

ORDINANCE NO. 1232

AN ORDINANCE APPROVING THE EXECUTION OF A MEMORANDUM OF UNDERSTANDING ,THE EFFECT OF WHICH CREATES A LONG-TERM LEASE OF THE SILCO THEATER TO THE CORPORATION FOR DOWNTOWN DEVELOPMENT, D/B/A SILVER CITY MAINSTREET

WHEREAS, the Town of Silver City is the owner of certain improved property located at 311 N. Bullard Street, which property is commonly referred to as the “Silco Theater”; and

WHEREAS, The Corporation For Downtown Development, d/b/a Silver City MainStreet, (hereinafter, “SCM”) has filed an application with the Director of Community Development for the execution of a long-term lease for said Silco Theater; and

WHEREAS, the Town Council finds that the Town is authorized by Chapter 48, Article II, Sections 48-22 and 48-26 to lease the subject property to SCM in furtherance of the goals of the Town’s Arts and Cultural District, and in furtherance of the economic development of the downtown area as contemplated in the Downtown Redevelopment Area Plan; and

WHEREAS, the Town Council finds that the Memorandum of Understanding with the terms and conditions proposed therein, the effect of which creates a long-term lease between the Town and SCM with particular terms and conditions, is in the best interest of the Town, and necessary to the health, safety and welfare of the Town;

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE TOWN OF SILVER CITY, GRANT COUNTY, NEW MEXICO, that:

The appended Memorandum of Understanding creating a long-term lease between the Town and The Corporation For Downtown Development, d/b/a Silver City MainStreet is approved, and the Town Manager is hereby authorized to execute such documents as may be necessary to accomplish the transaction contemplated herein.

PASSED, ADOPTED AND APPROVED by vote of the Council of the Town of Silver City,
Grant County, New Mexico, this 8th day of July, 2014.

(Seal)

TOWN OF SILVER CITY

/s/ _____
Michael S. Morones, Mayor

Attest:

/s/ _____
Ann L. Mackie, Town Clerk

**MEMORANDUM OF AGREEMENT
LEASE OF TOWN-OWNED PROPERTY
WITH OPTION TO PURCHASE**

This Memorandum of Agreement ("Agreement") creating a lease of real property is made effective as of _____, 2014, by and between the TOWN OF SILVER CITY ("The Town", or "Landlord") having its principal place of business at P.O. Box 1188, Silver City, New Mexico, and THE CORPORATION FOR DOWNTOWN DEVELOPMENT, d/b/a "Silver City MainStreet", a New Mexico non-profit corporation, having its principal place of business at P.O. Box 4068, Silver City, New Mexico ("hereinafter, "SCM", "Lessee", or "Tenant").

RECITALS

WHEREAS, the Town is authorized by its charter, the provisions of Section 3-18-1, N.M.S.A., 1978 Comp., and Municipal Code Chapter 48, Article II, Sections 48-20 et seq. to enter into the lease of municipal real property; and

WHEREAS, the Town owns a particular parcel of improved real estate located at 311 N. Bullard Street, situated in the downtown area of Silver City, commonly referred to as the "Silco Theater"; and,

WHEREAS, the Silco Theater is located within the Town of Silver City's Arts and Cultural District, and is also within the designated Metropolitan Redevelopment Area Map and specifically referenced in the Metropolitan Redevelopment Area Plan of the Town as a necessary constituent for the creation of a downtown theater district; and

WHEREAS, an application for a long-term lease of the Silco Theater by The Corporation For Downtown Development, d/b/a Silver Street MainStreet has been received by the Director of Community Development; and

WHEREAS, the Town Council finds that the leasing of said property to SCM for the primary use as a public venue with uses including a movie theater, a production venue, a public meeting place, and a venue for short term lease to private persons for public events, and therefor will be beneficial to the downtown area, and will be consistent with the goals of the Arts and Cultural District, as well as the economic development goals mentioned in the Town's Metropolitan Redevelopment Area Plan; and

WHEREAS, the Town Council finds that said lease agreement will be beneficial to the Town as a whole by fostering economic development and revitalization of the downtown area, and is, therefor, necessary for the health, safety and welfare of the Town and its inhabitants; and

WHEREAS, the execution of such long-term lease is subject to the requirements set forth in Municipal Code Chapter 48, Article II, Sections 48-20 et seq. regarding the Sale, Lease or Exchange of Town-owned property; and

WHEREAS, the Town Council finds Chapter 48, Article II, Sections 22 (a)(3), (d)(3) in conjunction with Section 26 thereof, permits real property interests to be leased to SCM as a qualified economic development project, and further, that such lease will be economically beneficial to the Town's goals and policies, would be consistent with the economic development plan adopted by the Town Council, and in accordance with the Town's local economic development plan;

NOW, THEREFORE, in consideration of the mutual promises, covenants, and conditions set forth herein, the parties hereto agree as follows:

1. EFFECT OF RECITALS: The recitals mentioned above are material representations of the parties and are included herein as inducements for the execution of this Memorandum of

Agreement.

2. PREMISES: The Town, in consideration of this Memorandum of Agreement and under the terms and conditions described herein, leases to SCM a parcel of improved real estate located at 311 N. Bullard Street, Silver City, New Mexico, more specifically described in Appendix “A” to this Agreement.

3. TERM: The Agreement term will begin on _____, 2014 and will continue for a period of *fifteen (15)* years, unless otherwise terminated under the provisions of this Agreement.

This agreement shall automatically renew for an additional period of five (5) years on the same terms as this Agreement or as it may exist as amended, unless either party gives written notice of the termination no later than one hundred and twenty days prior to the end of the term or renewal term. The terms and conditions of this long-term lease shall supercede the short-term lease currently in effect between the parties.

4. LEASE PAYMENTS. Lease payments shall be \$5,437.33 per month for the subject property, which amount shall be equal to the amortized cost of the principal debt and interest thereon which the Town has assumed in order to purchase the Silco from SCM. Any other cost incurred by the Town with regard to the Silco, including necessary renovation and maintenance not accomplished by SCM under this lease, or as required in the Purchase and Sale Agreement, as amended, between the parties, shall, at the option of the Town, be made immediately due and payable, or shall be amortized over the period of months then remaining in the lease executed herein. The parties agree that nothing in this lease shall relieve the Lessee from any obligations of renovation as described in said Purchase and Sale Agreement, as amended, between Lessor and SCM attendant to the purchase of the Silco from SCM.

5. POSSESSION: SCM shall be entitled to continue in possession of the premises on the first day of the term of this Agreement and shall yield possession to the Town on the last day of the term of this Agreement, unless otherwise agreed by both parties in writing.

6. USE OF THE PREMISES: As a condition of the granting of this lease, SCM has obligated itself under the Purchase and Sale Agreement executed between the Town and SCM, as amended, to design, construct, operate and maintain a movie/production theater and performing arts center, capable of playing commercial movies in the standard modern format. SCM warrants that the primary use of the demised premises shall be the purposes mentioned herein, and shall not use the demised property for any other purpose, except with the permission of the Town.

7. PROPERTY AND LIABILITY INSURANCE: SCM will secure and maintain liability insurance upon the demised premises in an amount at least equal to the dollar cap on claims prescribed by the New Mexico Tort Claims Act as it exists now, or may exist in the future. It shall also maintain property insurance in an amount equal to or greater than the replacement cost of the improvements upon the real estate. SCM shall name the Town as an “also insured” on the policy, and shall provide copies thereof to the Town annually. Any notice of non-payment or lapse in coverage shall constitute a breach of this Lease.

8. INDEMNITY REGARDING USE OF PREMISES: SCM agrees to indemnify, hold harmless, and defend the Town from and against any losses, claims, liabilities, and expenses, including reasonable attorney fees, if any, which Town may suffer or incur in conjunction with SCM’s use of the Premises. SCM shall notify the Town of any claim made against it, whether real or anticipated within five (5) days of learning of such claim.

9. DESIGN AND CONSTRUCTION OF THEATER: A material provision of this Agreement

and a substantial inducement therefor is the promise of SCM to design, construct and operate a movie/production theater which will be maintained for at least as long as the term of this lease and any extensions granted therefor. The design and construction shall be compliant with requirements of the American with Disabilities Act as now in effect. If for any reason, said leased premises is not maintained for the purposes mentioned herein, this Lease may be terminated on thirty (30) days notice from the Town at its sole discretion. Any improvements constructed upon the demised premises shall be removed or rendered usable for the Town's use and benefit, the determination of which shall be at the complete and sole discretion of the Town. Nothing in this paragraph shall relieve Lessee from its obligations mentioned in the Purchase and Sale Agreement, as amended, that was executed between the parties wherein the Town purchased the Silco from SCM.

10. OWNERSHIP OF IMPROVEMENTS: Improvements made to or upon the demised premises shall become fixtures thereof, and ownership thereof shall pass to the Town at the termination of the lease and any renewals thereof.

11. INCOME, OBLIGATION TO PAY GROSS RECEIPTS: Any revenues derived from the operation of the leased premises shall inure to the benefit of SCM. Gross Receipts shall be remitted according to law.

12. OBLIGATION OF NON-DISCRIMINATION: SCM shall not cause or permit discrimination against any particular class of individuals which is a protected class under State and Federal law. The property shall remain a public venue, except only when the facility is leased to a private entity for a particular purpose.

13. DESTRUCTION OR CONDEMNATION OF IMPROVEMENTS PREMISES: If the

improvements to and upon the Premises are destroyed in a manner that prevents the conducting of Tenant's use of the Premises in a normal manner and, if the damage is not repairable within a reasonable time period, the insurance proceeds shall belong to the Tenant, but this Lease shall terminate and possession of the real property shall revert back to the Town, with no further obligations to Tenant.

14. MECHANICS LIENS: Neither the Tenant nor anyone claiming through the Tenant shall have the right to file mechanics liens or any other kind of lien on the Premises and the filing of this Lease constitutes notice that such liens are invalid. Further, Tenant agrees to give actual advance notice to any contractors, subcontractors or suppliers of goods, labor, or services that such liens will not be valid.

15. DEFAULTS: Tenant shall be in default of this Lease, if Tenant fails to fulfill any lease obligation or term by which Tenant is bound. If the Tenant fails to fulfill its obligation to the Landlord within thirty day(s) after written notice of such default is provided by Landlord to Tenant, Landlord may take possession of the Premises without further notice, and without prejudicing Landlord's rights to damages. In the alternative, Landlord may elect to cure any default and the cost of such action shall be added to Tenant's financial obligations under this Lease. Tenant shall pay all costs, damages, and expenses suffered by Landlord by reason of Tenant's defaults. Other occurrences which shall be considered to be acts of default are:

1. Any failure by SCM to pay the rent on the date the payment is due.
2. The total abandonment or surrender of the Premises by SCM.
3. An event of insolvency occurs, which event shall be any of the following:
 - A. If SCM shall make an assignment for the benefit of creditors.

B. If SCM shall file or acquiesce in a petition in any court (whether or not pursuant to any statute of the United States or of any state) in any bankruptcy, reorganization, composition, extension, arrangement, or proceedings.

C. If SCM shall make an application in any such proceedings for or acquiesce in the appointment of a trustee or receiver for HMS of all or any portion of its property.

D. If any petition shall be filed against SCM to which it does not acquiesce in any court (whether or not pursuant to any statute of the United States or any state) in any bankruptcy, reorganization, composition, extension, arrangement, or insolvency proceedings, and the proceedings shall not be dismissed, discontinued, or vacated within ninety (90) days.

E. The commencement of any proceeding pursuant to the application of any person other than SCM to which SCM does not acquiesce in which a receiver or trustee shall be appointed for SCM and the receivership or trusteeship shall not be set aside within ninety (90) days after such appointment.

4. Failure to complete the contingencies mentioned in the Purchase and Sale Agreement between the parties as described within the stated period for compliance.

16. ASSIGNABILITY/SUBLETTING: Tenant may not assign or sublease any interest in the Premises without the prior written consent of Town. This prohibition shall not affect the right of SMS to lease existing apartments and commercial storefronts and to retain the income therefrom.

17. INDEPENDENT CONTRACTOR: No Partnership. This Lease is by and between the Town and SCM, and is not intended and shall not be construed to create the relationship of agent, servant, employee, partnership, joint venture, or association as between the Town and SCM.

18. RECORD KEEPING: SCM shall retain all records relating to the design, construction and

maintenance of the leased premises for the term of the lease. It shall also retain records of income, costs and other financial accounts. All records required to be kept by the terms of this Lease shall be available for inspection by the Town, and copies thereof shall be furnished to the Town Clerk upon his/her request.

19. SEVERABILITY: If any portion of this Lease shall be held to be invalid or unenforceable for any reason, the remaining provisions shall continue to be valid and enforceable. If a court finds that any provision of this Lease is invalid or unenforceable, but that by limiting such provision, it would become valid and enforceable, then such provision shall be deemed to be written, construed, and enforced as so limited.

20. WAIVER: The failure of either party to enforce any provisions of this Lease shall not be construed as a waiver or limitation of that party's right to subsequently enforce and compel strict compliance with every provision of this Lease.

21. CUMULATIVE RIGHTS: The rights of the parties under this Lease are cumulative, and shall not be construed as exclusive unless otherwise required by law.

22. GOVERNING LAW: This Lease shall be construed in accordance with the laws of the State of New Mexico.

23. NOTICE: Notices under this Lease shall not be deemed valid unless given or served in writing and forwarded by mail, postage prepaid, addressed as follows:

LANDLORD:

Town Manager
Town of Silver City
PO Box 1188
Silver City, New Mexico 88062

TENANT:

The Corporation For Downtown Development
d/b/a Silver City MainStreet
P.O. Box 4068
Silver City, New Mexico 88062

Such addresses may be changed from time to time by either party by providing advance notice as set forth above.

24. OPTION TO PURCHASE PREMISES AND RIGHT OF FIRST REFUSAL: The Town grants to Lessee the option to purchase the demised premises under the following circumstances and subject to the right of first refusal reserved by the Town:

A. All the underlying indebtedness to which the Town is presently liable or may become liable with regard to the purchase, renovation, repair and maintenance of the demised premises shall have been fully paid off, along with all attendant costs, fees, interest, and penalties, if any.

B. All contributions of capital made by the Town to the demised premises shall have been reimbursed to the Town. Such reimbursement may be paid concurrent with closing the purchase/sale transaction.

C. The Lessee shall have faithfully performed all its obligations created under this lease and under the Purchase and Sale Agreement between the Town and Silver City MainStreet (now, the “Lessor” herein).

D. The Lessee shall agree to continue to operate the demised premises as a public venue for the arts.

E. The rents and reimbursements paid by Lessee to the Town over the term of this

lease shall be credited towards the purchase price of the demised premises. The purchase price shall be the greater of the appraised value, or the combined sum of all rents and reimbursements paid to the Town.

F. The term of the option to purchase shall be co-extensive with the term of this lease, including any extensions thereof.

G. If SCM shall exercise its option to purchase the Silco property under the terms and conditions mentioned herein, the Town does hereby and shall reserve a right of first refusal to re-purchase the referenced property. This right of first refusal shall extend for a period of ten (10) years from the date of such purchase by SCM. Accordingly, if SCM receives and accepts a bona fide offer to purchase the Silco property, it shall be subject to the Town's right herein. SCM shall thereupon notify the Town within 15 days thereof, and the Town shall have 45 days to indicate its intention to exercise its right of first refusal to purchase under the same terms and conditions as agreed upon by SCM and the third party bona fide purchaser.

H. All the rights and obligations mentioned herein shall survive closing the purchase of the mentioned property by SCM.

25. ENTIRE AGREEMENT/AMENDMENT: This Lease Agreement contains the entire agreement of the parties and there are no other promises or conditions in any other agreement whether oral or written. This Lease may be only be modified or amended if both parties agree to alterations in writing. The relevant provisions of the Purchase and Sale Agreement between the parties regarding satisfaction of contingencies are incorporated herein.

25. ADDITIONAL PROVISIONS: The parties agree that minor modifications of this Lease may be necessary to effect the common intent of the parties. Therefor, it is agreed that such

