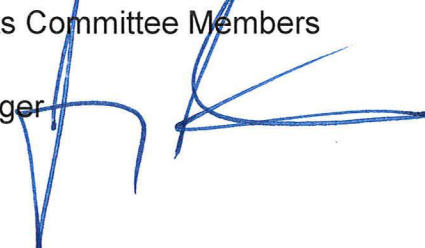


MIAMI BEACH

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

COMMITTEE MEMORANDUM

TO: Finance and Citywide Projects Committee Members

FROM: Jimmy L. Morales, City Manager 

DATE: July 13, 2018

SUBJECT: **UPDATE TO THE** DISCUSSION REGARDING AMENDING
THE MANAGEMENT AGREEMENT BETWEEN THE CITY
OF MIAMI BEACH AND LIVING ARTS TRUST, INC. D/B/A
O CINEMA

Below is a revised memorandum highlighting some clarifications regarding O Cinema. Additions to the memo are bold and underlined herein.

HISTORY

The City of Miami Beach (City) and Living Arts Trust, Inc. d/b/a O Cinema (O Cinema) are parties to a management agreement dated October 24, 2014 (Management Agreement), for the management and operation of a portion of the Byron Carlyle Theatre, located at 500 71st Street, Miami Beach, Florida (Theatre). The basic terms and conditions of the Management Agreement are as follows:

Premises: The Theatre building consists of approximately 28,000 square feet. The western portion of the building, primarily consisting of four auditoriums, is in poor condition, including damage from flooding, mold, and electrical deficiencies, and is unsuitable for use and currently vacant. The eastern portion of the building, consisting of approximately 18,000 SF, consists of approximately 10,647 SF occupied by O Cinema, approximately 3,996 SF of vacant office space retained by the City and approximately 3,345 SF of common area. (a For purposes of the agreement, O Cinema occupies 72% of the Theatre building while the City retains 28%.The vacant office space retained by the City is in poor condition, including damage from flooding, mold, and electrical deficiencies, and would require significant improvements and repairs to be suitable for occupancy.

Initial Term: Sixty-one (61) months, commencing October 1, 2014 and ending October 31, 2019

Renewal Options: City's option to renew with single or multi-year terms, not to exceed a total of 5 years, by providing O Cinema with not less than 365 days

written notice prior to the expiration date, or not less than ninety (90) days written notice prior to the expiration of a renewal term

Permitted Uses: a) Primary Use as a Motion Picture Theater; b) Secondary (Ancillary) Uses include: i) live theatrical entertainment venue (not as a dance hall or entertainment establishment), ii) private rentals for individual and group events and receptions and iii) corporate events and receptions; c) Food and Beverage Concession including beer and wine and d) "Film-Centric" Merchandising Shop

Base Use Fee: Years 1-3: \$2,500 annually. Beginning Year 4: the greater of \$5,000 annually, or 10% of Net Ticket and Net Concession Revenue, increased by 1% annually

Operating Expenses: O Cinema is responsible for all maintenance and repairs of the Facility, including janitorial expenses and 72% of the utilities.

Capital Contribution: The City is responsible for all major repairs and capital improvements. In addition to the Base Use Fee above, beginning Year 4 (October 1, 2017), the agreement stipulates that O Cinema shall contribute \$2,500 annually to help defray the City's cost of capital repairs and replacements, as detailed in the chart below.

Benchmarks: O Cinema is required to achieve the following: 1) operate 5 days a week, 48 weeks a year; 2) minimum 500 events/screenings per year; 3) minimum 10,000 visitors per year, increasing 5% each year; 4) market O Cinema as part of annual budget of no less \$50,000 per year and 5) provide residents discounted, quality offerings at a 10% discount at least 12 times per year or a minimum of one film screening per month.

ANALYSIS

On June 25, 2018, Kareem Tabsch, Co-Director of O Cinema, sent an email to Commissioner Arriola requesting the City's support and assistance in the management of the Facility, attached hereto as Attachment 1 (O Cinema Request Letter).

Specifically, O Cinema requested the City's support by amending the Management Agreement in the following three areas:

1. City to waive the base use fees and revisit annual benchmarks;
2. City to provide support in the ongoing maintenance and repairs of HVAC, septic, sewer, life safety systems, roof and elevator; and
3. City to provide support in covering utility costs of operating the Facility.

Additionally, O Cinema is requesting a subsidy to assist in creating low-cost/free programs for children, families and seniors. Lastly, O Cinema is requesting a two

year extension to the Management Agreement (currently expiring October 31, 2019).

Payments from O Cinema

The chart below illustrates the annual amounts paid to the City by O Cinema over the initial 3.5 years of the agreement.

| <u>Year</u> | <u>Utilities</u> | <u>Base Use Fee</u> | <u>Capital Contribution</u> |
|-------------------|------------------|---------------------|-----------------------------|
| FY 14/15 | \$ 22,841.20 | \$ 2,500.00 | - |
| FY 15/16 | \$ 20,590.03 | \$ 2,500.00 | - |
| FY 16/17 | \$ 21,245.12 | \$ 2,500.00 | \$ 2,500.00 |
| FY 17/18 (6 mos.) | \$ 9,040.85 | \$ 2,500.00* | \$ 1,250.00 |

* Pending True-up

Expenses Incurred by the City

Property Management has provided a work order history for the past five years at the facility, attached hereto as Attachment 2 (Work Order History). The costs associated with these work orders range from approximately \$5,000 to \$47,000 annually. Additionally, Property Management has provided a summary of capital renewal and replacement projects since 2001 in the amount of \$1,465,592, attached hereto as Attachment 3 (CR&R Projects). Property Management is currently evaluating the projected annual maintenance and repair expenses for the facility. For FY17/18, O Cinema has budgeted approximately \$5,500 for the maintenance and repairs of the facility. This is likely inadequate to properly maintain the facility in an acceptable manner and the cost to the City would likely be significantly higher. By comparison, Miami New Drama has budgeted \$50,000 for maintenance and repairs at the Colony Theatre for FY18/19. **It should be noted that Miami New Drama receives an annual City subsidy for the operation and maintenance of the Colony Theater and that O Cinema currently receives no financial support from the City for the operation of the Byron-Carlyle Theater.**

Current Condition of Facility

At the April 13, 2016 Commission meeting, the Mayor and City Commission discussed interior flooding at the facility. Property Management contracted with Douglas Woods and Associates, Inc. (structural engineers) to perform a condition assessment. The Commission memorandum and condition assessment report are attached hereto as Attachment 4 (April 13, 2016 Commission Memo). Douglas Woods recommended three options to address flooding in the restrooms (the lowest lying areas of the O Cinema premises). None of the options would address other building areas from king tide flooding or from tidal surge. Additionally, if major renovations were to be considered, and if the cost of such renovations were to exceed 50% of the value of the existing building, then the

entire building would have to be brought into compliance with current FEMA design criteria. In Douglas Woods' opinion, such an extensive renovation would be as or more expensive than constructing a new building. The Commission recommended in favor of demolishing the building and moving forward with the redevelopment of the site in conjunction with the North Beach Master Plan.

In December 2017, VFA, Inc. provided a Requirement List Report, attached hereto as Attachment 5. The report concluded the facility would require approximately \$1.4 Million of improvements over the next four years, however the major issues outlined in the April 13 Commission Memo are not addressed in this \$1.4 million.

O Cinema Default of Management Agreement

On December 26, 2017, the City issued a Notice of Default to O Cinema for failure to comply with the terms and conditions of the Management Agreement. As contained in the Notice of Default, O Cinema failed to:

1. obtain the requisite State license for the sale of beer and wine for consumption on premises: **as per O Cinema, pursuit of this application is currently on hold;**
2. remit City of Miami Beach resort taxes: **O Cinema is current with its obligation to remit resort taxes;**
3. remit Florida sales tax to the Department of Revenue: **O Cinema now represents that it has entered into a payment plan arrangement with the State;** and
4. satisfy the City's insurance requirements under the Agreement: **O Cinema is now in compliance with the City's insurance requirements.**

On January 26, 2018, O Cinema provided a response to the City's Notice of Default and made several assertions regarding the various defaults. On March 8, 2018, the City provided a Notice of Failure to Cure Defaults, attached hereto as Attachment 6, advising O Cinema the City disagreed with several of their assertions, the default cure period had expired and the City was placing O Cinema in default of the Management Agreement. On March 9, 2018, the City Manager issued a Letter to Commission (LTC) informing the Mayor and City Commission of the status of the Management Agreement.

On March 20, 2018, the City Manager and City staff met with representatives from O Cinema and discussed the default of the Management Agreement. The City agreed to extend, for a period of six (6) months (on or before September 21, 2018), the time for O Cinema to cure the remaining defaults, including, but not limited to, ceasing all illegal sales of alcohol and registering for, and becoming current on all Florida sales tax obligations. On April 12, 2018, the City issued to O Cinema a Notice of 6-Month Extension to Cure, attached hereto as Attachment 7.

On June 22, 2018, O Cinema provided a response letter to the City, attached hereto as Attachment 8 (O Cinema Response Letter), disputing various aspects of the meeting. **O Cinema has now provided a sales tax certificate number to the City** and represented they would be deemed in compliance once the State provided the final documentation to O Cinema. ~~O Cinema did not provide the sales tax certificate number or any documentation of such, as requested by the City in the April 12 letter.~~ **O Cinema has represented they were in the process of obtaining an alcohol license and now represents that this process is on hold.** O Cinema advised the City, while they have every intention of obtaining an alcohol license, they are under no obligation to do so. O Cinema did not provide any documentation of its efforts, if any, in this regard. **The City acknowledges that O Cinema is under no obligation to obtain an alcohol license as long as no alcohol is sold or served on the premises.** Lastly, O Cinema referenced a more recent issue which arose subsequent to the default, regarding the rental of the Facility for church services and the requirement to pay a percentage of the rental revenue to the City as part of the Base Use Fee. On July 5, 2018, the City provided a response to O Cinema, attached hereto as Attachment 9, advising them they remain in default of the agreement and requesting additional information regarding the rental of the facility for church services. **Currently, O Cinema has ceased all sales of beer and wine, is current with its obligation to remit City resort taxes, and has further provided documentation that it is currently in compliance with the City's insurance requirements.**

CONCLUSION

At this time, O Cinema is within the 6 month extension to cure the default and the City will continue to work with them to achieve compliance with the Management Agreement.

Based on staff's understanding, the financial impact of approving O Cinema's request would result in an annual reduction in revenue of at least \$26,000 annually (\$21,000 utilities reimbursement and \$5,000 Minimum Base Use Fee). Additionally, the cost of assuming responsibility for all maintenance and repairs of the facility is currently being evaluated by Property Management; however, based on the Colony Theatre, could be in the amount of \$50,000. Lastly, O Cinema has requested an annual subsidy of \$100,000, which would be reduced by the cost of utilities incurred by the City (\$100,000-\$22,000=\$78,000 net subsidy).

The Administration seeks direction regarding O Cinema's request to amend the Management Agreement. If recommended by the City, the increased costs would be considered as an enhancement during the FY 2018/19 budget development process.

Attachments:

- 1 O Cinema Request Letter
- 2 Work Order History
- 3 CR&R Projects
- 4 April 13, 2016 Commission Memo
- 5 Requirement List Report
- 6 Notice of Failure to Cure Defaults
- 7 Notice of 6-Month Extension to Cure
- 8 O Cinema Response Letter to City
- 9 City Response Letter to O Cinema

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