

## USE AGREEMENT

This Use Agreement (the "AGREEMENT") is entered into this \_\_\_\_ day of \_\_\_\_\_, 1995, between the City of Naples (the "CITY"), whose address is 735 Eighth Street South, Naples, Florida 33940, and The Naples Art Association ("the ART ASSOCIATION"), a Florida not-for-profit corporation, whose address is 970 Fifth Avenue North, Naples, Florida, 33940, for and in consideration of the mutual promises contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged. The CITY and the ART ASSOCIATION agree as follows:

### 1. PREMISES

1.1 The CITY agrees to permit the ART ASSOCIATION to use the property generally located in Cambier Park and being 8,000 square feet in size and being legally described in Exhibit "A," hereby made a part hereof and referred to as the "PROPERTY" herein.

1.2 The ART ASSOCIATION agrees to construct a building or buildings (the "BUILDING") and surrounding area, including but not limited to landscaping and exterior improvements (collectively known as the "VISUAL ARTS CENTER") as described herein, in accordance with the terms and conditions of this AGREEMENT.

1.3 Nothing contained herein shall grant to the ART ASSOCIATION an ownership or fee simple property right in the PROPERTY.

1.4 It is mutually agreed that the BUILDING constructed upon the PROPERTY shall be designated "no-smoking".

### 2. TERM

2.1 The term of this AGREEMENT shall be for a period of fifty (50) years, commencing at 12:01 a.m. on the date that a Certificate of Occupancy is issued for the VISUAL ARTS CENTER and ending fifty (50) years after that date.

2.2 The term of this AGREEMENT shall be extended by mutual consent of the parties hereto, for successive twenty-five (25) year terms (the "Extension Periods") upon written agreement in accordance with the terms hereof.

2.3 Upon the expiration of the initial term of this AGREEMENT, or any Extension Periods beyond the initial term of this AGREEMENT, the VISUAL ARTS CENTER located on the PROPERTY may become the property of the CITY, provided however, that should the CITY not agree to an extension of the terms as requested by the ART ASSOCIATION, the VISUAL ARTS CENTER shall be purchased by the CITY under the terms of Paragraph 15 of this AGREEMENT. Should the ART ASSOCIATION not seek to extend this AGREEMENT, then the VISUAL ARTS CENTER shall become the property of the CITY at no cost.

2.4 The ART ASSOCIATION and the CITY agree to review the conditions of paragraphs 4, 5, 6 and 12 of this AGREEMENT on every tenth (10th) anniversary of the

Commencement Date during the term hereof, and to modify said paragraphs 4, 5, 6, and 12 of this AGREEMENT as needed to ensure that use is for the benefit of the general public as a visual arts center.

**3. CONSIDERATION**

3.1 In consideration of the mutual obligations and benefits set forth herein, the CITY agrees to provide a location for the ART ASSOCIATION's VISUAL ARTS CENTER, and the ART ASSOCIATION commits to provide a visual arts center for the display of art work, teaching facilities, and studio rooms. The gallery shall serve a public function as a public art center and shall be open for public viewing at no charge or at a reasonable charge, under the conditions set forth herein.

3.2 Art classes and programs for all age groups shall be provided on an ongoing basis.

**4. USE OF THE PROPERTY BY THE ART ASSOCIATION**

4.1 The PROPERTY shall be used solely for the construction and operation of a visual arts center pursuant to the terms of this AGREEMENT.

4.2 The ART ASSOCIATION shall be and hereby is granted the right to use the VISUAL ARTS CENTER (both indoors and outdoors) for the following activities:

a. Permitted uses:

- Art exhibitions and sales, art appreciation
- Art teaching (lectures, workshops and juvenile programs)
- Studio work (seminars and support activities for visual arts center)
- Art resource library
- Meetings & lectures

b. Accessory uses:

- Office for the ART ASSOCIATION
- Sale of art products/supplies
- Receptions & dinners
- Storage
- Secured storage for art
- Kitchen

c. Serving of wine and champagne permitted:

- The ART ASSOCIATION may serve wine and/or champagne as part of any reception or dinner provided that it is consumed within the BUILDING.

4.3 Whenever not specifically stated herein, interpretation of the compatibility of proposed use of the VISUAL ARTS CENTER shall be made by the City Manager, but use in any manner other than as specifically set forth herein is prohibited unless approved by the City Council of the City of Naples.

4.4 The ART ASSOCIATION shall provide art displays open for public viewing, weekdays, except federal holidays, year-round, except whenever the ART ASSOCIATION is having a limited number of special showings, receptions, or other events. The ART ASSOCIATION may, at its sole discretion, open the VISUAL ARTS CENTER in the evenings, on holidays, or on weekends. A violation of this requirement is a breach of this AGREEMENT, unless caused by natural disaster, or by alterations, modifications, repairs, maintenance, additions, or a change of an art exhibit.

## **5. USE OF THE VISUAL ARTS CENTER BY OTHERS**

5.1 All use of the VISUAL ARTS CENTER shall conform with paragraph 4 of this AGREEMENT. The VISUAL ARTS CENTER located on the PROPERTY shall be owned and controlled by the ART ASSOCIATION, shall be under their continuous management, and shall be used primarily by the ART ASSOCIATION.

5.2 The ART ASSOCIATION shall annually, on or before November 1, provide to the CITY a schedule of exhibits for the coming 12 month period. This shall be the annual schedule of events. Unless notified by the City Manager in writing to the contrary, the Annual Schedule shall be provided to the Community Services Department of the City of Naples.

5.3 The ART ASSOCIATION shall make the VISUAL ARTS CENTER available for rental by others at such times as the VISUAL ARTS CENTER is not being used by the ART ASSOCIATION. Such utilization shall be subject to the use restrictions set forth in this AGREEMENT and booking regulations as are adopted by the ART ASSOCIATION. The ART ASSOCIATION shall be solely responsible for the' monitoring, scheduling and control of bookings, approval of users, and related matters.

## **6. RENTAL FEES FOR USE BY OTHERS**

6.1 The ART ASSOCIATION's Board shall annually, on or before thirty (30) days from the beginning of the ART ASSOCIATION's fiscal year, set the fee schedule for use of the VISUAL ARTS CENTER by others, and shall forward said schedule to the CITY for its information.

6.2 All users of the VISUAL ARTS CENTER shall pay the rental fee assessed for use directly to the ART ASSOCIATION.

6.3 Rental rates shall be on a two-tier basis. Tier One is for non—profit activities, and Tier Two is for profit activities.

6.4 Tier One (Non-profit) - Shall be charged to all organizations having 501c(3) tax status and shall be based upon a rate fixed annually as an amount necessary to permit the ART ASSOCIATION to recoup all of the user's proportionate share of the annual costs of ownership

of the VISUAL ARTS CENTER, including, for example, personnel, utilities, cleaning, debt service and related expenses.

6.5 Tier Two (All others) - Tier Two shall be charged to all organizations that do not have 501c(3) tax status, and shall be a rate fixed annually equal to the Tier One rate defined in paragraph 6.4 hereof, plus a reasonable additional remuneration.

6.6 All rates must be uniformly applied.

## **7. CONSTRUCTION, OPERATION AND MAINTENANCE**

7.1 The BUILDING. The ART ASSOCIATION shall cause to be constructed on the PROPERTY a VISUAL ARTS CENTER (the BUILDING, landscaping and exterior improvements, including aperture art), and shall be responsible for all costs associated with the construction of the VISUAL ARTS CENTER.

7.2 Utilities. The ART ASSOCIATION shall cause appropriate utilities to provide services to the VISUAL ARTS CENTER as required at a location identified by the ART ASSOCIATION architect. Costs associated with the relocation of electrical, telephone, cable, or other utilities (said relocation of utility lines to be underground) except potable water and sanitary sewer shall be paid by the ART ASSOCIATION. In the event non-potable irrigation water is available to the VISUAL ARTS CENTER, the ART ASSOCIATION shall agree to connect to and utilize such irrigation water.

7.3 Operating Expenses. The ART ASSOCIATION is solely responsible for the costs associated with the annual operating budget of the VISUAL ARTS CENTER; the CITY is not required to expend public funds to support either the capital or operating expenses of the ART ASSOCIATION and/or the VISUAL ARTS CENTER.

7.4 Maintenance. The ART ASSOCIATION shall maintain the exterior and interior of the VISUAL ARTS CENTER in a manner consistent with reasonably accepted commercial standards, and in the manner in which the CITY maintains City Hall (as to exterior BUILDING maintenance) and other similar CITY facilities (as to interior BUILDING facilities).

## **8. THE CITY'S CONSTRUCTION, OPERATION AND MAINTENANCE OBLIGATIONS**

8.1 Utilities. The CITY shall provide potable water and sanitary sewer lines adequate to serve the VISUAL ARTS CENTER, at a location on the PROPERTY identified by the ART ASSOCIATION architect. The CITY shall also provide such stormwater management facilities as are required by applicable permitting agencies.

8.2 Parking. The CITY shall not require construction of any parking by the ART ASSOCIATION, nor shall the ART ASSOCIATION require the CITY to build parking. Parking shall be that which is available on public rights-of-way.

## **9. CONSTRUCTION AND PERMITTING**

9.1 Code. All aspects of construction must be permitted through the CITY's Building Department, in accordance with applicable codes.

9.2 SAC. To ensure compatibility with the other improvements of the 5th Avenue overlay district, Site Plans and elevations must be presented for review and approval by the Staff Action Committee ("SAC") associated with the Community Redevelopment Association ("CRA"), as defined in the Fifth Avenue Overlay District Ordinance (the "Overlay District"). Both the CITY and the ART ASSOCIATION agree and acknowledge, however, that the BUILDING to be constructed on the PROPERTY is not subject to the development restrictions of the Overlay District, but must be approved in accordance with the provisions of paragraph 9.3 hereof.

9.3 Site Plan Approval. The CITY specifically reserves the right and must approve, while sitting as a Council at a regular meeting, the site plans and elevations of the VISUAL ARTS CENTER, the color scheme, and the foundation landscaping that shall be provided by the ART ASSOCIATION. The following types of signs may be requested:

- Ground signs
- Wall signs
- Directional on-site signs.

Maximum size per sign will be determined by the City Council.

9.4 Permit Fees. The CITY shall waive the building permit fee and all CITY impact fees associated with construction of the BUILDING. The ART ASSOCIATION may apply to Collier County Government requesting a waiver of County impact fees but shall be responsible for payment of County impact fees in the event that the County does not agree to a waiver. City of Naples utility connection fees cannot be waived due to bond covenants and the ART ASSOCIATION shall be responsible for their payment.

9.5 Building Setbacks. Setback requirements shall be based upon the site plan as approved by City Council.

## **10. FINANCING**

10.1 Upon the execution of this AGREEMENT, the ART ASSOCIATION shall immediately begin its fund raising program, including a feasibility study to be conducted by a qualified consultant, which program shall be designed to procure sufficient revenues to allow commencement of construction by June 30, 1998. In the event that the ART ASSOCIATION's fund raising efforts fail to succeed in the procurement of sufficient funds to commence construction by June 30, 1998 (as evidenced by the issuance of a building permit for construction of the BUILDING, the CITY may, at its option, cancel this AGREEMENT by written notice to the ART ASSOCIATION, and neither party shall have any continuing obligation hereunder.

10.2 The CITY will require documentation in the form of a statement of deposit and/or loan commitment, evidencing the availability of all funds sufficient to construct an operational

visual arts center prior to the issuance of a building permit for the construction of the VISUAL ARTS CENTER to be located on the PROPERTY. An operational visual arts center is defined as one which can fully function as a visual arts center, including lighting, air conditioning, flooring, exhibit areas, wall display area, teaching areas, classroom facilities, and studios. Such funding may include a mortgage that does not exceed fifty percent (50%) of the value of the improvements. Any such mortgage shall require sufficient notice of default and opportunity to cure in favor of the CITY, shall permit the CITY to assume the mortgage in the event of the ART ASSOCIATION's default, and shall acknowledge the CITY's ownership of the PROPERTY on which the BUILDING is located.

## **11. TAXES, USER FEES AND ASSESSMENTS**

11.1 The ART ASSOCIATION herein covenants that it is currently a non-profit corporation validly formed and operating under Section 501c(3) of the Internal Revenue Code, and that it shall maintain such status during the life of this AGREEMENT. The ART ASSOCIATION shall pay all taxes and assessments applicable to non-profit 501c(3) organizations. In the event that the non-profit status of the ART ASSOCIATION ceases, the ART ASSOCIATION shall be in default hereunder. "Assessments" shall include, but not be limited to, stormwater, water, and sewer system development charges and user fees.

## **12. INSURANCE**

12.1 The ART ASSOCIATION shall provide Fire and Extended Coverage insurance, plus Public Liability and Property Damage insurance for the VISUAL ARTS CENTER, as well as Builder's Risk insurance during construction. In all policies, the CITY shall be included as a named insured. The Chart of coverage shall be shown in Exhibit B and updated per insurance industry standards.

## **13. DESTRUCTION FROM FIRE OR OTHER CAUSES**

13.1 In the event of damage or destruction by fire or other causes, the ART ASSOCIATION shall be required within one year to commit to reconstruct the VISUAL ARTS CENTER in essentially the same manner as it existed prior to its destruction; provided, however, the ART ASSOCIATION shall be required to conform to any modified building ordinances enacted after the initial certificate of occupancy was issued. In the event, however, that the BUILDING is substantially damaged or destroyed more than ten (10) years after the issuance of a certificate of occupancy, the ART ASSOCIATION may redesign its BUILDING within the same footprint, with the site plan being otherwise subject to City Council's approval. Notwithstanding the foregoing, in the event that the ART ASSOCIATION determines, in its sole discretion, not to reconstruct the VISUAL ARTS CENTER, then the ART ASSOCIATION shall remove the VISUAL ARTS CENTER's debris from the PROPERTY at the ART ASSOCIATION's expense, restore the PROPERTY to its condition existing immediately prior to construction of the VISUAL ARTS CENTER and this AGREEMENT shall be cancelled.

## **14. ASSIGNMENT**

14.1 The ART ASSOCIATION shall not assign this AGREEMENT to any entity without written approval of the City Council. Any merger of the ART ASSOCIATION with

another entity to provide the services intended herein must first be approved by the City Council in formal session before becoming valid.

14.2 The ART ASSOCIATION herein agrees to indemnify, defend and hold harmless the CITY, its employees and elected officials from any claim of damages or liability arising out of the construction and/or use of the VISUAL ARTS CENTER; provided, however, the ART ASSOCIATION shall not be required to defend the CITY from any suit that may arise from the act of executing this AGREEMENT.

**15. CITY'S OPTION TO PURCHASE**

15.1 The CITY may exercise its option to purchase the VISUAL ARTS CENTER upon the expiration of the Initial Term, or any Extension Period, in accordance with the terms set forth herein.

15.2 To exercise this option, the City Council must adopt, in an advertised public hearing, a resolution outlining the public purpose that will be met through the purchase of the VISUAL ARTS CENTER.

15.3 The purchase price shall be an amount equal to:

a. The fair market value of the VISUAL ARTS CENTER, as determined in accordance with subparagraph b. below, plus costs of fundraising for a new location (which shall not include fundraising for a new building); and reasonable costs required for the moving of the physical property of the ART ASSOCIATION contained in the BUILDING; and other costs as mutually agreed upon.

b. The fair market value of the VISUAL ARTS CENTER shall be determined by the average of two (2) appraisals which shall be undertaken in accordance with the following: the fair market value of the VISUAL ARTS CENTER shall be determined utilizing an assumption as if the BUILDING were owned in fee simple by the owner of the VISUAL ARTS CENTER. The appraisal shall separately state the value of the PROPERTY and the value of the BUILDING, and shall be based on current market value, not on replacement cost. The value of the VISUAL ARTS CENTER shall be utilized for the purpose of determining the purchase price. The appraisals shall be conducted at CITY expense by Member of the Appraisal Institute ("MAI") appraisers agreed to by the ART ASSOCIATION (which appraisal average is herein referred to as the "Fair Market Value" of the VISUAL ARTS CENTER).

15.4 Upon exercise of the above set forth option, the ART ASSOCIATION shall have three (3) years to vacate the VISUAL ARTS CENTER.

15.5 Further, the CITY may exercise its option to purchase the VISUAL ARTS CENTER under the following procedures:

a. If any member of the City Council, pursuant to a written request, seeks a determination that the exhibits of the ART ASSOCIATION at the VISUAL ARTS CENTER violates community standards, the determination shall be made only after concurrence by a

majority of the members of City Council that said issue be placed on the agenda of a regular City Council meeting.

b. After said concurrence, the City Council shall 1) hold a public hearing to determine if the exhibits of the ART ASSOCIATION at the VISUAL ARTS CENTER violate accepted community standards, 2) if a determination of violation is made by a vote of five (5) members of the City Council, the ART ASSOCIATION shall receive notice to correct or to change said exhibit(s), identifying specific actions to be undertaken by the ART ASSOCIATION so that the complained of exhibit is no longer violative of community standards.

c. The ART ASSOCIATION shall begin correcting the activities to conform to community standards immediately and demonstrate total corrective action to have been taken within a twelve (12) month period. A second public hearing shall be held one (1) year from the above-referenced public hearing to assess the action taken by the ART ASSOCIATION.

d. If necessary, a public hearing shall be held six (6) months from the second public hearing to vote on the exercise of the CITY's option to purchase the VISUAL ARTS CENTER pursuant to Section 15.

e. At a third public hearing, the City Council may, by simple majority, vote to purchase the VISUAL ARTS CENTER if the determination is made by the City Council that the ART ASSOCIATION has failed to comply with the City Council's notice of specific corrective action described in 15.5b hereof. Said purchase option shall be exercised pursuant to paragraph 15.3 and 15.4 above.

## **16. DEFAULT**

16.1 A default shall exist when one of the following conditions exist or occur and remains uncured in accordance with paragraph 16.3 hereof (a "Condition of Default"):

a. The ART ASSOCIATION abandons the VISUAL ARTS CENTER.

b. The ART ASSOCIATION negligently violates any of the terms of this AGREEMENT and fails to cure the violation within the time periods described in paragraph 16.3 below.

c. The ART ASSOCIATION willfully or wantonly violates any of the terms of this AGREEMENT.

16.2 Written notice of the occurrence of a Condition of Default shall be provided by the CITY to the ART ASSOCIATION via certified mail, return receipt requested.

16.3 The ART ASSOCIATION shall make a good faith effort to cure a Condition of Default, within ninety (90) days of receipt of the notice prescribed in Paragraph 16.2 hereof. Such cure period is limited to thirty (30) days for landscaping matters.



16.4 Upon the occurrence of an uncured event of default, this AGREEMENT shall be cancelled, and the VISUAL ARTS CENTER shall become the property of the CITY at no cost to the CITY.

**17. OWNERSHIP OF BUILDING**

17.1 Notwithstanding the fact that the improvements contemplated herein are to be constructed on land owned by the CITY and no default exists on the part of the ART ASSOCIATION, ownership of all improvements shall vest in the ART ASSOCIATION, as long as this AGREEMENT is in full force and effect.

**18. BOARD MEMBERSHIP**

18.1 The CITY and the ART ASSOCIATION mutually agrees that upon the execution of this AGREEMENT, the CITY shall appoint one (1) member of City Council to the Board of Directors of the ART ASSOCIATION. The City Council's appointment shall be for a two-year term, with said appointment and term starting at the beginning of the ART ASSOCIATION's fiscal year in order to coincide with the appointment of other board members. City Council representation on the board shall last as long as this AGREEMENT is in effect.

**19. QUIET ENJOYMENT**

19.1 The CITY grants the ART ASSOCIATION quiet enjoyment of the VISUAL ARTS CENTER and covenants not to disturb such quiet enjoyment as long as there exists no default on the part of the tenant under the terms and conditions of the use agreement.

**20. AMENDMENTS TO THE AGREEMENT**

20.1 All amendments must be in writing, approved by the City Council and by the Board of the ART ASSOCIATION, prior to taking effect. Any proposal made by one party hereto shall be deemed void if not responded to within six (6) months of its proposal.

**21. ANNUAL PRESENTATION**

21.1 The ART ASSOCIATION shall present an annual report to the CITY MANAGER within ninety (90) days of the ART ASSOCIATION's fiscal year end. The annual report shall include a review of the past fiscal year's budget, use of the VISUAL ARTS CENTER, special events, rentals, fund raisers, and other items the ART ASSOCIATION feels important to share with City Council. They shall also provide a schedule of events for the new fiscal year.

**22. GENERAL PROVISIONS**

22.1 The captions and headings in this AGREEMENT are for information only and are not substantive.

22.2 This AGREEMENT constitutes the complete agreement between the parties and no modification shall be binding unless in writing and executed by the parties.

22.3 ARBITRATION. In the event of any dispute, question or interpretation of this AGREEMENT which the parties cannot resolve, it shall be submitted at the request of either party to binding arbitration according to the rules of the American Arbitration Association.

22.4 Either the CITY or the ART ASSOCIATION shall be entitled, to recover reasonable legal costs and attorney fees incurred in connection with enforcement of any covenant, term, or condition of this AGREEMENT.

IN WITNESS WHEREOF, the parties hereto have executed this AGREEMENT as of the date first above written.

CITY OF NAPLES

By: \_\_\_\_\_, Mayor

Attest:

\_\_\_\_\_  
, City Clerk

THE NAPLES ART ASSOCIATION

By: \_\_\_\_\_

Witnesses:

\_\_\_\_\_  
\_\_\_\_\_