

LEASE AND JOINT-USE OPERATING AGREEMENT

This lease and joint-use operating agreement ("Agreement") is entered into by and between the City of Mansfield ("City"), a Texas municipal corporation, and Historic Mansfield Performance Park ("HMPP"), a Texas non-profit corporation. For convenience, the City and HMPP may be referred to herein collectively as "parties" and individually as a "party."

RECITALS

WHEREAS, the City owns two certain tracts of land, a 2.087 acre tract of land and a .12 acre adjoining tract of land, both of which are more particularly described on Exhibit "A" attached hereto ("Property"); and

WHEREAS, HMPP desires to lease the Property from the City and to construct and operate an outdoor amphitheater on the Property; and

WHEREAS, the City desires to lease the Property to HMPP and to permit HMPP to construct and operate an outdoor amphitheater (the "Improvements" or "Amphitheater") on the Property in accordance with the terms of this Agreement.

NOW, THEREFORE, for and in consideration of the mutual promises and covenants set forth in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties do hereby agree as follows:

I.

LEASE OF PROPERTY

- 1.1 Term. The City hereby agrees to lease the Property to HMPP and HMPP hereby agrees to lease the Property from the City for an initial term of thirty (30) years with two (2) ten (10) year renewals at the option of HMPP commencing upon the City's acceptance of the Improvements (the "Commencement Date"). The City shall accept the Improvements when construction is completed in substantial compliance with the design plans approved by the City. Each renewal option may be exercised only if at the time of commencement of that option HMPP is not in default or breach of any condition in this Agreement
- 1.2 Rent. The annual rent shall be \$1.00 and other good and valuable consideration which shall be due upon the full execution of this agreement and on each subsequent annual anniversary of such date.
- 1.3 Electricity. In addition to the annual rent, HMPP shall owe payment for the cost of electricity attributable to HMPP's use of the Amphitheater. The Payment shall be due within thirty (30) days of the date of invoice by the City.

- 1.4 Maintenance of Property. HMPP shall have the duty to properly maintain the Property (excluding work allocated to the City under Section 1.8) in a like new condition, including any required repairs or capital improvements to the Amphitheater or other facilities located on the Property. Should HMPP fail to maintain the Property after thirty (30) days notice to HMPP by the City, the City shall have the right but not the duty to perform the maintenance and charge the cost to HMPP.
- 1.5 Permissible Uses. During the term of this Agreement, HMPP shall be permitted to use the Property only as a public venue for musical, theatrical or other entertainment performances, arts and crafts events, and for ancillary park purposes, including the sale of food, drinks, and alcoholic beverages limited to beer and wine. As it deems appropriate, HMPP may charge for fundraising purposes. All scheduled performances must be family friendly. The City reserves the right to refuse to permit a performance from occurring that does not comply with the use requirements of this section.
- 1.6 Reserved Use of the Property. Subject to the requirements in Section 1.5 and approval by the City, HMPP may allow private groups to use the Amphitheater, provided the private group agrees to comply with the terms of this Agreement.
- 1.7 Compliance with Law. HMPP shall comply with all City ordinances related to public gatherings during all events conducted on the Property. HMPP may not use or permit using the Property in any manner that results in waste of the Property or Improvements or constitutes a nuisance or for any illegal purpose.
- 1.8 City's Duties. During the term of this Agreement, the City shall maintain the grass and any landscaping on the Property and City shall provide access to water, sewer and electric utilities. The City shall also provide for janitorial services for the on-site restroom and for waste removal as needed. The City will provide the services in the same manner as it maintains City parks, but shall coordinate the schedule so as not to conflict with HMPP events.
- 1.9 Restrooms. HMPP shall be required to provide portable restrooms for any event that will exceed one hour in length or that attracts more than 100 persons to attend the event. The City and HMPP shall meet annually on a date between January 1st and March 15th of each year to discuss and coordinate City use and HMPP events.
- 1.10 Concessions. HMPP may invite food and drink vendors to enter onto the Property during the times of scheduled performances for the purpose of selling food and drinks to the public, provided that such vendors have obtained the necessary permits to engage in that activity. During the times that performances are scheduled by the City, the City may invite food and drink vendors to enter onto the Property for the purpose of selling food and drinks to the public.

- 1.11 Scheduling of Events. HMPP shall be given priority in scheduling events on the Property. The City may schedule the use of the Property, at no cost to the City, in the absence of events previously scheduled by HMPP. City scheduled events may not be cancelled or postponed by HMPP without the City's consent. Under no circumstances shall the City be liable for the cost of the performers scheduled by HMPP.
- 1.12 Use as Public Open Space. When events are not scheduled, the Property and Improvements (excluding on site restrooms) shall be maintained as a public open space.

II. IMPROVEMENTS

2.1 Construction of Improvements.

- (a) Construction. As consideration for this Agreement and as a condition of obtaining the right to lease the Property, HMPP agrees to design and construct the Improvements described on Exhibit "B," which is attached hereto and incorporated herein, on the Property at the HMPP's sole cost and expense, including the cost of the connection of any utilities necessary to serve the Improvements.
- (b) Applicable Law. The Improvements shall be constructed in accordance with all applicable state, federal and local standards existing as of the date of the full execution of this Agreement. Any modification to the Improvements shall comply with then existing regulations and standards.
- (c) Commencement and Completion. The commencement of the construction of the Improvements shall be within three (3) months from the Commencement Date of this Agreement or at any later date agreed to by the parties, and shall complete the construction of the Improvements within six (6) months thereafter.
- (d) General Contractor. HMPP may retain a general contractor and may utilize subcontractors to construct the Improvements, provided that any general contractor and all subcontractors must be approved by the City.
- (e) Costs. Prior to commencing construction of the Improvements, HMPP shall provide the City with an itemized list of the construction costs and the names and contact information of all general and subcontractors who will assist in the project.
- (f) Construction Bonds. Prior to the initiating any construction of the Improvements, HMPP shall provide the City with one original and one quality copy of the following construction bonds:

- (1) Performance Bond. A good and sufficient Performance Bond in an amount equal to one hundred percent (100%) of the total cost of the Improvements (as stated in the itemized lists of costs provided to the City), guaranteeing the full and faithful execution of the work and performance of this Agreement and for the protection of the City against any improper execution of the work or the use of inferior materials. The Performance Bond shall guarantee completion of the Improvements within one year of execution of this Agreement.
- (2) Payment Bond. A good and sufficient Payment Bond in an amount equal to one hundred percent (100%) of the total cost of the Improvements (as stated in the itemized lists of costs provided to the City), guaranteeing payment for all labor, materials and equipment used in the construction of the Improvements.
- (3) Maintenance Bond. A good and sufficient Maintenance Bond in an amount equal to one hundred (100%) of the total cost of the Improvements (as stated in the itemized lists of costs provided to the City), guaranteeing the maintenance in good condition of the Improvements for a period of two (2) years from and after the date that a Letter of Acceptance is issued from the City indicating that the Improvements have been completed by HMPP and accepted by the City.

Each of the above bonds shall be in a form acceptable to the City. Any surety company through which a bond is written shall be duly authorized to do business in the State of Texas, and the City, through its City Manager, shall retain the right to reject any surety company for any work under this Agreement regardless of such company's authorization to do business in the State of Texas. Approval by the City shall not be unreasonably withheld or delayed.

- 2.2 Design of Improvements. The design of the Improvements shall be approved by the City prior to the commencement of construction.
- 2.3 Title to Improvements. Title to the Improvements shall be vested in the City upon the completion of the construction of the Improvements and the issuance of a letter of acceptance by the City.
- 2.4 Signs. After the effective date of this Agreement, the City may install the City logo and other signs identifying the Improvements in accordance with the City's regulations for park signs. HMPP may install signs or advertising on the Property, subject to the right of the City to approve all signs and advertising and require removal of any sign or advertising not approved.

- 2.5 Encumbrances Prohibited. During the term of this Agreement, HMPP shall not cause or permit the Property or the Improvements to be encumbered in any way by lien or other cloud to the title. In the event a lien is filed on the Property related to the construction of the Improvements, HMPP shall, upon demand and at its sole cost, take all necessary steps to have the lien removed.
- 2.6 Future Modifications. HMPP shall not modify the Improvements on the Property without the written consent of the City.
- 2.7 Permits Required. The general contractor and all subcontractors shall obtain all required construction and building permits from the City, but the City shall waive all permit fees.

III. INSURANCE

- 3.1 Insurance. Without limiting any of the other obligations or liabilities of HMPP, HMPP agrees to purchase and maintain during the term of this Agreement and any renewal, and at HMPP's sole expense, the types and minimum amounts of insurance coverages listed below, together with the coverage provisions and endorsements as indicated:
- (a) Worker's Compensation Insurance. Worker's Compensation Insurance is subject to the following requirements:
- (1) Worker's compensation coverage shall be maintained for not less than the Texas Statutory limits.
 - (2) Employers' Liability Insurance shall be maintained with minimum limits of not less than \$250,000 per occurrence and \$500,000 aggregate.
 - (3) The policy shall contain a waiver of subrogation in favor of the City.
 - (4) The policy shall contain a requirement that City be given not less than thirty (30) days written notice of cancellation, non-renewal or material change.
- (b) Commercial General (Public) Liability Insurance. Commercial General (Public) Liability Insurance shall include coverage for Premises/Operations, Products/Completed Operations, Independent Contractor's liability, Personal Injury and Contractual Liability insuring the indemnity provision contained in this Agreement and fully insuring HMPP or its subcontractor's liability for bodily injury or death or property damage:

- (1) Combined limit of \$2,000,000 per occurrence for bodily injury and property damage.
 - (2) Annual aggregate limit of \$5,000,000.
 - (3) Products-Components/Operations Aggregate of \$1,000,000.
 - (4) Personal and Advertising Injury (with employment exclusion deleted) of \$1,000,000.
 - (5) Contractual Liability:
 - i. Bodily Injury of \$1,000,000 each occurrence.
 - ii. Property Damage of \$1,000,000 each occurrence.
 - (c) Property Insurance. HMPP shall purchase property insurance in an amount sufficient to cover the value of the Property after the construction of the Improvements. This policy shall be maintained throughout the term of this Agreement, shall name the City as an additional insured and shall contain a waiver of subrogation in favor of the City. HMPP shall provide a certificate of insurance demonstrating compliance with this section upon the City's request during normal business hours.
- 3.2 Companies. All policies of insurance shall be written with a company or companies approved and licensed by the Texas Department of Insurance to transact business in the State of Texas with a Best Rating of A or better.
- 3.3 Certificates. HMPP agrees to provide City with certificates of insurance evidencing the required insurance coverages and shall provide City with certificates or other proof of coverage as requested by City of current coverage upon the expiration or renewal of any insurance coverage.
- 3.4 Adjustments to Coverage. On or after the fifth (5th) anniversary of the Letter of Acceptance for the Improvements, the City may adjust the insurance coverages provided for herein or to require additional coverages and amounts, as may be required, in the City's reasonable judgment consistent with current industry standards, to provide sufficient coverages. HMPP shall procure any additional insurance coverages within 60 days of notice from City.
- 3.5 Additional Insureds. With respect to HMPP's operations only, the City, its council members, officers, employees and volunteers shall be shown as additional insureds on the policies by using endorsement CG 20 26 or broader. The coverage shall contain no special limitations on the scope of protection afforded the City.

3.6 Insurance Policy Requirements.

- (a) Each insurance policy to be furnished by HMPP under this Agreement shall include the following conditions by endorsement to the policy (HMPP shall be primary over any other coverage):
- (1) name the City as an additional insured as to all applicable policies;
 - (2) each policy shall require that 30 days prior to cancellation, non-renewal or any material change in coverage, a notice thereof shall be given to City by certified mail. If the policy is canceled for nonpayment of premium, only 10 days written notice to City is required;
 - (3) the policy phrase "other insurance" shall not apply to the City where the City is an additional insured on the policy.
 - (4) insurance furnished by HMPP shall be in accordance with the following requirements:
 - i. each policy is to be written through companies duly licensed to transact that class of insurance in the State of Texas; and
 - ii. each liability policy required herein shall be written with an occurrence" basis coverage trigger.
 - (5) HMPP waives subrogation rights for loss or damage against the City. Insurers shall have no right of recovery or subrogation against the City, it being the intention that the insurance policies shall protect all parties to the contract and be primary coverage for all losses covered by the policies;
 - (6) Companies issuing the insurance policies and HMPP shall have no recourse against the City for payment of any premiums or assessments for any deductibles, as all such premiums and deductibles are the sole responsibility and risk of the HMPP;
 - (7) Deductible limits on insurance policies exceeding \$25,000 require approval of the City;
 - (8) Any of such insurance policies required under this section may be written in combination with any of the others, where legally permitted, but none of the specified limits may be lowered thereby;
 - (9) HMPP shall provide notice of any claim or litigation that would affect required insurance coverages to the City in a timely manner;

- (10) Prior to the effective date of cancellation of any policy, HMPP shall deliver to the City a replacement certificate of insurance or proof of reinstatement.

IV. INDEMNIFICATION

- 4.1 HOLD HARMLESS AGREEMENT. HMPP SHALL INDEMNIFY AND HOLD HARMLESS THE CITY, ITS OFFICERS, AGENTS, SERVANTS AND EMPLOYEES, FROM ANY LOSS, DAMAGE, LIABILITY OR EXPENSE ON ACCOUNT OF DAMAGE TO PROPERTY AND INJURIES, INCLUDING DEATH, TO ANY AND ALL PERSONS WHICH MAY ARISE OUT OF ANY DEFECT, DEFICIENCY OR NEGLIGENCE OF HMPP'S ENGINEER'S DESIGNS AND SPECIFICATIONS INCORPORATED INTO ANY IMPROVEMENTS CONSTRUCTED IN ACCORDANCE THEREWITH, AND HMPP SHALL DEFEND AT HIS/HER OWN EXPENSE ANY SUITS OR OTHER PROCEEDINGS BROUGHT AGAINST THE CITY, ITS OFFICERS, AGENTS, SERVANTS OR EMPLOYEES OR ANY OF THEM, ON ACCOUNT THEREOF, AND SHALL PAY ALL EXPENSES (INCLUDING WITHOUT LIMITATION REASONABLE FEES AND EXPENSES OF ATTORNEYS) AND SATISFY ALL JUDGMENTS WHICH MAY BE INCURRED BY OR RENDERED AGAINST THEM OR ANY OF THEM IN CONNECTION HEREWITH.

HMPP, ITS SUCCESSORS, ASSIGNS, VENDORS, GRANTEEES, AND/OR TRUSTEES DO HEREBY FULLY RELEASE AND AGREE TO, INDEMNIFY, HOLD HARMLESS AND DEFEND THE CITY, ITS OFFICERS, AGENTS, SERVANTS AND EMPLOYEES FROM ALL CLAIMS, SUITS, JUDGMENTS, AND DEMANDS OF ANY NATURE WHATSOEVER, FOR PROPERTY DAMAGE OR PERSONAL INJURY, INCLUDING DEATH, RESULTING FROM OR IN ANY WAY CONNECTED WITH EVENTS CONDUCTED OR HOSTED BY HMPP ON THE PROPERTY OR THE CONSTRUCTION OF IMPROVEMENTS OR THE FAILURE TO SAFEGUARD THE CONSTRUCTION WORK, OR ANY OTHER ACT OR OMISSION OF HMPP RELATED THERETO, WHICH ACCRUE PRIOR TO ACCEPTANCE OF THE IMPROVEMENTS BY THE CITY. THIS INDEMNIFICATION AND HOLD HARMLESS SHALL NOT INCLUDE INDEMNIFICATION FOR ANY CLAIM ARISING AS A RESULT OF THE CITY'S NEGLIGENCE OR INTENTIONAL MISCONDUCT WITH RESPECT TO THE CONSTRUCTION OF THE IMPROVEMENTS.

V. TERMINATION

- 5.1 Termination. This Agreement may not be terminated except in accordance with this section.

- (a) Termination for Cause. This Agreement may be terminated by HMPP or by the City “for cause.” The term “for cause” means a violation of this Agreement that, after receipt of notice, remains uncured for more than thirty (30) days. Any notice of termination shall specifically identify the violation or violations and shall provide that the termination of the Agreement shall be effective upon the expiration of thirty (30) days from the date of the party’s receipt of the notice if the party fails to cure the violation or violations identified therein before the end of the thirty-day time period. In order for any termination under this section to be effective, the notice must be provided in accordance with the terms of this Agreement.
- (b) Termination for Convenience. After the acceptance of the Improvements by the City, this Agreement may be terminated by HMPP for any reason with six months notice to the City.
- 5.2 Effect of Termination/Expiration. Upon the termination or expiration of this Agreement, the parties’ duties and obligations under this Agreement shall cease and the City shall assume full control of the use of the Property and Improvements.

VI. MISCELLANEOUS PROVISIONS

- 6.1 Entirety. This Agreement and the exhibits attached hereto shall be the sole understanding and agreement of the parties with respect to the subject matter hereof. Any prior written or oral understandings of the parties that contradict the terms of this Agreement shall not be binding on the parties.
- 6.2 Assignment. This Agreement and any interest therein may not be assigned by either party without the written consent of the other party.
- 6.3 Binding. This Agreement shall be binding on the Property and the parties and their respective successors-in-interest.
- 6.4 Severability. In the event any term or provision of this Agreement is determined by a court of competent jurisdiction to be illegal or unenforceable, the remainder of this Agreement shall remain in effect and shall not be affected thereby.
- 6.5 Notice. Any notice required to be given by this Agreement shall be deemed to have been given within three days of depositing in the mail, if sent to the other party by United States certified mail, return receipt requested, or upon receipt of the notice if sent by other receipted delivery service, at the address listed below:

If to the City: City of Mansfield
1200 E. Broad St.
Mansfield, Texas 76063
Attn: City Manager

With copy to: Director of Legal Services
1200 E. Broad St.
Mansfield, Texas 76063

If to HMPP: Historic Mansfield Performance Park
108 S. Main St.
Mansfield, Texas 76063
Attn: President

The parties may at any time change their respective address for notice purposes by delivering a notice of change of address to the other party in accordance with this section.

- 6.6 Amendment. This Agreement may not be amended or modified except by written amendment which is signed by both parties.
- 6.7 No Joint Venture. Nothing in this Agreement should be construed by the parties or by any third party to create the relationship of principal and agent of a partnership, joint venture or employment it being understood the parties are solely acting as independent parties for the purpose of effecting the provisions of this Agreement. As such, neither party has the authority to represent or to bind the other with respect to any third party agreement or proposal.
- 6.8 Governing Law/Venue. This Agreement shall be governed by the law of the State of Texas. Venue for any legal action to interpret or enforce the terms of this Agreement shall lie in Tarrant County, Texas.
- 6.9 Attorney's Fees. In the event that it becomes necessary to take legal action to interpret or enforce the terms of this Agreement, the prevailing party in such action shall be entitled to recover reasonable attorney's fees and costs of court from the non-prevailing party.

SIGNED on this _____ day of _____, 2015 to be effective on the effective date.

CITY OF MANSFIELD

By: _____
Clayton Chandler, City Manager

ATTEST:

Vicki Collins, City Secretary

HISTORIC MANSFIELD PERFORMANCE PARK

By:_____

Print Name:_____

Title:_____

ACKNOWLEDGEMENT

BEFORE ME, the undersigned authority, personally appeared _____ who after being duly sworn stated that he/she is the _____ of Historic Mansfield Performance Park and that he/she signed the foregoing instrument on behalf of said entity for the purposes expressed therein.

Notary Public, in and for the State of Texas

My commission expires: _____

EXHIBIT "A"

Legal Description

A certain 2.087 acre tract of land platted as Block 23, Lot 1, 2 & 4B; Block 24, Lot A & Closed Street as shown on the deed dated September 1, 1987 recorded as Instrument No. 90570001453 in the Real Property Records of Tarrant County, Texas, also known as 110 S. Main St., Mansfield, Texas 76063

And

A certain .12 acre tract of land platted as Block 23, Lot 7 as shown on the deed dated October 8, 2014 recorded as Instrument No. D214281047 in the Real Property Records of Tarrant County, Texas, also known as 109 W. Broad St., Mansfield, Texas 76063

EXHIBIT “B”

Site Plan