

MIAMI BEACH

City of Miami Beach, 1700 Convention Center Drive, Miami Beach, Florida 33139, www.miamibeachfl.gov

COMMISSION MEMORANDUM

TO: Honorable Mayor Dan Gelber and Members of the City Commission

FROM: Alina T. Hudak, City Manager 

DATE: May 25, 2022

SUBJECT: **A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, APPROVING AND AUTHORIZING THE CITY MANAGER TO EXECUTE AMENDMENT NO. 5 TO THE MANAGEMENT AGREEMENT BETWEEN THE CITY OF MIAMI BEACH AND LIVE NATION WORLDWIDE, INC., FOR THE OPERATION AND MANAGEMENT OF THE FILLMORE MIAMI BEACH AT THE JACKIE GLEASON THEATER, TO SUSPEND THE TERM OF THE AGREEMENT DURING THE CONTEMPLATED CLOSURE OF THE FACILITY NECESSITATED BY EARLY WORK ON THE MBCC HOTEL PROJECT; AND FURTHER APPROVING AMENDMENT NO. 1 TO THE EARLY ACCESS AGREEMENT BETWEEN THE CITY AND MB MIXED USE INVESTMENT, LLC TO CLARIFY MB MIXED USE INVESTMENT, LLC'S EXISTING RESPONSIBILITY TO PAY FOR LIVE NATION'S COSTS AND EXPENSES RESULTING FROM THE TEMPORARY CLOSURE OF THE FILLMORE.**

BACKGROUND

On June 22, 2007, the City entered into a Management Agreement with Live Nation Worldwide, Inc. ("Live Nation") to manage the Jackie Gleason Theater of the Performing Arts, now named and known as the Fillmore Miami Beach at the Jackie Gleason Theater (the "Facility" or "Venue"). The Original Management Agreement has been amended four times: on December 9, 2009 (the "First Amendment"), July 7, 2011 (the "Second Amendment"), May 6, 2016 (the "Third Amendment"), and on March 10, 2021 (the "Fourth Amendment", the Original Management Agreement as so amended, the "Management Agreement"). The Management Agreement provides for an initial term of ten (10) years, commencing on June 22, 2007, and ending on August 31, 2017. The Management Agreement also provides for two 5-year renewal options: the initial 5-year renewal option is at the discretion of Live Nation ("First Renewal Term"); the second 5-year renewal option may be exercised upon mutual agreement of the parties ("Second Renewal Term"). In November 2016, pursuant to Section 3.2 (i) of the Management Agreement, Live Nation exercised the First Renewal Term, commencing on September 1, 2017 and expiring on August 31, 2022.

On December 9, 2009, the Mayor and City Commission adopted Resolution No. 2009-27278, approving the First Amendment, which permitted Live Nation to extend hours of operation and offer liquor sales at the Venue for a trial period, subject to conditions.

On April 13, 2011, the Mayor and City Commission adopted Resolution No. 2011-27640, approving the Second Amendment to the Management Agreement, which incorporated the extended hours of operation and liquor sales for the duration of the Management Agreement.

On April 13, 2016, the Mayor and City Commission adopted Resolution No. 2016-29368, approving the Third Amendment to the Management Agreement, which established the terms on which the City may remove the "Rehearsal Room" from the Management Agreement, should the City continue to pursue development of the Miami Beach Convention Center Hotel (the "Hotel Project") and other related off-site improvements. The Third Amendment also contemplates among other conditions, (1) financial and operational adjustments related to Live Nation's operations of the Venue, including establishing the Required City Distribution to be paid by Live Nation; (2) that a portion of the Facility and the surrounding area may undergo construction, including modifications to the Facility's back of house, reconfiguration of the Facility's loading docks, and upgrade of the fire alarm system (the "Facility Improvements"); and (3) that Live Nation shall receive a credit against amounts payable by Live Nation to the City in the event Hotel Project construction activities result in (a) cancellation or relocation of an Event or (b) for a continuous period of not less than twenty-four (24) hours, either (i) renders the Facility inaccessible, (ii) render the Facility uninhabitable or unfit for use, or (iii) causes the cessation of utilities at the Venue (collectively, "Material Disruptions"). Specifically, the Third Amendment stipulates that that if the City verifies that Live Nation is required to close the Facility due to Material Disruptions then Live Nation is to receive a credit equal to the sum of the following (collectively, the "Required Credit") (1) a pro-rated per-diem amount of the then-applicable Required City Distribution ("RCD") for the duration of such closure; (2) a pro-rated per-diem amount of all other fixed costs incurred by Live Nation to operate the Facility (net of the chilled water credit stipulated in the Third Amendment), and (3) any and all out-of-pocket expenses incurred by Live Nation in connection with the cancellation of Events, including without limitation, talent guarantees, marketing costs and costs related to personnel.

On January 14, 2021 the Mayor and City Commission adopted Resolution No. 2021-31546 approving the Fourth Amendment to the Management Agreement, extending the first renewal term by the number of days corresponding to the days the Facility has been closed due to the COVID-19 Pandemic; and adjusting the Required City Distribution payment to be suspended and prorated to the days corresponding to the Facility's closure. Accordingly, on February 1, 2022, the City and Live Nation entered into a Memorandum of Understanding to memorialize the Facility reopening date as November 14, 2021, thereby extending the current term through April 27, 2024, and resuming the Required City Distribution payment in January 2022 in the amount of \$407,196.42 after applying the corresponding credits in the amount of \$900,000.00, pursuant to Section 3.2 (b) of the Fourth Amendment to the Management Agreement.

Separate from the Management Agreement, on July 25, 2018, the Mayor and City Commission adopted Resolution No. 2018-30425, approving a lease agreement (the "Hotel Lease") between the City and MB Mixed Use Investment, LLC (the "Developer") approving the construction and development of the Miami Beach Convention Center Hotel (the "Hotel Project") at the site defined in the Hotel Lease (the "Site").

On November 6, 2016, more than sixty percent (60%) of the voters voting thereon in a City-wide referendum approved of the Hotel Lease as required by Section 1.03(b)(3) of the City Code.

Thereafter, on March 4, 2020, the City and MB Mixed Use Investment, LLC entered into an early access agreement (the "Early Access Agreement" or EAA) to grant the Developer access to the Site and to certain other areas, including certain portions of the Facility, so that the Developer may perform certain pre-construction activities (the "Early Work") that would accelerate the timeline for construction of the Hotel Project. The Early Access Agreement further requires the City and the Developer to reasonably cooperate with each other so that the Developer's activities under the Early Access Agreement do not materially interfere with the loading dock or other ongoing operations at the Facility; and the Developer agreed to indemnify the City for, among other things, Live Nation's expenses associated with Material Disruptions.

On February 4, 2022, in accordance with the Sections 2(a) and 11(g) of the Third Amendment, the City provided formal notice to Live Nation advising of the City's intent to recapture possession of the Rehearsal Room on June 1, 2022 and of the expected commencement of construction of the Facility Improvements and Hotel Project. Subsequently, on February 8, 2022, the City hand delivered formal notice to Live Nation confirming the construction commencement date of June 1, 2022.

ANALYSIS

The impact and benefits of commencing construction in June 2022 have been contemplated. In anticipation of the construction of the Facility Improvements and Hotel Project, and the foreseeability that Material Disruptions are unavoidable during the Early Work; Live Nation, the City and the Developer believe that a temporary closure of the Facility (the "Closure") will be a safer, more efficient, and more cost-effective manner for the Developer to expedite such portions of the Early Work as will most impact the Facility and its operations ("Closure Early Work").

Commencement of the Early Work on June 1, 2022 would allow the vertical construction of the Hotel Project to occur a year sooner (currently targeted for spring 2023). Additionally, the Facility Improvements stipulated in the Third Amendment would also be expedited. As the Third Amendment did not contemplate a temporary closure, a Fifth Amendment to the Management Agreement is necessary to set forth the City's and Live Nation's respective rights and obligations during the Closure. Concurrent with the execution of the Fifth Amendment, the City will execute a First Amendment to the Early Access Agreement ("EAA Amendment") to clarify the Developer's responsibility to indemnify the City for Live Nation's costs and expenses resulting from the temporary closure of the Fillmore. The obligation to reimburse Live Nation for the expenses associated with the Closure (the "Reimbursable Expenses"). The Fifth Amendment to the Management Agreement outlines the financial and operational adjustments related to the Closure and the process for the Developer's reimbursement to Live Nation of the Reimbursable Expenses, based upon the following essential terms:

- 1) The Facility will be closed temporarily commencing on June 1, 2022 (the "Closure Date"). Live Nation shall cancel, reschedule, or relocate any performances that are on the books from and after the Closure Date.
- 2) The Developer shall provide a notice to Live Nation 90 days ahead of its anticipated date to achieve Substantial Completion for the Closure Early Work (the "90-Day Notice").
- 3) Until Live Nation receives the Substantial Completion Notice Live Nation shall not book any performances or events that cannot be canceled without payment of any fees.

- 4) It is anticipated the Closure will last for approximately 12 months but may require a shorter or longer period. In any event, the Developer must achieve Substantial Completion of the Closure Early Work by or before August 31, 2023 (the "Closure Outside Date"). The Closure Outside Date will be subject to extension as a result of Unavoidable Delay, which will be defined narrowly to mean a Force Majeure Event (as such term is defined in the Hotel Lease) that otherwise would render the Facility inoperable even if Facility Improvements were not in progress.
- 5) During the Closure, the City will provide to Live Nation monthly updates regarding the Developer's progress.
- 6) The City shall extend the current term of the Management Agreement by the length of the Closure plus an additional 180 days to enable Live Nation a reasonable period within which to restore its business at the Facility.
- 7) In lieu of a credit, the City will suspend Live Nation's obligation to pay the RCD during the Closure. Any prepaid RCD, however, will be credited.
- 8) Pursuant to the EAA Amendment, the Developer will reimburse Live Nation for the reasonable, out-of-pocket expenses actually incurred by Live Nation in connection with the Closure, consisting of: (i) talent guarantees, (ii) marketing costs, (iii) continuing building utilities, maintenance and operating expenses (e.g., electric, water, pest control, security alarm monitoring, HVAC maintenance, escalator/elevator maintenance, etc.), and (iv) a percentage of the salaries for personnel who remain employed by Live Nation during the Closure that is based upon time spent performing tasks that are related to the Facility (the foregoing expenses are referred to herein as "Reimbursable Expenses").
- 9) Live Nation will invoice the Developer directly for the Reimbursable Expenses monthly.
- 10) Pursuant to the EAA Amendment, the Developer shall indemnify the City from and against any liability arising out of Developer's failure to pay the Reimbursable Expenses and other amounts to be paid by the Developer to Live Nation pursuant to the EAA Amendment.
- 11) In consideration of Live Nation's cooperation in connection with the Closure, the City will agree to approve the Second Renewal Term (5 years) contemplated by the Management Agreement so long as there is no event of default by Live Nation during the remainder of the First Renewal Term.

CONCLUSION

The Facility's closure would be a temporary, but continuous pause of events to expedite the Facility Improvements. By accelerating the construction at the Facility, it can be returned to Live Nation for events with less risk of Material Disruptions due to construction phasing. Additionally, the financial impact Live Nation experiences resulting from the Early Closure Work would be paid by the Developer.

The Fifth Amendment to the Management Agreement and the First Amendment to the Early Access Agreement, would 1) expedite construction so Live Nation can re-open quickly; 2)

complete Early Work so the Hotel Project construction can commence one year in advance, by spring 2023; and 3) align both agreements with the Development Agreement of the Hotel, as approved by the voters in the 2018 referendum.

RECOMMENDATION

Based upon the foregoing, the Administration recommends that the Mayor and City Commission adopt the Resolution approving Amendment No. 5 to the Management Agreement between the City and Live Nation Worldwide, Inc. for the operation and management of the Facility, to suspend the term of the Agreement during the contemplated closure of the Facility necessitated by the Hotel Early Work. Furthermore, the Administration recommends the Mayor and City Commission further approve Amendment No. 1 to the Early Access Agreement between the City and MB Mixed Use Investment, LLC to clarify the Developer's existing responsibility to pay for the losses and expenses resulting from Material Disruptions to the operations at the Facility.

Attachments

Resolution