



# Memorandum

**TO:** HONORABLE MAYOR AND  
CITY COUNCIL

**FROM:** Kim Welsh

**SUBJECT:** SEE BELOW

**DATE:** May 31, 2011

Approved

Date

6/7/11

**COUNCIL DISTRICT:** 3

**SUBJECT: AUTHORIZE THE CITY MANAGER TO NEGOTIATE AND EXECUTE AN AGREEMENT WITH CHRISTMAS IN THE PARK, INC. TO MANAGE AND PRODUCE A HOLIDAY EVENT DOWNTOWN.**

## RECOMMENDATION

It is recommended that the City Council:

- a. Adopt a resolution authorizing the City Manager to negotiate and execute a three-year agreement with Christmas in the Park, Inc. to manage and produce Christmas in the Park at Plaza de Cesar Chavez and to provide limited support staff and in-kind services for the 2011 event to support the successful production of the event.

## OUTCOME

An Agreement with Christmas in the Park, Inc. will result in the presentation of the Christmas in the Park Event, from 2011 through 2013.

## BACKGROUND

Due to reduced City of San Jose (City) fiscal resources, the City resources which previously supported the delivery of Christmas in the Park were eliminated in the 2010-2011 Adopted Budget. As part of this budget action, Council directed Office of Economic Development/Cultural Affairs staff to transition "Christmas in the Park" (event), a 35-day event with a 31-year history in the community, to a new community-based production model rather than a City production model. As a result, the City has explored alternative funding and event management strategies for the annual holiday event held in Plaza de Cesar Chavez.

The City and its non-profit partner, Christmas in the Park, Inc. (CITP), have successfully worked together since 1980 to make the holiday event in Plaza de Cesar Chavez a memorable experience for all who attend. Historically, the City chiefly funded and produced the event and CITP managed daily event operations, some fundraising, and volunteer support. Approximately 257,000 volunteer

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hours are invested by the community in cleaning, preparing, decorating, designing and performing at the event. That investment by the community drives the traditions and celebrations making this the largest event held downtown.

### **Transition to a Community-Based Production Model**

Since July 2010, the City and CITP have worked to develop a transition plan to sustain the event. Based on this transition plan, the City desires to enter into an agreement with CITP to take on the production of this holiday event in Plaza de Cesar Chavez. Through careful analysis of the event costs and production model, CITP has determined that the continued provision of City in-kind support and access to skilled City staff are essential to a successful transition to a community-based production model.

This agreement will outline terms for a partnership that will enable CITP to produce the event through the continuation of in-kind City services and through CITP's compensation of City staff to perform event responsibilities. CITP will compensate the City to allocate a portion of time of the City's Exhibit Designer/Builder staff position, which maintains event exhibits and oversees the County Participant Program that provides extensive labor, with the estimated value of this staff time at \$57,000. CITP will compensate the City for additional non-benefited, part-time City staff positions for a total estimated value of \$110,000 for the 2011 event. In addition, the City will allow CITP for the continued use of the City Service Yard at an estimated value of \$66,000 per year and use of the Plaza Cesar Chavez and adjacent parking spaces. A Letter of Intent outlining these mutual terms between the City and CITP was signed in February for the 2011 event. The Letter of Intent also specified milestones related to building the capacity of CITP, which have been successfully met by CITP.

### **ANALYSIS**

The City has had a long partnership with the CITP nonprofit organization, an all-volunteer organization. Council direction to transition the event production to a community-based partner led to negotiations with the CITP board to take on the production responsibilities. This will require CITP to transition to an effective fundraising board with professional staff.

### **Fundraising and Organizational Development Milestones**

Since December 2010, the CITP board has been successful in its communications strategy to inform the community of the impending changes to the event and the need for an additional \$200,000 in new support to hold the event in 2011. Media stories were picked up extensively and a new campaign of "Keep The Lights Burning" asked the community to donate at least \$1 dollar for every person visiting the park. Although this was a small request, it was also a significant boost to the program as the community donated nearly \$40,000, which is almost five times the amount in previous years. To meet the remaining portion of the \$200,000 goal, the CITP board has proposed new sponsorships and is actively seeking multi-year supporters to generate new revenue streams that will lead to future sustainability.

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Concurrently, the board has undertaken new organizational development initiatives. A new strategic business plan, marketing plan and board development plan have been completed. To develop new revenue streams, CITP is also cultivating new partnerships with several community and business organizations such as the Silicon Valley Leadership Group, San Jose Rotary Club, San Jose Downtown Association, Giant Creative Services and the Chamber of Commerce.

### **Economic Impact**

Each year, the holiday event generates significant economic benefits to the community. The City's Economic Impact Tool estimates that Christmas in the Park brings in \$13.3 million in total visitor spending, generating critical economic activity for the restaurants, businesses, and attractions in the core downtown area during the Thanksgiving to New Year's period. The estimated new incremental tax impact to the City is \$665,000.

A recent Economic Impact Assessment on Christmas in the Park by the International Festivals and Events (IFEA) organization, authorized by Christmas in the Park, reported the event generated approximately \$43.22 in direct spending from every non-San Jose visitor. They noted that 89% of the respondents had previously attended the event and that 99% would return in the future.

### **Terms of Agreement**

A three year agreement with CITP is recommended to enable CITP to develop multi-year sponsorship and other funding agreements which will help in the sustainability of the event.

In the draft Agreement, the City will provide the following in-kind support for the event:

1. Use of up to 32,000 square feet in the City's Central Service Yard for storage and maintenance of displays, decorations and equipment. The City will provide normal maintenance and utilities to service the 32,000 square feet of storage (projected in-kind value of \$65,280 in 2011-2012 and \$195,840 over the term of the agreement);
2. Use of Plaza de Cesar Chavez for the event;
3. Parking meter space surrounding Plaza de Cesar Chavez during the event;
4. Use of the City's event recycling services in accordance with available grant funding through the Environmental Services Department Grant Program;
5. Costs associated with the fountain support, maintenance and control;
6. Costs for turf repair and renovation; and
7. Use of the City's ASCAP music license.

In-kind support will be provided by the City, as they have in previous years, with no new increases or costs to the General Fund. Because the holiday event in Plaza Park is considered a City-owned event and CITP will produce the Christmas in the Park event in partnership with the City, no permits are applicable for City's use of the park or closure of City's parking meters for its own event.

The terms of the Agreement will also require CITP to reimburse the City for actual support costs including partial funding of an Exhibit Designer/Builder position and associated non-personal/equipment costs in 2011-2012. This position, which is proposed to be added to the Parks, Recreation, and Neighborhood Services Department (PRNS) through the 2011-2012 Operating Budget, would expire at the conclusion of 2011-2012 and will also support Happy Hollow Park and

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Zoo in 2011-2012. CITP would reimburse the City for the portion of time this position and any other part-time unbenefited positions spent supporting the 2011 Christmas in the Park event. At the conclusion of 2011-2012, CITP and City will discuss these positions and the costs of part-time City staff support provided for the set-up, take-down and operations of the event as part of the 2012-2013 budget process. This is currently estimated at approximately \$110,000 per year. CITP has held \$75,000 in a separate account for this purpose and is scheduled to deposit the remaining funds by August 15, 2011.

The initial term of the Agreement will expire on April 30, 2014, with the parties having a mutual option to extend for two additional years. No City support is assured beyond the 2011 event and any City in-kind support in any future fiscal year beyond 2011-2012 is subject to City Council appropriation of funds. If future City support is not acceptable to CITP, CITP may terminate the Agreement.

### **EVALUATION**

Considering the long history of the Christmas in the Park event and its high level of attendee loyalty, the economic and social impact of this event would be difficult to replicate or replace by another event. The City and CITP will evaluate its partnership and the terms of this agreement after the 2011 event.

### **PUBLIC OUTREACH/INTEREST**

- Criterion 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
- Criterion 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- Criterion 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

While this action does not meet any of the above Criteria, this memorandum will be posted on the City's website for the June 21, 2011 City Council agenda.

As with other large outdoor special events, staff and the event producer will provide community notifications of the event through the normal City coordination process. Significant signage and public notification will occur in the weeks leading up to the event, to inform the general motoring public of the event and any detours.

### **COORDINATION**

This memorandum has been coordinated with the City Manager's Office, the Budget Office, PRNS, Public Works, Department of Transportation, Environmental Services and the City Attorney's Office.

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### **FISCAL/POLICY ALIGNMENT**

This agreement furthers the vision of San Jose as the world's most livable big city, with diverse and distinctive qualities of life, and the City's economic development initiative to "Develop a Distinctive Set of Sports, Arts and Entertainment Offerings, Aligned With San Jose's Diverse, Growing Population" (Economic Strategic Goals 2010-2015 - Initiative 12). It also fulfills the goal of "Foster destination quality events in San Jose" outlined in *Cultural Connection: San Jose's Cultural Plan for 2011-2020*.

### **COST IMPLICATIONS**

There is no impact to the City General Fund. Christmas in the Park will reimburse the City's General Fund for an estimated 60% of a position supporting Christmas in the Park for 60% of the year (at an estimated cost of \$57,000), with the remaining 40% of this staff member's time used by the PRNS Capital program for repairs, maintenance and building of various back-logged park projects. CITP will also reimburse the City for additional non-benefited, part-time City staff positions for an estimated amount of \$53,000, bringing the total estimated reimbursed cost to \$110,000 for the 2011 event.

In addition, the continued in-kind support by the City to CIP is estimated at \$66,000 per year based on the estimated value of leasing the City Service Yard warehouse to store displays and equipment as well as prepare and maintain the event displays.

### **CEQA**

Exempt. PP05-277



KIM WALESH

Director of Economic Development and  
Chief Strategist

For questions, please contact Kerry Adams Hapner, Director of Cultural Affairs, at 793-4333.

Attachment A: Letter of Intent

Attachment B: Draft Agreement

**AGREEMENT BETWEEN THE CITY OF SAN JOSE AND  
CHRISTMAS IN THE PARK, INC. FOR THE PROMOTION  
AND PRODUCTION OF CHRISTMAS IN THE PARK**

THIS AGREEMENT is made and entered into this \_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_, by and between the CITY OF SAN JOSE, a municipal corporation of the State of California ("CITY") and CHRISTMAS IN THE PARK, INC., a California nonprofit corporation ("CORPORATION").

**RECITALS**

- A. The CHRISTMAS IN THE PARK event held in the CITY's Plaza de Cesar Chavez ( the "EVENT") is a an admission free holiday special event, lasting approximately 35 days, which has been held for 31 years through a collaborative partnership between the CORPORATION and the CITY. The EVENT has been developed and produced as a family-oriented special event and as a regional attraction.
- B. The mutually agreed upon mission of the EVENT has been to provide a "Gift of Joy and Magic" while providing a free, community inclusive special event for families.
- C. The EVENT is an acknowledged economic driver for the downtown core during the holiday season with programming engaging the community in volunteerism, entertaining, decorating, cleaning and maintaining, while providing the public with quality experiences, programming and an opportunity to celebrate in a safe environment.
- D. CORPORATION is a nonprofit, volunteer organization whose mission is to sponsor and support programs and activities at the EVENT through fundraising in conjunction with the CITY. In this capacity, CORPORATION promotes community awareness of the EVENT, volunteer opportunities, education activities and public recreational opportunities at the EVENT through efforts that support CORPORATION and CITY.
- E. CORPORATION has been a supporter of and collaborator on the EVENT since 1980 and CORPORATION has donated capital improvements and funding for programs, staff and renovation of exhibits
- F. Due to the CITY's budget situation, the CITY will not be able to provide the staffing or funding support for the 2011 EVENT and thereafter at the levels provided in the past, for the promotion, production, or management of the EVENT.

- G. CITY and CORPORATION desire to enter into an agreement where CITY shall agree that CORPORATION shall take the lead in the development, promotion, production, and management of the Event on behalf of the CITY. To that end, CITY and CORPORATION intend to work jointly to develop priorities, strategies, marketing initiatives, and implementation of available in-kind CITY services, as provided in this Agreement.

In view of the above, the parties agree as follows:

**SECTION 1. LOCATION AND DESCRIPTION OF EVENT.**

The EVENT is located in the PARK as described in Recital A above, as Plaza de Cesar Chavez. The EVENT is approximately 35 days in length, as mutually agreed upon period subject to availability of the PARK, plus move-in and move-out days.

**SECTION 2. AUTHORITY AND STATUS OF CORPORATION.**

- A. CORPORATION represents and warrants that the information contained in this Agreement is true and accurate; that the individuals who execute this AGREEMENT are duly authorized by CORPORATION; and that CORPORATION has the authority to enter into this AGREEMENT.
- B. CORPORATION further represents and warrants that CORPORATION is a California nonprofit corporation and that it possesses tax-exempt status under both state and federal law.

**SECTION 3. TERM.**

- A. The term of this AGREEMENT will commence on May 1, 2011 ("Commencement Date") and will expire on April 30, 2014, unless sooner terminated as provided elsewhere in this AGREEMENT.
- B. Prior to the Expiration Date, the parties may mutually agree to extend the term of this AGREEMENT for two additional years ("Extension Period"). All terms and conditions of this AGREEMENT shall apply during the Extension Period, except as otherwise agreed in writing.
- C. "Term" shall refer to both the initial term as described in Subsection A, above and the Extension Period.
- D. CITY and CORPORATION agree that any services provided in accordance with this AGREEMENT after the Commencement Date but prior to the execution of this AGREEMENT were delivered in consideration for the execution of this AGREEMENT, and that such services performed in accordance with the terms of this AGREEMENT.

**SECTION 4. PURPOSE OF AGREEMENT.**

The purpose of this AGREEMENT is to define the relationship and responsibilities of CORPORATION and CITY with respect to the EVENT.

**SECTION 5. GENERAL RESPONSIBILITIES OF CORPORATION.**

CORPORATION, as the producer and manager of the EVENT on behalf of the CITY, agrees to provide the following:

- A. CORPORATION will be responsible for the overall development, promotion, management and production of each EVENT occurring during the term of this Agreement, including responsibility for the maintenance and operation of all concessions, displays, entertainment and/or amusement rides. CORPORATION shall be responsible for obtaining all permits, licenses and other regulatory approvals necessary to conduct the EVENT, including without limitation, appropriate music licensing rights from BMI and similar organizations if applicable, provided that for the 2011 Event, City shall continue to provide its license with ASCAP. CORPORATION shall conduct all of the foregoing at CORPORATION's sole cost, except for the amount CITY has agreed to contribute to the 2011 EVENT, which is further described below.
- B. CORPORATION shall meet with CITY, as reasonably required, to coordinate with CITY and obtain CITY's approval of the priorities, strategies, marketing initiatives, for the upcoming EVENT.
- C. No later than February 15, 2011, CORPORATION shall provide CITY with a final Strategic Plan for the 2011 EVENT, including a Fundraising Plan, Marketing Plan, and Board Development and a 2011 Production/Operation Plan in a form satisfactory to OED.
- D. For each year after the 2011 EVENT, CORPORATION shall provide CITY for CITY's approval, a Fundraising Plan, Marketing Plan, and Production and Operation Plan for the next upcoming EVENT, which shall be delivered to CITY no later than March 15 of each year.
- E. CORPORATION agrees to pay to City funding in an amount up to \$110,000 as reimbursement of the City's costs to provide support to CORPORATION for the 2011 EVENT through its Design/Exhibit Builder staff person and City's costs for part time City staff. CITY and CORPORATION shall meet and mutually agree upon the estimated staff time and associated costs for such City event support and shall also consider identifying mutually satisfactory ways of reducing such costs. CITY shall submit invoices showing costs incurred for the positions needed no more frequently than a monthly basis, and CORPORATION shall pay such invoices within 30 days of invoices submitted by CITY.
- F. To evidence its financial ability to pay such amounts, CORPORATION deposited \$75,000 into a controlled account on or before March 15, 2011 and shall deposit a second payment of \$35,000, in the same account no later than August 15,

2011.

- G. CORPORATION shall promptly reimburse CITY for any reasonable additional costs incurred by CITY that are associated with the EVENT management or for EVENT support as may be requested from CORPORATION, that are above and beyond CITY'S agreed upon contribution as described below
- H. CORPORATION will use reasonable efforts to recruit and retain, allowing for reasonable turnover, an ongoing, effectively-functioning Board of Directors incorporates the broad range of background and skills needed to provide appropriate leadership and oversight to the organization and the EVENT.
- I. CORPORATION shall cite the cooperative efforts of CITY in all presentations, printed materials, fund solicitations and activities as applicable.
- J. CORPORATION shall maintain its tax-exempt status as provided by and under the State and Federal laws and shall adhere to its bylaws. CORPORATION may revise its bylaws in accordance with applicable law.
- K. CORPORATION shall maintain complete and accurate records of the terms and conditions of any donations, sponsorships or other funds received by CORPORATION related to the EVENT.
- L. CORPORATION will participate in the development of Downtown Holiday marketing plans with CITY.
- M. CORPORATION owns a servicemark in the name of Christmas in the Park and the internet domain name of christmasinthepark.com.

**SECTION 6. CITY'S CONTRIBUTION TO THE EVENT.**

- A. CITY's Director of Economic Development ("Director") is charged with the responsibility of the administration and management of this AGREEMENT on behalf of the CITY.
- B. Because this Agreement allows CORPORATION to produce and manage a City event in the PARK on behalf of the CITY, no special use permit is required, nor shall CITY charge CORPORATION for any cleaning or damage deposit.
- C. CITY agrees to pay the reasonable cost all on-site water and electricity charges for the PARK that are incurred by CORPORATION, to the extent such costs were necessary to produce the EVENT.
- D. Use of up to 32,000 square feet in the City's Central Service Yard for storage and maintenance of displays, decorations and equipment for the EVENT. City

shall provide the cost of normal maintenance, water and electrical utilities to service the 32,000 square feet of storage.

- E. For the 2011 EVENT City shall provide (subject to City Council's final approval of the budget for FY 2011-2012) the following support to the 2011 Event from the following City departments:
- a. Environmental see Section 6, Letter H below;
  - b. General Services, see Section 6, Letter D above;
  - c. Parks, Recreation and Neighborhood Services, Section 6, Letter B above; and
  - d. Department of Transportation, see Section 6, Letter G below
  - e. City Manager, ASCAP license, see Section 5A above.
- F. CITY's in-kind support of this AGREEMENT shall be determined on a fiscal year basis (July 1 to June 30) and is subject to annual appropriations by City Council.

CORPORATION acknowledges that CITY has informed CORPORATION that CITY, a municipal corporation, is precluded by the California State Constitution and other laws from entering into obligations which financially bind future governing bodies, and that, therefore, nothing in this AGREEMENT shall constitute an obligation of the City or any future legislative bodies of the CITY, to appropriate funds or to provide in-kind services for purposes of this AGREEMENT. In the EVENT that CITY's Council fails to appropriate sufficient funds in subsequent fiscal years during the term of this AGREEMENT to fund the contribution at a cost and hourly contribution level equal to at least 90% of the level for the 2011 EVENT, this AGREEMENT shall terminate effective June 30 of the prior fiscal year unless the parties mutually agree to keep this AGREEMENT in effect without any financial obligation imposed upon CITY.

- G. Free use of the 25 parking meters surrounding Plaza de Cesar Chavez for the mutually agreed days of the Event plus the set up and take down days as defined by the Event.
- H. CORPORATION should apply for CITY's Event Recycling Services, in accordance with available grant funding application and approval process through the ESD Grant program. No assurances are made regarding award of such grant funds.
- I. For the 2011 EVENT, City shall provide supervision for the Volunteer Support needed for the successful operations of the event. This can and shall include all of the Event Volunteer Days, the Year-Round Skilled Volunteer Program and the County Participant Program, as long as the County Participant Program is available for City use, through the CITY'S Design/Exhibit Builder staff member, or another City employee, with applicable training and qualifications, as determined by CITY, with the consultation of CORPORATION.

- J. Any provision of program assistance or other contribution by the CITY contained in this AGREEMENT shall not in any way constitute a delegation by CITY of any of its powers.

**SECTION 7. BOOKS, RECORDS AND ACCOUNTS.**

- A. CORPORATION shall keep and maintain complete and accurate books, records, and accounts ("Books and Records") related to CORPORATION. CORPORATION shall retain the CORPORATION records not less than three (3) years from the end of each period for which the CORPORATION records are kept. CORPORATION records shall be kept and maintained in accordance with generally accepted accounting principles, which shall be consistently applied. All CORPORATION records shall be open to and available for inspection by CITY, its auditors or other authorized representatives during normal business hours upon reasonable advance written notice in accordance with the notice provisions of this AGREEMENT.
- B. CORPORATION shall cooperate with City in compliance with any request for information regarding the EVENT, including an request for information received by the City under the California Public Records Act (the "CPRA").

**SECTION 8. BUDGETS, AUDITS AND REPORTING REQUIREMENTS.**

- A. **Annual Reporting.** Within ninety (90) days following the end of CORPORATION's fiscal year (April 1 - March 30) during the term of this AGREEMENT, CORPORATION shall provide CITY with the following in addition to any records required under Section 5 of this Agreement:
1. An annual financial report for the previous fiscal year.
  2. An annual narrative report on the operations of CORPORATION for the previous fiscal year which report shall detail the status of achieving CORPORATION's accomplishments, special events programs and other material activities affecting the CORPORATION operation.
  3. An approved budget for the current fiscal year which includes revenue estimates from all sources of income, all assets and planned expenditures to include funding for the services, salary and associated benefits for the CITY positions funded by CORPORATION under this Agreement.
  4. CITY and CORPORATION shall meet on an annual basis to update costs and positions associated with the EVENT. CORPORATION agrees that CITY has made no commitment to provide any staffing in support of the event after the 2011 EVENT and any such support is subject to City Council approval.

- B. **CITY's Right to Audit.** CITY reserves the right, at its own expense, to conduct audits of CORPORATION's operations under the AGREEMENT. All accounting records basic or secondary, used in the ordinary course of business, including cash register tapes and all banking deposit tickets, statements and any other banking records, purchase invoices, and all records of sales, excise or other taxes paid or payable to CORPORATION for sales, fees and charges from the operation of CORPORATION shall be made available to CITY's Manager, CITY's Attorney, CITY's Director of Finance, CITY's Auditor and/or the CITY's Director for inspection and/or auditing purposes upon CITY's request.

**SECTION 9. ENVIRONMENTALLY PREFERABLE PROCUREMENT POLICY.**

CORPORATION agrees that, in the performance of this AGREEMENT, CORPORATION shall perform its obligations under the agreement in conformance with City Council Policy 4-6, Environmentally Preferable Procurement Policy. A description for environmentally preferable procurement and the Policy can be found on the CITY's website at the following link: <http://www.sanjoseca.gov/esd/natural-energy-resources/epp.htm>.

Environmental procurement policies and activities related to the completion of work will include wherever practicable, but are not limited to:

- A. Use of recycled and/or recyclable products in daily operations (i.e. 30, 50, 100% PCW paper, chlorine process free; triclosan free hand cleaner, etc.)
- B. Use of Energy Star Compliant equipment.
- C. Vehicles and vehicle operations (i.e. Alternative Fuel, Hybrid, etc.)
- D. Internal waste reduction and reuse protocol(s).
- E. Water and resource conservation activities within facilities, including bans on individual serving bottled water and the use of compostable food service products, etc.

**SECTION 10. NO RELIGIOUS OR POLITICAL ADVOCACY.**

CORPORATION shall not expend any portion of the compensation hereunder to inhibit or promote religion and the services funded by this AGREEMENT must not be used to convey a religious message. Any portion of the compensation used in contradiction to the provisions of this SECTION, shall be deemed a disallowed cost. CORPORATION shall not expend any portion of the compensation hereunder for political advocacy efforts, whether for or against a political candidate, ballot measure or bill

**SECTION 11. VOLUNTEERS.**

Volunteers for the EVENT, may, with City's approval, to work on CITY approved EVENT projects, activities and programs, be enrolled in CITY's volunteer program to

the extent the nature of the volunteer work is consistent with CITY's volunteer program as determined by CITY's Manager. In order for enrollment in CITY's volunteer program to be effective, each volunteer must sign the CITY's standard volunteer agreement and may be subject to a background check.

**SECTION 12. TAXES.**

CORPORATION shall pay, before delinquency, any and all taxes, assessments, licenses, fees and other public charges which may be levied, assessed or imposed upon any of CORPORATION's interest, or which may be imposed upon CORPORATION's business, or which may be imposed upon CORPORATION for the privilege of performing the sale of gifts, film and sundry items which may be imposed upon any property of CORPORATION. CORPORATION recognizes and understands that this AGREEMENT may create a possessory interest subject to property taxation and that CORPORATION may be subject to payment of property taxes levied on such interest, and that any such tax payment shall be paid by CORPORATION.

**SECTION 13. INSURANCE REQUIREMENTS.**

CORPORATION agrees to have and maintain the policies set forth in EXHIBIT A, entitled "INSURANCE," which is attached hereto and incorporated herein. All policies, endorsements, certificates and/or binders shall be subject to approval by the Director of Human Resources or the Director's authorized designee ("Risk Manager") of the City of San Jose as to form and content. These requirements are subject to amendment or waiver if so approved in writing by the Risk Manager. CORPORATION agrees to provide CITY with a copy of said policies, certificates and/or endorsements before work commences under this Agreement.

**SECTION 14. CORPORATION RIGHTS AND STATUS.**

- A. The rights given to CORPORATION are revocable contract rights only and in no respect shall the same constitute or be construed as granting a leasehold interest in any of the real or personal property described in this AGREEMENT.
- B. CORPORATION, CORPORATION's agents, contractors, employees, and members shall be at all times independent contractors and shall not be considered agents or employees of CITY and shall not be entitled to any salary, fringe benefits, pension, Worker's Compensation, sick leave, insurance, or any other benefit or right connected with employment by the CITY, or any compensation from CITY whatsoever, and CORPORATION hereby expressly waives any claim it may have to any such rights.

**SECTION 15. INDEMNIFICATION.**

- A. CORPORATION agrees to defend, indemnify and hold harmless the CITY from and against any and all claims, demands, causes of action, or liabilities incurred by CITY arising from, in whole or in part, directly or indirectly, CORPORATION's acts or omissions under this AGREEMENT, except as may arise from the gross negligence or

willful misconduct of CITY. In any action or claim against CITY in which CORPORATION is defending CITY, CITY shall have the right to approve legal counsel providing CITY's defense and such approval shall not be unreasonably withheld. CORPORATION further agrees to release CITY from any and all claims for any damages, including property damage, injury or death occurring or arising out of use of CITY's property, except as may be caused by the CITY's gross negligence or willful misconduct.

B. The CORPORATION's obligations under this indemnification provision shall survive the expiration or termination of this AGREEMENT.

**SECTION 16.**            **ASSIGNMENT.**

- A. CORPORATION shall not assign, or attempt to assign, all or any part of this AGREEMENT without prior written approval of the CITY's Manager, which approval shall be in the sole discretion of CITY's Manager. No voluntary successor in interest of CORPORATION shall acquire any rights or powers under this AGREEMENT except as expressly set forth in this SECTION.
- B. CITY may assign from time to time all or any of its rights, title and interest in and to PARK, upon any terms and conditions consistent with the terms of this AGREEMENT. CITY shall notify CORPORATION in advance of the effective date of any such assignment.

**SECTION 17. TERMINATION AND DEFAULT.**

A. The parties understand that no City funding or staffing is assured after the 2011 EVENT. If mutually agreed funding and staffing levels are not reached by the parties for any future EVENT, which agreement shall be memorialized in a written amendment to this Agreement, then either party may terminate this Agreement by providing 30 days written notice to the other party, no later than July 15 of any year during the term of this Agreement.

B. Failure by either party to perform any provision of this AGREEMENT within the time specified hereunder, shall constitute a default if such failure to perform is not cured within the cure period specified in this AGREEMENT or if there is no specified cure period within ten (10) days after written notice by the nonbreaching party is received by the breaching party. If the failure to perform by its nature cannot be cured within the specified cure period, the breaching party shall not be in default if it commences to cure within the specified cure period and diligently and in good faith continues until cure is effected, which in any event shall not be more than thirty (30) days, unless the time required to cure is greater than such period and the nonbreaching party approves such longer period to cure in writing, which approval shall not be unreasonably withheld or delayed.

C. Upon termination or expiration of this Agreement, CORPORATION shall remove all personal property from City property, including without limitation, the Central Service Yard and CITY may proceed to conduct its holiday event at the PARK in its sole discretion. CITY and CORPORATION shall meet cooperatively to identify any exhibits located in the Central Service Yard which are owned by CORPORATION and which should be removed from the Central Service Yard. CITY acknowledges that CORPORATION has registered a service mark for "Christmas in the Park" and may use such service mark in connection with other holiday events organized by CORPORATION. To the extent that any event is held by CORPORATION on CITY property other than the EVENT produced on behalf of City pursuant to this or a successor Agreement (including if this agreement expires or is terminated without renewal by the CITY), CORPORATION understands that it must apply for a permit for use of such City property and shall pay the CITY's standard fees and charges for special events.

D. Upon termination or expiration of this Agreement,, the City may go forward and produce or hire another producer for a holiday event

**SECTION 18. WAIVER.**

No waiver of any default under this AGREEMENT shall constitute or operate as a waiver of any subsequent default hereunder, and no delay, failure or omission in exercising or enforcing any right, privilege or authority under this AGREEMENT shall constitute a waiver, abandonment or relinquishment thereof or prohibit or prevent any election under or enforcement or exercise of any right, privilege or option hereunder.

No waiver of any provision hereof by a party shall be deemed to have been made unless and until such waiver shall have been reduced to writing and signed by that party. Failure by a party to enforce any of the terms, covenants or conditions of this AGREEMENT for any length of time shall not be deemed to waive or decrease the right of that party to insist thereafter upon strict performance.

**SECTION 19. NOTICES.**

- A. All notices and other communications required or permitted to be given under this AGREEMENT shall be in writing and shall be personally served or mailed, postage prepaid and return receipt requested, addressed to the respective parties as follows:

To: CITY  
City of San Jose  
Director of Economic Development  
200 East Santa Clara St., 17<sup>TH</sup> Floor Tower  
San Jose, CA 95113

To: CORPORATION  
Christmas In The Park, Inc.  
c/o Leininger Center  
1300 Senter Road  
San Jose, CA 95112

Notice shall be deemed effective on the date personally delivered or, if mailed, three (3) days after deposit in the mail.

- B. A copy of any notice of a legal nature, including, but not limited to, any claims against CITY, its officers or employees shall also be served in the manner specified above to the following address:

City Attorney  
Richard Doyle  
200 East Santa Clara Street, 16<sup>th</sup> Floor  
San Jose, CA 95113

**SECTION 20. MISCELLANEOUS PROVISIONS.**

- A. The parties agree that this AGREEMENT shall be governed and construed in accordance with the laws of the State of California. In the event that suit shall be brought by either party to this AGREEMENT, the parties agree that venue shall be exclusively vested in the state courts of the County of Santa Clara, or where otherwise appropriate, exclusively in the United States District Court, Northern District of California, San Jose, California.
- B. The headings of the sections and subsections of this AGREEMENT are inserted for convenience only. They do not constitute a part of this AGREEMENT and shall not be used in its construction.

- C. If a court of competent jurisdiction adjudges any provision of this AGREEMENT as void or unenforceable, the remaining provisions shall not be affected hereby and shall remain in full force and effect.
- D. This AGREEMENT may only be amended by formal written agreement executed by both parties. This AGREEMENT includes the following exhibit which is attached and incorporated by reference:

EXHIBIT A      INSURANCE

EXHIBIT B      FEBRUARY 2011 LETTER OF INTENT WITH CHRISTMAS IN THE PARK, INC.

APPROVED AS TO FORM:

CITY OF SAN JOSE, a municipal corporation

\_\_\_\_\_  
BARBARA K. JORDAN  
Senior Deputy City Attorney

\_\_\_\_\_  
ED SHIKADA  
Deputy City Manager

CHRISTMAS IN THE PARK, INC., a California nonprofit corporation

\_\_\_\_\_  
Signature

Print Name: \_\_\_\_\_  
President

and

\_\_\_\_\_  
Signature

Print Name: \_\_\_\_\_  
Secretary or Treasurer

## EXHIBIT A

### INSURANCE REQUIREMENTS

CORPORATION, at CORPORATION's sole cost and expense, shall procure and maintain for the duration of the AGREEMENT (or for such longer periods as may be specified below) insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the work hereunder by the CORPORATION, his agents, representatives, employees or subcontractors. The cost of such insurance shall be included in the CORPORATION's bid.

#### A. Minimum Scope of Insurance

Coverage shall be at least as broad as:

1. The coverage provided by Insurance Services Office Commercial General Liability coverage "occurrence" form CG 0001; and
2. The coverage provided by Insurance Services Office form number CA 0001 covering Automobile Liability. Coverage shall be included for all owned, non-owned and hired automobiles; and
3. Workers' Compensation insurance as required by the Labor Code of the State of California and Employers Liability insurance.

There shall be no endorsements reducing the scope of coverage required above unless approved by the CITY's Risk Manager.

#### B. Minimum Limits of Insurance

CORPORATION shall maintain limits no less than:

1. Commercial General Liability: \$5,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.
2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage.
3. Workers' Compensation and Employers Liability: Workers' Compensation limits as required by the Labor Code of the State of California and Employers Liability limits of \$1,000,000 per accident.

C. Deductibles and Self-Insured Retentions

Any deductibles or self-insured retentions must be declared to, and approved by, the CITY. At the option of the CITY, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the CITY, its officials, employees, agents and contractors; or the CORPORATION shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by the CITY.

D. Other Insurance Provisions

The policies are to contain, or be endorsed to contain, the following provisions:

1. General Liability and Automobile Liability Coverages

- a. The CITY, its officials, employees, agents and contractors are to be covered as additional insureds as respects: liability arising out of activities performed by, or on behalf of, the CORPORATION; products and completed operations of the CORPORATION; premises owned, leased or used by the CORPORATION; or automobiles owned, leased, hired or borrowed by the CORPORATION. The coverage shall contain no special limitations on the scope of protection afforded to the CITY, its officials, employees, agents and contractors.
- b. The CORPORATION's insurance coverage shall be primary insurance as respects the CITY, its officials, employees, agents and contractors. Any insurance or self-insurance maintained by the CITY, its officials, employees, agents or contractors shall be excess of the contractor's insurance and shall not contribute with it.
- c. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the CITY, its officials, employees, agents, or contractors.
- d. Coverage shall state that the CORPORATION's 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.
- e. Coverage shall contain a waiver of subrogation in favor of the CITY, its officials, employees, agents and contractors.

2. Workers' Compensation and Employers Liability

Coverage shall be endorsed to state carrier waives its rights of subrogation against the CITY, its officials, agents and contractors.

3. All coverages

Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled, reduced in coverage or in limits except after thirty (30) days' prior written notice has been given to the CITY; except that ten (10) days' prior written notice shall apply in the event of cancellation for non-payment of premium.

E. Acceptability of Insurance

Insurance is to be placed with insurers acceptable to the CITY's Risk Manager.

F. Verification of Coverage

CORPORATION shall furnish the CITY with certificates of insurance and with original endorsements affecting coverage required by this clause. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Copies of all the required ENDORSEMENTS shall be attached to the CERTIFICATE OF INSURANCE which shall be provided by the CORPORATION's insurance company as evidence of the stipulated coverages.

Proof of insurance shall be either emailed in pdf format to: Riskmgmt@sanjoseca.gov, or mailed to the following postal address (or any subsequent email or postal address as may be directed in writing by the Risk Manager):

City of San Jose - Human Resources  
Risk Management  
200 East Santa Clara St., 2nd Floor - Wing  
San Jose, CA 95113-1905

G. Subcontractors

CORPORATIONS shall include all subcontractors as insureds under its policies or shall obtain separate certificates and endorsements for each subcontractor.

February 10, 2011

Martie Degutis, President  
Christmas in the Park Board  
1300 Senter Road  
San Jose, California 95112

Re: Letter of Intent Outlining Plan for proposed Agreement with the Christmas in the Park, Inc.  
for 2011 Event

Dear Ms. Degutis:

The 31-year partnership between the City of San José and Christmas is to be commended. It is the desire of the City of San Jose to continue to work in close coordination with your board on a successful outcome for the Christmas in the Park event. This Letter of Intent serves to outline the City of San Jose's proposed plan for ongoing services and mutual responsibilities.

### **Background**

Due to reduced City fiscal resources, the City of San Jose (City) needs to explore alternative funding and event management strategies for an annual holiday event held in Plaza de Cesar Chavez Park. The City and the Christmas in the Park, Inc. (CITP) have successfully worked together since 1980 to make the holiday event in Plaza Cesar Chavez Park a memorable experience for all who attend.

The City desires to enter into an agreement with CITP to produce a holiday event in Plaza de Cesar Chavez Park. This letter is intended to determine whether CITP will take on the Event production responsibility on behalf of the City of San Jose, starting with the 2011 Event. The City plans to provide in-kind services in support of the Event at a level to be determined in an agreement, subject to the approval of City Council, conditioned upon CITP demonstrating its increased capacity to produce and fundraise for the Event.

The Office of Economic Development (OED) will present an agreement for City Council approval, which would propose that City Council select the CITP as producing partner of the Event for the benefit of the community, if CITP meets the following minimum milestones and level of services for the production of the 2011 Event as detailed below.

1. CITP will complete and deliver to OED, a preliminary 2011 Strategic Plan including a Fundraising Plan, Marketing Plan, and Board Development strategies by February 15, 2011 in a form satisfactory to OED.

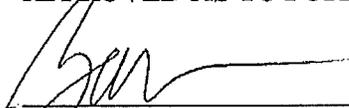
2. CITP Board has formally approved CITP's assumption of the duties of CITP production of the 2011 Event as described herein, no later than February 15, 2011.
3. CITP agrees to pay to City funding in an amount of \$150,000 for partial funding of the City's Design/Exhibit Builder Position and City costs of part time City staff support provided to CITP. These positions currently cost the City of San Jose \$150,000, of which \$56,500 is 6 months funding costs for the Design/Exhibit Builder Position. The first payment of \$75,000 shall be deposited into a CITP controlled account by March 15, 2011 and second payment of \$75,000 shall be deposited in the same account by August 15, 2011. The agreement between the City and CITP will describe CITP's required terms for payment of submit costs incurred by City for compensation to the Design/Exhibit Builder and/or part time City staff support. The invoices will be paid from the CITP account.
4. CITP will complete and deliver, in a form acceptable to OED a final 2011 Strategic Plan, Business Plan, and a 2011 Production/Operation Plan by March 15, 2011.
5. If CITP completes all of the foregoing, OED will present CITP with an Agreement setting forth the proposed terms of CITP's production of 2011 Event, which must be signed by CITP so that it may be presented to City Council for consideration and approval in April 2011. After Council approval of the Agreement, CITP will release the remaining funding to the City for agreed upon staff salaries.
6. CITP will participate in several "transition" meetings with City of San Jose Staff for 2011 event throughout March-December 2011, as reasonably required by OED and agreed to by CITP.
7. CITP will inform OED if CITP Board has approved CITP's continued production of the Event beyond 2011, not later than January 15, 2012. The final City Council approved-agreement shall set forth the terms of renewal or extension, if any, for the 2012 holiday event in downtown.
8. By February 1, 2011, OED will inform CITP of the proposed level of in-kind support that City can provide to the Event (subject to City Council's final approval of the budget for FY 2011-2012) from the following departments: Environmental Services; General Services; Parks, Recreation and Neighborhood Services; and Department of Transportation including:
  - Use of up to 32,000 square feet in the City's Central Service Yard for storage and maintenance of displays, decorations and equipment. City shall provide utilities to service the 32,000 square feet of storage.
  - The Agreement entered into with CITP to produce the Event for the benefit of the community, will include the specific roles and responsibilities of the parties, including the terms of use of the Park. OED intends to propose that agreement provide that CITP shall produce the Event in Plaza de Cesar Chavez for a period of approximately 35 event days (as mutually agreed) plus move-in days and move-out days, along with use of parking meter space surrounding Plaza de Cesar Chavez Park and use of City's event recycling services in accordance with available grant funding through the BSD Grant Program.
  - It is the intention of OED to propose that the agreement not require CITP to provide a cleaning or damage deposit, nor pay for City's costs associated with the fountain support, maintenance and control and typical costs for turf repair and renovation typically associated with the Event.

- Supervision for the County Participant Program will be provided by the Design/Exhibit Builder Position and trained part-time PRNS event operational staff as long as the Design/Exhibit Builder Position is funded and as long as the County Participant Program is available for City use. Most of the staffing will be utilized July through January of Fiscal Year 11-12.

If, due to additional staffing and budget reductions, the City is unable to provide the same level of in-kind support in 2012 as in 2011, the agreement shall provide that CITP and City shall discuss the situation and will allow CITP to withdraw as promoting partner for the 2012 event if mutually agreeable financial and staffing levels for the event are not reached within a reasonable time period.

If the terms of this letter are acceptable to the CITP, please sign below. Subject to the terms of this letter, the City and CITP will also begin work on development of the proposed Agreement to be presented to City Council for approval in April 2011. We hope that CITP is in agreement with the terms of this letter and that we can start to work on a more complete agreement for the 2011 Event. However, if CITP does not agree with this letter, then the City will pursue alternative producers for its 2011 holiday event in Plaza Cesar Chavez Park.

APPROVED AS TO FORM:



Barbara Jordan  
Senior Deputy City Attorney

CITY OF SAN JOSÉ  
A MUNICIPAL CORPORATION



Ed Shikada  
Assistant City Manager

I acknowledge and agree to the terms of this letter of intent.  
Christmas in the Park, Inc.

By Martie B. DeGuti

Name MARTIE B. DEGUTI

Title: President

Date: Feb. 10, 2011