

**AGREEMENT
BETWEEN THE CITY OF AUSTIN
AND
THE OLD PECAN STREET ASSOCIATION FOR THE OLD PECAN STREET
FESTIVAL**

1. BACKGROUND, RECITALS, AND STATEMENT OF PUBLIC PURPOSE

This Agreement is entered into by and between The Old Pecan Street Association, a Texas non-profit corporation (OPSA) and the City of Austin, a home-rule municipal corporation situated in Hays, Travis and Williamson Counties acting through its City Manager or his designee (City) regarding the Old Pecan Street Festival (OPSF), a bi-annual public street fair held on East Sixth Street in Austin, Texas.

The Old Pecan Street Association has been organizing and operating Festivals on East Sixth Street between Congress Avenue and Interstate 35 for 30 years. The Festivals are well-attended family events with a variety of arts and crafts, entertainment, food and other refreshments. Charitable organizations engage in fund-raising at the OPSF. The City has contributed financial and in-kind support to encourage the success of the Festivals for many years.

OPSA currently holds a Festival twice each year, in May and September. Attendance has been estimated at 200,000 per Festival. Surveys indicate that a significant number of the attendees are not Austin residents, and the Austin Convention and Visitors Bureau estimates that the economic activity generated each year is 2.8 million dollars. OPSA currently contracts with RoLu LLC to manage, operate and promote the OPSF, and RoLu's management has a positive impact on the OPSF. The Festivals provide enjoyable recreation and enhance the City's reputation as an exciting metropolitan area fostering tourism and economic development, a public purpose of the City. The parties wish to enter into an Agreement to formalize terms for City support of the OPSF, and establish OPSA's obligations for the OPSF.

City Council adopted Res. No. 20080925-083 directing the City Manager to negotiate an ongoing cost-sharing partnership that will incorporate the findings and recommendations of the City Auditor. City support of the Festivals, as provided in this Agreement, will enable the Festivals to continue operating on a sound financial basis, and will provide economic benefits to the City and its citizens. At its meeting on April 23, 2009, the City Council approved execution of this Agreement. This Agreement is entered into by the City under its home-rule authority and other law, including Texas Local Government Code Chapter 380.

2. CITY OF AUSTIN'S RESPONSIBILITIES

The City agrees to support the OPSF as set out in this Agreement.

- A. The City will provide a grant of \$45,000 per year, payable by check to OPSA on or before 30 days after the last day of the May Festival, in support of the two annual OPSF

festivals to be applied toward the cost of required security. OPSA shall not be required to pay for required security until a check for such grant has been received from the City. For purposes of this Agreement, "required security" means the number of personnel determined by the Austin Police Department to be necessary to provide reasonable security for the Festival. Austin Police Department ("APD") officers shall be employed to provide security.

- B. The City will designate a person or persons responsible for coordination of municipal actions and review related to Festival preparations and administration, except for APD determinations regarding security. The City will provide expedited review of any City permit applications necessary for operation of the Festival; provided however, that this Agreement does not waive any municipal fees or requirements for such an event, or guarantee approval of such permits.

3. OPSA'S RESPONSIBILITIES

Notwithstanding that OPSA has contracted with RoLu LLC for management of OPSF, and RoLu will perform many of the obligations under this Agreement, this Agreement is between the City and OPSA, and this Agreement does not obligate OPSA to continue to engage RoLu for Festival management services. OPSA shall be responsible for itself and for the actions or omissions of RoLu, or other subcontractor, in the performance of this Agreement. In exchange for the City's support, OPSA agrees to be responsible for the following:

- A. OPSA will or will cause its promoter to organize, manage, and promote, in a professional manner, up to two Festivals each year, to be held on or about the spring and fall. OPSA will provide a safe, secure and enjoyable environment for attendees at each Festival, with free admission to the public. Each Festival will occupy a number of blocks on East Sixth Street between Congress Avenue and Interstate 35, and adjacent streets, as provided in event permits OPSA obtains from the City. OPSA will provide spaces for exhibitors, and provide food, refreshments, entertainment. Exhibitors, vendors and entertainment shall be selected by OPSA or its promoter in its sole discretion. Portable toilets, barricades and other equipment necessary for the production of a professional festival will be provided in amounts and at locations as required by the City in its sole discretion, after consultation with OPSA and/or its subcontractors. OPSA or its promoter shall coordinate with City departments and personnel, including but not limited to the Austin Police Department, the Austin-Travis County Health Department and the Public Works Department, in advance of each festival to assure a safe, secure and enjoyable event for the public, and compliance with City requirements.
- B. OPSA will pay, or cause its promoter to pay the cost of security for the Festivals, including any cost above the \$45,000 provided by the City.
- C. OPSA shall provide, or cause to be provided, two standard size booths space for use by the City of Austin. OPSA or its promoter shall provide credit to the City of Austin as a supporter in its promotional activities and materials. For that purpose, OPSA and its

promoter is authorized to use the City seal on such materials.

- D. OPSA shall require RoLu LLC, or other festival management subcontractor selected by OPSA, to document its policies and procedures for the handling of festival cash and inventory to the City. Such policies and procedures shall be designed to assure accurate accounting of festival income and expenditures, and protect against theft or misapplication of funds, and may be subject to approval by the City Auditor. OPSA will cause to be paid to the City 10 % (ten percent) of the net profits from each Festival for a combined amount not to exceed the \$45,000 grant. For purposes of this Agreement, "net profits" means the net profits of the Festival promoter after all expenses have been paid, including the license fee to OPSA and a corresponding payment to the promoter in an amount equal to the license fee paid to OPSA, subject to such limitations on overhead expenses and exclusions of revenue as set forth in Article III, Section 2 of that certain "Services Agreement" entered into by and between RoLu, LLC and OPSA, and executed February 24, 2006. City shall have the right to audit the records of OPSA, the OPSF events, and OPSA shall cause RoLu, LLC or any other promoter to agree to allow the City to audit such promoter's books and records with respect to the OPSF events to determine compliance with this Agreement, including but not limited to the calculation of "net profits".
 - E. OPSA shall obtain or cause to be obtained insurance for the Festival in amounts and coverages determined by the City of Austin's Risk Manager, in her sole discretion. Such insurance shall at a minimum name the City as an additional insured.
 - F. **INDEMNIFICATION.** OPSA agrees to indemnify, defend, and save harmless the City, its agents, officers and employees, against and from any and all claims by or on behalf of any person, firm, corporation or other entity, to the extent they arise from OPSA's negligence or willful misconduct, and that of its agents and contractors, in connection with each Old Pecan Street Festival, and further from and against all costs, attorneys fees, expenses and liabilities incurred in or about any such claim or proceeding brought thereon. The City shall promptly notify OPSA of any claim or cause of action which may be asserted against the City relating to or covering any matter against which OPSA has agreed, as set forth above, to indemnify, defend or save harmless the City.
4. **TERM AND EFFECTIVE DATE.** This Agreement shall be effective upon the date of the last signature, and shall be in effect for an initial term of one year, and may be administratively renewed on the anniversary date for one (1) additional one year term, unless terminated earlier in accordance with Sections 5.C or 5.E below.
5. **MISCELLANEOUS**
- A. This Agreement does not abrogate OPSA, RoLu LLC, or their agents', employees', contractors', or volunteers' responsibility to comply with federal, state, and local laws, including all applicable City Code requirements.

- B. The City and OPSA agree that OPSA's and RoLu LLC's employees, agents, and volunteers are not City of Austin officials, staff, employees, or agents, nor shall OPSA or RoLu LLC's employees, agents, or volunteers represent themselves as City officials, staff, employees, or agents.
- C. Breach and Default. In the event of breach of this Agreement by OPSA, the City Manager or his designee may elect to declare an event of default, by providing written notice to OPSA identifying the default, necessary corrective action, and providing a 30 day period or other reasonable time to OPSA to cure such default. If the default is not cured by the date set out in the notice of default, the City Manager or his designee may recommend to the City Council that this Agreement be terminated and support of the Festival discontinued. City Council action is required to terminate this Agreement and discontinue support. In the event that the Agreement is terminated under this section, City shall provide written notice of such termination, and OPSA shall pay the City all costs for required security, and any other unpaid costs owed to the City as would be required if this Agreement had not been adopted by the City. Such costs shall be payable no later than thirty (30) business days after the termination occurs. Notwithstanding the above, if OPSA fails to produce the two Festivals which are the subject of this Agreement, OPSA shall refund to the City \$22,500 for each Festival which is not produced; such payment(s) are due to the City 30 days after the announced date of such canceled Festival. Repayment of such amount shall be the sole remedy to the City from OPSA for OPSA's failure to produce a Festival.
- D. Source of Funds. City's payment of costs under this Agreement is conditioned on and subject to the City Council's annual appropriation of funds for such purpose, and shall be made from current revenues then available to the City.
- E. Termination for Convenience. Either party may terminate this agreement without cause by providing 120 days advance written notice to the other party.
- F. This Agreement may be executed in multiple counterparts, and constitutes the entire agreement between the parties regarding the City's support of the OPSF. This Agreement may not be modified except as agreed by the parties in writing, nor may this Agreement be assigned, transferred or conveyed without the other party's express written consent.
- G. If a term or provision of this Agreement is determined to be void or unenforceable by a court of competent jurisdiction, the remainder of this Agreement will remain in full force and effect, as if it never contained the offending term or provision.
- H. Notice under this Agreement shall be given in writing and may be delivered by hand, by certified mail, or by a recognized overnight commercial delivery service (e.g., FedEx). Notice by hand-delivery is deemed effective immediately, by certified mail is deemed effective two (2) days after deposit in U.S. Post Office or in a U.S. Mail Box, and by overnight commercial delivery is deemed effective the following day.

Notice to a party shall be addressed as follows:

DRAFT

Marc A. Ott
City Manager
City Hall
301 W. Second Street
Austin, Texas 78701

Mike Watson
Legal Counsel to OPSA
102 Wee Scot Cove

Austin, TX 78734

Mailing Address:
P.O. Box 1088
Austin, Texas 78767-1088

- I. The City and OPSA hereby warrant that each has the right and authority to make and enter into this Agreement and to grant the rights set forth herein. It is expressly understood and agreed that the City, neither by the execution of this Agreement, nor any conduct of any representative of the City, shall be considered to waive, nor shall it be deemed to have waived, any immunity or defense that would otherwise be available to the City against claims arising in the exercise of its governmental powers and functions, nor shall it be considered a waiver of sovereign immunity to suit.
- J. Nothing in this Agreement shall be deemed to be a commitment or obligation of the City or OPSA to enter into any joint venture, joint enterprise, partnership or any other legal business relationship.
- K. Venue for any dispute arising under this Agreement shall be filed and maintained in Austin, Travis County, Texas.

This Agreement is entered into and executed by the following authorized representatives of the parties:

Printed Name: _____
Title: _____

City of Austin

April _____, 2009

Printed Name: _____
Title: _____
Old Pecan Street Association

April _____, 2009