CITY OF KIRKLAND
Department of Parks & Community Services
505 Market Street, Suite A, Kirkland, WA 98033 425.587.3300
www.ci.kirkland.wa.us

MEMORANDUM

To: David Ramsay

From: Carrie Hite, Deputy Director
Jennifer Schroder, Director

Date: February 23, 2009

Subject: Kirkland Performance Center Lease

RECOMMENDATION:

For the City Council to authorize the City Manager to sign Kirkland Performance Center's (KPC) new 10 year lease.

BACKGROUND DISCUSSION:

The City entered into a 10 year lease with the KPC, which expired in July of 2008. For the past 6 months, staff has been working with KPC's new Interim Director, Dan Mayer, and the Council to determine terms and conditions of the new 10 year lease. Staff brought forth proposed terms and conditions for a new lease to Council in September, 2008. Based on Council's direction, staff incorporated the new terms and negotiated the attached lease with KPC.

PROPOSED LEASE TERMS:

The terms and conditions incorporated into this new lease, and recommended by the Council include:

- 10 year term, effective August, 2008 - December 2018, with option for extension of this second term.
- Continue to operate the facility rent-free.
- Refund of admissions tax for the first five years, with the option to extend with Council authority.
- All other terms and conditions as in previous lease.

RESOLUTION R-4747

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF KIRKLAND AUTHORIZING THE CITY MANAGER TO SIGN THE AGREEMENT BETWEEN THE KIRKLAND PERFORMANCE CENTER AND THE CITY OF KIRKLAND REGARDING THE USE AND OCCUPANCY OF THE PERFORMING ARTS CENTER.

WHEREAS, support for the artistic and cultural development of the City of Kirkland and its residents fulfills an important public purpose; and

WHEREAS, the Kirkland Performance Center is organized for the express purpose of operating a performing arts center which promotes this artistic and cultural development; and

WHEREAS, both parties agree that the Performing Arts Center provides an essential venue for the presentation of such artistic and cultural events, and thereby fulfills this important public purpose; and

WHEREAS, both parties intend that the Kirkland Performance Center operate the Performing Arts Center in a manner consistent with this important public purpose.

NOW, THEREFORE, be it resolved by the City Council of the City of Kirkland as follows:

Section 1. The City Manager is hereby authorized and directed to execute on behalf of the City the agreement between the parties entitled "Agreement Between the City of Kirkland and the Kirkland Performance Center Regarding the Use and Occupancy of the Performing Arts Center" substantially similar to the Agreement attached hereto as Exhibit A.

Passed by majority vote of the Kirkland City Council in open meeting this _____ day of _____, 2009.

Signed in authentication thereof this ____ day of _____, 2009.

_____
MAYOR

Attest:

_____
City Clerk

AGREEMENT

BETWEEN

THE CITY OF KIRKLAND

AND

THE KIRKLAND PERFORMANCE CENTER

REGARDING THE

USE AND OCCUPANCY OF

THE PERFORMING ARTS CENTER

TABLE OF CONTENTS

Page

I. DEFINITIONS 2

II. LEASE AND DESCRIPTION OF PREMISES 2

III. TERM OF AGREEMENT 3

A. Effective Date of Agreement 3

B. Term 3

C. Option for Extension of Term 3

D. Termination of Agreement 3

IV. AUTHORIZED USE OF PREMISES 3

V. CITY USE 4

VI. RENT 4

VII. ADMISSIONS TAXES 5

VIII. RESERVE, RECORD KEEPING AND REPORTING 5

IX. IMPROVEMENTS, ALTERATIONS AND ADDITIONS TO THE PREMISES 6

A. Tenant Improvements 6

B. Other Improvements, Alterations and Additions 6

C. Waiver of Artistic Rights 6

X. QUIET ENJOYMENT 6

XI. HAZARDOUS SUBSTANCES 6

XII. MAINTENANCE; CLEANING; REPAIR; AND UTILITIES 7

A. City 7

B. KPC 7

XIII. INDEMNIFICATION 8

XIV. INSURANCE 8

XV. SIGNS 10

XVI. ASSIGNMENT, SUBLEASE OR TRANSFER 11

XVII. CONCESSIONS AND CATERING ACTIVITY 11

A. Definitions 11

B. Grant of Right 11

C. Right Not Effective During City Use Periods 12

D. Food Service Establishment Permit Required 12

E. Licenses and Permits Required; Contingent Expiration of Right 12

XVIII. COMPLIANCE WITH LAW 12

A. Lawful Use 12

B. Licenses and Similar Authorizations 12

C. Taxes 12

D. Attendance and Safety Standards 13

E. Nondiscrimination 13

F. Americans With Disabilities Act 13

G. Applicable Law and Venue 13

XIX. ROYALTIES, LICENSE FEES, AND SIMILAR PAYMENTS 13

XX. LIENS AND ENCUMBRANCES 14

XXI. DEFAULT 14

A. Default 14

B. Extension of Period to Remedy Default 14

XXII. REMEDIES UPON DEFAULT AND MATERIAL BREACH 15

XXIII. SURRENDER OF PREMISES AND REMOVAL OF PROPERTY 16

A. Surrender of Premises 16

B. Conditions of Premises Upon Surrender 16

C. Removal of Property 16

XXIV. NO WAIVERS 17

XXV. REMEDIES CUMULATIVE 17

XXVI. OBLIGATION OF KPC LIMITED TO CORPORATION 17

XXVII. ADDRESSES 17

XXVIII. TITLES OF SECTIONS 18

XXIX. AMENDMENTS 18

XXX. DISPUTE RESOLTUION 18

XXXI. ENTIRE AGREEMENT 18

AGREEMENT
BETWEEN
THE CITY OF KIRKLAND
AND
THE KIRKLAND PERFORMANCE CENTER
REGARDING THE
USE AND OCCUPANCY
OF THE PERFORMING ARTS CENTER

THIS USE AND OCCUPANCY AGREEMENT is dated as of June 9, 2008, and entered into by and between the CITY OF KIRKLAND (hereinafter referred to as the "City"), a Washington municipal corporation, and the KIRKLAND PERFORMANCE CENTER (hereinafter referred to as "KPC"), a Washington non-profit corporation.

WHEREAS, The City is interested in the artistic and cultural development of the City and its residents;

WHEREAS, KPC is organized for a express purpose of operating a performing arts center;

WHEREAS, the City and KPC cooperated in the development and construction of the performing arts center;

WHEREAS, both parties agree that the performing arts center provides an essential venue for the presentation of public entertainment and cultural events, and thereby fulfill an important public purpose;

WHEREAS, both parties agree that it would be in the best interests of the City, as Landlord, and KPC, as Tenant, for KPC to lease and have exclusive operation control of the performing arts center, and subject to the terms of this Agreement, reserving the right of the City to use the performing arts center;

WHEREAS, both parties agree that it would be in the best interests of the City and KPC for KPC to have total artistic and content control of performances at the performing arts center;

WHEREAS, both parties intend that KPC operate the performing arts center in a manner consistent with the important public purpose of presenting public entertainment and cultural events, and

WHEREAS, the parties hereto desire to document the terms and conditions they have agreed upon with respect to the use and occupancy of the performing arts center;

NOW, THEREFORE, in consideration of the mutual undertakings and promises contained herein, and as a direct benefit to the City, the parties agree as follows:

I. DEFINITIONS.

All words in this Agreement bearing initial capitals, other than proper nouns, section headings or words required to be capitalized for proper usage, are defined terms and shall have the meanings specifically assigned to them in the Design and Construction Agreement as set forth below. Any sums set forth below are subject to modification by a written amendment to this Agreement in the form attached as Exhibit C. Unless otherwise expressly provided, use of the singular includes the plural and vice versa.

A. Agreement means this Use and Occupancy Agreement, as from time to time amended in accordance with the terms hereof.

B. Approval means the prior written consent of a party hereto or designated representatives thereof.

C. Cash Equivalents means funds of KPC which have been invested in financial instruments or investment funds that have maturity dates which are convertible to cash on demand (with or without penalties for early withdrawal).

D. City means the City of Kirkland.

E. City Manager means the City Manager of the City of Kirkland, or his or here designee.

F. Facility means the performing arts center to be developed pursuant to this Agreement.

G. Kirkland Performance Center or KPC means the Kirkland Performance Center, a Washington non-profit corporation.

H. Tenant Improvements means all property (such as equipment, fixtures and furnishings, whether the property is physically affixed to the Facility or not) which is used in the scheduling or presentation of events at the Facility, including, but not limited to, lighting, sound system, curtains, seating, carpeting, phone system, lift, piano, stage rigging, and computerized box office system. Tenant Improvements does not mean the structure and core of the Facility; HVAC, plumbing, electrical and mechanical systems; elevator; and stage.

I. Use and Occupancy Agreement means the Use and Occupancy Agreement to be executed prior to the award of the Construction Contract.

II. LEASE AND DESCRIPTION OF PREMISES.

The City, as Landlord, hereby leases to KPC, and KPC, as Tenant, hereby leases from the City, subject to the terms and conditions hereof, the Premises, located at 350 Kirkland Avenue, Kirkland, Washington 98033.

III. TERM OF AGREEMENT.

A. Effective Date of Agreement. This effective date of this Agreement shall be June 9, 2008.

B. Term. The Term of this Agreement shall expire on June 30, 2018, which is ten (10) years and 21 days after June 9, 2008, the Effective Date of this Agreement, unless terminated earlier pursuant to the provisions hereof.

C. Option for Extension of Term. KPC may extend the term of this Agreement for two (2) additional consecutive terms of ten (10) years; provided that, every five (5) years thereafter, the parties have the option to renegotiate the amount of annual rent and other terms and conditions (except KPC retention of total artistic control of performances) of this Agreement. If the parties fail to agree on a satisfactory amount of annual rent or other terms and conditions of this Agreement, the parties agree to use non-binding mediation before the City may terminate this Agreement. If the parties fail to agree on annual rent or other terms and conditions of this Agreement through mediation, the City may terminate this Agreement.

Not later than six (6) months before the expiration of this Agreement, the City shall notify KPC of the City's exercise of its option to renegotiate the amount of annual rent, and other terms and conditions of this Agreement.

Not later than one (1) year before the expiration of this Agreement, KPC shall notify the City of KPC's exercise of its option to extend the initial term of this Agreement and of each extension. Notwithstanding any other provision of this Agreement, the option to extend the term of this Agreement shall not be assignable or exercisable by any person or entity other than KPC.

D. Termination of Agreement. Upon the occurrence of any event of default described in this Agreement, the City may terminate this Agreement. Upon not less than one (1) year's notice to the City, KPC may terminate this Agreement. In the event that this Agreement is terminated, KPC shall surrender the Premises to the City. The City shall not owe KPC any "refund" or other compensation for contributions made by KPC for the design and construction of the performing arts center, or tenant improvements to the performing arts center.

IV. AUTHORIZED USE OF PREMISES.

A. KPC shall have exclusive possession and operational control of the Premises, subject to the terms of this Agreement reserving the right of the City to use the performing arts center. KPC shall also have total artistic control of performances, also subject to the terms of this Agreement. KPC shall use the Premises for the presentation of performing arts, as well as for meetings of KPC Board members, staff, and other personnel directly associated with KPC, KPC classes and other KPC educational programs, presentations, KPC fund-raising endeavors, rehearsals, and other related activities, KPC offices, and such other activities as are incidental to the foregoing. KPC shall also use the Premises to actively encourage and provide for youth experiences with the performing arts. KPC may use the Premises for business and

community meetings and activities; provided that, such meetings and activities shall not unduly interfere with the priority use of the Premises for the presentation of performing arts. KPC may use the Premises to engage in concession and catering activity only as provided in this Agreement. KPC may use the Premises for additional purposes with the prior written approval of the City Manager.

B. Use of Meeting Room.

1. KPC shall has the right to use the Peter Kirk Community Center Lobby Meeting Room for up to ten days per year on a space available basis. These "KPC" dates must be reserved more than ninety (90) days in advance of the use date, and shall not compete with dates programmed or requested by Peter Kirk Community Center customers.

2. Conditions of Use include:

a. KPC staff will need to check the key in and out from the Peter Kirk Community Center staff. This will include a walk through prior to and after use to assess any damage.

b. KPC shall pay for operational expenses arising from its use of the Premises including, but not limited to, janitorial services, security false alarms, and damage assessed during walk through.

c. KPC will have staff present at all times during use.

V. CITY USE.

A. The City reserves the right to use the Premises with the exception of KPC's Administrative Offices up to seven (7) days per year on a space available basis. These "City use" dates must be reserved more than sixty (60) days in advance of the use date, and shall not compete with dates requested by KPC rental customers. The City also reserves the right to use the Premises on additional days on a space available basis. These "additional City use" dates may not be reserved more that sixty (60) days in advance of the use date and shall not compete with dates requested by KPC rental customers.

B. The City shall be allowed to use the Premises without rental charge, but shall pay operational expenses arising from its use of the Premises including, but not limited to, extra staffing or janitorial services.

VI. RENT.

In consideration of the value of KPC's contribution to development and operation of the performing arts center, the value of KPC's tenant improvements to the performing arts center, the value of KPC's maintenance and operation of the Premises, the value of KPC's payments of all utility charges, and subject to the terms and conditions of this Agreement, KPC hereby covenants and shall pay no rent for the

Premises during the second term of this Agreement. The amount of the annual rent during additional terms shall be established in accordance with Section III.C. of this Agreement.

VII. ADMISSIONS TAXES.

A. The City agrees to dedicate to KPC one hundred percent (100%) of the admissions taxes generated from KPC events at the Facility to support the public purposes served by the Facility for the first five years of this second term, to cover the periods of June 9, 2008 through June 30, 2013.

B. The City agrees to pay to KPC such admissions taxes within thirty (30) days of receipt; provided, however, that KPC must pay to the City such admissions taxes in accordance with applicable provisions of the Kirkland Municipal Code and State law.

VIII. RESERVE, RECORD KEEPING AND REPORTING.

A. KPC will strive to keep a minimum of $200,000 in Operating Reserves. Currently, KPC shall replenish the Operating Reserve according to the following schedule in order to carry the following fund balances:

1. $175,000.00 by December 31, 2008;

2. $200,000.00 by December 31, 2009.

B. The City shall appoint a liaison between the City and KPC who will ensure compliance with all record keeping and reporting requirements set forth in this section.

C. KPC shall maintain books, records, documents and other accounting procedures and practices in accordance with Generally Accepted Accounting Principles ("GAAP") consistently applied (e.g., a unitary, internally consistent system of accounts and records) that sufficiently and properly reflect all receipts and direct and indirect costs of any nature associated with the exercise of rights and the performance of obligations by KPC under this Agreement.

D. KPC shall provide quarterly reports in a form acceptable to the City. The reports shall include, at a minimum, unaudited financial statements (balance sheet and income and cash flow statements depicting performance against budget), profit and loss statements, box office statements (statements depicting ticket sales, admissions taxes collected, service charges, and average ticket prices), projected bookings, and fund development progress.

E. KPC shall provide an annual report, by a date to be mutually determined, to the City. The annual report shall include a budget for the forthcoming year that provides adequate funding for maintenance and operations, including funding for reserves and a development professional. The annual report shall also include a financial statement audited by an independent certified public accounting firm,

and prepared in accordance with sound accounting procedures consistently applied. The annual report shall summarize KPC's activities and status.

IX. IMPROVEMENTS, ALTERATIONS AND ADDITIONS TO THE PREMISES.

A. Tenant Improvements. KPC may make Tenant Improvements to the Premises with the consent of the City. If an Event of Default occurs, if KPC fails to perform its duties under this Agreement, or if this Agreement expires, terminates, or is otherwise not renewed, all KPC-provided or owned Tenant Improvements on the Premises shall remain in place and shall automatically and without further notice or act by the City and without compensation to KPC become the property of the City.

B. Other Improvements, Alterations and Additions. KPC shall not alter any structural features of the Premises without City approval. KPC, at its sole expense, may redecorate any interior surface of walls, ceilings, windows and doors.

C. Waiver of Artistic Rights. In the event that KPC installs an art work in the Premises that will incorporate such work into the Premises in such a way that removing such work may subject it to destruction, distortion, mutilation or other modification, KPC shall require the artist to waive any rights under federal or state law (including without limitation the Visual Artists Rights Act and the New York Arts and Cultural Affairs Law) with respect to the consequences of removing all or part of such work from the Premises. The waiver must be in writing, be signed by the City, KPC and the artist, be approved as to form by the City Attorney, and be recorded. The waiver must specifically identify the art work and the uses to which it applies.

X. QUIET ENJOYMENT.

The City covenants that it holds legal title to the Premises, free and clear of all liens and encumbrances, excepting only the lien for current taxes not yet due, if any, such mortgage or mortgages as are permitted by the terms of this Agreement, zoning ordinances and other building and fire ordinances and government regulations relating to the uses of such property, and easements, restrictions and other conditions of record. The City represents and warrants that it has full right and authority to enter into this Agreement and that KPC, upon performing its other covenants and agreements set forth in this Agreement and all extensions thereof, shall peaceably and quietly have, hold and enjoy the Premises for the term of this Agreement, including, but not limited to, the scheduling of KPC performances and events, management of operations, or selection of productions, employees and agents without hindrance or interference from the City, subject to the terms and provisions of this Agreement.

XI. HAZARDOUS SUBSTANCES.

KPC shall not cause or permit the presence, use, generation, release, discharge, storage, disposal, or transportation of any Hazardous Materials (as defined below) on, under, in, above, to, or from the Premises, the building, or the common areas, other than in strict compliance with all applicable federal, state and local laws, regulations and orders. The term "Hazardous Materials" refers to any substances, materials, and wastes that are or become regulated as hazardous or toxic substances under any applicable

local, state or federal law, regulation or order. KPC shall indemnify, defend and hold the City harmless from and against (a) any loss, cost, expense, claim, or liability arising out of any investigation, monitoring, clean-up, containment, removal, storage, or restoration work ("remedial work") required by, or incurred by the City or any nongovernmental entity or person in reasonable belief that such work is required by any applicable federal, state or local law, governmental agency, or political subdivision, and (b) any claims of third parties for loss, injury, expense, or damage arising out of the presence, release, continuing release or discharge of any hazardous material on, under, in, above, to, or from the Premises that occurred or originated during the term of this Agreement. The City shall indemnify, defend and hold KPC harmless from and against (a) any loss, cost, expense, claim, or liability arising out of any investigation, monitoring, clean-up, containment, removal, storage, or restoration work ("remedial work") required by, or incurred by KPC or any nongovernmental entity or person in a reasonable belief that such work is required by any applicable federal, state or local law, governmental agency, or political subdivision, and (b) any claims of third parties for loss, injury, expense, or damage arising out of the presence, release, continuing release or discharge of any hazardous material on, under, in, above, to, or from the Premises that occurred or originated during a time other than the term of this Agreement. If any remedial work is so required under any applicable federal, state or local law during the term of this Agreement, KPC shall perform or cause to be performed the remedial work in compliance with such law, regulation or order. All remedial work shall be performed by one or more contractors under the supervision of a consulting engineer, each selected by KPC and approved in advance in writing by the City. If KPC does not commence the remedial work in a timely fashion or does not diligently prosecute the remedial work to completion, the City may, but shall not be required to, cause the remedial work o be performed, subject fully to the indemnification of this paragraph. The foregoing indemnification obligation shall survive termination of this Agreement.

XII. MAINTENANCE; CLEANING; REPAIR; AND UTILITIES.

A. City. The City is responsible for maintenance and repair of the structural components of the performing arts center which shall include the roof, the exterior walls, the foundation, the HVAC system, and the elevator. The City is also responsible for maintenance which is necessary for the structural integrity of the performing arts center, including maintenance of load-bearing members, and of main lines of mechanical, electrical, and plumbing systems to the point of entry. The City is responsible for and will pay for landscaping and landscape maintenance that meet City standards; provided that, if KPC wants special plantings or landscaping and landscape maintenance that exceed City standards, KPC will be responsible for and will pay for such plantings or features. The City is also responsible for and will pay for maintenance of the parking lot that meets City standards.

Before entering the Premises to undertake maintenance and repair work, the City shall give KPC at least twenty-four (24) hours notice; provided that, such maintenance and repair work shall not unduly interfere with the use of the Premises for the presentation of performing arts. In the event of an emergency, however, no such notice shall be required.

B. KPC. KPC is responsible for maintenance and repair of the interior of the performing arts center which shall include tenant improvements, audio/visual systems, sound system, telephone

equipment, lighting and plumbing fixtures and appliances. KPC's responsibility for plumbing fixtures and appliances extends through fixture drain and trap down to the junction with the line into wall or floor, and includes attempting to clear clogs by means of plunger and toilet auger. KPC's janitorial and routine maintenance responsibilities include: timely repair or replacement of light fixtures or bulbs, electrical switches or controls; cleaning, repair or replacement of seating, curtains, carpets, flooring, and faucets; cleaning windows and walls; and servicing of audience areas and restrooms. KPC shall pay to the City an amount that provides for an annual service contract for preventative maintenance on the elevator. KPC shall timely pay all utility charges for utility service to the Premises including, but not limited to, electricity, water, storm water, sewer, garbage, and telephone.

XIII. INDEMNIFICATION.

The City shall not be liable to KPC or KPC's employees, agents, guests, invitees or visitors, or to any other person for any injury to person or damage to property on or about the Premises, resulting from and/or caused in part or whole by the negligence or misconduct of KPC, its employees, agents, servants, guests, invitees, and visitors, or of any other person entering upon the Premises, or caused by the building and improvements located on the Premises becoming out of repair, or caused by leakage of gas, oil, water or steam or by electricity emanating from the Premises, or due to any other cause except injury to persons or damages to property solely caused by the negligence of the City.

KPC shall defend, indemnify, and hold harmless the City, its officers, officials, employees and volunteers from and against any and all claims, suits, actions, or liabilities for injury or death of any person, or for loss or damage to property, which arises out of KPC's use of the Premises, or from the conduct of KPC's business, or from any activity, work or thing done, permitted, or suffered by KPC in or about the Premises, except only such injury or damage as shall have been occasioned by the sole negligence of the City.

XIV. INSURANCE.

A. The City shall maintain insurance covering the building of which the Premises are a part in an amount equal to its replacement cost, insuring against the perils of Fire, Lightning, Extended Coverage, Vandalism and Malicious Mischief, extended by Special Extended Coverage Endorsement to insure against all other Risks of Direct Physical Loss, such coverages and endorsements to be as defined, provided and limited in the standard bureau forms prescribed by the insurance regulatory authority for the State of Washington for use by insurance companies admitted in such state for the writing of such insurance on risks located within such state. Subject to the terms of this Agreement, such insurance shall be for the sole benefit of the City and under its sole control.

B. KPC shall notify the City immediately after a casualty occurs to the Premises or the building. (1) If the building is totally destroyed by fire or other casualty, (2) if the casualty is not insured, (3) if the cost of restoration would exceed the total Insurance proceeds and KPC's available funds, including the Operating Reserve, provided that KPC replenishes the Operating Reserve in accordance with Section VIII.A of this Agreement, or (4) if rebuilding or repairs cannot in the City's estimation be completed with three hundred sixty-five (365) days after the date upon which the City is notified by KPC of such

damage, then the Agreement shall terminate effective upon the date of the occurrence of such damage. The City shall give notice to KPC in writing of its determination to terminate this Agreement within ninety (90) days following the date of the occurrence of such damage.

C. If the building is damaged by any peril covered by the Insurance to be provided by the City, but only to such extent that rebuilding or repairs can in the City's estimation be completed within three hundred sixty-five (365) days after the date upon which the City is notified by KPC of such damage, this Agreement shall not terminate, and the City shall at its sole cost and expense thereupon proceed with reasonable diligence to rebuild and repair such building to substantially the condition in which it existed prior to such damage, except that the City shall not be required to rebuild, repair or replace any part of the partition, fixtures, additions and other improvements which may have been placed in, or about the Premises by KPC. If the building is subsequently damaged while the City is rebuilding and repairing the building, the City shall estimate whether rebuilding or repairs can be completed within three hundred sixty-five (365) days after the date upon which the City is notified by KPC of such subsequent damage. If the Premises are untenantable in whole or in part following such damage, the rent payable during the period in which they are untenatable shall be reduced to such extent as may be fair and reasonable under all of the circumstances. If the City does not complete such repairs and rebuilding within three hundred sixty-five (365) days after the date upon which the City is notified by KPC of such damage or such subsequent damage, as appropriate, KPC may at its option terminate this Agreement by delivering written notice of termination to the City within three hundred ninety-five (395) days after the date of the notice of the damage or the subsequent damage, as appropriate, as KPC's exclusive remedy, whereupon all rights and obligations hereunder shall cease and terminate.

D. Notwithstanding anything in this Agreement to the contrary, if the holder of any indebtedness secured by a mortgage or deed of trust covering the Premises requires that the insurance proceeds be applied to such indebtedness, then the City shall have the right to terminate this Agreement by delivering written notice of termination to KPC within fifteen (15) days after such requirement is made by and such holder, whereupon all rights and obligations under this Agreement shall cease and terminate.

E. KPC shall procure and maintain for the duration of the Agreement, insurance against claims for injuries to persons or damage to property which may arise from or in connection with the KPC's operation and use of the Premises.

No Limitation. KPC's maintenance of insurance as required by the agreement shall not be construed to limit the liability of KPC to the coverage provided by such insurance, or otherwise limit the City's recourse to any remedy available at law or in equity.

1. Minimum Scope of Insurance

KPC shall obtain insurance of the types described below:

a. Commercial General Liability insurance shall be written on Insurance Services Office (ISO) occurrence form CG 00 01 and shall cover premises and contractual liability. The City shall be named as an insured on KPC's Commercial General Liability insurance policy using ISO Additional Insured-Managers or Lessors of Premises Form CG 20 11 or a substitute endorsement providing equivalent coverage.

b. Property insurance shall be written on an all risk basis.

2. Minimum Amounts of Insurance

KPC shall maintain the following insurance limits:

a. Commercial General Liability insurance shall be written with limits no less than $1,000,000 each occurrence, $5,000,000 general aggregate.

b. Property insurance shall be written covering the full value of KPC's property and improvements with no coinsurance provisions.

3. Other Insurance Provisions

The insurance policies are to contain, or be endorsed to contain, the following provisions for Commercial General Liability insurance:

a. KPC's insurance coverage shall be primary insurance as respect the City. Any Insurance, self-insurance, or insurance pool coverage maintained by the City shall be excess of KPC's insurance and shall not contribute with it.

b. KPC's insurance shall be endorsed to state that coverage shall not be cancelled by either party, except after thirty (30) days prior written notice by certified mail, return receipt requested, has been given to the City.

4. Acceptability of Insurers

Insurance is to be placed with insurers with a current A.M. Best rating of not less than A:VII.

5. Verification of Coverage

KPC shall furnish the City with original certificates and a copy of the amendatory endorsements, including but not necessarily limited to the additional insured endorsement, evidencing the insurance requirements of KPC.

6. Waiver of Subrogation

KPC and City hereby release and discharge each other from all claims, losses and liabilities arising from or caused by any hazard covered by property insurance on or in connection with the premises or said building. This release shall apply only to the extent that such claim, loss or liability is covered by insurance.

7. City's Property Insurance

City shall purchase and maintain during the term of the lease all-risk property insurance covering the Building for their full replacement value without any coinsurance provisions.

XV. SIGNS.

The KPC may install signs on the exterior of the Premises, identifying the building as the Kirkland Performance Center or other mutually agreed upon name, and containing other information related to KPC, including without limitation, program information, fundraising information and special KPC announcements. The design, installation and location of said signs shall comply with applicable provisions of the Kirkland Municipal Code, including but not limited to zoning provisions and building regulations, and shall be subject to the written approval of the City Manager, which approval shall not be unreasonably withheld.

XVI. ASSIGNMENT, SUBLEASE OR TRANSFER.

Obligations or rights of KPC under this Agreement may not be assigned, subleased, or otherwise transferred by KPC, without the prior written consent of the City, which consent may be withheld at the sole discretion of the City. The assignment, sublease, or transfer of this Agreement without such consent shall constitute an Event of Default. Any such assignment, sublease, or transfer shall be specifically subject to all the terms and conditions of this Agreement. In the event of any proposed assignment, sublease, or transfer of this Agreement, KPC shall cause to be delivered to the City simultaneously with such proposed assignment, sublease, or transfer, an instrument in writing, executed by the assignee, in which the assignee shall assume and agree to accept all the terms and conditions of this Agreement.

XVII. CONCESSIONS AND CATERING ACTIVITY.

A. Definitions. As used in this section, unless the context clearly requires a different meaning,

1. "Concession and catering activity" means and includes the preparation, service, free distribution, or sale of food or any beverage, including any alcoholic beverage, or the free distribution or sale of any concession merchandise or service; and

2. "Concession merchandise or service" means and includes inedible goods and services such as souvenirs, novelties and tickets to events at other venues.

B. Grant of Right. The City grants to KPC the exclusive right to engage in concession and catering activity and to enter into agreements authorizing one or more concessionaries to engage in such activity for and on the behalf of, or under the auspices of, KPC, at the Premises, subject to the terms of this Agreement. If KPC decides to retain any such concessionaire(s), KPC shall select such concessionaire(s). If KPC enters into any such agreement(s), KPC shall remain ultimately responsible for compliance with terms and conditions, and performance of obligations under this Agreement. Any such agreement shall incorporate terms and conditions related to concessions and catering activity under this Agreement.

C. Right Not Effective During City Use Periods. The concession and catering rights granted in this section shall not be effective during any period of time when the Premises are used by the City, unless by express request of the City, with the exception of the box office.

D. Food Service Establishment Permit Required. KPC, or any such concessionaire(s), shall ensure that all food offered for sale on or from the Premises has been prepared, transported, served and otherwise provided only by a person or entity issued a current valid Food Service Establishment permit by the Seattle-King County Department of Public Health or its successor.

E. Licenses and Permits Required; Contingent Expiration of Right. KPC, or any such concessionaire(s), shall be responsible for obtaining and maintaining, at not cost to the City, all licenses, permits and other authorization required in order to legally conduct the concession and catering activity contemplated herein. The City shall have no obligation to issue such licenses, permits, or other authorization. The City shall issue such licenses, permits, or other authorization in accordance with applicable City rules and regulations. The inability of KPC, or any such concessionaire(s), to secure or to maintain any such license, permit or other authorization shall not invalidate the concession and catering right granted herein.

XVIII. COMPLIANCE WITH LAW.

A. Lawful Use. KPC and the City each agree to abide by, conform and comply with all applicable federal, state and local laws, and obtain all required licenses, permits, and authorizations. Whenever either party or its authorized representative is informed of any violation of any such law, ordinance, rule, regulation, license, permit, or authorization committed by it, it shall immediately desist from such violation. The final judgment of any court or administrative body of competent jurisdiction or the admission by a party in any action against it, whether the other party is a party thereto or otherwise, that it or its invitees has violated any law, ordinance, rule, or regulation shall be conclusive of that fact as between the City and KPC.

B. Licenses and Similar Authorization. KPC, at no expense to the City, shall secure and maintain in full force and effect during the term of this Agreement all required licenses, permits and similar legal authorizations, and comply with all requirements thereof. The City shall have no obligation to issue such licenses, permits, or authorizations. The City shall issue such licenses, permits, or authorizations in accordance with applicable City rules and regulations.

C. Taxes. KPC shall pay, before delinquency, all taxes, levies, and assessments of whatever kind or nature are imposed or become due during the term of this Agreement and arise from any activity on or use and occupancy of the Premises pursuant to this Agreement, including but not limited to taxes arising out of the activity or business conducted on the Premises; taxes levied on KPC property, equipment, and improvements on the Premises; taxes on KPC's interest in this Agreement and any leasehold interest created thereby under RCW 82.29A., if applicable; and any assessment levied for any local improvement, utility local improvement, or any similar undertaking. In the event the State of Washington makes any demand upon the City for payment of any tax resulting from KPC's use or occupancy of the Premises or the conduct of any activity subject to tax, or the State withholds funds due to the City to enforce collection

of leasehold excise or any other tax, KPC, at its sole expense, shall contest such action and indemnify the City for all sums expended by or withheld by the State from the City in connection with such taxation; provided, that KPC may pay any such tax in lieu of contesting it or indemnifying the City. The City shall pay and shall indemnify and hold KPC harmless for all taxes imposed, that relate to City sponsored events at the Premises (except for taxes imposed on concession sales by KPC or for KPC's benefit), and for all taxes that may be imposed on KPC or KPC use of the Premises resulting from any City use under this Agreement.

D. Attendance and Safety Standards. The Kirkland Fire Chief or his/her designee shall have the authority to determine, in the reasonable exercise of his/her discretion, the number of persons that may be admitted to, and safely and freely move about in the Premises. KPC shall not sell or issue tickets or credentials for admission to the Premises in an aggregate number that exceeds the Kirkland Fire Chief's determined number. KPC shall not admit to the Premises more people than the number so determined by the Kirkland Fire Chief. KPC shall not permit any chair or movable seat or other obstruction to the erected or placed in any passageway or fire exit. Sidewalks, grounds, entries, passages, vestibules, halls, elevators, abutting streets and all ways of access to the Premises shall not be obstructed by KPC or used for any purpose other than for ingress and egress to the Premises for persons or property. The City shall be responsible for assuring compliance with each of the foregoing requirements during periods of City use of the Premises under this Agreement.

E. Nondiscrimination. KPC shall, in employment made possible or resulting from this Agreement, ensure that there shall be no unlawful discrimination against any employee or applicant for employment in violation of RCW 49.60.180, as currently written or hereafter amended, or other applicable law prohibiting discrimination, unless based upon a bona fide occupational qualification as provided in RCW 49.60.180 or as otherwise permitted by other applicable law. Further, no person shall be denied or subjected to discrimination in receipt of the benefit of any services or activities made possible by or resulting from this Agreement in violation of RCW 49.60.215 or other applicable law prohibiting discrimination.

F. Americans With Disabilities Act. KPC shall comply with all governmental laws, ordinances and regulations applicable to the use of the Premises, including without limitation Title III of the Americans With Disabilities Act.

G. Applicable Law and Venue. This Agreement shall be construed under the laws of the State of Washington. The venue for any litigation relating to this Agreement shall be in the Superior Court of the State of Washington for King County.

XIX. ROYALTIES, LICENSE FEES, AND SIMILAR PAYMENTS.

KPC shall pay, before delinquency, all royalties, license fees, and other charges due and payable to any person or entity as the consequence of any public performance(s) or display(s) of copyrighted work(s) during its use of the Premises. The City shall be responsible for all similar royalties, license fees and other charges in connection with the City's use of the Premises.

XX. LIENS AND ENCUMBRANCES.

KPC shall keep the Premises, the Tenant's interest in this Agreement, and the Tenant Improvements free and clear of any liens and encumbrances. Notwithstanding the foregoing, KPC may finance up to $20,000 of the total costs of the Tenant Improvements. At the City's request, KPC shall furnish the City written proof of payment of any items that would or might constitute the basis for such a lien on the Premises, the Tenant's interest in this Agreement, and the Tenant Improvements if not paid.

XXI. DEFAULT.

A. Default. The following events shall constitute a default and material breach of this Agreement.

1. The failure to comply with any of the terms of this Agreement regarding insurance;

2. The material violation of any law, ordinance, rule or regulation which, after notice and reasonable time to cure, remains uncured;

3. The abandonment or vacating of the Premises for a period of twenty(20) days or more;

4. The absence of any KPC-scheduled performing arts event for a period of ninety (90) days or more, when not due to repair problems or maintenance work for which the City is responsible;

5. The failure to pay any sum of money due to the City within thirty (30) days after such notice from the City that such a payment is overdue;

6. The dissolution of the KPC or the merger of KPC with another entity without the prior written approval of the City;

7. The assignment or transfer of this Agreement without the prior written consent of the City as described in Section XVI of this Agreement; and

8. The failure to perform any other condition or covenant of this Agreement where such failure in performance is not remedied within the time allowed by this Agreement, or such other period for remedial action as is expressly otherwise provided for in this Agreement, or agreed upon by both parties.

B. Extension of Period to Remedy Default. Neither the City nor KPC shall be in default unless such party fails to perform an obligation required of it within thirty (30) days after written notice from the aggrieved party has been sent by the other, specifying the particular obligation that the other has failed to perform; provided, that if the nature of the other party's obligation is such that more than thirty (30) days are reasonably required for performance, then the other party shall not be in default if it commences performance within such thirty (30) day period, and thereafter diligently prosecutes the same to completion within one hundred eighty (180) days.

XXII. REMEDIES UPON DEFAULT AND MATERIAL BREACH.

Upon the occurrence of any Event of Default by KPC, the City shall have the option to pursue any one or more of the following remedies without notice or demand.

A. Accelerate all rent payments under this Agreement which shall then become immediately due and payable.

B. Terminate this Agreement, in which event KPC shall immediately surrender the Premises to the City, and if KPC fails so to do, the City may, without prejudice to any other remedy it may have for possession or unpaid rent, enter upon and take possession of the Premises and expel or remove KPC and any other person who may be occupying such Premises or any part thereof, and KPC agrees to pay to the City on demand the amount of all loss and damage the City may suffer by reason of such termination, whether through inability to relet the Premises on satisfactory terms or otherwise.

C. Enter upon and take possession of the Premises and expel or remove KPC and any other person who may be occupying such Premises or any part thereof, and relet the Premises for such terms ending before, on or after the expiration date of the term of this Agreement, at such rentals and upon such other conditions (including concessions and prior occupancy periods) as the City in its sole discretion may determine, and receive the rent therefor; and KPC agrees to pay to the City on demand any deficiency that may arise by reason of such reletting. The City shall have no obligation to relet the Premises or any part thereof and shall not be liable for refusal or failure to relet or in the event of reletting for refusal or failure to collect any rent due upon such reletting. If the City is successful in reletting he Premises at a rental in excess of that agreed to be paid by KPC pursuant to the terms of this Agreement, the City and KPC each mutually agree that KPC shall not be entitled, under any circumstances, to the excess rental, and KPC specifically waives any claim to the excess rental.

D. Enter upon the Premises, and do whatever KPC is obligated to do under the terms of this Agreement. KPC agrees to reimburse the City on demand for any expenses which the City may incur in thus effecting compliance with KPC's obligations under this Agreement, and KPC further agrees that the City shall not be liable for any damages resulting to the KPC from such action, whether caused by the negligence of the City or otherwise.

E. Whether or not the City retakes possession or relets the Premises, the City shall have the right to recover unpaid rent and all damages caused by KPC's default, including attorney's fees. Damage shall include, without limitation: all rentals lost, all legal expenses and other related costs incurred by the City following KPC's default, all costs incurred by the City in restoring the Premises to good order and condition, or in remodeling, renovating or otherwise preparing the Premises for reletting the Premises for a comparable use, all costs (including without limitation any brokerage commissions and the value of the City's time) incurred by the City, plus interest thereon from the date of expenditure until fully repaid at the rate of eighteen percent (18%) per year.

F. If KPC does not pay any installment of rent, additional rent or other charges owed the City under this Agreement as and when due, to help defray the additional cost to the City for processing late

payments KPC shall pay to the City on demand a late charge in an amount equal to five percent (5%) of the payment. The late charge shall be in addition to all of the City's other rights and remedies under this Agreement or at law and shall not be construed as liquidated damages or as limiting the City's remedies in any manner.

G. Pursuit of one remedy shall not preclude pursuit of any other remedies, such remedies being cumulative and non-exclusive, nor shall pursuit of any remedy constitute a forfeiture or waiver of any rent due the City or of any damages accruing to the City by reason of KPC's breach of this Agreement. No act or thing done by the City or its agents during the term of this Agreement shall be deemed a termination of this Agreement or an acceptance of the surrender of the Premises. No agreement to terminate this Agreement or accept a surrender of said Premises shall be valid unless in writing signed by the City. No waiver by the City of any violation or breach of this Agreement shall be deemed or construed to constitute a waiver of any other violation or breach of any of the terms of this Agreement. The City's acceptance of the payment of rental or other payments after the occurrence of an event of default shall not be deemed or construed as a waiver of such default, or as an accord and satisfaction. Forbearance by the City to enforce one or more of the remedies upon an event of default shall not be deemed or construed to constitute a waiver of such default or of the City's right to enforce any remedies with respect to such default or any subsequent default.

H. If the City employs the services of an attorney in connection with an event of default by KPC under this Agreement, or if either party brings an action or proceeding against the other party arising out of or concerning performance or interpretation of this Agreement, the prevailing party shall be entitled to recover from the other party its attorneys fees and costs.

XXIII. SURRENDER OF PREMISES AND REMOVAL OF PROPERTY.

A. Surrender of Premises. Upon termination or expiration of this Agreement, KPC shall surrender to the City the Premises and all keys therefor.

B. Conditions of Premises Upon Surrender. The Premises to be surrendered to City shall be surrendered in as good a condition as on the date of their acceptance by KPC, except for the effects of improvements, additions, alterations, and repairs made with the concurrence of City; property damage by fire and other perils insured in contracts or policies of fire, extended coverage, and vandalism; reasonable wear and tear, and acts of God.

C. Removal of Property. Prior to the expiration of this Agreement, or within sixty (60) days after termination in the event of an earlier termination of this Agreement, KPC shall remove from the Premises, at no cost or expense to the City, all personal property owned and placed in or on the Premises by KPC, its agents, invitees, employees, contractors or successors. In removing such personal property, KPC shall take due care to not damage or injure the Premises, and any such damage or injury shall be immediately repaired by the KPC to the City Manager's reasonable satisfaction, at KPC's sole cost and expense. Structural alterations, additions, and Tenant Improvements shall not be removed. In no event shall either party make any claim or demand upon the other, nor shall either party be liable for any

inconvenience, annoyance, disturbance, or loss of business arising out of such removal operation during such sixty (60) day period.

XXIV. NO WAIVERS.

No action other than a written document by the City Manager or the KPC Board President specifically so stating shall constitute a waiver by a party of any particular breach or default by the other. No such document shall waive a failure to fully comply with any term or condition of this Agreement not specifically referenced therein, irrespective of any knowledge any officer or employee of a party may have of such breach, default, or noncompliance. A party's failure to insist upon full performance of any provision of this Agreement shall not be deeded to constitute consent to or acceptance of such incomplete performance in the future.

XXV. REMEDIES CUMULATIVE.

The rights under this Agreement are cumulative; the failure to exercise promptly any right recognized hereunder shall not operate to forfeit any such right. The use of one remedy shall not be taken to exclude or waive the right to use another.

XXVI. OBLIGATION OF KPC LIMITED TO CORPORATION.

Any and all obligations of KPC under this Agreement are enforceable only against Kirkland Performance Center, a nonprofit corporation, and are not enforceable against nor do they impose any liability upon KPC's officers, directors, trustee, members, employees, or agents.

XXVII. ADDRESSES

Unless otherwise directed in writing, all notices and reports shall be in writing, and together with any payments, shall be delivered to City at the following address:

David Ramsay
City Manager
City of Kirkland
123 Fifth Avenue
Kirkland, Washington 98033-6189

and to KPC at the following address:

Dan Mayer
Interim Executive Director
Kirkland Performance Center
350 Kirkland Avenue
Kirkland, Washington 98033

Either party may change its address for receipt of reports, notices or payments without the formal amendment of this Agreement by giving the other party written notice of such change not less than fifteen (15) days prior to the effective date thereof.

XXVIII. TITLES OF SECTIONS.

The titles of section and subsections set forth herein are for convenience only, and do not in any way define, limit or construe the contents of any section.

XXIX. AMENDMENTS.

No change, alteration, modification, or addition to this Agreement shall be effective unless it is in writing and properly signed by both parties hereto.

XXX. DISPUTE RESOLUTION.

In the event a dispute arises as to whether the parties are complying with the terms of this Agreement, the parties agree to use the following dispute resolution procedure before pursuing any other remedy. First, either party may give notice to the other of the dispute and the City Manager and the KPC President or their designees will meet within three (3) City business days to attempt to resolve the dispute. If the dispute continues, either party may give written notice to the other and a Resolution Panel will be formed consisting of one member selected by the City Manager, one member selected by the KPC President, and a third member selected by the first two. The City shall pay any costs or fees associated with the member it selects. KPC shall pay any costs or fees associated with the member it selects. The City and KPC shall each pay one half of any costs or fees required for the third member. The parties agree to present the dispute to the Resolution Panel within twenty (20) calendar days after the written notice. The decision of the Resolution Panel will be announced within ten (10) City business days.

XXXI. ENTIRE AGREEMENT.

The parties hereto acknowledge that they have had the opportunity to have this Agreement reviewed by their respective legal counsel, and that the terms and conditions of this Agreement are not to be construed against either party on the basis of that party's having drafted the same. This Agreement, together with all of the exhibits attached hereto, embodies the entire Agreement of the parties hereto. There are no other understandings or agreements, written or oral, between the parties regarding the Premises except as expressly referenced herein.

IN WITNESS, WHEREOF, the authorized representatives of the parties hereto have executed this Agreement by affixing their signatures in the spaces below.

DATED this _____ day of _____, 2008.

KIRKLAND PERFORMANCE CENTER

By: _____
Dan Mayer, Interim Executive Director

Date:_____

By: _____
Doreen Marchione, Board of Directors President

Date: _____

THE CITY OF KIRKLAND

By: _____
David Ramsay, City Manager

Date: _____