



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Jim McBride

SUBJECT: SEE BELOW

DATE: March 29, 2004

Approved

Date

Council District: 3

**SUBJECT: REVISION OF THE FACILITY USE AGREEMENT FOR EVENTS
CONTRACTED AT THE CONVENTION & CULTURAL FACILITIES**

RECOMMENDATION

Adoption of a resolution approving a revision to the form Facility Use Agreement between Convention & Cultural Facilities (CCF) clients and the City to add a mutual indemnification clause.

BACKGROUND

The City's form Facility Use Agreement contains the terms and conditions that govern the clients use of the Convention and Cultural Facilities (CCF), which include the Convention Center, Civic Auditorium, Parkside Hall, Center for the Performing Arts, and Montgomery Theater.

Section 22.01.030 of the San José Municipal Code specifically provides that the Director of Conventions, Arts & Entertainment ("Director") is authorized to enter into agreements allowing the use of all or a portion of the Convention and Cultural Facilities provided that any modifications to the standard terms of the agreement that affect the City's liability are approved by the City Council.

Revisions to the form Facility Use Agreement were last approved by the City Council in November 2003.

ANALYSIS

In recent years, CCF and the Convention and Visitors Bureau have experienced an increase in the number of clients that have requested mutual indemnification language in the form Facility Use Agreement (Agreement). The Director of Conventions, Arts and Entertainment is

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authorized to negotiate and execute the form Agreements with the clients and may modify terms where appropriate as long as the changes do not increase the City's potential exposure to liability. While a mutual indemnification clause may increase the City's exposure to liability, the Department believes the change is critical to the success of bringing new business to San José.

Existing language in the Agreement requires the Client to indemnify and hold the City harmless from any and all claims resulting from client's acts or omissions or the acts or omissions of client's officers, agents, employees, contractors, exhibitors, registrants or other persons attending an event, except for such claims arising from the negligence or willful misconduct of City. Clients continually ask the City to reciprocate by providing mutual indemnification. The revised form Facility Use Agreement will include this change.

The Department is currently in negotiations with TheraSense for an event in May 2004 that will bring approximately 500 people downtown and generate an estimated \$350,000 in delegate expenditures. TheraSense has indicated that they will not bring their business to San José if we are unable to accommodate the changes requested. In addition, the Department has experienced similar challenges in negotiations with Intel, Microsoft, Borland and CMP Media. These groups also have the potential to bring a great deal of business to the Convention Center and the downtown business community. In order to remain competitive and capture greater market share, it is necessary to amend the Facility Use Agreement accordingly. A copy of the Agreement, highlighting the proposed change, is attached to this memo.

COORDINATION

This memorandum has been coordinated with the City Attorney's Office.

PUBLIC OUTREACH

Not applicable.

COST IMPLICATIONS

Revision of the terms of the Facility Use Agreement is consistent with the June 4, 2003 Mayor's Budget Message directing the Manager to provide the Convention and Visitors Bureau with the necessary flexibility to successfully book meetings in today's highly competitive convention market.

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CEQA

Not a project.

JIM McBRIDE, Acting Director
Conventions, Arts and Entertainment

Attachment

**FACILITY USE AGREEMENT
SAN JOSE CONVENTION & CULTURAL FACILITIES**

EXISTING LANGUAGE

7. **INDEMNITY AND WAIVER OF CLAIMS.** Client agrees to defend, indemnify and hold harmless City, its officers, agents and employees from and against any and all claims, demands, suits, causes of action, or liabilities incurred by City, its officers, agents or employee, arising from the Event (including, without limitation, any claim by any Exhibitor at the Event) or as a result of Client's acts or omissions under this Agreement or any act or omission of Client's officers, agents, employees, contractors (including independent contractors), exhibitors, registrants or other persons attending the Event with the express or implied permission or invitation of Client, except as may arise from the negligence or willful misconduct of City, its officers, agents, contractors or employees. In an action or claim against City in which Client is defending City, City shall have the right to approve legal counsel providing City's defense and such approval shall not be unreasonably withheld.

Client further waives all claims or causes of action against City, its officers, agents, or employees which it may now or hereafter have for loss of or damage to property and for injuries to or death of persons on or about the Facility, from any causes arising at any time except as may arise from the negligence or willful misconduct of City, its officers, agents, contractors or employees. Nothing in this Section 7 limits the waiver of claims by Client for interruption or termination of the Event, as set forth in Section 11. Client's obligations under this section shall survive expiration or earlier termination of this Agreement.

NEW LANGUAGE

7. **MUTUAL INDEMNITY.** Client agrees to defend, indemnify and hold harmless City, its officers, agents and employees from and against any and all claims, demands, suits, causes of action, or liabilities incurred by City, its officers, agents or employees, arising from the Event (including, without limitation, any claim by any Exhibitor at the Event) or as a result of Client's acts or omissions under this Agreement or any act or omission of Client's officers, agents, employees, contractors (including independent contractors), exhibitors, registrants or other persons attending the Event with the express or implied permission or invitation of Client, except as may arise from the negligence or willful misconduct of City, its officers, agents, contractors or employees. In an action or claim against City in which Client is defending City, City shall have the right to approve legal counsel providing City's defense and such approval shall not be unreasonably withheld.

City agrees to defend, indemnify and hold harmless Client, its officers, agents and employees from and against any and all claims, demands, suits, causes of action, or liabilities incurred by Client, its officers, agents or employees, arising from the Event as a result of the acts or omissions under this Agreement of City's officers, agents, employees, or contractors, except as may arise from the negligence or willful misconduct of Client, its officers, agents, contractors or employees.

8. **WAIVER OF CLAIMS.** Client waives all claims or causes of action against City, its officers, agents, or employees which it may now or hereafter have for loss of or damage to property and for injuries to or death of persons on or about the Facility, from any causes arising at any time except as may arise from the negligence or willful misconduct of City, its officers, agents, contractors or employees. Nothing in this Section 8 limits the waiver of claims by Client for interruption or termination of the Event, as set forth in Section 12. Client's obligations under this section shall survive expiration or earlier termination of this Agreement.