



Date: April 10, 2013

To: Mayor and City Council Members
From: Thomas J. Bonfield, City Manager
Subject: Revised DPAC Operating Agreement

Executive Summary

In 2008, the City of Durham opened the Durham Performing Arts Center (“DPAC”), a 2,800 seat theater in downtown Durham. The City chose as the DPAC’s operator a joint venture limited liability company between J.N. Worldwide, LLC (“Nederlander”) of New York, New York and Professional Facilities Management, Inc. (“PFM”) of Providence, Rhode Island, two firms that are industry leaders with significant experience in operating theaters across the nation as well as internationally. Durham Performing Arts, LLC is the name of the Nederlander-PFM joint venture limited liability company. The initial term of the DPAC Operating Agreement is five years ending June 30, 2014, with a unilateral option for the operator, Nederlander-PFM, to renew the Agreement for another five years, ending June 30, 2019, for a total of 10 years. The DPAC has enjoyed tremendous programmatic and financial success since its opening in November 2008, and is now ranked among the nation’s top theaters. In light of the DPAC’s success, the Operator has expressed to the City an interest in having a longer term commitment to operate the DPAC. The Administration agrees that a longer commitment will be in the City’s interest and recommends that the City enter into an agreement that could have a maximum term of 27 years.

Recommendation

The Administration recommends that the City Council authorize the City Manager to execute an agreement with Durham Performing Arts LLC, JN America LLC, and Professional Facilities Management, Inc. for the purpose of operating the Durham Performing Arts Center.

Background

The City and the Operator entered into a contract titled “DPAC Operating Agreement by and between the City of Durham and Durham Performing Arts, LLC, JN Worldwide, LLC and Professional Facilities Management, Inc.” dated April 29, 2007 to operate the DPAC. The DPAC opened on November 30, 2008.

The parties first amended the original agreement in March 2008 to put into effect certain duties required by naming rights agreement with Blue Cross/Blue Shield of North Carolina.

The Second Amendment to the DPAC Operating Agreement occurred in October 2009 for the purpose of putting into effect certain duties required by the naming rights agreement with Robert D. Teer, Jr.

The Third Amendment to DPAC Operating Agreement occurred in March 2009 to modify prior pre-opening budget terms and required the Operator to assume certain operating

responsibilities for the DPAC Light Sculpture designed by Jaume Plensa and installed in the DPAC Plaza.

In October 2009, the Fourth Amendment to the operating agreement established the Parking Voucher Program and the City Volunteer Program.

The Fifth Amendment to the DPAC Operating Agreement implemented modifications to the naming rights agreements in July 2010.

In addition to negotiated new terms, the revised and restated DPAC Operating Agreement incorporates each of the amendments into the revised and restated DPAC Operating Agreement.

Issues and Analysis

Under the revised and restated DPAC Operating Agreement, Durham Performing Arts LLC, as managed by Nederlander and PFM, will continue to operate the DPAC as a joint venture. Highlights of the revised agreement are as follows:

1. Term

The revised agreement will have the potential term of 27 years beginning in 2013.

The revised agreement's initial term will be 10 years commencing in April or May 2013 and ending June 30, 2023. The Operator then has the option for renewing the agreement for seven years. Subsequently, the Operator has two additional options of renewing the agreement for successive five year terms. The current agreement's term is five years with a five-year unilateral option for the Operator, for a total of ten years. The end of the first five year term is June 30, 2014.

2. Operating Profit Share

The revised agreement contains a change to the Operator/City profit share split. Currently, the Operator/City profit share split is 60%/40%. This will remain in effect until June 30, 2014, the end of the first original term. As of July 1, 2014, the City/Operator will split the operating profit as follows:

<u>Operating Profit</u>	<u>City Share</u>	<u>Operator Share</u>
\$ 0 to \$2,000,000	40%	60%
\$2,000,001 to \$2,300,000	0%	100%
\$2,300,001 to \$3,000,000	40%	60%
\$3,000,001 and above	30%	70%

By way of example, if for a given Fiscal Year the total Operating Profit is \$4,000,000.00 the distribution of Operating Profit share would be as follows:

<u>Operating Profit Ranges for \$4,000,000</u>	<u>City Share</u>	<u>Operator Share</u>
\$ 0 to \$2,000,000	\$800,000	\$1,200,000
\$2,000,001 to \$2,300,000	\$0	\$300,000
\$2,300,001 to \$3,000,000	\$280,000	\$420,000
\$3,000,001 and above	\$300,000	\$700,000
Total Distribution:	\$1,380,000	\$2,620,000

For comparison, under the current 60%/40% split, with a \$4 million operating profit, the Operator would receive \$2.4 million and the City would receive \$1.6 million.

The full year actual operating profit for the past three years is as follows:

FY12	\$4,575,367.00
FY11	\$2,548,957.00
FY10	\$3,047,029.00

FY09 was an 8 month partial year as the DPAC opened in November 2008. The change in the Operator/City profit share split is important to incentivizing the Operator to produce revenue at a high level that will enhance the opportunity for the City to always have adequate revenue for capital replacement, debt service, maintenance and repair and not to rely on any General Fund sources.

3. Management Fee

The Operator earns a management fee for providing services under the agreement. The FY14 Management Fee will be \$152,081.00. The fee is subject to annual increase by the greater of 4% or the CPI Index. Other than the annual increase called for in the original agreement, the management fee does not change. According to the annual audit, the FY12 management fee was \$140,608.00. the management fee for this year FY13 will be \$146,232.00.

4. Centralized Services Fee

Centralized Services refers to corporate accounting services, human resources services, box offices, computer systems support and corporate programming services. The Centralized Services Fee is a maximum of \$150,000.00 per year subject to annual increases in an amount equal to 3%. The current agreement began with a \$65,000.00 centralized services fee with no more than a 3% annual increase of the previous fiscal year. The centralized services fee was \$66,950.00. The current agreement also provides for a 3% annual increase; therefore, the centralized services fee for FY13, the current year, will be approximately \$68,959.00.

5. DPAC Facility Fund

The City will maintain a DPAC Facility Fund for the exclusive benefit of the DPAC property and the City will contribute 100% of the City's Facility Fee share to the Facility Fund. In addition, the Agreement requires that the City contribute a certain percentage of other revenues generated from the DPAC (profit share and naming

rights) to the Fund after paying any remaining amount needed to pay the debt service after exhausting any hotel occupancy taxes.

6. Facility Fee

The facility fee \$3.00 per ticket until June 30, 2018. The fee will be \$3.50 per ticket for the remainder of the term. The City and the Operator will continue to share the Facility Fee 50%/50%. As provided in the original agreement, the Operator's Facility Fee share remains as gross revenue for the DPAC.

7. Naming Rights

Under the revised agreement, the Operator has the exclusive right and will be responsible for promoting and securing naming rights for the DPAC. The revenue generated will be counted as gross revenue for the Operator. The current naming rights revenue will remain with the City until the naming rights agreements expire. Currently, Sports & Properties, Inc. has marketed and secured DPAC naming rights with the revenue going to the City. The current Sports and Properties, Inc. agreement with the City ends August 31, 2013, and will not be renewed.

8. Radius Restriction

The agreement exempts the City of Greensboro city limits from the radius restriction provision. Under the current agreement, the Operator may not develop or operate a competing theater of between 2,000 and 3,500 seats within a 50-mile radius of the DPAC. This provision remains notwithstanding an exemption for the City of Greensboro.

9. Annual Cap/Repairs and Maintenance Costs

The Annual Cap on Repairs and Maintenance Costs to be incurred by the Operator is \$40,000.00 subject to an annual increase by the greater of 4% or the CPI index. An amendment to the current agreement establishes that cap at \$35,000.00 with no annual increase.

10. Preventive Maintenance Plan

The Operator shall be responsible for all reasonable normal and customary maintenance expenditures to be incurred in connection with its obligations to maintain the DPAC in accordance with the Operating Standards. As part of such obligations, Operator shall be responsible for performing the preventative maintenance tasks described in the Preventative Maintenance Plan provided by the City. These Preventative Maintenance tasks shall not be considered as Repairs and Maintenance and shall be treated as an Expense, except to the extent the Preventative Maintenance Plan requires Operator to perform Repairs and Maintenance as a result of performing the Preventative Maintenance tasks. This will result in improved management of maintenance costs and lengthen the life of various DPAC mechanical, operating, and electrical systems and equipment.

11. Capital Expenditures Projection Schedule

The City has developed the DPAC Capital Expenditure Projection Schedule, and the Parties acknowledge that certain building operating components will require replacement to maintain facilities to support optimal DPAC operating conditions. The projections anticipate that approximately \$630,000.00 of annual average Capital Investment will be required over the forecast 25 year operating term. Thus, the City has determined that the Preventive Maintenance Plan must be an operational priority of the DPAC to minimize the use of the City funds to pay for Capital Expenditures component replacements. There is no substantive obligation of the City to comply with what is shown on the schedule but it is only referenced to be used as a tool for the City to determine its obligations over time.

12. Specific Improvements Schedule

The revised agreement specifies that the City complete the following items in accordance with provided minimum specifications and performance requirements according to the indicated schedules:

1. Replace carpet not later than August 31, 2018.
2. Replace the seats no later than August 31, 2020.
3. Replacement and/or improve acoustical and lighting systems by August 31, 2022. Parties agree that the performance standards and specifications for acoustical and lighting systems replacement will be determined closer to the date of replacement, if required. .

13. DPAC Name

The City and the Operator agree to retain the name Durham Performing Arts Center, and the Operator shall market the DPAC using "DPAC" or "Durham Performing Arts Center."

14. Casino Clause

The Operator may elect to terminate the Agreement in the event a casino is constructed within 75 miles of the DPAC and the casino constructs a live performance venue with a seating capacity between 1,500 seats and 7,500 seats.

15. Line of Credit

The new agreement no longer requires Nederlander to maintain a line of credit in the amount of \$2,000,000.00 for the sole benefit of the City to ensure Nederlander's obligation under the agreement.

Key provisions in the initial Agreement that continue in the revised Agreement include:

1. The Operator guarantees all annual operating deficits for the facility.
2. The Operator will book, on average, 100 event performances per year on a three-year rolling basis, not including American Dance Festival (ADF) performances or rehearsals.

3. The Operator will submit to the City an independent annual financial and performance audit for the operations of the DPAC.
4. The Operator agrees to use its best efforts to make the Theater available for ADF for seven weeks each year during June and July in return for \$35,000.00 in rent per year and a reasonable escalation in rent based upon the CPI Index from year to year.

Alternatives

If the City Council does not approve the revised and restated DPAC Operating Agreement, the current agreement remains effective until June 30, 2014 until the Operator elects to exercise the option not to renew another five-year term.

Financial Impact

Based upon conservative projections of operating results and incorporating the new terms in the proposed agreement, current financial modeling shows that expected revenues (profit share, occupancy taxes, naming rights, and facility fees) are sufficient to fund all existing debt service, projected capital needs, and other costs associated with the maintenance of the DPAC that are not the responsibility of the operator. It is not anticipated that any General Fund or tax support of the facility will be necessary.

SDBE Summary

As provided for in Section 8.6 of the revised and restated DPAC Operating Agreement the Operator shall meet with the Director of the City's Department of Equal Opportunity/Equity Assurance (EO/EA) to annually discuss potential contracting opportunities for goods and services for small disadvantaged businesses certified by the City for contracts of \$100,000.00 or more. The EO/EA director may set project specific goals and the Operator will provide annual reports on all contracting activity of \$100,000.00 or more.

Attachments

Revised and Restated DPAC Operating Agreement