

EXHIBIT A

INTERGOVERNMENTAL AGREEMENT

**Between
City of Portland
And
Metro
For the**

General Fund Special Appropriation for Additional Portland's Operating Support

THIS INTERGOVERNMENTAL AGREEMENT (this "Agreement"), dated this _____ day of _____, 2021 (the "Effective Date"), is made by and between City of Portland, Office of Management and Finance ("the City") and Metro, a Oregon metropolitan service district organized under the laws of the State of Oregon and the Metro Charter ("Metro"). The City and Metro may be referred to jointly in this Agreement as the "Parties" and individually as a "Party."

RECITALS

- A. The City, through its Office of Management and Finance ("OMF") owns the Portland's Centers for the Arts.
- B. The Portland's Centers for the Arts is the fifth largest performing arts center in the United States. It operates five theaters in three separate buildings in downtown Portland, which include the Arlene Schnitzer Concert Hall, Keller Auditorium, Antoinette Hatfield Hall and Brunish, Newmark and Winningstad Theatres.
- C. Metro is an elected regional government that covers three counties and twenty-four cities in the Greater Portland region and operates the Portland's Centers for the Arts under the Amended Agreement Regarding Consolidation of Regional Convention, Trade, Spectator and Performing Arts Facilities Owned and Operated by the City of Portland and Metro (the "Management Agreement"). The Metropolitan Exposition Recreation Commission ("MERC") oversees the Management Agreement and provides expertise, governance, and policy direction regarding the business of operating the venues.
- D. When the COVID-19 pandemic spread across the globe in March 2020, the performing arts and entertainment industry was one of the first sectors to come to a halt. Portland's had to immediately close its doors as large gatherings were prohibited by public health officials.
- E. Portland's has its own dedicated budget at Metro and relies on charges for services for over 80% of its operating revenue. While layoffs and other cost reductions have reduced costs significantly, many ongoing costs cannot be avoided, and operating reserves are insufficient to sustain the organization and facilities through the long pandemic without aid.

F. In late summer 2020, Portland’5 received two allocations of CARES Act funding: \$1.6 million from the City, and \$1.1 million from the State. This assistance allowed the organization to continue operating at a minimum level through the fall and winter. However, additional resources are required to keep the organization funded through the Summer of 2021 and allow them to prepare for a reopening of the stages – currently anticipated for Fall 2021.

G. Metro is also providing additional financial support to Portland’5 in the form of reduced costs for services and overhead. The support Metro provided to Portland’5 during Fiscal Year 2020-2021 equals approximately \$1.6 million.

H. Ordinance No. 190195, passed by the Council on November 12, 2020, authorized a \$1.6 million General Fund appropriation to provide operating support of Portland’5 expenses that include but are not limited to insurance, maintenance, security, utilities, engineering and ground lease costs.

I. Metro will report expenditures and invoice the City for all operating support costs eligible for reimbursement under this Agreement not to exceed \$1.6 million.

AGREEMENT

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and the conditions, covenants and agreements set forth below, the Parties hereby agree as follows:

ARTICLE 1 CITY OF PORTLAND FUNDING TERMS

1.1 **City Funding Amount.** On the terms and conditions of this Agreement, City agrees to disburse funds from the City’s General Fund to Metro in a total amount not to exceed ONE MILLION SIX HUNDRED THOUSAND DOLLARS (\$1,600,000) subject to forecasted availability. Metro may use the funds solely for Operating Support and on the terms and conditions set forth herein. Metro will be responsible for providing financial resources over and above the disbursed amount to cover any and all other additional operating costs and will continue to operate Portland’5 in accordance with the Management Agreement regardless of the City’s contribution. Table One below outlines the costs that are deemed “Operating Support” as they contribute to the stewardship of the City’s assets.

Table One. *List of Items that Metro May Bill the City for as Operating Support.*

<u>Expense Type</u>	<u>Description</u>	<u>Required Supporting Documentation</u>
Insurance	Insurance required to maintain operations so that once the pandemic subsidies, doors can open right away without delay.	Current dated certificates of insurance and documentation of invoice/payment.
Maintenance	Maintenance costs required to maintain the buildings so that once the pandemic subsidies, doors can open right away without delay.	Narrative describing what/when/why maintenance was performed and documentation of dated invoice/payment.
Security	Private security staff hours, related costs, or materials directly related to providing the security required to maintain operations so that once the pandemic subsidies, doors can open right away without delay.	Copy of dated payments to private security company with backup documentation of invoice/payment and any dated receipts related to materials purchases.
Utilities	Utility costs required to maintain operations so that once the pandemic subsidies, doors can open right away without delay.	Copy of dated bills/payments.
Engineering	Engineering costs required to maintain operations so that once the pandemic subsidies, doors can open right away without delay.	Narrative describing what/when/why work was performed and copy of dated invoices/payments/materials purchased.
Ground Lease	Ground lease costs required to maintain building operations so that once the pandemic subsidies, doors can open right away without delay.	Copy of dated bills/payments.
Portland's 5 Staff Hours	Staff hours costs required to maintain building operations and prepare for reopening, including sales/booking, ticket services, and event and production preparation, so that once the pandemic subsidies, doors can open right away without delay. Costs include wages and related payroll taxes and benefits.	Payroll report including wages and related payroll taxes and benefits by position and pay period.

1.2 **Disbursement.** Funds may be transferred to Metro on a reimbursement basis in installments of up to \$200,000 for each month of demonstrated Operating Support. Qualifying months span from November 2020 to June 2021. Metro may invoice City for multiple months at one time so long as the total amount of funding from the City does not exceed \$1.6 million.

1.2.1 **Timing of Availability of Funds.** The funds will be available for disbursement to Metro as soon as March 22, 2021, if all the conditions set forth below are met. After this date, Metro may request the City's funds at any time. The City will provide the requested funds within thirty (30) days of the request.

1.2.2 **Conditions Precedent to Payment.** The disbursement of the payment is subject to the following conditions prior to disbursement:

- (a) City shall have determined, in its sole discretion, that there is sufficient budget appropriation and availability to make the full payment. As of the date of the execution of this Agreement, the City warrants that it has the funds available for Metro as required under this Agreement. City will promptly notify Metro in the event it determines that there is insufficient budget appropriation to make the payments contemplated under this Agreement;
- (b) Metro will provide comprehensive, clear and specific back up documentation as described in Table One to the City with each invoice submitted certifying its operational costs—general venue financial statements are not sufficient.
- (c) Metro will continue to seek other funding sources to supplement its operating costs wherever possible. Metro will accept City funding under the premise of maintaining its current level of lean operations until events are reasonably expected to resume.
- (d) No litigation is pending that prevents Metro from performing their respective obligations under this Agreement; and
- (e) No Event of Default shall have occurred.

1.3 **City's Obligation to Indemnify.** To the extent permitted by law and within the limitations of the Tort Claims Act, City shall defend, save, hold harmless, and indemnify Metro, and their respective officers, employees and agents from and against all claims, suits, actions, losses, damages, liabilities, costs and expenses of any nature whatsoever, including attorneys fees, resulting from, arising out of, or relating to the activities of City or its officers, employees, subcontractors, or agents under this Agreement. City shall have control of the defense and settlement of any claim that is subject to this paragraph. However, neither City nor any attorney engaged by City shall defend the claim in the name of Metro or any department of Metro, nor purport to act as legal representative of Metro or any of their respective departments, without first receiving from the Metro Attorney, as applicable, authority to act as legal counsel for Metro, nor shall City settle any claim on behalf of Metro without the approval of the Metro Attorney, as applicable. Metro may, at their respective election and expense, assume its own defense and settlement.

1.4 **Breach of Agreement.** If City breaches a material provision of this Agreement, whether by action or inaction, and such breach continues and is not remedied within thirty (30) days after City receives written notice from Metro specifying the breach it shall be an Event of Default under this Agreement. In the case of a breach that cannot with due diligence be cured within a period of thirty (30) days, it shall be an Event of Default under this Agreement if City does not commence the cure of the breach within thirty (30) days after City receives written notice from

Metro and thereafter diligently prosecute to completion such cure within sixty (60) days unless such cure requires additional time as is reasonably necessary.

ARTICLE 2 METRO'S REPRESENTATIONS AND WARRANTIES

2.1 Metro represents and warrants to the City as follows:

2.1.1 **Authority.** Metro has full power, authority, and legal right to execute and deliver this Agreement and to incur and perform its obligations hereunder. The execution and performance by Metro of this Agreement has been duly authorized by all necessary action of Metro.

2.1.2 **No Violations or Default.** No event has occurred, and no condition exists that constitutes an Event of Default (as hereinafter defined) by Metro. Each of the following shall constitute an "Event of Default":

- a) **Breach of Agreement.** If Metro breaches a material provision of this Agreement, whether by action or inaction, and such breach continues and is not remedied within thirty (30) days after Metro receives written notice from the City specifying the breach it, shall be an Event of Default under this Agreement. In the case of a breach that cannot with due diligence be cured within a period of thirty (30) days, it shall be an Event of Default under this Agreement if Metro does not commence the cure of the breach within thirty (30) days after Metro receives written notice from the City of Portland and thereafter diligently prosecute to completion such cure within sixty (60) days unless such cure requires additional time as is reasonably necessary; or
- b) **Misuse of Funds.** It shall also be an Event of Default under this Agreement and the City shall be irreparably harmed by such default, if Metro uses any portion of City funds in a manner materially inconsistent with the items listed in Table 1 or in violation of applicable laws, statutes, or rules.

2.1.3 **Underspent Costs.** In the event that Metro incurs less than \$1.6 million in operating costs between November 1, 2020 and June 30, 2021, Metro shall only bill the City for its costs that were expended, regardless of whether they total less than what was anticipated.

ARTICLE 3 CITY'S AGREEMENT AND ACKNOWLEDGMENT

The City acknowledges that the City appropriation is being made for the City's benefit, and that the Portland's 5 Centers for the Arts are important City assets. The City will fully cooperate in all

respects with Metro as needed in order to provide operating support to the venues as a result of halted programming during the COVID-19 pandemic.

ARTICLE 4 METRO'S AFFIRMATIVE COVENANTS

4.1 Metro covenants and agrees as follows:

4.1.1 **Records and Inspection.** Metro shall keep proper books of account and records on all activities associated with reimbursement under this Agreement (collectively, the "Records"). Metro shall maintain the Records in accordance with generally accepted accounting principles. Metro shall permit the City and/or its duly authorized representatives, to inspect, review and make excerpts and transcripts of the Records with respect to the receipt and disbursement of funds, provided that any such examinations and audits shall be at the reviewing party's sole expense. Access to the Records is not limited to the required retention period. The authorized representatives shall have access to the Records at any reasonable time for as long as the Records are maintained. This Section 4.1.1 shall survive any termination of this Agreement.

4.1.2 **Audits.** The City, either directly or through a designated representative, may conduct financial and performance audits of the use of the City proceeds at any time at the City's expense; provided, however, that to the extent that an audit reveals any intentional malfeasance, Metro shall reimburse the City for any costs associated with the audit and Metro shall correct any deviations discovered as a result of the audit. Audits will be conducted in accordance with generally accepted auditing standards as promulgated in *Government Auditing Standards* by the Comptroller General of the United States General Accounting Office. In the event of an audit, Metro agrees to provide the designated auditor with reasonable access to Metro's employees and make all such financial, performance and compliance records available to the auditor. This Section 4.1.2 shall survive any termination of this Agreement.

4.1.3 **Metro's Obligation to Indemnify.** To the extent permitted by law and within the limitations of the Tort Claims Act and the Oregon Constitution, Metro shall defend, save, hold harmless, and indemnify the City and their respective officers, employees and agents from and against all claims, suits, actions, losses, damages, liabilities, costs and expenses of any nature whatsoever, including attorney's fees, resulting from, arising out of, or relating to the activities of Metro or its officers, employees, subcontractors, or agents under this Agreement. Metro shall have control of the defense and settlement of any claim that is subject to this paragraph. However, neither Metro nor any attorney engaged by Metro shall defend the claim in the name of the City or any bureau of the City, nor purport to act as legal representative of the City or any of their respective bureaus, without first receiving from the City Attorney, authority to act as legal counsel for the City, nor shall Metro settle any claim on behalf of either entity without the approval of the City Attorney. The City may, at its election and expense, assume its own defense and settlement.

**ARTICLE 5
RIGHTS AND REMEDIES
UPON EVENT OF DEFAULT**

5.1 **Rights and Remedies.** Upon the occurrence of an Event of Default and at any time thereafter, the non-defaulting party may, at its option, exercise any one or more of the following rights and remedies:

5.1.1 **Repayment.** In the event of a Misuse of Funds, City may declare the entire City operational support pursuant to this Agreement, to be immediately due and payable in full and, upon such declaration, Metro shall return to City the amount declared to be immediately due and payable. This provision will not apply if the parties dispute whether there is a Misuse of Funds.

5.1.2 **No Election Required.** The non-defaulting party shall have any other right or remedy provided in this Agreement, or available at law, in equity, or otherwise in such order and manner as it may select.

5.1.3 **Rights and Remedies Cumulative.** All rights and remedies described in this Article 5 are cumulative and in addition to any other remedy the non-defaulting party may have by agreement, at law, or in equity. Partial exercise of any right or remedy shall not limit or restrict any party's subsequent exercise of such right or remedy nor shall it restrict any party's contemporaneous or subsequent exercise of any other right or remedy.

5.1.4 **No Waiver.** No failure on the part of any party to exercise, and no delay in exercising, any right, power, or privilege under this Agreement shall operate as a waiver of that right or any other right. No modification or waiver of any provision of this Agreement shall be effective unless in writing, and then only in specific instance and for the purpose given. No notice or demand on any party shall entitle that party to any other notice or demand in other similar circumstances.

**ARTICLE 6
MISCELLANEOUS**

6.1 **Counterparts.** This Agreement may be executed in any number of counterparts, and any single counterpart or set of counterparts signed, in either case, by the Parties hereto shall constitute a full and original instrument, but all of which shall together constitute one and the same instrument.

6.2 **Survival.** All agreements, representations, and warranties shall survive the execution and delivery of this Agreement, any investigation at any time made by the City or on its behalf and the making of the City operating support to Metro.

6.3 **Notice.** Any notice required or permitted under this Agreement shall be in writing and shall be deemed effective (1) when actually delivered in person, (2) one business day after

deposit with a commercial courier service for "next day" delivery, (3) two business days after having been deposited in the United States mail as certified or registered mail, or (4) when transmitted by facsimile (answer back or receipt confirmed), addressed to the receiving Party as follows (with copies to any other Parties):

If to the City:

City of Portland
Office of Management and Finance
Spectator Venues Program Manager
1120 SW 5th Avenue Suite 901
Portland, OR 97204

If to Metro:

Metro
Finance Manager, Metropolitan Exposition and Recreation Commission (MERC) Venues
600 NE Grand Avenue
Portland, OR 97232

6.4 **Successors and Assigns.** Neither the City nor Metro may assign this Agreement, in whole or in part, without the prior written consent of the other Party. This Agreement shall be binding upon and shall inure to the benefit of the Parties and their respective permitted successors and assigns.

6.5 **Governing Law, Jurisdiction, Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of Oregon, without regard to its conflicts of law principles. Any legal action regarding this Agreement must be brought and conducted in the federal or state court, as appropriate, serving Multnomah County, Oregon, and the parties hereby consent to the jurisdiction and venue of such courts.

6.6 **Validity; Severability.** If any provision of this Agreement is held to be invalid, such event shall not affect, in any respect whatsoever, the validity of the remainder of this Agreement, and the remainder shall be construed without the invalid provision so as to carry out the intent of the Parties to the extent possible without the invalid provision.

6.7 **Time of Essence.** Time is of the essence of this Agreement.

6.8 **Relationship of the Parties.** Nothing contained in this Agreement or any acts of the Parties hereto shall be deemed or construed to create the relationship of principal and agent, or of partnership, or of joint venture or of any other association other than that of independent contracting parties.

6.9 **No Third Party Beneficiary Rights.** No person not a party to this Agreement is an intended beneficiary of this Agreement, and no person not a party to this Agreement shall have any right to enforce any term of this Agreement.

6.10 **Funding Acknowledgement / Signage.** Any oral reports made to neighborhood, business, or other civic organizations, as well as to any members of the press should acknowledge work being done is based on a partnership between the City and Metro.

6.11 **Amendments.** This Agreement may only be amended by a written agreement signed by the City and Metro. The City's Chief Administrative Officer and Metro's Chief Operating Officer and their respective designees are authorized to take all actions necessary to implement the terms of this Agreement and may authorize non-material amendments of this Agreement without further action by City of Portland's City Council and Metro Council, respectively, so long as the amount of the City funding is not increased.

6.12 **Merger Clause.** This Agreement contains the entire agreement between the City and Metro with respect to the subject matter thereof. It supersedes all prior written or oral discussions or agreements concerning work to be performed by either Party.

[Signature Page Follows]

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

<p>City of Portland</p> <p>By _____ Tom Rinehart, CAO</p> <p>APPROVED AS TO FORM:</p> <p>By _____ City Attorney</p>	<p>Metro</p> <p>By _____ Marissa Madrigal, Chief Operating Officer</p> <p>APPROVED AS TO FORM:</p> <p>By _____ Metro Attorney</p>
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