

## RESOLUTION NO. 24-15

A RESOLUTION RECOGNIZING THE HISTORY OF LOCOMOTIVE "OLD 168" AND FINDING A PUBLIC PURPOSE IS SERVED BY A LEASE AGREEMENT BETWEEN THE CITY OF COLORADO SPRINGS ON BEHALF OF ITS PARKS, RECREATION AND CULTURAL SERVICES DEPARTMENT AND THE CUMBRES AND TOLTEC SCENIC RAILROAD COMMISSION, PROVIDING FOR THE REHABILITATION AND RETURN TO SERVICE OF LOCOMOTIVE "OLD 168"

WHEREAS, the Denver and Rio Grande Railway Company (DRGW) was cofounded by our City's founder General William Jackson Palmer; and

WHEREAS, the Baldwin Locomotive Works built for the DRGW in 1883 a narrow gage locomotive, known as Locomotive Engine 168 ("Old 168") for early transportation in and around Colorado and Utah through the Rocky Mountain landscapes of canyons, high passes, and switchbacks and marks a significant time in history of engineering technology and triumph; and

WHEREAS, the DRGW donated to the City by the DRGW in 1938 as a gift and monument to the contributions of General William Jackson Palmer; and

WHEREAS, Old 168 has remained as a static display since 1964 at the City's Antlers Park; and

WHEREAS, the Cumbres and Toltec Scenic Railroad (C&TSRR) is jointly owned by the states of Colorado and New Mexico with the mission to preserve cultural and historical assets that developed the Old West and to educate and entertain present and future generations; and

WHEREAS, the Cumbres and Toltec Scenic Railroad Commission (C&TSRR Commission) has proposed to rehabilitate and operate Old 168 along the existing narrow gauge segment of track known as the DRGW's San Juan Extension located between Antonito, Colorado, and Chama, New Mexico; and

WHEREAS, to fully rehabilitate and restore Old 168 to operating condition, the C&TSRR Commission has proposed to raise and invest an estimated \$650,000.00 for needed repairs; and

WHEREAS, the City desires that Old 168 be restored and maintained in an operating condition, which is not economically feasible for the City at the present time; and

WHEREAS, the City's Parks, Recreation and Cultural Services Department and its Parks and Recreation Advisory Board recommends that City Council support a lease agreement with the C&TSRR Commission (Lease Agreement) by making a finding that the proposal and agreement fulfills a public purpose.

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF COLORADO SPRINGS:**

Section 1. City Council supports the proposal as presented for the exclusive use of Old 168. In the event the C&TSRR fails to rehabilitate and restore Old 168 to operating

condition within five (5) years after the date of execution of the Lease Agreement, City staff shall discuss the status of the rehabilitation master plan with City Council.

Section 2. City Council hereby finds the Lease Agreement for an initial term of fifteen (15) years to accommodate the rehabilitation and operation of Old 168 fulfils a public purpose, because it will contribute substantial historic, social and economic benefits to the City of Colorado Springs, and the citizens of Colorado, as well as allow for the locomotive to be maintained in a condition and in a setting more befitting of its historic significance.

Dated at Colorado Springs, Colorado this 10<sup>th</sup> day of March, 2015.

  
\_\_\_\_\_  
Keith King, Council President

ATTEST:

  
Sarah Johnson, City Clerk



## LEASE AGREEMENT

THIS LEASE AGREEMENT (“Agreement”) made as of this 23<sup>rd</sup> day of September, 2015, by and between the City of Colorado Springs, Colorado, a home rule city and Colorado municipal corporation, by and through its Parks, Recreation and Cultural Services Department (the “City”) and Cumbres and Toltec Scenic Railroad Commission, (the “C&TSRR”).

### I. GENERAL PROVISIONS

1.1 **Lease/Permit.** In exchange for the performance of the C&TSRRs’ obligations hereunder and for other good and valuable consideration, the City hereby grants to the C&TSRR the exclusive right to use (“Lease/Permit”) Locomotive No. 168 (Builder’s Number 6670), a City-owned narrow gauge railroad locomotive engine, its tender and parts (collectively the “Locomotive”) currently located in Antler’s Park for the purposes and subject to the terms and conditions provided in this Agreement.

1.2 **Purposes.** The purpose of the Agreement is to allow the C&TSRR to rehabilitate and return the Locomotive to service on the historic D&RG line between Antonito and Chama. The Locomotive would not be permanently removed from Colorado Springs, but would occasionally be returned for display. Recognizing that the Locomotive is an historic item of significant importance to the Pikes Peak Region and specifically to the enduring legacy of General William Jackson Palmer, Colorado Springs City Council has determined that the C&TSRR’s proposed use of the Locomotive will contribute substantial social and economic benefit to the City, will allow for the Locomotive to be maintained in a better condition and in a setting more befitting of its history and that the City’s grant of the Lease/Permit of the Locomotive to the C&TSRR for the purposes and under the terms and conditions provided in this Agreement serves a public purpose.

1.3 **Term.** In accord with City Charter provision 10-60, the initial term of this Agreement shall begin September 23, 2015 and continue for a period of fifteen (15) years, unless earlier terminated or revoked as provided herein. The Parties may agree in writing to extend the Agreement for two additional fifteen (15) year terms for a total extended term of forty-five (45) years. Upon conclusion of the initial term or any available extension if exercised, C&TSRR shall have a right of first refusal to negotiate reasonable terms for a new Lease/Permit with the City.

1.4 **Rent.** Due to the unique nature of this Locomotive, the City has determined that there is no reliable methodology to determine fair market rental value of the Locomotive for the use contemplated herein. The City also has determined that rehabilitation, and improved maintenance of the Locomotive are desirable and necessary for the proper upkeep of the Locomotive. As rental, the C&TSRR shall agree to pay \$1.00 per year payable as a lump sum due at the end of the Lease/Permit term, or any extension thereof and to contribute an estimated \$650,000.00 in rehabilitation work to the Locomotive and shall be solely financially responsible for the improvements, maintenance, insurance and operation costs associated with the Lease/Permit for the Locomotive.

1.5 **Notice.** All notices under this Agreement shall be provided in writing to the following persons:

FOR C&TSRR:                      Executive Director  
   C&TSRR Commission  
   P.O. Box 561  
   Antonito, Colorado 81120

FOR CITY:                              Director  
   Parks, Recreation and Cultural Services  
   1401 Recreation Way  
   Colorado Springs, CO 80905

1.6 **Indemnity.** During the term of this Agreement, the C&TSRR agrees and covenants to be responsible for, and to protect, defend, save harmless and indemnify the City for and against any losses, claims, demands, damages, injuries, death or expenses of whatsoever kind and nature arising out of the rehabilitation and use of the Locomotive and/or the acts or omissions of each respective party or its officers, agents, employees, volunteers, servants or subcontractors.

1.7 **Insurance.** During the term of this Agreement, the C&TSRR agrees to provide in a form acceptable to the City, insurance coverages for the Locomotive, themselves and their officers, employees, agents, volunteers, servants and subcontractors. A copy of the C&TSRRs' insurance policy shall be provided to the City and shall be kept current at all times. The policy and any endorsements thereto, shall expressly state that the City Clerk of the City of Colorado Springs, Colorado must be given thirty (30) days' advance notice of the cancellation or termination of the insurance coverage, as applicable.

1.8 **Review by City Council and the Compact Commission.** It is understood and agreed between the City and the C&TSRR that the terms, conditions and provisions of this Agreement are expressly subject to the review, and approval in the case of the Compact Commission, of the governing bodies for each party. With regard to the City, governing body review shall be evidenced by a Resolution recognizing the unique nature of this Agreement and finding that the Agreement serves a public purpose. In accord with City Charter § 4-10, approval of the Agreement shall be evidenced by the signature of the Mayor on this document. With regard to the Compact Commission, approval shall be through vote of the Compact Commission and shall be evidenced by the signature of the President and General Manager of the C&TSRR or an official designated by vote of the Compact Commission.

1.9 **Agreement Administration.** For purposes of the Agreement, the Director of Parks, Recreation and Cultural Services, or the Director's designee, shall be the Agreement Administrator on behalf of the City and the C&TSRRs' President as designated by the Compact Commission, or the Commission's designee, shall be the Agreement Administrator for the C&TSRR. Each Party shall handle all matters of mutual concern through its designated Agreement Administrator, unless otherwise set forth in this Agreement or as required by law.

1.10 **Fiscal Obligations.** This Agreement is expressly made subject to the limitations of the Colorado Constitution and Section 7-60 of the Charter of the City of Colorado Springs. Nothing herein shall constitute, nor be deemed to constitute, the creation of a debt or multi-year fiscal obligation or an obligation of future appropriations by the City Council of Colorado Springs, contrary to Article X, § 20, Colo. Const., or any other constitutional, statutory, or charter debt limitation. Notwithstanding any other provision of this Agreement, with respect to any financial obligation of the City which may arise under this Agreement in any fiscal year after the year of execution, in the event the budget or other means of appropriation for any such year fails to provide funds in sufficient amounts to discharge such obligation, such failure (i) shall act to terminate this Agreement at such time as the then-existing and available appropriations are depleted, and (ii) neither such failure nor termination shall constitute a default or breach of this Agreement, including any sub-agreement, attachment, schedule, or exhibit thereto, by the City. As used herein, the term “appropriation” shall mean and include the due adoption of an appropriation ordinance and budget and the approval of a Budget Detail Report (Resource Allocations) which contains an allocation of sufficient funds for the performance of fiscal obligations arising under this Agreement.

1.11 **Termination.** Either party may terminate this Agreement for cause at any time by giving prior written notice to the other party specifying the effective date thereof. Except in an event of emergency as described below, City shall provide C&TSRR with reasonable advance notice which shall be deemed to be a minimum of ninety (90) days and shall take steps including allowance of reasonable time to arrange for business planning, transport, storage or other actions necessary to protect the Locomotive and any Locomotive parts. In the event City terminates this Agreement, City shall at its sole expense provide for transport of the Locomotive and any Locomotive parts to the City of Colorado Springs. The Locomotive shall be relocated to a site consistent with National Historic Register standards.

C&TSRR may terminate this Agreement for cause by giving thirty (30) days prior written notice to City which notice shall include a plan providing for planning, transport, storage or other actions necessary to protect and return of the Locomotive and any Locomotive parts to the City. In the event that C&TSRR terminates this Agreement, C&TSRR shall at its sole expense return the Locomotive and any Locomotive parts to City in a condition equal to or better than the display condition at the completion of the 1984 restoration. The Locomotive shall be relocated to a site consistent with National Historic Register Standards.

For cause shall mean, breach of contract by either party, revocation, termination, dissolution or expiration of the Cumbres and Toltec Compact Commission, or its successor, voluntary or involuntary bankruptcy of the Cumbres and Toltec Compact Commission, and any other reason that causes C&TSRR's inability to meet the requirements of the rehabilitation master plan.

In the event of an emergency, City may in its sole discretion, take immediate action to repossess or to relocate the Locomotive to a safe location. An emergency shall include but not be limited to, natural disaster, war, public riot, dissolution of the Cumbres & Toltec Railroad Compact Commission, or any similar circumstance that would place the Locomotive at imminent risk of destruction or significant irreparable damage.

## II. REHABILITATION AND REMOVAL OBLIGATIONS

2.1 **Rehabilitation.** The parties agree that in order for the C&TSRR to use the Locomotive for the purposes provided herein, certain temporary and permanent improvements must be made to the Locomotive. The C&TSRR shall conduct rehabilitation activities pursuant to an approved master plan for rehabilitation (master plan). The master plan shall utilize best practices for historic preservation and shall contain a scope of work, budget and timeline for rehabilitation activities which have been estimated to cost approximately \$650,000.00 (the "Improvements"). Prior to transporting the Locomotive from the City for rehabilitation work, the C&TSRR shall obtain approval in writing from the City of its proposed process to protect the Locomotive from damage during transport, to conduct an assessment of the Locomotive for rehabilitation work and develop the master plan for rehabilitation. Such approval by the City shall be granted or denied within sixty (60) days of its submission to the City representative. Any necessary permitting for the relocation of the Locomotive and the rehabilitation work shall be the sole responsibility of the C&TSRR.

In addition to the initial rehabilitation work identified in the master plan, the C&TSRR may conduct additional improvements, and rehabilitation work on the Locomotive, provided that the City shall have the right to review and approve any proposed improvements and alterations prior to the date of the performance of that work. All Improvements, additional rehabilitation work and alterations to the Locomotive shall be solely at the expense of the C&TSRR and shall only be made upon the prior written approval of the City. If the C&TSRR proposes to include improvements that would be removed prior to return of the Locomotive to the City, such improvements shall be clearly identified to the City as personal property prior to installation. The Director of the Colorado Springs Parks, Recreation and Cultural Services Department, or her designated representative, shall have the authority to grant any such approval on behalf of the City.

The City shall review all rehabilitation proposals submitted to it in a timely manner and the City shall not unreasonably withhold or delay its approval of any such rehabilitation proposals. Rejected items shall include reasons for rejection. The failure of the C&TSRR to conduct the Improvements pursuant to the master plan as approved shall be deemed a default under the provisions of this Agreement.

2.2 **Permits.** The C&TSRR shall be responsible for obtaining all necessary State, local and national permits or licenses which are required to transport, rehabilitate, maintain, operate, or use the Locomotive.

2.3 **Ownership of Improvements.** Except for approved items identified as personal property, all Improvements, additional rehabilitation and alterations to the Locomotive, at the expiration of the initial term or any extension of the term invoked by the parties to this Agreement shall, at the option of the City, be and become part of the Locomotive, and shall, at the option of the City, remain upon and be surrendered with and as a part of the Locomotive upon termination of this Agreement. The C&TSRR, at its sole expense, shall remove any

improvements, additions, and alterations to the Locomotive that the City does not wish to retain and all personal property of any kind. At the C&TSRRs' sole expense, the C&TSRR shall repair any damage caused by any removal and return the Locomotive to a condition deemed acceptable for display purposes by the City. Should the C&TSRR fail to remove any improvements, additions or alterations to the Locomotive that the City does not wish to retain, the City shall have the right to have those removed and/or destroyed at the C&TSRRs' sole expense. Should the C&TSRR fail to remove any personal property of any kind, then the same shall be considered as abandoned and become the property of the City.

2.4 **Maintenance, Repair, Alterations, and Destruction.**

2.4.1 The C&TSRR agrees to rehabilitate, maintain and use the Locomotive pursuant to the approved master plan.

2.4.2 There shall be no destruction of the Locomotive or any component or part of the Locomotive without the prior written approval of the City. If approved by the City, any destruction shall be performed at the sole expense of the C&TSRR.

2.4.3 The C&TSRR agrees to provide routine maintenance pursuant to the approved master plan. Such routine maintenance shall not require additional City approval so long as the maintenance activities have been disclosed and approved through the master plan process.

2.5 **National Register of Historic Places Status.** The Parties agree that the Locomotive is entered on the National Register of Historic Places and the maintenance of that status is of vital importance. The C&TSRR agrees to refrain from taking any action that would jeopardize the status. The parties agree to cooperate to ensure that the National Register status is maintained during the lease term or as extended and to take any actions necessary to maintain such status.

2.6 **Mechanics Liens.** The C&TSRR agrees that it will properly pay for any work done on or to the Locomotive and will not suffer any mechanic's liens or other liens to attach to the Locomotive and shall properly cause any claim for any such lien to be released or to secure the City to its satisfaction in the event the C&TSRR desires to contest any such claim. If the C&TSRR does elect to contest any such claim, the C&TSRR agrees to defend the City and to pay all reasonable costs incurred along with attorneys' fees and judgments, if applicable.

2.7 **Removal from Static Display.** C&TSRR agrees to exercise reasonable care in the removal of the Locomotive from static display in Antlers Park and to make the City whole in the event of damage to Antler's Park caused by C&TSRR, its agents or contractors resulting from the preparation, removal and transport of the Locomotive from its display in that location.

2.8 **Agency or Endorsement.** Except as may be specifically provided for herein or in a separate agreement between the City and the C&TSRR, neither party shall be deemed or held out

to be a sponsor or endorser of any event presented with regard to the Locomotive by the other party.

### **III. THE C&TSRR'S ADDITIONAL OBLIGATIONS**

3.1 The C&TSRR agrees to provide an annual report to the City which shall provide at a minimum information concerning rehabilitation work, budget and expenditures, use of the Locomotive and any other information requested by the City.

3.2 During the Lease/Permit term, C&TSRR shall provide a special discount of twenty-five percent off of the coach ticket rack rate to any person who provides proof of residency within the City limits of Colorado Springs.

3.3 The C&TSRR agrees to work with the City to develop promotional materials at its sole expense for the Locomotive. Such materials shall be used only upon prior review and approval by the City, which approval shall not be unreasonably withheld or delayed. Promotional materials include but are not limited to, marketing videos or advertisements, print and interpretive materials in any format. The City at its election may provide information for the promotional materials.

3.4 The C&TSRR agrees to work with the City to plan and provide for occasional display or demonstration of the Locomotive within the City limits of Colorado Springs. No display or demonstration shall occur without prior agreement of the parties in writing to share or provide for payment of the costs associated with the display or demonstration. The parties agree to develop an opportunity for such display or demonstration that will not interfere with the business needs of the C&TSRR.

3.5 The C&TSRR agrees and acknowledges that the City has and retains the right to have its employees and agents enter upon the Locomotive upon 24 hours prior notice to C&TSRR for the purpose of inspecting or protecting the Locomotive.

3.6 The C&TSRR shall notify the City within ten (10) days if any of the following events occurs:

3.6.1 Revocation, termination, dissolution or expiration of the Cumbres and Toltec Compact Commission, or its successor.

3.6.2 The C&TSRR becomes insolvent, makes a general assignment for the benefit of creditors, files a voluntary petition for bankruptcy, suffers or permits the appointment of a receiver for its business or assets, or become subject to any proceeding under any bankruptcy or insolvency law, whether domestic or foreign, or has wound up or liquidated, voluntarily or otherwise.

3.6.3 The C&TSRR enters into any other lease, use, license or other similar agreement with a third party for the purposes provided under this Agreement.



#### IV. MUTUAL OBLIGATIONS

4.1 **Dangerous Conditions.** The C&TSRR and the City agree to immediately inform each other of any dangerous or potentially dangerous condition existing on the Locomotive or in connection with its use.

4.2 **Dispute Termination.** It is understood and agreed between the City and the C&TSRR that the terms, conditions and provisions of this Agreement shall be liberally construed in order to promote a harmonious relationship with regard to the rehabilitation, maintenance and use of the Locomotive. However, in the event that there is a dispute between the parties with regard to an interpretation of the terms, conditions and provisions of this Agreement, the aggrieved party shall notify the other party of that fact in writing. The parties agree to meet not more than ten (10) days after receipt of such written notification of the dispute and to use their best efforts to determine whether the dispute may be resolved by the parties. If after conducting the meeting, which shall be a condition precedent to seeking judicial relief, the parties remain unable to resolve the dispute, the aggrieved party may file for judicial relief in El Paso County District Court of Colorado's Fourth Judicial District.

#### VI. AGREEMENT INTERPRETATION

5.1 **Governing Law.** This Agreement is subject to and shall be interpreted under the laws of the State of Colorado, and the Charter, City Code, ordinances, rules and regulations of the City of Colorado Springs, Colorado. Court jurisdiction shall be exclusively in the El Paso County District Court for Colorado's Fourth Judicial District.

5.2 **Assignment or Subletting.** It is agreed that neither the Locomotive nor any part thereof shall be sublet, nor shall this Agreement be assigned by the C&TSRR to any third party without the prior written consent of the City. No assignment for the benefit of creditors, or by operation of law, shall be effective to transfer any rights to an assignee without the prior written consent of the City.

5.3 **Amendment.** No amendment or modification of this Agreement shall be valid unless expressed in writing and executed by the Director of Parks, Recreation and Cultural Services on behalf of the City and the President of the C&TSRR operating LLC as designated by the Compact Commission.

5.4 **Independent Contractor.** In the C&TSRR's performance of its obligations under this Agreement, it is understood, acknowledged and agreed between the parties that the C&TSRR is at all times acting and performing as an independent contractor. The City shall neither have nor exercise any control or direction over the manner and means by which the C&TSRR performs its obligations under the Agreement other than as stated within the Agreement terms. The C&TSRR understands and agrees that neither it nor its employees, agents, servants or other personnel are City employees. The C&TSRR shall be solely responsible for payment of salaries,

wages, payroll taxes, unemployment benefits or any other form of compensation or benefit to the C&TSRR or any of its employees, agents, servants or other personnel performing services or work under this Agreement, whether it be of a direct or indirect nature. Further, it is expressly understood and agreed that for such purposes, neither the C&TSRR nor its employees, agents, servants or other personnel shall be entitled to any City payroll, insurance, unemployment, Workers' Compensation, retirement or any other benefits whatsoever.

5.5 **Third Party Beneficiaries.** The parties specifically agree that this Agreement is not intended by any of its terms, provisions, or conditions to create in the public or any individual member of the public a third party beneficiary relationship, or to authorize any person not a party to this Agreement to maintain suit for personal injuries or property damage pursuant to the terms, conditions, or provisions of this Agreement. In requiring insurance under this Agreement, the City specifically does not waive or intend to waive any protection, immunity, or other provision of the Colorado Governmental Immunity Act, C.R.S. § 24-10-101 to 120, as now written or amended in the future.

5.4 **Integration.** This is a completely integrated Agreement and contains the entire agreement between the parties. Any prior written or oral agreements that are different from the terms, conditions and provisions of this Agreement shall be of no effect and shall not be binding upon any party.

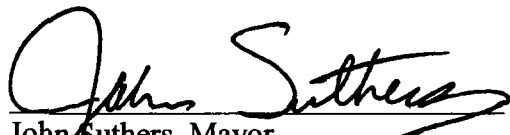
5.5 **Binding Effect.** This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors.

5.6 **Authority.** By signing below, the undersigned represent and warrant that they have been duly authorized to enter into this Agreement on behalf of the respective parties and that no further approval is required to bind the parties hereto.

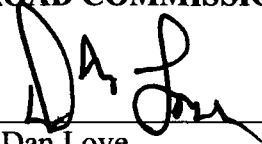
5.7 **Counterparts.** This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed to be an original hereof and all of which together shall constitute a single agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement this 23<sup>rd</sup> day of September, 2015.


**CITY OF COLORADO SPRINGS**

  
John Suthers, Mayor

**CUMBRES AND TOLTEC SCENIC  
RAILROAD COMMISSION**

By:   
Name: Dan Love  
Its: Chairman

ATTEST:

  
 Sarah B. Johnson, City Clerk



ATTEST:

\_\_\_\_\_  
 Title: \_\_\_\_\_

APPROVED AS TO FORM:

  
 Office of City Attorney

**EXHIBIT A**  
**Insurance Specifications**

[Under construction.]