OPERATING PARTNERSHIP AGREEMENT BETWEEN THE CITY OF WICHITA, KS (CITY) AND THE KANSAS AVIATION MUSEUM, INC, (MUSEUM)

Whereas, The Kansas Aviation Museum, Inc., hereafter "Museum" is a not-for-profit Arts and Cultural Organization which provides education and artistic leadership to the public, and does so in part by stewardship of City-owned facilities and City grants toward the operations of Museum; and

Whereas, it is the City's intent, subject to annual City Council appropriation and the availability of funds, to assist Museum to maintain the City-owned facility from which it operates in a manner such that the facility is well maintained and is open, accessible and secure for public use and benefit, while identifying future anticipated funding amounts to assist Museum to create long range plans.

Therefore, the parties agree to the terms of the following Operating Partnership Agreement (the "Agreement"), negotiated and executed annually to address a rolling, three-year operational plan:

1. **Term**. The Term of this Agreement shall commence on January 1, 2014, and shall continue for a period of three years, unless otherwise terminated under provisions agreed to herein. The parties agree to participate in annual performance reviews, the results of which shall be considered during discussions for extension of this Agreement. The parties anticipate entering into successive extensions or renegotiations of this Agreement, unless Museum is in default of this Agreement or its Lease with City. In the event that the parties fail to formalize or conclude negotiations prior to the expiration of the Term, this Agreement shall continue in full force and effect beyond the initial Term unless cancelled under the provision set out in this Agreement or as otherwise amended.

2. **The City Facility**. City has provided to the Museum, by long term leasehold for a fee of $1.00 per year, the property located at 3350 S. George Washington Boulevard, Wichita Kansas which includes the original Wichita Municipal Air Terminal building, surface parking, sidewalks and related hardscaping. The entire property is of recognized cultural and/or historical importance and is dedicated through the leasehold granted to be used for museum purposes. The lease between City and Museum is attached as Exhibit A to this Agreement (the "Lease").

3. **Maintenance of the City Facility**. Responsibility for maintenance of this property is allocated between the parties in the following manner:

   a. **Major Systems Maintenance.** Major systems maintenance items, relating to the building envelope and HVAC systems and other systems as outlined by City staff during a joint inspection of the facility are the responsibility of the City. The City retains discretionary control over the means, manner and timing of that maintenance.

   b. **Regular Systems Maintenance.** Minor and routine maintenance items relating to interior fit and finish, wear and tear, lighting, plumbing systems, security systems, housekeeping, etc. are the responsibility of the Museum. The Museum's

maintenance regimen shall include observation, inspection and timely notice to the City of actual or impending Major System repair needs. Any failure to perform Regular Systems maintenance or provide notice of Major System repair needs leading to exacerbation of Major System Maintenance will be considered in future operations allocations.

c. **Landscaping Maintenance.** The improvements to the property may include landscaping, through use of ornamental plantings, lawn, shrubs and trees. The property also includes hardscaping areas such as sidewalks, surfaced parking, and areas used for static exhibition. It shall be Museum's responsibility to maintain all such areas in a manner that is clean and aesthetically pleasing. All organic material shall be appropriately irrigated, fertilized and otherwise maintained in a healthy condition. Debris, leaves, ice, snow and any other material that creates a potentially hazardous or unsightly condition shall be removed by Museum with reasonable haste. Museum has ultimate responsibility for the safety of pedestrian path of travel while persons are on the leased property.

d. **Allocation of Maintenance Responsibility.** Unless otherwise agreed in writing, Museum, as the occupant with continual opportunity to evaluate property conditions, has responsibility for notice to City of all maintenance needs, and should anticipate bearing financial responsibility for that maintenance unless and until it is budgeted by the City.

e. **Property Insurance.** The Museum will procure and pay for an all-risk property insurance policy, providing coverage appropriate for functional repair or replacement of the City's building and other improvements, and any artifacts or other personal property owned by the City. City acknowledges that repair or replacement with identical or similar materials, and with identical or similar levels of skilled labor or craftsmanship may not be available or may not be economically feasible. The obligations of the Museum and City for restoration and repair continue to be set out in the lease agreement approved by the United States Department of Interior.

f. **Utilities.** Museum shall pay all costs for utility services (whether for installation, service, administration, connection, or maintenance thereof) used at the facility or upon the premises, with no responsibility or expense accruing or inuring to City, including all permits, licenses or authorizations necessary in connection therewith. Such payments by Museum shall be made directly to the utility supplier or service provider. Unless otherwise agreed upon in writing, if Museum requires utilities beyond that currently provided or that are available to be extended to the premises boundary, Museum agrees to pay the full cost and expense associated with the upgrade/extension/installation of all such utilities related to its use of the premises, and to comply with all provisions for maintaining such utilities.

g. **Modifications to the Facility.** The Museum shall obtain prior approval from the Division of Cultural Arts and Services before making any modifications to the City facility, whether such modification is intended for preservation, operational

efficiency, aesthetic improvement or other purpose. The City retains discretion on the approval decision subject to the lease. Any such change, if allowed, shall be for the benefit of the Museum only, and not on behalf of or for the benefit of the City. Any modification shall be secured before commencing the work by a public works bond for both performance and payment from a surety approved by the City Attorney. The Museum indemnifies the City against the imposition of any mechanic's lien for work done on the leasehold property. The parties acknowledge that any such improvement is for the sole benefit of the Museum, and shall be removed and the original condition restored on lease termination, unless this requirement is waived in writing by the City. Upon completion, any modification, other than approved and acknowledged trade fixtures, shall become immediately the property of the City.

h. **Cooperation with Maintenance**. Museum agrees to work cooperatively and in good faith with City and contractors in facility improvement and maintenance activities to minimize any disruptions. If requested by the City, Museum shall cooperate with and assist City to the greatest extent possible in the development and implementation of any plans, designs, ingress/egress, or transition that may arise in connection with such facility development, improvement, and maintenance activities.

i. **Waste Prohibited.** Museum acknowledges that the facility is itself a significant part of the City's cultural heritage, and must be protected. Museum will guard against and not commit waste of the facility by action or neglect, and will cooperate with City to allow inspections at all reasonable times, and will report all instances of property damage regardless of cause, in a timely fashion. Should Museum fail to so report or allow inspection, or be known to have committed waste, the parties recognize that the facility is unique property of substantial value, and stipulate that injunctive relief is appropriate to enforce the provisions of this Agreement.

4. **Museum Governance and Operation:**

a. **Governance**. The Museum shall maintain its status as a non-profit organization, and demonstrate at the request of the City that this status is current. The Museum shall establish and maintain a governing board that operates under reasonable procedural standards that promote transparency for both stakeholders and the public. The governing board of the Museum should be comprised of individuals reflecting the interests and perspectives of both stakeholders and the general public. Board service should be subject to reasonable term limits. The governing board shall include as a voting member a City Council member or a City staff person designated by the City Council.

b. **Identity**. Museum must retain its status as a not-for-profit corporation under State of Kansas Law with a specific legal identity and business purpose as registered with the Secretary of State.

c. **Operation.** Museum shall perform conservation, curation, public education and other activities and duties consistent with its mission and the goals of the City's Cultural Arts Plan. These activities shall be reported to the City for evaluation annually using the Operational Agreement Annual Report form attached as Exhibit B. This form shall be progressively modified as required on a yearly basis to allow current reporting of data.

d. **Performance Measures:**

i. Museum shall establish and then annually review and report its identified mission and core goals, which should be supportive of the goals set out in the City's Cultural Arts Plan.

ii. Museum shall analyze and demonstrate how its annual programming, activities and functions are appropriate and supportive of its identified mission and core goals.

iii. Museum shall maintain the vitality of its governing board by demonstrating how the board attendance and participation requirements has been enforced; how its adherence to established term limits has been met; and how racial, geographical and economic diversity has been sought.

iv. Museum shall demonstrate attainment or progress satisfactory to the City toward attainment of its Agreed Performance Measures, attached at Exhibit C. These Performance Measures are to be reviewed and adjusted after completion and filing of the Operating Agreement Annual Report.

e. **Corporate Independence** Nothing in this Agreement shall be deemed to create an agency or joint venture relationship. Both parties are, and shall remain, separate, independent corporate entities. No employee of either shall be deemed to be the employee or agent of the other. Should any corporate officer or elected official of either body participate as a member of the governing body of the other, that officer or elected official shall only be deemed to be acting on behalf of the individual deliberative body for which he or she is then currently engaged.

f. **Nondiscrimination.** The Museum agrees that it will not discriminate or permit discrimination against any person on the basis of race, color, sex, religion, disability, age (except where age is a bona fide occupational qualification), national origin or ancestry in its operations or services, and its use or occupancy of property under this Agreement. The Museum agrees to comply with all applicable provisions of federal and state laws, regulations, or executive orders prohibiting discriminatory conduct.

5. **Financial Stability.** Museum recognizes that one of its key obligations is to demonstrate the ability to achieve, separate from City support, growth in its direct fundraising capacity or in

other financial assets that allow it to provide increasingly independent continuity of services for all Wichita citizens and visitors.

a. **Planning**. The Museum shall include in its Operational Agreement Annual Report (the template for which is shown as Exhibit B to this Agreement) a five (5) year maintenance and operating forecast and a ten (10) year capital improvement forecast, prepared after a careful premises inventory. These forecasts should clarify the needs of the Museum for both premises and program, and include statements of the anticipated revenue sources for operations and capital. The Museum should seek input from City Cultural Arts and Services staff when preparing these documents, and anticipate that they may be subject to change upon annual renewal of the Operating Partnership Agreements.

b. **Capital Expenditure Funding.** Museum agrees to prepare, as part of its annual report to City, and City agrees to review and evaluate an updated evaluation and needs assessment for capital improvements for the facility. However, Museum agrees to pay all costs incurred in connection with the construction of the new structures, facilities and improvements, unless otherwise expressly agreed to in writing by the Museum and City. In any case of construction, Museum agrees to make direct payment to all materials, product and service providers for all such costs as they are incurred. Museum shall have no right, authority, or power to bind City for the payment of any claim for labor or material or for any charge or expense incurred in the erection, construction, operation, or maintenance of said improvements. Museum agrees to require contractors to name the City as beneficiary of the required original performance bond and the City as additional insured in any comprehensive accident or general liability insurance; builder's risk insurance; or any other policies obtained by the Museum relating to the approved construction.

c. **City Indirect Support**. The City provides to Museum a City facility at nominal rent, and major systems maintenance of that facility. Through its planning process, Museum will work with City staff to identify work that will be provided by the City for the benefit of Museum. The value of these services will be included in the evaluation of Museum's total City support.

d. **Direct Support**. Through this Agreement, the City will provide to Museum direct payment of funds that may be used by Museum for its operations. This funding is tied to the fraction of the Cultural Arts mill levy that is allocated to Museum by City Council. The allotment fraction will remain fixed for the three years covered by this Agreement. The absolute dollar amount provided to Museum will fluctuate from year to year during this Agreement, as do the revenues obtained by the applicable tax mill levy. However, the annual direct support provided by the City to Museum for the three years of this Agreement can be approximated at $32,000.

e. **Rent Adjustment**. To the extent that Museum has an existing lease with the City for its facility that calls for rent at an amount greater than $1.00 per year, this Agreement serves as formal written waiver of the rent due in excess of $1.00 per

year, effective as of January 1, 2014 , through the term of this Agreement, and any renewal hereof unless modified by City and Museum through amendment to this Agreement.. All other terms and conditions of the existing lease shall remain in effect during the term of this Agreement.

6. **Assignment**. Museum shall have no right to assign or delegate any of its rights or duties pursuant to this Agreement without the prior written consent of City. Any assignment or delegation so made and so permitted shall be subject to all terms, conditions and other provisions of this Agreement.

7. **Indemnification.** Each party shall protect, defend and hold the other, its officers, agents and employees completely harmless from and against all liabilities, losses, suits, claims, judgments, fines or demands arising by reason of injury to or death of any person or damage to any property, or other liability loss, including all reasonable costs for investigation and defense thereof (including but not limited to attorney fees, court costs and expert fees), of any nature whatsoever arising out of or incident to the use or occupancy of the facility or premises or the acts or omissions of that party's officers, agents, employees, contractors, subcontractors, licensees or invitees, regardless of where the injury, death, damage or liability loss may occur, except to the extent such injury, death, damage or liability loss is caused by the negligence of the indemnified party. Each party shall give the other reasonable notice of any such claims or actions. The provisions of this section shall survive the expiration or termination of this Agreement to the extent that they relate to liabilities, losses, suits, claims, judgments, fines or demands arising from or incident to events occurring during the effective term of this Agreement or an extension or modification thereof.

8. **Insurance Requirements**. Museum shall procure, maintain and carry, at its sole cost in accordance with this Agreement, all insurance as required per the amounts as set forth below. Insurance shall be furnished by a company meeting with the reasonable approval of the City Attorney. The requirements, procurement and carrying of the required insurance shall not limit any of the Museum's obligations or liability under this Agreement or as a matter of law. Where "minimum limits" of insurance are specified, such minimum insurance limits are required and considered by City to be the lowest insured amounts acceptable under this Agreement. The Museum is not limited or restricted whatsoever in securing additional insurance coverage and higher insured limits than those specified herein if, at Museum's determination and discretion and commensurate with the type of activity and associated business and operational risk, additional coverage and higher limits are necessary and appropriate.

Insurance shall include the following terms, conditions and minimum limits:

a. **WORKERS' COMPENSATION**

Museum shall maintain Workers' Compensation insurance to cover the statutory requirements of the Workers' Compensation laws of the State of Kansas for its operations on the Premises, and when applicable, to Federal Laws and Voluntary Compensation and Employer's Liability (including occupational disease) coverage.

b. **AUTOMOBILE LIABILITY**

Museum shall maintain automobile insurance, which shall include all owned, non-owned and hired automobiles used on the premises, and shall have minimum bodily injury and property damage limits as outlined herein.

Combined Single Limit	$500,000 Each Accident

c. **COMMERCIAL GENERAL LIABILITY**

Museum shall maintain Commercial General Liability insurance on an occurrence form. Minimum limits, as outlined herein, shall be:

Annual Aggregate	$500,000
Each Occurrence	$500,000

The City of Wichita shall be added as a primary and non-contributory additional insured, and Museum acknowledges the contractual responsibility to respond in defense and indemnity for any claims raised by third parties resulting from the negligent acts or omissions of Museum's officers, employees, agents or invitees.

d. **UMBRELLA/EXCESS LIABILITY COVERAGE**

The Museum shall provide minimum Umbrella/Excess liability limits (excess of all automobile and commercial general liability) of:

Each Occurrence Limit	$1,000,000
Annual Aggregate Limit	$1,000,000

The City of Wichita shall be added as primary and non-contributory additional insured covered under this umbrella/excess liability coverage.

Museum agrees that in the event of future changes in the law or upon notice by the City, the minimum levels of insurance required by this section may be increased within the bounds of commercial reasonableness.

9. **Personal Property**. Any personal property of Museum or others placed in or upon the premises shall be at the sole risk of the Museum, and City shall not be responsible or liable for any loss, damage and replacement thereto, regardless of the cause of such loss or damage, and the Museum waives all rights of recovery from or subrogation against the City for such loss or damage unless such loss or damage is the result of the City's negligence. Museum shall be solely responsible for obtaining insurance policies that provide coverage for losses of Museum-owned property. The City shall not be required to provide such insurance coverage or be responsible for payment of Museum's cost for such insurance.

10. **Cancellation**. The City, in addition to any other rights to which it may be entitled by law or otherwise, may cancel this Agreement by giving Museum sixty (60) days written notice, in order to assure compliance with Kansas Cash Basis and Budget law requirements. During this

notice period, management from both parties shall confer in an attempt to determine if the dispute may be mitigated sufficiently or resolved prior to expiration of the sixty (60) day period. Barring such satisfactory resolution, the termination shall be effective at the end of the originally noticed sixty (60) day period. Additionally, this Agreement shall terminate in conjunction with termination of the underlying Lease, when accomplished by either party.

11. **Waste Management**. Museum shall be responsible for the removal and disposal of garbage, debris, contaminants and any other waste material (whether solid or liquid) arising out of its occupancy of the facility or out of its operation. Such removal shall conform to all governmental requirements and regulations. Such removal and disposal of garbage, debris, contaminants, or other waste material is understood to include routine clean-up of the facility and premises. Museum shall immediately react and take prompt corrective actions to remove and dispose of any paper, garbage and debris on the premises upon demand of City. Museum shall provide, and screen from public view, suitable covered receptacles for all garbage, trash and other refuse. Piling of boxes, cartons, barrels, pallets or other similar items in an unsightly or unsafe manner on or about the premises is forbidden. In the event Museum shall fail to perform its upkeep, maintenance and repair responsibilities, City may, but is not obligated to, perform maintenance and make repairs thereon and thereto which it determines to be necessary, charging the same cost to the expense of Museum, to include a twelve percent (12%) administrative fee, upon thirty (30) days prior written notice of its intent to do so.

12. **Severability and Invalid Provisions.** In the event any term, covenant, condition or provision herein contained is held to be invalid by any court of competent jurisdiction, the invalidity of any such term, covenant, condition or provision shall in no way affect any other term, covenant, condition or provision herein contained; provided, however, that the invalidity of any such term, covenant, condition or provision does not materially prejudice either the City or the Museum in their respective rights and obligations contained in the valid terms, covenants, conditions or provisions in this Agreement.

13. **Cash Basis and Budget Laws**. The right of the City to enter into this Agreement is subject to the provision of the Cash Basis Law (K.S.A. 10-1112 and 10-1113), the Budget Law (K.S.A. 79-29350), and other laws of the State of Kansas. This Agreement shall be construed and interpreted so as to ensure that the City shall at all times stay in conformity with such laws, and as a condition of this Agreement the City reserves the right to unilaterally sever, modify, or terminate this Agreement at any time if, in the reasoned opinion of its legal counsel, the Agreement may be deemed to violate the terms of such laws.

14. **Non-Waiver of Rights**. No waiver or default by either party of any of the terms, covenants and conditions to be performed, kept and observed by the other party shall be construed as, or shall operate as, a waiver of any subsequent default of any of the terms, covenants or conditions herein contained, to be performed, kept and observed by the other party.

This Agreement is executed and effective this _____day of_____, 2014.

CITY OF WICHITA, KANSAS

_____
Carl Brewer, Mayor

ATTEST:

_____
Karen Sublett, City Clerk

Wichita Aviation Museum, Inc

_____
, President

5/23/14
Lon Smith, Executive Director

Approved as to Form:

_____
Gary E. Rebenstorf, Director of Law

Exhibit A – Lease Agreement

Exhibit B – Operational Agreement Annual Report template

Exhibit C – Agreed performance standards