

AGREEMENT FOR IMPROVEMENTS TO PERFORMING ARTS CENTER

BETWEEN: City of Newport,
a municipal corporation of the State of Oregon, (City)

AND: Oregon Coast Council for the Arts,
a nonprofit corporation incorporated in the State of Oregon, (OCCA)

EFFECTIVE DATE: The latest date signed by the parties.

RECITALS

- A. The City of Newport (City) is a municipal corporation with Home Rule authority pursuant to its Charter and the constitution of the State of Oregon.
- B. The Oregon Coast Council for the Arts (OCCA) is a nonprofit corporation organized under section 501(c)(3) of the Internal Revenue Code and the Laws of the State of Oregon.
- C. The City is the owner of the Newport Performing Arts Center (PAC), located at 777 W. Olive Street, Newport, OR, 97365.
- D. The City has contracted with the OCCA to manage the PAC.
- E. The OCCA has presented the City with a proposal for certain improvements to the PAC that will: 1) enhance the audience experience by upgrading key equipment, 2) increase the range of performances appropriate to the PAC by expanding the Studio Theater (located within the PAC) to allow it to serve as a formal performance space, and 3) increase the performance capacity of the PAC by creating the ability to stage simultaneous performances in the Silverman and Studio Theaters.
- F. Pursuant to state law and the Newport Municipal Code, the City collects transient room tax revenues from the occupants of transient lodging facilities located within the City.
- G. The City desires to use a portion of its transient room tax revenues to fund certain improvements to the PAC.

- H. It is appropriate for the City to use transient room tax funds to improve the PAC because the PAC is improved real property that has a useful life of 10 or more years and has a substantial purpose of supporting tourism or accommodating tourist activities.
- I. The OCCA submitted a plan for improvements to the PAC as described in the materials attached to this Agreement as Exhibit A (Project). The Project may be constructed in Phases approved by the City.
- J. City staff have experience and expertise in conducting public procurements and in overseeing public improvement projects.
- K. The City wishes to contribute transient room tax funds totaling \$250,000 to be used for the Project.
- L. OCCA wishes to contribute funds totaling approximately \$3,680,000 to be used for the Project. A portion of that contribution will be used as the dollar for dollar match for the City's \$250,000 described in paragraph 1.B. of this Agreement.

AGREEMENT

1. In consideration of the promises and obligations contained in this Agreement, the parties agree to the following, subject to the terms and conditions of this Agreement:
 - A. The City agrees to take all actions necessary to effectuate the Project, including but not limited to conducting procurement activities and entering into contracts for planning, architectural, engineering and construction services.
 - B. The City further agrees to contribute transient room tax funds (City Funds) totaling \$250,000 to be used for the Project.
 - C. The City will not contribute any City Funds to the Project unless and until the City has received a one-to-one dollar match for the City Funds from OCCA or the dollar match has been documented to the City's satisfaction.
 - D. OCCA agrees to contribute funds totaling not less than \$250,000 to be used for the Project, and to continue to fundraise in good faith to raise monies to be used to complete the Project.
 - E. It is understood and agreed by the parties that the scope of work attached as Exhibit A to this Agreement is preliminary and will continue to be refined during the course of the Project.

- F. The parties agree that OCCA will have input in all phases of the Project, but the City will have final say in the selection of any contractor working on the Project and the City will have sole authority for all payment obligations, change orders, and any final approval and/or acceptance of work done on the Project that relate to physical improvements or permanent fixtures in the Newport Performing Arts Center.

2. TERM.

This Agreement takes effect on the date it is signed by all the parties, and expires June 30, 2017, unless earlier terminated pursuant to the terms of this Agreement.

3. CITY OBLIGATIONS

- A. The City will perform or contract for the performance of all work on the Project related to physical improvements or permanent fixtures at the Newport Performing Arts Center. The City may, but is not required to contract for the purchase of goods and services for the Project on behalf of OCCA.
- B. The City will not begin work on a Project Phase unless and until the funding for that phase has been documented to the City's satisfaction.
- C. The City acknowledges and agrees that funds received by the City from the OCCA pursuant to this Agreement will be used exclusively to perform work on the Project as described in Exhibit A.
- D. The City acknowledges and agrees that the City is responsible for all the expenses of operation and maintenance of the Project, including but not limited to adequate insurance and any taxes or special assessments applicable to the Project. The City may use funds provided by the OCCA to pay the expenses required by this paragraph.
- E. The City will comply with all federal, state, and local laws and regulations applicable to the Project, including but not limited to the City's Tourism Facilities Grant Program Policies, workers' compensation laws, and any applicable provisions of ORS Chapters 279A, 279B, and 279C.
- F. Portions of the Project are a public work as defined by ORS 279C.800(6)(a); therefore, the City will comply with all state laws regulating prevailing wage rates and will require compliance with state laws regulating prevailing wage rates from any contractors employed on the Project.

- G. The City will keep an accounting of funds received from OCCA pursuant to this Agreement to ensure that the funds received from OCCA are used as required by this Agreement. The City will provide the accounting required by this paragraph to the OCCA annually during the term of this Agreement.
- H. In the event that the City completes the Project without using all of the funds provided by OCCA, any unexpended OCCA funds will be returned to the OCCA.
- I. Notwithstanding paragraph 1.B. of this Agreement, the City's payment obligations under this Agreement are contingent upon the availability of funds in the Tourism Grant Facilities Program.

4. OCCA OBLIGATIONS

- A. OCCA agrees to pay the City a minimum of \$250,000, as dollar-for-dollar match for the City Funds, to be used on the initial phases of the Project. OCCA further agrees to continue to fundraise in good faith to raise monies to be used to complete subsequent phases of the Project.
- B. The OCCA will indemnify, defend, save, and hold harmless the City and its officers, employees, and agents from any and all claims, suits, or actions of any nature arising out of the activities or omissions and due to the negligence and/or fault of the OCCA, its officers, employees, agents, contractors and subcontractors pursuant to this Agreement.
- C. Notwithstanding the OCCA's defense obligations described in paragraph B of this section, neither the OCCA nor any attorney engaged by the OCCA shall defend any claim in the name of the City, nor purport to act as a legal representative of the City, without the prior written consent of the City's attorney. The City may, at any time, elect to assume its own defense and settlement. The City reserves all rights to pursue any claims it may have against the OCCA if the City elects to assume its own defense.
- D. The OCCA acknowledges and agrees that the City shall have reasonable access to the OCCA's books, documents, papers and records related to this Agreement during the term of this Agreement and for a period of six years after termination of this Agreement. The OCCA will make copies of applicable records available to the City upon request.
- E. The OCCA acknowledges and agrees that this Agreement does not create an employment relationship between the City and the OCCA, its officials, employees, agents, or contractors. The OCCA further agrees that the OCCA is exclusively responsible for all costs and expenses related to

OCCA's employment of individuals to perform work related to the Project, including but not limited to retirement contributions, workers' compensation, unemployment taxes, and state and federal income tax withholdings.

5. DEFAULT

A. The following constitute default by the OCCA under this Agreement:

- i. Failure to provide \$250,000 in matching funds to the City by July 1, 2015, ;
- ii. A determination by the City that material statements, information, or representations in the materials attached as Exhibit A to this Agreement are false, misleading, fraudulent, or misrepresentations;
- iii. Violation of any of the terms or conditions of this Agreement;
- iv. Dissolution of the OCCA; and
- v. Appointment of a receiver, trustee, liquidator, or conservator for the OCCA or to take possession of all or substantially all of the OCCA's property; or the filing of a petition for bankruptcy, insolvency, dissolution, liquidation, or reorganization, or order for relief in which the OCCA is named as debtor, by, against, or with respect to the OCCA pursuant to any federal or state statute, regulation or law for the protection of debtors; and, with respect to any such appointment or filing, failure of the OCCA to secure a stay or discharge thereof within 45 days after such appointment or filing.

B. In the event of a default by the OCCA, the City will not exercise the remedies provided in paragraph C of this section unless and until the City notifies the OCCA in writing of the default and the OCCA fails to cure the default within 20 days of receipt of the notice; or if the default cannot reasonably be cured within 20 days, the OCCA commences action to cure the default within 10 days of receipt of the notice and diligently pursues the cure to completion. In no event will the time for opportunity to cure exceed 60 days from the date of receipt of notice of default. If the default is not cured within the time provided in this paragraph, the City may elect to pursue any of the remedies provided in paragraph C of this section.

C. In the event of default or failure to cure within the time period provided in paragraph B of this section, the City may pursue any one or more of the following remedies:

- i. City withholding of unexpended City Funds;

ii. Termination of this Agreement.

- D. The remedies provided by paragraph C of this section are cumulative, not exclusive, and are in addition to any other rights and remedies provided by law or under this Agreement.

6. TERMINATION

- A. The City may terminate this Agreement effective upon delivery of written notice to the OCCA or at such later date as may be determined by the City upon the following conditions:
- i. Default by the OCCA under this Agreement; or
 - ii. Lack of funding necessary to contribute City Funds to the Project.
- B. The OCCA may terminate this Agreement effective upon delivery of written notice to the City if the City fails to make payments due under this Agreement or fails to abide by the terms and conditions of this Agreement.
- C. Termination of this Agreement will not prejudice any rights or obligations of the parties accrued prior to termination.
- D. The City's entitlement to the remedies provided in section 6 of this Agreement survives termination of this Agreement.

7. NOTICE

All notices given pursuant to this Agreement must be in writing and delivered to the parties at the following addresses. Notice given pursuant to this section will be deemed to have been received on the date of personal delivery, three calendar days after deposit in the United States mail postage prepaid, or on the date of confirmed delivery by: 1) facsimile; 2) registered mail, return receipt requested; or 3) overnight delivery. Either party may change its notice address under this section at any time by written notice to the other party.

CITY:

City of Newport
Attn: Jim Voetberg, City Manager
169 SW Coast Highway
Newport, Oregon 97365

OCCA:

Oregon Coast Council for the Arts
Attn: Catherine Rickbone
777 W. Olive
Newport, Oregon 97365

8. ASSIGNMENT

The OCCA may not assign any of its rights, interests, or obligations under this Agreement without the prior written consent of the City, which may be withheld in the City's sole discretion.

9. MODIFICATION

No modification of this Agreement will be valid unless it is in writing and signed by both parties.

10. RELATIONSHIP OF PARTIES

The parties acknowledge and agree that nothing in this Agreement is intended to nor shall be construed to create any form of partnership or joint venture relationship between the parties.

11. NO THIRD PARTY BENEFICIARIES

This Agreement is entered into for the sole benefit of the City and the OCCA, and nothing contained herein is intended for the benefit of any other person or entity.

12. SEVERABILITY

If any provision of this Agreement is held by any court of competent jurisdiction to be invalid, such invalidity will not affect any other provisions of this Agreement, and this Agreement will be construed as if the invalid provision had never been included in this Agreement.

13. WAIVER OF BREACH

The waiver by either the City or the OCCA of a breach of any provision of this Agreement will not operate or be construed as a waiver of any other provision of this Agreement or of any subsequent breach of the same provision of this Agreement.

14. GOVERNING LAW

This Agreement is to be governed by and construed in accordance with the laws of the state of Oregon, without regard to conflicts of law principles.

15. VENUE

Any legal action or proceeding arising out of or relating to this Agreement shall be commenced in the Circuit Court of the State of Oregon for Lincoln County. The parties hereby consent to the jurisdiction of that court, waive any objections to venue and waive any claim that the forum is an inconvenient forum.

16. ENTIRE AGREEMENT

This Agreement and all attached exhibits constitute the entire agreement of the parties relating to the subject matter herein. There are no promises, terms, conditions or obligations oral or written other than those contained herein. This Agreement supersedes all prior communications, representations or agreements, either oral or written, between the parties relating to the subject matter herein.

17. COUNTERPARTS

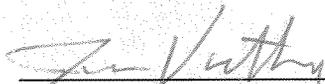
This Agreement may be executed in multiple counterparts, each of which will be considered an original and all of which together will constitute one and the same agreement.

18. PARAGRAPH HEADINGS

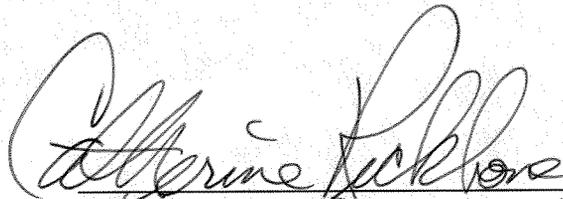
Paragraph headings are used solely for convenience and are not to be used in construing or interpreting this Agreement.

19. AUTHORITY TO ENTER INTO AGREEMENT

Each person executing this agreement on behalf of a party to this agreement hereby covenants that he or she is duly authorized by that party to bind that party to this agreement.

 1-30-13

Jim Voetberg, City Administrator (Date)
City of Newport

 1/31/13

Catherine Rickbone (Date)
Oregon Coast Council for the Arts