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**City Council**

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**NOTICE OF MOTION**

MM31.2	ACTION			Ward: 28
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**Amendments to the Umbrella Agreement - Sony Centre for the Performing Arts - Councillor Moscoe, seconded by Councillor Saundercook**

- Notice of this Motion has been given.*
- This Motion is subject to referral to the Executive Committee. A two-thirds vote is required to waive referral.*
- This Motion has been deemed urgent.*

**Recommendations**

Councillor Moscoe, seconded by Councillor Saundercook, recommends:

1. That Council approve the attached amendments to the Umbrella Agreement, which adjust the timing for the payments and financial securities to be provided by Castlepoint and which provide for the earlier provision of a deed to Castlepoint for the condominium strata land.
2. That Council authorize the Chief Executive Officer of the Hummingbird Centre for the Performing Arts, in consultation with the Chief Corporate Officer and the Acting Deputy City Manager and Chief Financial Officer, to approve any further amendments to the Umbrella Agreement consistent with the principles established in the attached term sheet.

**Summary**

At its meeting of February 12, 2009, the Board of Directors of the Hummingbird Centre for the Performing Arts recommended that Council adopt a number of amendments to the Umbrella Agreement.

These amendments will facilitate the financing of the proposed development transaction so the transaction can close by February 27, 2009. The closing must occur by this date to allow sufficient time to complete the renovations to the theatre before the theatre's scheduled reopening in January, 2010.

(Submitted to City Council on February 23 and 24, 2009 as MM31.2)

**Draft Dated February 13, 2009**

**PROPOSED AMENDMENTS TO THE UMBRELLA AGREEMENT**

1. The closing shall take place on February 27, 2009 (the “**Closing**”), failing which the City, in its discretion, may terminate the Umbrella Agreement.
2. On Closing Ferncastle shall pay:
  - (a) \$18,966,323 (less the deposit already paid of \$1.5M plus accrued interest); and
  - (b) \$1.0M on account of the Necessary Renovations Contribution.
3. If Ferncastle intends to commence construction during the 2009 calendar year, then it must commence construction by May 15, 2009 or such later date as may be agreed to by the parties (the “**Target Construction Date**”).
4. If Ferncastle does not commence construction by the Target Construction Date then it cannot commence construction prior to July 1, 2011, but not later than September 1, 2011 provided it gives the Sony Centre written notice at least one year prior to the commencement date of construction;
5. If Ferncastle does not commence construction by September 15<sup>th</sup>, 2011:
  - (a) it must commence construction between July 1 and September 15 of the calendar year in which it chooses to commence construction but in no event later than the Outside Construction Date;
  - (b) it must provide Sony Centre with at least one year’s prior written notice of a date for commencement of construction; and
  - (c) Ferncastle must commence construction within a period of approximately 10 years from Closing (the “**Outside Construction Date**”), failing which the Umbrella Agreement shall be terminated and the City shall be entitled to retain all monies paid by Ferncastle.
6.
  - (a) In addition to the payment for the development rights and the Necessary Renovations Contribution referred to in paragraph 2, Ferncastle shall pay an additional \$7,500,000 on account of the East Side Work (the “**East Side Funds**”).
  - (b) The East Side Funds shall be payable as follows:
    - (i) \$5,000,000 shall be paid to the City in trust on the earlier of May 15, 2009 and the date on which Ferncastle commences construction, and utilized by Sony Centre as funds are expended by Sony Centre on East Side Work being made by Sony Centre; and
    - (ii) \$2,500,000 shall be payable to the City on account of the East Side Work upon the substantial completion of the East Side Work.

- (c) In the event that Ferncastle shall fail to make the payment of any of the sums described in 6(b)(ii) above, the Umbrella Agreement shall be terminated and the City shall be entitled to retain all monies previously paid by Ferncastle to the City pursuant to the Umbrella Agreement.
- 7. On commencement of construction, an additional \$4,000,000 shall be paid to BLG, in trust, \$2.0M of which shall be released to Ferncastle's contractors on substantial completion of the Project Related Renovations and \$2.0M of which shall be security for Ferncastle's other obligations to the City under the Umbrella Agreement including, without limitation, the Project Related Renovations and shall be released on substantial completion of the Private Component.
- 8. Other than remediation work, Ferncastle shall not commence construction prior to the first advance under the loan agreement between Ferncastle and the bank providing financing to Ferncastle for the Private Component (the "**Bank**"). Notwithstanding the foregoing, in the event that Ferncastle shall commence any work on the site prior to having obtained the first advance from the Bank under the loan agreement, as aforesaid, and does not shortly thereafter receive the Bank Advance, Ferncastle covenants that it shall restore the theatre to its original condition and do such other work as is necessary to make the theatre suitable for use.
- 9. On Closing, there will be no lease granted by the City to Ferncastle as originally contemplated in the Umbrella Agreement.
- 10. A deed for the Private Lands will be provided by the City to Ferncastle at the time the Bank providing financing to Ferncastle for the Private Component makes an advance of least \$2,500,000 to Ferncastle pursuant to the Bank financing (the "**Bank Advance**"), subject to the following conditions being fulfilled to the satisfaction of the City:
  - (a) the City has been provided with the loan agreement between Ferncastle and the Bank, satisfactory to the City;
  - (b) Ferncastle has made all payments required under the Umbrella Agreement and is not otherwise in default under the Umbrella Agreement or any ancillary agreement thereto;
  - (c) arrangements respecting bonding and construction lien holdbacks are in effect which are satisfactory to the City;
  - (d) the assignment to the City of the plans and specifications for the Private Component as collateral security (subject in priority to the Bank) together with such other collateral security in favour of the City as existed in the original Umbrella Agreement as modified to reflect current circumstances and arrangements in the amended Umbrella Agreement; such additional collateral security shall include a right exercisable by the City prior to the delivery of a deed to Ferncastle, to acquire parking rights to accommodate the requirements of the Private Component from Castlepoint on lands owned by Castlepoint on the south side of the Esplanade. The price and terms of the parking rights shall be as mutually agreed on between the parties, each acting reasonably, and included in the amended Umbrella Agreement; and

- (e) the deed shall be subject to restrictive covenants respecting construction of the Private Component in accordance with approved plans and specifications, which restrictions shall be released by the City on substantial completion of the Private Component in accordance with approved plans and specifications.
- 11. The City shall grant a license to Ferncastle for construction purposes, prior to delivery of the deed referred to in paragraph 10 above.
- 12. The amended Umbrella Agreement shall contain amended default provisions to reflect the altered arrangements with Ferncastle including without limitation, the retention by the City of all amounts previously paid by Ferncastle to the City in the event that Ferncastle fails to pay the funds required in accordance with paragraph 6 hereof.