

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF AUTHORIZING THE) RESOLUTION NO. 02-3190
EXECUTIVE OFFICER TO EXECUTE AN)
AMENDED AND FULLY RESTATED) Introduced by Executive Officer Mike Burton
AGREEMENT WITH THE OREGON ZOO)
FOUNDATION)

WHEREAS, The Oregon Zoo Foundation is a tax exempt non-profit Oregon corporation organized and operated exclusively for charitable, scientific, and educational purposes permitted by Section 501c(3) of the Internal Revenue Code of 1986; and

WHEREAS, the exclusive purpose of The Oregon Zoo Foundation is to support and benefit The Oregon Zoo, a Metro owned and operated facility; and

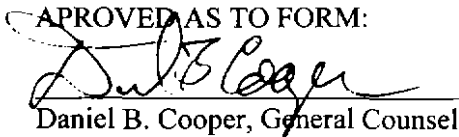
WHEREAS, Metro and The Oregon Zoo Foundation desire to define their mutual roles, rights, and responsibilities in accordance with the Amended and Fully Restated Agreement attached as Exhibit A; now therefore

BE IT RESOLVED that the Metro Council authorizes the Executive Officer to execute Exhibit A.

ADOPTED by the Metro Council this 9th day of May, 2002



Carl Hosticka, Presiding Officer

APPROVED AS TO FORM:


Daniel B. Cooper, General Counsel

AMENDED AND FULLY RESTATED AGREEMENT

This Agreement, dated March 29, 1985, amended as of November 28, 1989 and April 2, 1997, and amended and fully restated as of May 9, 2002, is between Metro (formerly Metropolitan Service District) and the Oregon Zoo Foundation (formerly Friends of the Washington Park Zoo).

Metro and the Oregon Zoo Foundation ("Foundation") agree that the March 29, 1985 Agreement is amended and restated as follows:

RECITALS

Metro, a municipal corporation, maintains and operates the Oregon Zoo, formerly the Washington Park Zoo (Zoo), pursuant to Oregon law.

Foundation is a tax-exempt non-profit Oregon corporation organized to encourage and aid the development of the Zoo as an educational and recreational center and to provide citizen support for the Zoo.

The purpose of this agreement is to define the relationship between Metro and Foundation in regard to their duties and purposes with respect to the Zoo.

Metro and Foundation, in consideration of their promises to each other as outlined below, agree to the following terms:

1. Term of Agreement. This amended agreement will become effective when signed by both parties and will continue in force until terminated by either party.
2. Termination of Agreement. This agreement may be terminated by either party without cause by giving no less than 30 days written notice. The 30-day period begins to run on the date written notice is received.
3. Amendments. This agreement may be amended at any time by a written agreement signed by both parties.
4. Duties of Foundation. During the term of this agreement, Foundation shall:
 - a. Raise significant funding for the Zoo in consultation with the Zoo Director.
 - b. Recruit a broad-based membership in the Foundation from throughout Oregon and Southwest Washington.
 - c. Develop general community support for the Zoo.

- d. Promote volunteer participation at the Zoo.
- e. Maintain a provision in its Articles of Incorporation that, upon dissolution of Foundation, all assets of Foundation will be distributed to the Zoo or its tax-exempt successor. Assets may be subject to restrictions as provided in Section 7d.
- f. Upon termination of this agreement, distribute to the Zoo or its tax-exempt successor all restricted assets raised for the benefit of the Zoo, and all sums owed the Zoo, cease using the Oregon Zoo name, and cease representing the Zoo in fund raising activity.
- g. Include on its Board two Metro Councilors ex-officio appointed by the Council Presiding Officer or Council President, and the Zoo Director, ex-officio, all of whom shall be ex-officio non-voting members and shall not be counted for purposes of calculating the Foundation Board quorum and voting requirements.
- h. Perform such other services to benefit the Zoo as agreed to by the parties, provided that Foundation will not do anything inconsistent with its status as a tax-exempt, non-profit corporation.
- i. Undertake the above activities at the expense of Foundation, and in cooperation with the Zoo staff, except as provided below or as otherwise agreed to by the parties.
- j. The Foundation shall purchase and maintain at Foundation's expense, the types of insurance listed below covering Foundation, its employees and agents. The Foundation shall provide Metro with a certificate of insurance complying with this article within thirty (30) days of executing this Agreement. Notice of any material change or policy cancellation shall be provided to Metro thirty (30) days prior to change.
 - (1) Comprehensive General Liability policy with the Broad Form Comprehensive General Liability endorsement providing coverage against claims for bodily injury or death and property damage occurring in or upon or resulting from the facilities licensed hereunder, such insurance to offer immediate protection to the limit of not less than \$1,000,000 and such insurance shall include Blanket Contractual Liability coverage as set forth below:
 - (i) Worker's Compensation insurance providing coverage for Oregon statutory requirements;

- (ii) Employer's Liability Insurance with limits not less than \$1,000,000 each accident;
- (2) Non-Profit Directors and Officers Insurance to protect the directors, officers and board members (past, present, and future) of the organization. Coverage shall include employment practices liability coverage, which must also include employees as insureds.
- (3) Comprehensive General Liability policy required by this Agreement shall name as additional insureds Metro, its elected officials, departments, employees and agents.

5. Duties of Metro. During the term of this agreement Metro shall:

- a. Metro grants permission to Foundation to use its name, "The Oregon Zoo" in the Foundation's name and fund raising materials.
- b. Assist the Foundation in performing its duties, including assisting with membership drives, newsletters, annual reports and such other matters as the parties shall agree.
- c. Provide annual Zoo passes and Zoo gift shop discounts for Foundation members who have been issued individual, numbered and dated annual membership cards.
- d. Provide reciprocal Zoo admission for members of recognized societies formed under the auspices of a national and/or international zoos.
- e. Provide space at the Zoo for Foundation meetings, staff offices, a membership booth, and other space as agreed by the parties, provided that the Foundation pays the costs of equipment, supplies, and telephones associated with using the spaces provided.
- f. Provide access to the Zoo for a reasonable number of annual events for Foundation members. The nature and dates of these events shall be determined by the parties' mutual agreement and in coordination with the Zoo Director and staff.
- g. The Council Presiding Officer or Council President shall appoint two Metro councilors to serve as members of the Foundation Board, as provided in Section 4g.

- h. The Zoo Director shall serve as non-voting ex-officio member of the Foundation Board.
 - i. Permit the Foundation to obtain insurance benefits for Foundation staff through the Metro benefits office, provided the cost of the insurance is paid by the foundation, and further provided that the practice is approved by Metro's insurance providers. The Foundation acknowledges that the Metro group health plan is a governmental plan not subject to the Employee Retirement Income Security Act (ERISA), as amended.
6. Coordination Between Metro and Foundation. Metro and Foundation will coordinate their efforts to accomplish their goals and purposes as effectively as possible. Specifically:
- a. The Foundation, in consultation with the Zoo Director, shall adopt and publish an annual operating budget before the beginning of each fiscal year. Before final adoption of its annual operating budget, the Foundation shall forward a copy to Metro so that Metro may consider the proposed budget in conjunction with Metro's budget for the Zoo. The Foundation shall review its budget at least quarterly.
 - b. The Foundation, in consultation with the Zoo Director, shall adopt and publish an annual report, including a financial statement audited by an independent auditor, on or before September 30 of each year.
 - c. Foundation and the Zoo Director shall meet at least once each calendar quarter to set goals, evaluate past and pending projects, and review financial matters with respect to Foundation.
 - d. Solicitation of grant funds from specific sources shall be made by agreement between the Zoo Director and the Foundation.
 - e. The Zoo Director shall perform the duties of Executive Director of the Foundation under the direction and control of the Foundation Board of Directors.
 - (1) The Zoo Director shall continue to be an employee of Metro, and Metro shall provide the Zoo Director with the salary and benefits of that position. The Zoo Director shall receive no additional compensation from Foundation.
 - (2) Metro shall provide the Zoo Director with Workers' Compensation insurance coverage for tasks undertaken pursuant to this Agreement.

- (3) Foundation shall defend, indemnify, and hold Metro, the Oregon Zoo, their agents, elected and appointed officials, and employees, (the Indemnitees) harmless from any and all claims, demands, damages, actions, losses, and expenses, including attorneys' fees, arising out of or in any way connected with the Zoo Director's performance of the duties of Executive Director of the Foundation. In the event that Foundation refuses or fails to defend as required herein, the Indemnitees may, at their sole option, settle or defend any claims and Foundation shall, upon demand, pay the full costs of any settlement, judgment, or defense, including all expenses and attorneys' fees.
- f. The Foundation and the Zoo shall coordinate their efforts to build community support for the Zoo. The Zoo Director shall ensure that public information materials routinely identify the Zoo's affiliation with Metro in a manner which is consistent with Metro standards.
- g. It is the intention of the parties that the Foundation not be a Metro component unit or affiliated organization as those terms are used by the Governmental Accounting Standards Board (GASB). In the event the Foundation is determined to be an affiliated or component organization under GASB standards, the parties agree to negotiate and implement such additional accounting and fiscal control measures as may reasonably be required by Metro's independent auditors.
- h. It is understood and agreed between the parties that nothing in this agreement shall constitute or be construed to be an employment, partnership, joint venture, or joint employer relationship between Metro or the Zoo on the one part and the Foundation on the other part.
- i. **Indemnification**
- (1) Foundation shall defend, indemnify and hold harmless Metro, the Oregon Zoo and their officers, agents and employees, against all loss, damage, expenses, judgments, claims and liability, whether arising in tort, contract or by operation of any statute or common law, arising out of the Foundation's performance of, or failure to perform, this Agreement.
- (2) Metro shall defend, indemnify and hold harmless the Foundation and its officers, agents and employees, against all loss, damage, expenses, judgments, claims and liability, whether arising in tort, contract or by operation of any statute or common law, arising out of or in any way connected to Metro's performance of, or failure to perform, this Agreement, subject to the limitations and conditions of the Oregon Constitution and the Oregon Tort Claims Act, ORS Chapter 30.
- (3) The foregoing indemnification, defense, and hold harmless provisions are for the sole and exclusive benefit of the Foundation, Metro, and the Oregon Zoo and their respective officers, employees, and agents, and are not intended, nor shall they be construed, to confer any rights on or liabilities to any person or persons other than Metro, the Oregon Zoo, Foundation and their respective officers, employees and agents.

j. Each party hereby waives any and every claim during the terms of this Agreement or any extension or renewal thereof for any loss or damage covered by an insurance policy to the extent that such loss or damage is recovered under said insurance policy. Inasmuch as the waiver will preclude the assignment of any aforesaid claim by way of subrogation (or otherwise) to an insurance company (or any other person) the parties are advised to give each insurance company written notice of terms of such waiver, and to have insurance policies properly endorsed, if necessary.

7. Allocation of Membership Fees, Donations, and Contributions. As additional consideration for Metro's obligations, the Foundation will pay the Zoo the following amounts:

- a. From the fees received for Foundation annual memberships, an amount to be agreed upon periodically between the parties to reimburse Metro for the cost of (1) annual passes and gift shop discounts for Foundation members and for the cost of complementary admissions for members of other zoos. By the end of each month the Foundation will pay the agreed amount to the Zoo for the membership fees received during the previous month. The funds shall be received by the Zoo as unrestricted revenue.
- b. The Foundation will deposit all funds it receives from any source, unless otherwise directed by the donor, to the bank account of the Oregon Zoo Foundation. The Foundation Board will determine the disposition of these funds consistent with the terms of this agreement, the annual operating budget, and fiscally sound investment principles. Except as provided in Paragraph 7.a. above, the Board may continue to hold and invest such funds until Metro requests payment for a mutually agreed purpose consistent with this agreement and any restrictions imposed by the donor.
- c. Upon request, the Foundation shall make payment within 15 days to Metro of restricted funds held by the Foundation for the Zoo in accordance with the terms agreed to between the parties, on a project by project basis. Funds released prior to the incurring of expenditure obligation will be in accordance with a project budget submitted by the Zoo and will be subject to status reporting and final reconciliation by the Zoo.
- d. The Foundation shall not accept contributions that involve restrictions pertaining to the Zoo without the advance approval of the Zoo Director. The Zoo Director may accept or reject contributions that involve restrictions.

The Signature of the Foundation Chair below is duly authorized by the Foundation Board of Directors.

METRO

OREGON ZOO FOUNDATION

By: _____
Executive Officer

By: _____
Chair

Date: _____

STAFF REPORT

IN CONSIDERATION OF RESOLUTION NO. 02-3190, FOR THE PURPOSE OF AUTHORIZING THE EXECUTIVE OFFICER TO EXECUTE AN AMENDED AND FULLY RESTATED AGREEMENT WITH THE OREGON ZOO FOUNDATION

Date: April 25, 2002

Prepared by: Pete Sandrock

BACKGROUND

In 1985 Metro executed an Agreement with the Friends of the Washington Park Zoo (Friends), a tax-exempt non-profit Oregon corporation established to conduct fund raising for the Zoo's capital campaign and to develop general community support for the Zoo. In 1997 the parties amended the original Agreement to provide that the Zoo Director would also serve as the Executive Director of the Friends. In that same year the Friends changed its name to The Oregon Zoo Foundation. The parties now desire to update and clarify their roles, rights, and responsibilities as set forth in Exhibit A, the Amended and Fully Restated Agreement.

ANALYSIS/INFORMATION

1. **Known Opposition.** None. The Board of Directors of the Oregon Zoo Foundation (OZF) has approved the Amended and Fully Restated Agreement.
2. **Legal Antecedents.** The proposed agreement amends and restates the original 1985 agreement as amended in 1997.
3. **Anticipated Effects.**
 - a. **Amend and restate.** The new agreement replaces the old agreement but includes significant differences.
 - b. **Term and termination.** The new agreement will remain in effect until terminated by either party on 30 days written notice.
 - c. **Foundation duties:**
 - The Foundation's first duty is to "raise significant funding" for the Zoo.
 - The Foundation's Board of Directors will include two Metro councilors, nominated by the Metro Presiding Officer/President, and the Zoo Director. The councilors and Zoo Director will serve as ex-officio non-voting board members.
 - d. **Metro duties:**
 - Metro, acting through The Oregon Zoo, will assist OZF with membership drives, newsletters, annual reports, etc.
 - Metro, acting through The Oregon Zoo, will provide passes and gift shop discounts to OZF members subject to a fee to be paid by the Foundation. The amount of the fee will be "agreed upon periodically" by the parties. The current fee is \$18.75 per membership per year (approximately thirty-three thousand members).
 - Metro, acting through The Oregon Zoo, will rent office space, equipment, telephones, and supplies to OZF.

- Metro will provide health insurance benefits for OZF provided that OZF pays Metro for the cost of the benefit.
- e. **Coordination:**
- Before adopting its annual operating budget, OZF shall forward a copy to Metro so that the Council may consider OZF's proposed budget in conjunction with Metro's budget for the Zoo.
 - OZF will publish an independently audited financial statement by September 30th of each year.
 - The Zoo Director will continue to serve without compensation as OZF's Executive Director.
 - The Zoo Director will ensure that public information materials routinely identify the Zoo's affiliation with Metro in a manner that is consistent with Metro standards (the Foundation is not required to identify the Zoo's affiliation with Metro in fund raising solicitations to targeted donors).
- f. **Fees, donations, and contributions:**
- Fees paid by OZF for passes and discounts shall be received by the Zoo as unrestricted revenue.
 - OZF will not accept donor-restricted contributions without the prior approval of the Zoo Director. OZF will hold and invest unrestricted donations until Metro requests payment for a mutually agreed purpose.

4. **Budget Impacts.** None.

RECOMMENDED ACTION

The Executive Officer recommends that the Council adopt Resolution 02-3190.