

AGENDA ITEM NO. 1A
COUNCIL MEETING 3/17/11
APPROVED BY _____

DEPARTMENT DIRECTOR _____

CITY MANAGER 

March 17, 2011

FROM: BRUCE A. RUDD, Assistant City Manager/Interim PARCS Director

BY: PAUL A. MELIKIAN, Administrative Manager
Parks, After School, Recreation and Community Services Department

SUBJECT: APPROVE A LICENSE AGREEMENT WITH CHILDREN'S MUSICAL THEATERWORKS
FOR USE OF THE MEMORIAL AUDITORIUM THEATER

RECOMMENDATIONS

It is recommended that the Council approve the attached License Agreement with Children's Musical Theaterworks for use of the Memorial Auditorium Theater.

EXECUTIVE SUMMARY

Children's Musical Theaterworks (CMT), a California nonprofit corporation, provides accessible musical theater services to the citizens in the City of Fresno for the benefit of the youth, families, educational institutions, its members and the entire community. The organization uses the theater at Memorial Auditorium for all of its performances and some rehearsal days. Department staff entered into discussions with CMT for a license agreement that would ensure CMT continued priority access to the theater, repayment of delinquent facility reservation fees, and a revised method in which facility reservation fees will be paid and reconciled. This Agreement supersedes any prior Agreement between the City and CMT and has an initial term of three (3) years with an option to extend for an additional two (2) years.

Under the terms of the Agreement, the City will:

- Grant CMT first right to reservation dates at Memorial Auditorium for each year of the Agreement. Dates for each upcoming season are due to City by January 15th. Dates not reserved by this time will be considered open for other reservations and not available to CMT once a paid reservation is received from another party.
- Require that all event ticket sales be through a 3rd party ticket provider.
- Provide custodial service to restrooms, dressing rooms, and theater areas for performance dates. No custodial service will be provided for rehearsal dates.
- Assess reservation fees for Memorial Auditorium in accordance with the City Master Fee Schedule, including a 5.00% late fee for delinquent payments received after due dates.
- Retain responsibility for building maintenance, repair, and payment of utilities subject to availability of funds.

Conversely, CMT will:

- Remit all past due facility reservation fees and Arts, Parks, Entertainment Surcharges for the time period November 30, 2009 through December 31, 2010 of a combined amount of \$20,437 per a repayment schedule (detailed in Agreement). The first installment payment is due April 1, 2011.

REPORT TO THE CITY COUNCIL

License Agreement - Children's Musical Theaterworks

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- Remit aggregate facility reservation fees for the current season and every year of the Agreement to City within fifteen (15) days of the last day of each month for all event and rehearsal dates for the prior month. For example, all reservation fees for events and rehearsals held in March would be due and payable to the City by April 15th.
- Remit Arts, Parks, Entertainment Surcharges (APES) to City after each event date within a time frame generally used in the industry. Resulting APES revenue from each event shall be supported by a sales report from a third party ticket service. In no case shall APES fees be paid more than thirty (30) days after an event date.
- On an annual basis, provide a financial statement, report of recommended facility improvements and repairs, list of Board members, proof of active corporate status, and proof of insurance.

The Agreement also allows for CMT to request arrangements in which it would provide goods or services provided in exchange for a reduction of the outstanding balance of reservation fees. Examples of this could be custodial services or improvements to the facility. The City retains final approval of such requests and their valuation.

This Agreement has been reviewed and approved by the Risk and City Attorney's Offices.

BACKGROUND

CMT provides accessible musical theater services to the citizens in the City of Fresno for the benefit of the youth, families, educational institutions, its members and the entire community. A specific and primary purpose of this corporation is to provide excellent, accessible education and training in all aspects of musical theater, such as singing, dancing, acting, audition and performance skills for all children between the ages of 6 and 19 years. In addition, CMT also provides for a positive environment in which youth can learn teamwork, communication skills and the pride of accomplishment.

FISCAL IMPACT

There will be no impact to the General Fund as a result of approving this agreement. All reservation and APES fees from the theater are deposited into a dedicated Memorial Auditorium fund, which currently represents the only funding specifically identified for future repairs and improvements to this 75-year-old facility (built 1936).

K:\Rept to CC\2011
3/9/11

Attachment: License Agreement

LICENSE AGREEMENT
For
CHILDREN'S MUSICAL THEATERWORKS

This License Agreement ("Agreement") is entered into this ____ day of March 2011, by and between the CITY OF FRESNO, CALIFORNIA, a municipal corporation, through its Parks, After-school, Recreation and Community Service Department ("City"), and Children's Musical Theaterworks ("CMT"), a California nonprofit corporation.

WITNESS

WHEREAS, the City owns and operates Memorial Auditorium, 2425 Fresno Street, Fresno, California; and

WHEREAS, CMT desires to use Memorial Auditorium for performances and rehearsals annually; and

WHEREAS, the City wishes to grant CMT permission to use the Auditorium subject to repayment of past due reservation fees and ongoing payment of current fees; and

NOW, THEREFORE, in consideration of the above recitals, which recitals are contractual in nature, the mutual covenants herein contained and such other and further consideration as is hereby acknowledged, the parties agree as follows:

1. PARTICIPATING AGENCIES AND DESIGNATED CONTACT PERSONS

City Representative: Paul Melikian, Administrative Manager
City of Fresno
Dickey Youth Development Center
1515 E. Divisadero Street
Fresno, CA 93721
Tel: (559) 621-2900

Children's Musical Theaterworks:	Joe Wettstead President 2425 Fresno Street Fresno, CA 93721 Tel: (559) 288-2888	Judy Stene Treasurer 2425 Fresno Street Fresno, CA 93721 Tel: (559) 442-3140
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2. ROLES, CONTRIBUTIONS AND RESPONSIBILITIES

A. City will:

- Grant CMT first right to reservation dates at Memorial Auditorium for each year of this Agreement. Reservation dates for each upcoming season must be approved by the City by January 15th of each year of this Agreement. Dates not reserved by this time will be considered open for other reservations and not available to CMT once a paid reservation is received from another party.
- Require that all event ticket sales be through a 3rd party ticket provider.
- Provide custodial service to restrooms, dressing rooms, and theater areas for performance dates. No custodial service will be provided for rehearsal dates.
- Assess reservation fees for Memorial Auditorium in accordance with the City Master Fee Schedule, including a 5.00% late fee for delinquent payments received after due dates specified in this Agreement.
- Retain responsibility for building maintenance, repair, and payment of utilities subject to availability of funds for such purpose in any given year of this Agreement.

B. CMT will:

- Remit all past due facility reservation fees for the time period November 30, 2009 thru December 31, 2010 of \$15,547 per the repayment schedule below. (Amount adjusted for refundable deposit amount). This repayment obligation shall survive expiration or termination of this Agreement.
- Remit all past due Arts Parks, Entertainment Surcharges (APES) for December 2009 thru December 2010 in the amount of \$4,890.00 per the repayment schedule below. This repayment obligation shall survive expiration or termination of this Agreement.

Repayment Schedule - Includes facility reservation fees and APES	
Installment #1 -	\$ 3,406.16 due April 1, 2011
Installment #2 -	\$ 3,406.16 due September 1, 2011
Installment #3 -	\$ 3,406.16 due March 1, 2012
Installment #4 -	\$ 3,406.16 due September 1, 2012
Installment #5 -	\$ 3,406.16 due March 1, 2013
Installment #6 -	<u>\$ 3,406.16 due September 1, 2013</u>
Total	\$ 20,437.00

- Remit aggregate facility reservation fees to City within 15 days of the last day of each month for all event and rehearsal dates for the prior month. For example, all reservation fees for events and rehearsals held in March would be due and payable to the City by April 15th.
- Remit APES fees to City after each event date within a time frame generally used in the industry. Resulting APES revenue from each event shall be supported by a sales report from a 3rd party ticket service. In no case shall APES fees be paid more than 30 days after an event date.

3. REPAYMENT OF DELINQUENT FACILITY RESERVATION FEES

During the life of this agreement, CMT may propose to the City arrangements in which goods or services are provided in exchange for a reduction of the outstanding balance of facility reservation fees including the Arts, Parks, and Entertainment Surcharge. The repayment schedule in section two of this Agreement shall apply unless the City, under its sole discretion, has approved such goods or services and corresponding valuations in writing. Pending or disputed requests to provide goods or services in lieu of scheduled repayment installments shall not be grounds for non-payment by the due dates specified in Section Two of this Agreement.

4. LATE FEE

The following shall be considered Late Payments under this Agreement:

- Delinquent installment payments that are received after the scheduled dates.
- Aggregate facility reservation fees received later than fifteen (15) days after the last day of the previous month.
- APES fees that are paid more than thirty (30) days after an event date.

A late fee of 5.00% of the outstanding balance shall apply to any Late Payment. Notwithstanding any late fee, any Late Payment shall be considered a material breach and grounds for termination of this Agreement.

5. TERM

This Agreement shall be effective upon its complete execution by the parties' authorized agents and shall remain in effect for an initial term running through January 1, 2014. Thereafter, the parties may negotiate an extension of this Agreement for up to two years.

6. REPORTING REQUIREMENTS

City and CMT agree to meet at least once annually to discuss the following items, which CMT agrees to provide on an annual basis within 90 days after the close of each annual period:

- A. A financial statement which includes a balance sheet detailing all assets and liabilities, and an income statement detailing all revenue and expenses during the year.
- B. Report of recommended facility improvements and repairs.
- C. CMT shall provide a list of Board members and contact information whenever there is a change to membership, or once annually, whichever comes first.
- D. Provide proof of active corporate status.
- E. Proof of insurance as required in Section 10 of this Agreement.

7. ALTERATIONS AND IMPROVEMENTS.

CMT agrees not to make any alterations or improvements to the Premises without first receiving City's written approval thereof. Except as may be otherwise authorized in writing, any such permanent structural alterations or improvements shall be and remain the property of the City, subject to CMT's use therefore during the term of this Agreement. Upon expiration of the term of this Agreement, or any renewal thereof, or upon the earlier termination thereof, all furnishings and artifacts placed upon the Premises by CMT shall, at the option of CMT, become the property of CMT except as otherwise provide by this Agreement.

8. COMPLIANCE WITH GOVERNING LAW

Each party shall comply with all federal, state and local laws, rules and regulations in its pursuit hereof. No party in its performance of this Agreement shall employ discriminatory practices on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, sexual orientation, ethnicity, status as a disabled veteran or veteran of the Vietnam era.

9. CAPACITY OF THE PARTIES

Each party is acting in an independent capacity. Nothing in this Agreement and nothing in the course of dealings between the parties hereunder shall be deemed to create any fiduciary relationship, trust, partnership, joint venture, agency or employment relationship, jointly and severally.

In addition and without limitation, each party shall be solely responsible for all matters relating to payment of its employees, including, but not limited to, compliance with applicable social security withholding, workers' compensation insurance, benefits and all other regulations governing such matters. Personnel supplied by City will not for any purpose be considered employees or agents of CMT. The City assumes full responsibility for the actions of such personnel while they are performing services pursuant to this Agreement, and shall be solely responsible for their supervision, daily direction and control, payment of salary (including withholding of income taxes and social security), disability benefits and the like, as applicable. Conversely, personnel supplied by CMT will not for any purpose be considered employees or agents of the City. CMT assumes full responsibility for the actions of such personnel while they are performing services pursuant to this Agreement, and shall be solely

responsible for their supervision, daily direction and control, payment of salary (including withholding of income taxes and social security), disability benefits and the like, as applicable.

The City and CMT agree and acknowledge that their relationship is strictly and solely that of an independent contractor to each other. The City's employees and/or agents are not entitled to any employee benefits or insurance, including without limitation any health care, worker's compensation, unemployment or disability benefits, to be provided by CMT. CMT agrees and acknowledges that its employees and/or agents are not entitled to any employee benefits or insurance, including without limitation any health care, worker's compensation, unemployment or disability benefits, to be provided by the City.

The parties further agree and acknowledge that each party is solely responsible for determining the method and means by which it will fulfill its obligations hereunder. Each shall be solely responsible for payment of all sales, use, or other taxes assessed against or associated with the performance of each party's respective obligations or on the exercise of their rights under this Agreement, including without limitation income, payroll or employment-related taxes and payments.

Neither party shall engage any person or entity to serve in any capacity, or incur any expense or obligation on behalf of the other without the prior written consent of both parties.

10. INDEMNIFICATION AND INSURANCE

To the furthest extent allowed by law, CMT shall indemnify, hold harmless and defend the City and each of its officers, officials, employees, agents and authorized volunteers from any and all loss, liability, fines, penalties, forfeitures, costs and damages (whether in contract, tort or strict liability, including but not limited to personal injury, death at any time and property damage) incurred by City, CMT or any other person, and from any and all claims, demands and actions in law or equity (including attorney's fees and litigation expenses), arising or alleged to have arisen directly or indirectly out of the performance of this Agreement. CMT's obligations under the preceding sentence shall apply to any negligence of City or any of its officers, officials, employees, agents or authorized volunteers, but shall not apply to any loss, liability, fines, penalties, forfeitures, costs or damages caused solely by the gross negligence, or by the willful misconduct, of City or any of its officers, officials, employees agents or authorized volunteers.

If CMT should subcontract all or any portion of the work to be performed under this Agreement, CMT shall require each subcontractor to indemnify, hold harmless and defend City and each of its officers, officials, employees, agents and volunteers in accordance with the terms of the preceding paragraph.

The two preceding paragraphs shall survive termination or expiration of this Agreement.

Throughout the life of this Agreement, CMT shall pay for and maintain in full force and effect all policies of insurance required hereunder with an insurance company(ies) either (i) admitted by the California Insurance Commissioner to do business in the State of California and rated not less than "A-

VI" in Best's Insurance Rating Guide, or (ii) authorized by City's Risk Manager. The following policies of insurance are required:

(i) COMMERCIAL GENERAL LIABILITY insurance which shall be at least as broad as Insurance Services Office (ISO) form CG 00 01 and shall include insurance for "bodily injury", "property damage" and "personal and advertising injury", including premises and operation, products and completed operations and contractual liability (including, without limitation, indemnity obligations under the Agreement) with limits of liability of not less than \$1,000,000 per occurrence and \$2,000,000 general aggregate for bodily injury and property damage, \$1,000,000 per occurrence for personal and advertising injury and \$2,000,000 aggregate for products and completed operations.

(ii) WORKERS' COMPENSATION insurance as required under the California Labor Code.

(iii) EMPLOYERS' LIABILITY insurance with minimum limits of \$1,000,000 each accident, \$1,000,000 disease policy limit and \$1,000,000 disease each employee.

CMT shall be responsible for payment of any deductibles contained in any insurance policies required hereunder and the CMT shall also be responsible for payment of any self-insured retentions.

The above described policies of insurance shall be endorsed to provide an unrestricted 30 calendar day written notice in favor of the City of policy cancellation of coverage, except for the Workers' Compensation policy which shall provide a 10 calendar day written notice of such cancellation of coverage. In the event any policies are due to expire during the term of this Agreement, CMT shall provide a new certificate evidencing renewal of such policy not less than 15 calendar days prior to the expiration date of the expiring policy(ies). Upon issuance by the insurer, broker, or agent of a notice of cancellation in coverage, CMT shall file with the City a new certificate and all applicable endorsements for such policy(ies).

The General Liability insurance policy shall be written on an occurrence form and shall name City, its officers, officials, agents, employees and volunteers as an additional insured. Such policy(ies) of insurance shall be endorsed so CMT's insurance shall be primary and no contribution shall be required of City. Any Workers' Compensation insurance policy shall contain a waiver of subrogation as to City, its officers, officials, agents, employees and volunteers. CMT shall have furnished City with the certificate(s) and applicable endorsements for ALL required insurance prior to City's execution of this Agreement. CMT shall furnish City with copies of the actual policies upon the request of City's Risk Manager and this requirement shall survive termination or expiration of this Agreement.

The fact that insurance is obtained by CMT shall not be deemed to release or diminish the liability of CMT or its subcontractors, including, without limitation, liability under the indemnity provisions of this Agreement. The duty to indemnify City and its officials, officers, employees, agents and authorized volunteers shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation upon the amount of indemnification to be

provided by CMT. Approval or purchase of any insurance contracts or policies shall in no way relieve from liability nor limit the liability of CMT.

If at any time during the life of the Agreement or any extension, CMT fails to maintain the required insurance in full force and effect, all work under this Agreement shall be discontinued immediately until notice is received by City that the required insurance has been restored to full force and effect and that the premiums therefore have been paid for a period satisfactory to City. Any failure to maintain the required insurance shall be sufficient cause for City to terminate this Agreement.

If CMT should subcontract all or any portion of the services to be performed under this Agreement, CMT shall require each subcontractor to provide insurance protection in favor of City and each of its officers, officials, employees, agents and volunteers in accordance with the terms of this section, except that any required certificates and applicable endorsements shall be on file with CMT and City prior to the commencement of any services by the subcontractor.

11. ATTORNEY'S FEES

If a party is required to commence any proceeding or legal action to enforce or interpret any term, covenant or condition of this Agreement, the prevailing party in such proceeding or action shall be entitled to recover from the other party its/their reasonable attorney's fees and legal expenses.

12. PRECEDENCE OF DOCUMENTS

In the event of any conflict between the body of this Agreement and any exhibit/attachment hereto, the terms and conditions of the body of this Agreement shall control and take precedence over terms and conditions expressed within the exhibit/attachment. Furthermore, any terms or conditions contained within any exhibit/attachment hereto which purport to modify the allocation of responsibility or liability between the parties, provided for within the body of this Agreement, shall be null and void.

13. NOTICES

Any notice required or intended to be given to a party under the terms of this Agreement shall be in writing and shall be deemed to be duly delivered the earlier of (a) actual receipt by personal delivery to the representative (as defined herein), as the case may be, or in lieu of such personal service, by way of Federal Express or other similar courier addressed to such party at the appropriate address set forth herein, (b) the date of receipt by facsimile to the City Representative or the CMT Representative, or (c) three (3) business days after the date of mailing (postage pre-paid return receipt requested). Either party may change its address for the purpose of this Paragraph by giving written notice of such change to the other.

14. BINDING

Once this Agreement is signed by all the parties, it shall be binding upon, and shall inure to the benefit of, the parties, and each party's respective heirs, successors, assigns, transferees, agents, servants, employees and representatives.

15. ASSIGNMENT

There shall be no assignment by any party of its rights or obligations under this Agreement without the prior written approval of the other party. Any attempted assignment by a party, its successors or assigns, shall be null and void unless approved in writing by the other party.

16. TERMINATION UPON DEFAULT

Should CMT default in the performance of any of the terms and conditions of this Agreement and fail to commence a cure thereof within seven (7) business days after CMT has been served with written notice of such default, the City may terminate this Agreement. Notwithstanding the foregoing, if the breach by CMT or any of its officers, directors, employees, or agents is such that it threatens the health, welfare, or safety of any person or property, then City may, in its discretion, require that such breach be cured in less than seven (7) business days or immediately.

City shall be in default under this Agreement if City fails to perform or fulfill any term, covenant or condition contained in this License Agreement and City fails to commence a cure thereof within seven (7) business days after City has been served with written notice of such default. Nothing herein shall be construed as excusing either party from diligently commencing and pursuing a cure within a lesser time if reasonably possible.

CMT shall be liable for all charges due at the time of any termination of this Agreement pursuant to this Section 16, as well as for any outstanding obligations set forth herein that survive the term or expiration of this Agreement.

In addition to the right to terminate this Agreement upon CMT's default, City shall have the right to terminate part or all of this Agreement upon thirty (30) days notice to CMT when the facilities are required for public necessity or emergency use.

17. WAIVER

The waiver by the City of any breach of any term, covenant or condition of this Agreement shall not be deemed a waiver of such term, covenant or condition or waiver of any subsequent breach of such term, covenant or condition. The consent or approval by the City to or of any act by CMT requiring the City's approval or consent shall not be deemed to waive provisions for CITY's approval or consent to any such subsequent acts by CMT. The payment or partial payment of any fee or compensation or performance of any obligation hereunder by either party shall not constitute a waiver of any breach by

the other party or of any of the rights and remedies which either party may have as a result of such breach.

18. GOVERNING LAW AND VENUE

This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of California. Venue for purposes of the filing of any action regarding the enforcement or interpretation of this Agreement and any rights and duties hereunder shall be Fresno, California.

19. HEADINGS

The section headings in this Agreement are for convenience and reference only and shall not be construed or held in any way to explain, modify or add to the interpretation or meaning of the provisions of this Agreement.

20. SEVERABILITY

The provisions of this Agreement are severable. The invalidity or unenforceability of any one provision in this Agreement shall not affect the other provisions.

21. INTERPRETATION

The parties acknowledge that this Agreement in its final form is the result of the combined efforts of the parties and that, should any provision of this Agreement be found to be ambiguous in any way, such ambiguity shall not be resolved by construing this Agreement in favor or against any party, but rather by construing the terms in accordance with their generally accepted meaning.

22. ENTIRE AGREEMENT

It is mutually understood and agreed that the foregoing along with the attached Exhibits constitutes the entire Agreement between the parties and supersedes all prior or contemporaneous agreements, understandings, representations or statements, whether written or oral. Any modifications or amendments to this Agreement must be in writing signed by an authorized agent of each party.

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SIGNATURES APPEAR ON NEXT PAGE.

IN WITNESS THEREOF, the parties have caused their authorized agents to execute this MOU:

Children's Musical Theaterworks (CMT), a
California nonprofit corporation

Dated: _____

By: _____
Joe Wettstead, President

Dated: _____

By: _____
Judy Stene, Treasurer

CITY OF FRESNO,
a municipal corporation

Dated: _____

By: _____
Bruce A. Rudd, Assistant City Manager/
Interim PARCS Manager

ATTEST:

REBECCA E. KLISCH, City Clerk

BY: _____
Deputy

APPROVED AS TO FORM:
CITY ATTORNEY'S OFFICE

BY: _____
Katherine Doerr, Deputy