

**OPERATION AND MANAGEMENT AGREEMENT BETWEEN  
THE CITY OF ESCONDIDO AND  
THE CALIFORNIA CENTER FOR THE ARTS, ESCONDIDO FOUNDATION**

This Operation and Management Agreement (“Agreement”) is made as of \_\_\_\_\_, 2023 between the City of Escondido, and the California Center for the Arts, Escondido Foundation for the purposes of providing for professional management and operation of the California Center for the Arts, Escondido.

**Recitals**

**WHEREAS**, in 1994, the California Center for the Arts, Escondido Foundation (“CCAEF”) was incorporated in California as a nonprofit public benefit corporation and is exempt from income tax under California Revenue and Taxation Code section 23701d and Internal Revenue Code section 501 (c)(3); and

**WHEREAS**, in or about 1994, the City of Escondido (“City”) constructed an arts, theatre and Museum complex (“Center”) to provide a focal point in southern California for the presentation of a variety of world class, visual and performing art events, to encourage diverse cultural activities in programs, and to provide a venue for local events, educational, opportunities, and presentations; and

**WHEREAS**, the City desires that the Center be managed with special expertise in the field of performing arts, theatre and museum operations; the holding of special events; the attraction of world-class entertainers; and the promotion and support of local cultural programming, all the while affording proper accountability to the citizens of Escondido; and

**WHEREAS**, the CCAEF is competent to provide professional personnel with such special expertise, interest, and capacity to operate and manage the Center to accomplish the goals of the City, as stated herein; and

**WHEREAS**, the City and the CCAEF share a common vision and goals for the Center and desire to work in partnership to assist each other in achieving these goals; and

**WHEREAS**, the parties desire to commit to writing their respective rights, duties, obligations and promises with respect to the City’s desire to have the CCAEF serve, and the CCAEF’s agreement, to serve, as the operator of the Center for the term stated in this agreement.

**NOW, THEREFORE**, the Parties agree as follows:

## Agreement

### **Section 1. Definition of Terms**

The following words and phrases in this Agreement shall have the significance attached to them in this Section unless otherwise indicated or apparent from their context.

**Agreement.** The Agreement shall consist of the recitals, terms, and all documents referenced herein and made a part hereof, including Exhibits and Attachments, if any.

**CCAEF.** The California Center for the Arts, Escondido Foundation, a California nonprofit public benefit corporation, acting by and through its Board of Trustees, employees, consultants and volunteers.

**Center or Center Premises.** The total complex, located at 340 North Escondido Boulevard, Escondido, California 92025, consisting of theaters, educational facilities and studios, museum, conference center, administrative offices, immediately adjacent exterior gardens, plazas, and grounds, and a central plant, which are collectively referred to in this Agreement as "the Center." A satellite image outlining the Center Premises is attached as "Exhibit 1" and incorporated by reference. The area commonly referred to as the Great Lawn is not included as part of the Center Premises under this Agreement. The parking lot on the west side of the footbridge by the Center's Administration building shall be for the primary use of the CCAEF; however, the City reserves the right to use that parking area for its use with 30-day advance notice. The City and Center commit to working together to develop a mutually beneficial and streamlined process for the area of Grape Day Park commonly known as the "Great Lawn".

**City.** The City means the City of Escondido, a general law city formed pursuant to the laws of the State of California.

**Contract Administrator.** The Contract Administrator means the City Manager or his/her designee or, upon written notice to CCAEF, such other person as shall be designated from time to time by City.

**Party or Parties.** Center or City may be referred to individually as Party or collectively as Parties.

**Routine Maintenance.** Routine Maintenance as used herein shall refer to the regularized facility maintenance and cleaning services provided by the respective Parties referenced in Appendix A.

### **Section 2. Grant of License**

City hereby grants to CCAEF the right to use and operate the Center and Center Premises, as identified in Exhibit 1, and CCAEF so agrees to operate such facilities, subject to the terms and conditions set forth in this Agreement.

### **Section 3. CCAEF Representation of Nonprofit Good Standing**

CCAEF warrants that it is a validly existing nonprofit public benefit corporation in good standing with the State of California, and that it has provided the City with a current copy of a resolution of the Board of Trustees of the CCAEF Corporation authorizing the execution of this Agreement on behalf of CCAEF. CCAEF also warrants that it has, in conjunction with its execution of this Agreement, provided City with copies of its current Articles of Incorporation, its Bylaws, filings with the Office of the California Secretary of State, liability insurance policies, a list of names of the current members of its Board of Trustees, a list of names of other officers of the corporation,

## Agreement

and an organizational chart detailing the CCAE staffing. The CCAEF shall also provide to the City copies of formation documents relating the CCAE Charitable Trust, and other documents as may be public records under California or Federal law. CCAEF agrees that it will provide City with copies of any of the above documents which change in form or scope at any time during the term of this Agreement, and with any other documents which may be reasonably required by City, within thirty (30) days of such change or request.

### **Section 4. Operation of the Facilities**

4.1 Exclusive Right to Center Activities. To further the purposes of the City, the CCAEF shall have exclusive rights to produce, present, or provide a wide variety of performing arts and visual presentations, and to operate a museum and education facilities for a wide variety of events. These presentations will be offered through efforts of the CCAEF or in cooperation with performing artists, other performing arts organizations, or commercial promoters, with the goal that the Center will be operated for the benefit of the public. CCAEF may, at its own discretion, use the theaters, or other parts of the Center, for production of in-house programming. CCAEF shall assemble, safeguard, preserve and conserve objects of art for display at the museum. The City recognizes that a permanent art collection is held in trust by CCAEF. CCAEF has exclusive rights to operate the Conference Center for meetings, banquets, special events and gatherings. CCAEF shall also have the exclusive right to sell, or to contract for the right to sell, beverages, food, confections, clothing, novelties, and publications within the Center as appropriate. These activities shall be conducted at no financial risk to the City. Any excess revenues received from the production of Center activities may be retained by the CCAEF for funding of additional programming at the Center.

4.2 Right to Rent and Contract for Use. CCAEF shall have the exclusive right to rent and control events at the Center, distribute tickets, operate a ticket office, and charge admission for events at the museum and theaters, as well as to establish pricing and rate structures for all activities at the Center. CCAEF shall use the Center facilities for presentation of performing arts (e.g. dance, music, theater) by outside groups and promotional entities that rent the Center and stage their own productions, and shall have the right to enter into contracts with such groups to fulfill this purpose. CCAEF shall use the Center for rental to outside groups and promotional entities that rent the facility for their own events, for the display of artistic exhibitions and for educational activities, or for other appropriate uses consistent with the purposes of this Agreement.

4.3 Leasing of Center Space. CCAEF may offer space at the Center for lease to other entities sharing CCAEF's vision or purpose. Such leases, if in excess of one year, shall be subject to the City's prior approval and shall be executed by and between the City and the entity selected by CCAEF. Such leases between the City and the entity shall be subject to and in accordance with all the terms and conditions set forth in this Agreement.

4.4 Reservation for City Use. CCAEF understands that the City may occasionally need use of some portions of the Center facilities, subject to the following guidelines: The City may schedule use of Conference Center rooms 12 days per calendar year at no room rental cost. If possible, the use will occur on Monday through Thursday. If the space is needed on a Friday, Saturday or Sunday, the City shall vacate the premises by no later than 4:00 PM, to allow the

## Agreement

CCAEF to rent the facilities in the evening. City shall pay the full market cost of all labor, food, beverages, setup, preparation and any items rented by the CCAEF on behalf of the City. If a potential rental of the space becomes likely, the CCAEF will work with the City to determine if a different room or theater is available that would serve the City's needs and allow the CCAEF to generate more rental income. The Contract Administrator shall be the City's designated agent to coordinate with CCAEF staff for City use of these Center facilities.

4.5 First Amendment and Political Activities. CCAEF has adopted and implemented an Expressive Activities Policy which conforms to state and federal law. Further, the Center shall not be used directly by CCAEF for the purpose of working on or campaigning for the nomination or election of any persons to any public office, whether partisan or non-partisan. However, CCAEF may rent all or part of the Center facilities to persons or entities for political activities at standard, publicly-available (non-preferred) rates.

4.6 Information Technology Policies and Support. The CCAEF shall follow all information and computer technology protocols, guidelines, policies, restrictions and directions from the City if the CCAEF intends to connect its computers to the City's servers. The CCAEF shall employ sufficient staff to provide on-site assistance to the CCAEF employees; however, the City may provide additional assistance to the CCAEF on computer technology access and related questions subject to availability.

4.7 Reasonable Self-imposed Restrictions. Subject to the terms of this Agreement, including but not limited to Section 17.3, CCAEF may develop reasonable restrictions for the use of the Center which are consistent with and supportive of the rights of the general public, consistent with the requirements of this agreement, and which are designed to enable CCAEF to use these facilities consistent with the purpose of this Agreement.

4.8 Security. The City and the CCAEF share concerns regarding the security at the Center for both individuals and property, and commit to implementing appropriate security measures. The CCAEF is responsible for maintaining the proper security of the Center Premises, which may include retention of security personnel at the CCAEF's expense. Security personnel may include City Park Rangers, through a separate Memorandum of Understanding.

4.9 City Property. At all times during the term of this Agreement, the Center Premises shall remain the absolute property of the City. No legal title or leasehold interest in the Center shall be deemed or construed to have been created or vested in CCAEF by anything contained in this Agreement or otherwise. Because CCAEF is an operator of a City-owned facility organized for the purpose of reducing the burden on City government, the Parties intend that CCAEF shall have no liability of any sort for payment of property taxes.

### **Section 5. CCAEF Property**

City agrees that all furniture, equipment, and other similar property of a personal nature which is acquired by CCAEF solely with its own resources shall be and remain the property of CCAEF. All fixtures, including items which are attached to, affixed or otherwise become part of the Center, shall be property of the City.

## Agreement

### **Section 6. Center Naming Rights**

CCAEF shall have the right to name or change the name of the Center, or a portion of the Center. If the CCAEF has developed a Naming Policy, which has been approved by the City Council, no additional approval is needed. If no such policy has been developed or approved by the City Council, naming rights are subject to the prior written approval of the City. The amount and use of any monetary donation or payment made by a third-party for naming rights to the Center, or a portion thereof, shall also be the subject to prior written approval of the City, unless the aforementioned policy has been previously approved by the City Council.

### **Section 7. Construction, Improvements, and Alterations**

7.1 Protection of Center Facility. CCAEF agrees to use reasonable and professional care and skill to protect the Center Premises at all times. Further, the CCAEF shall use care to protect and preserve all alterations, additions and improvements made by the City to the Center. CCAEF agrees not to alter any existing improvements on the Center Premises, except in accordance with written permission and/or plans and specifications previously submitted and approved in writing by the Contract Administrator or other designated City representative.

7.2 Training and Instructions. Where applicable, City shall provide CCAEF with instructions for use of existing equipment, materials and fixtures and train CCAEF personnel with respect to the care of any new equipment, materials and fixtures installed by or on behalf of the City.

7.3 Use of City Employees and Contractors. City reserves the right to employ its own employees or contractors to perform any repairs, maintenance, alterations and Regular Maintenance to the Center Premises at any time and with reasonable notice to the CCAEF. The City may, at its discretion, chose to pay the CCAEF to complete repairs, maintenance or alterations on Center facilities.

7.4 Recommendations & Responsibility for Improvements. Recommendations for interior decoration and alterations for the accommodation of the ongoing operation of the Center shall be the responsibility of CCAEF. Other than preliminary design sketches intended to provide a conceptual visualization of a proposed change, which will be produced by CCAEF at no cost to the City, no architectural or design work may begin without written approval from the City. No construction related to any plans and/or specifications produced by such architectural or design work can begin without written approval from the City. The cost of architectural, design, and resulting construction shall be the responsibility of the CCAEF, except in the cases of City approved Capital Improvement Projects as described in Section 7.5.

7.5 Capital Improvement Project Funding. CCAEF may request funding from the City for Capital Improvement Projects (CIP) related to the Center. The costs of any such CIPs shall be borne by the City, but only where the City shall have first approved of and prioritized such expenditures in writing. CCAEF shall establish a yearly budget and proposal for any CIP expenses it recommends for the Center Premises and for which it seeks City contribution. The CIP budget shall be submitted to the City not later than April 1 each year to allow the City to review the recommendation and, if approved, to include such amount in its CIP or other budget for City Council consideration for the next fiscal year starting July 1. The City shall provide the format necessary for submittal of CIP requests.

## **Agreement**

7.6 **Quarterly Facility Walkthrough.** On a quarterly basis, representatives from the City and the CCAEF shall walk through the premises, including the interior of all the buildings, to identify short and long-term repairs and improvements as well as identifying items that may be included in the City's CIP budget.

### **Section 8. Waste, Damage or Destruction of Center**

CCAEF shall take all reasonable measures to assure that any tenants, users, contractors or licensees of the Center avoid any form of waste, damage, destruction of the Center Premises and immediately adjacent City property, or make any temporary or permanent alterations of the facilities without the City's prior written consent. Such measures shall include use of written agreements, provision of insurance, and if necessary, on-site monitoring of performances, conferences, events, and other uses of the Center. In the event of any waste, damage or destruction to property under the control of the CCAEF or City, CCAEF shall give immediate notice to the City of any damage to the facilities within not more than twenty-four (24) hours of such damage occurring. CCAEF shall not itself commit or allow any waste or damage to the Center premises or City property, or permit or any nuisance. CCAEF shall keep the Center clean and clear of refuse and obstructions, and shall assure that either itself or all licensees, invitees or users dispose of all garbage, trash, and rubbish and return the Center to the condition prior to use, in a manner satisfactory to City.

### **Section 9. Routine Maintenance, Repair and Cleaning**

The Parties agree to perform the Routine Maintenance of the Center Premises as provided for in Appendix A. City responsibilities shall be completed by City maintenance staff or by qualified contractors hired by the City. CCAEF responsibilities shall be completed by CCAEF staff with the qualifications and certifications necessary to complete the work, or by qualified contractors hired by the CCAEF. CCAEF shall notify the City of any non-emergency repair or maintenance issues which it requests the City to undertake, or which are among the City's responsibilities, within ten (10) days of discovery of such facility issue. If the maintenance or repair does not clearly fall into a category listed in Appendix A, the Parties will meet and confer regarding the respective responsibility for such repair or maintenance under this Agreement. For purposes of carrying out day-to-day responsibilities in implementing this paragraph, CCAEF staff and City shall regularly meet and discuss those items of maintenance and repair that both Parties expect CCAEF shall undertake as well as those items of maintenance and repair which the City shall undertake.

### **Section 10. Obligation of Diligent and Permitted Use**

CCAEF and City covenants to diligently perform all of ~~its~~ their obligations under this Agreement, and to use the Center solely for the purposes described in this Agreement.

### **Section 11. Special Events and Use of Additional City Areas**

11.1 **Coordination and Permits.** The CCAEF may request the temporary use of portions of Grape Day Park, including the area commonly referred to as the Great Lawn, or other City-owned facilities adjacent to the Center Premises, subject to prior written approval of the Contract

## **Agreement**

Administrator and any conditions required therein. Any request to use such non-Center areas or facilities shall be coordinated so as not to conflict with other City-sponsored events and shall be accompanied by the necessary no-fee Special Event or no-fee Temporary Use Permits, additional insurance coverage as may be required by the City, and additional permits or authorizations as may be required to conduct the event required by other government agencies. No changes to the facilities or grounds of Grape Day Park may be made by the CCAEF without prior express approval from the City through the permit process. If changes are approved, they must be temporary in nature unless expressly approved as a permanent change by the City prior to the event. If alcoholic beverages will be sold or provided in conjunction with any event covered under this section, a current license (includes 1-day licenses) issued by the California Department of Alcoholic Beverages, shall be held by the Party using the space.

11.2 Parking Area. The portion of the parking lot north of the channel and west of the footbridge by the CCAEF Administration Building is available for general public parking. However, since this is the primary area for Center Patron parking, it is listed as part of the Center premises, under "Definitions". If the City has a need to use or close this area, the Contract Administrator shall contact the primary CCAEF liaison to discuss the impact, identify options and develop a mutually agreeable solution. See Exhibit "1" for map of this area.

### **Section 12. Production Assistance**

During those periods when CCAEF is not fully utilizing the Center for presentation, production, rehearsal, exhibitions or programs, CCAEF will continue to assist other non-profit or community performing artists or groups producing cultural events. Such assistance may include promotional, production and technical assistance as is appropriate to the particular performing artist or group utilizing the Center. CCAEF may charge fees for production management, labor, lighting design, sound engineering, production design, or other such production or support activities which it provides to performing artists and other organizations.

### **Section 13. Catering**

CCAEF shall be permitted to use, hire or retain any catering company or caterer it reasonably chooses, consistent with the terms of this Agreement. CCAEF and its caterers and employees shall be required to comply with all state, county and local food handling laws, rules and regulations.

### **Section 14. Entry and Inspection**

City reserves the right to enter the Center Premises for the purpose of viewing and ascertaining its condition, to protect City's interests in the facilities, or to inspect the operations conducted thereon at any time with reasonable notice to the CCAEF's primary representative, and at a time that does not interfere with Center operations or events. In secure areas (as reasonably designated from time-to-time by CCAEF), City's representatives may be accompanied by CCAEF personnel.

## Agreement

### **Section 15. Facility Schedule**

15.1 Center Program Schedule. CCAEF shall have sole discretion over the Center schedule and content, including but not limited to rental of facilities, presented and produced performances, and museum exhibitions so long as they are consistent with the mission for the Center, as defined in this Agreement. On or about July 15, October 15, January 15, and April 15, CCAEF shall submit to the City for its review, a projected Schedule ("Schedule") which will indicate the various anticipated renting or uses of the Center, including the Conference Center, each theater, and the museums and educational facilities throughout the following 3 months. The City shall have the opportunity to review the Schedule for the purpose of assuring that the community has appropriate and reasonable access to the facilities, to presentations, and visual arts presentations and that the various parts of the Center are being utilized effectively throughout the year. It shall be the objective of the CCAEF to present at least 2 exhibition rotations in the museums and educational facilities each year. Any substantial modifications to the Schedule shall be subject to the reasonable review of the City.

15.2 CCAEF Program Approval. CCAEF shall have control over leasing details such as artist or group approval, performance schedule and length, and other artistic or promotional matters, including but not limited to artist and performance selection, exhibition theme and schedule, presentation and production specifics, and artistic content.

### **Section 16. Financial Reporting Requirements**

16.1 Price and Fee Schedule. CCAEF shall provide to City, by July 15, a current schedule of prices or fees for all items or facilities sold or rented at the Center. When such prices or fees are changed, CCAEF shall notify the City as soon as is practical of the new fee schedule.

16.2 Periodic Reports to the City Council. The CCAEF shall participate in the City's Center for the Arts City Council Subcommittee meetings, as required and on dates mutually agreeable to the CCAEF and the City. Additionally, the CCAEF Executive Director shall participate in the quarterly financial status updates presented by the City's Finance Department staff to the full City Council. These quarterly reports should include a brief verbal report of the Center's activities and current plans for use of the Center and are intended to provide an opportunity for both City and CCAEF to communicate directly their concerns and expectations with respect to the operations of the facilities, and to provide for public information and comments.

16.3 Annual Report. Except as provided in Section 16.9, on or before the filing deadline for its Federal Tax Return for each of CCAEF's fiscal years (November 15), CCAEF shall submit to City its completed financial statement audited by an independent certified public accountant, who shall be approved by the City. Such audited financial statement shall be generated in accordance with generally accepted accounting principles and include an audited supplemental statement that segregates operations of the theaters, Conference Center, museum and education facilities, and other overall CCAEF operations. The segregated operations information and records shall include all revenues and expenses with respect to the operation of the theaters, Conference Center, museum and education facilities including the following: 1) Revenues -- for single ticket sales, subscription sales, concessions, rental income, and facility charges; and 2)



## Agreement

Expenses -- for payroll, utilities, repair and maintenance of premises, repair and maintenance of equipment and other overhead.

16.4 Supplemental Annual Report. In addition to the Annual Report, CCAEF shall also submit to the City all supplemental or amended annual reports published by the independent certified public accountant including but not limited to the Audit Communication Letter required by Statement of Auditing Standards No. 114, the Report on Internal Control and Management Letter, if applicable.

16.5 Regular Financial Reports. The CCAEF shall submit its monthly regular financial status reports ("Financial Reports"), produced in the normal course of its operations, to the Contract Administrator or designee within one week of such reports being presented to the CCAEF Board of Trustees.

16.6 Operating Budget. City shall have the right to review the CCAEF's proposed annual operating budget in a form agreed to by both Parties for the next fiscal year. The budgeted uses of the Management Fee paid to the CCAEF by the City shall be noted in the budget as a monthly planned expenditure and the City shall be given the opportunity to request changes as it believes are necessary. At the time of the City's quarterly budget report to the City Council, the CCAEF will report on deviations from the budgeted uses of the City Management Fee, if any, and explain the cause and/or purpose of the deviations.

16.7 Board and Committee Meetings. CCAEF shall notify the Contract Administrator in advance of all meetings of its Board of Trustees, whether regular or special. The Contract Administrator shall have the right to attend any of such meetings at his/her discretion. The Contract Administrator shall serve as a non-voting member *ex-officio* of the CCAEF Finance Committee.

16.8 Information Reporting. On an ongoing basis and upon request of the City, CCAEF shall provide such other reports or information reasonably necessary for the City to review the operations of the Center and the manner in which City funds are being utilized. The requests shall be responded to as promptly as reasonably possible depending on the information requested, and all information shall be provided and used consistent with Section 16.11.

16.9 Audit by City Accountant. The City may choose, in its sole discretion, to select, manage and compensate an independent certified public accountant to generate an annual and supplemental financial statement audits of the CCAEF provided for in this Section 16. In such case, CCAEF shall be responsible for the timely and complete submission of all information and records required to perform the audit in the timeframes required by the City. CCAEF staff and CCAEF outside auditors/CPA's will be made available during the audit process and allowed to participate in the process to assist the firm by providing information, documentation, explanations, and preparation of necessary schedules. The preparation of confirmations will be the responsibility of the CCAEF.

## **Agreement**

16.10 **Cooperation.** The CCAEF shall fully cooperate with the City and its consultants in the preparation of all audits and reports required by this Section 16 and shall provide all requested information and documentation as is requested in a timely manner satisfactory to the City. A failure to fully and timely cooperate with auditors, consultants and the City in the submission of the financial reports required under this Agreement shall constitute a material breach of the Agreement.

16.11 **Confidentiality.** Whenever the Parties exchange information which is exempt from public disclosure under the California Public Records Act, Government Code Section 6250 et seq., the Parties shall cooperate with each other in a good faith effort to maintain the confidentiality of such documents, to the extent allowed by law. However, the City and CCAEF shall comply with any lawful order of a court with competent jurisdiction when required to produce documents or information to third parties.

### **Section 17. CCAEF's Executive Director/CEO**

17.1 **Executive Director/CEO.** The CCAEF shall employ an Executive Director/CEO who shall have the requisite knowledge, background and experience to lead the CCAEF and Center to satisfactorily perform the CCAEF's obligations of this Agreement and who shall serve as the principal liaison for the CCAEF and Center with the City and Contract Administrator. In the event that the CCAEF furloughs staff for any reason, the Executive Director/CEO shall not be furloughed for more hours in a particular month than any other full-time employee of the CCAEF.

17.2 **Executive Director Selection.** The Contract Administrator may participate with the CCAEF Board of Trustees in the process of selecting a new Executive Director/CEO and in the annual evaluation process of an existing Executive Director. The Contract Administrator may provide final input on any individual selected for the position of CCAEF Executive Director.

17.3 **Executive Director Consultation with City.** The City may provide input and advice to the Executive Director through the Contract Administrator on operational and financial issues, procedures for submission and approval of expenditures related to this Agreement, the adoption of policies for use of the Center, as well as development of contracts, schedules, fees, and other items necessary to implement the purposes of this Agreement.

### **Section 18. Future Disposition of the Center**

The City retains the right to dispose of the Center Premises, or a portion of it, to another entity by sale, lease or other transfer of rights during the term of this Agreement. In the event the Center Premises, or a portion thereof, are sold, leased or otherwise disposed of, the City may take any and all steps it deems reasonably necessary to facilitate the disposition, including, but not limited to, the expedited turnover of portions of the Center Premises and the assignment of its rights and duties under this Agreement. City shall comply with Section 29.4.B of this Agreement should it chose to implement this provision. In the event that the Center, or a portion thereof, is disposed of, CCAEF and the City shall meet and confer on the impacts of the disposition.

## Agreement

### **Section 19. Compliance with Law**

CCAEF agrees to comply, and secure compliance from its Board of Trustees, employees and representatives, with all the requirements of all municipal, county, state, and federal laws pertaining to the Center and its operations. The judgment of any court of competent jurisdiction that CCAEF has violated any law, or CCAEF's admission that it has done so, shall be conclusive of that fact as between City and CCAEF. Notwithstanding the foregoing, CCAEF shall not be in breach of this Agreement and City shall have no right to terminate this Agreement in the event of a minor violation of a requirement or statute if CCAEF promptly complies with the requirement or statute upon learning of such violation. CCAEF will not knowingly take any action that would, in the judgment of the City's Contract Administrator or counsel, adversely affect the CCAEF's nonprofit public benefit status.

### **Section 20. Nondiscrimination**

CCAEF agrees that it shall abide by all state and federal nondiscrimination laws including, but not limited to, not discriminating in any manner against any person or persons on account of age, race, marital status, gender, religious creed, color, ancestry, national origin, sexual orientation, sexual identity, mental disability, or medical condition in CCAEF's or its renters' use of the Center.

### **Section 21. Insurance**

21.1 Required Insurance Coverage. The CCAEF on behalf of the Center and City shall procure and maintain for the duration of the Agreement insurance coverage against claims for injuries to persons or damages to property which may arise from or in connection with the Center's operation and use of the Center Premises, as well as its agents, representative, employees, or contractors. The cost of such insurance shall be borne by the Center and the City, as provided for herein. Insurance coverage shall be at least as broad as the following:

- (a) *Commercial General Liability (CGL).* Insurance Services Office Form CG 00 01 covering CGL on an "occurrence" basis, including products and completed operations, property damage, bodily injury and personal & advertising injury with limits no less than \$10,000,000 per occurrence.
- (b) *Automobile Liability.* ISO Form CA 00 01 covering any auto (Code 1), or if the Center has no owned autos, hired (Code 8) and non-owned autos (Code 9), with limits no less than \$10,000,000 per accident for bodily injury and property damage.
- (c) *Workers' Compensation.* The Center shall maintain Worker's Compensation as required by the State of California, with Statutory Limits, and Employer's Liability Insurance with limits of no less than \$1,000,000 per accident for bodily injury or disease.
- (d) *Employment Practices Liability.* The Center shall maintain Employment Practices Liability Insurance with limits of no less than \$2,000,000.
- (e) *Directors and Officers Liability.* The Center shall maintain Directors and Officers Liability Insurance with limits of no less than \$10,000,000.

## Agreement

(f) *Property Insurance.* The Center shall maintain property insurance against all risks of loss to any tenant improvements or betterments, at full replacement cost with no coinsurance penalty provision.

(g) *Sexual Abuse or Molestation (SAM) Liability.* The CGL policy referenced above is not endorsed to include affirmative coverage for sexual abuse or molestation, the Center shall obtain and maintain a policy covering Sexual Abuse and Molestation with a limit no less than \$2,000,000 per occurrence or claim.

If the Center maintains broader coverage and/or higher limits than the minimums shown above, the City requires and shall be entitled to the broader coverage and/or the higher limits maintained by the Center.

Each insurance policy required by this Agreement must be acceptable to the City Attorney and shall meet the following requirements:

- A. *Premium Payment.* The City shall pay 75% and the CCAEF shall pay 25% of the insurance premiums.
- B. *Acceptability of Insurers.* Insurance coverage must be provided by an insurer authorized to conduct business in the state of California with a current A.M. Best's rating of no less than A-: FSC VII, or as approved by the City.
- C. *Additional Insured Status.* The CGL, Automobile Liability, Employment Practices Liability, Directors and Officer Liability and SAM Liability policies must name the City (including its officials, officers, agents, employees, and volunteers) specifically as an additional insured under the policy on a separate endorsement page. The Commercial General Liability additional insured endorsement shall be at least as broad as ISO Form CG 20 10 11 85, or if not available, through the addition of *both* CG 20 10, CG 20 26, CG 20 33, or CG 20 38, *and* CG 20 37 if a later edition is used. The Automobile Liability endorsement shall be at least as broad as ISO Form CA 20 01.
- D. *Primary Coverage.* The Center's insurance coverage shall be primary coverage at least as broad as ISO CG 20 01 04 13 with respect to the City, its officials, officers, agents, employees, and volunteers. Any insurance or self-insurance maintained by the City, its officials, officers, agents, employees, or volunteers shall be in excess of Center's insurance and shall not contribute with it.
- E. *Notice of Cancellation.* Each insurance policy shall provide that coverage shall not be canceled, except with prior written notice to the City.
- F. *Subcontractors.* If applicable, the Center shall require and verify that all contractors and subcontractors maintain insurance meeting all the requirements stated in this Agreement, and the Center shall ensure that the City (including its officials, officers, agents, employees, and volunteers) is an additional insured on any insurance required from a subcontractor.
- G. *Waiver of Subrogation.* The Center hereby grants to the City a waiver of any right to subrogation that any insurer of the Center may acquire against the City by virtue of the payment of any loss under such insurance. The Center agrees to obtain any endorsement that may be necessary to

## Agreement

affect this waiver of subrogation, but this subsection shall apply regardless of whether or not the City has received a waiver of subrogation endorsement from the insurer. Any Workers' Compensation policy required by this Agreement shall be endorsed with a waiver of subrogation in favor of the City for all work performed by the Center, its agents, representatives, employees and subcontractors.

- H. *Legal Liability Coverage.* The property insurance is to be endorsed to include Legal Liability Coverage (ISO Form CP 00 40 04 02 or equivalent) with a limit equal to the replacement cost of the leased property.
- I. *Self-Insured Retentions.* Self-insured retentions must be declared to and approved by the City. The City may require the Center to purchase coverage with a lower retention or provide proof of ability to pay losses and related investigations, claim administration, and defense expenses within the retention. The policy language shall provide, or be endorsed to provide, that the self-insured retention may be satisfied by either the named insured or the City. Unless otherwise provided for herein, any and all deductibles and SIRs shall be the sole responsibility of the Center who procured such insurance and shall not apply to the Indemnified Additional Insured Parties. Policies shall NOT contain any self-insured retention (SIR) provision that limits the satisfaction of the SIR to the Named. The policy must also provide that Defense costs, including the Allocated Loss Adjustment Expenses, will satisfy the SIR or deductible. Entity reserves the right to obtain a copy of any policies and endorsements for verification.

21.2 Certificates of Insurance. CCAEF agrees to deposit with City, on or before the effective date of this Agreement, one certificate of insurance for each of the policy or policies necessary to satisfy the insurance provisions of this Agreement and to keep such insurance in effect during the entire term of this Agreement. This certificate must be reviewed by, and acceptable to, the City Attorney prior to commencement of the Agreement Term. CCAEF will also deposit with the City within 60 days of the Effective Date of this Agreement, an additional insured endorsement naming City specifically and separately as an "additional insured", with the exception of the worker's compensation policy. The appropriate endorsements described above shall follow within sixty (60) days.

21.3 City Review and Approval. City shall retain the right at any time to review the coverage, form and amount of the insurance required hereby. If, in the opinion of the City, the insurance provisions in this Agreement do not provide adequate protection for City and for members of the public using the Center, City may require CCAEF to obtain insurance sufficient in coverage, form and amount to provide adequate protection from and against the kind and extent of risks which exist or are foreseeable at the time a change in insurance is required. City's requirements shall be reasonable, but shall be designed to assure adequate protection of the City's interests. The City shall notify CCAEF in writing of changes in the insurance requirements and, if CCAEF does not deposit with City within sixty (60) days of receipt of such notice a new Certificate of Insurance for each policy or policies of insurance incorporating such changes, this Agreement shall be deemed in default without further notice to CCAEF and may be forthwith terminated by the City.

## **Agreement**

21.4 **Insurance No Limit of Liability.** The procuring of such required policy or policies of insurance shall not be construed to limit CCAEF's liability hereunder nor to fulfill the indemnification provisions and requirements of this Agreement. Notwithstanding said policy or policies of insurance, CCAEF shall be obligated for the full and total amount of any damage, injury or loss attributable to any act or omission of it or its agents, customers or guests in connection with this Agreement or with use or occupancy of the Center Premises.

### **Section 22. Indemnification**

As to claims between the Parties:

22.1 **City Indemnification.** CCAEF shall defend, indemnify, and hold harmless City, its officers, agents, and employees from and against any and all claims, demands, and liabilities for loss of any kind or nature which City, its officers, agents, or employees may sustain or incur or which may be imposed upon them or any of them for injury to or death of persons or damage to property as a result of, arising out of, or in any manner connected with this Agreement or with the occupancy and use of the Center Premises by CCAEF, its invitees, visitors, or any other persons whatsoever. CCAEF further agrees to pay any and all costs and expenses, including, but not limited to, court costs and reasonable attorney's fees incurred by City on account of any such claims, demands, or liabilities.

22.2 **CCAEF Indemnification.** City shall defend, indemnify and hold harmless CCAEF its officers, agents, and employees from and against any and all claims, demands, and liabilities for loss of any kind or nature which CCAEF, its officers, agents, or employees may sustain or incur or which may be imposed upon them or any of them for injury to or death of persons or damage to property as a result of, arising out of, or in any manner connected with this Agreement or with the occupancy and use of the Center Premises by City, its invitees, visitors, or any other persons whatsoever. City further agrees to pay any and all costs and expenses, including, but not limited to, court costs and reasonable attorney's fees incurred by CCAEF on account of any such claims, demands, or liabilities.

### **Section 23. Risk Management and Accident Reports**

23.1 **Risk Management.** Both parties shall engage in responsible and professional risk management activities to the greatest extent possible to minimize the exposure to claims and liability on behalf of itself and the City. Such risk management efforts shall include, but not be limited to, cooperating with the City's legal and insurance staff as well as the City's building and maintenance officials.

23.2 **Timely Notice.** CCAEF shall immediately report to City any accident causing property damage or injury to persons on the Center Premises. Such report shall contain the names and addresses of the involved parties, a statement of the circumstances, the date and hour of the accident, the names and addresses of any witnesses, and other pertinent information or documentation of the incident.

### **Section 24. Defense of Third-Party Claims and Litigation**

24.1 **Notice of Claims & Lawsuits.** In addition to the requirements of Section 23, CCAEF shall immediately report to City any notice, claim, or lawsuit ("Claim") served on or presented to the CCAEF, or its Board of Trustees or employees directly, by third-parties arising out of or related

## Agreement

to Center operations which may give rise to liability of the CCAEF or the City. CCAEF shall tender the Claim to its insurance carrier provided for in Section 21 and, as appropriate, the insurance carrier for its renter, performer, exhibiter, contractor or subcontractor and seek defense and indemnification of the Claim so presented. If the tender of the defense and indemnification of the Claim is accepted by the insurer, Sections 24.3 and 24.4 shall govern the Parties' obligation as to the payment of the self-insured retention, if any. If the tender of the Claim is not accepted by any insurer, Sections 24.3 and 24.4 shall govern the respective defense and indemnification obligations of the Parties.

24.2 Notice of Government Code Claims. City shall notify CCAEF of any Government Code Claim ("Claim") presented pursuant to California Government Code section 900 *et. seq.* to the City arising out of or related to Center operations which may give rise to liability of the CCAEF or the City within ten (10) calendar days of receipt. The Parties shall meet and confer as to the contents of the Claim and City shall tender the defense and indemnification of the Claim to all appropriate insurers who may cover such Claim. If the tender of the defense and indemnification of the Claim is accepted by the insurer, Sections 24.3 and 24.4 shall govern the Parties' obligation as to the payment of the self-insured retention, if any. If the tender of the Claim is not accepted by any insurer, Sections 24.3 and 24.4 shall govern the respective defense and indemnification obligations of the Parties.

24.3 City Responsibility for Claim. To the extent the Claim relates solely to a fixed, permanent physical attribute of the Center Premises under the responsibility of the City pursuant to this Agreement, the City shall undertake (i) the defense of both the City and CCAEF in the matter and be responsible for the payment of any settlement or judgment on the Claim on behalf of the City and CCAEF, and their respective councils, boards, and employees, and/or (ii) pay the self-insured retention amount necessary to secure insurance coverage.

24.4 CCAEF Responsibility for Claim. To the extent the Claim relates solely to the operation of an event at and/or under the supervision of the Center and its employees, volunteers, patrons, renters, performers, exhibitors, contractors and subcontractors, and unrelated to a fixed, permanent physical attribute of the Center Premises, the CCAEF shall undertake (i) the defense of the City and CCAEF in the matter and be responsible for the payment of any settlement or judgment of the Claim on behalf of the City and CCAEF, and their respective councils, boards and employees, and/or (ii) pay the self-insured retention amount necessary to secure insurance coverage.

24.5 Shared Responsibility for Claim. To the extent the Claim relates to or arises out of both a fixed, permanent physical attribute of the Center Premises and the operation of an event as described in Section 24.4, the Parties shall meet and confer regarding the joint defense of the Claim including the sharing of resources, potential retention of joint counsel, and sharing in the payment of a settlement or judgment. If the Parties are unable to resolve the dispute between themselves, they may seek appropriate remedies against each other pursuant to this Agreement and state law.

## Agreement

### **Section 25. Patron Waivers**

City may from time to time require that CCAEF obtain a liability waiver and release from the users of the Center Premises. CCAEF's indemnification obligation provided for herein shall include any claim by the City against the CCAEF for the failure to ensure that any user of the Center executes an enforceable waiver as provided in this section.

### **Section 26. No Affiliation**

Nothing contained in this Agreement shall be deemed or construed to create a partnership, joint venture or other affiliation between the City and CCAEF or between the City and any other entity or party, or cause the City to be responsible in any way for the debts or obligations of the CCAEF or any other party or entity.

### **Section 27. City Payment**

27.1 Management Fee. As compensation for the services performed on behalf of the City by the CCAEF provided for herein, the City will pay the CCAEF a Management Fee. This Management Fee is in addition to the other support by the City to CCAEF as provided for in this Agreement. The amount of the Management Fee throughout the term of this agreement is \$55,000 per month. The CCAEF agrees to designate \$100,000 of the total management fee each year to support the following community events: the Annual 4<sup>th</sup> of July (Independence Day) Celebration, Día de los Muertos, Música en la Plaza, and Winter Wonderland. The monthly Management Fee payment by the City to the CCAEF in a given month will be made by the 5<sup>th</sup> day of that month.

27.2 Use of Revenues. CCAEF shall use such revenues to pay the expenses of operating the Center in accordance with this Agreement. For purposes of this paragraph, "expenses" shall include employee salaries and benefits and all other expenses of operating/programming the Center. CCAEF agrees that on an annual basis it will provide a report to the City detailing all such revenues and expenses of the Center. Any revenues in excess of those needed to operate the Center shall be used to purchase needed items for the facility or placed in a reserve account to offset future operating expenses. CCAEF shall have the right to conduct special fundraising and seek to thereby obtain revenues over and above revenues derived from the operation of the Center for the purpose of creating and maintaining endowment funds, which shall be and remain the property of CCAEF or the CCAEF Charitable Trust.

### **Section 28. Coordination of Activities**

28.1 Notice to City. In order to avoid conflicts, CCAEF will notify the City and the City will notify CCAEF within a reasonable time after the approved scheduling of events in and improvements to Grape Day Park or the Great Lawn. City will consult and coordinate with the CCAEF with respect to any facilities maintenance or improvements which may impact or conflict with scheduled CCAEF or Center events and CCAEF will consult with the City in the planning of approved improvements or additions to Center Premises.

28.2 Outdoor Noise Response. The CCAEF is responsible for ensuring that its outdoor events are conducted consistent with the City's Noise Abatement and Control Ordinance. CCAEF



## Agreement

shall make available during outdoor events an individual to respond to noise complaints from City residents in person and/or by phone. CCAEF shall make public on its website an operable number for the receipt of noise complaints and shall be responsible for the satisfactory resolution of such reports.

### **Section 29. Term of Operation and Management Agreement**

29.1 Initial Term. This Agreement shall commence upon the last date executed by the City and CCAEF and shall expire on June 30, 2024 unless terminated pursuant to Section 29.4 (the "Initial Term").

29.2 Renewal Option. Within three (3) months before the expiration of the Initial Term, City and CCAEF may, extend the term of this Agreement (Extension Period) upon and subject to all of the provisions contained herein, or as otherwise agreed to by the Parties, for a single, additional one (1) year period.

29.3 Holding Over. At the expiration of the Initial Term and one Extension period provided for herein, in the event the City permits CCAEF to continue to operate the Center, all other terms and conditions of this Agreement shall continue in full force and effect, on a month-to-month basis.29.4

29.4 Termination.

A. For Cause. This Agreement may be terminated at any time for cause, provided written Notice of Default ("Default Notice") in performance is provided to the other Party. Within thirty (30) days of the date of such Default Notice, the Party receiving the Default Notice shall have the right to cure to the reasonable satisfaction of the other Party the breach or failure of performance under the terms of this Agreement.

B. For Convenience. Either Party may, at any time during the term of this Agreement, terminate this Agreement for any reason (i.e. without cause) by tendering six (6) months advance written notice to the other Party.

C. Immediate Termination. City may terminate this Agreement immediately in the event the CCAEF is declared insolvent by a court of competent jurisdiction, or is dissolved, or loses its tax-exempt status.

29.5 Existing Obligations. Any termination of this Agreement shall not have any effect on bona fide contracts, entered into in good faith by CCAEF and City shall make reasonable efforts to accept such contracts. CCAEF shall cooperate to diligently and promptly to assign such agreements to the City.

29.6 CCAEF Remaining Assets. If, for any reason, the CCAEF is dissolved, any assets remaining, including cash, after satisfaction of all debts and obligations, will be transferred to another nonprofit organization with a similar mission, as required by law.

### **Section 30. General Provisions**

30.1 No Right to Assign or Transfer. As the City has relied on the particular expertise of CCAEF in entering into this Agreement, CCAEF shall not assign, delegate, or transfer any duty or right under this Agreement, except as specifically authorized, and any such purported assignment, delegation, or subletting shall be void, unless the City has approved such action in

## Agreement

writing in advance.

30.2 Amendment of Agreement. This Agreement may be amended at any time by the Parties provided that all additions, deletions or changes are made in writing and executed by both Parties. The Contract Administrator may execute implementing MOUs and amendments to this Agreement without further City Council approval for all changes within the authority of the Contract Administrator under the Escondido Municipal Code.

30.3 Provisions Cumulative. The foregoing provisions are cumulative and in addition to and not in limitation of any other rights or remedies available to the City.

30.4 Merger Clause. This Agreement and its Exhibits, if any, are the entire understanding of the Parties, and there are no other terms or conditions, written or oral, controlling this matter. In the event of any conflict between the provisions of this Agreement and its Exhibits, if any, the provisions of this Agreement shall prevail.

30.5 Anti-Waiver Clause. None of the provisions contained herein shall be waived because of previous failure to insist upon strict performance, nor shall any provision be waived because any other provision has been waived, in whole or in part.

30.6 Severability. The invalidity in whole or in part of any provision of this Agreement shall not void or affect the validity of any other provisions of this Agreement.

30.7 Costs and Attorney's Fees. In the event that either Party should bring suit against the other Party to enforce any provisions of this Agreement, the prevailing Party in such litigation shall pay the other Party's costs and reasonable attorneys' fees incurred pursuant to said litigation.

30.8 Force Majeure. The time within which the Parties hereto shall be required to perform any act under this Agreement, other than the payment of money, shall be extended by a period of time equal to the number of days during which performance of such act is delayed due to an act of God, fire, earthquake, flood, explosion, war, invasion, insurrection, riot, mob violence, or any other similar cause beyond the reasonable control of either of the Parties.

30.9 Choice of Law. This Agreement shall be governed by the laws of the State of California. Venue for any action arising from this Agreement, including but not limited to matters concerning validity, construction, performance or enforcement shall be heard exclusively in the state court located in North San Diego County, California, or federal courts located in San Diego County, as allowable under federal law.

30.10 Notice to Parties. Any statements, communications or notices to be provided pursuant to this Agreement shall be sent to the attention of the persons indicated below, until such time as notice of any changes of person to be notified or change of address is forwarded to both Parties:

30.11 Business License. CCAEF shall be required to maintain a City of Escondido Business License during the term of this Agreement.

[SIGNATURE PAGE TO FOLLOW]

**Agreement**

CCAEF:

California Center for the Arts, Escondido Foundation  
340 North Escondido Boulevard  
Escondido, CA 92025

Attn: \_\_\_\_\_

Phone: \_\_\_\_\_

CITY:

City of Escondido  
201 N. Broadway  
Escondido, CA 92025  
Attn: Sean McGlynn, City Manager  
760-839-4577

IN WITNESS WHEREOF, this Agreement has been executed on behalf of the CITY by its Officer thereunto authorized and by CCAEF, the date and year first above written.

CITY OF ESCONDIDO  
a Municipal Corporation  
201 North Broadway  
Escondido, CA 92025-2798

Date: \_\_\_\_\_

\_\_\_\_\_  
Mayor

CALIFORNIA CENTER FOR THE ARTS, ESCONDIDO  
FOUNDATION

Date: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_, Chair  
Board of Trustees

APPROVED AS TO FORM:

CALIFORNIA CENTER FOR THE ARTS,  
ESCONDIDO FOUNDATION

By: \_\_\_\_\_

OFFICE OF THE CITY ATTORNEY  
Michael R. McGuinness, City Attorney

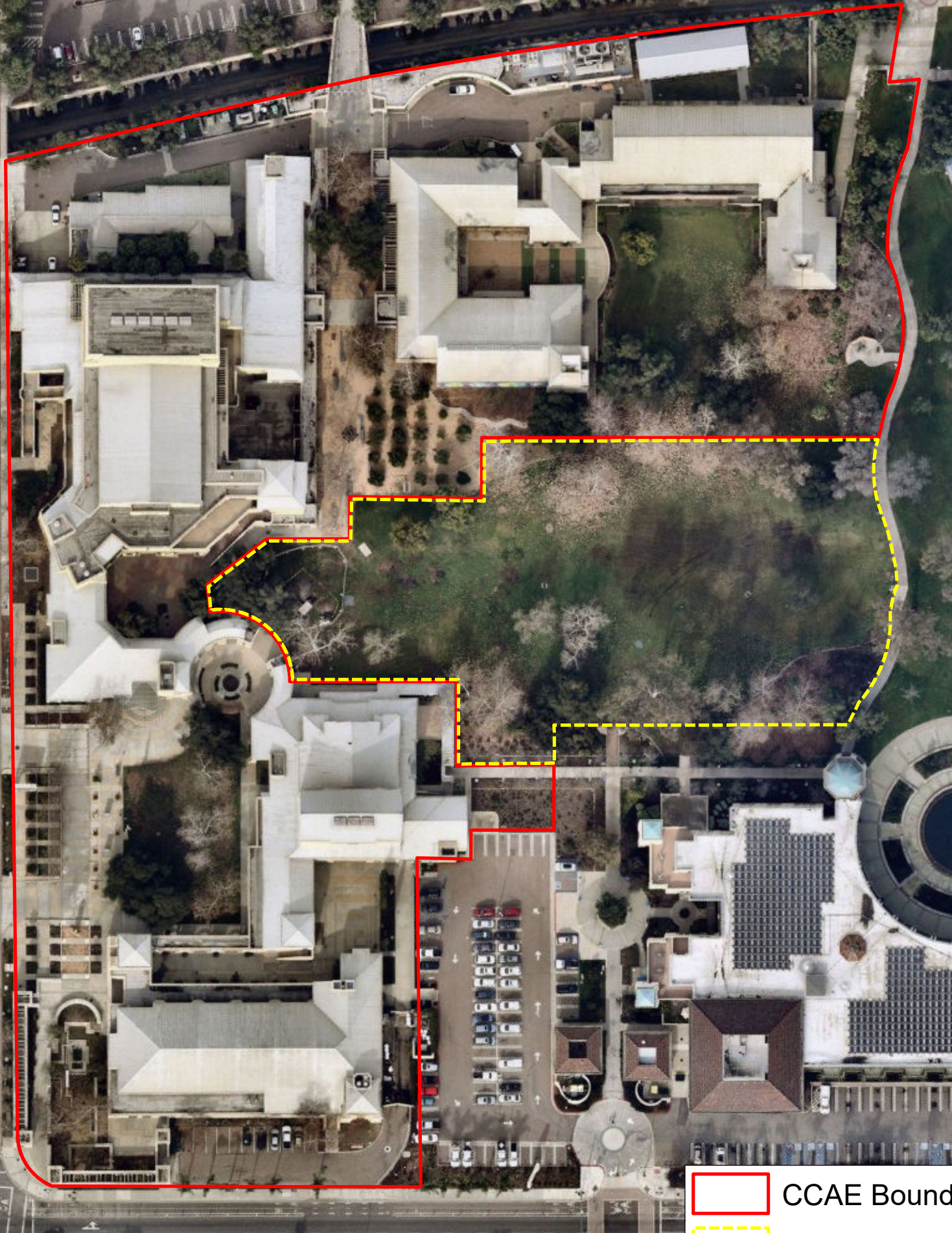
By: \_\_\_\_\_

## Agreement

Exhibit 1


[OVERHEAD PHOTO OF CAMPUS PERIMETER]





CCAЕ Boundary

Great Lawn





## Agreement

### APPENDIX A

#### Center Premises Regular Maintenance

The Parties shall be responsible for the following maintenance and cleaning of the Center Premises:

##### CITY MAINTENANCE RESPONSIBILITIES.

- Maintenance of permanent structures including interior walls and ceilings, not to include interior painting of walls.
- Maintenance of exterior walls, roofs, walks, lighting, structures, landscaping, and landscape irrigation systems.
- All structural electrical, heating, venting, air-conditioning, plumbing and sewer maintenance.
- Maintenance of all permanent kitchen equipment such as stoves, hoods, refrigerators, ice machines, walk in freezers
- Maintenance and repair of elevators and conveyances.
- Maintenance and repair of fire alarm system.
- Routine maintenance and cleaning of exterior grounds, not including exterior maintenance and cleaning for CCAE activities or programs.
- Maintenance and replacement of stage lighting and sound equipment, stage curtains, decorations, furnishings, and ornamentations.

##### CCAEF MAINTENANCE RESPONSIBILITIES.

- All routine interior cleaning and maintenance, including repairs and replacement required by such routine maintenance, such as, but not limited to, light painting, minor carpentry, minor drywall repairs, interior window cleaning, light bulb replacements, door lock and hinge lubing, drapery & window coverings, stage maintenance and inspections,
- All interior and exterior janitorial services required to keep the premises in a clean, sanitary and safe condition in a manner satisfactory to City and in compliance with all applicable laws such as, but not limited to, custodial services, routine sanitation of restroom facilities, plunging and snaking drains and fixtures
- Routine cleaning of permanent kitchen equipment in compliance with all applicable laws, such as, but limited to, stoves, hoods, refrigerators, ice machines, walk-in freezers
- Installation and maintenance of any new or additional improvements, alterations, additions, or decorations
- Maintenance and repair of CCAE security alarm systems
  - Exterior window cleaning and exterior landscape/hardscape leaf blowing
  - Repairs and replacement of interior structures, fixtures, and equipment due to the negligence or deliberate acts of Center, or of Center's agents, employees or any person or persons acting for Center or under Center's control, or invitees or licensees of the Center or due to other causes, including but not limited to, vandalism within the buildings.