

CITY OF EL PASO, TEXAS
AGENDA ITEM DEPARTMENT HEAD'S SUMMARY FORM

DEPARTMENT: Museums and Cultural Affairs

AGENDA DATE: June 16, 2009

CONTACT PERSON/PHONE: Sean McGlynn 541-4896

DISTRICT(S) AFFECTED: All

SUBJECT:

A Resolution that the City Manager be authorized to sign the Display Agreement by and between the City of El Paso (the City) and the University of Texas at El Paso (UTEP) memorializing the ownership, display, care and maintenance of the Locomotive known as Engine No. 1 currently on display in the Union Plaza Transit Terminal (the Terminal).

BACKGROUND / DISCUSSION:

Discussion of the what, why, where, when, and how to enable Council to have reasonably complete description of the contemplated action. This should include attachment of bid tabulation, or ordinance or resolution if appropriate. What are the benefits to the City of this action? What are the citizen concerns?

In 2002 funds were awarded by the Texas Department of Transportation through its Statewide Transportation Enhancement Program for the refurbishing and relocation of the locomotive to the Terminal in downtown El Paso. It is the desire of the City and UTEP to memorialize and document the ownership of the locomotive and the events leading up to the relocation and current display of the locomotive at the Terminal.

PRIOR COUNCIL ACTION

Has the Council previously considered this item or a closely related one?

None.

AMOUNT AND SOURCE OF FUNDING:

How will this item be funded? Has the item been budgeted? If so, identify funding source by account numbers and description of account. Does it require a budget transfer?

N/A

BOARD / COMMISSION ACTION:

Enter appropriate comments or N/A

N/A

*****REQUIRED AUTHORIZATION*****

LEGAL: (if required) _____ **FINANCE:** (if required) _____

DEPARTMENT HEAD: _____
(Example: if RCA is initiated by Purchasing, client department should sign also)
Information copy to appropriate Deputy City Manager

APPROVED FOR AGENDA:

CITY MANAGER: _____

DATE: _____

RESOLUTION

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

That the City Manager be authorized to sign the Display Agreement by and between the City of El Paso and the University of Texas at El Paso memorializing the ownership, display, care and maintenance of the Locomotive known as Engine No. 1 currently on display in the Union Plaza Transit Terminal.

ADOPTED THIS ____ DAY OF _____ 2009.

CITY OF EL PASO

John F. Cook
Mayor

ATTEST:

Richarda Duffy Momsen
Municipal Clerk

APPROVED AS TO FORM:



Cynthia Osborn
Assistant City Attorney

APPROVED AS TO FORM:



Sean P. McGlynn, Director
Museums and Cultural Affairs Department

1.2 The parties agree that the locomotive is and continues to be owned by UTEP. Further, the parties agree that it is not the intention of the parties to transfer ownership of the locomotive, but rather to display the locomotive in a more prominent place for the benefit and enjoyment of El Paso citizens and tourists, and for the promotion of economic development of the downtown area.

II. DISPLAY

2.1 The parties agree that the locomotive is to be displayed at the Terminal, for the benefit and enjoyment of El Paso Citizens and tourists, and for the promotion of economic development for the downtown area. The display of the locomotive shall be consistent with good museum practices, providing appropriate security protection and in an environment that is conducive to its preservation.

2.2 The parties agree that the display site of the locomotive will contain a sign which indicates that the locomotive is owned by UTEP and that there is an agreement for its display at the Terminal.

2.3 The parties agree that the display of the locomotive at the Terminal shall continue for a period of fifty (50) years from the date of this Agreement unless otherwise agreed to by the parties.

2.4 In the event that either party desires to discontinue the display of the locomotive at the Terminal, that party will provide notice to the other party as provided for Section V. herein, and shall discuss mutual acceptable terms for the discontinuation of the display of the locomotive.

2.5 In the event that either party desires to relocate the display to a location other than the Terminal, that party will provide notice to the other party and said relocation shall only be carried out upon mutually acceptable terms, and upon written amendment to this Agreement

2.6 The parties may agree to extend the period of display of the locomotive at the Terminal beyond the period specified in paragraph 2.3 above, upon mutually acceptable terms, and upon written amendment to this Agreement.

III. MAINTENANCE AND INSURANCE

3.1 To the extent that any maintenance or management of the care of the locomotive is necessary during the period of display it is agreed that City will seek the assistance and support of qualified third parties and/or local non-profit organizations to perform such maintenance as necessary. "Qualified" shall be construed to mean having experience with the maintenance and repair of 4-4-0 vintage locomotives and tenders.

3.2 Any necessary maintenance of the locomotive shall be at no cost to UTEP.

3.3 The City will secure and maintain at its own expense, appropriate insurance protection for the locomotive in an amount no less than \$1,000,000.00 (One Million Dollars), including but

not limited to, insurance protection against fire, water damage, theft, vandalism and other casualty loss.

3.4 UTEP assumes no responsibility whatsoever, for any property placed near or displayed with the locomotive, and UTEP is hereby and expressly released and discharged from any and all liabilities for any loss, injury or damages to person or property that may be sustained by reason of the display of the locomotive under this agreement. All watchmen or other protective service desired by the City must be arranged for by the City at no cost to UTEP.

3.5 To the extent authorized by the Constitution and the laws of the state of Texas, the City shall indemnify and save harmless UTEP from all loss, cost and expense arising out of any liability, for injuries or damages to persons or property sustained by or claimed to have been sustained by anyone whomsoever, by reason of the display of the locomotive hereinabove described, whether such use is authorized or not, or by any act or omission of the City or any of its officers, agents, employees, guests, patrons, or invitees and City shall pay for any and all damage to locomotive, or loss or theft of such property, done or caused by such patrons.

3.6 UTEP reserves the right to have one of its authorized employees examine the locomotive and tender during normal business hours to assess its condition at least once per year.

IV. CONSIDERATION

4.1 The parties agree that the consideration for this Agreement shall be: 1) the mutual covenants and responsibilities identified herein; 2) meeting the obligations associated with the stipulation of the gift of the locomotive to UTEP; and 3) the promotion of El Paso's history and heritage, tourism and economic development to the City.

4.2 Each party to this Agreement is responsible for their own acts and for those of their agent, employees, contractors, and personnel acting for and under the direction of such entities, during the performance of this Agreement.

V. TERM

5.1 The term of this Agreement shall commence on the date signed by the City Manager of the City of El Paso and shall continue for a period of fifty (50) years, and shall coincide with the period of display of the locomotive. Prior to the expiration, the Parties have an option to extend the Agreement upon mutually acceptable terms and conditions.

5.2 It is mutually understood and agreed that at the end of the term of this Agreement both parties shall discuss mutual acceptable terms related to the discontinued display and relocation of the locomotive.

5.3 During the term of the Agreement, either the City or UTEP may terminate this agreement upon eighteen (18) months written notice to the other party. It is mutually understood and agreed

that prior to the effective date of the termination both parties shall discuss mutually acceptable terms related to the discontinued display and relocation of the locomotive.

VI. MISCELLANEOUS PROVISIONS

6.1 **AMENDMENTS.** This Agreement may be amended by mutual agreement of the parties hereto in writing to be attached to and incorporated into this Agreement.

6.2 **LEGAL CONSTRUCTIONS.** In case any one or more of the provisions contained in this Agreement shall be held to be invalid, illegal, or unenforceable in any respect such invalidity, illegality, or unenforceability shall not affect any other provisions thereof and this agreement shall be construed as if such invalid, illegal, or unenforceable provisions had never been contained herein.

6.3 **NOTICES.** Any notice, demand, requests, consent or approval that either party may or is required to provide to the other shall be in writing and either personally delivered or sent via certified mail, return receipt, to the following addresses:

To the City: The City of El Paso
 Attention: City Manager
 Civic Center Plaza, 9th Floor
 El Paso, Texas 79901

With a Copy to: The City of El Paso
 Attn: Sean P. McGlynn, Director
 Museums and Cultural Affairs Department
 2 Civic Center Plaza 1st Floor
 El Paso, Texas 79901

To UTEP: The University of Texas at El Paso
 Attn: Vice President for Business Affairs
 500 West University Avenue
 El Paso, Texas 79968

With a Copy to: The University of Texas at El Paso
 Attn: Centennial Museum Director
 500 West University Avenue
 El Paso, Texas 79968

Changes may be made to the names and addresses noted herein through timely, written notice to the other party.

6.4 **VENUE.** For the purpose of determining place of Agreement and the law governing the same, this Agreement is entered into in the City and County of El Paso, the State of Texas, and shall be governed by the laws of the State of Texas. Venue shall be in the County of El Paso, Texas.

6.5 **SUCCESSORS AND ASSIGNS.** This Agreement shall be binding on UTEP and the City, their successors and assigns. Neither party may assign, sublet, or transfer its interest in this Agreement without the written consent of the other. Nothing herein shall be construed as creating any personal liability on the part of the officer or agent of UTEP.

6.6 **REPRESENTATION OF COUNSEL; MUTUAL NEGOTIATION.** Each party has had the opportunity to be represented by counsel of its choice in negotiating this Agreement. This Agreement shall therefore be deemed to have been negotiated and prepared at the joint request, direction, and construction of the parties, at arms' length, with the advice and participation of counsel, and will be interpreted in accordance with its terms without favor to any party.

6.7 **AUTHORITY TO EXECUTE AGREEMENT.** Each person signing below represents that he or she has read this Agreement in its entirety (including any and all Attachments); understands its terms; is duly authorized to execute this Agreement on behalf of the Party indicated below by his or her name; and agrees on behalf of such party that such Party will be bound by those terms.

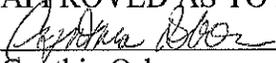
6.8 **ENTIRE AGREEMENT.** This Agreement supersedes any and all other agreements, either oral or in writing, between the parties hereto with respect to the subject matter hereof, and no other agreement, statements of promise relating to the subject matter of this Agreement which is not contained herein shall be valid or binding.

WITNESS THE FOLLOWING SIGNATURES AND/OR SEALS:

CITY OF EL PASO:

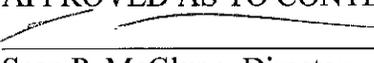
Joyce Wilson, City Manager

APPROVED AS TO FORM:



Cynthia Osborn
Assistant City Attorney

APPROVED AS TO CONTENT:



Sean P. McGlynn, Director
Museums and Cultural Affairs Department

(Acknowledgment on Following Page)

ACKNOWLEDGMENT

THE STATE OF TEXAS)
)
COUNTY OF EL PASO)

This instrument was acknowledged before me on this ____ day of _____, 2009, by **Joyce A. Wilson** as **City Manager** for the **City of El Paso**.

Notary Public, State of Texas

THE UNIVERSITY OF TEXAS AT EL PASO:



Cynthia Vizcaino Villa
Vice President for Business Affairs