

**METROPOLITAN EXPOSITION-RECREATION COMMISSION**

**Resolution No. 05-21**

**For the Purpose of Approving a Fundraising and Marketing Cooperation Agreement Between MERC and Friends of the Performing Arts Center, and Authorizing the MERC General Manager to Execute the Agreement on behalf of MERC.**

WHEREAS, Friends of the Performing Arts Center ("Friends") is a tax-exempt, nonprofit corporation that supports the mission and activities of PCPA; and

WHEREAS, among other activities, Friends administers the PCPA Capital Campaign and Fund, as authorized by the Commission in Resolution No. 99-50 and Resolution No. 00-01; and

WHEREAS, the agreement between Friends and MERC (originally approved by Resolution No. 93-14, and amended as approved by Resolution Nos. 94-70, 97-12, 98-37, 99-50, 00-01, and 02-27) expired on June 30, 2005; and

WHEREAS, Friends and MERC entered into a letter of agreement extending the terms of the 1993 agreement, as subsequently amended, through August 31, 2005 in order to permit the parties to negotiate the terms of a new agreement; and

WHEREAS, PCPA staff negotiated the terms of the attached agreement with Friends, and recommends 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 Friends of the Performing Arts Center, in a form substantially similar to the attached Exhibit "A"; and
2. That the Metropolitan Exposition-Recreation Commission authorizes the MERC General Manager to execute the agreement on behalf of MERC.

Passed by the Commission on August 24, 2005.

WITHDRAWN  
Chair

Approved as to Form:  
Daniel B. Cooper, Metro Attorney

By: \_\_\_\_\_

\_\_\_\_\_  
Secretary-Treasurer

## MERC STAFF REPORT

**Agenda Item:** For the Purpose of Approving a Fundraising and Marketing Cooperation Agreement Between MERC and Friends of the Performing Arts Center, and Authorizing the MERC General Manager to Execute the Agreement on behalf of MERC.

### **Resolution No. 05-21**

**Date:** August 24<sup>th</sup>, 2005

**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 order to permit the parties to negotiate a new agreement that will allow the Friends to continue it's advocacy and fundraising for capital projects for the Portland Center for the Performing Arts.

### **Fiscal Impact:**

With no development department, PCPA does not have the infrastructure necessary to fundraise for its capital needs. The Capital Fund and Campaign carried out by the Friends of the Portland Center for the Performing Arts 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 05-21 for the purpose of Approving a Fundraising and Marketing Cooperation Agreement between the MERC and the Friends of the Portland Center for the Performing Arts, and authorizing the MERC General Manager to execute the agreement on behalf of MERC.

## **FUNDRAISING AND MARKETING COOPERATION AGREEMENT BETWEEN MERC AND THE FRIENDS OF THE PERFORMING ARTS CENTER**

This Fundraising and Marketing Cooperation Agreement (hereinafter "Agreement") is between the Metropolitan Exposition-Recreation Commission ("MERC"), a commission of Metro, and the Friends of the Performing Arts Center ("FPAC"), an Oregon nonprofit corporation.

### **RECITALS**

WHEREAS, MERC administers and operates the Portland Center for the Performing Arts ("PCPA"), which is comprised of the Keller Auditorium, the Arlene Schnitzer Concert Hall, and the New Theater Building; and

WHEREAS, FPAC is a tax-exempt, nonprofit corporation that supports the mission and activities of PCPA; and

WHEREAS, the parties wish to document the terms of their agreement to cooperate in the development of donors and community support for PCPA.

### **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, 2005 until August 31, 2007, unless terminated sooner as provided herein.

MERC shall have the option to extend this Agreement for four (4) additional two-year periods. Sixty (60) days' written notice to FPAC by MERC prior to the expiration of the Agreement shall be sufficient to exercise a renewal option.

#### **2. MARKETING DUTIES OF FPAC.**

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

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

- C. Include on the FPAC Board the PCPA 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 PCPA Executive Director's performance of the duties of a FPAC board member. In the event that FPAC refuses or fails to defend as required by this Agreement, the Indemnitees may, at their sole option, settle or defend any claims and FPAC 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 PCPA through fundraising campaigns, soliciting, and obtaining grant funds.
- G. Coordinate and promote special events that will educate the public and promote public awareness of PCPA.
- H. Perform such other services to benefit PCPA as agreed to by the parties, provided that FPAC shall not take any action inconsistent with its status as a tax-exempt, non-profit corporation.
- I. Upon termination of this Agreement, distribute to MERC all restricted assets raised for the benefit of PCPA, all sums owed PCPA, cease using the name "Portland Center for the Performing Arts," and cease representing PCPA in fundraising activities.
- J. Undertake the above activities at the expense of FPAC, and in cooperation with PCPA staff, except as specifically provided in this Agreement or as otherwise agreed to by the parties.

### 3. **THE PCPA CAPITAL CAMPAIGN AND FUND.**

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

- A. **Naming Rights for Unnamed Seats.** FPAC 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 Theater to the Capital

Campaign, FPAC 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 PCPA theaters:

**Arlene Schnitzer Concert Hall**

Main Floor, Dress Circle, Mezzanine	\$500
Lower Balcony	\$400
Upper Balcony	\$300

**Newmark Theatre**

Main Floor	\$500
First Balcony	\$400
Second Balcony	\$300

**Keller Auditorium**

Main Floor	\$500
First Balcony	\$400
Second Balcony	\$300

- B. **Other Naming Rights.** FPAC may also identify naming rights purchasers for other naming rights (for example, naming PCPA). In the event that FPAC identifies such a naming rights purchaser, FPAC 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.** FPAC acknowledges and agrees that MERC has the right to contract with other contractors for marketing and selling naming rights. FPAC's right to sell naming rights at the PCPA facilities as outlined in this Agreement is non-exclusive.
- D. **Naming Rights Agreements.** FPAC shall provide MERC with a copy of each naming rights agreement proposed to be signed by a purchaser of naming rights at a PCPA facility at least five (5) 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. FPAC 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.** FPAC 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. FPAC shall have the following duties with respect to the Capital Campaign Account:

- 1) Oversight Committee. FPAC 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) FPAC directors, one of which shall be the FPAC Treasurer, and the PCPA Executive Director.
- 2) Notice Before Withdrawals. FPAC shall not withdraw any funds restricted for PCPA 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. FPAC 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) Quarterly Report. FPAC shall provide MERC with a quarterly report identifying funds deposited in the Capital Campaign Account, funds disbursed from the Capital Campaign Account, and all available investment return information.
- 5) Disbursements. FPAC shall disburse funds from the Capital Campaign Account for the sole purpose of funding capital projects or operating requirements at PCPA. MERC shall submit a written request for disbursement to FPAC, 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. FPAC's Administrative Overhead and Fundraising Expenses. As permitted by this paragraph, FPAC 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. FPAC shall inform donors of this retained fee. FPAC shall have the right to the following percentage of each donor contribution:

- 1) Seat Naming Rights. FPAC may retain ten percent (10%) of the proceeds of a donor's contribution to name a seat or seats in a PCPA theater, as identified in paragraph 3(A), above.

2) Naming Rights Other Than Seat Naming Rights.

- a. For contributions of \$50,000 or less to name a building or portion of a building other than a seat or seats, FPAC may retain ten percent (10%) of the proceeds.
- b. For contributions in excess of \$50,000 to name a building or portion of a building other than a seat or seats, FPAC 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, FPAC 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 FPAC and MERC, and the existing balance in the Capital Campaign Fund shall continue to be used to fund PCPA capital projects and/or operating requirements until any such balance has been depleted.

4. MERC'S DUTIES.

- A. PCPA Name. MERC grants FPAC permission to use the PCPA name and the names of all PCPA theaters in FPAC's fundraising materials.
- B. Staff Assistance. MERC shall provide PCPA staff assistance equivalent to forty (40) hours per month, under the supervision and direction of the PCPA Executive Director, to assist FPAC in performing its duties and carrying out its objectives.
- C. Executive Director as Liaison. The PCPA Executive Director shall act as a liaison between PCPA and FPAC in order to coordinate staff, facilities, and functions of PCPA and FPAC.
- D. Gift Shop Discounts. MERC shall provide gift shop discounts for FPAC members for items on which discounts are made available to other groups.
- E. Reimbursement of Costs and Expenses. MERC shall reimburse FPAC for costs and expenses incurred in carrying out the activities required by this Agreement in an amount not to exceed \$2,500 per each MERC fiscal year. FPAC shall submit invoices to MERC documenting such costs and expenses. MERC shall pay such invoices within 30 days of receipt.

- F. **Designated Space in PCPA Facilities.** MERC shall provide space at PCPA facilities to help FPAC perform its duties, including the following:
- 1) Meeting space, as available, for the FPAC Board and FPAC committees for use on a regularly scheduled basis.
  - 2) One office space for FPAC employees; provided, however, that FPAC will pay all costs associated with any equipment, supplies and telephones used in such office.
  - 3) Space for an information booth for FPAC in PCPA facilities, as agreed to by the PCPA Executive Director and as appropriate under the circumstances. However, all costs of running the booth shall be paid by FPAC.
  - 4) Space for signs and other publicity in PCPA facilities relating to FPAC, as the parties shall agree.
- G. **Space For FPAC Sponsored Activities.** MERC shall provide FPAC use of PCPA facilities for events sponsored by FPAC 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 PCPA Executive Director.
- H. **Ex Officio Board Member.** MERC shall provide the PCPA Executive Director to serve as an ex officio member of the FPAC Board with no voting privileges.

5. **RELATIONSHIP BETWEEN MERC AND FPAC.**

- A. MERC and FPAC shall meet at least once each calendar quarter to set goals, evaluate past and pending projects, and review financial matters of FPAC.
- B. FPAC 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 PCPA projects will be determined by agreement between FPAC and PCPA. The nature and extent of FPAC's participation in any given project will be determined solely by FPAC.
- D. Individuals hired by FPAC shall be independent contractors or employees of FPAC and shall not be employees of PCPA, MERC or Metro. FPAC shall pay all necessary employment and payroll taxes for the individuals whom it employs.
- E. It is the intention of the parties that FPAC 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 FPAC 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 PCPA on the one part and FPAC 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 AND INSURANCE.**

- A. FPAC 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 FPAC's designs or other materials by MERC and for any claims or disputes involving FPAC. MERC shall cooperate with FPAC in the investigation, defense, and settlement of all claims.
- B. FPAC shall comply with ORS 656.017, which requires it to provide Workers' Compensation coverage for all its subject workers. FPAC shall provide MERC with certification of Workers' Compensation insurance including employer's liability. If FPAC has no employees and will perform the work without the assistance of others, a certificate to that effect may be provided.
- C. If requested by MERC, FPAC shall either procure at its sole cost and expense a special events liability policy, in a form acceptable to MERC, with coverage for claims arising from an FPAC event or terminate this Agreement on not less than seven (7) days' advance written notice to MERC. MERC shall also have the right to procure a special events liability policy at its own expense.

**8. TERMINATION.**

This Agreement may be terminated by mutual consent of the parties. In addition to the foregoing and the right of FPAC to terminate this Agreement as provided above in Section 7(C), MERC may terminate this Agreement by giving FPAC seven (7) days' prior written notice of intent to terminate, without waiving any claims or remedies it may have against FPAC. 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 FPAC such sums as necessary, in MERC's sole opinion, to protect MERC against any loss, damage, or claim which may result from FPAC's performance or failure to perform under this Agreement or the failure of FPAC to make proper payment to any of its suppliers or subcontractors.

**10. PROJECT INFORMATION.**

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

**11. 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.

**12. 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.

**13. 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.

**14. 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.

**FRIENDS OF THE PERFORMING ARTS  
CENTER**

**METROPOLITAN EXPOSITION-  
RECREATION COMMISSION**

By: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_