

APPROVAL OF AMENDED FACILITIES USAGE AGREEMENT WITH ONE MORE PRODUCTIONS FOR GEM THEATER

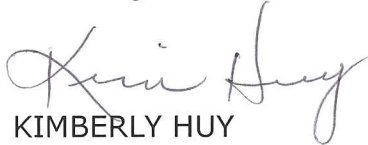
April 23, 2013

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RECOMMENDATION

It is recommended that City Council:

- Approve the amended and restated Facilities Usage Agreement between the City and One More Productions for the Gem Theater;
- Authorize the City Manager to execute the Agreement, and make minor modifications as appropriate thereto, on behalf of the City; and
- The City Manager is authorized to enter into future amendments to this Agreement on behalf of the City.

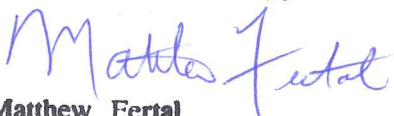


KIMBERLY HUY
Director

By: Elaine Ma'ae *em*
Senior Administrative Analyst

Attachment: Amended Agreement

Recommended for Approval



Matthew Ferial
City Manager

AMENDED AND RESTATED FACILITIES USAGE AGREEMENT
(Gem Theater - One More Productions)

THIS AMENDED AND RESTATED AGREEMENT is made and entered into this _____ day of April, 2013, by and between the CITY OF GARDEN GROVE, a municipal corporation, hereinafter referred to as "CITY," and One More Productions, a non-profit public benefit corporation, hereinafter referred to as "OMP."

RECITALS

- 1) CITY owns a 158-seat theater, known as the "Gem Theater," located at 12852 Main Street (the "Theater").
- 2) On February 12, 2008, CITY and OMP entered into the initial Facilities Usage Agreement wherein CITY allowed OMP to utilize the Theater for the presentation of professional theatrical performances.
- 3) Under the 2008 initial Facilities Usage Agreement, CITY further allowed OMP to utilize the Theater without charge in exchange for providing capital upgrades at an estimated cost of one hundred fifty thousand dollars (\$150,000), interior maintenance of the theater and presenting professional theatrical performances in the Theater.
- 4) On March 8, 2011, CITY and OMP amended Section 4(e) the 2008 initial Facilities Usage Agreement to address programming for calendar years 2011 through 2014.
- 5) OMP has not utilized the Theater for almost two years following a fire that damaged the Theater. The fire damage has been repaired and the parties are prepared to continue their respective rights and obligations for the use of the Theater pursuant to this Amended and Restated Facilities Usage Agreement.

AGREEMENT

THE PARTIES MUTUALLY AGREE AS FOLLOWS:

- 1) TERM. This Agreement shall commence on the _____ day of April, 2013, and shall continue through the _____ day of April, 2018 (the "Term").
 - a) Commencing no later than one (1) year prior to expiration of the Term of this Agreement, City and OMP may negotiate extensions of the terms for additional years.
- 2) TERMINATION.
 - a) TERMINATION WITHOUT CAUSE. Either party may terminate this Agreement without cause by giving written notice of such termination at

least two hundred forty (240) days prior to the intended date of termination.

i) CITY OBLIGATION. If the City terminates this Agreement without cause, the City will repay OMP a prorated percentage of the financial investment made by OMP, as outlined in Section 3(a).

(1) OMP acknowledges that it is not eligible for relocation assistance and benefits pursuant to California Relocation Assistance Law, Government Code section 7260, et seq. or other applicable relocation law.

ii) OMP OBLIGATION. If OMP terminates this Agreement without cause, OMP will not be entitled to repayment of any portion of the financial investment made by OMP.

b) TERMINATION FOR CAUSE. Either party may terminate this Agreement upon any material breach by the other party by providing written notice specifying the nature of said breach. Unless the Section of this Agreement that is the subject of the breach provides for a grace period for performance or specifies a longer cure period, the breaching party shall have thirty (30) days to cure the breach.

3) FACILITY USE. The facility covered by the Agreement is the 158-seat Gem Theater, owned by CITY, and located at the Village Green Park, 12852 Main Street, in the City of Garden Grove.

a) In exchange for providing the initial capital upgrades in 2008 at an estimated cost of one hundred fifty thousand dollars (\$150,000), OMP shall have use of the Theater during those times necessary for the fulfillment of its obligations under this Agreement. The capital upgrades provided by OMP are more specifically set forth in Exhibit "A" hereto.

b) CITY reserves the right to use the facility for CITY functions twice per year without charge by OMP, subject to OMP's approval of the dates and times of such functions, which will not unreasonably be withheld. CITY shall submit a use request for each such use in writing no later than 30 days prior to the desired date of use. CITY acknowledges that OMP scheduled and publicized performance dates shall take priority over any CITY use of the facility.

c) CITY reserves the right to the use and scheduling of the upstairs VIP Reception area and six (6) house seats located in the adjacent "Mayor's Box," for all OMP theatrical productions in the Theatre without charge by OMP. All scheduling of this area shall be the responsibility of CITY's Community Services Department. In the event CITY has not scheduled use of said area and seats thirty-six (36) hours prior to any OMP performance, it shall promptly so notify OMP and OMP shall have the right to use said area and release said seats to the public not earlier than twenty-four (24)

hours in advance of any such performance. Should OMP desire to utilize these spaces for any purpose, OMP shall request such use no less than 14 days in advance. CITY agrees to reasonably accommodate any such request.

- d) OMP shall ensure that all productions carried out in furtherance of this Agreement are of a professional quality. Should any production include content generally referred to either as "adult" or "designed for mature audiences", OMP shall prominently advertise said production to the public as such. No lewd, obscene, libelous or hate-promoting performances shall be allowed in the Theater.
 - e) If, in the professional opinion of CITY's Chief of Police, there is a clearly identifiable reason that special security arrangements are needed for any particular event, CITY shall promptly advise OMP of said need. Once so notified, OMP shall be responsible for making such arrangements and paying for all costs for such security.
- 4) PROGRAMMING OBLIGATIONS. OMP shall ensure programming in the Theater, so as to maximize facility usage with the following minimum requirements:
- a) Programming shall, in general, be in conformance with the programming identified in OMP's proposal attached hereto as Exhibit "B."
 - b) Should OMP fail to meet the obligations under this Section, CITY shall have the right to renegotiate or terminate the Agreement without financial compensation to OMP.
 - c) During the initial term in 2008, CITY provided OMP a reasonable period of time for expansion in order to meet CITY's minimum requirements for theatrical performances, rentals and other programming as outlined in this Section 4. OMP's initial requirement was to produce five (5) full theatrical productions by December 31, 2009. "Full theatrical production" means a play, musical or opera, including comic or light opera, conducted with theatrical lighting, sound and costumes. Productions must consist of an average of at least nine public performances each.
 - d) Commencing January 1, 2010, OMP was required to produce a minimum of five (5) full theatrical productions per year.
 - e) Commencing January 1, 2011 OMP was required to include at least five (5) other performances including but not limited to live music, comedy, children's theater, interactive theater and dance. For calendar year 2012, OMP programming was required to include at least ten (10) other performances. For calendar years 2013 and 2014, OMP programming shall include at least fifteen (15) other performances. From 2015 to the end of the contract term in 2018, OMP shall provide twenty (20) other performances. Amended changes reflect the current economic state.

- f) By December 31, 2008, OMP was required to develop a rental fee structure to be reasonably approved by CITY, to make the Theater available for public rentals, the income from which may be retained by OMP. The Rental fee structure was approved in January 2011 and is in effect throughout the term of this Agreement, subject to revisions as may be approved in the reasonable discretion of CITY's City Manager.
- 5) REPORTING. OMP shall submit to CITY, in each year of this Agreement, on the dates noted herein, the reports enumerated in Subparagraphs 5(a) – (c). All reports required under this Agreement must be presented no later than ten (10) days after the date listed herein to be considered timely. In the event that City Hall is closed on a date on which a report is due, that report will be considered to be due on the next day that City Hall is open.
- a) During years one (1) and two (2) of the initial agreement, OMP was required to provide CITY a semi-annual report by July 31, and January 31, covering the previous six-month period. Said report shall include such items as revenues and expenditures, performance recap with attendance figures, rental summary, and any other information reasonably requested by CITY.
 - b) Beginning in year three (3) of the initial agreement and continuing through the term of this Agreement, OMP shall provide an annual report by January 31 of the following year.
 - c) OMP shall submit financial statements by May 1 of each year, covering the prior calendar year.
- 6) FINANCIAL OBLIGATIONS.
- a) OMP agrees to establish and maintain an accounting system adhering to generally accepted accounting practices, and shall provide an annual financial statement to CITY pursuant to Section 5(c) above.
 - b) CITY shall have no financial obligation to OMP for compensation for any costs of productions performed in the Theater, whether presented by OMP or any other person or organization, or the costs for any services to be provided by OMP under this Agreement, other than necessary technical services provided for CITY functions within the Theater.
 - c) In the event that OMP exceeds the annual amount provided by CITY for utility services as outlined in Section 8(a), OMP shall be responsible for payment of excess costs.
- 7) NONPROFIT STATUS. OMP shall at all times during the term of this Agreement, maintain California non-profit corporate status, and shall adhere to all laws and regulations related to such status.

- 8) FACILITY MAINTENANCE, REPAIRS AND ALTERATIONS. Generally, OMP shall provide for the interior maintenance of the Theater, and CITY shall provide exterior maintenance and building repairs.

a) CITY OBLIGATIONS.

- (1) CITY shall keep the Theater, including the building, interior and exterior walls, roof and common areas, and the equipment, in good condition and repair; provided, however, CITY shall not be obligated to paint, repair or replace interior wall coverings, or to repair or replace any improvements that are not ordinarily a part of the building or that exceed building code standards. There shall be no liability of CITY on account of any injury or interference with OMP's business with respect to any improvements, alterations or repairs made by CITY to the Theater or any part thereof. OMP expressly waives the benefits of any statute now or hereafter in effect, which would otherwise afford OMP the right to make repairs at CITY's expense or to terminate this Agreement because of CITY's failure to keep the premises in good order, condition and repair. Following the completion of capital improvements to the Theater by OMP as required in Section 3(a), CITY agrees to provide for any capital improvements necessary for the physical safety of the Theater. In addition, CITY shall pay for utility services, in an annual amount not to exceed twenty thousand dollars (\$20,000), for the provision of water, natural gas, waste disposal and electricity. The amount is subject to increase, based upon the annual Consumer Price Index (CPI). All other utility charges shall be the sole responsibility of OMP.
- (2) CITY may perform inspections of the Theater at any given time to monitor health and safety regulations.
- (3) CITY will monitor temperature control gauges and set timers for air conditioning and heating units to operate daily from 7 a.m. to 12 a.m.

b) OMP OBLIGATIONS.

- (1) Notwithstanding CITY's obligation to keep the Theater in good condition and repair, OMP shall be responsible for payment of the cost thereof to CITY for that portion of the cost of any maintenance and repair of the Theater, or any equipment that serves only OMP or the Theater, to the extent such cost is attributable to causes beyond normal wear and tear. OMP shall be responsible for the cost of painting, repairing or replacing wall coverings, and for repairing or replacing any Theater improvements that are not ordinarily a part of the building or that exceed building code standards. CITY may, at its option, upon reasonable notice, elect to have OMP perform any particular such maintenance or repairs, the cost of which is otherwise OMP's responsibility hereunder. OMP shall provide custodial services (including, but not limited to, cleaning of all restrooms, upholstery,

carpeting and windows), and shall maintain the Theater in a clean and orderly state.

- (2) OMP shall not store items near or in front of electrical panels.
- (3) OMP shall not store items on the building rooftop.
- (4) OMP shall safely utilize extension cords with the appropriate size and wattage rating. All extension cords and the use thereof, must meet National Electrical Code standards.
- (5) No pets, with the exception of guide dogs, are permitted in the Theater. Any violation will result in excessive cleaning fees.
- (6) No person shall inhabit the Theater for purposes other than those outlined in this Agreement.

c) ALTERATIONS. With the exception of the capital work required by this Agreement in Section 3(a), OMP shall make no additional alterations, structural modifications, remodeling, or change in use of any portion of the Theater without the prior written permission of CITY, which will not be unreasonably withheld.

d) On the last day of the Term hereof, or on any sooner termination, OMP shall surrender the Theater to CITY in the same or reasonably similar condition as received, ordinary wear and tear excepted, clean and free of debris. Any damage or deterioration of the Theater shall not be deemed ordinary wear and tear if the same could have been prevented by good maintenance practices by OMP. OMP shall repair any damage to the Theater occasioned by the installation or removal of OMP's trade fixtures, alterations, furnishings and equipment. Except as otherwise stated in this Agreement, OMP shall leave the air lines, power panels, electrical distribution systems, lighting fixtures not provided by OMP, air conditioning, window coverings, carpets, wall paneling, ceilings and plumbing on the premises and in good operating condition. OMP shall be entitled to remove the sound and lighting systems it provides, but shall not remove any of the other capital upgrades made to the Theater.

9) INSURANCE REQUIREMENTS.

a) COMMENCEMENT OF ACTIVITY. OMP shall not commence work under this Agreement until all insurance certificates and endorsements have been received and approved by CITY. All insurance required by this Agreement shall contain a Statement of Obligation on the part of the carrier to notify CITY of any material change, cancellation, or termination at least thirty (30) days in advance.

b) WORKERS' COMPENSATION INSURANCE. For the duration of this Agreement, OMP shall maintain and ensure that all of its contractors and subcontractors shall maintain Workers' Compensation Insurance in the amount and type required by law, if applicable.

c) INSURANCE AMOUNTS. OMP shall maintain the following insurance for the duration of this Agreement:

- i) Commercial general liability in the amount of \$1,000,000.00 per occurrence (**claims made and modified occurrence policies are not acceptable**); Insurance companies must be acceptable to CITY and have a Best's Guide Rating of A- Class VII or better, as approved by CITY.
- ii) Automobile liability in the amount of \$15,000.00 combined single limit; Insurance companies must be acceptable to CITY and have a Best's Guide Rating of A- Class VII or better, as approved by CITY.

An Additional Insured Endorsement for the policy under Section 10(c)(i) shall designate CITY, its officers, officials, employees, agents, and volunteers as additional insured for liability arising out of work or operations performed by or on behalf of OMP. OMP shall provide to CITY proof of insurance and endorsement forms that conform to CITY's requirements, as approved by CITY.

An Additional Insured Endorsement for the policy under Section 10(c)(ii) shall designate CITY, its officers, officials, employees, agents, and volunteers as additional insured for automobiles owned, leased, hired, or borrowed by the OMP. OMP shall provide to CITY proof of insurance and endorsement forms that conform to CITY's requirements, as approved by CITY.

For any claims related to this Agreement, OMP's insurance coverage shall be primary insurance as respects CITY, its officers, officials, employees, agents, and volunteers. Any insurance or self-insurance maintained by CITY, its officers, officials, employees, agents, or volunteers shall be excess of OMP's insurance and shall not contribute with it.

- 10) INDEPENDENT CONTRACTOR. It is agreed that in the performance of the services to be performed by OMP, OMP shall act and be an independent contractor and not an agent or employee of CITY, and shall obtain no rights to any benefits which accrue to CITY's employees.
- 11) NON-LIABILITY OF OFFICIALS AND EMPLOYEES OF CITY. No official or employee of CITY shall be personally liable to OMP in the event of any default or breach by CITY, or for any amount, which may become due to OMP, or any obligation under the terms of this Agreement.
- 12) NON-DISCRIMINATION. OMP covenants there shall be no discrimination against or segregation of any person, group, or employee due to race, color, creed, religion, sex, marital status, age, handicap, national origin or ancestry, in any action or activity pursuant to this Agreement.

13) ASSIGNABILITY. OMP shall not have the right to assign this Agreement to any person or entity without the prior written permission of CITY, which will not be unreasonably withheld.

14) GENERAL PROVISIONS.

- a) COMPLIANCE WITH LAWS. Both parties shall comply with all applicable laws, ordinances, codes, and regulations of the federal, state and local governments.
- b) DISCLOSURE OF DOCUMENTS. All data, documents, or other information developed or received by either party are deemed confidential and not to be disclosed without authorization of the disclosing party, unless disclosure is required by law.
- c) CONFLICT OF INTEREST AND REPORTING. OMP shall at all times avoid conflict of interest or appearance of conflict of interest in the performance of this Agreement.
- d) NOTICES. All notices shall be personally delivered or mailed to the below listed address, or to such other address as may be designated by written notice. These addresses shall be used for delivery of service of process.

- i) Address of OMP is as follows:
One More Productions
2521 W. Camden Place
Santa Ana, CA 92704
Attn: Damien Lorton

- ii) Address of CITY is as follows:
City of Garden Grove
11222 Acacia Parkway
Garden Grove, CA 92840
Attn: Community Services Director

Correspondence between OMP and CITY may also be conducted via electronic mail.

- e) LICENSES, PERMITS, FEES AND ASSESSMENTS. At its sole expense, OMP shall obtain all licenses, permits, and approvals as may be required by this Agreement, including any Bureau of Alcoholic Beverage Control or City licenses necessary, if alcoholic beverages are to be served.
 - f) FAMILIARITY WITH WORK. By executing this Agreement, OMP warrants that:
 - i) It has investigated the work to be performed;
 - ii) It has investigated the site of the work and is aware of all conditions there;

- iii) It has considered how the work should be performed; and
 - iv) It understands the facilities, difficulties, and restrictions of the work under this Agreement.
- g) **TIME OF ESSENCE.** Time is of the essence in the performance of this Agreement.
- h) **LIMITATIONS ON SUBCONTRACTING.** The experience, knowledge, capability, and reputation of OMP were a substantial inducement for CITY to enter into this Agreement. OMP shall not contract with any other entity to perform the services required without written approval of CITY. If OMP is permitted to subcontract any part of this Agreement, OMP shall be fully responsible to CITY for the acts and omissions of its subcontractor as it is for the acts and omissions of persons directly employed. Nothing contained in this Agreement shall create any contractual relationship between any subcontractor and CITY. All persons engaged in the work will be considered employees of OMP. CITY will deal solely and directly with OMP.
- i) **AUTHORITY TO EXECUTE.** The persons executing this Agreement warrant that they are duly authorized to execute this Agreement on behalf of the entity for which they are signing, and that by executing this Agreement, the party for which each is signing is bound by this Agreement.
- j) **INDEMNIFICATION.** OMP agrees to protect, defend, and hold harmless CITY and its elective or appointive boards, officials, officers, agents, employees, and volunteers from any and all claims, liabilities, expenses or damages of any nature, including attorney's fees, for injury or death of any person, damage to property, interference with the use of property and any other monetary damage claims, arising out of, or in any way connected with performance of the Agreement by OMP, OMP's agents, officers or employees, subcontractors, or independent contractors. The only exception to OMP's responsibility to protect, defend and hold harmless CITY is due to the negligence of CITY, or any of its elective or appointive boards, officials, officers, agents, employees, or volunteers, in the case of which CITY agrees to protect, defend, and hold harmless OMP and its elective or appointive boards, officials, officers, agents, employees, and volunteers from any and all claims, liabilities, expenses or damages of any nature, including attorney's fees, for injury or death of any person, damage to property, interference with the use of property and any other monetary damage claims, arising out of, or in any way connected with performance of the Agreement by CITY, CITY's agents, officers or employees, subcontractors, or independent contractors.
- k) **MODIFICATION.** This Agreement constitutes the entire Agreement between the parties and supersedes any previous agreements, oral or written. This Agreement may be modified only by subsequent mutual written agreement executed by OMP and CITY. City Manager of CITY, or his or her designee, has the authority to approve minor modifications to this Agreement as appropriate and reasonably necessary to clarify and/or advance the purposes of this Agreement.
- l) **WAIVER.** All waivers of the provisions of this Agreement must be in writing by the appropriate authorities of CITY or OMP, as appropriate.

- m) CALIFORNIA LAW. This Agreement shall be construed in accordance with the laws of the State of California. Any action commenced pursuant to this Agreement shall be initiated in the central or main branch of the Orange County Superior Court.
- n) INTERPRETATION. This Agreement shall be interpreted as though prepared by both parties.
- o) CITY'S REPRESENTATIVE. The City Manager of CITY, or his or her designee, shall serve as CITY's representative in carrying out any CITY responsibility under this Agreement.
- p) PRESERVATION OF AGREEMENT. Should any provision of this Agreement be found invalid or unenforceable, the decision shall affect only the provisions interpreted, and all remaining provisions shall remain enforceable.

IN WITNESS THEREOF, the parties have executed this Agreement on the day and year first referenced herein.

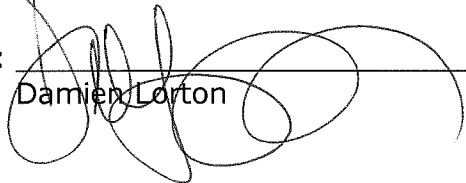
CITY OF GARDEN GROVE

By: _____
City Manager

ATTEST:

City Clerk

ONE MORE PRODUCTIONS

By:  _____
Damien Lorton

APPROVED AS TO FORM:

City Attorney