

RESOLUTION NO. 4039

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

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

WHEREAS, Kirkland Performance Center is organized for the express purpose of promoting the development of and operating a performing arts center; and

WHEREAS, both parties desire to have a new performing arts center developed in Kirkland; and

WHEREAS, both parties agree that the renovation and restoration of the old library building and site into a performing arts center is a proper and prudent use of public property; and

WHEREAS, both parties desire to document the terms and conditions they have agreed upon with respect to design and construction of the facility;

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Kirkland that the City Manger is hereby authorized on behalf of the City of Kirkland to sign and execute the attached agreement between the parties, entitled "AGREEMENT BETWEEN THE KIRKLAND PERFORMANCE CENTER AND THE CITY OF KIRKLAND REGARDING THE DESIGN AND CONSTRUCTION OF A PERFORMING ARTS CENTER."

PASSED by majority vote of the Kirkland City Council on the 5th day of November, 1996.

SIGNED in authentication thereof on the 5th day of November, 1996.



Mayor

ATTEST:



City Clerk

**AGREEMENT
BETWEEN
THE KIRKLAND PERFORMANCE CENTER
AND
THE CITY OF KIRKLAND
REGARDING THE
DESIGN AND CONSTRUCTION OF
A PERFORMING ARTS CENTER**

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**AGREEMENT
BETWEEN
THE CITY OF KIRKLAND
AND
THE KIRKLAND PERFORMANCE CENTER
REGARDING THE
DESIGN AND CONSTRUCTION OF
A PERFORMING ARTS CENTER**

THIS DESIGN AND CONSTRUCTION AGREEMENT is entered into by and between the CITY OF KIRKLAND (hereinafter referred to as the "City"), a Washington municipal corporation, and the KIRKLAND PERFORMANCE CENTER (hereinafter referred to as "KPC"), a Washington non-profit corporation.

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

WHEREAS, KPC is organized for the express purpose of promoting the development of and operating a performing arts center;

WHEREAS, both parties desire to have a new performing arts center developed in Kirkland;

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

WHEREAS, both parties agree that a new performing arts center will provide valuable educational opportunities for children and adults to learn about the performing arts, including, but not limited to, dance, music, and theater;

WHEREAS, both parties agree that the renovation and restoration of the old library into a new performing arts center is a proper and prudent use of public property;

WHEREAS, both parties agree that a new performing arts center will stimulate economic development;

WHEREAS, both parties agree that a new performing arts center will benefit existing businesses and create new businesses;

WHEREAS, both parties agree that a new performing arts center will create new employment opportunities;

WHEREAS, both parties agree that cooperation between the City and KPC is essential in developing a new performing arts center;

WHEREAS, the City is the owner of a building (hereinafter referred to as the "old library") which is situated upon real property in the City of Kirkland, King County, State of Washington, legally described in Exhibit A;

WHEREAS, both parties support the renovation of the old library into an approximately 400-seat theater to be used as a performing arts center which will continue to be owned by the City, but operated by KPC;

WHEREAS, the City desires to support KPC and participate in the development of a new performing arts center together with KPC through the making of the old library available for the performing arts center, and the expenditure of such City funds as are provided for herein to help pay for the same, provided that the Facility is designed and constructed pursuant and subject to the provisions of applicable federal law, state law and City ordinances;

WHEREAS, the City has approved the appropriation of City funds totaling Nine Hundred Twenty-Five Thousand Dollars (\$925,000) as contemplated herein;

WHEREAS, KPC has raised funds totaling \$3,168,034, including \$1,599,061 in cash, \$703,973 in pledges and \$865,000 in grants;

WHEREAS, the City's funds and KPC's funds together are sufficient for the design and construction of a new performing arts center subject to the terms and conditions stated herein;

WHEREAS, KPC will pay to the City funds totaling \$2,069,482 for the design and construction of a new performing arts center subject to the terms and conditions stated herein;

WHEREAS, KPC will pay \$628,552 for tenant improvements to the new performing arts center subject to the terms and conditions stated herein;

WHEREAS, the City is prepared to proceed with contracting for the construction of a new performing arts center upon KPC's payment and the City's receipt of funds totaling \$2,069,482 for the design and construction of a new performing arts center;

WHEREAS, the City is prepared to proceed with contracting for the construction of a new performing arts center upon KPC's grant of a security interest in funds totaling \$628,552 for tenant improvements to the new performing arts center; and

WHEREAS, the parties hereto desire to document the terms and conditions they have agreed upon with respect to the design and construction of the Facility;

NOW, THEREFORE, in consideration of the mutual undertaking and promises contained herein, and the benefits to be realized by each party and in future consideration of the benefit to

the general public by the creation and operation of the theater, and as a direct benefit to the City, the parties agree as follows:

I. DEFINITIONS.

All words in this Agreement bearing initial capitals, other than proper nouns, section headings or words required to be capitalized for proper usage, are defined terms and shall have the meanings specifically assigned to them in the following subsections. Unless otherwise expressly provided use of the singular includes the plural and vice versa.

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

B. Approval means the prior written consent of a party hereto or designated representatives thereof, including the Project Management Committee.

C. Architect means the person or entity awarded the contract for design of the Facility.

D. Architect Agreement means the agreement entered into between the City and the Architect for design of the Facility.

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

F. City means the City of Kirkland.

G. City's Share of Total Design and Construction Costs or City's Share means the sum of Nine Hundred Twenty-Five Thousand Dollars (\$925,000), to be used solely for actual construction and renovation costs.

H. City Manager means the City Manager of the City of Kirkland, or his designee.

I. Construction Contractor means the person or entity awarded the contract for construction of the Facility pursuant to the bidding procedures described in this Agreement.

J. Construction Contract means the agreement to be entered between the City and the Construction Contractor for construction of the Facility.

K. Design means the phase of the Project during which the form, functions, materials, and method of construction of the Facility is established through graphic and written means; also the graphic and written description of the Facility including the instructions to be followed by the Construction Contractor to construct the Facility.

L. Design and Construction Contingency Fund means an amount equal to at least ten percent (10%) of the Construction Contract and, once actual construction begins, an amount as determined by the Project Management Committee.

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

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

O. KPC's Share of Total Design and Construction Costs or KPC's Share means the difference between the Total Design and Construction Costs and the City's Share of Total Design and Construction Costs.

P. Letter of Credit means a single letter of credit in the amount of One Hundred Thousand Dollars (\$100,000) from a financial institution acceptable to the City to secure pledges from individuals.

Q. Project means all work related to the design and construction of the Facility.

R. Project Budget means the Project Budget attached hereto as Exhibit B.

S. Project Management Committee means a six-member committee composed of three KPC appointees and three City appointees.

T. Project Manager means the Public Works Director of the City of Kirkland, or his designee.

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

V. Tenant Improvement Costs means \$628,552 needed to acquire Tenant Improvements. The term "Tenant Improvement Costs" does not and shall not include any legal fees, fund raising costs, or Total Design and Construction Costs incurred by KPC or the City in connection with the Project or otherwise.

W. Total Design and Construction Costs means \$2,994,482 needed to renovate the old library into a performing arts center. The term "Total Design and Construction Costs" includes the capital costs of design, bidding, construction, and renovation. The term "Total Design and Construction Costs" does not and shall not include any legal fees, fund raising costs,

or Tenant Improvement Costs incurred by KPC or the City in connection with the Project or otherwise.

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

II. UNDERTAKINGS OF THE PARTIES.

KPC and the City hereby agree to undertake the design and construction of the Facility, in accord with the respective rights and obligations of the parties as set forth in this Agreement.

A. General Scope of Commitments.

(1) Commitments by KPC.

(a) KPC's Share of Total Design and Construction Costs. KPC hereby agrees, in accord with and subject to the terms stated in this Agreement, to pay KPC's Share of Total Design and Construction Costs. KPC agrees to pay to the City one hundred percent (100%) of KPC's Share of Total Design and Construction Costs in cash, in Cash Equivalents assigned to the City, or in the form of pledges assigned to the City backed by a Letter of Credit from a financial institution acceptable to the City according to the following schedule:

Payment, Assignment or Transfer	Deadline
Fifty percent (50%) of KPC's Share	Execution of this Agreement
One-hundred percent (100%) of KPC's Share	Award of Construction Contract

KPC further agrees that KPC's Share of Total Design and Construction Costs shall not be pledged to any other party or purpose.

(b) Tenant Improvement Costs. KPC hereby agrees, in accord with and subject to the terms stated in this Agreement, to pay the Tenant Improvement Costs. KPC shall grant to the City a security interest in cash and Cash Equivalents totaling \$628,552 to be used to pay the Tenant Improvement Costs on or before the date of the Award of the Construction Contract. The terms of the security agreement establishing such a security interest shall require KPC to deposit such cash in an escrow account with an escrow trustee selected by the Project Management Committee and acceptable to the City prior to award of the Construction Contract. The terms of the security agreement establishing such a security interest also shall require KPC to assign such Cash Equivalents to the City until such Cash Equivalents mature. Upon maturity of the Cash Equivalents, the City shall assign them back to KPC, which shall be required to deposit the proceeds of such Cash Equivalents in the escrow account. The terms of both the security agreement and the escrow agreement shall include representations that KPC has not filed a petition in bankruptcy, that KPC has not pledged the funds in the escrow account to

any other persons, that no creditors of KPC have obtained lien status, and that no other persons have any other security interests in the funds in the escrow account. The escrow instructions shall provide that the escrow trustee shall not disburse funds in the escrow account without the consent of the Project Manager. The Project Manager shall consent to such disbursements only for approved Tenant Improvements.

(c) Initial Operating Costs, Pre-Opening Costs and Operating Reserve.

KPC agrees to present to the City evidence of the availability of Three Hundred Fifty Thousand Dollars (\$350,000) in cash to pay Operating Costs from January 1, 1997 to October 31, 1997, to pay Pre-Opening Costs and to establish the Operating Reserve which is satisfactory to the City according to the following schedule:

Evidence of Available Cash	Deadline
Fifty Thousand Dollars (\$50,000) for Operating Costs from January 1, 1997 to May 31, 1997	Award of Construction Contract
Fifty Thousand Dollars (\$50,000) for Pre-Opening Expenses and Fifty Thousand Dollars (\$50,000) for Operating Costs from June 1, 1997 to October 31, 1997	When construction is fifty percent (50%) complete
Two Hundred Thousand Dollars (\$200,000) to establish the Operating Reserve	Prior to issuance of the Certificate of Occupancy

(d) Business Plan. KPC has presented to the City a business plan for the Facility which is satisfactory to the City (at the City's sole discretion).

(e) Fundraising. KPC agrees to commit One Hundred Thousand Dollars (\$100,000) to pay the costs of a development professional and other development staff and associated costs for two (2) years to raise funds (exclusive of promotional materials, additional printing costs, or other pre-opening expenses) for the use and operation of the Facility in addition to KPC's Share of Total Design and Construction Costs. KPC further agrees to account separately for the costs of the development professional. KPC agrees to actively solicit public funds for the Project Budget.

KPC agrees to submit invoices to and to request reimbursement from public grantors and private contributors in a timely manner. KPC agrees to pay to the City reimbursements from public grantors and payments from private contributors to the Project immediately upon receipt until such time as KPC has paid to the City one hundred percent (100%) of KPC's Share of Total Design and Construction Costs in cash. KPC agrees that any grant funds that exceed the amount necessary to pay to the City KPC's Share shall be used as specified by the granting agent or cash donor as follows: first, to establish and maintain a Design and Construction Contingency Fund until the termination of the Design and Construction Agreement; second, to establish and

replenish the Operating Reserve; third, to fund operating costs; and fourth, to fund Project enhancements.

(f) Monthly Reports. KPC agrees to report monthly to the City on fundraising activities and grant applications throughout design and construction, and through the first three (3) months of the operation and use of the Facility. Monthly reports shall include monthly balance sheets, aging reports, data on the status of new, current and past due pledges, data on other current and past due receivables, and reports on new user contracts.

(g) Professional Services. KPC agrees to provide to the City professional start-up and transition services.

(h) Pledge Reserve; Letter of Credit. KPC agrees to maintain a pledge reserve fund of Fifty Thousand Dollars (\$50,000) for protection against unfulfilled pledges upon the execution of this Agreement. KPC further agrees to obtain a Letter of Credit from a financial institution acceptable to the City for at least One Hundred Thousand Dollars (\$100,000) upon the execution of this Agreement to be used if the pledge reserve fund is depleted.

(i) Project Management. KPC agrees to make such KPC personnel as called for under this Agreement available for consultation with City, the Architect, the Construction Contractor, and such other persons or entities as are retained by the City for the Project, to enter into the Use and Occupancy Agreement for the long-term use and occupancy of the Facility by KPC, and to cooperate with the City in the Project, in order to produce a suitable performing arts center, which the parties recognize to be in their mutual best interests.

(j) Project Operations. KPC agrees to negotiate and enter into a mutually acceptable Use and Occupancy Agreement with the City for the long-term use and occupancy of the Facility by KPC. The Use and Occupancy Agreement shall include provisions requiring KPC to establish an Operating Reserve of Two Hundred Thousand Dollars (\$200,000) in cash net of any outstanding liabilities. The Use and Occupancy Agreement also shall include provisions requiring KPC to replenish the Operating Reserve according to a schedule determined by KPC and the City whenever the Operating Reserve is less than Two Hundred Thousand Dollars (\$200,000).

(2) Commitments by the City.

(a) City's Share of Total Design and Construction Costs. The City hereby agrees, in accord with and subject to the terms stated in this Agreement, to provide the City's Share of Total Design and Construction Costs as soon as KPC has paid to the City one hundred percent (100%) of KPC's Share of Total Design and Construction Costs in cash, in Cash Equivalents assigned to the City, or in the form of pledges assigned to the City backed by a Letter of Credit from a financial institution acceptable to the City. The City's Share of Total Project Costs shall be used solely for actual construction and renovation costs.

The City agrees to be responsible for Project Management for the Project, to relocate the senior activities center during the Project, and for other miscellaneous pre-construction and consultant services, including the costs of a Construction Manager. The City agrees to pay costs which are estimated to total Two Hundred Thousand Dollars (\$200,000) to provide these services, in addition to the City's Share of Total Design and Construction Costs.

(b) Professional Services. For professional start-up and transition services, the City agrees to pay KPC up to a total of One Hundred Thousand Dollars (\$100,000) in addition to the City's Share of Total Design and Construction Costs.

(c) Project Account. The City agrees to deposit KPC's Share of Total Design and Construction Costs and the City's Share of Total Design and Construction Costs into a Project Account to be used solely for purposes related to the Project. When the Project is completed, including, but not limited to, the final disposition of any outstanding claims related to the Project, the City shall close the Project Account and shall refund any remaining funds on a pro rata basis to KPC and the City.

(d) Project Management. The City agrees to make such City personnel as called for under this Agreement available for consultation with KPC, the Architect, the Construction Contractor, and such other persons or entities as are retained by the City for the Project, and to cooperate with KPC in the Project, in order to produce a suitable performing arts center, which the parties recognize to be in their mutual best interests. Such cooperation shall include providing invoices to KPC in a timely manner to enable KPC to submit invoices to and to request reimbursement from public and private grantors in a timely manner.

(e) Project Operations. The City agrees to negotiate and enter into a mutually acceptable Use and Occupancy Agreement with KPC for the long-term use and occupancy of the Facility by KPC. The Use and Occupancy Agreement shall include provisions requiring KPC to establish an Operating Reserve of Two Hundred Thousand Dollars (\$200,000) in cash net of any outstanding liabilities. The Use and Occupancy Agreement also shall include provisions requiring KPC to replenish the Operating Reserve according to a schedule determined by KPC and the City whenever the Operating Reserve is less than Two Hundred Thousand Dollars (\$200,000).

(f) Investment Income. The City agrees that any income earned from investments of the City's Share of Total Design and Construction Costs and KPC's Share of Total Design and Construction Costs shall be for the benefit of the Project.

III. PROJECT DESIGN.

A. The parties acknowledge that the City, not KPC, has entered into the Architect Agreement. The parties agree that the City has the rights of "Owner" under the Architect Agreement, as well as all obligations thereunder.

B. The City acknowledges that the Architect Agreement is for the design of a Facility for KPC's use and benefit, and that all fees incurred thereunder shall be paid by KPC. Consequently, KPC shall be deemed a third party beneficiary under such Contract and said Contract shall so provide.

C. The Project Management Committee shall be consulted in connection with all phases of the design process and in all decisions regarding the Project as are made by the City and the Architect. The City further agrees not to amend the Architect Agreement without the express prior Approval of Project Management Committee.

D. No significant decisions regarding the Facility design shall be unilaterally made by the City, the Architect, or by the City and Architect, without Project Management Committee participation and Approval.

IV. PROJECT CONSTRUCTION.

A. Compliance with State and Local Laws. The parties shall comply with all applicable state and local laws and regulations, and applicable conditions of public grantors, including anti-discrimination laws.

B. Project Construction to be Treated as a Public Work. The parties agree that the construction of the Project shall be treated as a public work under the control and jurisdiction of the City. Such construction shall, therefore, be undertaken in accordance with applicable law, rules and regulations, as determined by the City, and other provisions of this Agreement.

C. Rights and Obligations Regarding Approval of Contractors Selected For Work on Project. KPC does not reserve and is not granted under this Agreement any right to approve the qualifications or use by the City of the Architect or Construction Contractor selected to work on the Project during its construction phase, except as follows:

(1) The Project Management Committee shall be fully consulted in preparation of the bid documents for construction, and any other contracts which the City proposes to enter into with respect to the Project; and

(2) The Project Management Committee shall review bids in accordance with City procedures.

D. Construction Scheduling. The City shall consult with the Project Management Committee to have the Project construction commenced and completed in such time period(s) or such other time periods as is mutually deemed reasonable and feasible.

E. City Invitation of Bids for the Project's Construction. The City shall invite bids for the construction of the Project when all of the following actions have occurred:

(1) Plans and specifications for the Project, appropriate bid documents, and terms and conditions of the Architect Agreement, the Construction Contract, and any other contract which the City proposes to enter into with respect to the Project have been prepared and the same have been approved by the Project Management Committee.

(2) One hundred percent (100%) of KPC's Share of Total Project Costs in cash, in Cash Equivalents assigned to the City, or in the form of pledges assigned to the City backed by a Letter of Credit from a financial institution acceptable to the City has been paid to the City by KPC in accordance with Section II of this Agreement.

F. Bid Process. The City must have received a responsive bid from a qualified and responsible bidder for construction of the Project that is equal to or less than the project budget. If the lowest responsible bid exceeds the project budget, the City shall so advise the Project Management Committee. The Project Management Committee shall take one (1) or more of the following actions:

(1) The Project Management Committee shall make design and/or program requirement changes which would enable the Project to be constructed within the project budget. For this purpose, the City shall make available to the Project Management Committee the services of the Architect and the Project Director. A refined project budget shall include the cost of redesign. Following completion of such changes, the City shall solicit new bids for construction of the Project, if necessary.

(2) The Project Management Committee shall select one (1) or more deductive alternates sufficient in value to allow the City to accept the lowest responsible bid within the project budget. The Project Management Committee shall identify such alternates while the lowest responsible bid remains outstanding and binding upon the bidder, which shall be not less than thirty (30) days.

If the lowest responsible bid received by the City for construction of the Project allows the City to include one (1) or more proposed alternates within the project budget, the City shall so advise the Project Management Committee prior to accepting such bid. Prior to the expiration of the bid, the Project Management Committee shall recommend which additive alternate or alternates the Project Management Committee desires the City to accept.

G. City Council Award of Contract for the Project's Construction. The City Council shall award a contract for the construction of the Project when the following actions have occurred:

(1) KPC and the City have agreed on the terms and conditions of the Use and Occupancy Agreement, including KPC's obligation to occupy, manage and operate the Facility.

(2) The City must have received a responsive bid from a qualified and responsible bidder for construction of the Project that is equal to or less than the project budget.

H. Access to Project. Throughout the construction and renovation of the old library, physical access to the Project site by the public, KPC, or persons whom KPC desires to have access, shall require authorization by the Project Management Committee. Any such authorization shall be conditioned on the visitor complying with safety rules and procedures throughout their visit to the Project site.

V. PROJECT MANAGEMENT.

A. Generally. The KPC Board and the City Council shall review and approve the Project Design. The City shall appoint a Project Manager. KPC and the City shall each appoint three persons to a six-person Project Management Committee to oversee agreed-upon aspects of design and construction, including major change orders, and to supervise the Project Manager. In case of a tie vote by the Project Management Committee, the City Manager shall cast the deciding vote.

B. Change Orders.

(1) Any change order that may increase costs over the agreed-upon budget including contingencies shall require reduction in the scope of work so that actual costs of the project do not exceed said budget, and shall be approved by the Project Management Committee. Reductions to the project budget will be made as necessary in lieu of incurring cost overruns.

(2) The Project Management Committee may approve any change orders that do not increase costs over the Project Budget.

(3) The Project Manager may make decisions without Project Management Committee Approval in emergency situations where: (i) the Project Manager reasonably believes that destruction of property or injury to persons is likely to occur; (ii) there is no time to consult with the Project Management Committee prior to the making of the decision by the Project Manager; (iii) the Project Manager's actions in such circumstances are limited to dealing with the emergency circumstances and are taken in a cost effective manner; and (iv) thereafter, the Project Manager immediately notifies the Project Management Committee of the nature of the emergency circumstances and his decision with respect to such circumstances; provided, however, that the Project Manager shall not approve any change orders in which the cost of the change exceeds one percent (1%) of the Total Design and Construction Costs, or up to fifty percent (50%) of the remaining contingency.

(4) No Design or Construction Change Without Mutual Approval. After execution of the Construction Contract, no design or construction change request initiated by or on the behalf of KPC or the City shall be implemented without the prior Approval of the Project Management Committee.

VI. TENANT IMPROVEMENTS.

A. KPC shall procure and provide Tenant Improvements. KPC shall also contract for and manage construction and/or installation of Tenant Improvements in coordination with the Construction Contractor. KPC directors, officers, and employees, unless properly licensed and bonded, shall not construct or install Tenant Improvements.

B. KPC shall pay the Tenant Improvement Costs as required in Section II of this Agreement. KPC shall grant to the City a security interest in cash and Cash Equivalents totaling \$628,552 to be used to pay the Tenant Improvement Costs on or before the date of the Award of the Construction Contract. The terms of the security agreement establishing such a security interest shall require KPC to deposit such cash in an escrow account with an escrow trustee selected by the Project Management Committee and acceptable to the City prior to award of the Construction Contract. The terms of the security agreement establishing such a security interest also shall require KPC to assign such Cash Equivalents to the City until such Cash Equivalents mature. Upon maturity of the Cash Equivalents, the City shall assign them back to KPC, which shall be required to deposit the proceeds of such Cash Equivalents in the escrow account. The terms of both the security agreement and the escrow agreement shall include representations that KPC has not filed a petition in bankruptcy, that KPC has not pledged the funds in the escrow account to any other persons, that no creditors of KPC have obtained lien status, and that no other persons have any other security interests in the funds in the escrow account. The escrow instructions shall provide that the escrow trustee shall not disburse funds in the escrow account without the consent of the Project Manager. The Project Manager shall consent to such disbursements only for approved Tenant Improvements. Funds to be used to pay KPC's Share of Total Design and Construction Costs, including yield from the investment of such funds, and funds to be used to pay Pre-Operating Costs and to establish the Operating Reserve shall not be used to pay the costs of Tenant Improvements.

C. In view of the special purpose facility into which the old library is to be renovated, and due to the express consideration that the City undertakes this Project for the general public to benefit by the operation of a performing arts center, KPC and the City hereby agree that the Facility must continue to be useful as a performing arts center. Consequently, the City shall retain a security interest in all Tenant Improvements. In the event that this Agreement is terminated or the Use and Occupancy Agreement is terminated or is not renewed, all KPC-provided or owned tenant improvements which are at the construction site or in the Facility shall remain in place and thereupon become the property of the City.

VII. PROCESS FOR PAYMENT OF PROJECT EXPENSES BY CITY.

A. Process for Payment of Invoices From Architect, Contractor and Consultants. Each invoice from the Architect, the Construction Contractor, and any other consultant engaged to perform work in connection with the Project's design or construction shall be submitted to the Project Manager for Approval or disapproval. The Project Manager shall immediately provide a copy of all invoices to the Project Management Committee, together with any available certifications regarding the appropriateness of making the requested payment. The Project

Management Committee and the Project Manager shall cooperate to determine in a timely fashion whether an invoice should be approved or disapproved, and in order to permit payment of approved invoices in accord with the applicable contracts of the invoicing party. After the Project Manager and the Project Management Committee have approved any such invoice for payment, the City shall pay the same in accord with the terms of the applicable contract with the invoicing party or make a request to draw funds for such payment, in accord with the respective obligations of the parties. If either the Project Manager or the Project Management Committee disapproves an invoice, the parties shall meet to discuss the basis for the objection to payment and shall seek to resolve the matter as soon as possible.

B. Process for Reimbursement of Project Costs. The City shall maintain and provide the Project Management Committee and KPC with a timely itemized record of all Project Costs incurred or paid by the City. The City shall also provide timely itemized statements to the Project Management Committee and KPC, indicating amounts to be reimbursed to the City for Project Costs paid by the City in excess of the City's Share of Project Costs through the applicable date, and since the last most recent reimbursement of such expenses.

C. Report of Project Construction Progress and Expenses. The City's Project Manager shall provide a timely report to the Project Management Committee and the KPC regarding the following:

(1) The aggregate amount of invoices received from the Architect, the Construction Contractor and other consultant(s) that the City has paid since the last report;

(2) The aggregate amount of Architect, Construction Contractor, and consultant charges that the City has paid to date;

(3) The aggregate amount of City expenses that have been reimbursed to the City by KPC since the last report;

(4) The aggregate amount of City expenses that have been reimbursed to the City by KPC to date; and

(5) The balance of funds (if any) remaining available for the Project's construction, with a separate statement of the amount of the contingency so remaining.

D. Public Agency Grants. KPC shall submit invoices to and request reimbursement from public grantors, including, but not limited to, the Washington State Arts Commission and the King County Arts Commission, in a timely manner. KPC agrees to pay to the City reimbursements from public grantors immediately upon receipt until such time as KPC has paid to the City one hundred percent (100%) of KPC's Share of Total Design and Construction Costs in cash. KPC agrees that any grant funds that exceed the amount necessary to pay to the City KPC's Share, including Three Hundred Seventy-Five Thousand Dollars (\$375,000) from the Cultural Facilities Grant Fund administered by the Washington State Arts Commission and a total of \$490,000 from the "Small Arts," "Suburban Arts" and "Hotel/Motel" grant funds administered by

the King County Arts Commission, shall be used as follows: first, to pay to the City until KPC has paid to the City one hundred percent (100%) of KPC's Share of Total Design and Construction Costs in cash; second, to establish and maintain a Design and Construction Contingency Fund until the termination of the Design and Construction Agreement; third, to establish and replenish the Operating Reserve; fourth, to fund operating costs; and fifth, to fund Project enhancements.

E. Drawing on Letters of Credit. KPC shall execute any documents necessary to direct its financial institution (the "Bank") to draw on the KPC Letter of Credit as contemplated herein to pay KPC's share of invoices submitted by the City for fees and costs incurred by the City under the Architect Agreement, the Construction Contract or other consultants' invoices (if pursuant to an Project Management Committee-approved contract), or City expense reimbursement requests.

VIII. TERMINATION OF AGREEMENT.

Unless agreed otherwise in writing by both parties, this Agreement shall terminate if KPC is unable to obtain funds, loans, letters of credit or other reasonable assurance of financial ability, or if the City has not invited bids for renovation of the Facility by December 31, 1996. If Project is undertaken as provided herein, this Agreement shall terminate upon issuance of the certificate of occupancy. Otherwise, this Agreement shall terminate by June 30, 1998.

IX. RELATIONSHIP WITH USE AND OCCUPANCY AGREEMENT.

After the execution of this Agreement, but prior to the Award of the Construction Contract, the parties shall execute a Use and Occupancy Agreement. The Use and Occupancy Agreement is effective upon:

A. KPC's presentation and the City Council's approval of KPC's anticipated Business Plan and Operating Budget;

B. KPC's presentation of and the City Council's satisfaction that KPC has sufficient ability to meet the requirements of the business plan and for on-going operational costs.

C. KPC's presentation of and the City Council's satisfaction that KPC has Three Hundred Fifty Thousand Dollars (\$350,000) in cash to pay Operating Costs from January 1, 1997 to October 31, 1997, to pay Pre-Opening Costs and to establish the Operating Reserve; and

D. The City's issuance of a Certificate of Occupancy for the renovated structure.

X. MISCELLANEOUS PROVISIONS.

A. No Liens. The City warrants to deliver possession of the Facility to KPC, free and clear of all liens, claims and encumbrances on the Facility or the Facility Site on the effective date of the Use and Occupancy Agreement and warrants KPC's quiet title under the Use and Occupancy Agreement and quiet possession to the Facility.

B. Resolution of Disputes. KPC and the City shall make their best efforts to resolve disputes as expeditiously as possible. In the event a matter requiring KPC and City approval can not be resolved, the matter shall be referred to the Project Management Committee plus an independent party who shall serve as a non-voting member of the committee except in the case of deadlock (the "Independent Committee Member"). The Project Management Committee shall select the Independent Committee Member within fifteen (15) business days of executing this Agreement. The City Manager shall not serve on the committee in any event. A majority of the committee shall determine the matter in dispute. If the committee is unable to resolve the dispute by majority vote within five (5) business days, or such extended period as the committee may designate by majority vote, then the matter shall be decided by the Independent Committee Member. In the event of a deadlock, the parties shall seek to give deference to the decision of the Independent Committee Member, provided however, such decision is non-binding, and either party shall then have the right to seek judicial resolution of the matter. The Independent Committee Member shall be an individual qualified and experienced in construction matters, with no affiliations with either KPC or the City, and shall be selected by mutual agreement of KPC and the City within fifteen (15) business days after execution of this Agreement or, in the event of a vacancy in the position of Independent Committee Member, within fifteen (15) business days after the occurrence of such vacancy. The parties shall share in equal amounts the cost charged by the Independent Committee Member for serving in such capacity.

C. Continuation of Efforts in Event of Dispute. Notwithstanding the existence of any dispute between the parties hereto, the parties shall continue to carry out, without unreasonable delay, all of their respective responsibilities under this Agreement that are not affected by the dispute.

D. Notices. Except as otherwise provided herein, any notice or communication to be given by one party to the other under this Agreement must be in writing. Such notices or communications shall be: (i) delivered; (ii) mailed, postage prepaid, by United States mail; (iii) sent by express mail; or (iv) sent by facsimile transmission, to the following respective addresses or to such other addresses as the parties, from time to time, may specify in writing:

If to the City:

Terrence L. Ellis
 City Manager
 City of Kirkland
 123 Fifth Avenue
 Kirkland, Washington 98033
 FAX No. (206) 803-1914

cc: Gail Gorud
 City Attorney
 City of Kirkland
 733 7th Avenue, #100
 Kirkland, Washington 98033
 FAX No. (206) 889-9444

If to the KPC:

Steve Lorian
 Executive Director
 Kirkland Performance Center
 220 Kirkland Avenue
 Kirkland, Washington 98033
 FAX No. (206) 828-0422

cc: Peter Paget
 550 Kirkland Way, #400
 P.O. Box 817
 Kirkland, Washington 98083-0817
 FAX No. (206) 828-8289

E. No Agency. The parties agree that neither the City nor KPC is an agent for, nor has the power or authority to bind the other, nor is any partnership or joint venture created by this Agreement. In accord with these principles, the parties acknowledge that the Architect Agreement, the Construction Contract, and all other agreements entered into by the City are the sole obligations of the City, provided however, KPC is obligated to reimburse City such sums as are contracted for under this Agreement. In no event shall KPC be liable to the Architect, Construction Contractor or other third parties contracting with the City in relation to the Project, nor subject to any claims by the City for contribution on such third party claims unless the third party claims resulted from a breach by KPC of its obligations under this Agreement. Notwithstanding the foregoing, KPC reserves all defenses to such claims if the alleged KPC breach is an action taken by KPC in response to a prior breach of obligations by the City or, in the case of a City contract with the Architect, Construction Contractor or other third parties, resulting from a prior breach by such third parties under their respective contracts. This Agreement does not create any third party beneficiary rights or claims against KPC.

F. Corporate Obligations Only. The obligations of KPC under this Agreement, are solely the obligations of the non-profit corporate entity known as the Kirkland Performance Center, and no director, trustee, officer, employee, agent or other KPC representative shall have

any liability hereunder individually, or in his or her capacity as director, trustee, officer, employee, or agent.

G. Warranties. The City agrees that KPC may, unless prohibited by the terms of a warranty, make claims on all warranties given to the City under the Architect Agreement, the Construction Contract, or under any other agreements for the provision of materials, labor or other service in connection with the Project. The City shall also, on notice from KPC, make such warranty claims as KPC requests pursuant to the terms of the warranties.

H. Amendments. The parties hereto expressly reserve the right to amend this Agreement from time to time as they deem necessary; provided, that no such amendment or any other form of modification or supplementation of the terms of this Agreement shall be effective and binding on the parties hereto unless it is in writing and signed by an authorized representative of each of the parties hereto.

I. Headings. The titles of sections contained herein are for convenience only and do not in any way define, limit or construe the contents of any section.

J. Entire Agreement. This Agreement, and the Use and Occupancy Agreement, embody the entire agreement between the parties hereto with respect to the design, construction, use and occupancy of the Facility. All other agreements or modifications of agreements have expired. There are no other understandings or agreements, written or oral, between the parties relating to the general subject matter hereof. The parties acknowledge that they have negotiated the terms hereof and that they have had the opportunity to have this Agreement reviewed by their respective legal counsel. The terms and conditions of this Agreement shall not be construed against any party on the basis of that party's draftsmanship of any of the same.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement by having their authorized representative(s) affix their signatures below:

CITY OF KIRKLAND

KIRKLAND PERFORMANCE CENTER

By: _____
Terrence L. Ellis
City Manager

By: _____
Steve Lorian
Executive Director

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EXHIBITS

Exhibit

Description

A

Legal Description of Facility Site

B

Project Budget

EXHIBIT A**LEGAL DESCRIPTION OF FACILITY SITE**

A portion of S.E. $\frac{1}{4}$ of S.W. $\frac{1}{4}$ of Sec. 5, Twp. 25 North, Range 5 E.W.M. described as follows: Beginning at a point in the south line of Section 5, Twp. 25 North, Range 5 E.W.M., N. $89^{\circ}39'$ E. 1511.50 ft. from the meander corner between Section 5 and 8, said point being the south-easterly corner of Kirkland Recreation Field and running thence S. $89^{\circ}39'$ W. 84.12 ft., thence N. $0^{\circ}31'40''$ W. 265.23 ft. along existing fence, thence continuing along the existing fence N. $30^{\circ}23'$ W. 243.22 ft., thence N. $0^{\circ}21'$ W. 56.0 ft., thence N. $89^{\circ}39'$ E. 206.29 ft. to a point which bears N. $0^{\circ}21'$ W. from the point of beginning being on the east line of said Kirkland Recreation Field, thence S. $0^{\circ}21'$ E. 531.80 ft. to the point of beginning. Except therefrom the right-of-way of Kirkland-Redmond Short Line Road. Containing 1.48 Acres more or less.

EXHIBIT B
PROJECT BUDGET

NON-CONSTRUCTION-RELATED COSTS	<u>Amount</u>	<u>Subtotal</u>	<u>Total</u>
KPC Operating Costs 1993 - 1996	\$ 420,000		
KPC Operating Costs Jan. 1, 1997 - Oct. 31, 1997	\$ 100,000		
KPC Pledge Reserve	\$ 50,000		
KPC Operating Reserve	\$ 200,000		
KPC Pre-Opening Expenses	\$ 50,000		
Subtotal - KPC Non-Construction Budget		\$ 820,000	
City Payment for Fund Development Services	\$ 100,000		
Subtotal - City Non-Construction Budget		\$ 100,000	
TOTAL NON CONSTRUCTION-RELATED COSTS			\$ 920,000
CONSTRUCTION-RELATED COSTS	<u>Amount</u>	<u>Subtotal</u>	<u>Total</u>
Maximum Allowable Construction Costs	\$2,192,717		
Architectural/Engineering Costs	\$ 369,863		
Construction Contingency	\$ 219,100		
Washington State Sales Tax	\$ 179,802		
Permits and Testing Services	\$ 33,000		
Subtotal - "Total Design and Construction Costs"		\$2,994,482	
Subtotal - "Tenant Improvement Costs"		\$ 628,552	
City Senior Center Relocation	\$ 50,000		
City Reports and Studies	\$ 64,300		
City Construction Management Services	\$ 88,000		
Subtotal - Miscellaneous City Construction Costs		\$ 202,300	
TOTAL CONSTRUCTION-RELATED COSTS			\$3,825,334
TOTAL PROJECT BUDGET			\$4,745,334