

AGENDA
CITY OF BROOKINGS
PARKS AND RECREATION COMMISSION MEETING
Council Chamber - 898 Elk Drive
January 22, 2009 - 7:00 pm

- I. CALL TO ORDER**
- II. PLEDGE OF ALLEGIANCE**
- III. ROLL CALL**
- IV. APPROVAL OF MINUTES**
 - A. Minutes of December 18, 2008
- V. PUBLIC APPEARANCES**
- VI. REGULAR AGENDA**
 - A. Capella – Gary Milliman
- VII. INFORMATION UPDATES/DISCUSSION ITEMS**
 - A. Easy Manor Park – Chair Benoit
 - B. Lower Stout Park – Commissioner Parrish
- VIII. COMMISSIONER REPORTS/COMMENTS**
- VIII. ADJOURNMENT**
 - A. Next meeting February 26, 2009

MINUTES
BROOKINGS PARKS AND RECREATION COMMISSION
December 18, 2008

CALL TO ORDER

Chair Benoit called the meeting to order at 7:00 pm followed by the Pledge of Allegiance.

ROLL CALL

Present: Commissioners Ken Barkema, Patricia Brown, Deborah Dudley, Frances Hartmann, Tony Parrish, Don Vilelle, and Chair Michelle Benoit.

Also present: John Cowan Public Works Director

APPROVAL OF MINUTES

- A. **Motion made by Commissioner Parrish to approve the minutes of November 13, 2008 as written; motion seconded and Commission voted, the motion carried unanimously.**

PUBLIC APPEARANCES

None

REGULAR AGENDA

- A. Capella – Tony Parrish advised that the Capella opening ceremonies were very nice and another public meeting is to be scheduled for January. Commissioner Dudley suggested the Capella be open during Natures Coastal Holiday, but was advised the Capella and area will not be ready until springtime. Capella signage on Highway 101 is in process.
- B. Working with the Homeless Coalition to address the use of Azalea Park by homeless persons – Commissioner Dudley advised that an area of Azalea Park is being used by homeless people, tree branches are being torn from the trees and debris has accumulated in the area; wondered if there is a possibility of creating a tent city where homeless people could camp or to educate the homeless on using the area responsibly. Susan Brown, Chair of the Homeless Coalition appeared and advised that they do not have the capability to have a tent city at this time anywhere in Curry County and suggested attendance at the next Homeless Coalition meeting to address issues concerning educating the homeless on using the area responsibly.

INFORMATION UPDATES/DISCUSSION ITEMS

- A. *Easy Manor Park* – Chair Benoit advised that we are still waiting on grant paperwork from the state. City Manager Gary Milliman has contacted the state to find out status of grant.
- B. *Lower Stout Park* – Commissioner Parrish advised that the engineers' report was positive and that the committee will next meet with the City Manager on December 30th to determine how to finance park landscape and art projects.

COMMISSIONER REPORTS/COMMENTS

Commissioner Parrish – March of the Santas was successful.

Commissioner Hartmann – Natures Coastal Holiday at Azalea Park and Stout Mountain Railroad were both very nice this year.

Commissioner Vilelle – has received several positive comments on the Chetco Point Trail.

ADJOURNMENT

With no further business before the Commission, the meeting adjourned at 7:22 pm. Next meeting scheduled for January 22, 2009.

Respectfully submitted,

Michelle Benoit, Chair
(approved at January 22, 2009 meeting)



MEMORANDUM

Office of the City Manager

GARY MILLIMAN
City Manager

TO: Capella Committee _
Cc: Parks and Recreation Commission

DATE: January 14, 2009

SUBJECT: Capella Update/Meeting

Last week, staff met with Elmo Williams and Ted Fitzgerald concerning the Capella transition. Following are notes from that meeting.

1. Construction work on the Capella is not complete. It is anticipated that construction will be completed this week.
2. After completion of all construction, a "walk through" of the building will be arranged with staff. Commissioners will be invited. The walk through is intended to familiarize staff with the buildings electrical system, surveillance camera system, etc.
3. In February, we propose to host an event at the Capella to organize a volunteer support group. Staff will need to work with the Committee to develop an invitation list. Staff provided an "interest form" which was distributed during the open house. Williams recalls that the form was distributed to interested persons, but does not recall the disposition of any completed forms.
4. Williams will contact one of the local performing arts groups to determine if they would be interested in managing the facility.
5. In the interim, the City will add the Capella to its existing Parks Use Permit application. We need to establish a use fee.
6. Accounts Clerk Rhonda Gardener (who handles the Parks Use Permits) is researching the development of an "events package" which would include information on local wedding/event planners, florists, etc. and could be provided to people interested in renting the facility.
7. There was some discussion concerning the possibility of the City entering an agreement with a private business (i.e. and event planner, florist, motel) to manage events. Williams had no objection to this approach.
8. In the discussion, there are really two different issues to be addressed. One is managing special events at the facility. The second is Williams's vision that the facility be open to the general public without fee every day.
9. A Committee meeting is needed. Joyce will be contacting you to arrange.



MEMORANDUM

Office of the City Manager

GARY MILLIMAN

City Manager

TO: Mayor and Council
Cc: Parks and Recreation Commission

DATE: December 24, 2008

SUBJECT: Capella Agreement

In a recent meeting with Elmo Williams I learned...for the first time...of an agreement document executed in October, 2005, by then Mayor Pat Sherman dealing with the transition of ownership of the Capella.

I now have a copy of that agreement. A review of the City Council minutes for the January, 2005, meeting indicates that the City Council authorized Williams to undertake the project, and for the City to accept the project upon completion. There is no mention of authorization for the Mayor to enter into an agreement in the minutes of the January, 2005, City Council meeting or any other City Council meeting.

The subject agreement provides that:

"...city will accept and assume responsibility for all utilities and maintenance of capela and agrees to operate capela in accordance with the intent of its creation, namely making it open to the public during daylight hours at no charge, and for special occasions at night, subject to a reasonable rental fee."

This provision has been interpreted by Williams and some others as a commitment by the City to staff the operation of the Capella and substantially alters current thinking on the operation of the Capella. I have been working with a Committee of the Parks and Recreation Commission to develop a transition plan which would include the formation of a non-profit organization to operate and manage the Capella. I have proposed that the Commission recommend to the Council that the City issue a request for proposals from local non-profit organizations to determine if there is an existing non-profit that would be willing to assume this function.

The effort to enlist volunteers to assume operation of the Capella is consistent with City Manager Leroy Blodgett's staff report to the City Council of January 4, 2005, which reads:

"Mr. Williams has indicated that the facility would be maintained by volunteers."

According to a Curry Coastal Pilot story dated January 12, 2005, discussing volunteer operation and maintenance of the Capella:

"Karolyn Pieren told the Council her husband, Robert, who does building and landscape maintenance for area shopping centers, has offered to take care of the chapel."

I have written a letter to the Pierens to determine if they are still interested.

Today I received a letter from Williams stating:

"It's important that we establish a work routine for the Capella soon. As of now the Capella is locked up. Numerous people visit and are frustrated because their inspection is a disappointment."

Williams also recently told me that Blodgett and Sherman had "promised" that the City would install a caretaker trailer in the park to provide security for the Capella. There is no written record of such a commitment.

I will be bringing the matter of seeking to enlist a non-profit organization to assume the operation of the Capella back to the Parks and Recreation Commission at their January meeting. In the interim, we simply do not have the staff resources to oversee the daily operation of the Capella (i.e. "open during daylight hours) in a responsible way.

AGREEMENT REGARDING CAPELA CONSTRUCTION

DATE: 9-27-05

PARTIES

Elmo Williams(Builder)

City of Brookings (City)

THIS AGREEMENT made this 10th day of October, 2005 between Elmo Williams, (hereinafter referred to as "Builder") and the City of Brookings., (hereinafter referred to as "City").

This document memorializes the agreement between the parties regarding the rights and duties of the parties relating to the construction by builder, at Builder's sole expense, of a structure for the public use of contemplation and gatherings in Azalea Park, a city park. The structure, for purposes of this agreement is called the "capela" and the intent of both parties is that the building will be donated in its entirety to the city for specific uses after completion of construction

- 1. AGREEMENT TO BUILD.** Builder agrees to build the structure to the specifications submitted to and approved by the city, and meet or exceed all relevant building codes as directed by city planning and building departments.
- 2. AGREEMENT TO ACCEPT STRUCTURE FOR USE.** City agrees to accept the structure as completed in accordance with submitted and accepted plans and specifications.
- 3. AGREEMENT TO ASSUME RESPONSIBILITY FOR STRUCTURE.** City agrees that, upon completion of structure, city will accept and assume responsibility for all utilities and maintenance of capela and agrees to operate capela in accordance with the intent of its creation, namely making it open to the public during daylight hours at no charge, and for special occasions at night, subject to a reasonable rental fee.
- 3. DUTIES OF PARTIES.** Builder agrees to employ a licensed general contractor for construction of the capela, and to follow the plans and specifications as submitted to and approved by the city of Brookings. City agrees to accept responsibility for capela in a timely manner upon completion of construction by Builder.

4. TERMINATION: This agreement may be terminated by either party prior to construction being commenced by Builder.

5. ASSIGNMENT: Builder agrees that this agreement will inure to the benefit of any successor in interest to Builder, in the event that Builder should not be able to complete construction oversight personally.

6. GOVERNING LAW: This Agreement shall be construed, interpreted and applied in accordance with the laws of the state of Oregon.

7. INDEMNIFICATION: Builder agrees to indemnify, protect and save City harmless from all loss, damage, cost and expense that Builder may sustain or from which City shall become liable, resulting from death or injury to persons or loss or destruction of or damage to property, which may be caused by Builder and City agrees to indemnify, protect and save Builder harmless from all loss, damage, cost and expense that City may sustain or from which Builder shall become liable, resulting from death or injury to persons or loss or destruction of or damage to property, which may be caused by City.

8. WORKMEN'S COMPENSATION: Builder is responsible for providing its own employees with adequate Workmen's Compensation Insurance.

9. NOTICES: Notices from one party hereto to the other relative to this contract shall be deemed delivered if and when mailed to the address of the party to whom said notice is given first appearing herein; in all cases, five days from the date of mailing shall be deemed a reasonable notice.

10. ATTORNEY'S FEES: If litigation is instituted with respect to this agreement, the prevailing party shall be entitled to recover from the losing party, in addition to all other sums and allowable costs, its reasonable attorney fees, both in preparation for and at trial and any appeal or review, such amount to be set by the court before which the matter is heard.

11. INTEGRATION: This agreement comprises the full and complete agreement between the parties regarding the above-referenced project and supersedes all prior written and oral negotiations and agreements with respect to the project. Any modifications, changes, additions or deletions to this agreement must be approved by both parties in writing.

SIGNATURES

DATED: 9-27-05

Builder

Elmo Williams
Elmo Williams

City of Brookings

Pat Sherman 10/18/05
By:

CITY OF BROOKINGS



STAFF REPORT

Date: January 4, 2005
To: Mayor Sherman & City Councilors
From: Leroy Blodgett, City Manager
Subject: Elmo Williams' request

REPORT

Approximately five months ago Elmo Williams proposed to the City Parks & Recreation Commission to build a chapel in Azalea Park as a tribute to his deceased wife Lorraine. Parks & Rec. Commission expressed an interest in the project and instructed Mr. Williams to gather more information and preliminary design for their consideration. Mr. Williams then traveled to Arkansas to meet with the architect and made arrangements for them to visit the proposed site. Mr. Williams ask the City Manager for permission, which was granted, to remove the brush and berry vines from the site so the architect could do a thorough site inspection and get elevations.

Mr. Williams then requested permission of the Parks & Rec. Commission to proceed with construction of the project. On December 16, 2004, the Commission held a meeting to listen to Mr. William's request and receive public input. After much discussion and public input the Commission decided to refer the issue to City Council without any recommendation. Mr. Williams will be at the January 10, 2005 council meeting to present his request.

Below are some of the concerns:

Church/State issues:

The term "chapel" has raised many concerns. The building will actually be used as a quiet place for meditation and to hold small concerts, weddings and other events. The facility could be called anything such as pavilion and some people may feel better. I have checked with our City Attorney and he informed me that there is no Church/State issue, but he also suggested a term for the building that was less related to religious use.

Maintenance & Vandalism:

Mr. Williams has indicated that the facility would be maintained by volunteers. Much of the maintenance of Azalea Park is accomplished with volunteer labor and money. We hope that is the case with the proposed facility. However, it may not be wise to count totally on volunteerism for long term maintenance and repair of the facility. Much of the facility will be constructed with glass making the potential vandalism repairs more expensive. Assuming the City spent an average of 2 days per month on maintenance and

repair the labor cost would be approximately \$4,000 per year. Material for repairs is difficult to estimate, but to be safe we may figure up to \$1,000 per year. With these assumptions the annual cost would be approximately \$5,000.

Land Use:

The Public Open Space zone allows for many recreational and public uses. The proposed facility is not specifically listed as an allowed use; however it would be impossible to list every potential use that might be in a park. For example, a food concession or a gazebo is not listed as a permitted use, but is considered part of a public park. The same could be considered for the proposed facility.

Long Term Commitment:

Mr. Williams has not requested a long term commitment from the City to maintain and preserve the facility. Even if there is not a written commitment, in the future there may still be a community obligation. An example is the Bankus fountain. In that case there was no written commitment to preserve the fountain, however, when the issue came up to remove it for highway improvements the Commission felt the "memorial" should remain and if the highway needed more room it should be relocated in the same area with a similar design. If the project is approved I suggest there be a written agreement that allows the City to remove, modify or relocate the facility if deemed necessary in the future.

Does it belong in Azalea Park?

This is probably the most difficult question to answer. It is probably also the most important question and the basis for a final decision. The answer is based on opinion, not any specific criteria or fact. There seems to be many different opinions on this subject.

STAFF RECOMMENDATION

Because the basis of a final decision is mostly based on the question of whether the facility belongs in the park staff is not prepared to make a recommendation. If it is approved staff will review plans to make sure it meets building codes and conditions of approval.

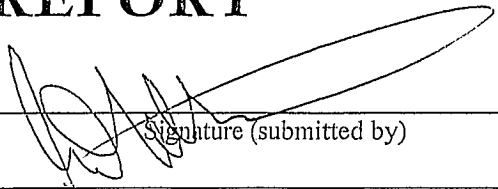
CITY OF BROOKINGS

PARKS & RECREATION COMMISSION

AGENDA REPORT

Meeting Date: November 13, 2008

Originating Dept: City Manager



Signature (submitted by)

City Manager Approval

Subject: Capella

Recommended Motion:

Motion to recommend to the City Council that the City issue a request for letter of interest from local non-profit organizations in connection with the management of the Capella by the Sea.

Background/Discussion:

Elmo Williams has scheduled a grand opening preview for the Capella for December 12 followed by a dedication ceremony on December 13.

The Capella Subcommittee (Barkema/Parrish) had recommended an earlier community event to develop support for the formation of a non-profit organization to assume management of the Capella. Mr. Williams proceeded in a different fashion. At a recent meeting with Mr. Williams, staff was advised that the Azalea Park Foundation may be interested in assuming responsibility for operation of the Capella. Another option would be for the City staff to assume responsibility for booking activities at the Capella, such as the case with the band shell and other areas of the Park. However, the City does not have the resources to "open and close" the Capella every day and provide a security presence as desired by Mr. Williams.

The City Manager is recommending that the Parks and Recreation Commission consider an approach whereby the City enters into an agreement with a local non profit organization for management of the facility. Cities such as Bandon and Corvallis have entered into similar agreements, and we have obtained several examples. It is recommended that the City issue a draft operating agreement and a request for letters of interest.

Policy Considerations:

Elmo Williams has contributed a major new asset to the community, the Capella by the Sea at Azalea Park. The City does not have the resources to fully exploit the use of and manage this new asset. Other communities with similar circumstances have entered into management agreements with local non-profits organizations.

**CONTRACT
FOR
MANAGEMENT, OPERATION AND MAINTENANCE OF
THE CAPELLA BY THE SEA**

This agreement is entered into this _____ day of _____ 2008, by and between the City of Brookings, a municipal corporation of the State of Oregon, hereinafter referred to as CITY, and _____ a not for profit corporation of the State of Oregon, hereinafter referred to as [NPO], and jointly referred to as PARTIES, or individually as a PARTY:

WITNESSETH

WHEREAS, CITY owns and operates a building known as the Capella by the Sea, hereinafter referred to as CAPELLA, which is located at Azalea Park, 640 Old County Road, Brookings, Oregon; and

WHEREAS, CITY has determined it is in CITY's best interest that an entity experienced and qualified in the management, operation and maintenance of a _____ to manage, operate and maintain CAPELLA; and

WHEREAS, CITY determined [NPO] is qualified and capable of providing the services required by CITY,

NOW, THEREFORE, in consideration of the premises, promises, terms and conditions herein set forth, the PARTIES agree as follows:

- A. **Description of CAPELLA.** CAPELLA is described as follows: The Capella by the Sea, located at Azalea Park, 640 Old County Road, Brookings, Oregon.
- B. **Management and Operation.** [NPO] shall manage and operate CAPELLA as follows:
 - 1. Operate CAPELLA in accordance with all provisions of this contract for the convenience of the public;
 - 2. Work with the Brookings Harbor Chamber of Commerce, local tourism and lodging businesses, community groups and others in promoting the CAPELLA as a venue for wedding ceremonies and other activities that may generate a sustainable income for the CAPELLA and promote tourism development.
 - 3. Use [NPO]'s best efforts to secure, maintain, and develop full utilization of CAPELLA and to foster a positive public image for CAPELLA;
 - 4. Establish operational policies, including but not limited to user rates, which balance low cost access and self-sufficiency. The policies shall also reflect a service orientation that fosters community use and enjoyment;
 - 5. Encourage free artistic expression by permitting groups and organizations use of the facility without discrimination, in a fair and equitable manner, and by allowing events which appeal to a broad audience and are free from censorship;
 - 6. Develop an effective outreach program to support CAPELLA through alliances with community organizations and a strong network of volunteers;

7. Manage the finance of CAPELLA in a prudent manner, so as to minimize using any CITY General Fund money for CAPELLA operations, routine building maintenance or maintenance of items within [NPO]'s responsibility as specified within this contract;
 8. Obtain all federal, state and local permits, licenses and authorizations necessary for the management and operation of this agreement. CITY shall cooperate with [NPO] in obtaining any such permits, licenses, and authorizations;
 9. Provide security to prevent unauthorized entry to CAPELLA;
 10. Provide public access to information about CAPELLA, including listing a telephone number in the local telephone book; establishing and maintain a website featuring the CAPELLA; and
 11. Furnish, at [NPO]'s own expense, such business equipment, materials and supplies necessary for the proper operation of CAPELLA.
 12. Except when otherwise scheduled for use for an organized activity, or maintenance, [NPO] shall operate free access to CAPELLA for individual use, such as meditation or visitation, during the hours 9:00am until dusk, 365 days per year.
- C. **Exclusive Use.** CITY does hereby grant to [NPO] exclusive license to use CAPELLA and CITY owned equipment therein for the term of this agreement or as such term may be extended in accordance with the provisions of this agreement; and, further, CITY promises not to grant to any other person any right to use CAPELLA for such period or periods or take any action not in accordance with this agreement which would inhibit [NPO]'s rights pursuant to this agreement unless mandated by an authority of competent jurisdiction, except as provided in Section 20, Item 20.1.
- D. **Title to CAPELLA.** It is the intention of the PARTIES that legal title to CAPELLA and equipment and facilities made available by CITY to [NPO] for [NPO]'s use shall remain vested in the CITY and that no interest of [NPO] in real or personal property shall be created by this contract. It is understood and agreed by the PARTIES that this contract does not create a lessor/lessee relationship between the PARTIES. This agreement is a license to use CAPELLA under the terms and conditions specified in this agreement. Any rights granted to [NPO] by this contract shall not be construed to imply any authority, privilege, or right to operate or engage in any business or activity other than as specifically provided in this contract.
- E. **Utilities.** CITY shall pay for all electric utilities and security camera system maintenance.
- F. **Insurance.**
1. [NPO] shall procure, and prepay the premiums on the following types of insurance in the amounts as hereinafter set forth:
 - a. Workers' Compensation - [NPO] shall carry workers' compensation and occupational diseases insurance as authorized by the statutes of the State of Oregon from a company or agency authorized to do business in the State of Oregon and with a company which meets with the reasonable approval of the CITY.
 - b. General Liability - [NPO] shall, at its own expense, purchase and maintain a General Liability policy during the term of this contract and any renewal thereof. The insuring agreement shall be as broad as a Commercial General Liability Occurrence Form (ISO GG 0001), providing limits of not less than \$500,000 per occurrence for bodily injury, personal injury and property damage, with an annual aggregate not less than \$1,000,000.
 - i. This policy shall name the CITY, its officials, employees and agents as Additional Insured - Owner, against any liability arising out of [NPO]'s use, occupancy, or maintenance of the Premises.
 - ii. Each insurance endorsement shall state that coverage shall not be suspended, voided, or canceled by either PARTY, reduced in coverage or in material limits

except after thirty (30) days prior written notice by certified mail, return receipt requested, has been given to CITY.

iii. [NPO] shall furnish acceptable insurance certificates to CITY with original endorsements for each insurance policy signed by a person authorized by that insurer to bind coverage on its behalf. Certificates will be received and approved by CITY prior to the effective date of the contract. The certificate shall specify the CITY and its officers, agents, employees and volunteers are Additional Insured-Owner. Insuring companies or entities are subject to CITY acceptance. [NPO] shall be financially responsible for all pertinent deductibles, self-insured retention and/or self-insurance. All such deductibles, retention, or self-insurance must be declared to, and approved by, CITY. In addition, policies must not specifically exclude coverage for sexual abuse and molestation. If sexual abuse and molestation coverage is excluded under [NPO]'s Commercial General Liability coverage, evidence of separate sexual abuse and molestation coverage and the limits of that coverage must be shown in the form of an insurance certificate, and be provided to the CITY prior to the execution of any agreement.

iv. Waiver of Subrogation - Neither CITY or [NPO] shall be liable to the other or to any insurance company by way of subrogation, or otherwise insuring other PARTY for any loss or damage to any building, structure, or other tangible property, or any resulting loss of income or extra expense, even though such loss or damage might have been caused by the negligence of such party, its officers, directors, employees or agents if any such loss or damage is covered by insurance benefitting the PARTY suffering such loss or damage or was required to be covered by insurance pursuant to this Contract.

c. In the event any insurance policy required herein shall be canceled or altered or materially changed without the approval of CITY, [NPO] shall immediately obtain substitute insurance coverage satisfactory to CITY.

d. CITY shall include CAPELLA building under the CITY's property and general liability policies. In the event that CAPELLA is damaged and the loss is declared to be less than 50 percent of the insured value of CAPELLA, CITY shall restore the building to the extent possible utilizing insurance proceeds.

e. [NPO] shall insure all equipment and furnishings not owned by CITY which are housed in the facility. CITY insurance shall cover CITY-owned equipment housed in the facility. [NPO] shall maintain a list of [NPO] owned equipment with a minimum value of \$5,000 and provide this in the [NPO]'s annual report. CITY owned equipment or furnishings shall be marked with a CITY asset tag or other appropriate marking based upon the value of the item.

f. Any subcontractor hired by [NPO] to perform any permanent alterations or improvements to CAPELLA must adhere to CITY's requirements regarding indemnification and insurance prior to the commencement of any such work.

G. **Indemnification.** [NPO] shall indemnify and hold harmless CITY, its present and future officials, employees, and agents, from and against any and all liabilities, penalties, fines, forfeitures, demands, claims, causes of action, suits, and costs and expenses incidental thereto, (including cost of defense, settlement, and reasonable attorney's fees), which any or all of them may hereafter suffer, incur, be responsible for or pay out as a result of bodily injuries (including death) to any person, damage (including loss of use) to any property (public or private), or any violation or alleged violation of statutes, ordinance, orders, rules or regulations of any governmental entity or agency, directly or indirectly caused by, or arising out of the management,

operation or maintenance of CAPELLA by [NPO] and out of any act or omission of [NPO], its employees or subcontractors in the performance of this agreement and for the performance of and payment under any contracts entered into by [NPO]. Insurance coverage and requirements herein constitute the minimum requirements, and said requirements shall in no way lessen or limit the liability of [NPO] hereunder. Notwithstanding anything herein to the contrary, [NPO], its present and authorized assigns shall have no responsibility or liability with respect to or arising out of any act, omission or operation of any person or entity in any way relating to CAPELLA prior to the commencement of the term of the original agreement between [NPO] and CITY dated July 15, 1991.

H. **Term of Agreement.** The original term of this agreement shall be for that period commencing immediately after this contract has been fully executed by the PARTIES, and ending _____.

1. Following the end of the term of this agreement, CITY and [NPO] may agree to extend this agreement for an additional three-year term by mutual consent. [NPO] shall notify CITY on or before _____, as to whether [NPO] wishes to extend this agreement. CITY will not unreasonably withhold exercising the option if all the terms and conditions of this Agreement have been met.
2. CITY and [NPO] realize the successful operation and financial health of the CAPELLA requires that rentals be booked in advance. This may require booking past the expiration date of this agreement. It is therefore agreed that, in the event this agreement expires or is terminated by CITY under the agreement's provisions, CITY or any organization operating the theater after the expiration or termination of this agreement shall honor rentals up to eleven months past the date of expiration or termination. Any fees collected by [NPO] prior to the expiration or termination of the agreement for bookings between the date of expiration or termination and one year past said date, shall be remitted to CITY.

I. **Annual Report.** An annual report for the preceding fiscal year shall be submitted to CITY by [NPO] no later than February 1 of each year. The report shall include, but is not limited to, the following:

1. [NPO]'s Activities:
 - a. to maintain and enhance the building and its equipment,
 - b. to optimize the utilization of the facilities,
 - c. to manage the finances of the CAPELLA in a prudent manner, so as to minimize using any CITY's General Fund money for theater operations and routine building maintenance;
2. Income statement and balance sheet, including any earnings from trust funds;
3. Summary of accomplishments;
4. Goals and expectations for the coming year;
5. Budget for the coming fiscal year showing all expected revenue and expenses;
6. Use of facility, including number of permits, estimated attendance, etc.;
7. A facility maintenance plan for the coming year;
8. A financial review completed at [NPO]'s expense. The review shall be completed by an outside third party at least once every three (3) years beginning in _____. This information shall be supplied to CITY within two weeks of its completion with an indication in the annual report as to the status of the review.
9. Proof of CITY owned equipment, personal property and improvements other than permanent buildings or fixtures.

J. **Termination.** Notwithstanding any other provision of this agreement to the contrary, this agreement may be terminated as follows:

1. The PARTIES, by mutual written agreement, may terminate this agreement at any time;
2. Except as otherwise provided, either PARTY may terminate this agreement in the event of a material breach of the contract by the other PARTY. In the event of a breach by either PARTY, the other PARTY shall give the breaching PARTY thirty (30) calendar days after written notice, to remedy the breach, except as provided in 10.3 below in the case of [NPO]'s failure to maintain a current insurance policy for the [NPO]'s use of the building.
3. CITY may terminate this agreement immediately upon [NPO]'s failure to have in force any insurance required by this contract. CITY may provide [NPO] with two (2) days' notice to secure replacement insurance, but CAPELLA shall not be used, occupied, or maintained for any reason whatsoever so long as [NPO]'s required insurance protection is not in force.
4. In the event of the dissolution of the corporation, [NPO], then [NPO]'s rights under this agreement shall immediately cease and terminate.
5. Notwithstanding any other provision of this contract to the contrary, CITY may, upon declaring [NPO] in default as provided below, terminate the whole or any part of the agreement by written notice to [NPO] advising of the date of termination, which shall be not less than 15 days after date of notice.
6. [NPO] may terminate this agreement in the event CITY imposes any fee, tax, assessment, levy or other charge against [NPO], against admissions or against CAPELLA or the operation thereof, or directly or indirectly increases the cost to users of CAPELLA, upon not less than thirty (30) days written notice to the CITY.

K. **Default.**

1. [NPO] may be declared in default by CITY if:
 - a. [NPO] shall vacate, desert or abandon CAPELLA or shall permit CAPELLA to remain vacated, deserted or abandoned for a period of seven (7) days; or
 - b. [NPO] shall fail to keep CAPELLA in a safe, sanitary and slightly condition, and in good repair or shall permit CAPELLA to remain in such condition for a period of fourteen (14) days or more, except in those instances where CITY is required to make repairs; or
 - c. [NPO] shall default in the payment of taxes payable by [NPO] under the agreement; or
 - d. [NPO] shall fail to comply with any of the statutes, ordinances, rules, orders, regulations, or requirements of the federal, state, and city government; or
 - e. [NPO] becomes insolvent; or
 - f. A voluntary or involuntary petition in bankruptcy is filed by or against [NPO]; or
 - g. A receiver is appointed to take charge of [NPO]'s affairs.
2. In such event or events of default as set forth above, whether the agreement shall be terminated or not, [NPO] agrees to surrender to CITY possession of CAPELLA immediately without notice; and CITY may remove [NPO] or any other person who may be occupying CAPELLA or any part of it, without resort to courts for an Order sanctioning such action.

L. **Surrender.** Upon the expiration of the original term or terms, as extended by the PARTIES, [NPO] shall surrender to CITY, CAPELLA, in as good order and condition as the same now exists, usual wear, tear, and damages by the elements excepted, and without notice of termination.

M. **Inspection.**

1. Any governmental agency which has lawful jurisdiction over CAPELLA or the operations at CAPELLA, including CITY, may make inspections of CAPELLA and its operations at any time

that CAPELLA is on or at any other time or times which may be reasonable for such inspections, provided however, that such inspections shall be made only by authorized personnel of such authorities or of CITY. Such inspections shall not interfere with the orderly operation of CAPELLA by [NPO].

2. The books and records of [NPO] pertaining to operations and maintenance of CAPELLA shall be available for inspection and audit by CITY at the expense of CITY during reasonable business hours.
3. An annual inspection shall be conducted by December 31 of each year by representatives of [NPO] and CITY. The inspection will be an opportunity for each PARTY to point out areas of concern. Notes of the inspection shall be kept by CITY with a copy forwarded to [NPO].

N. Fees and Charges.

1. CITY and [NPO] recognize, understand, and expressly agree that there may be a need to adjust the rates for third party user charges during the term of this agreement. It is expressly understood and agreed that [NPO] may establish fees or charges for use of CAPELLA and that such rates shall be collected by [NPO].
2. [NPO] shall be responsible for [NPO]'s cost of management and all applicable local, state or federal fees, taxes, and surcharges.

- O. Building Maintenance.** [NPO] shall be responsible for on-going maintenance and repair of CAPELLA resulting from their use, including custodial type maintenance such as window washing and routine cleaning. This shall include, but not be limited to, preventative maintenance and repair of building mechanical systems, interior wall finishes, and floor coverings. CITY shall be responsible for major structural support elements including but not limited to foundation, exterior and interior walls, roof repairs, floors and sub-flooring (excluding floor coverings), and any other items which, if not maintained or repaired, would result in long-term damage to CAPELLA. In addition, CITY is responsible for the replacement of building mechanical systems such as electrical. In cases where responsibility is unclear, both PARTIES will work together to come to a satisfactory solution.

- P. Funding Requests.** If, at any time, [NPO] wishes to request funds from CITY, such requests must be submitted to the City Manager prior to October 1 of each year and shall be considered by the Budget Committee during its annual review of CITY's annual budget and CIP Program

Q. Capital Improvements.

1. CITY reserves the right to establish certain conditions for capital improvements, as appropriate. [NPO] may develop preliminary concept plans, raise funds, and be responsible for capital improvements to CAPELLA upon receiving prior written approval from CITY. CITY shall approve all conceptual plans, prior to raising funds and obtaining building permits.
2. Any construction plans shall be provided to CITY for review and inspection.
3. All monies held or subsequently received by CITY for capital improvement to CAPELLA shall be made available to [NPO] when capital improvements are undertaken and when approved by the City Council.

- R. Removal of Fixtures/Personal Property.** Upon the completion of the term of this agreement, as may be extended by option or otherwise, [NPO] is expressly given the right at any time within ninety (90) days after such termination to enter upon and remove from the site any equipment, personal property or improvements of any kind and nature, other than permanent buildings or fixtures, which were purchased or placed upon the site by [NPO], but [NPO] shall not be obligated to so remove any of the above. Upon the expiration of said ninety (90) day period, any of the above items remaining on the site shall become the property of CITY.

- S. Force Majeure.** The performance of this agreement may be suspended and the obligations thereunder excused, in the event and during the period that such performance is prevented by a

cause or causes beyond the control of the parties. Such causes shall include acts of God, acts of war, riot, fire, explosion, accident, flood or sabotage; or an unconditional prohibition of the operation of the site by judicial order, administrative or governmental laws, regulations, rules, requirements, orders or actions, including refusal to issue, cancellation, suspension or revocation of any permit, license or other authorization necessary for the management, operation, or maintenance envisioned by this agreement.

1. CITY, during time of a declared natural or manmade disaster, shall in an emergency, have the right to utilize CAPELLA, without cost. CITY will be responsible for any damages caused by CITY during its use of CAPELLA and agrees that [NPO] will not be responsible to third parties for damages resulting from the CITY's use of CAPELLA during the emergency.
- T. **Independent Contractor.** [NPO] is and shall perform this agreement as an independent contractor, and as such, shall have and maintain complete control over all of its employees, subcontractors, agents, and operations. Neither [NPO] nor anyone employed by it shall represent, act, purport to act or be deemed the agent, representative, subcontractor, employee, or officer of CITY.
- U. **Assignment.** Excepting CITY-approved agreements relating to construction at the site and other agreements made prior to the date of this agreement, [NPO] shall not assign the operations of CAPELLA without the prior consent of CITY. [NPO] may enter into maintenance or minor repair contracts for CAPELLA without prior authorization. CITY may, in its sole discretion, reject in writing any such subcontract or subcontractor. Services subcontracted under the agreement shall be specified by written agreement and shall be subject to each applicable provision of this agreement with appropriate changes in nomenclature in referring to parties to such subcontract. If any subcontractor shall fail to perform the work undertaken by the subcontractor in a manner satisfactory to CITY, its subcontract shall be immediately terminated by [NPO] upon written notice from CITY and in event of such termination, [NPO] shall complete such work by contractor or otherwise. Failing such, CITY may prosecute such work to completion and [NPO] and its sureties shall be liable to CITY for any costs occasioned CITY thereby. Nothing contained in this agreement shall create any contractual relation between any subcontractor and CITY.
1. [NPO] shall give CITY immediate notice in writing of any action or suit filed, and prompt notice of any claim made against [NPO] by any subcontractor or vendor which may result in litigation, related in any way to this agreement.
- V. **Notices.** All notices given under this agreement shall be deemed properly served if delivered in writing personally, or sent by certified mail to CITY, addressed to the City Manager, 898 Elk Drive, Brookings, OR 97415 and to [NPO] addressed to _____. Date of service of notice served by mail shall be the date on which such notice is deposited in a post office of the United States Post Office Department.
- W. **Status of [NPO].** It is acknowledged that [NPO]'s status is a non-profit corporation. [NPO] shall notify CITY immediately if it's corporate status changes.
- X. **Remedies.** It is further agreed by and between the PARTIES that the rights and remedies here created are cumulative and the use of one remedy shall not be taken to exclude or waive the right to the use of another.
- Y. **Governing Law and Severability.** This agreement shall be governed by the laws of the State of Oregon applicable in the case of contracts made and to be performed in Oregon. Any action at law or in equity brought by either CITY or [NPO] against the other shall be brought in the Curry County Circuit Court in the State of Oregon. The provisions of this agreement shall be deemed to be severable and the invalidity or unenforceability of any provision shall not affect the validity and enforceability of other provisions hereof. The PARTIES to this contract do not intend to confer on any third party any rights under this contract.

1. In the event of a conflict between the terms or the conditions of this agreement and those of any exhibit attached hereto, the terms and conditions of this agreement shall take precedence.
- Z. **Attorney Fees.** In the event of any action to enforce or interpret this contract, the prevailing PARTY shall be entitled to recover from the losing PARTY reasonable attorney fees incurred in the proceeding, as set by the court, at trial, on appeal or upon review.
- AA. **Compliance with Laws, Rules, and Regulations.** [NPO] shall at all times observe and comply with the provisions of the charter, ordinances and regulations of CITY and state and federal laws, rules, regulations, which in any manner limit, control, or apply to the actions or operations of [NPO], its subcontractors, or its or their employees, agents or servants, engaged upon the work or affecting the materials supplied to or by them under the agreement. Notwithstanding any other term, provision, or condition herein, each and every term, provision and condition herein is subject to the provisions of the Charter of CITY and the ordinances enacted thereunder. CITY represents that it has the authority pursuant to said Charter to enter into this agreement and that no provision of this agreement, to the knowledge of CITY, is in violation of said Charter.
- BB. **Discrimination Prohibited.** The PARTIES agree not to discriminate on the basis of race, religion, color, sex, marital status, family status, national origin, age, mental or physical disability, sexual orientation or source of income in the performance of this contract.
- CC. **Time of Essence.** Time is of the essence in the performance of the provisions of this agreement.
- DD. **Headings.** The paragraph headings contained herein are for convenience in reference and are not intended to define or limit the scope of any provision of this agreement.
- EE. **Non-Waiver.** Any waiver by either PARTY of any breach of any term or condition of this agreement by the other PARTY shall not operate as a waiver of any subsequent breach of such term or condition or any other term or condition of this agreement.
- FF. **Special Conditions.** The obligations of CITY and [NPO] with respect to performance pursuant to this agreement shall be subject to the fulfillment of the following conditions within sixty (60) days following the execution of this agreement.
 1. This agreement shall have been authorized by the Brookings City Council by motion.
- GG. **Terms and Definitions.** For purposes of this agreement, the following is defined:
 1. Person: Any natural person, firm, partnership, association or corporation.
- HH. **Entire Agreement.** This contract embodies the entire agreement of the PARTIES. There are no promises, terms, conditions or obligations other than those contained herein. This contract shall supersede all prior communications, representations or agreements, either oral or written, between the parties. This contract shall not be modified, changed or altered in any respect except in writing, signed by both PARTIES.

IN WITNESS WHEREOF, the PARTIES hereto have caused the signatures of their legally authorized representatives to be affixed hereto on the day and year indicated on the first page of this agreement.

CITY OF BROOKINGS

[NPO]

City Manager Gary Milliman

Title