

COUNCIL AGENDA: AUGUST 20, 2013

SUBJECT: MODIFICATION TO LICENSE AGREEMENT FOR BARN THEATRE

SOURCE: PARKS AND LEISURE SERVICES DEPARTMENT

COMMENT: The Barn Theatre is a private non-profit group which operates in the building of the same name in Murry Park. The building is owned by the Barn Theatre, but the land on which the building sits is owned by the City and leased to the Theater. For certain events, the Theater includes performances outdoors and to the east of their building.

On June 4, 2013, the City Council approved Conditional Use Permit 2013-009 for alcohol sales at the Barn Theatre. One of the conditions of that permit was that temporary fencing be placed during events that would include outdoor beverage sales. Subsequent coordination with the California Alcoholic Beverage Control Board (ABC) has resulted in a change of that condition. The ABC requires that if alcohol sales are to be permitted outdoors with a 'permanent' permit, that the fencing be permanent, not temporary. As a result, Staff requests authority to approve construction of a fence, of a design subject to approval by the Zoning Administrator. Fence features would be incorporated into CUP 2013-009 as a minor modification once details are presented. Consultation with the City Attorney confirms that this action is a minor modification which could be approved by the Zoning Administrator. The fence would be constructed and maintained by the Barn Theatre. As a related matter, this would result in a modification to the existing licenses agreement between the City and the Barn Theatre.

RECOMMENDATION: That the City Council:

1. Authorize Parks and Leisure Services Department to negotiate the modification to the Revocable Licenses Agreement; and
2. Approve the construction of a fence of the same or lesser dimension as was approved in CUP 2013-009.

ATTACHMENTS: CUP 2013-009
Revocable Licenses Agreement

M Director NIA Appropriated/Funded

 City Manager

ITEM NO.: 11

RESOLUTION NO. 35 -2013

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF PORTERVILLE
CONTAINING FINDINGS AND CONDITIONS IN SUPPORT OF
CONDITIONAL USE PERMIT (PRC 2013-009C) TO ALLOW FOR AN ON-SALE TYPE 69
(BEER, WINE AND DISTILLED SPIRITS AT A NON-PROFIT THEATER COMPANY)
LICENSE FOR THE BARN THEATER LOCATED AT 42 SOUTH PLANO STREET

WHEREAS: The Porterville Planning Commission at their regularly scheduled meeting of August 11, 1965, approved Conditional Use Permit 2-65 with Resolution No.163; and

WHEREAS: The Porterville Planning Commission findings for Resolution No. 163 shall remain in effect; and

WHEREAS: The City Council of the City of Porterville, at its regular scheduled meeting of June 4, 2013, conducted a public hearing to consider Conditional Use Permit (PRC 2013-009C), to allow for an on-sale type 69 (beer, wine and distilled spirits at a non-profit theater company) license for the Barn Theater located at 42 South Plano Street; and

WHEREAS: A Conditional Use Permit is required pursuant to the City of Porterville Development Ordinance Section 301.03; and

WHEREAS: The City Council of the City of Porterville received testimony from all interested parties related to the requested alcohol license; and

WHEREAS: The City Council made the following findings:

1. That the proposed project will advance the goals and objectives of and is consistent with the policies of the General Plan and any other applicable plan that the City has adopted.

The proposed on-sale Type 69 (beer, wine and distilled spirits at a non-profit theater company) license would suit the purpose of the Barn Theater by providing an extra venue of entertainment that will not be detrimental to the public health, safety, or welfare.

2. That the proposed location of the project and the conditions under which it will be operated or maintained will not be detrimental to the public health, safety, welfare, or materially injurious to properties or improvements in the vicinity.

Conditions of approval are included herein to ensure adequate development standards are met. Further, all land owners within the City of Porterville are held to performance standards identified in Chapter 307 of the Development Ordinance. Specifically, Section 307.03 of the Ordinance states "Land or buildings shall not be used or occupied in a manner creating any dangerous, injurious, or noxious fire, explosive, or other hazard; noise, vibration, smoke, dust, odor, or form of air pollution; heat, cold, dampness, electrical or other

disturbance; glare, refuse, or wastes; or other substances, conditions, or elements which would substantially adversely affect the surrounding area.”

3. Pursuant to “General Rule” Exemption Code 15061 (b) (3) of CEQA guidelines the project as proposed is categorically exempt.

The activity is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. This activity can be seen with certainty that there is no possibility to have a significant effect on the environment.

4. The subject site is located in Census Tract 39.01 which allows a maximum of six (6) on-sale licenses. Currently, there are two (2) on-sale licenses issued. Under the regulations of the Business and Professions Code, whenever the ratio of off-sale licenses to population in a census tract exceeds the average ratio for the county, an “undue concentration” of licenses is determined to exist. According to the ABC, eleven (11) licenses currently exist in tract 39.01, nine (9) of which are off-sale and two (2) are on-sale. Because this application will not deem the on-sale licenses to be over-concentrated, a Letter of Public Convenience or Necessity is not required.

NOW, THEREFORE, BE IT RESOLVED: That the City Council of the City of Porterville does hereby approve Conditional Use Permit (PRC 2013-009C) subject to the following conditions:

1. The uses shall be consistent with Exhibit A- Site Plan, attached hereto.
2. At all times, the facility shall be operated and maintained to comply with applicable Local, State, and Federal laws and regulations.
3. The developer/applicant shall keep the beer, wine and distilled spirits in a secure place with access only available to the Board of Directors and staff, and in all other ways shall comply with Exhibit “A”. Any future changes in operation which substantially alters the condition or nature of the subject site will require approval by the City Council if such modification involves expansion, relocation, or change in accessibility to the conditioned uses.
4. Outdoor events shall continue to require approval of a Community Civic Event permit per Municipal Code standards.
5. Lighting in the outdoor seating area shall be provided to the satisfaction of the Police Chief and Zoning Administrator.
6. The outdoor consumption area as represented on the plan shall not exceed forty (40) feet in width by 100 feet in length, and shall be enclosed with temporary fencing to the satisfaction of the Police Chief and Zoning Administrator.

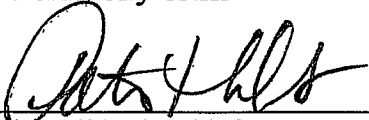
7. The applicant shall maintain the security lighting on the parking lot in a manner to allow reasonable surveillance of the area to the satisfaction of the Police Department and Zoning Administrator.
8. The applicant shall operate the establishment in such a manner as to preserve the public safety, health and welfare, to prevent the use from becoming a nuisance and operate the business in compliance with all laws, ordinances and regulations regarding the sale of alcohol. In the event that this or any other condition of approval is violated, the City Council may modify or revoke the conditional use permit as provided in Section 601.10 of the Porterville Development Ordinance.
9. The elements of the conditional use permit approving on-site alcohol sales will be subject to modification or revocation if the on-sale license is sanctioned by the State of California.
10. The entire site shall be permanently maintained free of accumulated dirt and litter and in an otherwise neat and attractive manner.
11. There will be no visible advertising of alcohol from the exterior of the facility.
12. The hours of operation during which alcoholic beverages may be sold and served under the on-sale license shall be limited to only during, and two hours prior to and one hour after, a bona fide theatre performance. The hours are further restricted to not earlier than 10:00 a.m. and not later than midnight Monday through Saturday and Sunday from 10:00 a.m. to 10:00 p.m.
13. Alcoholic beverages may be sold and served to ticketholders only.
14. The conditional use permit shall be become null and void if not undertaken actively and continuously pursued within two (2) years.

PASSED, APPROVED AND ADOPTED this 4th day of June, 2013.

By: 
Virginia R. Gurrola, Mayor

ATTEST:

John D. Lollis, City Clerk

By: 
Patrice Hildreth, Chief Deputy City Clerk

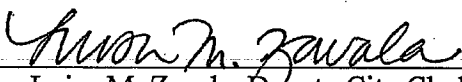
STATE OF CALIFORNIA)
CITY OF PORTERVILLE) SS
COUNTY OF TULARE)

I, JOHN D. LOLLIS, the duly appointed City Clerk of the City of Porterville do hereby certify and declare that the foregoing is a full, true and correct copy of the resolution passed and adopted by the Council of the City of Porterville at a regular meeting of the Porterville City Council duly called and held on the 4th day of June, 2013.

THAT said resolution was duly passed, approved, and adopted by the following vote:

Council:	WARD	McCRACKEN	GURROLA	SHELTON	HAMILTON
AYES:	X	X	X	X	X
NOES:					
ABSTAIN:					
ABSENT:					

JOHN D. LOLLIS, City Clerk


By: Luisa M. Zavala, Deputy City Clerk

REVOCABLE LICENSES AGREEMENT

THIS AGREEMENT, made and entered into the ____ of _____, 2013, by and between the CITY OF PORTERVILLE, a municipal corporation, hereinafter called the LICENSOR, and the BARN THEATRE, a non-profit corporation, hereinafter called the LICENSEE:

WITNESSETH:

WHEREAS, the LICENSOR is the owner of the hereinafter described real Property; and

WHEREAS, the property is deemed suitable, necessary, and proper by the LICENSOR and the LICENSEE for use by the LICENSEE in carrying on and conducting a community enterprise of a non-profit, non-political, and non-religious nature for which the LICENSEE has been incorporated and organized, and is now engaged in, carrying on and conducting as a community enterprise, and for the benefit, enlightenment, amusement, recreation, education and advancement of the Porterville Area, and not for the profit of any individual or enterprise.

NOW, THEREFORE, it is hereby covenanted and agreed between the LICENSOR and the LICENSEE as follows, to wit:

1. The real property herein referred to and covered by the terms of this license is that certain real property situated in the City of Porterville, County of Tulare, State of California, described as follows to wit:

Beginning at the Northwest corner of Northeast Quarter of Section 36, Township 21 South, Range 27 East, MD. B & M., said point being on the East Line of Plano Street in the City of Porterville,

County of Tulare, State of California; thence South 3°55' East along the easterly line of said Plano Street 375 feet to the point of beginning of the parcel being described; thence East 170 feet; thence South 7° East 375 feet, more or less, to the Northwesterly line of Park Drive; thence southerly and westerly along said westerly and northerly line of Park Drive 200 feet, more or less, to the easterly line of the said Plano Street; thence northerly along the easterly line of said Plano Street 500 feet, more or less, to the point of beginning.

Excepting therefrom, the westerly 20 feet measured at right angles to said easterly line of Plano Street, and also excepting such portions thereof as may be required for the widening of Park Drive.

2. That the LICENSOR for and in consideration of the promises, covenants, agreements, and stipulations herein contained on the part and behalf of the LICENSEE to be paid, kept and performed, at the time and in the form and manner herein specified, with time being made the essence hereof, hereby grants to the LICENSEE a license to engage, use and employ the described real property together with the appurtenances thereon for the purpose of carrying on and conducting as a community enterprise for the benefit, enlightenment, amusement, recreation, education and advancement of the Porterville Area a theatre group in accordance with the By-laws and Articles of Incorporation of LICENSEE. The LICENSEE shall use and employ the real property together with the improvements thereon exclusively for the usual and customary theatrical activities of the LICENSEE; and no business, retail, or wholesale, activities or enterprises shall be carried on or conducted for profit or be allowed, suffered, or permitted to be carried on at or upon the property

during the terms of this license, except as otherwise specified in this Agreement. LICENSEE shall be allowed to grant a sublicense, for a period of not more than two (2) consecutive days to other individuals and organizations for the use of the premises, provided that LICENSEE does this no more than five (5) times per year, and LICENSEE complies with the requirements of this Agreement, including, but not limited to, Paragraphs 5, 16, 17, 18, and 19.

3. The LICENSEE agrees at all times during the term of license to use the described real property, together with improvements thereon, solely and exclusively for activities of the LICENSEE presently authorized by its Articles of Incorporation and By-laws, it being further stipulated that no substantial amendment to the Articles or By-laws of the LICENSEE may be used to amend, extend, or modify the terms and provisions of this license without first obtaining the express written consent of the LICENSOR.
4. The Parties further agree that all of the terms, provisions, stipulations, agreements, and conditions herein contained on the part and behalf of the LICENSEE to be paid, kept, and performed, shall be and the same are hereby expressly declared to be continuing conditions, covenants and agreement by precedent to any right on behalf of the LICENSEE to enjoy or exercise any of the rights or privileges granted by this license.
5. LICENSEE agrees that in the use, employment and enjoyment of this license by the LICENSEE, the LICENSEE shall not suffer, allow, or permit any religious discrimination, political discrimination, or race discrimination to be

engaged in, conducted, carried on, or participated in by the LICENSEE or any agent, employee, or servant of the LICENSEE in carrying on or conducting any of the activities of the LICENSEE with reference to the use, employment and enjoyment of this license.

6. That during the entire term of this license, the LICENSEE shall at all times maintain with the State of California its status as a non-profit corporation.
7. That the term of this license shall commence as of April 17, 2012, for a period of five (5) years, ending at midnight on April 17, 2017. The parties may agree to extend this Agreement to be reviewed and adjusted for an additional one (1) year, with the terms of said Agreement to be reviewed and modified as the parties deem appropriate prior to renewal.
8. The LICENSEE stipulates and agrees that in the occupancy of the real property and the improvements thereon that the LICENSEE shall not suffer, allow or permit any waste to be committed thereto or thereon, nor shall the LICENSEE suffer, allow, or permit any mechanic's lien or other liens to be filed upon the real property or any of the improvements thereon; nor shall the LICENSEE suffer, allow, or permit the building or permanent improvement thereto, other than trade fixtures, to be removed from the real property during the term hereof without permission of the LICENSOR first had and received.
9. The LICENSOR shall have the free right at all times by its authorized agents or representatives of entry upon the property and into, upon, and about the improvements thereon for purposes of inspection and posting of any legal notices thereon.

10. That any and all signs erected or maintained by the LICENSEE upon the property or any of the improvements thereon shall fully comply with and conform to all regulations and standards of the City of Porterville now in force or which may hereafter be in full force and effect.
11. The LICENSEE shall of its own proper cost and expense, and without any cost, charge, or expenses to the LICENSOR, pay and discharge when due and before delinquent all light, electric power, water, gas, telephone, garbage removal, all utilities, and all other occupation charges for the premises and the same shall not be suffered, allowed, or permitted to become a charge or lien upon the real property.
12. It is expressly stipulated and agreed herein that the LICENSOR shall not be called upon, expected to, nor shall the LICENSOR pay and discharge any costs whatsoever arising from or in any connection with the use and enjoyment of this license by the LICENSEE or in the use and enjoyment of any of the improvements placed upon the property by the LICENSEE.
13. The LICENSEE shall at all times during the terms of this license keep and maintain all of the buildings, fixtures, and grounds directly adjacent to the building. LICENSEE shall ensure the same is kept in good order and repair, inside and outside, together with all fixtures and appurtenances used and employed in the occupancy/license of the real property and the improvements thereon, including sewer lines, plumbing fixtures, electrical fixtures and all conveniences or necessities used and employed by the LICENSEE in the occupancy of the premises; and the LICENSEE shall at its sole cost and

expense from time to time, as the needs may arise therefore, make renewals and replacements thereof in first class modern character and efficiency. LICENSOR shall maintain the turf area, parking lot, and prune trees when necessary.

14. The LICENSEE shall promptly and completely observe, comply with, and conform to all present and future applicable federal, state and local laws, requirements, and standards. LICENSEE shall, at its own cost and expense, make any and all improvements thereon or alteration thereto, structurally or otherwise, that may be required at any time hereafter by any such present or future law, rule, requirement, order, direction, ordinance, or regulations.
15. LICENSEE shall not make any alterations, improvements, additions or any other structural or building changes without the prior written approval of the LICENSOR.
16. The LICENSEE shall not suffer, allow, or permit any property, properly or legally assessable to the LICENSEE, to be assessed against the LICENSOR or against the real property or for which the LICENSOR shall be liable or responsible to pay, or for the same to become a charge or lien upon the real property.
17. It is expressly stipulated, covenanted and agreed that this license shall not be assigned, transferred, mortgaged or hypothecated in any manner; nor shall the buildings or improvements or facilities used and employed by the LICENSEE in enjoying this license be sublicensed without the prior written consent of the LICENSOR's *Parks and Leisure Services Director or his Designee*; for each

such assignment or sublicensing, it being further stipulated that the consent by the LICENSOR to any one assignment/sublicense shall not be construed as a consent to any further of additional assigning or sublicensing.

18. The LICENSEE covenants and agrees at all times during the term of the license to keep and maintain all buildings, structures, and insurable improvements on or pertinent to the real property fully insured (with LICENSOR named as an additional insured) for the replacement value to insure that the building can be replaced in the event of a fire with comprehensive coverage and in an amount and in such company or companies as may be acceptable to the LICENSOR; and all such policies of insurance shall be delivered to and held by the LICENSOR, except, however, that if the improvements shall have a mortgage thereon, a mortgage loss clause may be attached thereto in favor of such mortgage to the extent of the outstanding balance due on the aforesaid construction loan.

19. The LICENSEE, as a material part of the considerations to be rendered to the LICENSOR for the granting of the license, and to the fullest extent permitted by law, covenants and agrees, to the fullest extent permitted by law, to defend and hold LICENSOR harmless and free from all liability and claims for damages by reason of any injury to any person or persons, or property of any kind whatsoever, from any cause or causes whatsoever while in, upon, or in any way connected with the said licensed premises, or the premises adjacent thereto during the term of license or any extension thereof. It is further stipulated and agreed that the LICENSEE shall save, indemnify, and defend

the LICENSOR, all of its officers, agents and employees of and from all claims, demands, actions or causes of actions arising from or in any way connected with the occupation and of the demised premises, *including but not limited to any sublicense or use by other parties*, together with all costs and attorney's fees; that at all times during the term of this license, LICENSEE shall be and is hereby required and it hereby agrees to keep in full force and effect, with the premium fully prepaid thereon, Two Million Dollars \$2,000,000.00 for personal injury and property damage (*covering all occupation and use of the premises*) combined single limits with liquor and product liability, and shall file with the LICENSOR the original policies and/or certificate thereof.

20. If the LICENSEE shall fail, neglect, or refuse to pay, do, or perform any of the terms, stipulations, promises, covenants, conditions, or agreements hereof on its part and behalf to be paid, kept and performed, the LICENSOR may, at its option, but it shall not be obligated to do so, pay or cause the same to be paid, done or performed, and the amount of money expended by the LICENSOR in so doing, or incurred by the LICENSOR in so doing, shall become a debt immediately due from the LICENSEE to LICENSOR, and shall constitute a material breach hereof entitling LICENSOR to immediate termination hereof pursuant to paragraph 21 below.

21. If the LICENSEE shall fail, neglect or refuse to pay, for a period of (30) days after notice, do or perform any of the items in the form and manner herein provided, the terms, provisions, covenants, conditions, and agreements hereof

on its part and behalf to paid, kept and performed, the LICENSOR may terminate and cancel license and at such time and in such event, full and complete title to all improvements, buildings, structures, fixtures, excluding trade fixtures, shall have then vested in the LICENSOR, subject to the encumbrances now existing against such structures; and the LICENSOR may immediately re-enter into the possession of said real property together with all of the said improvements, and the same to have, hold, and enjoy thereafter as the sole, absolute and unconditional owner. In such event, LICENSEE shall have a period of thirty (30) days after notice to remove its personal property and trade fixtures from the premises.

22. LICENSEE covenants and agrees on the last day of the term of this license, or the sooner determination of the term of this license, to peacefully leave, surrender and vacate to the LICENSOR the said real property together with the improvements thereon and the fixtures attached thereto in good order and condition and state of repair.

23. Failure on the behalf of the LICENSOR to insist on strict performance of the covenants, terms, stipulations, agreements and conditions of the license shall not be construed as a waiver by the LICENSOR of any of its rights hereunder, or as a waiver or a relinquishment of the strict future performance of the covenants, conditions and agreement herein contained, but all and each thereof shall be and remain in full force and effect.

24. If any litigation is commenced between the parties to this Agreement concerning the Agreement or the rights and duties of either in relation to the

Agreement, the party prevailing in the Litigation shall be entitled, in addition to any other relief that may be granted in the litigation, to its cost for the litigation including expert witness fees and a reasonable sum as and for its attorney's fees in the litigation, which shall be determined by the court in that litigation or in a separate action brought for that purpose.

25. The parties agree that this Agreement is entered into and is to be performed in Tulare Country, California.

WITNESS the hands and seals of the parties the day and year first above written.

CITY OF PORTERVILLE

BY _____
Virginia R. Gurrola, Mayor

BY _____
John D. Lollis, City Clerk

BARN THEATRE

BY _____
President