

## **Citizens' Oversight Projects (COPs)**

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SaveECPAC Project

September 23, 2014



TO:

Bill Wells, El Cajon Mayor

El Cajon City Council

Douglas Williford, El Cajon City Manager

Morgan Foley, El Cajon City Attorney

## **Ten Conditions for Legal and Prudent Rental of ECPAC to The Rock Church and Other Users**

### **Introduction**

The City Council voted on August 12, 2014 to proceed with exclusive negotiations with the Rock Church to lease the East County Performing Arts Center (ECPAC) as a “major tenant” to use the theater for religious worship services throughout the year, and allow them to build an adjacent and permanent (35 year lease) building for Rock Church offices<sup>1</sup>. The SaveECPAC committee of Citizens Oversight submitted a written communication to the City of El Cajon on September 4, 2014, outlining the legal basis for objections to the lease agreement as initially presented by City Manager Doug Williford<sup>2</sup>. Citizens Oversight has been involved in providing oversight to this issue since 2005 and before (see “About Citizens Oversight” on page 6.)

Based on the legal precedents we outlined in that letter, we hereby provide these Ten Conditions for legal and prudent rental of ECPAC to the Rock Church and other renter, to assist the City of El Cajon create a deal with the Rock Church which will fall within those legal precedents. We do not believe it is impossible for the Rock Church, and other religious groups, to rent the theater, contrary to some

1 <http://www.copswiki.org/Common/M1484> – El Cajon City Council August 12 Meeting Agenda, Item 4.3

2 <http://www.copswiki.org/Common/M1487> – “Issues of Concern Regarding Negotiations with Rock Church for Use of ECPAC and surrounding City Property”

statements made by some city officials. However, a religious group is not “just another business” and there are special considerations so the City can be fair to all segments of the public. The following ten items are what we believe is necessary for the ECPAC theater to be legally, prudently, and fairly used by religious groups like the Rock Church<sup>3</sup>.

## **1. Primarily a “Performing Arts Center”**

The ECPAC facility is primarily a Performing Arts Center which may rent to anyone, including religious groups, rather than primarily a “church” which may rent unused time. The 1995 transfer agreement stated that the theater would be “operated for civic, educational, cultural, and recreation purposes,” and the City should uphold this agreement.

## **2. Term of any rental agreement – one year or less**

The City has a responsibility to ensure that all groups have equal access to this public asset. Having long-term rental agreements means groups have to be ready to jump on board during a narrow window of opportunity and then have to wait many years for another opportunity. Large groups, by dominating the theater, make it difficult for other, especially smaller community oriented nonprofits to use the theater at all. By limiting terms to one year or less, this provides equal access to all groups, and mirrors limits school districts enforce in renting their facilities. Citizens Oversight would support even shorter maximum terms, to perhaps one quarter (i.e. 90 days) to provide more opportunity to groups that may not want such extensive rental agreements that would otherwise shut them out of the opportunity.

## **3. Frequent Review and Fair Arbitration**

Rental agreements must be reviewed for renewal after each term, and there must be a way to fairly arbitrate between the current (religious) user and any other users (including secular users) that may want to use it, for those same days

This is how the school districts do it. Their policies state that religious use must be temporary. The State Attorney General's opinion is that the rental agreements can, however, be renewed indefinitely. By putting them up for approval each time, this emphasizes that the facility may be provided to a different user at the end of each rental term.

The California Constitution includes a provision that “Free exercise and enjoyment of religion without discrimination or preference are guaranteed.” The City has a responsibility to respect this

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<sup>3</sup> We reserve the right to add to or change this list if we discover additional provisions that are necessary.

provision in how it conducts its interaction with the public. So if two users want to use the theater at the same time, there must be a mechanism to fairly arbitrate between those users, so that one user will not dominate any other user.

#### **4. Any religious group cannot also “run the theater” during other rental times or decide who can use the facility**

The public has the right for “free exercise of religion” and that also means to be free of religious influence, if desired. Allowing a religious group to manage and/or operate the theater during times when that group has not rented the theater allows them to control and influence other users. The group that runs the theater should not also be a major user of the theater. Any group that operates or manages the theater must do so on a nondiscriminatory and nonpreferential basis.

#### **5. For a religious user who wishes to rent all Sundays, the schedule of non-Sunday uses must be flexible to accommodate other users and community events.**

The Rock Church has proposed that it rent all Sundays of the year, each for an 18-hour period, from 4 AM to 11PM. In addition, it wants to also rent all Tuesdays for rehearsals and one Friday and Saturday each month. These non-Sunday rentals should be flexible to allow users to rent the theater when necessary. For example, the rehearsal on Tuesday may need to occur on a different day if an important engagement requires Tuesday. Since rehearsals do not encourage any customers to come to the business district, the City should prefer a performing group on those days instead. It may be necessary to insist that rehearsals be performed elsewhere, if an entire rental evening would be consumed at ECPAC with no audience at all.

If other religious users wanted to use all Fridays or all Saturdays (Islamic groups tend to meet on Friday and Jewish groups on Saturdays), allowing the Rock Church to lock up those days, once per month, would unduly stop those other religious users from exercising their freedom to worship in the same facility.

Flexibility in the use of these non-Sunday days is essential to allow a theater manager to bring in acts that may need multiple days or require extensive changes to the theater (scenery, lighting changes, special audio) to support those productions.

The theater manager may find a religious user is fine as long as they do not consume all of Sunday, so as to free up the theater for Sunday matinee or evening events. This is different from what is being

proposed by the Rock Church, as they have requested an extensive and dominating schedule that consumes all Sunday, from 4:00 AM to 11:00 PM.

## **6. Rates given to the Rock Church must not be more advantageous than those given to any other similar (nonprofit) user on an hour-by-hour basis**

The historical standard rate for nonprofit users at ECPAC has been about \$2500 per (8 hour) day. The proposal by the Rock Church suggests that they will be renting the theater for about \$1000 per (8 hour) day. This is far below any other theater in this market area. The City cannot give special treatment to one religious user over other religious users or over secular users. The Rock Church is not an organization that is under any financial distress. Thus, whatever rate given to the Rock Church will necessarily also be the top rate given to any other (nonprofit) user. To charge the Rock Church sub-market rates is imprudent as it then means the theater manager must then give all renters will get the same submarket rates, or be guilty of providing preferential treatment to one religious group over all others.

## **7. Rental agreements must be “at will” and allow termination without cause**

The City, and any future theater manager, does not know in advance how well a long-term agreement will work out. Any given renter may not be respecting the premises (for example CCT opened holes in ceiling firewalls to allow workers to unsafely walk out on lighting supports over the seating area), parking may be a problem, or the theater manager may want to embark on a new direction to develop the theater and the arts district. Similarly, if the renter wishes to cease renting the theater, they are allowed to terminate. However, termination at will typically requires reasonable notice and changes within say 90 days may have monetary penalties associated with such termination, usually on a sliding scale.

In the case of The Rock Church, there are at least three lawsuits that have surfaced, including the recent termination of a pastor who was prepared to testify against the church in a child-molestation suit. If such matters should be proven true, then there must be a way to exit the agreement with such a renter.

## **8. The Grossmont Cuyamaca Community College District must have first priority, per 1995 transfer agreement**

In the 1995 transfer agreement, the City agreed that five days would be provided to the College District free of charge, and the district could rent other days at the best rate given to any other user. Since this agreement predates any agreement with any renter, the GCCCD must be given priority to ensure that

their needs are respected.

## **9. Any new building on public property and associated with the ECPAC theater must be utilizable by any theater user on an equal basis.**

The Rock Church has proposed that they be provided with a land lease at the rate of \$4,000 per month for 35 years, to allow them to build a multistory office building just south of the ECPAC theater for their offices and Sunday School classes. Providing this singular religious user sole access to this building for their operations is a violation of the “Establishment clause” of the U.S. Constitution.

After an extensive the review of the theater by the ECPAC Foundation (a project of Citizens Oversight) culminating in a proposal made in 2012<sup>4</sup>, the addition of a building in this area was suggested to accommodate “back stage” events where the audience can meet performers. These are commonly found in theaters and frequently this is a separate venue on its own accord, normally outfitted with refreshments (cocktails, etc) as well. Also in this building, we proposed additional restrooms which are desperately needed by theatergoers and may be made available to the general public as well, for downtown events (car shows, parades, etc) as there are no public restrooms in the downtown district. Venue space for seminars and meetings is nonexistent in El Cajon, and this building can improve the inventory available to the general public in El Cajon. Offices for the management of the theater are appropriate in this building so the entire ECPAC theater need not be air conditioned during unused days and still provide comfortable offices for the theater management team.

There are plenty of vacant buildings in the nearby area which would be suitable for the Rock Church offices, if they decide these are needed. General purpose meetings rooms could be designed to be suitable for Sunday School classes by the Rock Church. This entire new building should also be available to other secular and religious users of the ECPAC theater, or even to groups that do not need to rent the entire theater, not just the “rooftop venue” as proposed.

If handled in this manner, there should be no constitutional violations. But turning this into the Rock Church headquarters with special access to ECAPC is certainly a violation of the establishment clause. The City must be able to terminate an agreement with any user of this building as well, along the same lines as suggested in Item #7. A 35-year land lease is so imprudent that it does not even pass the giggle test.

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4 <http://www.copswiki.org/Common/M1269> – “Proposal to the City of El Cajon regarding the East County Performing Arts Center” (Citizens Oversight DBA ECPAC Foundation)

## 10. The City should establish an independent oversight board

An independent oversight board is a prudent step to take to allow the theater to be independent from any major user and from the pressures of political campaigns. Such an oversight board would review rental agreements to insure they are in the best interests of the community and fairly arbitrate between various users who may wish to use the theater at any given time. Conflicts in events, such as between a heavy Sunday user like The Rock Church, and downtown events, like the Mother Goose Parade, can be dealt with by this group.

### About Citizens Oversight and the SaveECPAC Committee

Citizens Oversight, Inc. (AKA Citizens Oversight Projects – COPS) is a 501(c)3 nonprofit that focuses on improved civic engagement. The ECPAC theater is one of the first issues we started following and was one impetus for the formation of COPS. Members of COPS were involved as citizen observers in the Blue Ribbon Commission formed to study the transfer of the theater from the Arts Center Foundation to the Christian Community Theater in 2005. One of the groups that was essential to the plans that led to the building of the theater was the Grossmont Community Concerts Association – GCCA, founded in 1947 by Harold Lutz, band and orchestra leader at Grossmont High School, and father of Raymond Lutz, founder of Citizens Oversight. Thus, this group has a long history studying the theater, and after the shutdown in 2010 and threatened demolition in 2012, created a plan of action for the city to follow to reopen the theater.<sup>5</sup>

Respectfully Submitted:



Ray Lutz  
Save ECPAC Committee  
Citizens Oversight, Inc, a 501c3 Corporation

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<sup>5</sup> <http://www.copswiki.org/Common/M1269> – “Proposal to the City of El Cajon regarding the East County Performing Arts Center” (Citizens Oversight)