

**AGREEMENT BETWEEN CITY OF SUNNYVALE
AND BAY AREA CHILDREN'S THEATRE
FOR USE OF THEATER FACILITIES
AT THE SUNNYVALE COMMUNITY CENTER**

THIS AGREEMENT dated XXXX is by and between the CITY OF SUNNYVALE, a municipal corporation ("CITY"), and BAY AREA CHILDREN'S THEATRE, a nonprofit organization ("BACT").

WHEREAS, the CITY has a continuing interest in providing theater programming for youth and families at the Sunnyvale Theater; and

WHEREAS, the BAY AREA CHILDREN'S THEATRE has an established track record of providing quality theater programming for youth and families throughout the bay area; and

WHEREAS, the parties have agreed a pilot program of school and family performances during the period of January 5, 2018 and March 25, 2018 are of mutual interest;

NOW, THEREFORE, THE PARTIES ENTER INTO THIS AGREEMENT.

1. USE OF FACILITIES AND EQUIPMENT BY BACT

- (a) Authorization of Use: Subject to the terms and conditions of this Agreement, CITY hereby authorizes BACT to use the theater facilities at the Sunnyvale Community Center, 550 East Remington Drive, Sunnyvale, California for a period commencing on January 5, 2018, and concluding on March 25, 2018. This Agreement is not a lease, but a license.
- (b) Specific Theater Schedule: CITY will provide use of the Sunnyvale Theatre to BACT for technical production and performances the following dates:
 - i. Show #1: Load-in sets and technical rehearsal on Jan. 5 (10 a.m. to 4 p.m.). Two performances each day on Jan. 6, 7, 12, 13, 14 (9 a.m. to 3:30 p.m.). BACT will strike set on Jan. 14.
 - ii. Show #2: Load-in sets and technical rehearsal on Jan. 25 (10 a.m. to 4 p.m.). Two performances each day on Jan. 26, 27, 28 and Feb. 2, 3, 4 (9 a.m. to 3:30 p.m.). BACT will strike set on Feb. 4.
 - iii. Show #3: Load-in sets and technical rehearsal on March 16 (10 a.m. to 4 p.m.). Two performances each day on March 17, 18, 20, 21, 22, 23, 24, 25 (9 a.m. to 3:30 p.m.). BACT will strike set on March 25.

- (c) Limitations on Use: Use of facilities by BACT includes use of: theater (stage, house and technical booth), green room, lobby, concessions, and box office; and all equipment in those spaces not prohibited in this agreement. This agreement does not include use of staff offices, dance studio, storage, or spaces/equipment dedicated for other use.
- (d) Policies and Procedures: BACT shall follow all policies and procedures set forth in CITY's Theatre Policies and Procedures Handbook as they appropriately apply to their production use. BACT acknowledges that it has been provided a copy of the handbook and has read and agrees to all requirements described in that handbook.
- (e) Set Shop: Use of the set shop for minimal emergency set repair of is permitted and shall be subject to the approval of the CITY's Theatre Technical Coordinator. BACT must provide their own parts for repair, set shop use is for equipment only.
- (f) Set and Light Designs: BACT will submit set and light designs for each production to the CITY's Theatre Technical Coordinator at least three (3) weeks in advance of the load-in date for approval.
- (g) Equipment: CITY staff will provide technical training for BACT staff at a mutually agreed upon date prior to the first performance and provide ongoing technical support for questions or programs with CITY equipment and facilities. Use of CITY owned equipment not specifically included in this agreement is prohibited. In the event that BACT fails to adequately clean equipment or facilities, per procedures, CITY staff will clean the facilities as necessary and bill at the CITY's published hourly rate for Technical Staff labor costs. BACT will be charged for the costs associated with any repairs or replacement to any equipment and facilities broken or damaged during their use.
- (h) Box Office Services: BACT will be permitted use of the box office window during their approved use time only. CITY will not provide computers, printers, box office storage or access to a safe. All BACT materials must be removed from the box office at the conclusion of the daily performances.
- (i) Mutual Publicity – Printed Material: CITY will promote BACT performances on the theater calendar, bulletin board displays, and printed promotional items where appropriate. CITY will provide use of one theater lobby bulletin board and a shared external theater bulletin board to advertise its upcoming productions. BACT must recognize the City on all printed materials advertising events to be held on City property and on all printed materials to be displayed on City property. BACT will comply with City Branding Guidelines provided by the City at the execution of this agreement. Recognition in marketing materials shall consist of the City of Sunnyvale logo, printed not less than .625" wide for vertical lockup and .9375" wide for horizontal lockup, and the phrase, "This program is supported in part by the City of Sunnyvale", printed in no less than 10-point type and appearing on either

the front or back of the piece. Materials to be displayed in the CITY flier rack must be pre-approved by the City.

- (j) Mutual Publicity – Website and Social Media: For BACT social media posts referencing performances at the Sunnyvale Theatre, BACT will tag or reference the Sunnyvale Theatre in that post. On the BACT website, a link to the CITY's website is required. For CITY social media posts referencing BACT performances, CITY will tag or reference BACT in that post. On the CITY website, a link to BACT will be listed where users can find show information and purchase tickets.
- (k) Extension: The terms included in this agreement expire on March 25, 2018. Any future use may be negotiated in a new agreement.

2. DEPOSITS, FEES, AND CHARGES

- (a) Deposit: Upon execution of this Agreement BACT shall provide CITY with a deposit of one thousand dollars (\$1,000.00) to secure this Agreement. If for any reason prior to the termination of this Agreement BACT desires to cancel it, such deposit shall be forfeited. Upon expiration of this Agreement at the designated time CITY shall refund the deposit to BACT.
- (b) Records and Accounts: BACT must maintain a system of records and accounts. BACT will provide performance attendance reports to the CITY within 5 business days at the conclusion of each production for each show.
- (c) Production Fee: For use of the theater facilities, BACT shall pay CITY a \$600 per show fee for a maximum of 40 performances equaling \$24,000. The CITY will invoice on the following schedule, payments are due within 30 days of the invoice date.
 - i. 1st Production (January 2018) = 1st payment (maximum of \$6,000) due Jan. 31
 - ii. 2nd Production (January to February 2018) = 2nd payment (maximum of \$7,200) due Feb. 28
 - iii. 3rd Production (March 2018) = 3rd payment (maximum of \$10,800) due March 31
- (d) Late charge: BACT shall pay all fees due the CITY in a timely fashion. BACT shall be assessed late charges if payment is not received by the CITY within ten (10) days after the due date. An additional late fee shall be assessed each month that the fees owed by BACT remain unpaid. The late charge shall be assessed based on the following schedule:
 - i. 10 days after due date = 2% fee of current balance
 - ii. 40 days after due date = 3.5% + 1st late fee.The CITY does not waive its right to terminate this Agreement due to non-payment of fees.

3. COMPLIANCE WITH LAWS

- (a) BACT shall not discriminate against any employee or applicant for employment because of race, religion, creed, color, gender, sexual orientation, age (persons 40 years of age or older), disability, national origin, or any other basis to the extent prohibited by federal, state, or local laws.
- (b) BACT shall comply with all federal, state and CITY laws, statutes, ordinances, rules and regulations, and the orders and decrees of any courts, or administrative bodies, or tribunals in any manner affecting the performance of this Agreement.

4. INDEPENDENT CONTRACTOR

BACT is acting as an independent contractor and is not an agent, servant or employee of CITY. Nothing in this Agreement shall be interpreted or construed as creating or establishing the relationship of employer and employee between CITY and BACT. BACT is responsible for paying all required state and federal taxes.

5. INDEMNITY; DAMAGE TO CITY PROPERTY

- (a) BACT agrees to indemnify and hold harmless CITY, its officers, and employees from any and all claims, demands, actions, causes of action, losses, damages, liabilities, known or unknown, and all costs and expenses, including reasonable attorneys' fees in connection with any injury or damage to persons or property arising out of or in any way connected with the act, omission or negligence of BACT, its officers, employees, agents, contractors, subcontractors or any officer, agent or employee thereof in relation to BACT's use of CITY facilities pursuant to this Agreement.
- (b) BACT shall not damage or deface the interior or exterior of CITY's theater facility and equipment or the grounds upon which the facility is situated. In the event that during the term of this Agreement, BACT or any of its employees, agents, contractors or invitees violates any of the theater policies and procedures, or damages or defaces the interior or exterior of CITY's theater facility, or the grounds upon which the facility is situated, BACT shall be obligated to reimburse CITY within thirty (30) days after presentation of an invoice for the actual expense of the repair of the damages or defaced facility or grounds. If BACT contests its responsibility for any alleged damage or defacement, the dispute shall be submitted to a neutral arbitrator mutually agreed upon by CITY and BACT. BACT shall not be obligated to reimburse CITY for the actual expense of the repair unless and until an arbitrator determines that BACT was responsible for the damage or defacement.

6. INSURANCE

BACT shall take out and maintain during the life of this Agreement policies of insurance as specified in Exhibit "A" attached and incorporated by reference, and shall provide all certificates and/or endorsements as specified in Exhibit "A."

7. CITY REPRESENTATIVE

The Director of Library and Community Services, as the CITY Manager's authorized representative, shall represent CITY in all matters pertaining to the services to be rendered under this Agreement. All requirements of CITY pertaining to the services and materials to be rendered under this Agreement shall be coordinated through the CITY representative.

8. BACT REPRESENTATIVE

The Executive Artistic Director of BACT shall represent BACT in all matters pertaining to the services and materials to be rendered under this Agreement. All requirements of BACT pertaining to the services or materials to be rendered under this Agreement shall be coordinated through the BACT representative.

9. NOTICES

All notices required by this Agreement shall be in writing and shall be personally delivered, sent by first class mail with postage prepaid, or by commercial courier, addressed as follows:

To CITY: Director of Library and Community Services
CITY OF SUNNYVALE
665 W. Olive Ave
Sunnyvale, CA 94086

To BACT: Bay Area Children's Theatre
Attn: Executive Artistic Director
2162 Mountain Blvd
Oakland, CA 94611

Nothing in this provision shall be construed to prohibit communication by more expedient means, such as by email or phone to accomplish timely communication. However, to constitute effective notice, written confirmation must be sent by first class mail, by commercial carrier, or hand-delivered. Each party may change the address by written notice in accordance with this paragraph. Notices delivered personally shall be deemed communicated as of actual receipt; mailed notices shall be deemed communicated as of three days after mailing unless such date is a date on which there is no mail service. In that event communication is deemed to occur on the next mail service day.

10. ASSIGNMENT

Neither party shall assign or sublet any portion of this Agreement without the prior written consent of the other party.

11. TERMINATION

- (a) If BACT defaults in the performance of this Agreement, or materially breaches any of its provisions, CITY may at its option give BACT written notice thereof and shall give BACT not less than thirty (30) days to cure the default. If BACT fails to cure the default, CITY may immediately terminate the Agreement and shall give prompt written notice of termination to BACT.
- (b) Upon expiration or termination of this Agreement, BACT shall remove all of its property from the theater facility. If BACT fails to do so CITY may store such equipment and property at the expense of BACT and shall have a lien thereon until BACT reimburses CITY for any and all expenses of moving and storage of such equipment. If BACT fails to reclaim its property and equipment within thirty (30) days of storage, CITY shall have the right to sell it and retain the proceeds of sale as reimbursement of expenses.

12. ENTIRE AGREEMENT; AMENDMENT

This writing constitutes the entire Agreement between the parties relating to the services to be performed or materials to be furnished hereunder. No modification of this Agreement shall be effective unless and until such modification is evidenced in writing signed by all parties.

13. MISCELLANEOUS

Time shall be of the essence in this Agreement. Failure on the part of either party to enforce any provision of this Agreement shall not be construed as a waiver of the right to compel enforcement of such provision or any other provision. This Agreement shall be governed and construed in accordance with the laws of the State of California.

//

//

//

IN WITNESS WHEREOF, the parties have executed this Agreement.

ATTEST:

CITY CLERK

City Clerk Date

APPROVED AS TO FORM:

City Attorney Date

CITY OF SUNNYVALE ("CITY")

By _____
Interim City Manager Date

BAY AREA CHILDREN'S THEATRE
("BACT")

By _____
Nina Meehan, BACT Date

EXHIBIT "A"

INSURANCE REQUIREMENTS

BACT shall procure and maintain for the duration of the contract insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work by the BACT, its agents, representatives, or employees.

Minimum Scope and Limits of Insurance BACT shall maintain limits no less than:

1. **Commercial General Liability**: \$1,000,000 per occurrence and \$2,000,000 aggregate for bodily injury, personal injury and property damage. ISO Occurrence Form CG 0001 or equivalent is required.
2. **Automobile Liability**: \$1,000,000 per accident for bodily injury and property damage. ISO Form CA 0001 or equivalent is required.
3. **Workers' Compensation** Statutory Limits and **Employer's Liability**: \$1,000,000 per accident for bodily injury or disease.

Deductibles and Self-Insured Retentions

Any deductibles or self-insured retentions must be declared and approved by the City of Sunnyvale. The BACT shall guarantee payment of any losses and related investigations, claim administration and defense expenses within the deductible or self-insured retention.

Other Insurance Provisions

The **general liability** policy shall contain, or be endorsed to contain, the following provisions:

1. The City of Sunnyvale, its officials, employees, agents and volunteers are to be covered as additional insureds with respects to liability arising out of activities performed by or on behalf of the BACT; products and completed operations of the BACT; premises owned, occupied or used by the BACT; or automobiles owned, leased, hired or borrowed by the BACT. The coverage shall contain no special limitations on the scope of protection afforded to the City of Sunnyvale, its officers, employees, agents or volunteers.
2. For any claims related to this project, the BACT's insurance shall be primary. Any insurance or self-insurance maintained by the City of Sunnyvale, its officers, officials, employees, agents and volunteers shall be excess of the BACT's insurance and shall not contribute with it.
3. Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not affect coverage provided to the City of Sunnyvale, its officers, officials, employees, agents or volunteers.

4. The BACT's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
5. Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, cancelled by either party, reduced in coverage or in limits except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the City of Sunnyvale.

Acceptability of Insurers

Insurance is to be placed with insurers with a current A.M. Best's rating of not less than A:VII, unless otherwise acceptable to the City of Sunnyvale.

Verification of Coverage

BACT shall furnish the City of Sunnyvale with original a Certificate of Insurance effecting the coverage required. The certificates are to be signed by a person authorized by that insurer to bind coverage on its behalf. All certificates are to be received and approved by the City of Sunnyvale prior to commencement of work.