

MEMORANDUM OF UNDERSTANDING
BETWEEN THE CITY OF COSTA MESA AND THE COUNTY OF ORANGE
FOR REVENUE SHARING

This Memorandum of Understanding ("Memorandum") dated as of the 2nd day of February 2023 is between the City of Costa Mesa, a municipal corporation ("City") and the County of Orange, a political subdivision of the State of California ("County"). City and County are referred to herein individually as a "Party" and collectively as the "Parties."

RECITALS

WHEREAS, on or about December 29, 2022, the Parties entered into the Beneficiary Agreement Between County of Orange and City of Costa Mesa for American Rescue Plan Act Funding ("Beneficiary Agreement") in connection with the State and Local Fiscal Recovery Funds program;

WHEREAS, the Beneficiary Agreement provided that the funds granted under that agreement would be used for the construction of the Lions Park Café at the Lions Park;

WHEREAS, the Beneficiary Agreement was conditioned on the Parties executing a revenue sharing agreement that will provide for County, through OC Public Libraries, to receive 50% of the Lions Park Café's Net Revenues on an ongoing basis;

WHEREAS, City will operate the Lions Park Café in or about the Lions Park Campus and adjacent to the Donald Dungan Library;

WHEREAS, the Donald Dungan Library, is an OC Public Libraries branch location and City desires to complement the Lions Park Campus by operation of the Lions Park Café in furtherance of the public interest; and

WHEREAS, the Parties now desire to enter into this Memorandum for revenue sharing.

NOW THEREFORE, in consideration of the foregoing recitals and the mutual covenants and promises herein contained, the Parties hereto agree as follows:

ARTICLES

I. Definitions:

A. "Lions Park Café" means the café, or similar dining establishment, operated at the facility, site, or building constructed and/or improved using funds under the Beneficiary Agreement and situated in or about the Lions Park Campus and adjacent to the Donald Dungan Library.

B. "Net Revenue" or "Net Revenues" means all revenues received by City from the Lions Park Café from any and all sources including, but not limited to, the sale of coffee, food, refreshments, and leases, operating agreements, concession agreements, licenses, subleases,

event fees, or the sale of other goods or services by, or from, Lions Park Café, less only Expenses, as defined below.

C. "Expenses" include expenses that are necessary for the operation of the Lions Park Café, and include the cost of goods sold, utility costs, compensation paid to employees, expenses for supplies, or other actual operating expenses for the Lion Park Café, which shall be capped at and in no event exceed 75% of Revenues. "Expenses" do not include a share of capital project costs or any costs or expenses for Lions Park Campus or any other building, facility, or improvement.

D. "Revenues" means all revenues received by City from the Lions Park Café from any and all sources including, but not limited to, the sale of coffee, food, refreshments, and leases, operating agreements, concession agreements, licenses, subleases, event fees, or the sale of other goods or services by, or from, Lions Park Café.

II. Term and Termination:

A. Term: This Memorandum shall be effective as of the date the last of the Parties has executed the same ("Effective Date"). This Memorandum shall remain in full force and effect until the Lions Park Café ceases to operate on a permanent basis, unless terminated pursuant to the provisions of paragraph B below.

B. Termination: In addition to any other remedies or rights it may have by law, County has the right to immediately terminate this Memorandum with City, without penalty for cause, or after 30 days' written notice without cause, unless otherwise specified. Cause shall be defined as any material breach of any provision of this Memorandum by City, or any misrepresentation or fraud on the part of City. County may exercise its right to terminate the Memorandum, for cause or without cause, without liability, fee, cost, expense, penalty, or charge of any kind and County's termination of the Memorandum shall relieve County of all further obligations.

II. City's Responsibilities:

A. City shall operate the Lions Park Café at no expense to County.

B. Within 30 days after the end of each quarter (i.e. on August 1, November 1, February 1, and May 1 of each year), City shall:

- a. Pay 50% of the Lions Park Café's Net Revenues received during the previous quarter to County. City shall commence Net Revenue payments once the Lions Park Café receives revenues and continue making such payments during the term of this Memorandum;
- b. Send payment via a check for the Net Revenues made out to the "County of Orange, OC Public Libraries" at the following address: OC Public

Libraries, 1501 E. Saint Andrew Place, 2nd Floor, Santa Ana, CA 92705 and write "Mesa Verde and Donald Dungan Libraries" on the check;

- c. Use the other 50% of the Lions Park Café's Net Revenues for maintenance at the Mesa Verde Library and Donald Dungan Library; and
- d. Provide County with a summary of Revenues, Net Revenues, and Expenses for the prior quarter. City may satisfy the foregoing obligation by providing County with all, or a portion of, Lions Park Café's financial statements for the prior quarter.

C. City shall ensure the Lions Park Café incurs only reasonable and necessary expenses that are typically incurred by other similar establishments within the City. City shall ensure it, and the Lions Park Café, account for Lions Park Café's revenue and expenses according to generally accepted accounting principles applicable to City.

D. City shall maintain records related to the operation of the Lions Park Café for not less than three (3) years after the final payment is made under this Memorandum, unless a longer period of records retention is required by law, and provide the records to County within 10 days of County's request.

E. City shall permit County's Auditor-Controller or the Auditor-Controller's authorized representative access during normal working hours to all books, accounts, records, reports, files, financial records, supporting documentation, and other papers or property of City for the purpose of auditing or inspecting any aspect of performance under this Memorandum. County will provide reasonable notice of such an audit or inspection.

F. City shall maintain commercially reasonable insurance coverage that is adequate for performing its obligations under this Memorandum.

G. City shall, in performing under this Memorandum, comply at its own expense with all applicable local, state, and federal laws, statutes, requirements, and regulations.

III. County's Responsibilities:

A. County, through OC Public Libraries, shall accept the revenue sharing funds paid by City to County under this Memorandum.

B. County shall deposit all such revenues in OC Public Libraries' Library Fund as OC Public Libraries revenues to be used on an ongoing basis for funding programming by OC Public Libraries for both the Mesa Verde and Donald Dungan libraries.

IV. Miscellaneous Articles:

A. Notwithstanding anything to the contrary, nothing herein shall require County to incur an expense, obligation, or liability of any kind related to operation of the Lions Park Café or this Memorandum.

B. The Parties agree that County's (inclusive of County's affiliates, subcontractors, employees, officers, directors, elected and appointed officials, and those special districts and agencies which County's Board of Supervisors acts as the governing Board) liability arising under or related to the Lions Park Café and this Memorandum is limited and disclaimed in full and/or to the maximum extent allowed by law, whichever is more limiting. In no event shall County (inclusive of County's affiliates, subcontractors, employees, officers, directors, elected and appointed officials, and those special districts and agencies which County's Board of Supervisors acts as the governing Board) be liable or responsible for any type of claim, damage (including but not limited to exemplary, punitive, indirect incidental, and consequential damages), or liability regardless of the form of the action or the theory of recovery, whether in contract or in tort or otherwise.

C. City shall indemnify, defend with counsel approved in writing by County, and hold County, its elected and appointed officials, officers, employees, agents and those special districts and agencies which County's Board of Supervisors acts as the governing Board ("County Indemnitees") harmless from and against any claims, demands, liability of any kind or nature, including but not limited to personal injury or property damage, arising from or related to the Lions Park Café or the services or performance provided pursuant to this Memorandum. If judgment is entered against City and County by a court of competent jurisdiction because of the concurrent active negligence of County or County Indemnitees, City and County agree that liability will be apportioned as determined by the court. Neither Party shall request a jury apportionment.

D. City cannot assign this Memorandum without the express written approval of County. This Memorandum shall be binding upon and inure to the benefit of the Parties and their permitted successors, assigns, and legal representatives.

E. No alteration or variation of the terms of this Memorandum shall be valid unless made in writing and signed by the Parties; no oral understanding or agreement not incorporated herein shall be binding on any of the Parties; and no exceptions, alternatives, substitutes or revisions are valid or binding on County unless authorized by County in writing.

F. Notices or other communications, which may be required or provided under the terms of this Memorandum, shall be given as follows:

City: City of Costa Mesa
P.O. Box 1200
Costa Mesa, CA 92628-1200
Attention: Lori Ann Farrell Harrison, City Manager
loriann@costamesaca.gov

County: County of Orange/OC Community Resources
1501 E. Saint Andrew Place, 2nd Floor
Santa Ana, CA 92705
Attention: Julie Oakley, Real Estate & Non-Profit Strategies Manager,
OC Public Libraries
julie.oakley@occr.ocgov.com

All notices shall be in writing and deemed effective when delivered in person or deposited in the United States mail, first class, postage prepaid and addressed as above. Notwithstanding the above, the Parties may also provide notices by facsimile transmittal, and any such notice so given shall be deemed to have been given upon receipt during normal business hours or, in the event of receipt after business, on the following business day. Any notices, correspondence, reports and/or statements authorized or required by this Memorandum, addressed in any other fashion shall be deemed not given.

G. In any action or proceeding to enforce or interpret any provision of this Memorandum, or where any provision hereof is validly asserted as a defense, the Parties shall bear their own attorney's fees, costs, and expenses.

H. The laws of the State of California and applicable local and federal laws, regulations, and guidelines shall govern this Memorandum.

I. City shall be considered an independent contractor and neither City, its employees, nor anyone working under City shall be considered an agent or an employee of County. Neither City, its employees nor anyone working under City shall qualify for workers' compensation or other fringe benefits of any kind through County. The Parties agree that County will not operate and is not responsible or liable in anyway for the Lions Park Café.

J. If any term, covenant, condition, or provision of this Memorandum is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions hereof shall remain in full force and effect and shall in no way be affected, impaired, or invalidated thereby.

K. This Memorandum may be executed in two or more counterparts, each of which shall be deemed an original and all of which together shall constitute the same agreement. Facsimile, documents executed, scanned, and transmitted electronically, and electronic signatures shall be deemed original signatures for purposes of this Memorandum, with such facsimile, scanned, and electronic signatures having the same legal effect as original signatures.

L. The individuals signing this Memorandum have the authority to commit the Party they represent to the terms of this Memorandum, and do so commit by signing.

IN WITNESS WHEREOF, the Parties hereto have caused this Memorandum to be executed on the date first above written.

CITY OF COSTA MESA, CALIFORNIA

DocuSigned by:
Lori Ann Farrell Harrison 2/7/2023
By: _____ Dated: _____
Lori Ann Farrell Harrison
City Manager

COUNTY OF ORANGE

DocuSigned by:
Helen Hernandez 2/16/2023
By: _____ Dated: _____
Helen Hernandez, Deputy Purchasing Agent
County Procurement Office
County of Orange, California

APPROVED AS TO FORM:
Office of the County Counsel
County of Orange, California

DocuSigned by:
John Cleveland
BY: _____
Deputy
2/15/2023
DATED: _____

**APPROVED AS TO FORM FOR
CITY:**
City of Costa Mesa

DocuSigned by:
Kimberly Hall Barlow
BY: _____
Kimberly Hall Barlow
City Attorney
2/15/2023
DATED: _____