



**BUSINESS OF THE CITY COUNCIL
CITY OF MERCER ISLAND, WA**

**AB 5158
February 22, 2016
Regular Business**

**MEMORANDUM OF UNDERSTANDING ("MOU")
WITH THE MERCER ISLAND CENTER FOR THE
ARTS ("MICA") REGARDING A LEASE FOR A
PERFORMING ARTS CENTER AND RELATED
ENVIRONMENTAL IMPACTS REVIEW**

Proposed Council Action:

Authorize the Interim City Manager to execute a MOU with MICA to conduct a review of the potential environmental impacts of constructing a performing arts center in the southwest corner of Mercerdale Park.

DEPARTMENT OF

City Attorney (Kari Sand)

COUNCIL LIAISON

n/a

EXHIBITS

1. Proposed MOU
2. Proposed Agreement to Lease Subject to Certain Conditions Precedent

APPROVED BY CITY MANAGER

AMOUNT OF EXPENDITURE	\$	n/a
AMOUNT BUDGETED	\$	n/a
APPROPRIATION REQUIRED	\$	n/a

SUMMARY

BACKGROUND

The City Council discussed a proposed Ground Lease with the Mercer Island Center for the Arts ("MICA") during the Council's November 16, 2015 and January 19, 2016 regular meetings. See AB 5133 and AB 5149, respectively. Modifications to the proposed Ground Lease, now re-titled "Proposed Agreement to Lease Subject to Certain Conditions Precedent" and attached hereto as Exhibit 2, discussed at those meetings have been incorporated into the version attached. Additionally, the City's insurance risk pool, the Washington Cities' Insurance Authority (the "WCIA"), has reviewed the proposed Lease and substantially revised the indemnification and insurance requirements set forth in Sections 13 and 14, respectively. Further, the WCIA added language in Section 2.1.6 that requires MICA's prime contractor to procure and maintain insurance of the types and coverage listed, including Builder's Risk insurance.

Following Council review of the proposed lease on January 19, staff met with representatives of the applicant (MICA) to discuss compliance with the environmental review requirements of the State Environmental Policy Act (SEPA). SEPA requires that environmental review be conducted prior to a governmental decision regarding a lease of public land (WAC 197-11-704(2)(a)(ii)). Staff has determined that approval of a Memorandum of Understanding (MOU), substantially in the form attached to this Agenda Bill as Exhibit 1, would both memorialize the City's and MICA's desire to enter into the proposed Lease (Exhibit 2) and would ensure that the environmental review and decision processes required by SEPA will be followed. Upon satisfactory completion of the SEPA environmental review process, the proposed Lease would be brought back to the City Council for final action.

THE MEMORANDUM OF UNDERSTANDING (“MOU”) ESTABLISHES THE SEPA REVIEW PROCESS

The proposed MOU at Exhibit 1 establishes the process the City and MICA will follow in order to conduct a thorough and meaningful review of the potential environmental impacts of constructing and operating a center for the performing and visual arts and for arts education programs, including theatres, a recital hall, classrooms, a food and beverage venue and other arts and arts education spaces (the “Center”). The Center’s proposed location is on the Recycling Center site and a portion of Mercerdale Park, located generally at the southwest corner of 77th Avenue SE and SE 32nd Street.

Significantly, the MOU is not an “action” as that term is defined in the State Environmental Policy Act, Chapter 43.21C RCW, and the state and local implementing rules promulgated thereunder (collectively, “SEPA”). By contrast, a future decision by the Mercer Island City Council regarding a specific project – that is, whether to approve a long-term lease with MICA to construct the Center on a portion of Mercerdale Park – is an “action” as that term is defined by SEPA, and accordingly, triggers SEPA review. See WAC 197-11-704(2)(a)(ii); see also, Int’l Longshore & Warehouse Union, Local 19 v. City of Seattle, 176 Wn. App. 512, 309 P.3d 654 (2013) (the so-called “arena case,” wherein Division One held that a MOU between King County, the City of Seattle and private investor Chris Hansen’s company, ArenaCo., did not trigger SEPA review and judicial review was not available because the MOU was not an “action” but merely “a decision about the process that will be used to make a decision.”). Similarly, here, the MOU simply sets forth the SEPA review process to be followed, and it is merely a preliminary step and not a project approval. The MOU indicates the parties’ desire to move forward, but it does not limit or control the Council’s future decision on the proposed MICA lease. Once the SEPA review process is complete and the environmental impacts of the Center proposal are fully understood, then the Council may consider whether or not to go forward with the proposed MICA lease. Thus, it is the Council’s future consideration of the proposed Lease with MICA that triggers SEPA review now.

The City’s Development Services Group (“DSG”) staff is conducting the environmental review for the proposed Center pursuant to SEPA. The full SEPA review of the Center includes, but is not limited to, the following: a comprehensive traffic impact analysis, identification of adequate parking to meet the City code, identification of on-site environmental conditions, potential impacts and possible mitigating actions, such as mitigation for impacts to the nearby Category III wetland and its associated buffer and impacts related to any geotechnical hazards. The City may not take any action within the meaning of SEPA except as authorized by law, and the MOU is not intended to limit the City’s exercise of substantive SEPA authority in any way. MICA will reimburse the City for all costs incurred by the City as part of the SEPA review, including but not limited to peer reviews by qualified consultants to ensure the environmental assessment conducted is fair, competent and objective. MICA will be solely responsible for funding any required mitigation, whether or not imposed through the City’s exercise of its substantive SEPA authority.

SEPA REVIEW MUST BE COMPLETED PRIOR TO THE CITY COUNCIL’S CONSIDERATION OF THE PROPOSED “AGREEMENT TO LEASE SUBJECT TO VARIOUS CONDITIONS PRECEDENT”

Once the SEPA review for the Center is concluded and the environmental impacts of the Center are known, then the Council may consider approval of the “Agreement to Lease Subject to Certain Conditions Precedent” in substantially the form attached as Exhibit 2 (the proposed Lease is Exhibit 1 to the MOU). As spelled-out in the proposed Lease, MICA’s construction of the Center at the former Recycling Center site and on a portion of the southwest corner of Mercerdale Park is expressly subject to several conditions precedent, as follows:

- completion of a thorough SEPA review by the City as set forth in the MOU;
- completion of a code text amendment for the special purpose Public Institution Zone to allow a performing and visual arts center as a permitted use within the P zone (see Section 2.2 of the proposed Lease at Exhibit 2);

- attainment of fundraising milestones by MICA (see Ex. 2, Section 3.7);
- receipt of a building permit and all other permits necessary for construction of the Center, and all related costs and fees shall be paid by MICA (see Ex. 2, Section 2.2.1);
- compliance with all applicable laws, regulations and ordinances in constructing, operating and maintaining the Center and in using the Premises (see Ex. 2, Section 2.2); and
- posting of a payment and performance bond for construction of the Center by MICA (see Section Ex. 2, Section 2.1.5).

RECOMMENDATION

City Attorney

MOVE TO: Authorize the Interim City Manager to execute a MOU with MICA in substantially the form attached hereto at Exhibit 1.

Memorandum of Understanding Regarding a Center for the Arts

This Memorandum of Understanding Regarding a Center for the Arts ("MOU"), dated this ____ day of _____, 2016 ("Effective Date"), is entered by and between the CITY OF MERCER ISLAND, a Washington municipal corporation ("City"), and the MERCER ISLAND CENTER FOR THE ARTS, a Washington nonprofit corporation ("MICA"). The City and MICA are referred to collectively as the "Parties."

RECITALS

A. The City owns property commonly known as the "Recycling Center," "Bicentennial Park" and the "Northwest Native Garden," located generally at the southwest corner of 77th Ave. SE and SE 32nd St. (northwest corner of Mercerdale Park), all in the City of Mercer Island, Washington.

B. The City and MICA share a long-term mission to nurture, promote, and support high-quality cultural arts activities for the community. MICA's mission is to construct and operate a center for the performing and visual arts and for arts education programs, including theatres, a recital hall, classrooms, a food and beverage venue and other arts and arts education spaces (the "Center"). MICA will be solely responsible for the cost of design, permitting, site development, construction and operation of the Center. The Parties intend that the Center will allow Mercer Island residents and people from throughout the Puget Sound area the opportunity to gather, to converse and create, to celebrate excellence in the lively arts, and to inspire generations of artists, audiences, and students through exceptional live performances, special events, exhibitions, and educational experiences.

C. Subject to the satisfaction of various conditions precedent, including but not limited to environmental review as set forth in Section 3 below, the Parties desire to enter into an Agreement to Lease Subject to Certain Conditions Precedent in substantially the form attached hereto and incorporated herein by reference as Exhibit 1 (the "Lease Agreement") to allow MICA to construct and operate the Center on the Premises legally described in Exhibit A to the Lease Agreement (the "Premises").

D. This MOU is intended to be a binding and enforceable agreement of the Parties establishing the process to be followed by the Parties in order to complete environmental review of the Center. As appropriate following the completion of such environmental review and related appeals and/or appeal periods, the Parties may approve the Lease Agreement at Exhibit 1. Taken together, both this MOU and the Lease Agreement reflect the mutual understandings of the Parties as to the agreements, actions, permits, and/or approvals lawful and necessary to accomplish the financing, permitting, construction, lease, operation, maintenance use and occupancy of the Center (collectively, the "Project"). The Parties intend to actively participate and to work together collaboratively, in good faith and with due diligence, to carry out the

process described herein consistent with this MOU. These undertakings are personal to the Parties, and this MOU shall not be assigned to any other person or entity unless both Parties agree.

UNDERSTANDINGS

1. **Purpose and Term of this MOU Agreement.** This MOU sets forth the environmental review to be completed with respect to the Center. This MOU will terminate upon the earlier of (a) the completion of the environmental review and related appeals and/or appeal periods described in Section 3 herein resulting in an outcome that is not reasonably acceptable to the Parties; or (b) the Effective Date of the Lease Agreement substantially in the form at Exhibit 1; or (c) in the event of a material adverse condition as specified in Section 5 below.

2. **Location.** MICA is proposing to construct and operate the Center on the Premises, which comprises approximately 41,346 square feet of land within the southwest corner of Mercedale Park. Considering that the Premises is located on a portion of public park land owned by the City, the City hereby authorizes MICA to apply for SEPA review at its sole cost, and the City will evaluate this location as part of the SEPA review for the Center as more particularly described in Section 3 below.

3. **Environmental Review.** The Parties acknowledge that the Center and any proposed lease of the Center is subject to environmental review and potential mitigation under the State Environmental Policy Act, Chapter 43.21C RCW, and the state and local implementing rules promulgated thereunder (collectively, "SEPA"). Before the City Council considers approval of the Lease Agreement at Exhibit 1, the City will complete a full SEPA review, including but not limited to a comprehensive traffic impact analysis, identification of adequate parking to meet the City code, and identification of possible mitigating actions, including but not limited to mitigation for impacts to the nearby Category III wetland and its associated buffer and impacts related to any geotechnical hazards. Further, prior to the City Council's consideration of approval of the Lease Agreement, any environmental-related appeals related to the Center must result in an outcome that is reasonably acceptable to the Parties. The City may not take any action within the meaning of SEPA except as authorized by law, and nothing in this MOU is intended to limit the City's exercise of substantive SEPA authority. MICA will reimburse the City for all costs incurred by the City as part of the SEPA review, including but not limited to peer reviews, and MICA will be solely responsible for funding any required mitigation imposed through the City's exercise of substantive SEPA authority.

4. **Approval and Execution of the Lease Agreement.** Provided the environmental review set forth in Section 3 above is satisfied, MICA's President, after approval of the MICA Board of Directors, and the City Manager, after approval of the City Council, may approve and execute the Lease Agreement in substantially the form at Exhibit 1.

5. **Material Adverse Conditions.** In the case of a natural disaster, the discovery and remediation of any hazardous materials on the Premises and unanticipated costs associated

therewith, or a significant, material change in the legal or financial position of MICA such as disincorporation, bankruptcy or insolvency and in the event the Parties are unable to agree in good faith on viable alternatives for addressing any of the foregoing material adverse conditions, this MOU will terminate upon at least thirty (30) days' prior written notice at the option of either Party in the sole discretion of the terminating Party.

6. **Amendments.** The Parties anticipate that the terms of this MOU may need to be modified in the future. MICA's President, after approval of the MICA Board of Directors, and the City Manager, after approval of the City Council, are hereby authorized to approve mutually agreed amendments to this MOU and to supplement this MOU where necessary to improve the administration of this MOU and the collaboration between the Parties. All amendments must be in writing signed by the President of MICA and the City Manager.

7. **Counterparts.** The Parties may execute this MOU in two or more counterparts, which shall, in the aggregate, be signed by both Parties. Each counterpart shall be deemed an original instrument as against any Party who has signed it.

8. **Notices.** All notices and communications between the Parties will be between the persons identified immediately below or such successor persons as may be identified in writing by either Party. Each of the persons designated below and any successors will have authority to bind their respective organizations or will obtain any necessary authority on an ad hoc basis and in a timely manner. Each such notice or other communication which may be or is required to be given under this Agreement shall be in writing and shall be deemed to have been properly given when delivered personally or by email during normal business hours to the party to whom such communication is directed, or three (3) days after being sent by regular mail, to the appropriate Party at the following address:

If to MICA:

Mercer Island Center for the Arts
P.O. Box 1702
Mercer Island, WA 98040
Attn: _____
Email: _____

If to the City:

City of Mercer Island
9611 SE 36th St.
Mercer Island, WA 98040
Attn: City Manager
Email: _____

Either party may change its address for notices from time to time by notice to the other party given as above provided.

IN WITNESS WHEREOF, both the City and MICA have caused this MOU to be executed by authorized officers as of the date first written above.

CITY OF MERCER ISLAND
a Washington municipal corporation

By: _____
Title: _____

Approved as to form:

By: _____
Title: City Attorney

MERCER ISLAND CENTER FOR THE ARTS
a Washington nonprofit corporation

By: _____
Title: _____

AGREEMENT TO LEASE SUBJECT TO CERTAIN CONDITIONS PRECEDENT

THIS AGREEMENT TO LEASE SUBJECT TO CERTAIN CONDITIONS PRECEDENT ("Agreement") is made as of the ___ day of _____, 2016 ("Effective Date"), by and between the CITY OF MERCER ISLAND, a Washington municipal corporation ("City"), and the MERCER ISLAND CENTER FOR THE ARTS, a Washington nonprofit corporation ("MICA") (collectively referred to herein as the "Parties").

PREAMBLE

The City and MICA share the long-term mission of building a vibrant, socially-engaged community on Mercer Island. One of the City's missions, as stated by its Arts Council, is "to nurture, promote, and support high-quality cultural arts activities for the Community." MICA's mission is to provide "a cultural focal point on Mercer Island where Islanders and people from throughout the Puget Sound area gather to converse and create, to celebrate excellence in the lively arts, and to inspire generations of artists, audiences, and students through exceptional live performances, special events, exhibitions, and educational experiences." To fulfill those missions, the Parties will need to collaborate as described in this Agreement. Therefore, both Parties commit to a working relationship throughout the term of this Agreement based on the principles of mutual cooperation and goodwill, always with the ultimate interests of the people of Mercer Island in mind. For example, and not by way of limitation, the Parties may work together to improve the environmental conditions in and appearance of Mercerdale Park, improve community facilities located within Mercerdale Park and Bicentennial Park, and plan and present existing and new community activities and events.

RECITALS

- A. The City owns property commonly known as the "Recycling Center," "Bicentennial Park" and the "Northwest Native Garden," located generally at the southwest corner of 77th Ave. SE and SE 32nd St., Mercer Island, Washington;
- B. A portion of said property has been designated and legally described in Exhibit A, which is incorporated herein by this reference (the "Premises");
- C. The Premises are between and adjacent to the grassy area of Mercerdale Park and the Mercerdale Hillside (collectively "Mercerdale Park");
- D. Subject to the City's land use regulations and building permit processes in effect at the time a complete application for a building permit is submitted, MICA desires to lease the Premises from the City for purposes of constructing and operating a center for the performing and visual arts and for arts education programs, including theatres, a recital hall, classrooms, a food and beverage venue and other arts and arts education spaces (the "Center"), the construction of which will be managed and financed by MICA and which will then be operated and controlled by MICA;

- E. The City will benefit by having access to the Center and will be able to use the Center for its own arts, educational and recreational purposes as well as to benefit the Mercer Island Farmers Market and Mercerdale Park users;
- F. The Mercer Island community will also benefit by the provision of arts facilities that will replace the youth theatre venue formerly located at SE 40th St. on what is commonly referred to as the Mercer Island School District's North Mercer Campus that was lost due to the construction of a new elementary school; and
- G. The leasing of the Premises to MICA will not materially interfere with the continued use of Mercerdale Park for recreational and park purposes, nor will it interfere with the adjacent operation of the Farmer's Market or the City's annual Summer Celebration events.

NOW, THEREFORE, in consideration of the terms and conditions contained herein, the City and MICA mutually agree as follows:

1. PURPOSE OF AGREEMENT.

This Agreement provides for the leasing of the Premises to MICA and for the development, operation and maintenance of the Center by MICA on the Premises. This Agreement is also intended to provide a framework for the City and MICA as to the use of parts of the Center by the City at certain times as well as to provide access, as required by the City, to certain parts of the Center by the public and by certain other entities for the purposes herein provided.

2. PROJECT DESCRIPTION.

2.1. Construction and Operation of the Center. Subject to the provisions of this Agreement, MICA shall design, construct, maintain and operate the Center. The design, construction, maintenance and operation of the Center shall be at the sole responsibility of MICA. The design and construction of the Center shall be subject to the following considerations and provisions:

2.1.1 During the development of the Center design, the schematics and draft plans and specifications shall be provided to the City's Representative (identified in Section 27) for review when reasonably requested by the City so the City can confirm that there are no conflicts with the City's desired use of Mercerdale Park and that the Center project will be aesthetically consistent with Mercerdale Park.

2.1.2 MICA shall regularly communicate with the City's Representative during Center design, preconstruction activities, construction activities, and post-construction activities when reasonably requested by the City's Representative. Notwithstanding this

regular communication, MICA shall provide the City's Representative with written notice of its intent to begin construction at the Premises not less than thirty (30) days prior to the commencement of such construction and shall use its best efforts to coordinate construction activities on the Premises with City activities at Mercerdale Park.

2.1.3 The final design of the Center project – including but not limited to signage, landscaping, traffic flow and parking – and any subsequent plans and specifications for additions or improvements thereto, shall be subject to the City's land use regulations and building permit processes, including Design Commission review if applicable, in effect at the time a complete application for a building permit is submitted.

2.1.4 Prior to commencing construction, MICA shall obtain the approval of the City's Representative for any temporary use of City property other than the Premises in order to facilitate the construction of the Center (e.g., staging areas) and for any interference that construction will cause in the use of Mercerdale Park or other City property or public right-of-way.

2.1.5 Prior to commencing construction, MICA shall require the prime contractor with which it contracts to build the Center to post a payment and performance bond in the amount of 100% of the amount of the prime contract as security to ensure the Center is completed and all laborers and materialmen are paid. Surety shall be licensed to conduct business in the State of Washington and shall be named in the current list of "Surety Companies Acceptable in Federal Bonds" as published in the Federal Register by the Audit Staff Bureau of Accounts, U.S. Treasury Department. In addition, MICA shall require the prime contractor to procure and maintain insurance, as required in this Section, without interruption from commencement of the contractor's work through the term of the construction contract and for thirty (30) days after the Substantial Completion date, as defined in Section 3.7.4, unless otherwise indicated herein. The prime contractor's required insurance, except for the Builders Risk policy which may be procured by MICA at its option, shall be of the types and coverage as stated below:

Automobile Liability insurance covering all owned, non-owned, hired and leased vehicles. Coverage shall be at least as broad as Insurance Services Office (ISO) form CA 00 01.

Commercial General Liability insurance shall be as least at broad as ISO occurrence form CG 00 01 and shall cover liability arising from premises, operations, independent contractors, products-completed operations, stop gap liability, personal injury and advertising injury, and liability assumed under an insured contract. The Commercial General Liability insurance shall be endorsed to provide a per project general aggregate limit using ISO form CG 25 03 05 09 or an equivalent endorsement. There shall be no exclusion for liability arising from explosion, collapse or underground property damage. MICA shall be named as an additional insured under the Contractor's Commercial General Liability insurance

policy with respect to the work performed for the MICA using ISO Additional Insured endorsement CG 20 10 10 01 and Additional Insured-Completed Operations endorsement CG 20 37 10 01 or substitute endorsements providing at least as broad coverage. The city shall be named as an additional insured under the Contractor's Commercial General Liability insurance policy using ISO Additional Insured – Designated Person or Organization endorsement CG 20 26 07 04 or substitute endorsement providing as least as broad coverage.

Workers' Compensation coverage as required by the Industrial Insurance laws of the State of Washington.

Builders Risk (a/k/a course of construction) insurance covering interests of MICA, the contractor, subcontractors, and sub-subcontractors in the work. Builders Risk insurance shall be on a special perils policy form and shall insure against the perils of fire and extended coverage and physical loss or damage including flood, earthquake, theft, vandalism, malicious mischief, and collapse. The Builders Risk insurance shall include coverage for temporary buildings, debris removal, and damage to materials in transit or stored off-site. This Builders Risk insurance covering the work will have a deductible of \$5,000 for each occurrence, which will be the responsibility of the contractor. Higher deductibles for flood and earthquake perils may be accepted by MICA upon written request by the contractor and written acceptance by MICA. Any increased deductibles accepted by the MICA will remain the responsibility of the contractor. The Builders Risk insurance shall be maintained until MICA has granted Substantial Completion of the Center.

The prime contractor shall maintain the following insurance limits:

Automobile Liability insurance with a minimum combined single limit for bodily injury and property damage of \$1,000,000 per accident.

Commercial General Liability insurance shall be written with limits no less than \$1,000,000 each occurrence, \$2,000,000 general aggregate and \$2,000,000 products-completed operations aggregate limit.

Builders Risk insurance shall be written in the amount of the completed value of the project with no coinsurance provisions

If the prime contractor maintains higher insurance limits than the minimums shown above, MICA shall be insured for the full available limits of Commercial General and Excess or Umbrella liability maintained by the prime contractor, irrespective of whether such limits maintained by the prime contractor are greater than those required by this Agreement or whether any certificate of insurance furnished to MICA evidences limits of liability lower than those maintained by the prime contractor.

The prime contractor's Automobile Liability and Commercial General Liability insurance policies are to contain, or be endorsed to contain that they shall be primary insurance as respects MICA. Any insurance maintained by MICA shall be excess of the prime contractor's insurance and shall not contribute with it.

Insurance is to be placed with insurers with a current A.M. Best rating of not less than A: VII.

Prime contractor shall furnish MICA with original certificates and a copy of the amendatory endorsements, including but not necessarily limited to the additional insured endorsements, evidencing the insurance requirements of the prime contractor before commencement of the work. Upon request by MICA, the prime contractor shall furnish certified copies of all required insurance policies, including endorsements, required in this Agreement and evidence of all subcontractors' coverage.

The prime contractor shall cause each and every subcontractor to provide insurance coverage that complies with all applicable requirements of the prime contractor-provided insurance as set forth herein, except the prime contractor shall have sole responsibility for determining the limits of coverage required to be obtained by subcontractors. The prime contractor shall ensure that MICA is an additional insured on each and every subcontractor's Commercial General liability insurance policy using an endorsement at least as broad as ISO Additional Insured endorsement CG 20 38 04 13.

The prime contractor shall provide MICA and all Additional Insureds for this work with written notice of any policy cancellation within two business days of their receipt of such notice.

Failure on the part of the prime contractor or any subcontractor to maintain the insurance as required shall constitute a material breach of contract, upon which MICA may, after giving five business days' notice to the contractor to correct the breach, immediately terminate the contract or, at its discretion, procure or renew such insurance and pay any and all premiums in connection therewith, with any sums so expended to be repaid to MICA on demand, or at the sole discretion of MICA, offset against funds due the contractor from MICA.

2.2 Compliance with Laws; Permits; Related Legal Proceedings. MICA acknowledges that a building permit for the Center could not be issued by the City under existing zoning law, that applying for a building permit will first require a code text amendment for the special purpose Public Institution ("P") Zone in Mercer Island City Code Section 19.05.010(A) to include a center for the performing and visual arts as a permitted use within the zone, and that by its execution of this Agreement, the City is not committing to the code text amendment or, if the code text amendment is adopted, that the amended zoning code would permit construction of the Center at the Premises. MICA shall abide by all applicable laws, regulations and ordinances

in constructing, operating and maintaining the Center and in using the Premises, including, without limitation, possessing all required licenses, certifications, or other approvals (whether required to be held by MICA as an entity or by MICA's individual employees, volunteers, subtenants, or other agents) relevant to MICA's use of the Premises for specific programs. In addition, MICA agrees to the following:

2.2.1 MICA shall obtain any necessary approvals and permits as may be required by any applicable law or regulation prior to beginning construction on the Premises. The costs of all fees connected with acquiring required approvals and permits shall be the exclusive responsibility of and shall be paid by MICA.

2.2.2 Without limiting Section 2.2.1 above, MICA shall, at its sole cost and expense, perform all actions necessary to comply with any and all traffic mitigation measures and traffic management requirements that may be required as a condition of MICA's use of the Premises for the Center and/or the construction of the Center on the Premises. The City shall be responsible for implementing traffic management related to any City use of the Center.

2.2.3 MICA shall be required to operate the Center for the Term of the tenancy under this Agreement consistent with Section 3 of this Agreement. During the Term, MICA shall be solely responsible for all costs associated with operation and maintenance of the Center (except for the costs the City has agreed to pay as detailed in Sections 5.2, 9.1 and 10.4). In addition, following Substantial Completion (as defined in Section 3.2 below), MICA shall not vacate or abandon the Premises or reduce operations and maintenance at the Center to such an extent that it is no longer satisfactorily or successfully fulfilling its mission as specified in this Agreement.

2.3 Project Funding. Except as otherwise provided in this Section 2.3, MICA shall meet all funding requirements set forth in this Agreement and Section 3.7 (Timeliness) below, including but not limited to the requirement to have raised, received pledges or obtained financing for one hundred percent (100%) of the Center's projected total construction costs prior to the start of construction. The City shall be responsible only for its legal and consulting costs related to the negotiation and approval of this Agreement and any associated administrative and judicial appeals.

Notwithstanding the foregoing, nothing in this Agreement shall prevent the City from voluntarily contributing additional funds to the Project, making other off-site improvements benefitting the Project and the Center, or providing in-kind services to MICA.

2.4 Public Benefits. In partial consideration for this Agreement, MICA covenants and agrees to include within the Center the following public benefits and features that would have otherwise required the expenditure of public funds:

2.4.1 Improve the condition, and appearance of Mercedale Park:

- removal of the old Recycling Center buildings and pavement unless removed by Mercer Island School District #400;
- lighting, walkway and improvements within the Premises;
- wetlands and drainage enhancement and mitigation as may be required under applicable regulations; and
- public restrooms to replace the existing outdated restrooms.

2.4.2 Preserve, enhance and promote new community facilities at or near the current Recycling Center:

- public plaza to include improved park amenities (benches, tables, waste and recycling receptacles and drinking fountains) or other landscaped outdoor open spaces;
- replacement of portions of the Northwest Native Garden that have fallen into disrepair;
- replacement of portions of Bicentennial Park amenities (such as the flag pole and seating area) that have fallen into disrepair;
- outdoor theatre stage that faces the grassy area of Mercedale Park for public performances; and
- an indoor/outdoor eating venue that will be open to the public to the extent the venue remains economically viable. MICA will have the sole determination as to whether the venue is economically viable and the sole authority to curtail its operations and/or close the venue, but a minimum of thirty days prior to closing the venue or curtailing its operations, MICA will give written notice to the City of its intent and shall consult with the City's Representative to allow the City a reasonable opportunity to make proposals which may enable the eating venue to remain in operation.

2.4.3 Promote the on-going success of existing and new community activities at Mercedale Park:

- hot and cold water sinks, meeting applicable regulatory requirements, and electricity outlets for Mercer Island Farmer's Market vendors as long as the Farmer's Market operates on Mercer Island;
- sinks and electricity outlets will also be made available for the annual Mercer Island Summer Celebration events and other City-sponsored outdoor use of Mercedale Park; and
- on-site storage for Mercer Island Farmer's Market equipment as long as the Farmer's Market operates on Mercer Island.

2.4.4 Provide the City access to the Center:

- use of spaces within the Center for City-related public meetings;

- use of classroom space for City-sponsored art classes;
- use of the Center as a back-up Emergency Operations Center (“EOC”) (any additional costs related to such use will be paid by the City); during an emergency, use of the Center as a back-up EOC shall take precedence over all other Center uses; and
- other purposes dependent on the needs of the City.

2.5 Commencement Date: The term “Commencement Date” shall mean the date of the conveyance of a leasehold interest in the Premises to MICA, which date will be the date of the issuance of the Building Permit for the Center. MICA acknowledges that the Building Permit cannot be issued until all legal requirements and contractual conditions precedent have been satisfied.

3. **RIGHT TO USE REAL PROPERTY FOR CENTER.**

3.1 Lease of Premises After All Conditions Precedent Are Satisfied. The City represents and warrants that it has full right and power to enter into this Agreement, and to convey the leasehold interest described herein to MICA on the terms and conditions herein contained. If and only if MICA has first satisfied all of the requirements in this Agreement that are specified as being a condition precedent to issuance of the Building Permit and the happening of the Commencement Date, the City hereby leases to MICA and MICA leases from the City, as provided below, the Premises “as is” (subject to Section 3.4 below), together with all improvements thereon in the condition in which it now exists.

3.2 Term. The initial term of the tenancy under this Agreement shall be as follows:

3.2.1 Beginning on the Commencement Date and continuing for the period of time required to construct the Center and achieve Substantial Completion as provided in Section 3.7.4; plus,

3.2.2 Fifty (50) years beginning at Substantial Completion. The fifty (50) year initial occupancy term shall commence upon the City's receipt of written notice from MICA that the Center is substantially complete. The written notice shall be provided by a Commencement Certificate, the form of which is attached as Exhibit B. Notwithstanding MICA's duty to provide the City with written notice that the Center construction is substantially complete, the City may request an official determination regarding whether construction of the Center is substantially complete by contacting MICA's Designated Representative, as established in Section 27, and, if necessary, through use of the dispute resolution procedures contained in Section 12. The term "Substantial Completion" shall mean the date when the City has issued a temporary certificate of occupancy for the Center or at any time in which the Center is fully occupied by MICA, whichever is earlier. MICA shall be deemed to have accepted possession of the Premises on the Commencement Date. Prior to the Commencement Date and subject to Section 3.10,

MICA shall have no right to possess or otherwise occupy the Premises or, without prior approval of the City, place any items of personal property on the Premises.

3.3 Option to extend. MICA shall have the option to extend the term of the tenancy under this Agreement up to three (3) periods of ten (10) years each under the same terms and conditions as during the initial term. The initial term, as such may be extended, is referred to herein as the "Term." MICA shall be deemed to have exercised each such option unless it gives notice to the City of its intention to not exercise such option at least six (6) months prior to the expiration of the initial term and any extensions thereto; and provided further that, the approval and commencement of any option term is contingent on MICA's completion of all routine and extra maintenance necessary to maintain the Center in a "first-class" manner appropriate for the Center's age and consistent with Section 9. For purposes of determining whether MICA has met its maintenance obligations, MICA and the City shall mutually agree upon a professional inspection team, which shall inspect the Center and report on its condition. MICA shall be solely responsible for all costs associated with such inspection. Any further extensions of this Agreement are to be mutually agreed upon between the Parties, and the City agrees to negotiate in good faith if MICA requests extensions of the term. Any extension shall be governed by the terms and conditions of this Agreement, except if MICA exercises an option to extend, it will have one fewer option to extend the tenancy under this Agreement than it had prior to exercising such option.

3.4 Environmental Responsibility. Nothing contained in this Agreement shall be construed as MICA's agreement to assume any liabilities or obligations the City may have under applicable law as a consequence of the Release (as defined in Section 15, below) of any Hazardous Substance (as defined in Section 15, below) onto, into or under the Premises, or any other environmental contamination of the Premises, prior to the Commencement Date. MICA has obtained, at its sole cost and expense, a Phase I Environmental Assessment ("Phase I EA") of the Premises and has provided the City with a copy of the Phase I EA. The Phase I EA has found no evidence of any contamination on the Premises and does not recommend any further investigation. The City and MICA have determined that a Phase II Environmental Assessment ("Phase II EA") is not necessary.

3.5 Wetlands. The Parties acknowledge the existence of a Category III wetland adjacent to the Premises and a buffer zone for that wetland on a portion of the Premises. MICA will be solely responsible for any costs of any mitigation which may be required for the construction of the Center.

3.6 Modifications to Premises. The City recognizes that the existing condition of the Premises will be modified by the construction and development of the Center.

3.7 Timeliness. This Agreement is conditioned upon MICA's covenant to construct the Center in a timely manner, consistent with the following:

3.7.1 MICA shall have received contributions or pledges equal to at least seventy percent (70%) of the Center's projected total construction costs, as defined in this Section 3.7.1, within five (5) years after the Effective Date of this Agreement; provided that, the City may grant extensions as required if MICA demonstrates, in the City's sole discretion, that it has engaged in good faith efforts to secure the funds and has reasonable expectations for raising the required funds. The length of any extension granted by the City pursuant to this Section 3.7.1 shall be determined by the City, in its sole discretion, based upon the facts and circumstances of MICA's request for such extension. With respect to any determination under this Agreement of "projected total construction costs," the amount used shall be the total calculated by MICA at the time of the determination of the total cost to construct the Center during the period within which construction is expected to occur, with MICA being required to demonstrate to the reasonable satisfaction of the City's Representative that such amount is based on reliable data and information.

3.7.2 Notwithstanding the requirements of Section 3.7.1 above, MICA shall have received contributions, pledges or financing equal to one hundred percent (100%) of the Center's projected total construction costs, as defined in Section 3.7.1, prior to the issuance of the Building Permit for the Center and within seven (7) years after the Effective Date of this Agreement; provided that, the City may grant extensions as required if MICA demonstrates, in the City's sole discretion, that it has engaged in good faith efforts to secure the funds and has reasonable expectations for meeting such goals. The length of any extension granted by the City pursuant to this Section 3.7.2 shall be determined by the City, in its sole discretion, based upon the facts and circumstances of MICA's request for such extension. The final day of any extension period shall not be more than ten (10) years after the Effective Date of this Agreement.

3.7.3 MICA covenants and agrees that construction shall begin within sixty (60) days after the occurrence of the Commencement Date (issuance of the Building Permit); provided that, MICA has received contributions, pledges or financing equal to 100% of the projected total construction costs; provided that, this period shall be extended to the extent of any delay in the commencement of construction of the Center caused by force majeure events or by actions of the City that are not due to a breach of this Agreement by MICA or by any delay caused by permit or land use appeals, including both administrative and judicial appeals, related to the construction of the Center and use of the Premises as contemplated pursuant to this Agreement; and provided further that, the City may grant extensions as required if MICA demonstrates, in the City's sole discretion, that it has engaged in good faith efforts to commence construction of the Center and has reasonable expectations for meeting such goal. The length of any extension granted by the City pursuant to this Section 3.7.3 shall be determined by the City, in its sole discretion, based upon the facts and circumstances of MICA's request for such extension.

3.7.4 MICA covenants and agrees that the Center shall be substantially complete within two (2) years after the Commencement Date; provided that, this period shall be

extended to the extent of any delay in the construction of the Center caused by force majeure events or by actions of the City that are not due to a breach of this Agreement by MICA or by any delay caused by permit or land use appeals, including both administrative and judicial appeals, related to the construction of the Center and use of the Premises as contemplated pursuant to this Agreement; and provided further that, the City may grant extensions as required if MICA demonstrates, in the City's sole discretion that it has engaged in good faith efforts to complete construction of the Center and has reasonable expectations for meeting such goal. The length of any extension granted by the City pursuant to this Section 3.7.4 shall be determined by the City, in its sole discretion, based upon the facts and circumstances of MICA's request for such extension. MICA will provide to the City a copy of the AIA G704 Certificate of Substantial Completion promptly after it is issued by the Architect.

3.7.5 In the event that MICA does not meet any of the timeliness provisions set forth in Sections 3.7.1 through 4, the City may immediately terminate the Term pursuant to Section 25 or, if the Term has not yet begun, terminate this Agreement, with no obligation to provide notice and/or time to cure and with no obligation to reimburse MICA for costs.

3.8 Ownership of the Center. The Center to be constructed on the Premises by MICA shall be and remain the property of MICA during the Term, subject to the terms and conditions of this Agreement.

3.9 Annual Report. MICA shall provide the City with an annual report setting forth an evaluation of all service programs provided, the cost of operating and maintaining the Center, and such other information related to the Center as may be requested by the City. The annual report shall be provided no later than sixty (60) days following the end of each calendar year for the prior year.

3.10 Access to Premises Prior to Commencement Date. To better inform the public and assist MICA in its fundraising efforts, MICA may post a sign on the Premises prior to the Commencement Date that includes a rendering of the proposed Center and other information typical for signs of this nature. The size, appearance and actual location of the sign are subject to approval of the City, which will not be unreasonably withheld or delayed. To enable MICA to evaluate the Premises and plan for construction, the City will permit MICA and its representatives to go onto the Premises prior to the Commencement Date from time to time for the purpose of inspection, planning, special events, surveying and site testing as may be necessary or desirable. MICA will request consent from the City prior to entering the Premises, which consent shall not be unreasonably withheld or delayed. The City may condition its consent on MICA agreeing to repair any damage caused by its entering the Premises. Upon request by the City, any reports produced by MICA or its consultants shall be shared with the City.

4. **RENT.**

MICA shall pay to the City as rental for the Premises an annual rent of ONE DOLLAR (\$1.00) payable on the Commencement Date and on each annual anniversary thereof during the Term and during any extension periods. In addition, the City shall have the right and privilege to use the Center constructed and operated by MICA as more fully set forth below in Section 5.

5. **USE PRIVILEGES.**

5.1. Use of the Center. As additional consideration for the granting of this lease by the City, MICA hereby agrees that the City shall have the right to use portions of the Center as follows:

5.1.1 The City shall have the right to use the spaces within the Center (including all equipment therein) at reasonable preferential rates and dates and times.

5.1.2 The City shall have the right to put on performances each year in the outdoor Center venue that faces the grassy area of Mercerdale Park for the purpose of having a public presentation to persons sitting in Mercerdale Park. The City shall not pay any usage fee to MICA for the use of such venue, except that the City shall pay all costs as described in Section 9 below.

5.1.3 The annual schedule for the spaces and the dates and times of usage shall be agreed upon by the City and MICA prior to January 1st of each year. The City and MICA shall review and approve the annual schedule for the City's use of the Center with both the City and MICA doing whatever they reasonably can do to accommodate the programming needs of each other and to ensure that the City can exercise its rights to use the Center set forth in Section 2.4.

5.1.4 During the City's use of any spaces within the Center as above provided, the City shall provide staff necessary to supervise the City's use of the Center and the equipment therein as described in Section 10 below.

5.2 Public Restrooms. The Center shall be designed so that the public has access to public restrooms at the Center between 6:00 a.m. and 10:00 p.m. on all calendar days. The City will be responsible for the maintenance, repair and security of such restrooms and for the cost of related utilities to the same extent as any public restrooms in the City's park system.

5.3 Mercer Island Farmer's Market. For so long as the Mercer Island Farmer's Market ("MIFM") shall continue to operate on SE 32nd St. adjacent to the Premises, on Sundays or another day of the week subject to MICA's and the City's prior approval, MICA shall provide storage space, electrical power, facilities for the MIFM vendors to wash their hands and equipment, and adequate hot water, the details of which will be agreed upon between MICA and MIFM consistent with Washington State Department of Health regulations. MICA will assume no responsibility for loss or damage to items placed in the storage space, may place restrictions on

items stored there to the extent necessary to address fire safety or similar concerns, may require that MIFM assume responsibility for any damage its causes to the Center incident to its use of the storage space, and shall have the right to inspect the storage space and its contents from time to time upon notice to the MIFM. During periods of use and at the conclusion of every market day, MIFM is responsible for cleaning and maintaining locations at the Center that are being used by MIFM vendors for washing their hands and equipment. MICA shall have the right to require MIFM to enter into a written agreement in which both Parties acknowledge their respective obligations with respect to the above provisions. MICA shall act in a commercially reasonable manner with respect to the provisions that it requires be included in such agreement.

6. INGRESS AND EGRESS.

By way of this Agreement, the City hereby grants to MICA the non-exclusive right of ingress and egress access across the entryways and driveways to the Premises from 77th Ave. SE and SE 32nd St. MICA, its staff, MICA members, licensees, and invitees shall have the non-exclusive right to ingress and egress on these entryways and driveway systems throughout the Term. Nothing contained in this Agreement shall limit the rights of MICA, its staff, MICA members, guests, licensees and invitees to use of Mercerdale Park to the same extent the general public has the right to use Mercerdale Park.

7. IMPROVEMENTS.

During the Term, MICA shall be permitted to make, at its own expense, any alterations, additions or improvements to the Center or Premises consistent with the programs offered by it, subject to the City's usual land use and building permitting processes in effect at the time of application, as described in Section 2. Subject to Section 25, MICA may remove any fixtures if it wishes upon termination of the Term or any extensions to the Term provided that it leaves the Premises and the Center in a structurally sound, safe and clean condition, and further provided that such removal will not cause permanent injury to the structure of the Center or the Premises. Nothing shall be removed or altered that will affect the structural integrity of the Center. At the time of the termination of the Term of this Agreement, the Center will become the property of the City.

8. UTILITIES.

MICA, at its own expense, shall construct and maintain any and all utilities and associated facilities required for construction of the Center upon the Premises. For purposes of this Agreement, the term "utilities" shall include telephone, internet and cable, heat, light, water, gas, power, sewer, and for all other public utilities which shall be used in or charged against the leased Premises during the full term of this Agreement. The City will reimburse MICA for any incremental costs of utilities which are due to the City's use of the theatres, recital hall and kitchen within the Center. Separate metering will be provided for the electrical and water use by the public restrooms, Farmer's Market facilities, Summer Celebration and other City-sponsored outdoor uses of Mercerdale Park. Incremental costs are those costs which would not

have been incurred but for the City's use of such facilities. The reimbursements will be based on reasonable estimates of those incremental costs.

9. MAINTENANCE AND REPAIR COSTS.

9.1 Maintenance and Operating Costs. Except as otherwise set forth herein, MICA shall assume total responsibility for the maintenance and operating costs for the Premises, including the Center. MICA shall at all times keep the Premises in accordance with the laws of the State of Washington and the City and in accordance with all directions, rules and regulations of the health officer, fire marshal, building inspector, or other proper officer of any pertinent and authorized public authority, at the sole cost and expense of MICA. Notwithstanding the other terms of this Section 9.1, the City shall pay the actual repair expenses for damage to the Premises for any damages caused by the negligence or willful misconduct of the City, its employees, agents or contractors, or if persons participating in City-sponsored activities caused damage to the Premises (including the Center) during those City-sponsored activities. If the source of such damages is not known, MICA shall be responsible for repairing damages to the Center (except the public restrooms), and the City shall be responsible for repairing damages to the remainder of the Premises (excluding the Center) and the public restrooms.

9.2 Maintenance Plans. MICA will formulate annual maintenance plans for the Premises and a capital replacement plan and a reserve account for all equipment and major systems, and copies of all such plans will be provided to the City. All maintenance plans will provide for the Center being maintained in a "first-class" manner, which will be at least the same level as the City maintains the Mercer Island Community and Event Center.

9.3 Janitorial Services. MICA, at its own expense, shall provide janitorial services for the Center and the Premises (except the public restrooms) and shall keep the Center and the Premises in a safe and clean condition, free of accumulations of dirt, rubbish, snow, ice, hazardous environmental contaminants, and unlawful obstructions, and shall maintain the landscaping and the Premises exterior entranceways and walkways in a safe and clean condition consistent with the City's standards of maintenance.

10. OVERSIGHT.

10.1 Monitoring of Activities. When the City is using parts of the Center as provided in Section 5, the City shall be solely responsible for monitoring City-sponsored activities within and around the Center and the Premises so as to avoid the risk of property damage or personal injury. At all other times and except as otherwise provided in this Agreement, as between MICA and the City, MICA shall be solely responsible for monitoring activities within the Center and on the Premises so as to avoid the risk of property damage or personal injury.

10.2 Security. Except as otherwise provided in Section 5, MICA agrees to provide adequate security and safety to protect the Center and occupants against injury during all uses of the Center. For these purposes, "adequate security and safety" shall be the level of security

and safety provided by the City at the Mercer Island Community and Events Center during normal operating times.

10.3 Normal Functioning. MICA agrees to provide operational support and maintenance necessary to ensure that the Center is fully functioning at all times during which it is open to the public.

10.4 Incremental Costs. The City will reimburse MICA for any incremental costs of staff, security, repairs and janitorial services which are due to the City's use of the theatres, recital hall and kitchen within the Center.

11. **SIGNS AND NAMING.**

11.1 Signs. All signs or symbols placed anywhere externally on the Center shall comply with the City's Development Code. If any signs are permitted by the City, such signs shall be removed by MICA at the termination of the Term.

11.2 Naming. MICA shall have sole discretion in the naming of rooms, spaces and areas within the Center and of the Center itself. The name placed on the exterior of the Center must be approved by the City, which approval will not be unreasonably withheld, conditioned or delayed, provided that the City shall not, for any reason, withhold its approval of the names "MICA," "Mercer Island Center for the Arts" or the name or names of any individual donor, sponsor, volunteer or patron selected by MICA, in its sole discretion.

12. **DISPUTE RESOLUTION.**

For purposes of this Section 12, the Designated Representative of the City shall be the City Manager and the Designated Representative of MICA shall be its President. If either party claims that the other party has breached any term of this Agreement, or in the event of disputes or disagreements under this Agreement that cannot be resolved by the Designated Representatives of the Parties, the following procedures shall be followed if and when informal communications, such as telephone conversations, fail to satisfy the claiming party:

12.1 The claiming party's Designated Representative shall provide a written notice to the other party's Designated Representative of the alleged breach, dispute, or disagreement. The notice shall identify the act or omission at issue and the specific term(s) of this Agreement that the complaining party alleges was violated.

12.2 The responding party's Designated Representative shall respond to the notice in writing within fifteen (15) working days. The response shall state that party's position as well as what, if any, corrective action the responding party agrees to take.

12.3 The claiming party shall reply in writing, indicating either satisfaction or dissatisfaction with the response. If satisfied, any corrective action shall be taken within fifteen

(15) days of receipt of the responding party's reply unless otherwise mutually agreed. If dissatisfied, the claiming party shall call an in-person meeting. Otherwise, the matter shall be considered closed. The meeting shall occur within a reasonable period of time (but in no event more than ten (10) days after the claiming party has called for an in-person meeting) and shall be attended by the Designated Representatives of each party, and such others as the Parties individually invite.

12.4 If the claiming party remains dissatisfied with the results of the meeting, it shall then refer the matter to the Mayor of the City and the Chairperson of the MICA Board of Directors, or their designees, for resolution. If the issue is not resolved at this level within thirty (30) days, then either party may require in writing that the matter shall be reviewed in a non-binding, structured mediation process developed on a cooperative basis by the Parties, and the Parties shall consider in good faith any recommendations or settlements arising from such process. The Parties shall use a mediator agreed to by the Parties or failing agreement, Judicial Arbitration and Mediation Service (JAMS). If JAMS is no longer in existence, either party may request the Presiding Judge of the King County Superior Court to appoint a mediator.

12.5 All of the steps preceding shall be a prerequisite to either party suing under this Agreement for breach, specific performance, or any other relief related to this Agreement, except that either party may seek an injunction for irreparable harm.

13. **INDEMNIFICATION/HOLD HARMLESS.**

13.1 MICA's Indemnification/Hold Harmless. MICA shall defend, indemnify, and hold harmless the City, its officers, officials, employees and volunteers from and against any and all claims, suits, actions, or liabilities for injury or death of any person, or for loss or damage to property, which arises out of MICA's use of the Premises, construction or use of the Center, or from the conduct MICA's business, or from any activity, work or thing done, permitted, or suffered by MICA in or about the Premises, except only such injury or damage as shall have been occasioned by the sole negligence of the City.

Should a court of competent jurisdiction determine that this Agreement is subject to RCW 4.24.115, then, in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of MICA and the City, its officers, officials, employees, and volunteers, MICA's liability hereunder shall be only to the extent of MICA's negligence. It is further specifically and expressly understood that the indemnification provided herein constitutes MICA's waiver of immunity under Industrial Insurance, Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties. The provisions of this section shall survive the expiration or termination of this Agreement.

13.2 City's Indemnification/Hold Harmless. The City shall defend, indemnify and hold harmless MICA, its officers, officials, employees and volunteers from and against any and all claims, suits, actions, or liabilities for injury or death of any person, or for loss or damage to

property, which arises out of the City's use of the Premises or the Center or from any activity, work or thing done, permitted, or suffered by City in or about the Premises or the Center, except only such injury or damage as shall have been occasioned by the sole negligence of MICA.

The City waives its immunity under Washington's Industrial Insurance Act, Chapter 51 RCW, as respects MICA, its officers, officials, employees, and agents only, and only to the extent necessary to provide MICA, its officers, officials, employees, and agents with a full and complete indemnity and defense of claims made by the City's employees. The Parties acknowledge that these provisions were mutually negotiated and agreed upon by them.

13.3 Survival. The provisions of this Section shall survive the expiration or termination of this Agreement and the Term.

14. **INSURANCE.**

14.1 MICA's Insurance Obligations. MICA agrees to maintain the following insurance. By requiring such insurance coverage, the City shall not be deemed to, or construed to, have assessed the risks that may be applicable to MICA in this Agreement. MICA shall assess its own risks and, if it deems appropriate and/or prudent, maintain greater limits or broader coverage than is herein specified.

14.1.1 Scope and Limits of Insurance. Coverage shall be at least as broad as:

14.1.1.1 Property Insurance: Property insurance shall be written on ISO Special Causes of Loss Form CP 10 30 or a form as least as broad and shall be endorsed to provide coverage from the peril of earthquake. Property insurance shall be written covering the full replacement value of the Center and all other Lessee's property on the Premises with no coinsurance provisions. The City shall be named as loss payee as its interest may appear.

14.1.1.2 Waiver of Subrogation

MICA and the City hereby release and discharge each other from all claims, losses and liabilities arising from or caused by any hazard covered by property insurance on or in connection with the Premises or the Center. This release shall apply only to the extent that such claim, loss or liability is covered by insurance.

14.1.1.3 Commercial General Liability: Commercial General Liability insurance shall be at least as broad as Insurance Services Office (ISO) occurrence form CG 00 01 and shall cover premises and contractual liability. The City shall be named as additional an insured on MICA's Commercial General Liability insurance policy using ISO Additional Insured-Managers or Lessors of Premises Form CG 20 11 or a substitute

endorsement providing at least as broad coverage. Commercial General Liability insurance shall be written with limits of not less than \$5,000,000 per occurrence, \$5,000,000 general aggregate.

14.1.1.4 Automobile Liability: Limits of not less than \$1,000,000 combined single limit per accident.

14.1.1.5 Workers' Compensation: Workers' Compensation coverage, as required by the Industrial Insurance Act of the State of Washington statutory limits.

14.1.2 Adjustment to Limits. Periodically, but not more than once every ten (10) years, the City may require MICA to increase the General Liability and Automobile Liability limits to levels that are consistent with prevailing practices involving similar rentals.

14.1.3 Deductibles. Any deductibles of the insurance coverage shall not limit or apply to the City and shall be the sole responsibility of MICA.

14.1.4 Other Insurance Provisions. The insurance coverages required by this Agreement are to contain or be endorsed to contain the following provisions where applicable:

14.1.4.1 Liability Coverages:

- To the extent of MICA's negligence, insurance coverage shall be primary insurance as respects the City, its officers, officials, employees, and agents. Any insurance and/or self-insurance maintained by the City, its officers, officials, employees, and agents shall not contribute with MICA's insurance or benefit MICA in any way.
- MICA's insurance coverage shall apply separately to each insured against whom a claim is made and/or lawsuit is brought, except with respect to the limits of the insurer's liability.

14.1.4.2 All Policies. MICA shall provide the City with written notice of any policy cancellation within two business days of their receipt of such notice. Failure on the part of MICA to maintain the insurance as required shall constitute a material breach of lease, upon which the City may, after giving five business days' notice to MICA to correct the breach, terminate the Lease or, at its discretion, procure or renew such insurance and pay any and all premiums in connection therewith, with any sums so expended to be repaid to the City on demand.

14.1.4.3 Acceptability of Insurers. Unless otherwise accepted by the City, insurance coverage is to be placed with insurers with a Best's rating of no less than A:VIII, or, if not rated by Best's, with minimum surpluses the equivalent of Best's surplus size VIII.

14.1.4.4 Verification of Coverage. MICA shall furnish the City with certificates of insurance and endorsements required by this Agreement. The certificates and endorsements for each policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. The certificates and endorsements are to be on forms approved by the City and are to be received and approved by the City prior to the commencement of activities associated with this Agreement. The City reserves the right to require complete certified copies of all required policies at any time.

14.1.4.5 Application of Insurance Proceeds. In the case of any insurance policies as described in Section 14.1.1.1, the application of the proceeds from damage or loss to property shall be applied as follows: first, for the purpose of defraying the cost of repairing, restoring, replacing and/or rebuilding the Center and other improvements on the Premises as provided in Section 26.1 herein; and second, if MICA elects termination pursuant to Section 26.2, said funds shall be applied first to restoring the Premises as set forth in Section 26.2. All insurance proceeds shall be deposited into an account agreed to by the City and MICA for disposition as above provided.

14.2 City's Insurance Obligations. The City agrees to maintain commercial general liability insurance or other similar liability coverage acceptable to MICA covering injuries to persons and damage to property covering all of the activities pertaining to this Agreement. The City's membership in Washington Cities Insurance Authority satisfies the City's insurance obligations of this Agreement. By requiring such insurance coverage, MICA shall not be deemed to, or construed to, have assessed the risks that may be applicable to the City in this Agreement. The City shall assess its own risks and, if it deems appropriate and/or prudent, maintain greater limits or broader coverage than is herein specified.

15. **HAZARDOUS SUBSTANCES.**

MICA shall not, without first obtaining the City's prior written approval, generate, release, spill, store, deposit, transport, or dispose of (collectively "Release") any hazardous substances, sewage, petroleum products, radioactive substances, medicinal, bacteriological, or disease-producing substances, hazardous materials, toxic substances, or any pollutants or substances defined as hazardous or toxic as defined by applicable federal, state, and local laws, regulations, or agencies in any reportable quantities ("Hazardous Substances") in, on or about the Premises, except that MICA may store and use limited quantities of Hazardous Substances (such as paints,

cleaning agents and office supplies) as necessary in the ordinary course of its operations. MICA shall indemnify, hold harmless, and defend the City from any and all claims, liabilities, losses, damages, cleanup costs, response costs, and expenses, including reasonable attorney's fees, arising out of or in any way related to the Release by MICA, or any of its agents, representatives, employees, or authorized users, or the presence of such Hazardous Substances in, on or about the Premises whether or not approved.

16. RIGHT OF INSPECTION.

The City shall have the right to inspect the Premises and the Center during reasonable hours at any time during the Term to ensure compliance with the provisions of this Agreement. When reasonably necessary for such purposes, the City may temporarily alter access to the Premises. Except in an emergency, mutual prior consent is required for any such closures that would require the cancellation of scheduled programming at the Center.

17. LIENS AND INSOLVENCY.

MICA shall keep the Center and the Premises free from encumbrances including mortgages, deeds of trust and any liens arising out of any work performed, materials furnished, or obligations incurred by MICA. In the event MICA becomes insolvent, voluntarily or involuntarily bankrupt, or if a receiver, assignee, or other liquidating officer is appointed for the business of MICA, then the City may terminate the Term and this Agreement at the City's option following at least thirty (30) days' notice to MICA and an opportunity to remedy such condition within such period.

18. CONDEMNATION.

If at any time during the term of this Agreement, the Premises or a substantial portion thereof shall be taken, appropriated or condemned by reason of eminent domain or threat of eminent domain, this Agreement and the Term shall terminate as of the date of any final judgment entered upon such condemnation or as of the date possession is taken by the condemning authority, whichever is earlier; provided that, in case of a taking of part of the Premises not required for MICA's reasonable use, then this Agreement shall continue in full force and effect. The entire award with reference to the value of land shall belong to the City and MICA hereby assigns to the City any award which may be made in such taking or condemnation of the land. The Parties shall share, on a proportionate basis (as based upon each party's proportionate share of the capital costs incurred with respect to the construction and subsequent improvement of the Center determined in accordance with generally accepted accounting principles consistently applied, taking into account the initial construction and related capital costs as well as the cost of subsequent capital improvements that are depreciable over the remaining life of the Center), the award with reference to the value of the Center provided that, nothing herein shall be deemed to give the City any interest in or to any award made to MICA for the taking of personal property or fixtures belonging to MICA, for the interruption of or damage to MICA's business, or for MICA's moving expenses. The City covenants and agrees not to exercise its power of eminent domain with respect to the Premises.

19. PERSONAL PROPERTY TAXES.

MICA shall pay promptly when due all taxes assessed during the term of this Agreement upon MICA's fixtures, furnishings, equipment, and stock in trade, upon MICA's leasehold interest under this Agreement, or upon any other personal property situated in or upon the leased Premises. In the event any governmental authority, during the term of this Agreement shall levy any tax upon rentals, then MICA shall promptly pay such charge.

20. REAL PROPERTY AND LEASEHOLD EXCISE TAXES.

20.1 Real Property Taxes. In the event that either party is determined to be subject to real property taxes, the taxed party shall be solely responsible for such assessments. In the event that both Parties are determined to be subject to real property taxes, and it being understood

that the King County Assessor will assess the Premises as though all structures and improvements thereto were a part of the realty, the Parties therefore agree that the City shall advise MICA as promptly as possible after receipt of annual general property tax statements, that proportion of the annual taxes which apply to improvements to said Premises, and that proportion which apply to the assessed valuation of the land. Not less than five (5) days prior to April 30 and October 30 of each year of the term of this Agreement and any renewal term, MICA shall deliver to the City a check payable to the King County Treasurer for the portion of the taxes applicable to the improvements, and shall reimburse the City for payment of that proportion of the taxes applicable to the land. The taxes for a partial year shall be pro-rated.

20.2 Leasehold Excise Tax. As the Premises is publicly-owned property, this Agreement may be subject to a leasehold excise tax under Ch. 82.29A RCW. Upon the effective date of the Commencement Certificate, MICA shall complete the necessary paperwork to receive an exemption from the leasehold excise tax. In the event the State of Washington makes any demand upon the City for payment of any leasehold excise tax under RCW 82.29A resulting from MICA's use or occupancy of the Premises, the City shall tender to MICA the right to defend against the levy of any such tax and to appeal any adverse decisions. MICA shall indemnify the City for all sums expended by the City or withheld by the State from the City in connection with such taxation.

21. ASSIGNMENT.

MICA shall not assign or sublet its rights or responsibilities under this Agreement without the written authorization of the City, which authorization will be in the City's sole discretion. Neither assignment nor sublease shall relieve MICA from its liability or obligations under this Agreement. A consent to one assignment or subletting shall not be deemed a consent or waiver to any subsequent assignment or subletting.

22. SEVERABILITY.

If any term of this Agreement is held invalid or unenforceable, the remainder of this Agreement will not be affected but will continue in full force.

23. NON-WAIVER.

Failure of either party to insist upon the strict performance of any term of this Agreement will not constitute a waiver or relinquishment of any party's right to thereafter enforce such term.

24. INTEGRATION.

This writing contains all terms of this Agreement. It replaces all prior negotiations and agreements. Modifications must be in writing and be signed by each party's authorized representative.

25. TERMINATION.

The Term or, if the Term has not yet commenced, then this Agreement, shall be subject to the following termination provisions:

25.1 Termination After Initial Term or After Any Extension. In the event that MICA chooses not to extend the Term pursuant to Section 3.3, the Term shall terminate at the expiration of the unextended Term and no amounts shall be due from either party to the other.

25.2 Termination for Default. The Parties are required to follow the dispute resolution process in Section 12 prior to taking steps under this Section to terminate for default. Only after pursuing the steps in Section 12 shall each party have the right to terminate under this Section 25.2 in the event the other party is in default of any material term or condition of this Agreement by providing thirty (30) days' advance written notice specifying the basis for such determination. If the other party thereafter fails to commence reasonable steps within the thirty day period to correct fully and to remedy the default within ninety (90) days from the date of the notice, then the Term or, if the Term has not yet begun, this Agreement shall be deemed terminated; provided that, if the nature of the default is such that it cannot be remedied within ninety (90) days, then the Term and this Agreement shall not terminate so long as the party in default is proceeding promptly to remedy the default and does so within such additional period as may be agreed by the Parties. This Section 25.2 shall not be invoked by either party for purposes other than default. Such termination shall be subject to the following terms and conditions:

25.2.1 If the City terminates for default by MICA, the City shall take immediate ownership of the Center and shall have no obligation to reimburse MICA in any amount. MICA shall be subject to the following obligations:

25.2.1.1 If the Center was substantially completed pursuant to Section 3 at the time of termination, MICA shall pay the City upon termination an amount equal to three times the Operating Funds (as defined below); provided that, the City shall use good faith efforts to identify, in its sole and absolute discretion, an alternative tenant to operate the Center and, if such tenant assumes operation of the Center at any point during the three years after termination, the City shall reimburse MICA a pro rata amount of what it has previously paid the City.

25.2.1.2 If the Center was not substantially completed pursuant to Section 3 at the time of termination, and if the City elects to demolish what has theretofore been constructed, MICA shall be solely responsible for immediate repayment to the City of any costs reasonably incurred by the City to restore the Premises to the condition existing immediately prior to the Commencement Date, including but not limited to demolition and removal costs for the Center and related improvements.

25.3 Relinquishing Possession; Disposition of Fixtures and Removal of Personal Property and Fixtures. Upon termination, MICA shall surrender the Premises and the Center to the City in a structurally sound, safe and clean condition and remove MICA's personal property and convey title to the Center to the City. MICA shall remove all personal property within forty-five (45) days of the expiration of the Term or it shall be considered surplus and become the property of the City. The City may dispose of such surplus property by any reasonable means and charge MICA for the City's disposal costs. During such 45-day period, MICA may also remove any improvements, additions, or fixtures erected in or attached to the Center; provided that, MICA is not then in default and the removal will not cause permanent injury to the structure of the Center or the Premises.

25.4 Operating Funds. For purposes of this Section 25, the phrase "Operating Funds" shall mean the actual average annual costs incurred by MICA in operating the Center during the 3-year period prior to termination or, if there have not yet been three full years of operation, then during the actual period of operation.

26. **DESTRUCTION.**

26.1 Total or Partial Destruction. In the event of total or partial destruction of the Center, as soon as reasonably possible following receipt of insurance proceeds and any necessary permits, MICA shall commence repair, reconstruction and restoration of the Center and undertake the same diligently to completion. MICA's failure to comply with this Section 26(a) shall be a basis for default unless MICA elects to terminate using the process set forth in Section 26(b) below.

26.2 Election to Terminate. In the event the cost of repairing damage to the Center exceeds 50% of the value the Center would have after such restoration, MICA may, at its option, elect not to restore the Center pursuant to Section 26.1, subject to MICA providing the City with written notice of such election within four (4) weeks of the receipt of the insurance proceeds and subject to MICA's payment to the City an amount equal to the reasonable costs related to restoring the Premises to the condition existing immediately prior to the Commencement Date, in which case MICA shall surrender ownership of the Center to the City. Following MICA's election and payment pursuant to this Section 26.2, this Agreement shall terminate.

27. **NOTICES.**

All notices and communications between the Parties will be between the persons identified immediately below or such successor persons as may be identified in writing by either party. Each of the persons designated below and any successors will have authority to bind their respective organizations or will obtain any necessary authority on an ad hoc basis and in a timely manner. Each such notice or other communication which may be or is required to be given under this Agreement shall be in writing and shall be deemed to have been properly given when delivered personally or by email during normal business hours to the party to whom such

communication is directed, or three (3) days after being sent by regular mail, to the Parties' Representatives at the following addresses:

If to MICA:

Mercer Island Center for the Arts
P.O. Box 1702
Mercer Island, WA 98040
Attn: _____
Email: _____

If to the City:

City of Mercer Island
9611 SE 36th St.
Mercer Island, WA 98040
Attn: City Manager
Email: _____

Either party may change its address for notices from time to time by notice to the other party given as above provided.

28. JURISDICTION, VENUE, AND GOVERNING LAW.

The Parties hereto, their successors and assigns, hereby consent to the jurisdiction and venue of the King County Superior Court, State of Washington, for the determination of any dispute that may arise pursuant to the terms of this Agreement and other agreements contained herein to the extent not resolved pursuant to Section 12 above. All the rights and remedies of the respective Parties shall be governed by the provisions of this instrument and by the laws of the State of Washington as such laws relate to the respective rights and duties of City and MICA.

29. SECTION HEADINGS.

The section headings used in the Agreement are for the convenience of the Parties. In the event of a conflict between a section heading and the text of a particular section, the written text shall prevail.

30. SUCCESSORS AND ASSIGNS.

Subject to the provisions hereof pertaining to assignment and subletting in Section 21, the covenants and agreements of this Agreement shall be binding upon the heirs, legal representatives, successors, and assigns of any or all of the Parties hereto.

31. AMENDMENTS.

MICA and the City anticipate that terms of this Agreement may need to be modified in the future. MICA’s President, after approval of the MICA Board of Directors, and the City Manager, after approval of the City Council, are hereby authorized to approve mutually agreed amendments to this Agreement and to supplement this Agreement where necessary to improve the administration of this Agreement and the collaboration between the Parties. All amendments must be in writing signed by the President of MICA and the City Manager.

32. AUTHORITY.

The City has the authority to enter into this Agreement pursuant to RCW 35A.11.010 and the City Council approved this Agreement on _____, 2016, at a regular Council meeting for which public notice was properly advertised; and

MICA's Board of Directors approved this Agreement on _____, 2016.

33. COUNTERPARTS.

The Parties may execute this Agreement in two or more counterparts, which shall, in the aggregate, be signed by both Parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.

IN WITNESS WHEREOF, both the City and MICA have caused this Agreement to be executed by authorized officers effective on the date first written above.

CITY OF MERCER ISLAND, a Washington
municipal corporation

MERCER ISLAND CENTER FOR THE ARTS, a
Washington nonprofit corporation

By _____
Its City Manager

By _____
Its President

Approved as to form:

City Attorney

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I certify that I know or have satisfactory evidence that Steve Lancaster is the person who appeared before me, and said person acknowledged that he signed this instrument, on oath and stated that he was authorized to execute the instrument and acknowledged it as the Interim City Manager of the City of Mercer Island, to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

DATED: _____

(notary signature)
Printed Name: _____
NOTARY PUBLIC in and for the State of Washington
My commission expires: _____.

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I certify that I know or have satisfactory evidence that _____ is the person who appeared before me, and said person acknowledged that s/he signed this instrument, on oath and stated that s/he was authorized to execute the instrument and acknowledged it as the President of Mercer Island Center for the Arts, a Washington nonprofit corporation, to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

DATED: _____

(notary signature)
Printed Name: _____
NOTARY PUBLIC in and for the State of Washington
My commission expires: _____.

EXHIBIT A