

## MEMORANDUM

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TO: **ERIC KING**  
FROM: **BRAD EMERSON**  
SUBJECT: **CROW'S FEET COMMONS  
COMPLIANCE ISSUES**  
DATE: **AUGUST 29, 2014**  
CC: **BEND CITY COUNCIL**



### Purpose

It's clear from the widespread community response that the Mirror Pond Plaza (Plaza) is a highly valued gathering place for the community, and many people value the up-change associated with Crow's Feet Commons (CFC) leasing of the historic Rademacher House. As in any relationship that has expectations beyond a normal business/cash partnership there are some areas that haven't worked as expected, by both CFC and the City of Bend. The purpose of this memo is to provide additional context to the issues surrounding the lease of the Plaza by CFC as well as potential next steps to ensure the intent of keeping downtown Bend healthy and vibrant are fully realized.

### Background

When Arts Central notified the City in the spring of 2011 of its intent to vacate the Rademacher House, the City worked with the Downtown Business Association and other key stakeholders to re-program the space for a more active retail use that would increase foot traffic and promote more positive activities. The City used a Request for Proposal (RFP) process rather than a traditional real estate transaction to allow for a more creative approach in attracting the right tenant in creating a positive community space. Through this competitive process, CFC was selected and the City entered into a lease in September, 2013 (attached). It has been the City's intent to assist CFC in becoming a success since the start of their operations. Some of our efforts are indicated by the following:

- At the inception of their building lease, the City provided three months' free rent to help CFC establish itself for long term success;
- The City currently subsidizes the rent to CFC. Their current rent is \$.66/sf. Per the City's real estate agent, the average market rate for downtown retail / food services businesses with significant outdoor usable space is \$1.50/sf; and
- In an effort to help foster positive community activity on the plaza, the City has bundled Special Event Permits for CFC for multiple repeating events for the fee of one Special Event Permit (attached).

### **Lease of the Mirror Pond Plaza**

In 2013, CFC requested to lease the Mirror Pond Plaza (Plaza) in an effort to help manage the programming of that space. The Plaza lease (attached) was for 500sf in area at a flat rate of \$543./year and it expired on December 31, 2013. The lease required CFC to notify the City if they intended to renew it, however the City never received any request for an extension. It was only when the City notified CFC that we did not receive a request that we became aware of their desire to renew. Discussions with CFC about the lease issues began in April, 2013 and have continued up until the recent decision to not renew. Since March 2014, there have been several meetings and phone calls and over 30 email exchanges to work through issues related to the lease of Mirror Pond Plaza between the City and CFC.

The Mirror Pond Plaza lease that expired on December 31, 2013 was not renewed because of the following unresolved issues:

- The Plaza lease specifically limited the use to tables, seating and food service and also stipulated that the area was not to be subleased. Subsequent conversations with the tenant have indicated that the space was rented out to third parties on a number of occasions and for uses that are not allowed in the lease;
- There have been issues with compliance with OLCC requirements as they pertain to the Plaza lease area;
- In an email dated Tuesday May 13, 2014, Crow's Feet Commons acknowledged that they did not do regular lunchtime table service or keep track of sales of meals during their 2013 lease agreement with the City; and
- There are current outstanding compliance issues with CFC's lease for the Rademacher house, which include signage and ensuring that special events applications are properly secured and paid for.

### **Next Steps**

Moving forward, we would like to work with CFC to continue programming positive activities in the Plaza, including:

- Their continued ability to use the Plaza for special events and allowance of a "blanket permit" to minimize cost and streamline approval processes;
- Exploration of a sidewalk café permit that would allow additional seating in a portion of the Plaza; and
- Participation in the newly formed Downtown Livability Group to implement more comprehensive solutions that improve customer and public experiences downtown including the Plaza.

The City is committed to the continued success of Crow's Feet Commons at the Rademacher House as they have been a positive addition to that space. While they do not have a lease for the Plaza, CFC can still use that area for events by applying for and receiving a Special Events Permit from the City.

SUMMARY OF FUNDAMENTAL PROVISIONS

This is a summary only and the terms in the body of the Lease control.

Name and Address of Landlord	City of Bend 710 NW Wall Street P.O. Box 431 Bend, OR 97701-0431
Name of Tenant:	David Marchi dba Crow's Feet Commons
Address of Premises	875 NW Brooks Street Bend, OR 97701
Address for Notices to Tenant:	1637 NW Fresno Ave Bend, Oregon 97701
Business at Premises	Crow's Feet Commons
Approximate Area:	500 square feet for tables/chairs
Lease Term:	6.5 months
Commencement Date:	5/15/2013
Initial Base Rent:	\$543.00/year

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## RETAIL LEASE

This lease is between the City of Bend (Landlord) and David Marchi (Tenant).

### Recitals

A. Landlord owns the land and improvements located at the Riverfront Plaza. The full extent of the property owned by the City is shown on Exhibit A (the Property).

B. Tenant seeks outdoor space near Tenant's existing operations for an outdoor café area to include tables and chairs, and potentially the placement of up to three food vendor carts. Landlord and Tenant have agreed to Tenant's use of a portion of the Property (the Premises) on the terms set forth in this agreement. A map of the Property showing the Premises is attached as Exhibit A.

### Terms of Lease

1. Lease. Landlord leases the Premises to Tenant on the terms stated in this Lease.

2. Term. This lease shall be effective when signed by both parties. Tenant shall have the right to occupy the premises from May 15, 2013 (the Commencement Date) to December 31, 2013.

a. Option to Extend. This this lease may be extended my mutual agreement by five one- year terms. If tenant wishes an extension, Tenant shall provide written notice of extension to Landlord at least 90 but no more than 180 days before the end of the term being extended. Landlord shall, within 30 days of receipt of the notice, inform Tenant in writing if it agrees to the extension, and if so, the amount of the rent due for the following year. The term shall be extended if Tenant provides the rent within 30 days of the date of Landlord's notice agreeing to the extension and setting the rent.

3. Rent. Tenant shall pay \$543.00 as Base Rent for the period from 5/15/2013 to 12/31/13.

Rent shall be paid in advance on or before the first day of each rental year during the Term. Upon execution of this Lease, Tenant shall pay to Landlord the Base Rent for the first rental year for which rent is due.

All Rent shall be paid when due without notice, offset, or deduction for any reason, except as specifically provided in this lease.

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4. Property Tax. Tenant shall pay all real property taxes and assessments levied, assessed or imposed on the Premises.

5. Insurance

a. Increases in Premiums. If the insurance premiums on the Property are increased during the Term as a result of the installation of equipment on the Premises by Tenant, by reason of Tenant's maintaining certain goods or materials on the Premises, or as a result of other use or occupancy of the Premises by Tenant, Tenant shall pay the additional cost of the insurance whether or not Landlord has consented to the activity resulting in the increased insurance premiums. Tenant shall refrain from any activity on the Premises that would (1) make it impossible to insure the Property, or (2) increase the insurance rate unless Tenant pays the additional cost of the insurance. All of Tenant's electrical equipment shall be U-L approved. If Tenant installs any electrical equipment that overloads the lines in the Premises or in any such buildings, Tenant shall at its own expense make whatever changes are necessary to comply with the requirements of the insurance underwriters and governmental authorities having jurisdiction.

b. Indemnity and Insurance. Tenant shall defend, indemnify, and hold the City, its officers, agents, employees and volunteers harmless against all liability, claims, losses, demands, suits, fees and judgments (collectively known as 'claims'), that may be based on, or arise out of damage or injury (including death) to persons or property caused by or resulting from any act or omission sustained in connection with the performance of this contract or by conditions created thereby or based upon violation of any statute, ordinance or regulation. This indemnification required shall not apply to claims caused by the sole negligence or willful misconduct of the City, its officers, agents, employees and volunteers. The Tenant agrees that it is not an agent of the City and is not entitled to indemnification and defense under ORS 30.285 and ORS 30.287.

Tenant shall purchase and maintain at their own expense the insurance noted below subject to review and acceptance by the City of Bend. All insurance shall apply on a primary, non-contributory basis and remain in effect for the duration of the contract terms. Any policy written on a 'claims made' basis may only be done so with the written approval and authorization of the City of Bend and coverage written in this manner shall extend for two years past the life of the lease.

Commercial General Liability Insurance with minimum coverage in effect of \$1,000,000 per incident, claim or occurrence and \$2,000,000 in aggregate. The policy shall include coverage for personal injury, bodily injury, advertising injury, property damage, premises, operations, products completed operations, employer's practices liability, errors and omissions and contractual damages.

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Tenant shall remain fully responsible and liable for any claims resulting from the negligence or intentional misconduct of Tenant, its subcontractors, and their officials, agents and employees in performance of this contract, even if not covered by, or in excess of insurance limits.

Commercial General Liability coverage shall name, by certificate and endorsement the City, its officers, agents, employees and volunteers as additional insured's with respect to Tenant's work, activities or services provided under this lease.

Workers' Compensation Insurance as required by ORS chapter 656 and meeting the minimum requirements therein. Tenant shall ensure that each subcontractor obtains and maintains workers' compensation insurance and that the carrier notifies the state of Oregon or files a guaranty contract with the state of Oregon Workers' Compensation Division before performing work.

Tenant shall provide proof of coverage required by acceptable Certificate of Insurance and signed Endorsement from the carrier(s). The Certificate and Endorsement shall provide that there will be no cancellation, termination, material change or reduction in limits of the insurance coverage without a minimum 30-day written notice to the City. The Certificate and Endorsement shall also state the deductible or self-insured retention level.

c. Waiver of Subrogation. Tenant grants Waiver of Subrogation to the City, its officers, agents, employees and volunteers for any claims arising out of Tenant's lease, work, activities or service. Further, Tenant agrees that in the event of loss due to any of the risks for which it has agreed to provide insurance, recovery by the Tenant shall be solely with their insurance carrier. Tenant also grants to City on behalf of any insurer providing coverage to either Tenant or City with respect to the work or services of Tenant a waiver of any right to subrogation which any insurer or Tenant may acquire against City by virtue of the payment of any loss under such insurance coverage.

6. Use of Premises. The Premises may be used for food and beverage sales as described in the Exhibit C. Tenant shall not use the Premises other than as described in Exhibit C. Tenant shall:

a. Comply with applicable laws, regulations and requirements affecting the Premises and correct, at Tenant's expense, any failure to comply by Tenant. Tenant shall comply with the Americans with Disabilities Act and all occupational safety and health laws and regulations.

b. Refrain from creating or allowing any nuisance or damage to the Premises. Tenant shall not permit any noise or odor to escape or be emitted from the Premises nor permit the use of flashing (strobe) lights.



c. Refrain from loading the electrical systems beyond the point considered safe and refrain from using electrical systems in any harmful way. If Landlord employs an engineer, architect, electrical, or other consultant to determine whether Tenant's use of the Premises is in violation of this section, Tenant shall pay the reasonable costs incurred in connection with that employment. Tenant shall use drain protection devices as needed to avoid harmful use.

d. Refrain from making any marks on or attaching any sign, insignia, antenna, aerial or other device to the Premises or make any other changes to the existing improvements on the Premises without the written consent of the Landlord, which consent shall not be unreasonably withheld. Landlord need not consent to any sign that fails to conform to the design concept of the building or to Landlord's policies and procedures. Prior to installing any signs, Tenant shall submit detailed drawings to Landlord for approval indicating the location, size, layout, design, and color of proposed sign, including all lettering and graphics. Electrical service to all signs shall be at Tenant's sole expense. Notwithstanding Landlord's consent to any signs, Tenant shall (i) comply with all laws and obtain any necessary permits and governmental approvals related to such signs at its own cost and expense, and (ii) within 15 days after Lease expiration or earlier termination, remove at Tenant's expense all signs and repair any damage to the Premises caused by Tenant's signs.

e. Comply with any reasonable rules Premises promulgated by Landlord and communicated to Tenant in writing. Landlord's rules may regulate deliveries to the Premises and may regulate parking by employees. Landlord reserves the right to require employees of Tenant to park in designated areas.

f. Not permit any cash, credit card, or coin-operated vending, novelty or gaming machines or equipment on the Premises.

g. Not generate, release, store, or deposit on the Premises any environmentally hazardous or toxic substances, materials, wastes, pollutants, oils, or contaminants, as defined or regulated by any federal, state, or local law or regulation or any other Law (collectively, "Hazardous Substances"), except that Tenant may have and use small quantities of Hazardous Substances on the Premises as required in the ordinary course of Tenant's business. Tenant shall indemnify, defend, and hold harmless Landlord from and against any and all claims, losses, damages, response costs and expenses of any nature whatsoever (including without limitation attorneys', experts', and paralegals' fees) arising out of or in any way related to the generation, release, storage, or deposit of Hazardous Substances on the Premises or on Landlord's property by Tenant or any other person or entity other than Landlord on and/or after the date of this Lease.

h. Comply with the requirements of all operation and easement agreements and all other agreements and requirements of record on the Property.

i. Shall allow public access to, in, and through the Premises and shall have no right to control access or restrict any use of the Premises except to the extent that the use prevents the use of the Premises or a portion of the Premises for Tenant's operations as described in Exhibit C. Tenant shall allow any person to use the existing benches for resting, eating lunch, and other similar activities.

7. Tenant Improvements and Alterations. Tenant shall make no improvements or alterations on the Premises.

8. Tenant's Responsibilities. Tenant is responsible for:

a. Any repairs and replacements necessitated by the negligence, modification of systems in place at commencement of lease or use of the Premises by Tenant, its agents, employees and invitees.

b. Any repairs or alterations required under Tenant's obligation to comply with all applicable Laws as set forth in this Lease.

c. All other repairs, maintenance, and replacements to the Premises which Landlord is not expressly required to make repairs within the Premises if the need for the repair arises from Tenant's improper use of the Premises. All of Tenant's work shall be in full compliance with then-current building code and other governmental requirements.

9. Liens, Taxes. Tenant shall keep the Premises free from all liens arising from any act or omission of Tenant or those claiming under Tenant. Tenant shall be responsible for and shall pay when due all taxes assessed on the Premises or personal property of Tenant.

10. Ice, Snow and Debris. Tenant shall, at its own expense, keep the Premises free and clear of ice, snow, rubbish, debris, and obstructions. Tenant shall indemnify and hold Landlord harmless from any injury whether to Landlord or Landlord's property or to any other person or property caused by Tenant's failure to perform Tenant's obligations under this section. Landlord reserves the right to cause the removal of ice, snow, debris and obstruction from the area in front of the Premises. Tenant shall pay Landlord's removal costs within ten days after billing.

11. Injury to Tenant's Property. Landlord shall not be liable for any injury to the goods, stock, merchandise, leasehold improvements or any other property of Tenant for any reason. Tenant shall carry adequate insurance coverage at its cost and expense to cover all risks to its property.

12. Default. The following shall be events of default:

a. Failure of Tenant to pay any rent when due or failure of Tenant to make any other payment required under this Lease within 10 days after it is due.



b. Failure of Tenant to comply with any other provision of this Lease within 10 days after written notice by Landlord stating the failure to comply. If the default cannot be remedied within the 10-day period, this provision shall be complied with if Tenant begins correction of the default within the 10-day period and proceeds with reasonable diligence to effect the remedy.

c. The abandonment of the Premises by Tenant or the failure of Tenant for 15 days or more to occupy the Premises unless the failure is excused under other provisions of this Lease.

d. The assignment or subletting or purported assignment or subletting of Tenant's interest under this Lease without Landlord's written permission.

13. Remedies on Default. In the event of a default, Landlord may exercise all remedies authorized under Oregon law, including the following:

a. Landlord may elect to terminate Tenant's right to possession of the Premises by written notice to Tenant. After the notice is delivered, Landlord may take possession of the Premises and remove any persons or property by legal action or by self-help with the use of reasonable force and without liability for damages. To the extent permitted by law, Landlord shall have the right to retain the personal property belonging to Tenant which is on the Premises at the time of re-possession, or the right to other security interest therein as the law may permit, to secure all sums due to Landlord under this Lease. Perfection of Landlord's security interest shall occur by taking possession of such personal property or otherwise as provided by law.

14. Surrender at Expiration. At expiration or termination, Tenant shall surrender the Premises in first-class condition, broom clean and pressure washed. All fixtures to be removed by Tenant shall be removed before the expiration or termination date. Any and all repairs for which Tenant is responsible shall be completed to the latest practical date prior to the surrender.

15. Assignment and Subletting. Tenant shall not, either voluntarily or by operation of law, sell, assign or transfer this Lease or sublet any portion or all of the Premises, or assign any right in the Premises. Any attempt to do so shall be void and shall terminate this Lease.

16. Inspection. Landlord shall have the right to enter upon the Premises at any time for the purpose of inspecting the Premises, for the purpose of making repairs or improvements to the Premises, or for any other lawful purpose.

17. Notices. Notices under this Lease shall be in writing and shall be deemed given when actually delivered or when deposited in the United States mail as certified or registered mail, addressed to the addresses set forth in the Summary of Fundamental Provisions of this Lease or to such other address as may be specified from time to time.

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18. Brokers. Tenant covenants, warrants and represents that he has not engaged any broker, agent or finder who would be entitled to any commission or fee in connection with the negotiation and execution of this Lease that will not be paid directly by Tenant to the Broker. Tenant agrees to indemnify, defend and hold Landlord harmless against and from any claims for any brokerage commissions incurred at Tenant's request. Landlord shall be responsible for payment of Landlord's broker.

19. Limitation on Landlord's Liability. Neither Landlord nor any of its employees, or agents shall be liable to Tenant for monetary damages other than refund of rent.


20. Miscellaneous. This Lease does not grant any rights of access to light or air over any part of the Property. Time is of the essence of this Lease. The acceptance by Landlord of any Rent or other benefits under this Lease shall not constitute a waiver of any default. Any waiver by Landlord of the strict performance of any of the provisions of this Lease shall not be deemed to be a waiver of subsequent breaches of the same character or of a different character, occurring either before or subsequent to such waiver, and shall not prejudice Landlord's right to require strict performance of the same provision in the future or of any other provision of this Lease. This Lease contains the entire agreement of the parties and supersedes all prior written and oral agreements and representations and there are no implied covenants or other agreements between the parties, except as expressly set forth in this Lease. Neither Landlord nor Tenant is relying on any representations except as expressly set forth in this Lease. The parties acknowledge and agree that any calculations of square footage in the Premises and on the Property are approximations. This Lease shall not be amended or modified except by agreement in writing, signed by the parties. Subject to the limitations on the assignment or transfer of Tenant's interest in this Lease, this Lease shall be binding upon and inure to the benefit of the parties, their respective heirs, personal representatives, successors, and assigns. If any provision of this Lease is held to be invalid or unenforceable, the remainder shall not be affected. Expiration or termination of this Lease does not terminate obligations intended to survive expiration or termination.

21. No Warranty of Quiet Enjoyment. Because the area will continue to be used by the public, Landlord provides no warranty of quiet enjoyment.

22. Prior Inspection. Tenant has inspected the premises prior to executing this lease. Tenant understands agrees it is taking possession of the premises in as-is condition subject to improvements agreed to be performed by Landlord.

**Landlord**

Bend Urban Renewal Agency  
CITY OF BEND

  
\_\_\_\_\_  
Eric King, City Manager  
Date:

Date: 5/28/13

**Tenant**

David Marchi  
(dba. Crow's Feet Commons)

  
\_\_\_\_\_  
David Marchi



## EXHIBIT A - Location



**EXHIBIT B  
THE PREMISES**

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## EXHIBIT C

Crow's Feet Commons  
875 NW Brooks St., Bend OR 97701

### Riverfront Plaza Operations Plan

Timeframe:  
June 1- June 1

Daily Hours:

Summer Operations: June 1- September 1: 8:00 am- 10:00pm, daily and working in compliance with events already scheduled for summer season including Farmer's Market

Operations: September 1 - May 31: 8:00 am- 8:00 pm (sun-thurs), 8:00- 10:00 pm (fri-sat)

Daily Operations Procedure:

8:00 am- Daily operations: Tables will be arranged on 500 square feet of the western quadrant of the plaza. This will allow plenty of walk through on the Brooks Street Promenade and clearance for both ADA accessible ramps and stairs from the southern parking lot onto the plaza.

8:00- 10:00- Normal business operations with Crow's Feet Commons assuming all legal liability for alcohol sales which is subject to OLCC requirements. Additionally, legal liability for events and customer liability are set in place and is compliant with City requirements.

10:30- Dismantle tables, chairs and umbrellas to locked location at 875 NW Brooks St.

ADA compliance:

All tables and chairs will be ADA compliant.

Compliance with "walk through accessibility".

Due to the construction of the Plaza, both ADA compliant ramps and stairs will be not be subject to obstruction in any way. Although walk through will be marginally compromised by obstructing the west stairway, there will be no obstruction to the ramps on the outer edges of the plaza.

Currently we have lighting throughout the plaza to increase security and ambiance. We will insure that they will fall inline with the intended use of the space and will minimize obstruction to visitors who will walk through outside our usual business hours.

Loitering issues:

Acting as an extension of our property boundaries, patrons will be asked to leave if they are not conducting themselves as per our requests.

Event Plans:

Currently we have many events that have been passed by the City for noise compliance, special events participant excess and Temporary Use of Annual License by the OLCC. These events have been widely successful in creating community and fun in this otherwise quiet space. Additionally in the winter, we will continue to work with Mt. Bachelor to create Mt. Bachelor Friday's like we did last winter.



#### Long Term Goals:

Our desire to extend a long term lease is due to a number of reasons. First, we rely on this space to invite customers, visitors of Bend and locals to enjoy this space that the City has spent so much money to preserve. In years since the acquisition of this space, the Plaza was widely underused and became a problem area of vagrancy for the Bend Police Department. Long term, we want to showcase this space for community driven events. Our sole intention for this space is to create a respected, supported and vibrant community. Each event that we will approve and create will have the best interests of the City, the Bend Downtown Business Association and Bend Police Department in mind.

Additionally making alliances with the likes of Mt. Bachelor, Central Oregon Trails Alliance and other non-profits will connect the downtown businesses with off sight organizations thus bringing a more vibrant commerce experience.