant sports management partner. It is reasonable to expect continued interest in our building by a NBA tenant.

PURPOSE

The purpose of the proposed MOU (attached) is to implement the terms of the AMA concerning the joint efforts of the City/Agency and Arena Manager to pursue a NBA franchise; to respond to any overtures in a coherent, timely and effective manner; to advance the process by which the Arena can be updated to accommodate a NBA franchise and to provide ongoing Council review of this effort.

ANALYSIS

Following are the major provisions of the MOU:

(1) Establishes roles and responsibilities.

The MOU supplements the AMA by clearly defining roles and responsibilities regarding attracting a NBA franchise. The proposed MOU allows a potential NBA tenant to conduct negotiations with Arena Management, with active City participation. This avoids any potential NBA tenant from conducting separate discussions with the City and Arena Manager. Separate discussions can establish an adversarial relationship between the City and Arena Manager and work against joint efforts to secure a NBA franchise.

The MOU provides that during its term the City will not have unilateral discussions of business terms with a NBA franchise and defines the roles and responsibilities for both the City and the Arena Manager in cooperatively pursuing a NBA franchise. It states:

“City/Agency and Manager shall work together in a cooperative effort to market the Arena as a NBA franchise home court venue. Arena Manager shall take the lead in these marketing efforts, however, all significant or substantial discussion and negotiations with NBA franchise representatives regarding business terms, including but not limited to: Additional Improvements (hereinafter defined), building rent and general terms of allocations of basketball-related revenues and expenses will include City participation.”

(2) Provides a framework for potential negotiations by addressing major concerns.

For example, the MOU provides:

- Any deal would benefit financially both parties. Since the NHL and NBA have a comparable number of home games in their seasons, a NBA tenant would pay annual rent comparable to the rent paid for hockey use.
- Certain improvements would be required to the existing Arena to accommodate a NBA tenant: locker rooms, administrative offices, practice facility, etc. In 2006 the City and Arena Manager committed to use a portion of the proceeds from the Comerica Naming Rights Agreement at the Arena to provide funding to identify improvements necessary to accommodate a NBA franchise. That effort is ongoing. A portion of the additional

revenues from the NBA use of the Arena would be used to underwrite the costs of these improvements. The MOU contemplates that in the event a NBA franchise becomes a tenant it will be necessary to extend the AMA term to match the term of the NBA franchise's lease.

- The City/Agency and the Arena Manager acknowledge the need to keep the building competitive by continuing to fund capital reserves sufficient to meet agreed upon building repair, replacement and enhancement schedules.
- The extension of the existing AMA will maintain the provisions that the City/Agency and Arena Manager will continue to cooperate to insure that adequate parking and effective access are maintained to support the Arena.
- City/Agency and Arena Manger shall jointly develop and agree on terms to be presented in a letter of intent for the purpose of negotiating with or to be presented to any specific NBA franchise.

(3) Cooperation and cost benefit analysis.

City/Agency staff are required to publish a cost-benefit analysis before an agreement for use of the Arena by a NBA franchise is voted on by the City Council/Agency Board. It is intended by the parties that the analysis be conducted by an appropriate outside expert chosen by City/Agency. City/Agency will work in close cooperation with Arena Manager in the selection of the expert and both City/Agency and Arena Manager will provide relevant information requested by the expert to complete the analysis in a timely manner. City/Agency and Arena Manger shall each pay one half of the cost of the expert.

(4) Term.

The MOU has an Initial Term of two years. The term will be automatically renewed for successive one year periods unless, at least 90 days prior to the Anniversary Date, a party gives written notice to the others of intent to not renew the MOU.

SUMMARY

By entering into the MOU, City/Agency and Arena Manager are setting forth a more clearly defined path for the Parties to follow in their efforts to attract a NBA franchise to San Jose. Execution of the MOU does not create an obligation on the part of City/Agency or Arena Manager to enter into an agreement that may result from the discussions or negotiations regarding a NBA tenant.

EVALUATION AND FOLLOW-UP

Representatives of Arena Manager, City and Agency will meet on a regular basis and City/Agency representatives will provide a status report on a semi-annual basis to the Community and Economic Development Committee of the City Council with respect to the activities of the Parties under this Memorandum.

COST SUMMARY AND IMPLICATION

The Office of Economic Development would cover costs out of their non-personal funds at the time it is necessary to complete a cost-benefit analysis.

COORDINATION

This memorandum has been coordinated with the City Attorney's Office.

CEQA

Exempt, File No. PP09-202.



DEBRA FIGONE
City Manager



HARRY S. MAVROGENES
Executive Director

For questions please contact PAUL KRUTKO, CHIEF DEVELOPMENT OFFICER,
at (408) 535-8179 or
ABI MAGHAMFAR, REDEVELOPMENT AGENCY
DEPUTY EXECUTIVE DIRECTOR
at (408) 795-1891

Attachment

**MEMORANDUM OF UNDERSTANDING OF GENERAL TERMS AND
CONDITIONS FOR AN AGREEMENT FOR USE OF HP PAVILION AT
SAN JOSE BY AN NBA FRANCHISE**

Introduction

Section 3.03 of the Amended and Restated Arena Management Agreement (“AMA”) provides a framework for the City of San Jose and the Redevelopment Agency of the City of San Jose (“City” and “Agency” or collectively “City/Agency”) and San Jose Arena Management (“Arena Manager”) to market HP Pavilion at San Jose (“Arena”) as a home court venue for an NBA franchise. The section provides that the City and Arena Manager shall work cooperatively to develop general terms and conditions of an agreement that can be used as a guideline for negotiations with an NBA franchise to prepare for successful marketing of the Arena prior to a presentation of a letter of intent to an NBA franchise. The letter of intent will outline comprehensive sources of revenue and expenses relative to the occupancy of the NBA franchise, which will receive the revenues and be responsible for the expenses.

As expressed in the original AMA and reaffirmed in the 2000 update of the AMA, Arena Manager and City/Agency mutually desire to attract an NBA franchise to play their home games at the Arena and recognize the successful marketing of the Arena for such additional professional sports franchise requires the cooperation of all parties. City/Agency and Arena Manager agree for the term of this Memorandum to work diligently and in good faith towards the goal of obtaining an NBA franchise to play its home games at the Arena.

The purpose of this Memorandum is to set forth such general terms and conditions and the respective roles and process City/Agency and Arena Manager shall use during the term of this Memorandum to market the Arena for use as an NBA franchise venue. Neither this Memorandum nor the Parties actions in developing this Memorandum are directed toward any specific NBA franchise, however, it is intended that this Memorandum will facilitate the Parties in pursuing a candidate in a coordinated and timely fashion when a candidate or candidates are identified. It is anticipated that City/Agency will adopt a common position on issues presented pursuant to the memorandum and will not act independently from one and other.

Process

City/Agency and Arena Manager shall work together in a cooperative effort to market the Arena as an NBA franchise home court venue. Arena Manager shall take the lead in these marketing efforts, however all significant or substantial discussion and negotiations with NBA franchise representatives regarding business terms, including but not limited to, Additional Improvements (hereinafter defined), building rent and general terms of allocations of basketball related revenues and expenses will include City participation. All information related to said issues shall be shared with City/Agency promptly upon

Arena Manager receipt. City/Agency will not participate with regard to specific discussions of potential ownerships interests of Arena Manager in an NBA franchise. From time to time City/Agency shall each have designated a principal representative or representatives to lead such parties' participation in the discussions and negotiations contemplated herein.

During the term of this Memorandum, City/Agency will not conduct or participate in separate discussions or negotiations regarding business terms with an NBA franchise.

City/Agency and Arena Manager shall jointly develop and agree on terms to be presented in a letter of intent for the purpose of negotiating with or to be presented to any specific NBA franchise. Terms to include basketball rent, basketball revenues, basketball related improvements and basketball related expenses.

Representatives of Arena Manager, City and Agency will meet on a regular basis and City/Agency representatives will provide a status report on a semi-annual basis to the Economic Development Committee of the City Council/Agency Board with respect to the activities of the Parties under this Memorandum.

City/Agency and Arena Manager shall each be responsible for any and all costs and expenses they incur in marketing the Arena for use as an NBA franchise venue unless otherwise agreed by the Parties in advance of incurring the expense.

Parties recognize that from time to time the Parties will need to protect confidential information produced, requested, or provided by one of the parties or an NBA franchise, to the others. Such confidential information when denominated and agreed by all Parties to be confidential information and protected from disclosure by applicable laws, shall not be distributed, disseminated, or become public without approval of the party providing the confidential information unless so ordered by a court of competent jurisdiction.

Recognition of Need for Additional Facilities to Attract and Accommodate an NBA Franchise and Additional Revenues to be Generated by an NBA Franchise

Arena Manager and City/Agency recognize that additional capital investment in facilities will be necessary to attract an NBA franchise (Additional Improvements).

The Additional Improvements that would be constructed outside of the existing Arena building may be constructed on the Arena site or elsewhere within San Jose on property owned by the City or Agency. City/Agency and Arena Manager shall agree on scope and estimated cost of these facilities prior to submitting any letter of intent to a prospective NBA franchise.

The Additional Improvements may include, without limitation, the following: Additional NBA franchise operations and locker-room facilities and guest amenities and services including bars, clubs, food service and meeting rooms, NBA franchise practice facilities and offices located outside of the Arena building and additional Arena Manager offices

located outside of the Arena Building along with the upgrade of parking facilities to serve the Arena. Agreements as to parking facilities to service an NBA franchise will be separately prepared.

It is envisioned that such Additional Improvements would be owned by the City and used by the NBA franchise and/or Arena Manager. The AMA between City and Arena Manager would be amended to include the Additional Improvements and such Additional Improvements that are to be used by an NBA franchise would be subject to a long term Use Agreement between the NBA franchise and Arena Manager as approved by City.

City/Agency is willing to consider providing the land and either paying for all or a portion of the construction of the Additional Improvements or for servicing the debt incurred in construction of the Additional Improvements. City/Agency anticipates revenue streams generated by the addition of the NBA franchise will be received to cover the cost of the City/Agency investment in the Additional Improvements.

An NBA franchise is expected to generate additional revenues to City/Agency and Arena Manager. City/Agency and Arena Manager recognize that a principle of all Parties is that the addition of an NBA franchise will have a positive financial impact on City's general fund as well as the overall financial position of Arena Manager. City/Agency anticipates the use of the Arena by an NBA franchise will generate basketball rent to City comparable to hockey rent.

Long Term Nature of the Agreement

It is recognized that Additional Improvements and investments will be needed to attract an NBA franchise. Adequate assurance will be necessary to secure the continued long term presence of the NBA franchise in San Jose to justify City/Agency investment. In addition, it is recognized that the AMA term will need to be extended to coordinate with the term of the NBA franchise's use agreement for use of the Arena.

Preservation of Facilities

City/Agency and Arena Manager recognize that using the Arena facilities as the home court venue of an NBA franchise will result in significant additional wear on the Arena facility. Modifications may be required to maintain the Applicable Standard over any extended term of the AMA. The preservation of the quality of the Arena is of utmost importance. Provision must be made for repair, replacement and upgrade of the Arena as well as providing/maintaining parking to serve uses of the Arena required under the AMA. Additional capital repair, replacement and enhancement funds must be taken into consideration in any agreement involving an NBA franchise as well as the decision process for the expenditure of these funds.

Cost-Benefit Analysis

The Parties agree that this mutual effort to obtain an NBA franchise does not require a determination of material adverse economic effect (Financial Impacts) as discussed in Section 3.03 B (4) of the AMA. However, each Party may conduct and present any and all financial analysis relative to the matters herein as they deem appropriate.

City/Agency is required to publish a cost-benefit analysis before an agreement for use of the Arena by an NBA franchise is voted on by the Council/Agency Board. It is intended by the Parties that the analysis be conducted by an appropriate outside expert chosen by City/Agency. City/Agency will work in close cooperation with Arena Manager in the selection of the expert and both City/Agency and Arena Manager will provide relevant information requested by the expert to complete the analysis in a timely manner. City/Agency and Arena Manager shall each pay 1/2 the cost of the expert. The analysis prepared by the expert is not binding on either Party and no Party to the Memorandum is obligated to accept or adopt all or any part of the analysis.

Term of this Memorandum

This Memorandum shall have an Initial Term of two (2) years. The Memorandum term will be automatically renewed for successive one (1) year periods unless, at least ninety (90) days prior to the Anniversary Date, a party gives written notice to the others of intent to not renew this Memorandum. The Anniversary Date shall be the date of approval of this Memorandum by City/Agency.

During the Initial Term and during active negotiations between the Parties and an NBA franchise, the Memorandum may be terminated only for cause. Termination for cause includes a finding by the City Council, in the City Council's sole discretion, that Arena Manager has not or is not making sufficient efforts to market the Arena for use as an NBA franchise venue as are intended and expressed under the terms of this Memorandum.

In the event of non-renewal or termination of this Memorandum, the terms of the AMA shall govern and control the actions of the parties with respect to adding an NBA franchise at the Arena.

Future Actions

By its execution of this Memorandum, City/Agency and Arena Manager are not committing to or agreeing to undertake any other action requiring the subsequent independent exercise of discretion by City/Agency or Arena Manager. It is further agreed and understood that this Memorandum does not imply any obligation on the part of City/Agency or Arena Manager to enter into any agreement that may result from the discussions or negotiations contemplated herein. It is expressly acknowledged and agreed by the parties that, until and unless an agreement for the use of the Arena as the home court venue for an NBA franchise is approved by the Parties, in their sole and

absolute discretion, any drafts or other communications resulting from performance of this Memorandum shall not be used to impose any legally binding obligation on such party or as evidence of any oral or implied agreement by such party to enter into legally binding documents.

Approved as to form:

“City”
City of San Jose, a municipal corporation

City Attorney

City Clerk

Approved as to form:

“Agency”
The Redevelopment Agency of the City of San Jose

General Counsel

“Arena Manager”
San Jose Arena Management LLC
A Delaware LLC
