



CITY ATTORNEY'S OFFICE

OAKLAND CITY COUNCIL

ORDINANCE NO. _____ C.M.S.

AN ORDINANCE AUTHORIZING THE CITY ADMINISTRATOR OR DESIGNEE TO EXECUTE AN ASSIGNMENT PURSUANT TO WHICH THE CITY, AS ASSIGNEE WOULD ASSUME FROM THE FOX OAKLAND THEATER, INC., (“FOT”) AS ASSIGNOR, FOT’S INTERESTS AS LANDLORD UNDER THE FOLLOWING SUBLEASES:

(1) THE AMENDED AND RESTATED FOX THEATER SUBLEASE WITH OAKLAND SCHOOL FOR THE ARTS AS SUBTENANT, DATED JANUARY 16, 2016, FOR A TERM ENDING JUNE 30, 2021 AT AN ANNUAL RENT OF APPROXIMATELY \$940,500;

(2) THE FOX THEATER BUILDING SUBLEASE WITH GASS ENTERTAINMENT, LLC AS SUBTENANT, DATED AS OF DECEMBER 2006, AS AMENDED, WITH OPTIONS TO EXTEND UNTIL FEBRUARY 6, 2034, FOR THE 69,450 SQUARE FEET CONCERT HALL AT AN ANNUAL PERCENTAGE RENT BASED ON PAID ADMISSIONS AND THE 1,300 SQUARE FEET BAR AND EVENT SPACE AT A BASE RENT OF APPROXIMATELY \$2,813.56 PER MONTH, INCREASED BY 10% IN 2024 AND EVERY FIVE YEARS THEREAFTER UPON RENEWAL; AND

(3) THE AMENDED AND RESTATED FOX THEATER RESTAURANT LEASE AGREEMENT WITH THE EMPORIUM OAKLAND LLC, AS SUBTENANT, DATED AUGUST 29, 2018, FOR \$110,774 IN ANNUAL RENT FOR THE 4,503 SQUARE FEET ARCADE BAR VENUE, WITH OPTIONS TO EXTEND UNTIL 2036.

WHEREAS, the City of Oakland would assume fee ownership of the historic Fox Theater property located at 1807 Telegraph Avenue, Oakland, California as part of the proposed asset transfer of the Fox Theater from the Oakland Redevelopment Successor Agency (“ORSA”) to the City, pursuant to the Long Range Property Management Plan (“LRPMP”), which is being considered concurrently with this Resolution and subject to approval by the ORSA Board, the City Council, and the effectiveness of an Alameda Countywide Oversight Board resolution approving the proposed transactions; and

WHEREAS, contingent on required approvals for the proposed asset transfer, as outlined in the proposed Second Amendment to the Amended and Restated Disposition and Development Agreement dated December 15, 2006, as amended by a First Amendment to Amended and Restated Disposition and Development Agreement dated August 1, 2008 (collectively, the “DDA”), the City would continue to lease the Fox Theater property to the Fox Oakland Theater, Inc. (“FOT”), a City controlled nonprofit organization, pursuant to the existing Ground Lease as amended and assigned from ORSA to the City under the terms of the proposed Assignment and Amendment to the Ground Lease; and

WHEREAS, under the proposed terms of the Leaseback Agreement being considered concurrently with this Resolution, the City would then lease back the entirety of FOT’s interest in the Fox Theater including all improvements owned by FOT; and

WHEREAS, the City would acquire FOT’s rights and obligations as sublandlord under FOT’s subtenant leases, as well as the rights and the obligations under FOT’s professional services agreements; and

WHEREAS, the City would take over responsibility for operating and maintaining the Fox Theater and managing the three subleases with the assistance of a third-party property management company;

WHEREAS, pursuant to the DDA, a portion of the ground floor of the wrap around buildings off Telegraph, along 18th Street and 19th Street, as well as the second and third floors were intended for use by the Oakland School for the Arts (“OSA”), a public charter school in the Oakland Unified School District, and the DDA set forth the essential terms of the OSA lease; and

WHEREAS, on December 18, 2006, FOT executed a lease with OSA for approximately 62,910 square feet of the Fox Theater for a public charter school; and

WHEREAS, on January 26, 2016, the lease with OSA was amended and restated with a term commencing on January 1, 2009 under the prior lease and will terminate on June 30, 2021; and

WHEREAS, OSA owes a base rent of \$78,375 per month, totaling approximately \$940,500 in annual rent, and additional rent for taxes, common area maintenance for the building, and insurance; and

WHEREAS, on April 15, 2006, FOT as the landlord, OSA as the tenant, and CBS Outdoor Inc. executed a pledge agreement whereby OSA is obligated to pay the revenue stream under the pledge agreement to the landlord for the full term of that pledge and OSA shall make base rent payments to the landlord as needed to make up any difference if the pledge agreement is terminated or revenue stream pledged is not paid to the landlord; and

WHEREAS, pursuant to the DDA, the 2,800-seat concert hall theater portion of Fox Theater would be leased as a performing arts venue, and the DDA set forth the essential terms of the lease; and

WHEREAS, on or about December 1, 2006, GASS Entertainment, LLC, a Delaware limited liability company, as tenants, and Another Planet Entertainment, LLC, a California limited liability company, as guarantor of additional premises rent payments, executed a lease, as amended, for approximately 69,450 square feet of the concert hall portion of the Fox Theater to operate a performing arts venue for an annual percentage rent based on paid admissions and facility fees related to attendance and events held at the concert hall for an initial term of ten years and an initial option to renew for five additional years; and

WHEREAS, on June 30, 2010, GASS Entertainment, LLC executed a First Amendment to the lease extending the termination date until February 6, 2019 and received a second option to renew until June 30, 2026; and

WHEREAS, on May 18, 2011, GASS Entertainment, LLC executed a Second Amendment to the lease adding 1,300 square feet of additional premises to the lease for a bar and event space until February 6, 2019, and any such extensions for the concert hall would apply to the additional premises. The monthly base rent for the additional premises is approximately \$2,813.56 per month plus additional rent for taxes, insurance, and common area maintenance or approximately \$152,000 per year. The monthly base rent will increase by an additional 10% on February 6, 2024 and by 10% every five years thereafter. The Second Amendment increased the pro rata share percentage of taxes, insurance, and common area maintenance to 49.38% to reflect the additional 1,300 square feet premises; and

WHEREAS, GASS Entertainment, LLC has exercised its first option to renew the 69,450 square feet concert hall and additional 1,300 square feet premises for a bar and event space until February 6, 2024; and

WHEREAS, on April 10, 2015, GASS Entertainment, LLC executed a Third Amendment to the lease which revised the amortization of tenant improvement allowance repayments; and

WHEREAS, on September 8, 2017, GASS Entertainment, LLC executed a Fourth Amendment to the lease which re-confirmed a second option to renew until June 30, 2026; a third option to renew until February 6, 2029; and a fourth option to renew until February 6, 2034; and

WHEREAS, pursuant to the DDA, a portion of the wrap around building on the ground floor was designed for retail uses; and

WHEREAS, on August 29, 2018, FOT executed a lease with Emporium LLC for 4,503 square feet of the Fox Theater for an arcade bar venue for approximately \$110,774 in annual rent for an initial term of 3 years until August 29, 2021, with three options to renew for an additional 5 years each until 2036; and

WHEREAS, City Charter Section 219(6) and Oakland Municipal Code (“OMC”) Section 2.42.100.B require leases of real property longer than one year to be authorized by an ordinance.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF OAKLAND DOES ORDAIN AS FOLLOWS:

SECTION 1. The City Council finds and determines the foregoing recitals to be true and correct and hereby makes them a part of this Ordinance.

SECTION 2. The City Council hereby authorizes the City Administrator or designee to execute an Assignment of Leases Agreement, substantially in the form attached and incorporated herein as **Exhibit A**, between the City, as assignee, and Fox Oakland Theater, Inc., as assignor, pursuant to which the City would assume as sub-landlord FOT's right, title and interest in, to, and under the existing leases, as may be amended, at the Fox Theater with the following tenants, contingent upon the effectiveness of an Alameda Countywide Oversight Board resolution approving the Fox Theater property asset transfer:

- (1) The Amended and Restated Fox Theater Sublease with Oakland School for the Arts as subtenant, dated January 16, 2016, for a term ending June 30, 2021 at an annual rent of approximately \$940,500;
- (2) The Fox Theater Building Sublease with GASS Entertainment, LLC as subtenant, dated as of December 2006, as amended, with options to extend until February 6, 2034, for the 69,450 square feet concert hall at an annual percentage rent based on paid admissions and the 1,300 square feet bar and event space at a base rent of approximately \$2,813.56 per month, increased by 10% in 2024 and every five years thereafter upon renewal; and
- (3) The Amended and Restated Fox Theater Restaurant Lease Agreement with the emporium Oakland LLC, as subtenant, dated August 29, 2018, for approximately \$110,774 in annual rent for the 4,503 square feet arcade bar venue, with options to extend until 2036.

SECTION 3. Contingent upon approval of the ORSA Resolution, Council Ordinances, and Council Resolutions being considered concurrently with this Ordinance, the City Council authorizes the City Administrator or his or her designee, without returning to Council, to conduct all negotiations, execute and submit all documents, including but not limited to applications, agreements, amendments, modifications, payment requests, operating reserves, and related actions which may be necessary for the above-referenced agreements.

SECTION 4. That prior to execution, all agreements shall be reviewed and approved as to form and legality by the City Attorney, and executed copies shall be filed with the City Clerk.

SECTION 5. If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held to be invalid or unconstitutional by decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the Chapter. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, clause or phrase thereof irrespective of the fact that one or more other sections, subsections, clauses or phrases may be declared invalid or unconstitutional

SECTION 6. This ordinance shall become effective immediately on final adoption if it receives six or more affirmative votes; otherwise it shall become effective upon the seventh day after final adoption.

IN COUNCIL, OAKLAND, CALIFORNIA,

PASSED BY THE FOLLOWING VOTE:

AYES -FORTUNATO BAS, GALLO, GIBSON MCELHANEY, KALB, REID, TAYLOR,
THAO AND PRESIDENT KAPLAN

NOES –

ABSENT –

ABSTENTION –

ATTEST: _____
ASHA REED
Acting City Clerk and Clerk of the
Council of the City of Oakland, California

Date of Attestation: _____

NOTICE AND DIGEST

AN ORDINANCE AUTHORIZING THE CITY ADMINISTRATOR OR DESIGNEE TO EXECUTE AN ASSIGNMENT PURSUANT TO WHICH THE CITY, AS ASSIGNEE WOULD ASSUME FROM THE FOX OAKLAND THEATER, INC., (“FOT”) AS ASSIGNOR, FOT’S INTERESTS AS LANDLORD UNDER THE FOLLOWING SUBLEASES:

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Exhibit A

Assignment of Lease Agreements
(Fox Theater located at 1807 Telegraph Ave)

ASSIGNMENT OF LEASES

THIS ASSIGNMENT OF LEASES (“**Assignment**”), is made as of the ___ day of _____, 202__ (“**Effective Date**”) by and between Fox Oakland Theater, Inc., a California nonprofit public benefit corporation (“**Assignor**”) and the City of Oakland, a municipal corporation (“**Assignee**”).

RECITALS

WHEREAS, Assignor and Assignee have entered into (i) that certain Amendment and Assignment of Ground Lease dated as of the date hereof, and (ii) that certain Lease Back Agreement with Option to Purchase dated as of the date hereof (the “**Leaseback Agreement**”) pertaining to the real property and the improvements located thereon known as the Fox Theater, located in the City of Oakland, Alameda County, California, (“**Property**”) as more particularly described in the Leaseback Agreement; and

WHEREAS, the Leaseback Agreement provides, *inter alia*, that Assignee shall manage and operate the Property; and

WHEREAS, Assignor desires to assign to Assignee certain leases pertaining to the Property, and Assignee desires to assume the rights and obligations of Assignor under such leases.

NOW THEREFORE, in consideration of the premises and the mutual covenants herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

1. Assignment. Assignor hereby assigns, sets over and transfers to Assignee all of its right, title and interest in, to, and under the leases (“**Leases**”) with the tenants of the Property identified on Exhibit A attached hereto and incorporated herein by this reference, together with all prepaid rent and all security or other deposits paid by the tenants under the Leases.
2. Assumption of Lease Obligations. Assignee assumes and agrees to perform all obligations of Assignor as the landlord under the Leases arising as of the date hereof.
3. Deposits. Assignee assumes all liability and obligations of the landlord under the Leases to return any security deposits or other deposits of a similar nature made by tenants in connection with or pursuant to the Leases, unless Assignee delivers the deposits to a future landlord under the Leases and gives any notice required by law and such delivery and notice releases all prior landlords for any obligation to deliver the deposits to the tenants.
4. Representations and Warranties. Assignor hereby represents and warrants that as of the date of this Assignment: (i) there are no uncured defaults existing under any of the Leases on the part of Assignor or any of the tenants, and to the best of Assignor’s knowledge, no breach has been committed under any Lease which alone or with the passage of time, the giving of notice, or both would constitute a default under the Lease; (ii) none of the tenants under any

of the Leases have any right of offset nor any claim against Assignor under the Leases; (iii) Assignor has not received any prepaid rent under any of the Leases except as described in writing to Assignee; (iv) Assignor has delivered to Assignee a complete and correct copy of each of the Leases, together with all amendments thereto, and shall deliver the originals of all such documents to Assignee concurrently with the execution of this Assignment; (v) Assignor has delivered to Assignee a complete and correct listing of all security and other deposits paid or payable pursuant to the Leases; (vi) except as disclosed in writing, there are no subleases, licenses, or agreements affecting the Property or part thereof; and (vi) except as stated in the Leases, no party has (a) any right to extend or renew the term of any Lease, (b) any option to terminate any Lease, (c) any right to expand or relocate Tenant's leased premises, or (d) any option or right of first refusal to purchase the Property or any part thereof.

4. Indemnity. Assignor agrees to indemnify, protect, defend (with counsel reasonably acceptable to Assignee) and hold harmless Assignee from and against any and all liability, loss, cost, damage and expense (including attorneys' fees and costs and court costs) relating to Assignor's obligations with respect to the Leases arising or accruing prior to the Effective Date. Assignee agrees to indemnify, protect, defend (with counsel reasonably acceptable to Assignor) and hold harmless Assignor from and against any and all liability, loss, cost, damage and expense (including attorneys' fees and costs and court costs) relating to Assignee's obligations with respect to the Leases arising and accruing from and after the Effective Date.

5. Miscellaneous. This Assignment and the obligations of the parties hereunder shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns, shall be governed by and construed in accordance with the laws of the State of California, and may not be modified or amended in any manner other than by a written agreement signed by the parties.

6. Severability. If any term or provision of this Assignment or the application thereof to any persons or circumstances shall, to any extent, be invalid or unenforceable, the remainder of this Assignment or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable shall not be affected thereby, and each term and provision of this Assignment shall be valid and enforced to the fullest extent permitted by law.

7. Counterparts. This Assignment may be executed in counterparts, each of which shall be an original and all of which counterparts taken together shall constitute one and the same instrument.

SIGNATURES ON FOLLOWING PAGE

IN WITNESS WHEREOF, the undersigned have executed this Assignment of Leases as of the date first set forth above.

ASSIGNOR:

FOX OAKLAND THEATER, INC.
a California non-profit public benefit corporation

By:
Name:
Title: _____

By:
Name:
Title: _____

ASSIGNEE:

CITY OF OAKLAND, a municipal corporation

By: _____
Name:
City Administrator

APPROVED AS TO FORM AND LEGALITY:

Barbara Parker
City Attorney

By: _____
Deputy City Attorney

Exhibit A

LEASES

(Attach list.)