

METROPOLITAN EXPOSITION RECREATION COMMISSION

Resolution No. 15-15 "A"

For the Purpose of Approving a Fundraising and Marketing Cooperative Agreement (Agreement) between the Metropolitan Exposition Recreation Commission (MERC) and Portland's Centers for the Arts Foundation, and Authorizing the Metro Deputy COO To Execute the Agreement on behalf of MERC.

WHEREAS, the Portland's Centers for the Arts Foundation (the Foundation)(formerly known as Friends of Portland Center for the Performing Arts) is a tax-exempt, nonprofit corporation that supports the mission and activities of Portland's Centers for the Arts (Portland's); and

WHEREAS, among other activities, the Foundation administers the Portland's Capital Campaign and Fund, as authorized by the Commission; and


WHEREAS, the Agreement between the Foundation and MERC expires on August 31st 2015; and

WHEREAS, Portland's staff believe that the Agreement with the Foundation is in the best interests of Portland's and therefore recommend approval of the attached Agreement.

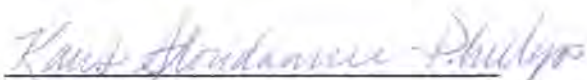
BE IT THEREFORE RESOLVED AS FOLLOWS:

1. That the Metropolitan Exposition Recreation Commission approves the Fundraising and Marketing Cooperation Agreement Between MERC and the Portland's Centers for the Arts Foundation, with the Agreement attached as Exhibit "A" modified to remove the pricing for Naming Rights for Unnamed Seats and delegating authority to the Executive Director for Portland's to approve appropriate seating prices and revising Section 5 of the Agreement to provide that the Executive Director of Portland's shall meet with the Foundation instead of MERC; and
2. The Metropolitan Exposition Recreation Commission authorizes the Metro Deputy COO to execute the agreement on behalf of MERC in the form as described above.

Passed by the Commission on August 5, 2015.

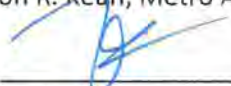


Chair



Secretary/Treasurer

Approved As to Form:
Alison R. Kean, Metro Attorney

By: 

Nathan A. S. Sykes
Deputy Metro Attorney

Exhibit A

FUNDRAISING AND MARKETING COOPERATION AGREEMENT BETWEEN MERC AND THE PORTLAND'S CENTERS FOR THE ARTS FOUNDATION

This Fundraising and Marketing Cooperation Agreement (hereinafter "Agreement") is between the Metropolitan Exposition Recreation Commission ("MERC"), a commission of Metro, and the Portland's Centers for the Arts Foundation ("P5F"), an Oregon nonprofit corporation.

RECITALS

- A. MERC administers and operates the Portland's Centers for the Arts ("P5"), which is comprised of the Keller Auditorium, the Arlene Schnitzer Concert Hall, and the Antoinette Hatfield Hall; and
- B. P5F is a tax-exempt, nonprofit corporation that supports the mission and activities of P5; and
- C. The parties wish to document the terms of their agreement to cooperate in the development of donors and community support for P5.

AGREEMENT

In exchange for the promises and other consideration set forth below, the parties, intending to be legally bound, agree as follows:

1. TERM.

The term of this Agreement shall be from September 1, 2015 until August 31, 2020, unless terminated sooner as provided herein.

MERC shall have the option to extend this Agreement for two (2) additional five-year periods. Sixty (60) days' written notice by MERC to P5F prior to the expiration of the Agreement shall be sufficient to exercise a renewal option.

2. MARKETING DUTIES OF P5F.

During the term of this Agreement, P5F shall use its best efforts to do the following:

- A. Develop general community support for P5, its mission, and its programs.
- B. Include on the P5F Board one member from the P5 Advisory Committee, who shall be chosen by mutual agreement between P5F and MERC and shall hold full voting privileges on the P5F Board.

- C. Include on the P5F Board the P5 Executive Director, who shall serve on the Board as an ex officio advisory member of the Board and who shall have no voting privileges.
- D. Defend, indemnify and hold Metro, MERC, the City of Portland, and their agents, elected and appointed officials, and employees (the “Indemnitees”) harmless from any and all claims, demands, damages, actions, losses, and expenses, including attorneys’ fees, arising out of or in any way connected with the P5 Executive Director’s performance of the duties of a P5F board member. In the event that P5F refuses or fails to defend as required by this Agreement, the Indemnitees may, at their sole option, settle or defend any claims and P5F shall, upon demand, pay the full costs of any settlement, judgment, or defense, including all expenses and attorneys’ fees.
- E. Maintain accurate membership and contribution files.
- F. Promote, enhance, educate, and support P5 through fundraising campaigns, soliciting, and obtaining grant funds.
- G. Coordinate and promote special events that will educate the public and promote public awareness of P5.
- H. Perform such other services to benefit P5 as agreed to by the parties, provided that P5F shall not take any action inconsistent with its status as a tax-exempt, non-profit corporation.
- I. Upon dissolution of P5F, distribute to MERC all restricted assets raised for the benefit of P5, all sums owed P5, cease using the name “Portland’s Centers for the Arts” and cease representing P5 in fundraising activities.
- J. Undertake the above activities at the expense of P5F, and in cooperation with P5 staff, except as specifically provided in this Agreement or as otherwise agreed to by the parties.

3. THE P5 CAPITAL CAMPAIGN AND FUND.

In addition to the duties required by paragraph 2 of this Agreement, P5F shall administer the P5 Capital Campaign and Fund (hereinafter “Capital Campaign”), as authorized by the MERC Commission in MERC Resolutions No. 99-50 and No. 00-01. P5F shall perform the following duties in the administration of the Capital Campaign:

- A. **Naming Rights for Unnamed Seats.** P5F shall use its best efforts to sell naming rights to the presently unnamed seats in the Arlene Schnitzer Concert Hall, the Newmark Theatre, and the Keller Auditorium. In the event that the MERC Commission approves adding seats in the Winningstad Theatre to the Capital Campaign, P5F shall also use its best efforts to sell naming rights to seats for the

amounts approved by the MERC Commission. The following prices shall be the prices for naming rights for presently unnamed seats in P5's theaters:

Arlene Schnitzer Concert Hall

Orchestra	\$750
Dress Circle	\$1,000
Mezzanine	\$500
First Balcony	\$250
Second Balcony	\$100

Keller Auditorium

Orchestra	\$750
Box Level	\$1,000
First Balcony	\$250
Second Balcony	\$100

Newmark Theatre

Orchestra	\$750
First Balcony	\$250
Second Balcony	\$100

- B. Other Naming Rights.** P5F may also identify naming rights purchasers for other naming rights (for example, naming P5). In the event that P5F identifies such a naming rights purchaser, P5F shall cooperate with MERC and with the City of Portland to ensure that the naming rights agreement complies with all applicable MERC and City of Portland policies, restrictions, and ordinances.
- C. Non-Exclusive Agreement.** P5F acknowledges and agrees that MERC has the right to contract with other contractors to market and sell naming rights, sponsorships, advertising and similar arrangements in which a person's name or an entity's name or logo is associated with P5 facilities. P5F's right to sell naming rights, as outlined in this Agreement, is non-exclusive.
- D. Naming Rights Agreements.** P5F shall provide MERC with a copy of each naming rights agreement proposed to be signed by a purchaser of naming rights at a P5 facility at least sixty (60) business days before the effective date of such agreement. MERC's copy of a proposed naming rights agreement shall specify all material terms and conditions of the agreement; provided, however, that the agreement may indicate that the purchaser's identity is anonymous, if requested by the purchaser. All naming rights agreements shall comply with all applicable MERC, Metro, and City of Portland policies, restrictions, ordinances and resolutions. P5F shall not accept any donation for naming rights that contains any restriction that would violate any law, ordinance, or Metro, MERC, or City of Portland policy.

E. Capital Campaign Account. P5F shall hold all funds received as a result of the sale of naming rights in an account (hereinafter the “Capital Campaign Account”), which may include an endowment account at the Oregon Community Foundation (“OCF”). MERC shall have the right in its reasonable discretion to approve the account. P5F shall have the following duties with respect to the Capital Campaign Account:

- 1) Oversight Committee. P5F shall establish an oversight committee (“Oversight Committee”) to monitor the safeguards, custodianship, and investment of the Capital Campaign Account. The Oversight Committee shall consist of four (4) P5F directors, one of which shall be the P5F Treasurer, and the P5 Executive Director.
- 2) Notice Before Withdrawals. P5F shall not withdraw any funds restricted for P5 from the Capital Campaign Account or permit any such withdrawal without first giving MERC at least ten (10) days’ prior written notice.
- 3) Change in Terms and Conditions. P5F shall notify MERC within ten calendar days of the effective date of any change in the terms and conditions associated with the Capital Campaign Account.
- 4) Annual Report. P5F shall provide MERC with an annual report identifying funds deposited in the Capital Campaign Account, funds disbursed from the Capital Campaign Account, and all available investment return information.
- 5) Disbursements. P5F shall disburse funds from the Capital Campaign Account for the sole purpose identified by the donor(s) of the funds. MERC shall submit a written request for disbursement to P5F, which request shall identify the capital project or operating requirement proposed to be funded, the cost of the project or operating requirement, and the date or anticipated date of completion of the project or operating requirement. The Oversight Committee shall review the disbursement request and decide whether to disburse funds for the identified capital project or operating requirement.

F. P5F’s Administrative Overhead and Fundraising Expenses. As permitted by this paragraph, P5F shall have the right to retain, for payment of administrative overhead and fundraising expenses, a percentage of each donor contribution before the donor contribution is deposited into the Capital Campaign Account. P5F shall inform donors of this retained fee. P5F shall have the right to the following percentage of each donor contribution:

- 1) Seat Naming Rights. P5F may retain fifteen percent (15%) of the proceeds of a donor’s contribution to name a seat or seats in a P5 theater, as identified in paragraph 3(A), above.

- 2) Naming Rights Other Than Seat Naming Rights.
 - a. For contributions of \$250,000 or less to name a building or portion of a building other than a seat or seats, P5F may retain ten percent (10%) of the proceeds.
 - b. For contributions in excess of \$250,000 to name a building or portion of a building other than a seat or seats, P5F and MERC will negotiate an appropriate administrative overhead and fundraising expense fee.

G. MERC Commission Option To Discontinue Capital Campaign. The MERC Commission may discontinue the Capital Campaign at any time by adoption of a duly adopted resolution. In the event that the MERC Commission discontinues the Capital Campaign, P5F shall cease its efforts to secure new donors. The naming agreements existing as of the effective date of the resolution shall, however, be honored by P5F and MERC, and the existing balance in the Capital Campaign Fund shall continue to be used to fund P5 capital projects and/or operating requirements until any such balance has been depleted.

4. MERC'S DUTIES.

- A. **P5 Name.** MERC grants P5F permission to use the P5 name and the names of all P5 theaters in P5F's fundraising materials.
- B. **Staff Assistance.** MERC shall provide P5 staff assistance equivalent to forty (40) hours per month, under the supervision and direction of the P5 Executive Director, to assist P5F in performing its duties and carrying out its objectives.
- C. **Executive Director as Liaison.** The P5 Executive Director shall act as a liaison between P5 and P5F in order to coordinate staff, facilities, and functions of P5 and P5F.
- D. **Gift Shop Discounts.** MERC shall provide gift shop discounts for P5F members for items on which discounts are made available to other groups.
- E. **Designated Space in P5 Facilities.** MERC shall provide space at P5 facilities to help P5F perform its duties, including the following:
 - 1) Meeting space, as available, for the P5F Board and P5F committees for use on a regularly scheduled basis.
 - 2) One office space for P5F employees; provided, however, that P5F will pay all costs associated with any equipment, supplies and telephones used in such office.

3) Space for signs and other publicity in P5 facilities relating to P5F, as the parties shall agree.

F. Space For P5F Sponsored Activities. MERC shall provide P5F use of P5 facilities for events sponsored by P5F as agreed to by the parties. The nature and dates of these events shall be determined by the parties' mutual agreement and in coordination with the P5 Executive Director.

G. Ex Officio Board Member. MERC shall provide the P5 Executive Director to serve as an ex officio member of the P5F Board with no voting privileges.

5. RELATIONSHIP BETWEEN MERC AND P5F.

A. MERC and P5F shall meet at least once each calendar quarter to set goals, evaluate past and pending projects, and review financial matters of P5F.

B. P5F shall provide MERC with a copy of its annual financial statement no later than ten (10) days after the statement is completed.

C. Fundraising goals, methods and timing for specific P5 projects will be determined by agreement between P5F and P5. The nature and extent of P5F's participation in any given project will be determined solely by P5F.

D. Individuals hired by P5F shall be independent contractors or employees of P5F and shall not be employees of P5, MERC or Metro. P5F shall pay all necessary employment and payroll taxes for the individuals whom it employs.

E. It is the intention of the parties that P5F not be a MERC or Metro component unit or affiliated organization as those terms are used by the Governmental Accounting Standards Board (GASB). In the event P5F is determined to be an affiliated or component organization under GASB standards, the parties agree to negotiate and implement such additional accounting and fiscal control measures as may reasonably be required by MERC or Metro.

F. It is understood and agreed between the parties that nothing in this Agreement shall constitute or be construed to be an employment, partnership, joint venture, or joint employer relationship between MERC or P5 on the one part and P5F on the other part.

6. ASSIGNMENT.

This Agreement is binding on each party, its successors, assigns, and legal representatives and may not, under any circumstance, be assigned or transferred by either party.

7. INDEMNITY

P5F shall indemnify and hold MERC, Metro, the City of Portland, and their agents, employees and appointed and elected officials harmless from any and all claims, demands, damages, actions, losses and expenses, including attorney's fees, arising out of or in any way connected with its performance of this Agreement, or with any patent infringement or copyright claims arising out of the use of P5F's designs or other materials by MERC and for any claims or disputes involving P5F. MERC shall cooperate with P5F in the investigation, defense, and settlement of all claims.

7.5 INSURANCE

P5F shall purchase and maintain at the P5F's expense, the following types of insurance, covering the P5F, its employees, and agents:

- (a) The most recently approved ISO (Insurance Services Office) Commercial General Liability policy, or its equivalent, written on an occurrence basis, with limits not less than \$1,000,000 per occurrence and \$1,000,000 aggregate. The policy will include coverage for bodily injury, death property damage, personal injury, contractual liability, premises and products/completed operations. Contractor's coverage will be primary as respects Metro;
- (b) Workers' Compensation insurance meeting Oregon statutory requirements including Employer's Liability with limits not less than \$500,000 per accident or disease; and
- (c) Directors and Officers insurance with limits of not less than \$1,000,000 per claim or occurrence.

Metro, its elected officials, departments, employees, and agents shall be named as ADDITIONAL INSUREDS on Commercial General Liability and Automobile policies. P5F agrees to waive subrogation against Metro.

P5F shall provide to Metro 30 days notice of any material change or policy cancellation.

P5F shall provide Metro with a Certificate of Insurance complying with this article upon return of the P5F signed agreement to Metro. Certificate of Insurance shall identify the Metro contract number.

8. TERMINATION

This Agreement may be terminated by mutual consent of the parties. In addition to the foregoing and the right of P5F to terminate this Agreement as provided above in Section 7(C), MERC may terminate this Agreement by giving P5F seven (7) days' prior written notice of intent to terminate, without waiving any claims or remedies it may have against P5F. Termination shall not excuse payment for expenses properly incurred prior to notice of termination, but neither party shall be liable for indirect or consequential damages arising from termination under this paragraph.

9. RIGHT TO WITHHOLD PAYMENT.

MERC shall have the right to withhold payments due to P5F such sums as necessary, in MERC’s sole opinion, to protect MERC against any loss, damage, or claim which may result from P5F’s performance or failure to perform under this Agreement or the failure of P5F to make proper payment to any of its suppliers or subcontractors.

10. PROJECT INFORMATION.

P5F shall share all information related to its activities under this Agreement and fully cooperate with MERC. P5F shall not release any information or news about the activities performed under this Agreement without the prior and specific written approval of MERC.

11. NON-DISCRIMINATION.

Both parties agree not to unlawfully discriminate against any person because of race, creed, ancestry, sexual orientation, disability, color, sex, marital status, age, religion or national origin.

12. STATE AND FEDERAL LAW CONSTRAINTS.

Both parties shall comply with the public contracting provisions of ORS chapter 279A and 279B, to the extent those provisions apply to this Agreement. All such provisions required to be included in this Agreement are incorporated herein by reference.

13. SITUS.

The situs of this Agreement is Portland, Oregon. Any litigation over this Agreement shall be governed by the laws of the State of Oregon and shall be conducted in the Circuit Court of the State of Oregon for Multnomah County, or, if jurisdiction is proper, in the U.S. District Court for the District of Oregon.

14. NO WAIVER OF CLAIMS.

The failure to enforce any provision of this Agreement shall not constitute a waiver by MERC of that or any other provision.

15. MODIFICATION.

Notwithstanding and succeeding any and all prior agreement(s) or practice(s), this Agreement constitutes the entire Agreement between the parties, and may only be expressly modified in writing(s), signed by both parties.

**PORTLAND’S CENTERS FOR THE
ARTS FOUNDATION**

**METROPOLITAN EXPOSITION-
RECREATION COMMISION**

By:_____

By:_____

Title: _____

Title: _____

Date: _____

Date: _____

MERC STAFF REPORT

Agenda Item: Approving a fundraising and marketing cooperation agreement between MERC and the Portland's Centers for the Arts Foundation, and authorizing the Metro Deputy COO to execute the agreement on behalf of MERC.

Resolution No.: 15-15

Date: August 5th, 2015

Presented by: Robyn Williams

Background/Analysis:

In fall, 1993 MERC entered into a general Agreement with the Friends of the Portland Center for the Performing Arts for a one year term ending September 1994; the parties also entered into a Marketing Services Agreement for \$25,000 to support start-up activities of the tax exempt, non-profit corporation. The Agreement was amended to continue through June 30, 1998 and to provide continuing support including \$2500 to the Friends each fiscal year. In 1999, the Agreement was extended two additional years and amended to allow the Friends to establish a PCPA Capital Fund and Campaign. In 2000 the Agreement was extended to June 30, 2002 and amended to allow the Friends to recoup reasonable organization and administrative expenses up to 10% of gifts received for the Capital Fund. In July 2002, the Agreement was extended to June 30, 2005.

In June 2005, the Friends and MERC entered into a letter of agreement extending the terms of the 1993 agreement, as amended, through August 31, 2005. In 2005 both parties wished to document the terms of their agreement to allow the Friends to continue it's advocacy and fundraising for capital projects for the Portland Center for the Performing Arts. That agreement went through August 31, 2007 and had four (4) two year options for renewal-which were exercised by written notice by MERC. That agreement expires August 31, 2015.

The Portland's Centers for the Arts Foundation (formerly the Friends of the Portland Center for the Performing Arts) and Portland's desire to continue this agreement until August 31, 2020 with two (2) additional five year periods as a renewal option.

Substantive changes in the agreement include:

- Five year term (VS 2 years) with two additional extensions of 5 years (VS four additional extensions of two years)
- Updated pricing for the Sell a Seat Campaign. (Pricing has not increased in 10 years.)
- Foundation retains 15% (VS 10%) and 10% of naming contributions of \$250,000 or less (VS \$50,000) for administrative costs. This has never increased and is in line with reasonable holdbacks for administration.

- Eliminates \$2500 annual support to the Foundation by P5. P5 handles their accounting so there is no need to provide this support.

Fiscal Impact:

With no development department, Portland'5 does not have the infrastructure necessary to fundraise for its capital needs. The Capital Fund and ongoing fundraising efforts carried out by the Portland'5 Foundation has the potential to provide on-going funding of otherwise unfunded capital projects and enhancements of the performing arts facilities.

Recommendation:

Staff recommends approval of Resolution 15- 15, Approving a fundraising and marketing cooperation agreement between MERC and the Portland'5 Centers for the Arts Foundation, and authorizing the Metro Deputy COO to execute the agreement on behalf of MERC.