

**CITY OF SAN ANTONIO  
ASSET MANAGEMENT DEPARTMENT  
CITY COUNCIL AGENDA MEMORANDUM**

**TO:** Mayor and City Council

**FROM:** Rebecca Waldman, Director, Department of Asset Management

**SUBJECT:** Magik Children's Theatre

**DATE:** September 22, 2005

**SUMMARY AND RECOMMENDATIONS**

An Ordinance amending the lease agreement with The Magik Theatre for Beethoven Hall in HemisFair Park, including changes to the Preservation Fee Schedule and reporting requirements.

Staff recommends approval.

**BACKGROUND**

The Magik Theatre is a non-profit arts organization committed to bringing live theater productions to children and their families. In May 1997 the City authorized a Lease Agreement with The Magik Theatre for use of the Beethoven Hall Theatre in HemisFair Park as the Magik Children's Theatre. In December 2001, the City amended the lease by modifying provisions related to payment for chilled water use, extending the completion of major renovation to the theater, clarifying reporting requirements, and entering into a Security Agreement with the Magik Theatre.

Under the terms of this Lease, the Tenant is obligated to pay a preservation fee on tickets sold in lieu of rent. The Tenant may use preservation fees with City approval for capital improvements and repair and maintenance if the costs of the repairs exceed the Tenant's annual budget for those items. The existing Schedule for Preservation Fees is as follows:

Income Category	1997 to 2002 Years 1-5	2003-2007 Years 6-10
Tickets priced under \$3.00	No Fee	No Fee
Tickets priced between \$3.00 and \$4.99 (per ticket)	15¢	50¢
Tickets priced \$5.00 and up (per ticket)	25¢	75¢
Years 11-15 Preservation Fees will be charged at 5% of the price of each ticket excluding those tickets at \$0 to \$2.99		

The Magik Theatre has suggested a change in the preservation fee schedule and the addition of other funding sources for Preservation Fees, as well. Therefore, an Amendment to the Preservation Fee schedule is being requested as follows:

Income Category	1997 to August 31, 2005	September 1, 2005 to June 30, 2012
Tickets priced under \$3.00	No Fee	No Fee
Tickets priced between \$3.00 and \$4.99 (per ticket)	15¢	15¢
Tickets priced \$5.00 and up (per ticket)	25¢	\$1.00
Camp Tuition (per attendee)	N/A	\$15.00
Academy Tuition (per attendee)	N/A	\$15.00

The schedule for increasing preservation fees for certain tickets has not been implemented under the current lease agreement and has accrued a deficit of \$42,304.55 as of June 30, 2005. By extending the number of years of collecting preservation fees, adding the Camp and Academy Tuition preservation fee, and the Board of Directors committing to fundraising efforts, the deficit is expected to be eliminated within approximately four to five years. Any deposits made toward this deficit shall be a new reporting requirement by the Tenant as a part of their required Quarterly reports. The effective date for implementation of this new Preservation Fee schedule is September 1, 2005.

#### **POLICY ANALYSIS**

This action is consistent with the City's policy to amend Lease Agreements and enter into Agreements as needed to reflect the contractual obligations of the parties.

#### **FISCAL IMPACT**


This action does not have any direct fiscal impact to the City of San Antonio.

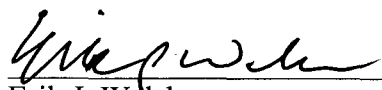
#### **COORDINATION**

This item has been coordinated with the City Attorney's Office and Contract Services.

#### **SUPPLEMENTARY COMMENTS**

A completed Discretionary Contracts Disclosure Form is attached.

  
 Rebecca Waldman  
 Director, Department of Asset Management

  
 Erik J. Walsh  
 Assistant to the City Manager

**City of San Antonio**  
**Discretionary Contracts Disclosure**

*For use of this form, see Section 2-59 through 2-61 of the City Code (Ethics Code)  
Attach additional sheets if space provided is not sufficient.*

(1) Identify any individual or business entity<sup>1</sup> that is a **party** to the discretionary contract:

PA

(2) Identify any individual or business entity which is a **partner, parent** or **subsidiary** business entity, of any individual or business entity identified above in Box (1):

☐ No partner, parent or subsidiary; or

List partner, parent or subsidiary of each party to the contract and identify the corresponding party:

NA

(3) Identify any individual or business entity that would be a **subcontractor** on the discretionary contract.

☐ No subcontractor(s); or

List subcontractors:

NA

(4) Identify any **lobbyist** or **public relations firm** employed by any party to the discretionary contract for purposes related to seeking the discretionary contract.

☐ No lobbyist or public relations firm employed; or

List lobbyists or public relations firms:

NA

<sup>1</sup> A *business entity* means a sole proprietorship, partnership, firm, corporation, holding company, joint-stock company, receivership, trust, unincorporated association, or any other entity recognized by law. A sole proprietor should list the name of the individual and the d/b/a, if any.

**(5) Political Contributions**

List all political contributions totaling one hundred dollars (\$100) or more within the past twenty-four (24) months made to any *current* or *former member* of City Council, any *candidate* for City Council, or to any *political action committee* that contributes to City Council elections, by any individual or business entity whose identity must be disclosed under Box (1), (2), (3) or (4) above, or by the officers, owners of any business entity listed in Box (1), (2) or (3):

☐ No contributions made; If contributions made, list below:

By Whom Made:	To Whom Made:	Amount:	Date of Contribution:
None			

**(6) Disclosures in Proposals**


Any individual or business entity seeking a discretionary contract with the city must disclose any known facts which, reasonably understood, raise a question<sup>2</sup> as to whether any city official or employee would violate Section 2-43 of the City Code (Ethics Code), ("conflicts of interest") by participating in official action relating to the discretionary contract.

☐ Party not aware of facts which would raise a "conflicts-of-interest" issue under Section 2-43 of the City Code; or

Party aware of the following facts:

NA

This form is required to be supplemented in the event there is any change in the information before the discretionary contract is the subject of council action, and no later than five (5) business days after any change about which information is required to be filed, whichever occurs first.

Signature: 	Title: Executive Director Company or D/B/A: Mask Theatre	Date: 09/12/05
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<sup>2</sup> For purposes of this rule, facts are "reasonably understood" to "raise a question" about the appropriateness of official action if a disinterested person would conclude that the facts, if true, require recusal or require careful consideration of whether or not recusal is required.

## **Second Amendment to Lease Agreement (The Magik Theatre)**

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This Amendment to Lease Agreement is entered into between Tenant and the City of San Antonio, a Texas municipal corporation, acting by and through its City Manager (Landlord), pursuant to the Ordinance Authorizing Renewal and Extension.

### **1. Identifying Information.**

**Authorizing Ordinance, Second  
Amendment (No. & Date):**

**Tenant:** The Magik Theatre

**Tenant's Address:** HemisFair Park, Bldg # 225 (Beethoven Hall Theater), 418  
S. Alamo, San Antonio, Texas 78205

**Lease:** Lease Agreement (The Magik Theatre) dated July 1, 1997  
between the City of San Antonio as Landlord and The  
Magik Theatre as tenant relating to Beethoven Hall at  
HemisFair Park

**Authorizing Ordinance for  
Original Lease (No. & Date):** 86014, May 8, 1997

**First Amendment:** Amendments to The Magik Theatre Lease dated January  
22, 2002

**Authorizing Ordinance for First  
Amendment (No. & Date):** 94991, December 13, 2001

### **2. Defined Terms.**

All terms defined in the Lease and not otherwise defined in this amendment, when used in this amendment, have the meanings ascribed to them in the Lease. References to "Lease" include both the original Lease and all previous amendments to it.

### **3. Article V Restatement**

Article V of the Lease (Rent/Preservation Fee/Concessions Income) is restated in its entirety to read as follows:

#### **V. RENT/PRESERVATION FEE/CONCESSIONS INCOME**

5.1 Preservation Fee. As consideration for TENANT's use of the Premises, and renovation of the Premises as provided herein,

(a) Tenant must pay a Preservation Fee on all tickets for all performances and events within the Premises in the following amounts:

Income Category	1997 to August 31, 2005 <sup>1</sup>	September 1, 2005 to June 30, 2012
Tickets priced under \$3.00	No Fee	No Fee
Tickets priced between \$3.00 and \$4.99 (per ticket)	15¢	15¢
Tickets priced \$5.00 and up (per ticket)	25¢	\$1.00
Camp Tuition (per attendee)	N/A	\$15.00
Academy Tuition (per attendee)	N/A	\$15.00

(b) Except as otherwise provided in this agreement, Preservation Fees will be held in the Beethoven Hall/Magik Theatre Fund (Magik Fund) to be used for repairs, maintenance, and capital improvement of the Leased Premises (Fund Expenditures);

(c) Tenant must number all tickets for performances and events at the Premises and must control and account for them by the income category defined above;

(d) Tenant must maintain detailed records for tuition collected from all attendees.

5.2 If Tenant permits a third party to receive ticket sale proceeds, Tenant must (a) require the third party to accurately account for tickets sold for each performance and event; (b) require the third party to remit all Preservation Fees as if collected by Tenant and (c) make City a third party beneficiary of the third party's agreement to remit the fees. If the third party fails or refuses to remit Preservation Fees, Tenant must, on City's request, assign the fees to City, which will then be entitled to sue for the fees in its own name. City assumes no duty to sue for or otherwise collect unpaid Preservation Fees.

### 5.3 Deposit of Preservation Fees

(a) Tenant must deposit Preservation Fees from the first 75,000 tickets sold or distributed in a year upon which a Preservation Fee is payable by Tenant into the Magik Fund. Tenant must make the deposit monthly in arrears not later than the 10<sup>th</sup> day of the month following the month in which such Preservation Fees are collected.

(b) Tenant must pay Preservation Fees from tickets in excess of 75,000 sold or distributed in a year upon which a Preservation Fee is payable to the City. Tenant must make the payment monthly in arrears not later than the 10<sup>th</sup> day of the month following the month in which such Preservation Fees are collected.

(c) On a quarterly basis, Tenant must provide City a report containing total ticket sales and collections for the immediately preceding quarter, broken down by ticket price.

### 5.4. Use of Magik Fund

(a) Unless City otherwise approves in writing, Tenant must each year budget at least the cost of repairs and maintenance for the previous year. It must also budget for capital improvement

<sup>1</sup> This amendment is signed in September 2005, so the information in this column is not used to define rights and obligations of the parties under this amendment, but instead to memorialize the parties' rights and obligations in the respect addressed before this amendment was signed. Memorializing these outdated rights and obligations does not impair Landlord's accrued rights as to other outdated rights and obligations not restated in this amendment.

an additional amount of 10% of the repair and maintenance line item. Magik Fund money may be used only if the cost of qualified Fund Expenditures exceeds Tenant's budgeted amounts.

(b) Tenant must obtain City's written approval before spending any Magik Fund money. City's approval may be granted by City's Director of Asset Management and will not be reasonably withheld.

(c) Magik Fund money not spent in a year remains in the Magik Fund and may be taken out only as provided in this agreement.

(d) If the balance in the Magik Fund account exceeds \$100,000, the excess over \$100,000 will be distributed as follows:

(1) 50% to Tenant to be used exclusively for operating expenses of the Leased Premises, as "operating expenses" are defined by generally accepted accounting principles, but excluding personal bonuses or non-traditional benefits (i.e., funding of officer employee or director vacations) and

(2) 50% to City, to be deposited into the City Cultural Facilities Trust Fund, (City Fund) to be used in accordance with the terms of the City Fund.

5.5 Tenant must immediately notify City of all emergencies posing a risk to (a) the health or well-being of occupants of the Leased Premises, (b) the structural integrity of the Leased Premises or, (c) the property value of the Leased Premises. In case of such emergency, after notice to City, Tenant must proceed to correct the problem in a prudent manner. Tenant must use available insurance proceeds and budgeted funds before withdrawing from the Magik Fund. If Tenant withdraws money from the Magik Fund without prior permission for emergency work, it must report the withdrawal as soon as practicable, but no later than 48 hours from actual withdrawal. If Tenant later receives insurance proceeds in respect of a matter for which Magik Fund money has already been spent, Tenant must deposit the insurance proceeds into the Magik Fund even if the insurance proceeds exceed the amount withdrawn from the Magik Fund.

5.6 Negotiation of Preservation Fees for a renewal term is a condition precedent to a renewal term.

5.7 Concessions. Tenant may control and operate, at its cost, the following concessions (Concessions) (a) valet parking, (b) other parking facilities that Tenant owns or has contracted for, and (c) the sale and serving on, in, or about the Premises alcoholic and non-alcoholic beverages, food, souvenirs, and other merchandise or services and concessions of any sort. Tenant may lease or license all or any portion of the Concession rights to any party or parties. City must not offer any concessions at the Leased Premises without Tenant's written consent, which shall not be unreasonably withheld. Tenant may, in its discretion, prohibit attendees and invitees from bringing food, beverages, or other concessions into the Leased Premises.

#### 5.8 Books and Records, Audit

(a) Tenant must maintain complete and accurate books and records of its operations on the Leased Premises in accordance with generally accepted accounting principles (GAAP). Tenant must retain a CPA to direct the maintenance of such books and records.

(b) On three days prior notice, City may audit Tenant's books and records. City may do so through its own staff or, at City's expense, through a CPA or other contractor. If, after the audit, the City concludes insufficient money has been deposited into the Preservation Fund, Tenant must deposit the deficiency into the Preservation Fund immediately. Interest accrues on the deficiency at 18% per annum from the date the payments should have been made. If the deposits into the Preservation Fund for the audit period are understated by more than two percent,

Tenant must reimburse City for the cost of the audit. Interest accrues on the audit cost at 18% per annum from the date City was out-of-pocket for the audit cost.

(c) Within ninety (90) days of the end of the TENANT's fiscal year (Jan. 1<sup>st</sup> – Dec. 31<sup>th</sup>), TENANT must deliver to City financial statements compiled by an independent CPA in accordance with GAAP and the Statements on Standards for Attestation Engagements. In addition, the independent CPA must perform procedures (to be agreed upon in advance with City) sufficient to express an opinion whether (1) the "Gross Revenues" generated and reported to the City under this Lease is true and correct; and (2) all amounts that should have been deposited into the Magik Fund or paid to the City hereunder, were, for the relevant period, properly deposited or paid, in all material respects. For the purpose of the agreed upon procedures, "Gross Income" means, in addition to any items included in the GAAP definition, all money received from other sources including donations, gifts, contributions, and reimbursed expenses, but not (1) amounts paid out in respect of sales taxes and (2) documented refunds. The independent CPA must deliver a duplicate original of the financial statements and the opinion on Gross Revenue to the City.

5.9 In addition to annual financial statements and required agreed upon procedures, Tenant must deliver to City the following reports at the indicated intervals:

(a) A quarterly report, based on the Leased Year, which shall be due on or before the forty-fifth (45<sup>th</sup>) day after the end of the quarter, containing the following information for the previous contiguous three month period.

- (1) Dates and number of Performances held during the quarter;
- (2) Total number of each class of ticket sold per performance;
- (3) Cost of each class of ticket sold;
- (4) Preservation Fee collected per class of ticket;
- (5) Total amount of Preservation fees deposited in the Magik Fund;
- (6) Total amount withdrawn from the Magik Fund evidencing all activity in the Fund for the quarter.
- (7) Copies of the bank statements for all bank accounts, which will include but not limited to the operating account, payroll account, and Magik Funk account.

(b) An annual report for each season, due on or before August 15<sup>th</sup> of each year following the end of the just completed season (Look Back), containing the following information:

- (1) Summary of the quarterly reports provided under paragraph 5:9 (a);
- (2) Annual Operating/Capital Budget for the applicable Season;
- (3) Profit and loss statement detailing all income and expenditures;
- (4) Summary of fundraising activities.

(c) An annual report for the upcoming season (Look Forward), due on or before April 1<sup>st</sup> of each year, containing the following information:

- (1) Projected operating budget for the new Season, identifying any and all problems and solutions thereto;



- (2) Planned capital improvements, if any, to the Leased Premises for the next year;
- (3) Detailed information on fundraising during the next year to include projections and a marketing plan;
- (4) A reasonable schedule for capital campaign funding for the renovation work referenced on paragraph 6.3 including, but not limited to, the manner and means by which the financial goals will be reached.

#### **4. Outstanding Preservation Fee Amount.**

The parties acknowledge that as a further condition of the ongoing agreement between the parties, Tenant shall deposit \$42,304.55 into the Magik Fund no later than June 30, 2010. This outstanding amount may increase to include the months of July and August 2005 if any Preservation Fees are collected during that period. Deposits into the Magik Fund must be up-to-date no later than June 30, 2010 and must be reported on a quarterly basis separate from current Preservation Fee deposits. Tenant's failure to eliminate the arrearage by that date is an event of default under the Lease.

#### **5. Notices.**

Paragraph 31.1 of the original lease is amended to require any notice to the City permitted or required hereunder to be in duplicate, one copy to go to the City Clerk and the other to the Director of Asset Management, City of San Antonio, Texas, P.O. Box 839966, San Antonio, Texas 78283-3966.

#### **6. No Default.**

Neither City nor Tenant is in default under the Lease and neither party is aware of a cause of action against the other arising out of or relating to the period before the date of City's signature on this amendment, other than the outstanding Preservation Fees amount due in to the Magik Fund.

#### **7. Same Terms and Conditions.**

This amendment is a fully integrated expression of the changes the parties intend to make to the Lease, as previously amended. The parties acknowledge that, except as expressly set forth in this amendment, the Lease as previously amended remains in full force and effect according to its terms, and the parties reaffirm the obligations thereof. Both City and Tenant are bound thereby. Except for matters for which provisions have been made in this amendment, neither party is in default under the Lease. There have been no amendments or other modifications to the Lease except as expressly described in this amendment.

#### **8. Date of Amendment**

For purposes of reference, the date of this amendment is deemed to be the date of the later of the signatures set forth below.

**Landlord**

**City of San Antonio**, a Texas municipal corporation

Signature: \_\_\_\_\_

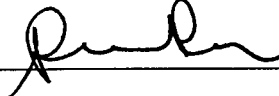
Printed  
Name: \_\_\_\_\_

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

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

**Tenant**

The Magik Theatre

Signature: 

Printed  
Name: Richard R. R...

Title: Executive Dir

Date: 01/12/05

**Attest:**

\_\_\_\_\_  
City Clerk

**Approved:**

\_\_\_\_\_  
City Attorney

**Address:**

City of San Antonio  
Attn: City Clerk  
City Hall, 2<sup>nd</sup> Floor  
P.O. Box 839966  
San Antonio, Texas 78283-3966