

**AGREEMENT
BETWEEN
CITY OF SAN JOSE
AND
SAN JOSÉ UNIFIED SCHOOL DISTRICT
FOR
USE OF SAN JOSE THEATERS**

THIS AGREEMENT ("Agreement") is made this _____ day of March, 2019 by and between the City of San Jose ("City"), a municipal corporation of the State of California, and the San José Unified School District ("District"), a public school district of the State of California. City and District may be referred to herein individually as a "Party" or collectively as the "Parties."

RECITALS

WHEREAS, the purposes of California Education Code Sections 10900 through 10914.5 are to promote and preserve the health and general welfare of the people of the state and to cultivate the development of good citizenship by provision for adequate programs of community recreation as well as to authorize cities and school districts to organize, promote, and conduct programs of community recreation as will contribute to the attainment of general educational and recreational objectives for children and adults of the state.

WHEREAS, both City and District share the common objective of enhancing the performing arts opportunities for the students and residents.

WHEREAS, the San Jose Redevelopment Agency invested over \$50 million to rehabilitate the California Theatre, which is located in a San Jose Redevelopment Project Area of which District is a taxing entity.

WHEREAS, City had the unique opportunity to acquire the California Theatre at no cost from the Successor Agency to the former San Jose Redevelopment Agency ("Successor Agency"), with the approval and support of District as a taxing entity.

WHEREAS, for the benefit of students and residents, City desires to enter into an agreement for the use of theaters by District.

NOW THEREFORE, in consideration of the covenants and agreements hereinafter set forth, City and District agree as follows:

AGREEMENT

Section 1. Purposes and Objective of Agreement

- A. The purposes of this Agreement are to finalize the acquisition of the California Theatre by City and to provide District with opportunities to use theaters per the terms set forth in this Agreement.
- B. The objective of this Agreement is to enhance the performing arts opportunities for the students and residents of City.

C. In furtherance and fulfillment of the purposes and objective of this Agreement, District approves the transfer of the California Theatre to City and agrees to take any and all such actions as are necessary thereto, including but not limited to execution of a Compensation Agreement between the Successor Agency, City and Taxing Entities (as defined in the Compensation Agreement).

Section 2. Description of San Jose Theaters

A. The San Jose Theaters ("Theaters") included in this Agreement consist exclusively of those managed by Team San Jose, its representative, successor, or permitted assign ("TSJ").

Section 3. Use of Theaters

A. Subject to the terms of City's management agreement with TSJ, City shall maintain control of Theaters at all times.

B. District shall be entitled to use of Theaters for an aggregate maximum of ten calendar days during each year of this Agreement.

C. All District requests for use of Theaters shall come from District's Superintendent or designee.

D. District requests for use of Theaters shall not be unreasonably withheld by TSJ.

E. When District cancels a secured date and TSJ is unable to secure an alternative booking, District shall be deemed to have used the secured date.

F. Unless explicitly specified elsewhere in this Agreement, District's use of Theaters shall be subject TSJ's standard booking process and TSJ's standard conditions of use.

Section 4. Rental Fees and Service Fees

A. District shall be entitled to rent-free use of Theaters.

B. Subject to City's annual budget process, City will pay the standard rental fee to TSJ for District's use of Theaters.

C. District shall be responsible for all applicable service fees for use of Theaters.

Section 5. Term

A. Subject to provisions set forth elsewhere in this Agreement, the term ("Term") of this Agreement shall be July 1, 2019 through June 30, 2035.

Section 6. Mutual Indemnification

A. To fullest extent permitted by California law, each Party shall defend, indemnify, and hold harmless the other Party, its respective agents, representatives, officers, consultants, employees, trustees, and volunteers ("Indemnified Parties") from any and all losses, liabilities, claims, suits, and actions of any kind, nature, and description, including, but not limited to, attorneys' fees and costs (collectively "Claims"), directly or indirectly arising out of, on account of, connected with, or resulting from, the operation, condition, use or occupancy of Theaters, with the exception of any Claims caused by the negligence or willful misconduct of the

Indemnified Parties; and in case any action or proceeding be brought against the Indemnified Parties, the other Party shall defend the Indemnified Parties at that Party's sole expense.

Section 7. Dispute Resolution

A. Except for the notice and cure provisions herein, failure or delay by either Party to perform any material term or provision of this Agreement constitutes a breach ("Breach") under this Agreement. The party who commits a Breach shall promptly commence to cure, correct or remedy such Breach and shall complete such cure, correction or remedy with reasonable diligence, and during any cure period shall not be in default of this Agreement.

B. This Agreement requires that the Parties work together in good faith to achieve the purpose and objective of this Agreement. In the event that a dispute arises as to the proper interpretation of the respective rights and responsibilities of the Parties under this Agreement, or as to any other aspect of this Agreement, the Parties agree that they each will assign the appropriate individuals to meet and make good faith efforts to negotiate in order to arrive at a resolution of the dispute. The informal dispute resolution process is as follows:

1. In the event of a Breach by either Party, the injured Party shall give written notice of Breach ("Notice of Breach") to the Party in Breach, specifying the Breach complained of by the injured Party. The Breaching Party shall promptly cure the Breach, or if the Breach cannot reasonably be cured within thirty (30) days, to promptly commence cure of the Breach.

Section 8. Termination

A. City may terminate this Agreement, with or without cause, upon securing for and providing to District commensurate performing arts opportunities for District students during the remaining term of this Agreement.

B. District may terminate this Agreement, with or without cause, at its sole discretion.

C. This Agreement may be terminated by mutual agreement of the Parties.

Section 9. Assignment and Subletting

A. Neither City nor District shall assign its interest or obligations in this Agreement, either expressly or by operation of law, without the prior written consent of the other and TSJ.

B. All covenants, promises, conditions, representations, and agreements expressed in this Agreement shall be binding on the Party who makes them and on that Party's representatives, successors, and permitted assigns.

Section 10. Waiver

A. In no event shall any payment by one Party or any acceptance of payment by the other Party hereunder constitute or be construed to be a waiver by City or District of any Breach of covenants or conditions of this Agreement or any default which may then exist on the part of City or District, and the making of any such payment or the acceptance of any such payment while any such Breach or default exists, shall in no way impair or prejudice any right or remedy available to City or District with respect to such Breach or default. The waiver by one Party of any Breach by the other Party of any of the provisions of this Agreement shall

not constitute a continuing waiver or a waiver of any subsequent Breach either of the same or of another provision of this Agreement.

Section 11. Independent Contractor

A. Under no circumstances shall this Agreement be construed as one of agency, partnership, joint venture or employment between City and District. Each Party acknowledges and agrees that it neither has, nor will give the appearance or impression of having, any legal authority to bind or commit the other Party in any way.

Section 12. Amendments

A. Under no circumstances shall this Agreement be construed as one of agency, partnership, joint venture or employment between City and District. Each Party acknowledges and agrees that it neither has, nor will give the appearance or impression of having, any legal authority to bind or commit the other Party in any way.

Section 13. Notices

A. Any and all notices or other communications required or permitted by this Agreement or by law to be served on or given to either Party hereto by the other Party shall be in writing and shall be deemed duly served and given when personally delivered to the Party to whom it is directed, or, in lieu of personal service, when deposited in the United States mail, first class, postage prepaid, addressed to:

City: Office of Cultural Affairs
12th Floor
San Jose City Hall
200 East Santa Clara Street
San Jose, CA 95113

District: Director of Facilities
San José Unified School District
855 Lenzen Avenue
San José, CA 95126

with a corresponding copy to:

City: City Manager
17th Floor
San Jose City Hall
200 East Santa Clara Street
San Jose, CA 95113

District: Deputy Superintendent
San José Unified School District
855 Lenzen Avenue
San José, CA 95126

Either Party to this Agreement may change its address for purposes of this Section by giving notice of the change to the other Party in the manner provided in this section.

Section 14. Force Majeure

A. If either Party shall be delayed or prevented from the performance of any act required by this Agreement by reason of acts of God, strikes, lockouts, labor troubles, inability to procure materials, without fault and beyond the reasonable control of the Party obligated (financial inability excepted), performance of such act shall be excused for the period of the delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay.

Section 15. Entire Agreement of City and District

A. This Agreement constitutes the entire agreement between City and District and supersedes all prior discussions, negotiations and agreements, whether oral or written. Notwithstanding the foregoing, TSJ is and shall be a third-party beneficiary of this Agreement and may enforce the terms hereof. This Agreement may be amended or modified only by a written instrument executed by City and District.

Section 16. Partial Invalidity

A. If any provision of this Agreement is held by a court of competent jurisdiction to be either invalid, void or unenforceable, the remaining provisions of this Agreement shall remain in full force and effect and unimpaired by the holding.

Section 17. Governing Law

A. This Agreement shall be governed by and in accordance with the laws of the State of California.

Section 18. Nondiscrimination

A. Neither City nor District shall discriminate, in any way, against any person on the basis of race, sex, color, age, religion, sexual orientation, disability, ethnicity, or national origin, in connection with or related to the performance of this Agreement.

Section 19. Headings

A. The headings of the sections in this Agreement are merely for the convenience of the Parties.

Section 20. Counterparts

A. This Agreement may be signed in counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same Agreement.

For City of San Jose, a municipal corporation of the State of California,

Toni Taber, City Clerk

Date

Approved to form:

Kevin Fisher, Chief Deputy City Attorney

Date

For San José Unified, a public school district of the State of California,

Stephen McMahon, Deputy Superintendent

Date

Ag

DRAFT--Contact the Office of the City Clerk at (408) 535-1260 or CityClerk@sanjoseca.gov for final document.