

**CHILDSPLAY, INC.
USE AGREEMENT**

THIS USE AGREEMENT (“Agreement”) made and entered into this ___ day of _____, 2016 (“Effective Date”), by and between the CITY OF TEMPE, an Arizona municipal corporation (“City”) and Childsplay, Inc., an Arizona non-profit corporation (“Childsplay”) which provides programming and production of performance arts-based programs for Tempe youth and the general community. City and Childsplay may be referred to jointly as the Parties, and each separately may be referred to as a Party.

**Section 1
AGREEMENT TO USE PREMISES; TERM**

City hereby enters into this Agreement to allow Childsplay to utilize the real property and improvements thereon located at the Mitchell School property located at 900 S. Mitchell Drive, Tempe, Arizona 85281, and the real property on which it is located of approximately 2.86 acres in Tempe, Arizona, as more fully described on Exhibit A (the “Premises”). The term of this Agreement shall commence on the Effective Date and end Fifty (50) Years thereafter. The Premises may be used for the purposes and under the conditions described in Section 3 of this Agreement. By mutual agreement the Parties may find a more suitable location for the continuation of the services and functions performed by Childsplay under terms mutually agreed upon by the Parties Any and all revisions to this Agreement shall be documented in writing and signed by both Parties. Title to the Premises shall at all times during the term of this Agreement remain in the City’s name.

**Section 2
CONSIDERATION**

On the Effective Date and each month thereof during the term of this Agreement, Childsplay shall pay to City the sum of One Thousand Five-Hundred Dollars \$1,500.00 per month from the Effective Date through June 30, 2032; Two Thousand Dollars (\$2,000.00) per month from July 1, 2032 through June 30, 2048; and Two Thousand Five Hundred Dollars (\$2,500.00) per month from July 1, 2048 through June 30, 2066 (“Fee”) plus any and all excise, privilege, use or sales tax levied on the rentals or the receipt thereof. Each monthly payment shall be due by and remitted to the City on the 1st day of each month. The consideration for this Agreement includes, without limitation, Childsplay’s payment of the entire cost of the construction of the improvements constituting the Premises, Childsplay’s performance of all of the covenants and obligations under this Agreement, the Performance Agreement that Childsplay and the City entered into as of January 14, 2016, and Childsplay’s contribution toward fulfillment of City’s policy and desire to promote the arts and encourage the significant benefits of performance-based art for the Tempe community and in particular, for the youth of the community.

Section 3
PERMITTED USES; CHILDSPLAY’S DUTIES

3.1. Childsplay shall use the Premises solely for the purpose of providing innovative theatrical programming and productions, and in particular, performance-based art for the youth of the community, and arts education programs; including, office space, rehearsal and performance space, workshop space for the creation and fabrication of stage scenery and costumes, and classrooms. Childsplay shall not make any alteration, addition to or improvement of, and shall not demolish all or any portion of the Premises without City’s prior written consent, which consent shall not be unreasonably withheld. Childsplay’s improvements shall be governed by Section 15, herein. Childsplay shall use the Premises without creating, or causing to be created, nuisances or hazards to the public health or safety and also not use or permit any use of Premises for any illegal or immoral purposes. Childsplay shall comply with all federal, State and local laws, rules and regulations concerning the Premises and the use thereof. Childsplay agrees that its use of the Premises shall be conducted in such a manner so as not to disturb the quiet enjoyment of neighboring properties. Childsplay understands and agrees that the parking or storage of any type of vehicle or trailer on any unpaved area shall be permitted only with the written consent of City and that no vehicle or trailer shall be driven on or over any landscaped or grass area without permission of City , except that City acknowledges and agrees that the parking area to the east of the Premises may continue to be used by park users and Childsplay personnel and for the occasional overnight parking of Childsplay vehicles for loading purposes. City also agrees that Childsplay may reserve parking spaces for along 9th Street for the Childsplay van(s).

3.2. Childsplay shall undertake and fulfill the following duties and obligations:

3.2.1. Comply with all obligations primarily imposed upon Childsplay by applicable provisions of applicable laws, including the Tempe City Code and building code materially affecting health and safety;

3.2.2. Keep the Premises in a clean, neat and safe condition free of unreasonable wear and tear;

3.2.3. Dispose from the Premises all ashes, rubbish, garbage and other waste in a clean and safe manner;

3.2.4. Maintain and keep all plumbing fixtures on the Premises in a clean and neat condition, free of damages;

3.2.5. Use all electrical, plumbing, sanitary heating, ventilating, air conditioning and other facilities and appliances in the Premises in a reasonable manner;

3.2.6. Not deliberately or negligently destroy, deface, impair or remove any part of the Premises or permit any other person to do the same; provided, however, that Childsplay shall not be responsible for graffiti or other damages caused by third parties not under Childsplay’s control;

3.2.7. Maintain the Premises in the same condition as at the time Childsplay first takes possession (normal wear and tear excepted), and keep the Premises free from unsightly debris and equipment;

3.2.8. Pay all long distance telephone and facsimile charges, Wi-Fi, telecommunication, cable and internet charges, and shall keep the Premises free of any liens created by the Childsplay's failure to make such payments;

3.2.9 Maintain all existing signage on the Premises and obtain all required City permits for any future signage;

3.2.10 Continue to provide the City a non-voting seat on Childsplay's Board of Directors; and

3.2.11 Provide the City with periodic reporting as it becomes available, but at a minimum on an annual basis, with financial information on Childsplay's fundraising reports as provided to Childsplay's Board of Trustees and its financial statement.

3.3 Childsplay shall not have the right, without the City's prior written consent, to create a security interest in Childsplay's interest under this Agreement (or in any subleases and the rents, income and profits therefrom) by mortgage, deed of trust or collateral assignment or otherwise.

Section 4 PERSONAL PROPERTY

The personal property of Childsplay placed in the buildings during the term of this Agreement by Childsplay shall remain in the property of Childsplay and may be removed by Childsplay from the Premises at any time during the Agreement term or upon the termination of this Agreement, provided Childsplay shall repair any damage to the Premises caused by such removal. Childsplay shall be responsible for repairing or replacing any items of personal property, appurtenance and equipment that are part of or located on the Premises damaged or destroyed during the term of this Agreement, and upon termination of this Agreement shall return the Premises to City in the same condition as at the execution of this Agreement, normal wear and tear excepted.

Section 5 UTILITIES AND MAINTENANCE

5.1. Childsplay shall, at its sole cost and expense, keep the Premises in good order and repair, normal wear and tear excepted, pursuant to Section 14 herein.

5.2. Childsplay shall pay all costs associated with the Premises, including without limitation all utilities, including , electricity, natural gas, and or every other service provided to the Premises before the charges become delinquent.

5.3 Childsplay shall have the right, subject to City's prior written consent, to make subsequent alterations, additions or other changes to improvements or fixtures existing from time to time, and the Premises shall constitute all such improvements as they exist from time to time. In connection with any action which Childsplay may take with regard to such improvements, alterations, additions or other changes, Childsplay shall be solely responsible for and hold harmless City for all costs, expenses and liabilities arising out of or in any way connected with such improvements, including without limitation, materialmen's and mechanics' liens. This provision shall in no way be construed to give rise to liability or responsibility for any damages to the Premises or any property located thereon.

5.4 City shall have the right at reasonable times and upon reasonable notice, to enter upon the Premises for inspection.

5.5 City shall have no responsibility, obligation or liability under this Agreement whatsoever with respect to the following:

5.5.1. costs of the use of utilities, including gas, heat, air conditioning, water, light, power, telephone, wi-fi, sewage, and any other utilities supplied to the Premises.

5.5.2. disruption in the supply of services or utilities to the Premises.

5.5.3. maintenance, repair or restoration of the Premises, solely excepting certain capital improvements to the Mitchell School Building, as agreed to by the City in its reasonable discretion.

5.6 Notwithstanding the foregoing, City desires to ensure that the appearance of the Property is consistent with the adjacent park property, which is owned and maintained by City. Therefore, as long as the City operates the surrounding area as a park open to the public, the City shall maintain the landscaping of the park property and any irrigation or watering system located on same, consistent with maintenance standards applicable at other similar facilities owned and maintained by the City at the time this Agreement is executed. City shall be entitled to reimbursement from Childsplay for the cost of any repairs or replacements to the landscaping or irrigation and watering systems caused by negligence of Childsplay or its invitees. Childsplay shall grant the City access to the Property at all reasonable times for the purpose of performing its maintenance obligations under this Section 5.6.

Section 6 DEFAULT AND REMEDIES

6.1 Default.

6.1.1 Childsplay Default. Childsplay shall be deemed in default under this Agreement upon the occurrence of any of the following events:

6.1.1.1. The failure to pay any amount due under this Agreement

and failure to cure such non-performance within thirty (30) days after written notice from City;

6.1.1.2. The failure to keep effective and in place the insurance required by this Agreement. City may terminate this Agreement upon a reasonable stated time period to cure this default as set forth in a written notice by City;

6.1.1.3. The failure by Childsplay to (a) maintain its routine daily operations for sixty (60) consecutive calendar days, or (b) maintain its status as an independent entity by dissolving, liquidating, merging or consolidating with or into any other entity whose mission is not substantially the same, or (c) maintain its existence as an Arizona nonprofit corporation unless such existence is reinstated within the applicable time period specified in §10-1422 of the Arizona Revised Statutes, as amended, or any successor provision; or (d) maintain its status as an entity the income of which is exempt from taxation pursuant to §501(c)(3) of the Internal Revenue Code of 1986, as amended;

6.1.1.4. The failure to perform any other term or condition of this Agreement and the failure to cure such non-performance within thirty (30) days after receipt of notice thereof from City;

6.1.1.5 The failure by Childsplay to perform any term or condition of the Performance Agreement it entered into with the City as of January 14, 2016 (C2016-04) beyond any applicable cure period in the Performance Agreement unless due to a City default as more fully described in such Performance Agreement; or

6.1.1.5. If such non-performance cannot reasonably be cured within such 30-day period, Childsplay fails to commence to cure the same within such 30-day period and thereafter fails to diligently pursue and complete the cure as soon as reasonably possible thereafter.

6.2. City Default. City shall be deemed to be in default of this Agreement upon the failure to perform any other term or condition of this Agreement and the failure to cure such non-performance within thirty (30) days after receipt of notice thereof from Childsplay.

6.3. Remedies. Upon the occurrence of any default, in addition to any other rights and remedies arising by operation of law, the non-defaulting party shall have the right to terminate this Agreement in accordance with Section 16 of this Agreement, in which event Childsplay shall remove all of Childsplay's property from the Premises at Childsplay's sole expense within sixty (60) days of the termination. The non-defaulting party may exercise any and all other remedies at equity and in law, to recover monies owed and any other damages incurred as a result of or arising from the other party's default.

Section 7
TAXES AND INSURANCE

7.1. Taxes. Childsplay agrees to pay or cause to be paid, before delinquent, any and all taxes levied or assessed against the Premises and which become payable during the term hereof. Childsplay acknowledges that the Premises may be subject to property tax as government-owned leased improvements pursuant to the provisions of A.R.S. §§ 42-6201-42-6209, or other provision of state law, and may be taxable pursuant to A.R.S. § 42-6203 (A)(7), and that the failure to pay such taxes would constitute an event of default under this Agreement and result in Childsplay's divestiture of its interest in and right to occupy the Premises.

7.2. Insurance.

7.2.1. Minimum Limits of Insurance. Childsplay shall at all times during the term of this Agreement, at its own cost and expense, carry and maintain for the mutual benefit of the City and Childsplay, general public liability insurance against claims for bodily injury, death or property damage, products/completed operations and personal and advertising injury, which insurance shall cover claims as may be occasioned by the operations, act, omission or negligence of Childsplay or its officers, agents, representatives, employees or servants during all times that this License is in effect. Insurance limits are inclusive of umbrella coverage. Childsplay shall maintain limits no less than those stated herein for each type of insurance.

7.2.2. General Requirements. Childsplay's insurance of the types and amounts required in this section shall be from companies possessing a current A.M. Best, Inc. rating of A-VII, or better and legally authorized to do business in the State of Arizona.

7.2.2.1 All insurance required herein shall be maintained in full force and effect until all work or services required to be performed under the terms of this Agreement is satisfactorily completed and formally accepted. Failure to do so may, at the sole discretion of City, constitute a material breach of this Agreement and may result in termination of this Agreement.

7.2.2.2 The insurance coverage, except workers' compensation and professional liability, required by this Agreement, shall name City, its agents, representatives, directors, officials, and employees, as additional insureds, and shall specify that insurance afforded Childsplay shall be primary insurance, and that any self-insured retention and/or insurance coverage carried by City or its employees shall not contribute to the coverages provided by Childsplay. This provision and the naming of the City as an additional insured shall not be construed as giving rise to responsibility or liability of the City for applicable deductible amounts under such policy(ies).

7.2.2.3 The insurance policies shall contain a waiver of transfer rights of recovery (subrogation) against City, its agents, representatives, officers, directors, officials and employees for any claims arising out of Childsplay's acts,

errors, mistakes, omissions, work or service.

7.2.2.4 The insurance policies may provide coverage, which contain deductibles or self-insured retentions. Such deductible and/or self-insured retention shall be assumed by and be for the account of, and at the sole risk of Childsplay who shall be solely responsible for the deductible. Payment of such deductible shall not be construed in any way to deem the City's self-insurance or other coverage as primary under this Agreement.

7.2.2.5 All policies shall contain an endorsement providing that the coverage afforded under such policies shall not be canceled or materially changed until at least thirty (30) days prior written notice has been given to City.

7.2.2.6 Childsplay shall be responsible for ensuring that the City is notified within thirty (30) days of the occurrence of any reduction in the insurance coverage amounts, cancellation or expiration of any of the policies as required by this License.

7.2.2.7 City reserves the right to periodically review said insurance limits to ensure coverage based on market and risk requirements throughout the effective term of this Agreement.

7.2.3. Proof of Insurance-Certificates of Insurance.

7.2.3.1. Prior to or upon execution of this Agreement, Childsplay shall furnish to City Certificates of Insurance issued by Childsplay's agent or broker, as evidence that policies providing the required coverages, conditions and limits required by this Agreement are in full force and effect and obtain from the City's Risk Management Division approval of such Certificates. Such certificate(s) shall include the endorsement listing the City as an Additional Insured pursuant to Section 7.2.2.2 and shall be attached as *Exhibit "B"* to this Agreement.

7.2.3.2. If a policy does expire during the life of this Agreement, a renewal certificate must be sent to the City ten (10) business days prior to the expiration date. Because of the potentially long term of this Agreement, the City reserves the right to make periodic adjustments in the coverage requirements to provide for appropriate coverage if commercially reasonable.

7.2.3.3. All Certificates of Insurance shall identify the policies in effect on behalf of Childsplay, their policy period(s), and limits of liability. Coverage shown on the Certificate of Insurance must coincide with the requirements in the text of the Agreement documents. Information required to be on the Certificate of Insurance may be typed on the reverse of the Certificate and countersigned by an authorized representative of the insurance carrier or agent. Copies of the initial Certificate of Insurance and any and all subsequent renewals

that are required under this Agreement shall be sent to:

City of Tempe
Attn: Risk Manager
20 E. 6th St., 2nd Floor
Tempe, AZ 85281

with copy to:
City of Tempe
Attn: Community Services, Social Services
3500 S. Rural Road
Tempe, AZ 85282

7.2.3.4. Childsplay shall provide City, within ten (10) business days, certified copies of any or all of the herein required insurance policies and/or endorsements. City shall not be obligated, however, to review same or to advise Childsplay of any deficiencies in such policies and endorsements, and such receipt shall not relieve Childsplay from, or be deemed a waiver of City's right to insist on, strict fulfillment of Childsplay's obligations under this Agreement.

7.2.4. Required Coverage.

7.2.4.1. Such insurance shall protect Childsplay from claims set forth below that may arise out of or result from the operations of Childsplay under this Agreement and for which Childsplay may be legally liable, whether such operations be by Childsplay or by a consultant or subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts may be liable. Coverage under the policy will be at least as broad as Insurance Services Office, Inc., policy form CG 00 01 10 01 and CG 20 37 07 04 or equivalent thereof, including but not limited to severability of interest and waiver of subrogation clauses.

7.2.4.2. Claims for damages because of bodily injury, sickness or disease, or death of any person other than the Childsplay's employees;

7.2.4.3. Claims for damages insured by usual personal and advertising injury liability coverage;

7.2.4.4. Claims for damages, because of injury to or destruction of tangible property, including loss of use resulting therefrom;

7.2.4.5. Claims involving contractual liability insurance applicable to Childsplay's obligations under the Indemnification Agreement.

7.2.5. Commercial General Liability - Minimum Coverage Limits. The Commercial General Liability insurance required herein shall be written for not less than \$1,000,000 limits of liability. Any combination between general liability and excess general liability alone amounting to a minimum of \$1,000,000 per occurrence and an aggregate of \$2,000,000 in coverage will be acceptable. The Commercial General Liability additional insured endorsement shall be as broad as the Insurance Services, Inc.'s (ISO) Additional Insured, Form B, CG 20 10 10 01 and CG 20 37 07 04, and shall

include coverage for Childsplay's completed operations and products.

7.2.6. Workers' Compensation and Employers' Liability. Childsplay shall maintain Workers' Compensation insurance to cover obligations imposed by federal and state statutes having jurisdiction over Childsplay's employees engaged in the performance of the work or services; and, Employers' Liability insurance of not less than \$1,000,000 for each accident, \$1,000,000 disease coverage for each employee, and \$1,000,000 disease policy limit. In case any work is subcontracted, Childsplay will require the subcontractor to provide Workers' Compensation and Employers' Liability to at least the same extent as required of Childsplay.

7.2.7. Automobile Liability. If Childsplay owns and/or operates vehicles in Arizona, Childsplay shall maintain Commercial/Business Automobile Liability insurance with a combined single limit for bodily injury and property damage of not less than \$1,000,000 each occurrence with respect to any owned, hired, and non-owned vehicles assigned to or used in performance of the Childsplay's work. Coverage shall be at least as broad as coverage Symbol 1, "any auto", (Insurance Service Office, Inc. Policy Form CA 0001 0306, or any replacements thereof). Such insurance shall include coverage for pollution for upset/overturn/collision of the automobile(s) and loading and off-loading hazards if hazardous substances, materials or wastes are to be transported and a MCS 90 endorsement shall be included with coverage limits of \$1,000,000 per accident for bodily injury and property damage.

7.2.8. Childsplay shall not commit or permit any acts or failure to act in or about the Premises which may in any way impair or invalidate such policy or policies of insurance for the building. Childsplay shall cooperate with City in connection with the collection of any insurance monies that may be due in the event of loss and shall execute and deliver to City such proofs of loss and other instruments as may be required for the purpose of facilitating the recovery of any such insurance monies that may be due in the event of loss and shall execute and deliver to City such proofs of loss and other instrument.

7.2.9. If the Premises are wholly or partially destroyed by fire or other casualty insured against by City, Childsplay shall give immediate notice thereof in writing to City, and shall fully cooperate with City in filing all necessary proofs of claim with insurance companies. The proceeds of such insurance applicable to the Premises shall be paid to City, and City shall rebuild, repair or restore the Premises to their condition at the time immediately preceding the loss or damage; provided, however, that City may elect to retain such insurance proceeds other than proceeds relating to the Childsplay's personal property and shall not be required to rebuild, repair or restore the Premises. This Agreement shall be terminated if such damage or destruction occurs within the last twelve (12) months of the term of this Agreement, or if more than one-third (1/3) of the Premises is damaged or destroyed. In the event of total destruction of the Premises, the rent shall abate during the period of rebuilding, repair or restoration by City or in the event of partial destruction of the Premises, the rent shall abate pro rate based upon the portion of the Premises rendered unusable during the period if rebuilding, repair, or restoration by City.

Section 8
ASSIGNMENT AND SUBLETTING; USE OF PREMISES BY CITY

Childsplay is not authorized to assign or sublease or subcontract its duties or obligations under this Agreement. However, notwithstanding the foregoing, City acknowledges and agrees that Childsplay may at certain times throughout the term of this Agreement, enter into short-term rental agreements for use of certain rehearsal and classroom space at the Premises to other community groups, non-profit corporations, and individuals, toward the promotion of arts and arts-based programming to benefit the youth of Tempe and the general community. Such short-term rental agreements are hereby approved by the City on a cost-recovery basis for the use of such space at the Premises. The City hereby reserves the right to utilize space at the Premises that is underutilized or not utilized, or not otherwise reserved, for the purpose of holding occasional City functions, activities and/or events, with the consent of the Childsplay, which shall not be unreasonably withheld.

Section 9
NONDISCRIMINATION REGULATIONS

Childsplay, its representative or successors in interest and assigns, as a part of the consideration hereof, does hereby covenant and agree as a covenant running with the land that it shall not discriminate against any person because of race, color, religion, sex, sexual orientation, gender identity, age, familial status, national origin or U.S. Veteran's status. In addition, Childsplay shall comply with the Americans with Disabilities Act, as amended from time to time (the "ADA"), and applicable state and local laws, and will not discriminate against disabled persons in accordance with applicable laws, rules and regulations. The foregoing shall not require Childsplay to retrofit the Premises to comply with the ADA as of the date of this Agreement. In the event of breach of any of the above nondiscrimination covenants, City shall have the right to immediately terminate this Agreement and to re-enter and repossess said Premises, and hold the same as if said Agreement had never been made or issued.

Section 10
LIABILITY AND INDEMNIFICATION

To the fullest extent of the law, Childsplay shall defend, indemnify and hold harmless the City, its officers, employees, boards, commissions, agents and assigns, individually and collectively, from and against all liabilities, obligations, losses, damages, penalties, claims, actions, suits, costs, charges, and expenses, including reasonable attorney's fees (hereinafter "Claims") which may be imposed upon or incurred by or asserted against the City Agreement. It is the intent of the parties to this Agreement that City shall, in all instances, except for loss or damage resulting from sole negligence of City, be indemnified against all liability, of any nature whatsoever for or on account of any injuries or death of a person or damages to or destruction of property belonging to any person arising out of, or in any way connected with Childsplay's use of the Premises or any part thereof regardless of whether or not the liability, loss or damage is caused, or alleged to be caused, in whole or in part by the willful or negligent act, omission, misconduct, or fault of Childsplay or any of its agents, employees, contractors, patrons, guests, invitees or of any other person entering upon the Premises hereunder with the implied or expressed invitation or permission of Childsplay or City.

the event that any action or proceeding shall be brought against City by reason of any claim referred to in this Section, Childsplay, upon written notice from City, shall at Childsplay's sole cost and expense, defend the same through counsel selected by the City. City shall not be liable for any damage to or theft of any personal property owned, leased or used by Childsplay left in, on or about the Premises. The provisions of this Section shall survive termination of this Agreement. The Childsplay acknowledges that it is leasing the Premises in its AS IS condition, and assumes the risks associated with the condition of the Premises, including any noncompliance with applicable law.

Section 11 NOTICES

All notices given, or to be given, by either Party to the other, shall be given in writing, by certified mail return receipt requested, and shall be addressed to the Parties at the addresses hereinafter set forth or at such other address as the parties may be written notices hereafter designate. Notices shall be addressed as follows:

If to CITY

City of Tempe
City Manager's Office
31 East 5th Street
Tempe, Arizona 85281

With Copy To:

City of Tempe
City Attorney's Office
21 East 6th Street, Ste. 200
Tempe, AZ 85281

If to CHILDSPLAY

Childsplay, Inc.
900 S. Mitchell Drive
Tempe, Arizona 85281
Attn: Managing Director

With Copy To:

Board Chairman
Childsplay, Inc.
900 S. Mitchell Drive
Tempe, Arizona 85281

Section 12
ATTORNEYS' FEES AND COSTS

In the event of any legal action or proceeding arising out of this Agreement, the prevailing party shall be entitled to seek recovery of its reasonable attorney's fees and costs incurred in such legal action or proceeding, and such fees and costs shall be included in any judgment rendered as determined by the Court.

Section 13
ENVIRONMENTAL REGULATIONS/HAZARDOUS MATERIALS

13.1. Childsplay covenants and agrees that it shall, at all times during the term of the Agreement, and at its sole cost and expense, comply with and assume sole responsibility and liability under all environmental laws applicable to use of or operations at the Premises including by its agents, assigns and/or employees. Childsplay agrees that should it or any of its agents, assigns, invitees or employees know of (a) any violation of environmental laws relating to the Premises, or (b) the escape, release or threatened release of any Hazardous Materials as defined in Section 13.2 herein, in, on, under or about the Premises, shall promptly and within twenty-four (24) hours, notify the City in writing of such, and that it will provide all warnings of exposure to hazardous materials in, on, under or about the Premises site in strict compliance with all applicable environmental laws. Further, Childsplay covenants and agrees that it shall at no time use, analyze, generate, manufacture, produce, transport, store, treat, release, dispose of or permit the escape of, or otherwise deposit in, on under or about the Premises, any Hazardous Materials, or permit or allow any of its agents, assigns or employees to do so. Prior to use of the Premises, Childsplay shall provide the City a general description of Childsplay's equipment and materials stored and/or to be stored at the Premises. Within ten (10) days of the City Council's approval of this Agreement, Childsplay shall provide the City's Tempe Fire Medical Rescue Department ("TFMR") a Hazardous Materials Inventory Statement (HMIS), and agrees to keep an updated HMIS on file with TFMR at all times during the use of or operations at the Premises.

13.2. Hazardous Materials ("Hazardous Materials") shall be defined as any and all substances, chemicals, wastes, sewage or other materials that are now or hereafter regulated, controlled or prohibited by any environmental laws, including without limitation, any (a) substance defined as a "hazardous substance", "extremely hazardous substance", "hazardous material", "hazardous chemical", "hazardous waste", "toxic substance" or "air pollutant" by Federal laws, including but not limited to, the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601, *et seq.*; the Resource Conservation and Recovery Act, 42 U.S.C. §6901 *et seq.*; the Hazardous Materials Transportation Act, 49 U.S.C. §1801, *et seq.*, the Toxic Substances Control Act, 15 U.S.C. §2601, *et seq.*, and all amendments thereto, or other similar governmental restrictions; and (b) any chemical, compound, material, substance or other matter that: (i) is a flammable explosive, asbestos, radioactive material, nuclear material, drug, vaccine, bacteria, virus, hazardous waste, toxic substance, injurious by itself or in combination with other materials; (ii) is controlled, designated in or governed by any hazardous materials laws; (iii) gives rise to any reporting, notice or publication requirements under any hazardous materials laws; or (iv) gives rise to any liability, responsibility or duty on the part of the Childsplay or its invitees with respect to any third person under any hazardous materials laws.

Section 14
REPAIRS AND MAINTENANCE

14.1. The City shall be responsible for the following:

14.1.1 Making any necessary repairs to the building exterior and interior which includes walls, doors, windows, and any other structural repairs;

14.1.2 Making all necessary repairs to the electrical system including lighting system;

14.1.3 Repairing/replacing the following items on a scheduled basis which should be representative of normal use and wear and not due to negligence or damage: carpet and floor tile;

14.1.4 Maintaining fire sprinkler inspections and fire extinguishers and maintaining and repairing sprinkler systems; and

14.1.5 Painting the interior of the building every ten (10) years; provided, however, that all painting that is required between the City's scheduled painting shall be the responsibility of Childsplay.

14.2. Childsplay shall be responsible for the following:

14.2.1 Maintaining and repairing of roofs;

14.2.2 Making all necessary repairs to and/or replacement of the hot water heater and the plumbing system;

14.2.3 Making all necessary repairs to and/or replacement of all HVAC systems, including performing necessary upkeep, including but not limited to, changing filters on a monthly basis, as well as any other upkeep required by applicable warranties and manufacturer specifications;

14.2.4 Cleaning the carpet on a scheduled basis;

14.2.5 Maintaining/repairing/and or replacing all appliances, communication systems and TV video systems, including Wi-Fi, cable and telephone;

14.2.6 Providing pest control services to the Premises; and

14.2.7 Maintaining responsibility for locks, locking and security systems; provided, however, that. Childsplay shall provide reasonable access to the Premises to City personnel for maintenance purposes.

14.3 Any requests for repair or maintenance service by the Childsplay shall be directed to the City of Tempe Community Services Department, Deputy Director of Arts & Culture during normal working hours, who shall submit a work order through the City's work order system. After hours and weekend emergencies shall be directed to the Tempe Police Department at (480) 350-8311. A follow-up telephone call shall be made to Community Services Department on the next business day at (480) 350-5681.

14.4 Childsplay shall be responsible for any damage caused or permitted by Childsplay or Childsplay's employees, agent, members, licensees, or invitees to the Premises. Childsplay shall make any necessary repairs by a qualified contractor or at City's election, City may repair such damage at the expense of Childsplay and Childsplay shall reimburse City for such expense upon City's demand.

Section 15 CHILDSPLAY'S IMPROVEMENTS

Childsplay at Childsplay's expense may make such alterations and improvements to the interior of the Premises as may be necessary or desirable for the conduct of business of Childsplay; provided, however, that Childsplay shall make no alterations or improvements which may impair the structural strength of the building of which the Premises are a part; and provided, further, that Childsplay shall first obtain City's written consent for such alterations and improvements that cost in excess of \$10,000, which shall not be unreasonably withheld and no consent shall be required for alterations or improvements less than \$10,000 unless such alterations or improvements affect the structural integrity of the Premises. City may require, as a condition to consenting to such alterations or improvements, that the work therefore be done by City's own employees or under City's direction, but at the expense of the Childsplay. City also may require that Childsplay give security that the work will be completed free and clear of liens and in a manner satisfactory to City. Any alteration or improvement made by Childsplay shall be completed expeditiously, subject to any delays beyond the control of Childsplay, and in compliance with all laws and ordinances and all rules and regulations of any and all governmental authorities having jurisdiction of or over the Premises. All such alterations and improvements shall remain the property of Childsplay and shall be removed by Childsplay at the termination of the Agreement if the improvements are not Fixtures (defined below) of the Premises. For purposes of this Agreement, a "Fixture" means an item permanently attached to the Premises that is not typically found in commercial buildings. Childsplay at its sole expense shall repair all damages to the Premises which shall have been occasioned by the installation or removal of Childsplay's improvements or alterations. City shall not be responsible or liable for any loss of or damage to Childsplay's improvements or alterations.

Section 16 TERMINATION

The City and the Childsplay each reserve the right to terminate this Agreement upon the mutual agreement of the parties or upon an event of default as described in Section 6 of this Agreement. Agreement may be provided for purposes of this Section on behalf of the City by the

City Manager or his designee. In addition, Childsplay is hereby placed on notice of the termination provisions contained in A.R.S. §38-511. The City reserves the right to terminate for any default of this Agreement by Childsplay, in its sole discretion.

Section 17
SIGNATURE BY CITY

This Agreement is subject to adoption by Mayor and City Council. Upon execution by the Mayor, the Mayor and Council authorize the City Community Services Director or his/her designee to sign other documents, extensions, renewals and/or amendments of the Agreement as may be necessary to effectuate this Agreement, or the programs contemplated herein, and further authorize the Community Services Manager or designee, to act upon any other minor matters not presently contemplated that may arise and require City's action in order to effectuate the purpose of the Agreement.

Section 18
USE OF TEMPE NAME AND LOGO

Childsplay agrees it shall not make any statement, written, oral or otherwise, including use of any promotional materials relating to use of this Premises, that could cause confusion relating to the promoter or responsible party. Childsplay agrees to put in all of its materials relating to use of the Premises, that it is not offered, sponsored, endorsed or produced by the City of Tempe, and is not in any way associated with the City of Tempe, unless otherwise previously endorsed in writing by the City.

Section 19
INDEPENDENT CONTRACTOR RELATIONSHIP

The relationship between Childsplay and City is that of an independent contractor and nothing contained in this Agreement shall be construed as establishing an employer/employee relationship, partnership or joint venture, between the parties, or cause City to be responsible in any way for the debts or obligations of Childsplay.

Section 20
SAFETY

The Childsplay shall be solely and completely responsible for conditions of the Premises, including safety of all persons, including employees, and property during the Agreement term. This requirement shall apply continuously. Safety provisions shall conform to all applicable and federal, including OSHA, state, county and local laws, ordinances, codes and regulations. Where any of these are in conflict, the more stringent requirement shall be followed to comply with the obligations set forth herein.

Section 21
LIENS

The Childsplay shall not permit any liens to be placed on the Premises or property, but if the Premises or any part thereof, or Childsplay's interest therein, shall at any time during the term of this Agreement become subject to any vendor's mechanic's, laborer's, or materialmen's lien based upon the furnishing of labor or material to Childsplay, the Childsplay shall immediately cause the same at its sole expense, to be discharged. In no event shall such lien remain in excess of forty-five (45) days after notice thereof, unless the lien and the claim occasioning has been litigated by the Childsplay.

Section 22
APPLICABLE LAW

This Agreement shall be governed and construed by the laws of the State of Arizona. Any litigation between the parties pursuant to this Contract shall be subject to and initiated in Maricopa County, Arizona.

Section 23
SEVERABILITY

Any term or provision of this Agreement which now or hereafter is declared contrary to any law, regulation, ordinance or requirement of any applicable governmental authority with jurisdiction over this Agreement, whether now in force or enacted in the future, or which is otherwise invalid, shall be deemed stricken from this Agreement, and shall not impair or invalidate the remaining portion of the applicable provision or the remainder of this Agreement.

Section 24
AMENDMENTS

This Agreement shall be in amended or modified only by a written instrument duly executed by both Parties.

Section 25
COUNTERPARTS

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which when taken together shall constitute one and the same instrument and it shall not be necessary that any single counterpart bear the signature of all Parties.

[SIGNATURE PAGE TO FOLLOW]

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed the day and year that hereinabove written.

CITY:

CHILDSPLAY:

THE CITY OF TEMPE, an Arizona
municipal corporation

Childsplay, Inc., an Arizona non-profit
corporation

By _____
Mark W. Mitchell, Mayor

By _____

ATTEST:

Brigitta M. Kuiper, City Clerk

APPROVED AS TO FORM:

Judith R. Baumann, City Attorney

EXHIBIT A
Legal Description of Premises

Lot 1, Mitchell Park, a Subdivision Recorded in Book 870, Page 14, records of Maricopa County, Arizona

DRAFT

EXHIBIT B
Insurance Certificate

[to be supplied by Childsplay]