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CITY OF KELOWNA

MEMORANDUM

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**Date:** March 5th, 2008  
**File No.:** 0870-20  
**To:** City Manager  
**From:** Cultural Services Manager  
**Subject:** Kelowna Visual and Performing Arts Centre Society operating the Rotary Centre for the Arts.

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**RECOMMENDATION:**

**THAT** Council approve the Management and Operating Agreement (MOA) between the Kelowna Visual Performing Arts Centre Society (KVPACS) and the City for the Rotary Centre for the Arts (RCA) to commence January 1<sup>st</sup>, 2008 as attached to the report from the Cultural Services Manager dated March 5, 2008;

**AND THAT** Council consider supplemental funding of \$60,000 for the RCA Maintenance Fund during Final Budget;

**AND THAT** Council authorize funding of \$40,000 for theatre programming from the Professional Arts Grants account to KVPACS for the term of this MOA;

**AND FURTHER THAT** the Mayor and City Clerk be authorized to execute this MOA on behalf of the City of Kelowna.

**BACKGROUND:**

KVPACS has operated the RCA since the Fall of 2002. This 46,000 ft<sup>2</sup> arts and cultural civic facility is remarkably diverse, providing spaces for dance, music, artist studios, pottery, community meetings, commercial and non-profit art gallery displays, food/beverage services, as well as a 332 seat theatre supported by rehearsal rooms and a set construction shop.

The term of the new MOA for the RCA is five years. There are benefits for the City, KVPACS, and especially the community, as we maximize the efficient use of tax dollars, as well as services and facilities available to the community.

The agreement is a comprehensive set of documents that address in considerable detail the City's need to have the civic asset protected, while at the same time providing KVPACS with the ability to manage and operate an exciting and vibrant facility in the heart of the Cultural District.

The City and KVPACS continue to share maintenance responsibilities for the facility. The City contracts KVPACS to perform maintenance functions, and provides a RCA Maintenance Fund. Council will consider a final budget supplemental in the amount of \$60,000, indexed by BC All Items Consumer Price Index for the term of the agreement. This amount has been determined by the parties largely to reflect the ever expanding increase in activity in the RCA resulting in increased funding, primarily for utilities and janitorial services. This increase is consistent with the City experience in other municipal buildings.

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The following chart illustrates the **RCA Maintenance Fund** components and financial details:

		<b>2003 Budget</b>	<b>2007 Actual</b>	<b>2008 Budget</b>
Facility Operator		\$ 41,500	\$ 43,386	\$ 46,000
Facility Utilities		\$ 38,700	\$ 62,200	\$ 64,000
Cleaning & Janitorial		\$ 30,000	\$ 54,240	\$ 90,000
Preventative & First Line		\$ 15,000	\$ 13,000	\$ 15,000
Refurbishment		\$ 10,000	\$ 5,388	\$ 5,000
<b>TOTAL</b>		<b>\$ 135,200</b>	<b>\$ 178,214</b>	<b>\$ 220,000</b>

Staff is recommending that \$40,000 previously granted to Sunshine Theatre Society be re-directed from the Professional Arts Fund to KVPACS through this MOA. In 2006, KVPACS entered into a management agreement with Sunshine Theatre Society whereby the Sunshine Theatre Society provides presentations of professional theatre in the Mary Irwin Theatre and KVPACS provides operational support including staffing, financial services and administration. This new relationship has proven successful with increased audience attendance, revenue generation and separation of duties.

While the overall agreement is complex, the following key points form the essence of the document:

- 1) The City appoints KVPACS to operate the facility and provide defined services to the public over a five year period,
- 2) The City provides a five year lease of the RCA to KVPACS,
- 3) KVPACS and the City of Kelowna are jointly responsible for the maintenance of the facility, the City contracts KVPACS to provide the maintenance services, and the City providing the RCA Maintenance Fund,
- 4) KVPACS is solely responsible for all day-to-day operations, management decisions, and staffing of the Facility,
- 5) KVPACS and the City will adhere to the quarterly timeline (Schedule J) to ensure good communication, financial reporting and identifying any budget requests concurrent with the City's budget cycle.
- 6) Public access to the Facility is defined and assured over the life of the agreement,
- 7) KVPACS is authorized to sub-lease, rent and offers programs in specific spaces within the Facility,
- 8) The City may appoint the Director of Recreation, Parks & Cultural Services, or the Cultural Services Manager to act as liaison to the Board of Directors and to attend meetings,
- 9) The City always remains the legal owner of all Property, the Facility and all major equipment with the exception of items listed in Schedule K.
- 10) KVPACS is granted a license to control specified parking at the south side of the Facility,
- 11) KVPACS will provide extensive support and work in collaboration with the many stakeholders, to ensure the success of the Cultural District.

#### **Summary of City commitments:**

	Term -	Five years including the Lease
RCA Maintenance Fund -		2008 City budget \$220,000, indexed to CPI for the term
Maintenance Obligations -		City to maintain structure, foundations, elevators, roofs, external facades, external glass, fire alarms, emergency lighting and HVAC systems.
License to Use -		A portion of adjacent parking lots,
Theatrical programming in the Mary Irwin Theatre -		2008 City budget - \$40,000

**INTERNAL CIRCULATION TO:**

Director of Recreation, Parks & Cultural Services  
Development Manager, Recreation, Parks & Cultural Services  
Properties Project Manager  
City Clerk  
Financial Planning Manager

**LEGAL/STATUTORY AUTHORITY:**

City Council does have the authority to approve this MOA since the term of the agreement is 5 years.

**FINANCIAL/BUDGETARY CONSIDERATIONS**

As the City considers its annual financial plan, KVPACS may also propose annual program and administration supplemental budget items for the following year. KVPACS will be provided an opportunity to provide justification for any supplemental budget items, and Council will have the final decision as to what additional budget amount it can support.

**EXTERNAL AGENCY/PUBLIC COMMENT:**

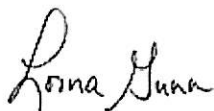
The City has negotiated this MOA with KVPACS, and the MOA has been approved and executed by authorized representatives of KVPACS.

City staff acknowledges the tremendous work being done by the Executive Director, staff and the Board of Directors of KVPACS in ensuring the delivery of Cultural Services to our community.

Considerations not applicable to this Report:


Legal/Statutory Procedural Requirements;  
Existing Policy;  
Personnel Implications;  
Technical Requirements;  
Communications Considerations;  
Alternate Recommendation.

Submitted by:



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L. Gunn  
Cultural Services Manager



Approved for Inclusion:

**Attachments**

Cc: Director of Recreation, Parks & Cultural Services  
Development Manager of Recreation, Parks & Cultural Services  
Project Manager of Civic Properties  
City Clerk  
Financial Planning Manager

DOCUMENT APPROVAL			
Facility Lease - Master			
Cir.	Dept.	Date	Int.
	R,P & CS		
	Risk Mgmt.		
	City Clerk		

**LEASE and OPERATING AGREEMENT**

**BETWEEN**

**THE CITY OF KELOWNA**

**AND THE**

**KELOWNA VISUAL AND PERFORMING ARTS  
CENTRE SOCIETY**

February 26, 2008



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**LEASE AND OPERATING AGREEMENT OF THE ROTARY CENTRE FOR THE ARTS**

THIS LEASE AND OPERATING AGREEMENT dated \_\_\_\_\_, 2008,

BETWEEN:

**CITY OF KELOWNA**, a municipal corporation pursuant to the laws of British Columbia having an address at 1435 Water Street, Kelowna, B.C., V1Y 1J4

(the "City")

AND:

**KELOWNA VISUAL AND PERFORMING ARTS CENTRE SOCIETY (Inc.**  
No. S32185) a society registered under the laws of British Columbia and having an office at 421 Cawston Avenue, Kelowna, B.C., V1Y 6Z1

(the "KVPACS")

WHEREAS:

- A. The City is the registered owner of certain lands and premises situate at 421 Cawston Avenue, Kelowna, B.C. and legally described as:

Parcel Identifier: 024-847-119

Lot A, District Lot 139

Osoyoos Division, Yale District, Plan KAP67454

(the "Land"),

on which is located several buildings and structures, one of which is the Rotary Centre for the Arts building (the "Facility"), a plan of which is attached to this Lease and Operating Agreement as Schedule "C" and Schedule "D";

- B. KVPACS wishes to lease the Facility and the City has agreed to lease the Facility to KVPACS on the terms and conditions of this Lease and Operating Agreement;
- C. The City and KVPACS wish to see KVPACS operate the Facility in a manner that is consistent with its social and cultural objectives outlined in its constitution and bylaws attached hereto as Schedule "B";
- D. KVPACS wishes to cooperate with the City in furthering the appreciation of arts education and visual and performing arts in Kelowna;
- E. The City recognizes the valuable contribution that the KVPACS provides to the Cultural District specifically and the City as a whole;

- F. The City has posted and publishes notices of its intention to grant this Lease and Operating Agreement to KVPACS, pursuant to the *Community Charter*.

NOW THEREFORE this Agreement is evidence that in consideration of the mutual covenants, conditions and agreements herein contained (the receipt and sufficiency of which consideration are hereby acknowledged), the City and KVPACS covenant and agree as follows:

## **ARTICLE 1**

### **DEFINITIONS**

#### **1.1 DEFINITIONS**

In this Lease and Operating Agreement:

- (a) "Additional Rent" means the amounts described in Section 4.5;
- (b) "Cold Beverage" means soft drinks, juice, iced tea drinks, isotonic water, bottled water, sports drinks, and bottled coffee drinks.
- (c) "First Line Maintenance" means repairs or maintenance that need to be done first in case of failure, problems with the structure, or vandalism resulting in a decrease in functionality or safety as well as all janitorial maintenance.
- (d) "Hazardous Substances" means any substance which is hazardous to persons or property and includes, without limiting the generality of the foregoing:
  - (i) radioactive materials;
  - (ii) explosives;
  - (iii) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water to the extent that it is detrimental to its use by man or by any animal, fish or plant;
  - (iv) any solid, liquid, gas or odour or combination of any of them that, if emitted into the air, would create or contribute to the creation of a condition of the air that:
    - (A) endangers the health, safety or welfare of persons or the health of animal life;
    - (B) interferes with normal enjoyment of life or property;
    - (C) causes damage to plant life or to property; or
    - (D) toxic substances; and

- (v) substances declared to be hazardous or toxic or special waste under any law or regulation now or hereafter enacted or promulgated by any governmental authority having jurisdiction.
- (e) "KVPACS Maintenance Fund" means the funds provided by the City to KVPACS pursuant to section 9.4(b).
- (f) "Preventative Maintenance" means any action taken that can prolong the life expectancy of structural equipment and prevent premature operational failures.
- (g) "Rent" includes Additional Rent;
- (h) "Taxes" means all taxes, fees, levies, charges, assessments, rates, duties, and excises whatsoever which are now or may hereafter be levied, imposed, rated, charged or assessed upon or with respect to the Land and/or the Facility, or any part thereof or any personal property of the City used therefore whether levied, imposed, rated, or assessed by any government body or otherwise, and whether or not now customary or in the contemplation of the parties on the date of this Lease and Operating Agreement and all interest and penalties relating thereto. Without restricting the generality of the foregoing, Taxes shall include all:
  - (i) real property taxes, general and special assessments, and capital taxes;
  - (ii) taxes, fees, levies, charges, assessments, rates, duties, and excises for transit, housing, schools, police, fire, or other governmental services, or for purported benefits to the Facility;
  - (iii) local improvement taxes, service payments in lieu of taxes, and taxes, fees, levies, charges, assessments, rates, duties, and excises, however described, that may be levied, rated, or assessed as a substitute for, or as an addition to, in whole or in part, any property taxes or local improvement taxes;
  - (iv) costs and expenses, including legal and other professional fees and interest and penalties on deferred payments, incurred by the City in contesting or appealing any taxes, assessments, rates, levies, duties, excises, charges, or other amounts as aforesaid;

but Taxes shall exclude all of the following:

- (i) income tax under Part I of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 as it existed on the Commencement Date to the extent that such taxes are not levied in lieu of such Taxes; and
  - (ii) Tenant's Taxes;
- (i) "Tenant's Taxes" means all taxes, fees, levies, charges, assessments, rates, duties, and excises which are now or may hereafter be levied, imposed, rated, or assessed

by any lawful authority relating to or in respect of the business or other activities carried on by KVPACS or relating to or in respect of personal property and all business and trade fixtures, machinery and equipment, cabinet work, furniture, and movable partitions owned or installed by KVPACS the expense of KVPACS or being the property of the KVPACS in the Facility and all Goods and Services Taxes and Social Services Taxes payable arising out of this Lease and Operating Agreement and the activities and the responsibilities undertaken by the KVPACS under this Lease and Operating Agreement.

- (j) "Term" means the original term of the Lease and Operating Agreement and any renewal term or terms.

## **ARTICLE 2**

### **GRANT OF LEASE AND OPERATING AGREEMENT**

#### **2.1 DEMISE**

The City, being the owner in fee simple of the Facility, does hereby lease the Facility to KVPACS, for the Term and upon and subject to the covenants and conditions of this Lease and Operating Agreement (the "Lease and Operating Agreement").

## **ARTICLE 3**

### **TERM AND COMMENCEMENT**

#### **3.1 TERM**

The term of this Lease and Operating Agreement shall be for five (5) years.

#### **3.2 COMMENCEMENT DATE**

The Term shall commence on the 1<sup>st</sup> of January, 2008 (the "Commencement Date").

#### **3.3 PREVIOUS AGREEMENTS**

This Lease and Operating Agreement replaces any and all previous agreements, whether written or not, between the City and KVPACS and the parties agree that any and all previous agreements shall be terminated and be of no further force and effect as of the Commencement Date.

## **ARTICLE 4**

### **RENT**

#### **4.1 RENT**

KVPACS shall pay to the City rent (the "Rent") for the Term of TEN Dollars (\$10.00), plus GST.

#### **4.2 PAYMENT OF RENT**

The Rent for the Term shall be payable by KVPACS to the City in advance upon execution of this Lease and Operating Agreement.

#### **4.3 NO DEDUCTIONS**

KVPACS shall pay the Rent without deduction, abatement, set-off, or withholding whatsoever, despite any law or statute now or in the future to the contrary. KVPACS's obligation to pay Rent shall survive the expiry or earlier termination of this Lease and Operating Agreement.

#### **4.4 TRIPLE NET LEASE**

This Lease and Operating Agreement shall be triple net and except for the City's specific payments expressly set out herein, all expenses, costs and payment incurred in respect of the Facility or for any other matter or thing affecting the Facility shall be borne solely by KVPACS and KVPACS will pay all its own costs of carrying out its obligations under this Lease and Operating Agreement.

#### **4.5 ADDITIONAL RENT**

KVPACS shall pay as Additional Rent monthly, within 15 days of receiving an invoice from the City, all monies owing by KVPACS to the City under this Lease and Operating Agreement, whether or not specifically described as Additional Rent.

## **ARTICLE 5**

### **LICENSE TO USE EXTERIOR SPACES**

#### **5.1 LICENSE GRANTED**

The City hereby grants to KVPACS, for the duration of the Lease and Operating Agreement, a non-exclusive license (the "License") to use the outdoor steps, patios, walkways, pathways, loading areas, and other areas necessary for pedestrian and vehicle access between the Facility and the adjoining public streets, lanes and sidewalks (the "License Areas"). Licensed areas are detailed on Schedule "C".

**5.2 REFERENCE TO LEASE AND OPERATING AGREEMENT INCLUDES LICENSE**

All references in this agreement to the Lease and Operating Agreement include the License and all references to the Facility include the License Areas, where the City so requires or the context so allows.

**ARTICLE 6**

**STATE OF TITLE**

**6.1 STATE OF TITLE**

KVPACS acknowledges that this Lease and Operating Agreement is subject to the following legal notations and charges registered against the title to the Land:

- (a) Permit, See DF KH120239
- (b) Permit, See KR94423
- (c) Permit, See KT141467
- (d) Statutory Right of Way KP82790
- (e) Statutory Right of Way KV5654

and KVPACS agrees to comply with the obligations within those documents, and within such other charges, interests and rights which the City may grant from time to time in the future, provided the interest of KVPACS under this Lease and Operating Agreement is not materially affected, and KVPACS shall execute any associated documents and plans.

**ARTICLE 7**

**UTILITIES AND TAXES**

**7.1 UTILITIES**

KVPACS shall contract for and pay directly all rates, charges, costs and expenses for electricity, heating, ventilation, air conditioning, telephone, cablevision, internet service, water supply, security systems, garbage removal, and other utilities and services provided to the Facility.

**7.2 TAXES**

KVPACS shall pay all Taxes and Tenant's Taxes. .



## **ARTICLE 8**

### **USE AND OCCUPATION**

#### **8.1 QUIET ENJOYMENT**

The City covenants with KVPACS for quiet enjoyment so long as KVPACS is not in default hereunder.

#### **8.2 USE**

KVPACS shall use the Facility for:

- (a) the operation and maintenance of an art centre for the perpetual benefit of the city and citizens of the City of Kelowna;
- (b) holding special exhibitions from time to time;
- (c) the provision of art courses and art-related activities designed to improve the art appreciation of residents of Kelowna and the surrounding area;
- (d) rent the performing art spaces, meeting spaces and arts education spaces to various groups, and program these same spaces;
- (e) lease and/or rent various spaces for artists studios, performing arts spaces, galleries, and / or food and beverage service consistent with the operation of an art centre; and
- (f) such other uses as are customarily incidental to an art centre and for no other purpose whatsoever.

#### **8.3 COVENANT TO OPERATE**

KVPACS shall throughout the whole of the Term continuously operate, occupy and utilize the entire Facility for the purpose set out herein, as a first-class art centre in keeping with the standards maintained by similar art centres in British Columbia, and without limiting the foregoing, KVPACS shall operate the Facility and ensure that, unless prevented by applicable Statutory Authorities or for reasons of repair and maintenance, the Facility is, at a minimum, open and available to the public throughout the Term subject to KVPACS' right to close at their discretion on any statutory holiday, Sundays and as per published schedules.

#### **8.4 ADMISSION FEE**

KVPACS may charge an admission fee to the Facility and it may charge for art lessons, other art programs or performances offered at the Facility at rates similar to than those of other similar arts centres operating in the Okanagan.

#### 8.5 SMOKING

KVPACS shall not permit smoking in any part of the Facility .

#### 8.6 ENERGY EFFICIENCY

KVPACS shall operate and maintain the Facility in a way that promotes recycling, energy efficiency, use of biodegradable products, use of recycled materials, and so as to reduce disposable materials. The City and KVPACS will use reasonable efforts to determine capital upgrades that will result in improved energy efficiency. Savings in annual utility expenses will be shared on a percentage participation basis of the capital upgrade.

#### 8.7 SECURITY

KVPACS shall take all reasonable steps to ensure that the Facility is secure at all times and that persons working at the Facility are at all times safe.

#### 8.8 COMPLIANCE WITH LAWS

KVPACS shall carry on and conduct its operations from the Facility and under this Lease and Operating Agreement in such manner as to comply strictly with any and all statutes, bylaws, rules and regulations of any federal, provincial, municipal or other competent authority in force from time to time, and shall not do anything in contravention thereof.

#### 8.9 STAFFING

KVPACS shall provide appropriate trained staff for the Facility at all times.

#### 8.10 COLD BEVERAGE SALES

KVPACS acknowledges that the City has entered into a cold beverage agreement with the Pepsi Bottling Group giving Pepsi the exclusive right to supply cold beverage products in the Facility and KVPACS agrees not to utilize, purchase, sell or advertise (or permit the utilization, purchase, sale or advertising of), on or from the Facility, Cold Beverage products other than those of the Pepsi Bottling Group and will not do anything that would cause the City to breach any of its obligations under that cold beverage agreement, KVPAC acknowledging that it has received a copy of that agreement.

#### 8.11 NUISANCE

KVPACS shall not do or omit or permit to be done or permit to be omitted anything which could damage the Facility or surrounding area or injure or impede the operation of the Facility or which shall or might result in any nuisance in or about the Facility. In any of the foregoing events, KVPACS shall forthwith remedy the same and if such thing or condition shall not be so remedied, the City may, after such notice, if any, as the City may deem appropriate in the circumstances, correct such situation at the expense of KVPACS and KVPACS shall pay such expense to the City as Additional Rent.

#### 8.12 ACCESSIBILITY OF THE FACILITY

KVPACS shall operate the Facility so that it is open to the public during ordinary hours of operation and so that its programs are available to the public and so that the Facility is fixtured and maintained to be accessible to disabled persons.

#### 8.13 SUPERVISION

KVPACS shall be responsible for supervising and controlling the activities of its members, directors, officers, employees, volunteers and members of the public who are utilizing the Facility and for managing the Facility without the necessity of interference, consent or approval from the City to the intent that KVPACS shall have the full and absolute authority to operate and manage the services provided by KVPACS in the Facility, subject only to the terms of this Lease and Operating Agreement.

#### 8.14 CULTURAL DISTRICT SUPPORT

KVPACS shall provide support through marketing, programming, and development of arts and cultural projects within the scope of this Lease and Operating Agreement to support the success for initiatives of the Cultural District, by co-operating and collaborating with the City and various organizations in the Cultural District.

### ARTICLE 9

#### FINANCING, REPORTING AND OBLIGATIONS

##### 9.1 FISCAL ROLE

KVPACS shall operate the Facility in a fiscally responsible manner.

##### 9.2 PROPOSED PROGRAM AND ADMINISTRATION BUDGET SUPPLEMENTAL

KVPACS may seek supplemental funds for the purpose of administering the Facility and providing programs at the Facility (but excluding for clarity, for any other purpose including maintenance and repairs), supplemental to those funds the City is obligated to provide under this Agreement by submitting the request, no more than once annually, as part of its proposed annual Program and Administration budget for the Facility in accordance with Schedule "J". KVPACS shall not otherwise seek or request additional payment of any monies from the City, except in the case unanticipated exceptional need or emergency the reason for which is to be fully stated.

Each year, at the same time the City considers its own financial plan, the City shall consider KVPACS's proposed supplemental Program and Administration budget request for the following year. The City shall be under no obligation whatsoever to approve the request for supplemental funds and approval of the request shall be at the discretion of City Council

KVPACS shall use reasonable efforts to obtain funding from sources other than the City and provide a report to the Director of Recreation Parks and Cultural Services at the same time as the proposed Program and Administration budget.

KVPACS may only request supplemental funding under this section for the purpose of addressing the following issues :

- (a) Accessibility to programs and services,
- (b) Increase in arts related programming,
- (c) Maintaining levels of income,
- (d) Funding for matching grants from other levels of government,
- (e) Legislative changes,
- (f) Achieve objectives as defined in KVPACS' constitution,
- (g) Achieve defined objectives of the City's Cultural Services Division.

### 9.3 AUDITED FINANCIAL STATEMENTS

KVPACS shall provide to the City, no later than 150 days from the end of the fiscal year, audited financial statements of KVPACS for the previous year in a form acceptable to the City, including all financial statements related to its operation of the Facility and a report of the previous years' activities in the Facility, including all membership and program registration and performance attendance statistics.

### 9.4 OPERATING FUNDS

The City shall provide an annual operating grant to KVPACS, which grant shall be provided in two (2) parts:

- (a) Programming and Administration in the amount of \$40,000 per year – KVPACS shall use such funds only for the general purposes of programming and administering the Facility, in accordance with any conditions or terms set out in the City's financial plan. ;
- (b) Maintenance Funds in the amount of \$220,000.00 per year (subject to indexation under section 10.3) – KVPACS shall use such funds only for the purposes set out in section 10.3.

## 9.5 INSTALLMENTS

The annual payment by the City to KVPACS under the preceding section shall be paid in two equal instalments within 10 (Ten) days of January 1 and within 10 (Ten) days of July 1 during each year of the Term. KVPACS acknowledges that it has received a portion of the annual payment for January 1, 2008.

## 9.6 PRE-REQUISITE TO CITY OBLIGATIONS

The City shall only be obliged to make payments to KVPACS under this Lease and Operating Agreement s long as:

- (a) The Facility is operated by KVPACS in strict compliance with this Lease and Operating Agreement;
- (b) KVPACS remains a non-profit society in good standing with the Registrar and does not operate the Facility with a view to making a profit or earning revenue that is used other than with respect to the operation of the Facility under this Agreement;
- (c) KVPACS has a membership open to all residents of the City of Kelowna; and
- (d) KVPACS has punctually observed and performed the terms, covenants and conditions to be performed by it in accordance with the terms of this Agreement.

## 9.7 KVPACS OBLIGATIONS

KVPACS shall:

- (a) maintain bylaws that permit all residents of the city of Kelowna to become members of the Society on the same terms and conditions as any other member;
- (b) provide to the City a true copy of its current Constitution and Bylaws upon execution of this Lease and Operating Agreement, and thereafter to provide true copies of all amendments to the said Bylaws and not amend its Constitution without the express written consent of the City;
- (c) make the Facility available to the City for City uses and City programs at such times as the Facility or part thereof is not booked for use at the time of the request for use by the City at the same rates then currently charged by KVPACS to other users of the Facility or the applicable part thereof, provided that nothing in this section shall authorize the City to sublet or rent the Facility to a third party;
- (d) operate the Facility under the name "Rotary Centre For The Arts" with no additions or variations, and enter into any naming rights only with respect to internal spaces within the Facility so long as it is consistent with Kelowna City Council Civic Community Facility Naming Policy. All revenue generated from naming will be

retained by KVPACS so long as they are the operator of the Rotary Centre for the Arts.

- (e) be solely responsible for determining the content of all exhibits and displays or art in the Facility;
- (f) permit the Director of Recreation Parks and Culture (or designate) of the City to attend all meetings of the KVPACS's Board of Directors for liaison purposes.

## **ARTICLE 10**

### **CLEANING, REPAIRS AND MAINTENANCE OF THE FACILITY**

#### **10.1 CLEANING**

KVPACS will keep clean and maintain the Facility in good repair to a standard as would a prudent owner of a first class art centre all in accordance with its obligations pursuant to the Lease and Operating Agreement except in respect of elements of the Facility that are the responsibility of the City to maintain and repair.

#### **10.2 MAINTENANCE AND REPAIR – CITY RESPONSIBILITIES**

The City, in consultation with KVPACS, must maintain, repair and replace (as determined by the City) the Facility structural members, foundations, and external facade, including exterior glass, fire alarms, emergency lighting, as well as the parking lot and the HVAC system to a standard as would a prudent owner to ensure the operational and structural integrity of the Facility.

#### **10.3 KVPACS MAINTENANCE FUND**

The KVPACS Maintenance Fund shall only be used by KVPACS for the following purposes and in 2008 the financial limits for these purposes shall be:

- (a) Facility Operator - \$46,000;
- (b) payment of utilities supplied to or consumed at the Facility - \$64,000;
- (c) Janitorial services for the Facility - \$90,000;
- (d) First Line and Preventative Maintenance - \$15,000;
- (e) Facility Refurbishment - \$5,000;

The above amount, and the amount of the payment to be made by the City pursuant to section 9.4(b), shall each be increased annually for each year following the first year of the Term by the same percentage as the percentage increase (if any) during the preceding calendar year in

the All Items Consumer Price Index for British Columbia as published by Statistics Canada. If KVPAC considers that maintenance and repair costs have increased by more than the BC All Items Consumer Price Index then KVPACS shall meet with the City designate for a review. If a funding increase is justified for any of the five purposes, the City designate will bring forward a supplemental budget requesting an increase in funds at the time the City considers it's own budget requests, provided that approval of the supplemental funds will be at the discretion of City Council. Any KVPACS Maintenance Funds not expended in a fiscal year must be identified in a reserve account and will only be used for the above purposes in following years.

Any funds remaining upon the expiry or earlier termination of this Agreement shall be repaid to the City.

#### 10.4 ANNUAL MAINTENANCE MEETING

The City and KVPACS agree to meet annually prior to July 1<sup>st</sup> of each year to tour the Facility to identify and to reduce to writing, the respective maintenance and repair and replacement obligations of KVPACS, and of the City for the next year.

#### 10.5 QUALIFIED TRADES PEOPLE

All work, maintenance and repairs must only be performed by qualified provincially certified trades people or trained and qualified personnel, and must be performed to a standard equivalent to the City's standard for its major public facilities and buildings.

#### 10.6 ACCOUNTING FOR MAINTENANCE FUNDS

KVPACS must account to the City at the times, and in the detail and in the form required by the City, for all KVPACS Maintenance Funds.

#### 10.7 FIRST LINE MAINTENANCE

KVPACS is responsible for First Line Maintenance in each event where it is necessary in respect of the components of the Facility set out in this section up to the amount for each event as specified. Expenditure for maintenance, repair and replacement beyond First Line Maintenance of the limits noted below is the responsibility of the City.

(a) Roof Repairs;

Roof repair including all leaks around drainpipes, skylights or any other roof features that penetrate the roof membrane, up to the amount set out in Schedule "E" for each event;

(b) Electrical;

Electrical maintenance and repairs including the replacement of all light bulbs, fixtures, fuses, circuit breakers, switches and related electrical control components including speciality lighting and sound electrical systems, up to the amount set out in Schedule "E" for each event;



(c) Plumbing;

Plumbing maintenance, repair and replacement, up to the amount set out in Schedule "E" for each event;

(d) Building Fabric;

Building fabric repair and replacement, including all doors, interior windows & glass, floor, fixtures, walls, ceilings and building infrastructure and all related hardware that control entry or exit from all areas, up to the amount set out in Schedule "E" for each event;

(e) Vandalism;

Internal vandalism shall be repaired by KVPACS up to the amount set out in Schedule "E" for each event. For clarification, the City shall repair external vandalism;

For clarity, the limits under Schedule "E" apply separately and (not cumulatively) on each occasion when First Line Maintenance and for each item with respect to which First Line Maintenance. In the event of any emergency that may require maintenance, repair or replacement at a cost that may exceed the limits stated, KVPACS shall immediately notify the City.

#### 10.8 REPLACE VS. REPAIR

Individual replacement shall be made in the event that repairs would cost more than the depreciated value of the component.

#### 10.9 SECURITY SYSTEMS

KVPACS is solely responsible for maintaining and repairing Facility security systems, which must be on an annual maintenance contract.

### ARTICLE 11

#### ALTERATIONS, IMPROVEMENTS

##### 11.1 CAPITAL EXPENDITURES

- (a) The City acknowledges a responsibility for long-term operational effectiveness of the building. The City will include appropriate funding in the City's capital planning consistent with other City of Kelowna public buildings over the life of this Lease and Operating Agreement. Future capital expansion, renovation and Facility development not identified in this Lease and Operating Agreement will be cooperatively & collaboratively discussed and be facilitated by the City and KVPACS. For clarity, this section does not obligate the City to actually expend funds for any purpose.

- (b) KVPACS shall not make any application for grant funding for capital expansion, renovation of the Facility from other levels of government without first receiving the express written approval from the City.

## 11.2 KVPACS' ALTERATIONS

- (a) KVPACS shall not:
  - (i) make or cause to be made any alterations, additions or improvements to the Facility;
  - (ii) erect or cause to be erected any partitions; or
  - (iii) install or cause to be installed any fixtures (including, for certainty, any fixtures within the theatre), exterior signs, floor covering, interior or exterior lighting, plumbing fixtures, shades, awnings, permanent exterior decorations or make any changes or otherwise in respect of the Facility without first obtaining the City's written approval.
- (b) KVPACS shall promptly pay all contractors, material suppliers and workmen so as to eliminate the possibility of a lien attaching to the Land.

## ARTICLE 12

### ENVIRONMENTAL TERMS

#### 12.1 COMPLIANCE WITH ENVIRONMENTAL LAWS

KVPACS's activities at the Facility, at KVPACS's own cost and expense, shall comply with all applicable municipal, regional, provincial and federal legislative enactments, by-laws, regulations or orders from time to time in force relating to the activities carried out on the Facility or any part thereof relating to Hazardous Substances and the protection of the environment, and KVPACS shall immediately give written notice to the City of the occurrence of any event at the Facility or any part thereof constituting an offence thereunder or which is in breach thereof, and KVPACS will not bring into the Facility, or any part hereof, or cause or permit the bringing into the Facility any Hazardous Substances.

#### 12.2 KVPACS's RESPONSIBILITIES

If at any time, despite the foregoing covenants of KVPACS;

- (a) there shall be any Hazardous Substances in the Facility or a part thereof as a result of KVPACS's use, occupation of or activities in the Facility; or

- (b) there is an occurrence of any event in the Facility or any part thereof arising from KVPACS's activities, operations, use or occupation of or in the Facility constituting an offence under or a breach of any applicable municipal, regional, provincial and federal legislative enactments, by-laws, regulations and orders from time to time in force relating to Hazardous Substances;

the KVPACS shall, at its own expense;

- (a) immediately give the City notice to that effect and thereafter give the City from time to time written notice of the extent and nature of the KVPACS's compliance with the following provisions of this section;
- (b) promptly remove the Hazardous Substances from the Facility and all parts thereof in a manner which conforms with all applicable municipal, regional, provincial and federal legislative enactments, by-laws, regulations and orders governing the movement of the same; and
- (c) if requested by the City, obtain at KVPACS's cost and expense from an independent consultant designated or approved by the City, verification of the complete and proper removal of the Hazardous Substances from the Facility or any part thereof or, if such is not the case, reporting as to the extent and nature of any failure to comply with the foregoing provisions of this section;
- (d) at KVPACS's own expense, remedy any damage to the Facility where damage arises from KVPACS's activities in use, occupation or operation of the Facility;
- (e) if any governmental authority having jurisdiction shall require the clean-up of any Hazardous Substances held, released, spilled, abandoned or placed in or on the Facility or any part thereof or released into the environment from the Facility or any part thereof during the Term by KVPACS and arising from KVPACS's use and occupation of, and operations and activities in the Facility, then KVPACS shall, at its own expense, prepare all necessary studies, plans and proposals and submit the same for approval, provide all bonds and other security required by governmental authorities having jurisdiction and carry out the work, and shall keep the City fully informed and provide to the City full information with respect to proposed plans, and shall comply with the City's requirements with respect to such plans. KVPACS agrees that if the City determines, in its sole discretion, that the City, its property or its reputation is placed in any jeopardy by the requirement for any such work, the City may itself undertake such work or any part thereof at the cost and expense of KVPACS;
- (f) provide authorizations to permit the City to make enquiries from time to time of any government or governmental agency with respect to KVPACS's compliance with any and all laws and regulations pertaining to KVPACS, KVPACS's activities on the Land or any part thereof including without limitation all applicable municipal, regional, provincial and federal legislative enactments, by-laws,

regulations and orders pertaining to Hazardous Substances and the protection of the environment; and KVPACS covenants and agrees that KVPACS will from time to time provide to the City such written authorization as the City may require in order to facilitate the obtaining of such information;

- (g) permit the City at any time and from time to time to inspect KVPACS's property and equipment used by KVPACS in the Facility or the Land and KVPACS's records relating thereto for the purpose of identifying the existence or absence of any Hazardous Substances and KVPACS shall assist the City in so doing; and
- (h) if KVPACS shall bring or create in the Facility or on the Land any Hazardous Substances or permit the bringing or creation in the Facility or on the Land of any Hazardous Substances or if KVPACS causes there to be any Hazardous Substances in the Facility or on the Land, then, notwithstanding any rule of law or equity to the contrary such Hazardous Substances shall be and remain the sole and exclusive property of the KVPACS, and shall not become the property of the City, and despite the degree of affixation of the Hazardous Substances or the goods containing the Hazardous substances on the Land and despite the expiry or earlier termination of this Lease and Operating Agreement.

### 12.3 ENVIRONMENTAL OBLIGATIONS SURVIVE

The above environmental protection obligations of KVPACS shall survive the end of the Term.

## ARTICLE 13

### SUBSTANTIAL DAMAGE AND DESTRUCTION, EXPROPRIATION

#### 13.1 NO ABATEMENT

If during the Term the Facility shall be damaged or destroyed by any cause whatsoever such that the Facility is rendered unfit for occupancy by KVPACS, the Rent hereby reserved shall not abate, but the City's payments (prorated on an annual basis) to KVPACS shall cease for the time that the Facility is closed to the public and the City may choose to use the insurance proceeds for whatever purpose it determines. The City is under no obligation to repair or rebuild the Facility. If the City chooses not to repair or rebuild the Facility, the City may notify KVPACS that this Lease and Operating Agreement is terminated and KVPACS shall vacate the Facility as if this Lease and Operating Agreement had expired or been terminated for cause.

#### 13.2 EXPROPRIATION

If an authority with expropriation power expropriates all or a material part of the Facility, the City may give reasonable notice to KVPACS, but in no case less than 30 days, and KVPACS shall have no claim for compensation against the City or the expropriating authority for any

interest in land except that where compensation is available for disturbance, KVPACS may make such claim to the expropriating authority

## **ARTICLE 14**

### **ASSIGNMENT, SUBLETTING, CITY INTERESTS**

#### **14.1 ASSIGNMENT AND SUBLETTING**

KVPACS shall not assign this Lease and Operating Agreement and KVPACS may not mortgage this Lease and Operating Agreement by assignment or sublease. KVPACS may sublet interior portions only of the Facility that are identified on the map in Schedule "D" in order to provide a wider variety of amenities and further the objectives of KVPACS. Where the City consents to a sublease, KVPACS will cause the subtenant to enter into a sublease in the form attached as Schedule "G" or such other form as may be required by the City and will ensure that the subtenant at all times has insurance outlined in Schedule "H" utilize the certificate of Insurance outlined in Schedule "I";

#### **14.2 CITY INTERESTS**

KVPACS acknowledges and agrees that the City may assign, sell, transfer, mortgage, subdivide and otherwise deal with its interest in the Land or the Facility or any portion thereof without the consent of KVPACS. Should the City decide to exercise its rights under this clause, the City will provide KVPACS 365 days notice of its intent.

## **ARTICLE 15**

### **KVPACS REPRESENTATIONS AND WARRANTIES**

#### **15.1 KVPACS REPRESENTS AND WARRANTS**

KVPACS represents and warrants to the City, as representations and warranties that are currently true and will be true during the Term;

- (a) that it is validly incorporated as a not-for-profit society under the laws of British Columbia;
- (b) that it will file all forms and documents which are required by law to be filed with the Registrar of Companies and diligently keep all corporate records required by law to be kept; and
- (c) that it is not and will not operate with a view to earning profit;
- (d) that all resolutions and other corporate prerequisites for this Lease and Operating Agreement have been duly passed and the persons executing this Lease and Operating Agreement on its behalf are authorized to do so.

## ARTICLE 16

### INSURANCE

#### 16.1 KVPACS TO PROVIDE INSURANCE

KVPACS shall procure and maintain, at its own expense and cost, the insurance policies listed in section 16.2 below, with limits no less than those shown in the respective items, unless in connection with the performance of some particular part of this Lease and Operating Agreement, the City advises in writing that it has determined that the exposure to liability justifies lower limits. The insurance policies shall be maintained continuously from commencement of this Lease and Operating Agreement until the date of termination of this Lease and Operating Agreement, or such longer period as may be specified by the City.

#### 16.2 INSURANCE

As a minimum, KVPACS shall, without limiting its obligations or liabilities under any other contract with the City, procure and maintain, at its own expense and cost, the following insurance policies;

- (a) Work Safe Insurance, covering all employees of KVPACS, engaged in the work or services in accordance with the statutory requirements of the Province of British Columbia having jurisdiction over such employees;
- (b) Comprehensive General Liability Insurance;
  - (i) providing for an inclusive limit of not less than \$5,000,000.00 (Five Million Dollars) for each occurrence or accident;
  - (ii) providing for all sums which KVPACS shall become legally obligated to pay for damages because of bodily injury (including death at any time resulting therefrom) sustained by any person or persons or because of damage to or destruction of property caused by an occurrence or accident arising out of or related to this Lease and Operating Agreement or any operations carried on in connection with this agreement;
  - (iii) including coverage for blanket contractual, personal injury, contingent employer's liability, broad form personal injury and property damage and non-owned automobile liability;
  - (iv) including a cross-liability clause providing that the inclusion of more than one insured shall not in any way affect the rights of any other insured hereunder, in respect to any claim, demand, suit, or judgment made against any other insured;



- (c) All Risks Insurance for loss of or damage to all KVPACS's equipment and chattels, owned, leased, held in trust, or for which KVPACS may otherwise be responsible and used or to be used in the performance of this agreement. This insurance shall be for an amount not less than the replacement cost value of such equipment and chattels. In the event of loss or damage, KVPACS shall, if so requested by the City, forthwith replace such lost or damaged equipment or chattels. This insurance shall also provide business interruption insurance to KVPACS for loss of revenue resulting from or due to loss or damage to equipment or the Facility. The period of indemnity shall not be less than twelve (12) months from the date of loss or damage. The City shall be named as a first loss payee with respect to any loss or damage to the permanent collection of art maintained by KVPACS on the policy required by 16.2 (c).

### 16.3 KVPACS CONTRACTORS

KVPACS shall require each of its contractors to provide comparable insurance to that required under section 16.2 (a) and 16.2(b) (i), 16.2(b)(ii), 16.2(b)(iii).

### 16.4 CITY NAMED AS ADDITIONAL INSURED

The policies required by section 16.2 (b) above shall provide that the City is named as an Additional Insured thereunder.

### 16.5 KVPACS INSURANCE IS PRIMARY

The policy required by section 16.2 (b) above shall provide that said policy is primary without any right of contribution from any insurance otherwise maintained by the City up to the above specified inclusive limit of not less than \$5,000,000.00 (Five Million Dollars) for each occurrence with respect to which KVPACS is held to be solely at fault.

### 16.6 CERTIFICATES OF INSURANCE

KVPACS agrees to submit Certificates of Insurance, in the form attached hereto as Schedule "A", and made a part hereof, for itself and for all of its contractors to the Risk Management Department of the City prior to the commencement of this Agreement. Such Certificates shall state that the insurer must provide that thirty (30) days' written notice to the Risk Management Department of the City, prior to any cancellation of any such policy or policies. KVPACS shall notify the City within thirty (30) days of receipt of any notification by the insurer of any material change of any such policy or policies.

### 16.7 OTHER INSURANCE

After reviewing KVPACS's Certificates of Insurance, the City may require other insurance or alterations to any applicable insurance policies in force during the period of this agreement and will give notification of such requirement. Where other insurances or alterations to any insurance policies in force are required by the City and result in increased insurance premium, such increased premium shall be at KVPACS's expense.

#### 16.8 ADDITIONAL INSURANCE

KVPACS may take out such additional insurance, as it may consider necessary and desirable to cover such items as art. All such additional insurance shall be at no expense to the City. KVPACS shall ensure that all of its contractors are informed of and comply with the City's requirements set out in this Lease and Operating Agreement.

#### 16.9 INSURANCE COMPANIES

All insurance which KVPACS is required to obtain with respect to this Lease and Operating Agreement, shall be with insurance companies registered in and licensed to underwrite such insurance within British Columbia.

#### 16.10 FAILURE TO PROVIDE

If KVPACS fails to do all or anything which is required of it with regard to insurance, the City may do all that is necessary to effect and maintain such insurance, and any monies expended by the City shall be repayable by and recovered from KVPACS. KVPACS expressly authorizes the City to deduct from any monies owing KVPACS, any monies owing by KVPACS to the City.

#### 16.11 NON-PAYMENT OF LOSSES

The failure or refusal to pay losses by any insurance company providing insurance on behalf of KVPACS or any contractor shall not be held to waive or release KVPACS or contractor from any of the provisions of the insurance requirements of this Agreement, with respect to the liability of KVPACS or otherwise. Any insurance deductible maintained by KVPACS or any contractor under any of the insurance policies is solely for their account and any such amount incurred by the City will be recovered from KVPACS as stated in section 16.8.

### ARTICLE 17

#### INDEMNITY BETWEEN THE PARTIES

##### 17.1 KVPACS'S INDEMNITY

KVPACS agrees to indemnify and save harmless the City and its elected and appointed officials, officers, and employees, in respect of all claims for bodily injury or death, property damage, or other loss or damage arising from the conduct of any work by or any act or omission of KVPACS or any directors, officers, volunteers, or employees, of KVPACS, but only to the extent of the portion of fault or liability of KVPACS and those persons for which it is vicariously liable to the extent that they or any of them are found liable and in respect of all costs, expenses, and liabilities incurred by the City in connection with or arising out of all such claims, including the expenses of any action or proceeding pertaining thereto, but only to the extent that may be ordered in the event that KVPACS or any of those persons for whom it is vicariously liable are found to be liable only for a portion of the same. KVPACS shall further

indemnify and save harmless the City in respect of any loss, cost, expense or damage suffered or incurred by the City arising from any breach by KVPACS or any of its covenants and obligations under this lease and operating agreement, but only to the extent of the portion of fault or liability found on the part of KVPACS or the persons for whom it is vicariously liable. This indemnity shall survive any expiry or early termination of this Lease and Operating Agreement.

Similarly, the City agrees to indemnify and save harmless KVPACS and its directors, officers, volunteers and employees in respect of all claims for bodily injury or death, property damage, or other loss or damage arising from the conduct of any work by or any or act or omission of the City its elected and appointed officials, officers, employees and contractors, but only to the extent of that portion of fault or liability of the City and those persons for whom it is vicariously liable to the extent that they or any of them are found liable, and in respect of all costs and expenses incurred by KVPACS in connection with or arising out of all such claims, including the expense of any action or proceeding pertaining thereto, but only to the extent that may be ordered, in the event that the City or those persons for whom it is vicariously liable are found to be liable for only a portion of the same. The City shall further indemnify and save harmless KVPACS in respect of any loss, cost, expense or damage suffered or incurred by KVPACS arising from any breach by the City of any of its covenants and obligations under this lease and operating agreement, but only to the extent of the portion of the fault or liability found on the part of the City or the persons for whom it is vicariously liable. This indemnity shall survive any expiry or early termination of this Lease and Operating Agreement.

## 17.2 LIENS

KVPACS shall, immediately upon demand by the City, remove or cause to be removed, and thereafter institute and diligently prosecute any action pertinent thereto, any builder's or other lien or claim of lien noted or filed against or otherwise constituting an encumbrance on any title of the City provided that any such lien encumbrance arises out of the action of KVPACS. Without limiting the foregoing obligations of KVPACS, the City may cause the same to be removed, in which case KVPACS shall pay to the City as Additional Rent the cost thereof, including the City's complete legal costs.

## ARTICLE 18

### DEFAULT, REMEDIES, TERMINATION

## 18.1 DEFAULT

If and whenever:

- (a) KVPACS shall be in default in the payment of any money, whether hereby expressly reserved or deemed as Rent, or any part thereof, and such default shall continue for thirty (30) days following any specific due date on which KVPACS is

to make such payment or, in the absence of such specific due date, for thirty (30) days following written notice by the City requiring KVPACS to pay the same; or

- (b) KVPACS's leasehold interest hereunder, or any goods, chattels or equipment of KVPACS located in the Facility, shall be taken or seized in execution or attachment, or if any writ of execution shall issue against KVPACS, or KVPACS shall become insolvent or commit an act of bankruptcy or become bankrupt or take benefit of any Act that may be in force for bankrupt or insolvent debtors or become involved in voluntary or involuntary winding up, dissolution or liquidation proceedings, or if a receiver shall be appointed for the affairs, business, property or revenues of KVPACS; or
- (c) KVPACS shall not observe, perform and keep each and every of the covenants, agreement, stipulations, obligations, conditions and other provisions of this Lease and Operating Agreement to be observed, performed and kept by KVPACS and shall persist in such default, in the case of monetary payments, beyond the thirty (30) day period stipulated in paragraph (a) aforesaid or, in the case of any other default, after forty five(45) days following written notice from the City requiring that KVPACS remedy, correct or comply or, in the case of any such default which would reasonably require in the City's opinion more than forty five (45) days to rectify, unless KVPACS shall commence rectification within the said forty five (45) day notice period and thereafter promptly and diligently complete the rectification of any such default by time specified by the City;

then, and in each of such cases, and at the option of the City, this Lease and Operating Agreement may be terminated and the Term shall then immediately become forfeited and void, and the City may without notice or any form of legal process whatever forthwith re-enter the Facility or any part thereof and in the name of the whole repossess and enjoy the same as of its former estate, anything contained herein or in any statute or law to the contrary notwithstanding.

## 18.2 CITY MAY PERFORM

If KVPACS shall fail to observe, perform or keep any of the provisions of this Lease and Operating Agreement to be observed, performed and kept by KVPACS, the City may, but shall not be obliged to, at its discretion and without prejudice, rectify the default of KVPACS, whether or not performance by the City on behalf of KVPACS is otherwise expressly referred to in the applicable section of this Lease and Operating Agreement. For such purpose the City may make any payment and/or do or cause to be done such things as it considers may be required including, without limiting the generality of the foregoing, entry into the Facility. Any such performance by or at the behest of the City shall be at the expense of KVPACS and KVPACS shall pay to the City as Additional Rent the cost thereof.

## 18.3 REMOVAL OF EQUIPMENT

- (a) So long as KVPACS is not in default hereunder at the expiration of the Term, KVPACS shall then have the right to remove only its own equipment as described in

Schedule "K" as updated from time to time from the Facility but shall make good any damage caused to the Facility resulting from the installation or removal thereof.

- (b) If KVPACS fails to promptly remove its equipment and supplies and restore the Facility as aforesaid, all such shall become the property of the City.
- (c) Should KVPACS abandon the Facility or should this Lease and Operating Agreement be terminated before the proper expiration of the Term, in such event, as of the moment of termination, all funds and assets of KVPACS shall be disposed of as per KVPACS Constitution and Bylaws provided that such funds and assets are distributed within the borders of the City of Kelowna.

#### 18.4 COSTS AND INTEREST

All monies owing by KVPACS to the City shall forthwith on demand be paid by KVPACS as Additional Rent together with interest, at the rate of twelve percent (12%) per annum calculated monthly from the date of demand until the same are fully paid and satisfied.

#### 18.5 VACATE UPON TERMINATION, SURVIVAL

At the termination of this Lease and Operating Agreement, whether by effluxion of time or otherwise, KVPACS shall vacate and deliver up possession of the Facility in good repair and in a clean, safe and uncontaminated condition safely stored within the Facility, subject only to KVPACS's rights and obligations in respect of removal in accordance with Section 18.3, and KVPACS shall surrender all keys to the Facility to the City.

#### 18.6 ADDITIONAL RIGHTS ON RE-ENTRY

If the City shall re-enter the Facility or terminate this Lease and Operating Agreement, then;

- (a) notwithstanding any such termination or the Term thereby becoming forfeited and void, the provisions of this Lease and Operating Agreement relating to the consequences of termination shall survive;
- (b) the City re-enter and retake possession of the Facility and the equipment owned by the City and KVPACS hereby releases the City from all actions, proceedings, claims and demands whatsoever for or in respect of any such entry or any loss or damage in connection therewith or consequential thereupon;
- (c) the City may re-let the Facility or any part thereof for a term or terms which may be less or greater than the balance of the Term and may grant reasonable concessions in connection therewith.

#### 18.7 NO WAIVER

No provisions of this Lease and Operating Agreement shall be deemed to have been waived by the City unless a written waiver from the City has first been obtained and, without limiting the



generality of the foregoing, no acceptance of Rent subsequent to any default and no condoning, excusing or overlooking by the City on previous occasions of any default nor any earlier written waiver shall be taken to operate as a waiver by the City or in any way to defeat or affect the rights and remedies of the City.

#### 18.8 REMEDIES CUMULATIVE

No reference to or exercise of any specific right or remedy by the City shall prejudice or preclude the City from any other remedy, whether allowed at law or in equity or expressly provided for herein. No such remedy shall be exclusive or dependent upon any other such remedy, but the City may from time to time exercise any one or more of such remedies independently or in combination. Without limiting the generality of the foregoing, the City shall be entitled to commence and maintain an action against KVPACS to collect any Rent not paid when due, without exercising the option to terminate this Lease and Operating Agreement.

#### 18.9 DELIVERY OF INFORMATION

At the expiry or earlier termination of this Lease and Operating Agreement, KVPACS will deliver to the City a detailed list and all computer software (with assignment of all rights) for management and recording of and all original paper and electronic information about Facility and its operations and maintenance.

### ARTICLE 19

#### GENERAL PROVISIONS

#### 19.1 APPROVALS

No provision in this Lease and Operating Agreement requiring the City's consent or approval shall be deemed to have been fulfilled or waived unless the written consent or approval of the City relating to the particular matter or instance has first been obtained and, without limiting the generality of the foregoing, no prior consent or approval and no condoning, excusing or overlooking by the City on previous occasions when such a consent or approval was required shall be taken to operate as a waiver of the necessity of such consent or approval whenever required under this Lease and Operating Agreement.

#### 19.2 LEGAL ADVICE

The parties covenant and agree that each party has been represented by counsel through the negotiation and preparation of this Lease and Operating Agreement and has received independent legal advice with respect to this Lease and Operating Agreement.

#### 19.3 FREEDOM OF INFORMATION

The parties acknowledge, agree and consent to the disclosure of this Lease and Operating Agreement as a matter of public record and further acknowledge and agree that applicable laws

may require disclosure of information provided by one party to the other party pursuant to or in connection with this Lease and Operating Agreement.

#### 19.4 CITY'S POWERS UNIMPAIRED

Nothing contained or implied herein shall derogate from the obligations of KVPACS under this Lease and Operating Agreement or under any other agreement with the City, or, prejudice or affect the City's rights, powers, duties or obligations in the exercise of its functions pursuant to the *Local Government Act, Community Charter* or under all other public and private statutes, by-laws, orders and regulations.

#### 19.5 FIXTURES

KVPACS agrees that any alterations, additions, improvements and fixtures made to or installed upon or in the Facility, whether before or after the commencement date of this Lease and Operating Agreement, will immediately upon affixation become the property of the City and remain with the Facility as part of it upon the expiration or earlier termination of this Agreement.

#### 19.6 RELATIONSHIP

Nothing contained in this Lease and Operating Agreement shall create any relationship between the City and KVPACS other than that of landlord and tenant, and it is agreed that KVPACS shall not in any way become a partner, joint venturer or a member of a joint enterprise with the City. Nothing precludes the City from participating with KVPACS in common marketing initiatives for the City's 'cultural district', programs or festivals.

#### 19.7 SOLE AGREEMENT

This Lease and Operating Agreement sets forth all of the warranties, representations, covenants, promises, agreements, conditions and understandings between the parties concerning the Facility and there are no warranties, representations, covenants, promises, agreements, conditions or understandings, either oral or written, express or implied, between them other than as set forth in this Lease and Operating Agreement.

#### 19.8 MODIFICATIONS

No alteration, amendment, change or addition to this Lease and Operating Agreement shall be binding upon the parties unless reduced to writing and signed by the parties.

#### 19.9 OVERHOLDING

This Lease and Operating Agreement will terminate at the end of the Term without notice or demand. If KVPACS stays in the Facility after the end of the Term without objection by the City and without a further written agreement with the City, such holding over will not constitute a renewal of this Lease and Operating Agreement. In such case, the City, at its option, may elect to treat KVPACS as one who has not vacated at the end of the Term and to exercise all its remedies in



that situation, or may elect to construe such holding over as a tenancy from month to month subject to all the terms of this Lease and Operating Agreement, except:

- (a) for the term;
- (b) for basic rent which will be \$1,000.00 per month, payable in advance on the first day of each month; and
- (c) that there will be no inducements or allowances, renewal rights, rent abatements, rights of refusal, rights to additional space or other like concessions or rights.

This provision shall not authorize KVPACS to overhold.

#### 19.10 EXHIBITING FACILITY

The City, during normal business hours, may exhibit the Facility to prospective tenants during the last 6 months of the Term and, at all reasonable times, to the City's prospective purchasers and lenders, but, in doing, will disturb KVPACS as little as possible.

#### 19.11 ATTORNMENT

If any person shall through the City succeed to the rights of the City under this Lease and Operating Agreement or to ownership of the Facility then, upon the request of the party succeeding to the City's rights hereunder, KVPACS shall attorn to and recognize the new owner(s) as the landlord of KVPACS under this Lease and Operating Agreement, and shall promptly execute and deliver any instrument that such party may reasonably request to evidence the attornment. In the event of any other transfer of the interest of the City hereunder, upon the written request of the transferee and the City, KVPACS shall attorn to and recognize the transferee as the landlord of KVPACS under this Lease and Operating Agreement and shall promptly execute and deliver any instrument that the transferee and City may reasonably request to evidence the attornment provided that the transferee agrees with KVPACS to become the landlord hereunder and to assume the obligations of the City hereunder that are to be performed by the transferee after the transfer.

#### 19.12 CERTIFICATES

The City and KVPACS agree that at any time and from time to time upon not less than thirty (30) days prior request by the other party, each will execute, acknowledge and deliver to the other a statement in writing certifying;

- (a) that this Lease and Operating Agreement is unmodified and in full force and effect or if there have been modifications that the same are in full force and effect as modified and identifying the modifications;
- (b) the dates to which the Rent and other charges have been paid and the request shall specify the charges in respect of which such information is required;

- (c) that, so far as the maker of the statement knows, without having conducted any searches or made any particular enquiries, the party who requests the statement is not in default under any provisions of this Lease and Operating Agreement; or, if in default, the particulars thereof; and

any other reasonable information which is requested.

#### 19.13 NON-REGISTRABLE FORM

KVPACS agrees that the City is not required to provide this Lease and Operating Agreement to KVPACS in a form registrable in the Land Title Office.

#### 19.14 APPLICABLE LAW

This Lease and Operating Agreement shall be governed and construed by the laws of the Province of British Columbia.

#### 19.15 COVENANTS AND SEVERABILITY

All of the provisions of this Lease and Operating Agreement are to be construed as covenants and agreements. Should any provision of this Lease and Operating Agreement be or become illegal, invalid or not enforceable, it shall be considered separate and severable from this Lease and Operating Agreement and the remaining provisions shall remain in force and be binding upon the parties and be enforceable to the fullest extent of the law.

#### 19.16 FURTHER ASSURANCES

The parties hereto shall execute and do all such further deeds, acts, things and assurances that may be reasonably required to carry out the intent of this Agreement.

#### 19.17 TIME

Time shall be of the essence hereof.

#### 19.18 NOTICE

- (a) Any notice to be given hereunder shall be in writing and may be either delivered by hand or sent by facsimile transmission or by prepaid registered or express mail and, if so mailed, shall be deemed to have been given five (5) days following the date upon which it was mailed and if delivered by mail or sent by facsimile transmission, shall be deemed to have been given on the day of delivery or transmission. The addresses of the parties for the purpose hereof shall be, in the case of the City, the address of the City set out above, and in the case of KVPACS, the address set out above or at the address of the Facility.

- (b) Either party may at any time give notice in writing to the other of any change of address, which shall be deemed to be the new address of such party for the giving of notices.

#### 19.19 HEADINGS

The headings in this Lease and Operating Agreement are inserted for convenience or reference only and shall not affect the construction of this Lease and Operating Agreement or any provision hereof.

#### 19.20 NUMBER AND GENDER

Whenever the singular or masculine or neuter is used in this Lease and Operating Agreement, the same shall be construed to mean the plural or feminine or body corporate where the context to this Lease and Operating Agreement or the parties hereto may so require.

#### 19.21 SUCCESSORS BOUND

All rights and liabilities herein given to, or imposed upon, the respective parties hereto shall extend to and bind their respective successors and assigns (if permitted).

#### 19.22 SCHEDULES

The following schedules are attached to and form part of this Lease and Operating Agreement:

- (a) Schedule "A" – Certificate of Insurance;
- (b) Schedule "B" – Kelowna Visual and Performing Arts Centre Society Constitution and Bylaws.
- (c) Schedule "C" – Plan of Facility Lands and Licensed Area;
- (d) Schedule "D" – Floor Plan of the Facility;
- (e) Schedule "E" - Financial Limits on First Line Maintenance ;
- (f) Schedule "F" Facility Sublease Agreement
- (g) Schedule "G" Facility Sublease Authority Spaces and Uses
- (h) Schedule "H" Sublease Insurance Requirements
- (i) Schedule "I" Sublease Certificate of Insurance
- (j) Schedule "J" Schedule Timelines

(k) Schedule "K" Equipment

As evidence of their agreement to the above terms, the City and KVPACS each have executed and delivered this Lease and Operating Agreement under seal on the dates written below.

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

CITY OF KELOWNA by its authorized  
signatories: )

\_\_\_\_\_  
Mayor )

\_\_\_\_\_  
City Clerk: )

Witness

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Address

KELOWNA Visual and Performing Arts  
Centre Society by its authorized  
signatories: )

\_\_\_\_\_  
Name: )

\_\_\_\_\_  
Name: )

Witness

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Address



## Schedule A

**CERTIFICATE OF INSURANCE****This Certificate is issued to:**

The City of Kelowna  
1435 Water Street  
Kelowna, BC V1Y 1 J4

**Insured**

Name: Kelowna Visual and Performing Arts Centre Society

Address: 421 Cawston Avenue, Kelowna BC

**Broker**

Name:

Address:

**Location and nature of operation or contract to which this Certificate applies:**

The management and operations of the Rotary Centre for the Arts.

Type of Insurance	Company & Policy Number	Policy Dates		Limits of Liability/Amounts
		Effective	Expiry	
<b>Section 1</b> Comprehensive General Liability including: <ul style="list-style-type: none"><li>• Products/Completed Operations;</li><li>• Blanket Contractual;</li><li>• Contractor's Protective;</li><li>• Personal Injury;</li><li>• Contingent Employer's Liability;</li><li>• Broad Form Property Damage;</li><li>• Non-Owned Automobile;</li><li>• Cross Liability Clause.</li></ul>				Bodily Injury and Property Damage  \$ <u>5,000,000</u> Inclusive \$ _____ Aggregate \$ _____ Deductible
<b>Section 2</b> All Risks Property Insurance (including Replacement Cost Value & Business Interruption)				\$ _____ Limit

It is understood and agreed that the policy/policies noted above shall contain amendments to reflect the following:

1. Any Deductible or Reimbursement Clause contained in the policy shall not apply to the City of Kelowna and shall be the sole responsibility of the Insured named above.
2. The City of Kelowna is named as an Additional Insured.
3. 30 days prior written notice of material change and/or cancellation will be given to the City of Kelowna.
4. All Risks Property Insurance shall be endorsed waiving all rights of subrogation against the City of Kelowna.

\_\_\_\_\_  
Print Name\_\_\_\_\_  
Authorized Signatory\_\_\_\_\_  
Date

## SCHEDULE "B"

Special Resolution: July 19, 2007

**RESOLVED** that the Bylaws of the Society be repealed and replaced with the following:

THE SOCIETY Number S-32185

### CONSTITUTION

1. The name of the Society is **KELOWNA VISUAL AND PERFORMING ARTS CENTRE SOCIETY**, (hereinafter called the "Society").
2. The purposes of the Society are:
  - (a) To nurture and foster an appreciation for the arts by operating the Rotary Centre for the Arts as a multi purpose arts facility;
  - (b) To provide community visual and performing arts programming and facility rental at reasonable rates;
  - (c) To provide arts educational programmes and opportunities to the community;
  - (d) To raise funds necessary for these objects by donation or otherwise;
  - (e) To cooperate with municipal and educational bodies and the local business community in the development of the arts; and
  - (f) To do all such things as are necessary and conducive to the attainment of the above objects, or any of them.
3. The activities and purposes of the Society shall be carried on without purpose of gain for its members and any income, profits or other accretions to the Society shall be used in promoting the purposes of the Society.
4. In the event of the winding-up or dissolution of the Society, all the funds and assets of the Society remaining after the payments or satisfaction of all costs, charges, expenses, debts and liabilities of the Society, including the remuneration (if any) of a liquidator and wages, and after the payment of any debts of the Society, shall be given, transferred and distributed to such organizations that are charities pursuant to the provisions of the **Income Tax Act** that shall be designated by the members of the Society at the time of the winding-up or dissolution of the Society and if effect cannot be given to the aforesaid provisions, such funds shall be given, transferred and distributed to such organizations that are determined by the members of the Society to be registered charities pursuant to the provisions of the **Income Tax Act** which have purposes similar to those of the Society.
5. Paragraphs 3 and 4 of the Constitution are unalterable in accordance with section 22 of the **Society Act**.

### BY – LAWS

**The by-laws of the Society are set out in Schedule B to the Society Act with the following variations, deletions and additions:**

1. By-law 2 is varied by deleting the words "and a corporation."
2. Bylaw 4 is varied by deleting the words in Schedule B and substituting therefore the following:
  - (a) Any person interested in the objects of the Society may become a member upon his complying with and subject to the provisions of the by-laws of the Society and upon payment of the appropriate membership fees.
  - (b) Individual, corporations and non-profit societies may be admitted as voting members. Each voting member shall have one (1) vote on each question arising at all general and extraordinary meetings of the members of the society. Honorary members shall not have a vote.
  - (c) The number of honorary non-voting members shall not exceed the number of voting members in the Society.



## SCHEDULE "B"

- (d) Save as here and otherwise specifically provided, the formalities of application for membership, the amounts of fees for respective classes of members, the time for payment of fees, and the privileges from time to time incidental to membership of various classes shall, from time to time, be determined by the directors."
3. Bylaw 23 is deleted.
4. Bylaw 25 (2) is varied by deleting the words used in Schedule B and substituting therefore the following: "The number of directors elected shall be a minimum of 5 and a maximum of 10. The Board will be empowered to appoint up to four additional directors who will hold office until the conclusion of the next Annual General Meeting."
5. Bylaw 26 is varied by deleting the words used in Schedule B and substituting therefore the following:
- (1) In this by-law "year" means the time between an annual general meeting and the immediately following annual general meeting, but shall not exceed 15 months.
  - (2) At each Annual General Meeting a Board will be elected. The Board is then empowered to appoint officers at the first Board meeting following the Annual General Meeting.
  - (3) At annual general meetings all elected directors shall be elected for two year terms.
  - (4) An election may be by acclamation; otherwise it shall be by ballot.
  - (5) If no successor is elected, the person previously elected or appointed continues to hold office.
  - (6) No officer or director may hold office for more than six consecutive years."
6. Bylaw 27 is varied by adding the following: "(3) In addition to the power to fill the vacancies, the directors may at any time appoint up to an additional four members as directors who will hold office until the conclusion of the next annual general meeting of the Society.
7. Bylaw 28 is varied by:  
Renumbering by-law 28(2) to 28(3), and by adding the following: "(2) If a director resigns or otherwise ceases to hold office during the first year of a two year term,  
(a) the remaining directors shall appoint a member to take the place of the former director until the next annual general meeting, and  
(b) at the next annual general meeting, a director shall be elected for a one year term to fill the vacancy."
8. Bylaw 58 be amended to read "A notice may be given to a member, either personally or by mail, or by facsimile or e-mail if the member has previously given their consent to receive notice by facsimile or e-mail, to the member at the member's registered address, facsimile number or e-mail address provided to the Society for that purpose."

DATED at the City of Kelowna, in the Province of British Columbia, this 19 day of July, 2007

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Signature

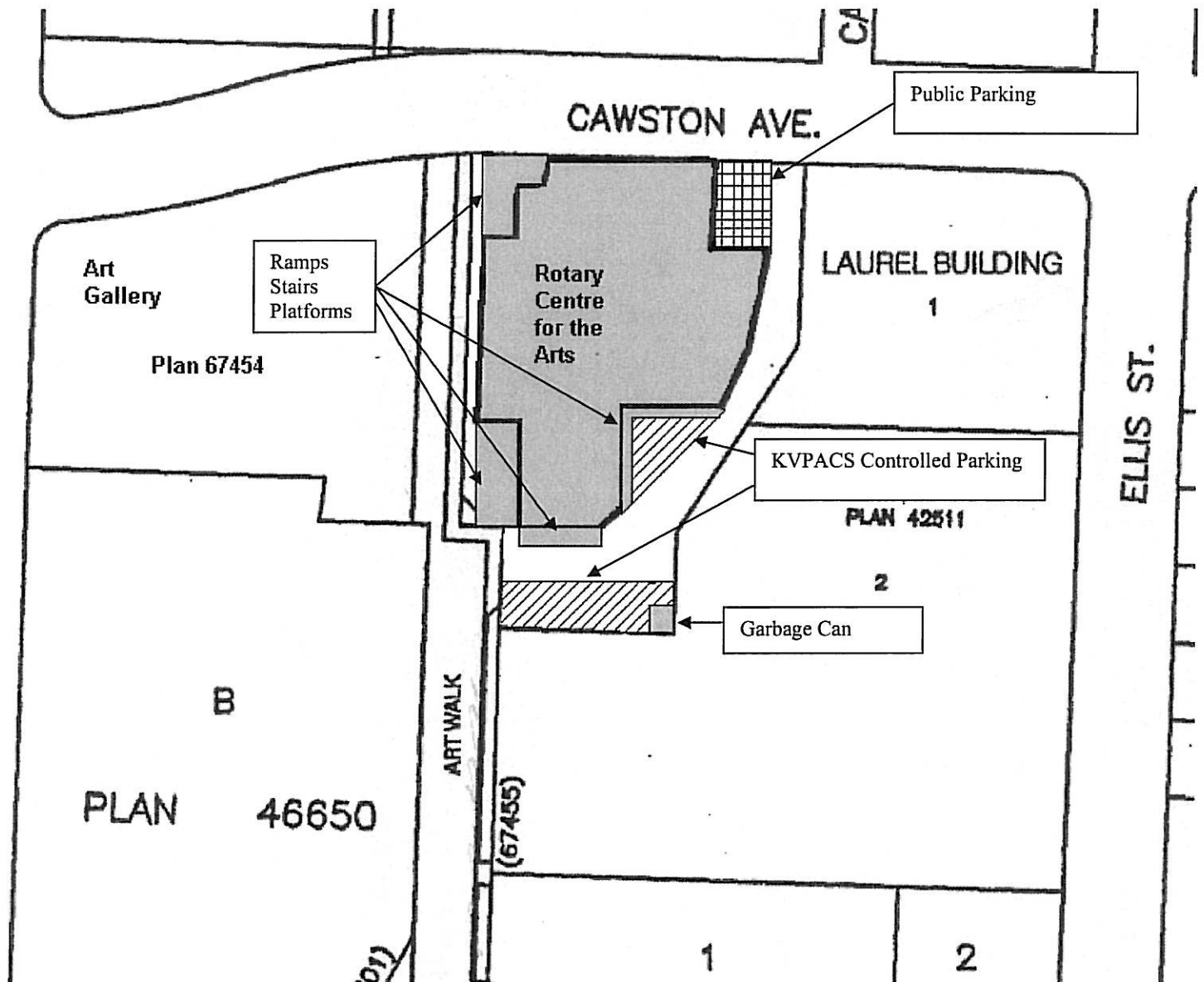
\_\_\_\_\_  
Address

\_\_\_\_\_  
Address

\_\_\_\_\_  
Phone number

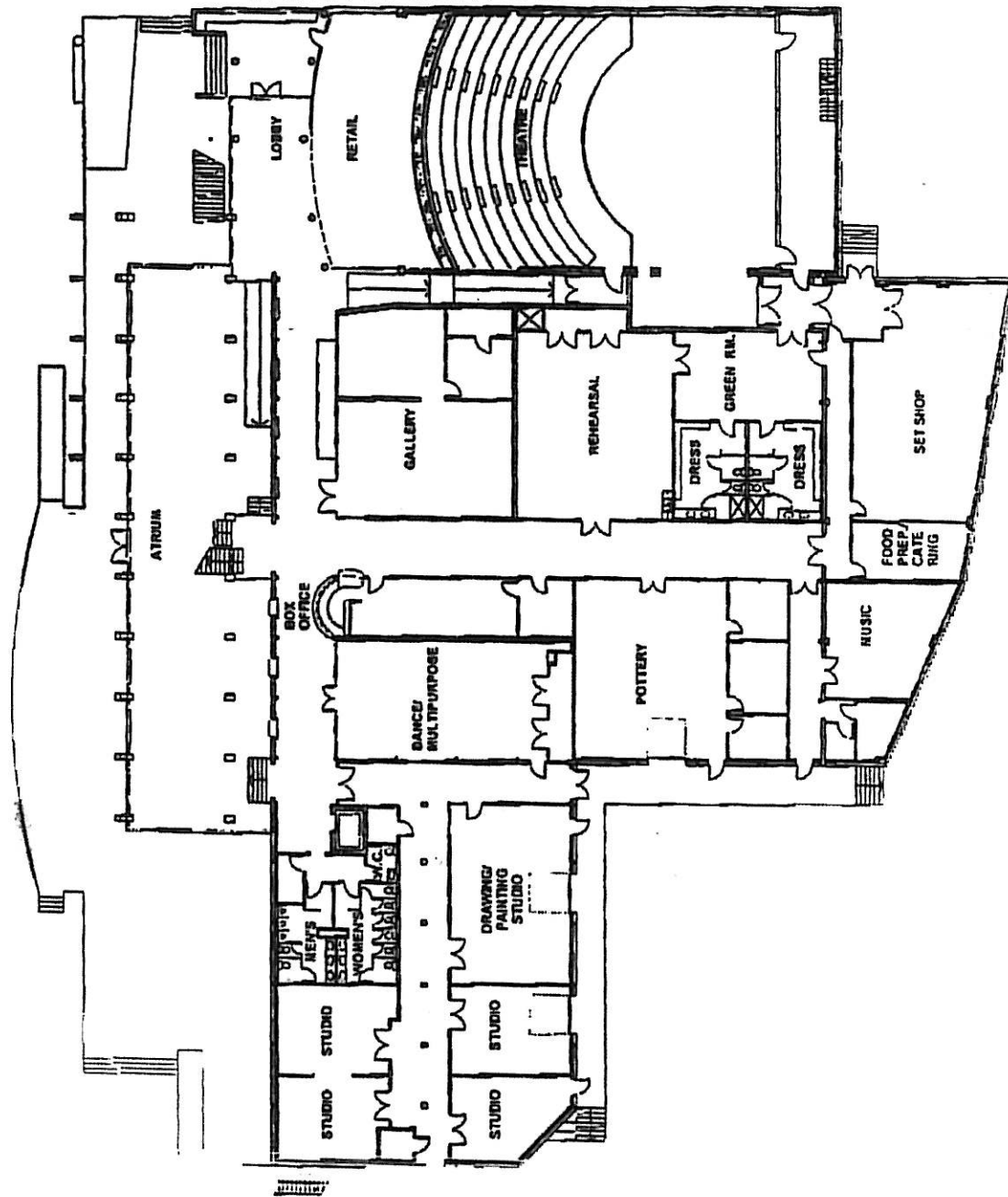
\_\_\_\_\_  
Phone Number

**SCHEDULE "C"**  
**PLAN OF FACILITY AND LANDS AND LICENSED AREAS**

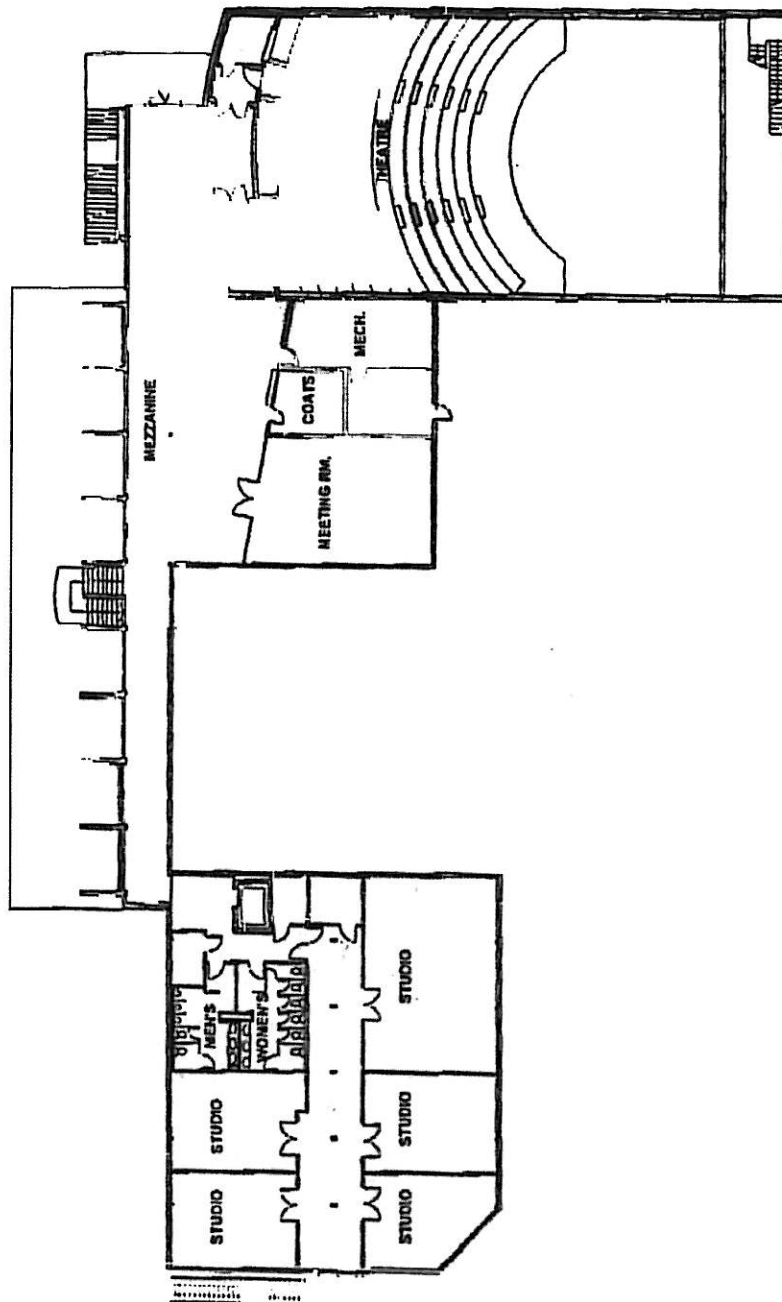


N. T. S.		
MAILING ADDRESS	421 CAWSTON AVENUE	
LEGAL DESCRIPTION	LOT #1	PLAN 67454
	SECTION 25	TWP 24

SCHEDULE "D"  
FACILITY FLOOR PLAN - FIRST FLOOR



**SECRET**



## SCHEDULE "E"

### FINANCIAL LIMITS OF THE FIRST LINE MAINTENANCE

2008	\$1,000
2009	\$1,020
2010	\$1,040
2011	\$1,061
2012	\$1,082

The intent is that the amount KVPACS is responsible for paying for First-Line Maintenance keeps pace with inflation. At the end of 5 years, the figures need to be adjusted for actual inflationary pressures. The inflation index to be used is the B.C. All Items Index.

Note that the increases calculated above are at 2% compounded annually.

**SCHEDULE F**

**ROTARY CENTRE FOR THE ARTS  
KELOWNA**

**Facility Sublease Agreement**

THIS SUBLEASE effective this 1st day of \_\_\_\_\_, 20\_\_, but actually executed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

Made pursuant to the *Land Transfer Form Act*, Part 2

BETWEEN:

THE KELOWNA VISUAL AND PERFORMING ARTS  
CENTRE SOCIETY (Inc. No. S32185), a Society duly  
incorporated under the *Societies Act* of the Province of British  
Columbia, having an office at Kelowna, B.C.

(hereinafter called the "Sub-Lessor")

OF THE FIRST PART

AND:

(hereinafter called the "Sub-Lessee")

OF THE SECOND PART

1. WITNESSETH that the Sub-Lessor does hereby demise unto the Sub-Lessee all and singular those certain premises (the "Premises") (as shown outlined in red on the plan attached hereto as Schedule "A-2-i") comprising approximately \_\_\_\_\_ square feet on the \_\_\_\_\_ floor of the Rotary Centre for the Arts (the "Facility") in the City of Kelowna in the Province of British Columbia which the Sub-Lessor holds as tenant from the City of Kelowna as head landlord.
2. Together with the use, in common with the Sub-Lessor, its employees, contractors, agents, invitees and licensees, of the Facility's entrances, lobbies, stairs, elevators, and common halls open to public use leading to the Premises.
3. To hold unto the Sub-Lessee from \_\_\_\_\_, 20\_\_ for the term of \_\_\_\_\_ years thence ensuing (the "Term"), determinable as hereinafter provided.

4. Yielding and paying therefore in Canadian dollars to the Sub-Lessor, its successors and assigns annual rent during the term hereby granted of \$\_\_\_\_\_.
5. The Sub-Lessee shall pay the annual rent in 12 equal monthly instalments on the first day of each month during each year of the Term hereof.
6. Provided, however, that if at the expiration of the Term the Sub-Lessee be allowed to continue in possession of the Premises upon payment of rent, such possession shall not be construed as a continuance of this Sublease, but shall be deemed a monthly tenancy which may be terminated at any time by the Sub-Lessor, or Sub-Lessee, giving one month's notice in writing to the other party, as the case may be.
7. The Sub-Lessee covenants with the Sub-Lessor as follows:
  - (a) to pay rent in the manner hereinbefore provided and to repair.
  - (b) to carry on in and use the Premises only for \_\_\_\_\_, and such other uses as the Sub-Lessor may hereafter in writing permit; PROVIDED ALWAYS that such use shall be carried on in a proper and lawful manner and the Sub-Lessee will observe all reasonable directions of the Sub-Lessor with regard to the manner in which the use shall be conducted;
  - (c) to enter the Premises only during the hours in which the Sub-Lessor shall keep the Facility open to the public unless the Sub-Lessor has consented in writing to allow the Sub-Lessee further rights of access to the Facility which further rights, if granted, shall unless expressly otherwise provided be revocable at the discretion of the Sub-Lessor;
  - (d) to allow the Sub-Lessor's duly authorized agents to have unqualified right of access to the Premises at all times;
  - (e) to supply all furniture, equipment and supplies for the purpose of the use permitted on the Premises;
  - (f) to pay monthly telephone fees and charges and all other utility, service and supply fees and charges charged directly to the Sub-Lessee arising from contract between the Sub-Lessee and the utility or service provider or supplier.
  - (g) to conduct the permitted use in a reputable and first class manner and to leave the Premises in good repair;
  - (h) to submit to the Sub-Lessor all disputes between the Sub-Lessee and any member of the public with respect to the permitted use and to abide by any decision of the Sub-Lessor in respect thereto. It is understood and agreed that all such disputes must be referred to the Sub-Lessee first;



- (i) to pay all wages, advertising, and other services not herein provided for as the same may be used or be incidental to the operation of the permitted use in the Premises;
- (j) to remove only the Sub-Lessee's furniture and unaffixed equipment supplied by the Sub-Lessee PROVIDED that any damage caused by such removal shall be repaired at the expense of the Sub-Lessee;
- (k) to advertise only in a manner which shall be approved by the Sub-Lessor from time to time. Sub-Lessor shall have the right to require any information as to the services, programs or activities sought to be advertised, and Sub-Lessor shall have the further right to reject any advertising deemed by it to be misleading, objectionable or which is not compatible with Sub-Lessor's marketing and image strategy for the Facility;
- (l) if permitted by the Sub-Lessor to install and maintain trade fixtures, to only install first class trade fixtures, and if permitted by the Sub-Lessor to redecorate, refurbish and make alterations necessary from time to time to maintain the demised Premises at a standard generally recognized to be current for arts centres in British Columbia;
- (m) to refrain from installing trade fixtures or making any alteration, redecorating or refurbishing or rearrangement or alteration of the Premises without the prior consent in writing of the Sub-Lessor;
- (n) to permit the Sub-Lessor and its agents together where necessary with workmen and appliances at all reasonable time to enter the Premises for the purpose of making repairs to the Facility as the Sub-Lessor may deem necessary;
- (o) to compensate the Sub-Lessor adequately for any damage to the Facility, the Premises and equipment (other than equipment owned by the Sub-Lessee) occasioned by the negligent or by wilful acts of the Sub-Lessee, its agents, employees and invitees;
- (p) to carry on the permitted use in such a manner as to most effectively serve the public, and the interests of the visual and performing arts in the City of Kelowna;
- (q) to procure and maintain, at its own expense and cost, the insurance policies listed in Schedule "A-2-ii" attached hereto and made a part of this Sublease. The insurance policies shall be maintained continuously from the date of commencement of this Sublease and until the termination date of this Sublease;
- (r) that upon the termination of this Sublease, the Sub-Lessee's fixtures shall become the sole and absolute property of the Sub-Lessor free from any claim or interest of the Sub-Lessee, and the Sub-Lessor shall have an unqualified option to purchase

all of the Sub-Lessee's unaffixed furniture, equipment and supplies provided that the price is arrived at by a qualified appraiser or appraisers mutually agreed upon by the parties hereto or failing agreement the matter to be submitted to arbitration pursuant to the provisions of the *Commercial Arbitration Act of British Columbia*;

- (s) the Sub-Lessee covenants with the Sub-Lessor that if at any time prior to the date herein fixed for the commencement of the Term of this Sublease or if at the date of the commencement of this Sublease or if at any time during the Term there shall be filed by or against the Sub-Lessee in any court a petition in bankruptcy or insolvency or for reorganization or for the appointment of a receiver or trustee of all or a portion of Sub-Lessee's property or if Sub-Lessee makes an assignment for the benefit of creditors or petitions for or enters into an arrangement, this Sublease, at the option of the Sub-Lessor, may be cancelled and terminated and in which event neither Sub-Lessee, nor any person claiming through or under the Sub-Lessee by virtue of any statute or of any order of any court shall be entitled to possession or to remain in possession of the Premises but shall forthwith quit and surrender the Premises, and the Sub-Lessor may re-enter the Premises and take possession of the whole of it, and , in addition to the other rights and remedies the Sub-Lessor has by virtue of any other provision herein or elsewhere in this Sublease contained or by virtue of any statute or rule by law, may retain as liquidated damages any rent, security, deposit or moneys received by it from the Sub-Lessee, or others on behalf of the Sub-Lessee;
- (t) the Sub-Lessee covenants to pay any business tax, rate, fees or assignments or charge of any kind levied on imposed by any Government taxing authority and to abide by and conform to all Governmental laws, by-laws and regulations;
- (u) the Sub-Lessee shall not bring into the Facility or the Premises, nor keep in or store in the Facility or the Premises, any hazardous substance or toxic substance or special waste prescribed or declared as such by any law or regulation of the Government of Canada or British Columbia, and without limiting the foregoing any radioactive materials, explosives, or other material or substance that would endanger the health, safety and welfare of persons, animals or plants;
- (v) the Sub-Lessee shall abide by all laws and regulations pertaining to the Premises and the Sub-Lessee's use and occupation thereof;
- (w) the Sub-Lessee must not do anything that would cause the insurance premiums of the Sub-Lessor to increase;

8. PROVISIO for re-entry by the Sub-Lessor on non-payment of rent or non-performance of covenants.

9. The Sub-Lessor covenants with the Sub-Lessee as follows:

- (a) for quiet enjoyment.
- (b) to provide janitor service in the Facility excluding the demised Premises;
- (c) to compensate the Sub-Lessee adequately for any damage to Sub-Lessee's equipment occasioned by the negligent or wilful acts of the Sub-Lessor, its servants, agents and employees.

10. The Sub-Lessor and Sub-Lessee covenant and agree as follows:

- (a) provided that upon breach by the Sub-Lessee of any covenant herein contained the Sub-Lessor may, on giving the Sub-Lessee seven (7) days to remedy the same, determine this Sublease and with its servants or agents break, re-enter and repossess the Premises;
- (b) the expression Sub-Lessor and Sub-Lessee herein shall include the parties hereto, their executors, administrators, successors and permitted assigns, respectively;
- (c) the Sub-Lessee will not assign nor sublet the whole or any part of the Premises;
- (d) any term of this Sublease that is inconsistent with the headlease between the City of Kelowna as head landlord and the Sub-Lessor as tenant of the Facility shall be read as modified to be consistent with the said headlease;
- (e) CITY – means the Corporation of the City of Kelowna.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals as of the day and year first above written.

The KELOWNA VISUAL AND )  
PERFORMING ARTS CENTRE )  
SOCIETY (Inc. No. S32185) was hereunto ) C/S  
affixed in the presence of: )

Authorized Signatory

Authorized Signatory

The Corporate Seal of \_\_\_\_\_ was )  
hereunto affixed in the presence of: )

Authorized Signatory

Authorized Signatory

## Schedules

A-2-i .....Lease Space Map

#### A-2-ii .....Sub-Lease Insurance Requirements

A-2-iii.....Sub Lease Certificate of Insurance

## SCHEDULE G

### SUB-LEASE AUTHORITY, SPACES AND USES

The City grants the authority to KVPACS to sub-lease the following spaces for the intended purposes as indicated, utilizing the form of sub-lease attached as Schedule "G" as amended with approval of the Landlord.

Name	Size	*Intended Purposes
1. General Artist's Studios	Approximately 4,550 sq. ft.	To create/produce/manufacture/design/and or otherwise generate art, to instruct art skills and participate in public events and displays.
2. Art Gallery	Approximately 1,500 sq. ft.	To display visual public art.
3. Pottery Studio	Approximately 1,500 sq. ft.	To create/produce/manufacture/design/ and or otherwise generate pottery art, to instruct visual arts skills and participate in public events and displays.
4. Café/Bistro/Restaurant and/or food preparation area(s)	Approximately 1,275 sq. ft.	To provide food and beverage services for participants, and the public.
5. Retail/Commercial area	Approximately 1185 sq. ft.	Provide products or services that are acceptable and complementary to arts and cultural activities within the Cultural District.

There will also be the following rental spaces that KVPACS will be responsible for:

Name	Size	*Intended Purposes
1. Set Shop	1,200 sq. ft.	To construct sets for use with theatre performances.
2. Theatre	325 Seats	To provide a venue for performing art events.
3. Atrium	1,000 sq. ft.	To provide space for public assembly.
4. Dance/Multi Purpose Room	1,150 sq. ft.	To provide space for a Dance Studio or other visual and performing arts activities.
5. Rehearsal Room	1,100 sq. ft.	To provide space for rehearsal or other visual and performing arts activities.
6. Music Room	576 sq. ft.	To provide space for music rehearsal or other visual and performing arts activities.
7. Meeting Room (second floor)	828 sq. ft.	To provide space for public and private assembly.

\*The various spaces have intended or primary purposes. For clarity, it is understood that the use of the various rooms may change from time to time. For example, the Music Room while intended to provide space for music rehearsals has been utilized as office space.



## **SCHEDULE H**

### **SUB-LEASE INSURANCE REQUIREMENTS**

#### **1. Sub-Lessee To Provide**

The Sub-Lessee shall procure and maintain, at its own expense and cost, the insurance policies listed in section 2, with limits no less than those shown in the respective items. The insurance policy or policies shall be maintained continuously from the commencement date of this Lease and until the termination date of this Lease.

#### **2. Insurance**

As a minimum, the Sub-Lessee shall procure and maintain, at its own expense and cost, the following insurance policies:

##### **2.1 Comprehensive General Liability Insurance**

- (i) Providing for an inclusive limit of not less than \$2,000,000 for each occurrence or accident.
- (ii) Providing for all sums which the Sub-Lessee shall become legally obligated to pay for damages because of bodily injury (including death at any time resulting therefrom) sustained by any person or persons or because of damage to or destruction of property caused by an occurrence or accident arising out of or related to this Lease.
- (iii) Including coverage for Products/Completed Operations, Blanket Contractual, Contractor's Protective, Personal Injury, Contingent Employer's Liability, Broad Form Property Damage, and Non-Owned Automobile Liability.
- (iv) Including a Cross Liability clause providing that the inclusion of more than one insured shall not in any way affect the rights of any other insured hereunder, in respect to any claim, demand, suit or judgement made against any other insured.

#### **3. The Sub-Lessor and the City of Kelowna Named As Additional Insured**

The policy required by section 2.1 above shall provide that the Sub-Lessor and the City of Kelowna are named as Additional Insureds thereunder and that said policy is primary without any right of contribution from any insurance otherwise maintained by the Sub-Lessor and/or the City

#### **4. Certificates of Insurance**

The Sub-Lessee agrees to submit a Certificate of Insurance in the form of Schedule A-2-iii attached hereto and made a part hereof, to the Risk Management Department of the City and to KVPACS, prior to the commencement date of this Lease. Such Certificate shall provide that 30 day's written notice shall be given to both the Risk Management Department of the City and to KVPACS, prior to any material changes or cancellations of any such policy.



5. **Additional Insurance**

The Sub-Lessee may take out such additional insurance, as it may consider necessary and desirable. All such additional insurance shall be at no expense to the Sub-Lessor.

6. **Insurance Companies**

All insurance, which the Sub-Lessee is required to obtain with respect to this contract, shall be with insurance companies registered in and licensed to underwrite such insurance in the Province of British Columbia.

7. **Failure to Provide**

If the Sub-Lessee fails to do all or anything which is required of it with regard to insurance, the Sub-Lessor may do all that is necessary to effect and maintain such insurance, and any monies expended by the Sub-Lessor shall be repayable by and recovered from the Sub-Lessee. The Sub-Lessee expressly authorizes the Sub-Lessor to deduct from any monies owing the Sub-Lessee, any monies owing by the Sub-Lessee to the Sub-Lessor.

8. **Non-payment of Losses**

The failure or refusal to pay losses by any insurance company providing insurance on behalf of the Sub-Lessee shall not be held to waive or release the Sub-Lessee from any of the provisions of the Insurance Requirements of this Lease, with respect to the liability of the Sub-Lessee otherwise. Any insurance deductible maintained by the Sub-Lessee under the insurance policy is solely for its account and any such amount incurred by the Sub-Lessor will be recovered from the Sub-Lessee as stated in section 7.

SCHEDULE I  
**CERTIFICATE OF INSURANCE**

**This Certificate is issued to:** Kelowna Visual and Performing Arts Centre Society and to the City of Kelowna

**Insured**

Name:

Address:

**Broker**

Name:

Address:

**Location and nature of operation or contract to which this Certificate applies:**

--

Type of Insurance	Company & Policy Number	Policy Dates		Limits of Liability/Amounts
		Effective	Expiry	
<b>Section 1</b> Comprehensive General Liability including: <ul style="list-style-type: none"> <li>• Products/Completed Operations;</li> <li>• Blanket Contractual;</li> <li>• Contractor's Protective;</li> <li>• Personal Injury;</li> <li>• Contingent Employer's Liability;</li> <li>• Broad Form Property Damage;</li> <li>• Non-Owned Automobile;</li> <li>• Cross Liability Clause.</li> </ul>				Bodily Injury and Property Damage  \$ <u>2,000,000</u> Inclusive \$ _____ Aggregate \$ _____ Deductible
<b>Section 2</b> Automobile Liability				Bodily Injury and Property Damage  \$ <u>2,000,000</u> Inclusive

It is understood and agreed that the policy/policies noted above shall contain amendments to reflect the following:

1. Any Deductible or Reimbursement Clause contained in the policy shall not apply to the Kelowna Visual and Performing Arts Society and shall be the sole responsibility of the Insured named above.
2. The Kelowna Visual and Performing Arts Society and the City of Kelowna are named as an Additional Insured.
3. 30 days prior written notice of material change and/or cancellation will be given to the Kelowna Visual and Performing Arts Society and the City of Kelowna.

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Authorized Signatory

\_\_\_\_\_  
Date

## **SCHEDULE "J"**

### **Schedule Timelines**

<b>Date</b>	<b>Objective</b>
<b>First Quarter</b>	KVPACS reviews un-audited year end financial statements with City
<b>Second Quarter</b>	<p>KVPACS provides City Staff with a copy of the Audited Financial Statements and minutes from the Annual General Meeting and statistical comparisons.</p> <p>KVPACS meets with City Staff to review Audited Financial Statements</p>
<b>Third Quarter</b>	<p>KVPACS to provide the City Staff the proposed budget for the following year including base level of funding and identifying all anticipated operational increases</p> <p>KVPACS makes annual presentation to Council including identification of supplemental funds that are going to be requested for the following year.</p> <p>KVPACS and City are to meet and determine a level of maintenance funding as well as capital requests for the following year if any.</p> <p>City submits budget request for City Manager review</p>
<b>Fourth Quarter</b>	<p>City Manager reviews KVPACS' budget request with City staff</p> <p>Council decides on budget allocations for the new year. Staff to advise KVPACS of anticipated level of funding.</p>

**SCHEDULE "K"**  
**EQUIPMENT**

Equipment owned by KVPACS includes:

- Photocopier
- Printers
- Telephone System
- Computer Network
- PCs
- Unattached desks
- Chairs
- Furniture
- Filing cabinets
- Shelving
- AV Equipment
- Pianos
- Sound Equipment

# Kelowna Visual & Performing Arts Centre Society Capital Asset Spreadsheet

December 31, 2006

Prepared by: VN Mar-8-07  
Combined Review by:

U.1

Updated 09/06

Description	Original Cost		Balance at 12-31-06		Disposals		Balance at 12-31-05		Accumulated Amortization		Balance at 12-31-06		Amortization Expense		Net Book Value 12-31-06		Net Book Value 12-31-05	
	Balance at 12-31-05	Additions	Balance at 12-31-06				Balance at 12-31-05		Balance to Amortize	M D	Balance at 12-31-06		Expense		Value 12-31-06		Value 12-31-05	
Computer Hardware	8,656	16,294	24,950				4,166		16,803	3	3.00	9,767	5,601		15,183		4,490	
	8,656	16,294	24,950				4,166		16,803			9,767	5,601		15,183		4,490	
Computer software	2,145	29,581	31,726				2,145		16,936	3	2.00	10,613	8,468		21,113			
Donated Software	728		728				510		728	3	2.00	728	218				218	
	2,873	29,581	32,454				2,655		17,664			11,341	8,686		21,113		218	
Donated equipment	10,000	1,852	11,852				9,500		10,926	3	10.00	10,593	1,093		1,259		500	
Furniture	44,698	90,348	135,046				8,397		89,872	3	10.00	17,384	8,987		117,662		36,301	
	54,698	92,200	146,898				17,897		100,798			27,977	10,080		118,921		36,801	
Totals	66,227	138,075	204,302				24,718		135,265			49,085	24,367		155,217		41,509	

Difference to Schedule of Likely Aggregate Misstatements (SLAM)

24,367  
-

Column Index: MD: 1-Declining balance with half year rule; 2-Declining balance no half year rule;  
3-Straight-line with half year rule; 4-Straight-line no half year rule.

## **SCHEDULE "J"**

### **Schedule Timelines**

<b>Date</b>	<b>Objective</b>
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