

RESOLUTION NO. 30527

A RESOLUTION AUTHORIZING THE MAYOR OR HIS DESIGNEE TO ENTER INTO A LEASE AGREEMENT BETWEEN THE CITY OF CHATTANOOGA AND THE TIVOLI FOUNDATION, INC., IN SUBSTANTIALLY THE FORM ATTACHED, FOR THE TIVOLI THEATRE AND THE SOLDIERS & SAILORS MEMORIAL AUDITORIUM, INCLUDING THE ROBERT KIRK WALKER COMMUNITY THEATRE, FOR A TERM OF FIFTY (50) YEARS, AT THE ANNUAL RENT OF ONE DOLLAR (\$1.00).

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF CHATTANOOGA, TENNESSEE, that it is hereby authorizing the Mayor or his designee to enter into a Lease Agreement between the City of Chattanooga and The Tivoli Foundation, Inc., in substantially the form attached, for the Tivoli Theatre and the Soldiers & Sailors Memorial Auditorium, including the Robert Kirk Walker Community Theatre, for a term of fifty (50) years, at the annual rent of one dollar (\$1.00).

ADOPTED: October 20, 2020

/mem

D R A F T

LEASE AGREEMENT BETWEEN CITY OF CHATTANOOGA AND THE TIVOLI THEATRE FOUNDATION, INC.

THIS LEASE AGREEMENT (“Agreement”) is entered into this ____ day of _____, 2020, to be effective July 1, 2020 (the “Effective Date”), between the **CITY OF CHATTANOOGA**, a municipal corporation of the State of Tennessee (hereinafter referred to as “City”) and **THE TIVOLI THEATRE FOUNDATION, INC.**, a Tennessee non-profit corporation with its principal address at 701 Broad Street, Suite 200, Chattanooga, Tennessee 37402 (hereinafter referred to as the “Foundation”) together with the City being hereinafter referred to as (the “Parties”).

WITNESSETH:

WHEREAS, Foundation is dedicated to the advancement of the historic Tivoli Theatre and the Soldiers and & Sailors Memorial Auditorium, including the Robert Kirk Walker Community Theatre (hereinafter collectively referred to as “Venues”), and therefore supports the stated mission of the Venues; and

WHEREAS, City recognizes the Venues as vital cultural community assets and wishes to enhance the Venues’ contributions to citizens in the areas of recreation, culture, arts and education; and

WHEREAS, City and Foundation are committed to the development and support of the Venues and the goal of becoming the best rated performance and cultural venues in a mid-sized city; and

WHEREAS, City and Foundation have been working together to promote and support the operation and development of the Venues; and

WHEREAS, City is the owner of the Venues and the Personal Property (hereinafter defined); and

WHEREAS, the Venues are very expensive to maintain and, although the Foundation has provided substantial capital repairs and improvements to the Venues over the past 5 years using both City and Foundation funds totaling approximately \$9,000,000.00, the Tivoli Theatre is in particular need of more extensive renovation and capital repairs; and

WHEREAS, the Foundation is prepared to undertake a sizable project costing, at a minimum, \$40,000,000.00, which will include without limitation making approximately \$15,000,000.00 in capital repairs and renovations to the Tivoli Theatre alone (the “Tivoli Theatre Project”) and making approximately \$25,000,000.00 in capital repairs and renovations to the adjacent Tivoli Centre building to connect it to the Tivoli Theatre and make it a performing arts center (the “Tivoli Center Building Project,” together with the Tivoli Theatre Project, collectively the “Projects”), all as generally described in the Master Plan and Concept Design Report attached hereto as Exhibit “A”, as the same may be modified by the Foundation from time to time; and

WHEREAS, the Foundation expects to receive funds from the City under this Agreement for the Tivoli Theatre Project, and the Foundation intends to raise the remainder of the funds for

the Projects from public and private sources through its on-going fundraising efforts, from federal and/or state tax credit programs, such as historic tax credits and new markets tax credits (collectively, the “Tax Credit Programs”) and from other sources; and

WHEREAS, Foundation has represented to the City that, in order to carry out and complete the Projects, Foundation must obtain a long-term leasehold interest in the Venues; and

WHEREAS, City has determined that it would be in the best interest of City to enter into this Agreement with Foundation to lease the Venues under the terms and conditions set forth herein in exchange for Foundation’s commitment to: (i) undertake and complete the Projects, (ii) assume primary responsibility for the long-term use, maintenance and repair of the Venues, and (iii) ensure that the Venues shall continue to be used and maintained as first-class performing arts and entertainment facilities, and, further, in recognition that the Projects will create and preserve jobs and stimulate economic growth in the vicinity, the City is willing to lease the City’s right, title and interest in and to the Venues to Foundation for less than fair market rental value; namely, at base rent of One Dollar (\$1.00) per year.

NOW, THEREFORE, for and in consideration of the mutual efforts of the Parties to promote and support the use of the Venues, and in consideration of the respective covenants, agreements, conditions and terms stated herein, the Parties agree as follows:

1. **PREMISES AND PERSONAL PROPERTY.**

1.1 **Premises.** Subject to the terms, covenants and conditions set forth in this Agreement, City leases to Foundation, and Foundation leases from City, the Venues, which defined term shall include the alleyway (adjacent to the Tivoli Theatre and behind the Tivoli Center) conveyed to the City by Lyndhurst Foundation, Inc. in 1987, all of which shall be used exclusively for the business of the Venues, which shall be used exclusively for the business of the Venues. Foundation shall not use or permit the Venues to be used for any other purpose without the prior written consent of the City.

1.2 **Personal Property.** Subject to the terms, covenants, and conditions set forth in this Agreement, City leases to Foundation, and Foundation leases from City, the equipment, buildings and furnishings owned by City, currently in use at the Venues, and necessary for the use and maintenance of the Venues (the “Personal Property”). City hereby authorizes Foundation to use any Personal Property leased to Foundation pursuant to and in furtherance of this Agreement, provided that the use shall be specifically covered by the insurance policies required to be maintained by Foundation under this Agreement. Foundation shall maintain all such Personal Property in good condition and repair and shall replace with items of similar quality any of the Personal Property that becomes inoperable or unusable but is necessary for the use of the Venues in Foundation’s reasonable discretion. All Personal Property located at the Venues on or before the Effective Date shall be and remain the property of City and shall not be removed by Foundation. All personal property attached to or installed in the Venues after the Effective Date and during the Term (hereinafter defined) of this Agreement shall be the personal property of Foundation (the “Foundation’s Personal Property”). Foundation agrees to provide a list of Foundation’s Personal Property attached or installed in the Venues after the Effective Date to the City on or before March 1st of each year throughout the Term of this Agreement. Upon expiration

of this Agreement such Foundation's Personal Property shall become City property. Further, Foundation agrees to comply with all state laws and City policies and procedures for the disposal of the Foundation's Personal Property.

2. **TERM OF AGREEMENT.** This Agreement shall be for a term of fifty (50) years (the "Term"), commencing on the Effective Date of this Agreement since T.C.A. 12-2-302(2) provides that a municipality is authorized to lease public property to a non-profit corporation for fifty (50) years.

3. **NAME.** The name of the Venues shall remain the "Tivoli Theatre", the "Soldiers and Sailors Memorial Auditorium" and the "Robert Kirk Walker Community Theatre," during the Term of this Agreement, unless both Parties agree to a name change in writing. The City acknowledges that Foundation may be required to provide name recognition to donors and other third parties in exchange for receiving funding, and the City hereby agrees to the same provided the names of the Venues shall always remain as noted above.

4. **RENT.** During the Term of this Agreement, Foundation shall pay to the City annual rent equal to one dollar (\$1.00).

5. **APPROPRIATIONS.** As a non-profit corporation which does not own the City-owned Venues, the Foundation is eligible to request funding from the City. The Foundation may request and the City may make appropriations in support of the Foundation's obligations under to this Agreement and in support of capital improvements to be made to the Venues (the "Appropriations"). Any City approved Appropriations shall be paid to Foundation in such timing as the City and Foundation may agree. Any request for capital appropriations must include a description of the capital improvement and a quote for the cost of the capital improvement. The appropriations request must be approved by the Director of the City's Department of Public Works ("DPW") and shall be in accordance with terms established under Section 9 of this Agreement. The City may make Appropriations to the extent allowed by the City's budget for each fiscal year of the Term of this Agreement. City intends to fund the payment of any Appropriations in each City fiscal year as part of the City's DPW budget. The payment of the Appropriations in any City fiscal year shall also be governed and subject to budgetary and fiscal constraints of City. In the event that the City is unable to pay the Appropriations due to budgetary and fiscal constraints, Foundation shall be entitled to terminate this Agreement as set forth in Section 12 of this Agreement.

6. **EMPLOYEES.** Foundation's management company or Foundation shall control and supervise the conduct, demeanor, and appearance of its and Foundation's employees and shall train those employees to render a high degree of courteous and efficient service to the patrons of the Venues. Foundation's management company and Foundation shall comply with all applicable federal, state and local laws, ordinances and regulations pertaining to all Venue employees. Foundation's management company and or Foundation shall be responsible for any employment benefits provided to its employees, including health insurance benefits, and the City shall have no responsibility or liability for those benefits.

7. **USE OF VENUES.**

7.1 **Permitted Use.** Foundation shall use the Venues, Personal Property and Foundation's Personal Property during the Term of this Agreement solely at and for the Venues and related and incidental purposes, and for no other purpose. City shall be allowed to use the Venues for special events upon thirty days' written notice to Foundation and based upon availability of dates. For all City events, City shall pay all expenses associated with incidentals for the event, including but not limited to catering and Foundation's or Foundation's management company employee time. City shall have unrestricted access to the Venues upon notice to Foundation and Foundation's management company to inspect the Venues, Personal Property and Foundation's Personal Property or for any other purpose to the extent allowed by the guidelines established by the Parties during the Term of this Agreement. Foundation shall provide a complete set of all keys and access codes to the Venues, to the City's DPW.

7.2 **No Improper Uses or Nuisances.** Foundation shall not use, nor suffer or permit any person to use, in any manner whatsoever, the Venues for any improper, immoral or offensive purpose, nor for any purpose in violation of any federal, state, City or County law, ordinance, rule, order or regulation, or of any applicable governmental rule or regulation now in effect or hereafter enacted or adopted. Foundation shall exercise reasonable efforts not to permit to be carried on any activity that would constitute an actionable nuisance under the laws of the State of Tennessee.

8. **MANAGEMENT AND SUPERVISORY RESPONSIBILITIES.** Foundation is hereby given general authority by City to manage and supervise the day-to-day use of the Venues, Personal Property and Foundation's Personal Property to perform the specific duties set forth in this Agreement.

9. **CAPITAL IMPROVEMENTS AND ALTERATIONS.**

9.1 **Improvements and Alterations.** A. Foundation may make such capital improvements and alterations to the Venues and the Venues' facilities as Foundation shall determine in its reasonable discretion are necessary to use the Venues, except as limited below. Routine maintenance and repairs or any capital expenditures of One Hundred Thousand Dollars (\$100,000.00) or less, shall not require the City's consent. Routine maintenance and repairs or any capital expenditures of One Hundred Thousand Dollars (\$100,000.00) or more, shall require the express written permission of the City's Director of DPW or the Mayor, which permission shall not be unreasonably conditioned, delayed or denied. Notwithstanding the above, the Foundation shall not alter any portion of the exterior of the Venues without the express written permission of the City's Director of DPW or the Mayor, which permission shall not be unreasonably conditioned, delayed or denied. Upon completion of any projects requiring the City's consent, Foundation shall provide copies of the final as-built plans and specifications to the City's DPW. Any alterations or capital improvements made by Foundation shall comply with any and all applicable local, state and federal laws, rules and regulations, and Foundation shall obtain any required permits for such alterations and capital improvements, at its expense. Foundation shall maintain records of all capital assets [\$25,000 or more, and sensitive minor equipment (less than \$25,000)] and provide a report of all additions and deletions/surpluses to the City's DPW on a semi-annual basis in an agreed upon format.

B. For the construction of capital improvements that utilizes the Appropriations provided by the City, the Foundation shall not commence construction until the project has been advertised in accordance with public advertising and competitive bidding consistent with the provisions of the Municipal Purchasing Act, T.C.A. § 6-56-301, *et seq.*

C. All construction contracts shall require that the general contractor constructing the improvements furnish and keep in force throughout the performance of the construction project a separate payment and performance bond, each in an amount and form satisfactory to the City Attorney. The bonds shall also guarantee to the City that all work shall be free of all mechanic's and materialman's liens. The bonds shall name the City as obligee and shall be in such form and with such sureties as the City may approve prior to commencement of construction.

D. The Foundation shall require its contractors to comply with the same insurance requirements that the Foundation is required to meet in Section 16 of this Agreement.

9.2 **Title to Real Estate, Building and Improvements.** The real estate and buildings located on the real estate on or before the Effective Date shall be and remain the property of City and shall not be removed by Foundation. All appurtenances, fixtures, improvements, equipment, additions and other property attached to or installed in the Venues after the Effective Date and during the Term of this Agreement shall be and remain the property of Foundation. Upon expiration of this Agreement such property shall become City property.

10. **MAINTENANCE.** Foundation shall maintain the Venues in a clean, safe, sanitary and sightly condition, and as necessary to maintain all licenses and accreditations in accordance with Section 9 above. Any contractor engaged by Foundation to perform work on the Venues shall be required by Foundation to maintain insurance in amounts, on policies of coverage and offered by companies satisfactory to City and insure against liability for injury to persons and property arising out of all such contractor's operations and naming Foundation and City as an additional insured. Foundation shall provide the City's DPW with a written report of all maintenance performed on the Venues on or before December 31st of each year during the term of this Agreement.

11. **FISCAL MATTERS.**

11.1 **Capital Campaign.** Foundation shall use reasonable efforts to initiate and complete a fund-raising campaign each year during the Term of this Agreement to finance the construction of capital improvements at the Venues. Foundation shall provide the City's DPW and the City's Chief Finance Officer ("CFO") with a written report of Foundation's fund-raising activities on or before December 31st of each year during the term of this Agreement.

11.2 **Revenue and Payment of Expenses.** Foundation shall collect and manage through its accounts all earned revenue produced from the use of the Venues. Such revenue shall be used to fund the future use and maintenance of the Venues. The Parties agree that all admission fees, rental fees, concessions, camp fees and any other fees shall be established by Foundation and

reported to the City's DPW. All operating expenses associated with the Venues shall be the obligation of Foundation and shall be paid by Foundation promptly when due. All expenditures of Foundation shall be made in the name of Foundation and not in the name of the City or the Venues. Foundation is not authorized to bind the City to any contract, agreement or obligation.

11.3 **Fee Schedule.** The Parties agree that prices and fees charged for use of the Venues shall be established by Foundation. All prices and fees must be displayed and visible by Venues patrons. All prices and fees established by Foundation must be reported in writing to the City's DPW and CFO on an annual basis.

11.4 **Annual Budget.** On or before March 1st of each year throughout the Term of this Agreement, Foundation shall at its sole expense, prepare and submit to the City Mayor and City Council for its review annual financial and performance reports, the budget setting forth a summary of the use of the Venues, the services provided by Foundation at the Venues, the estimated gross revenues, operating expenses and capital expenses of the Venues for the following fiscal year and the annual audit for the Foundation's prior fiscal year. The City Council may, in its discretion, provide comments or suggestions to Foundation on the submitted budget. In addition, the City Council shall have the right to disapprove the budget in the event that City Council determines that the Appropriations are projected to be expended for purposes inconsistent with the requirements of this Agreement, and those Appropriations shall not be used for that purpose.

11.5 **Annual Accounting.** Foundation shall arrange for an audit of its books and records by an independent, certified public accountant, which audit shall be conducted at Foundation's sole cost and expense and shall cover the previous fiscal year. In addition to the items required to be delivered by March 1st as described above, Foundation shall deliver to the City Council and City Mayor a signed copy of each such annual audit within one hundred twenty (120) days after the end of the current fiscal year in which such Foundation spends funds appropriated by City. No future Appropriations will be approved/disbursed without such audit.

11.6 **Annual Reporting Requirements.** Foundation shall be required to comply with all federal, state, and local laws governing annual reporting requirements of Foundation's business affairs and transactions, which includes, but is not limited to, compliance with T.C.A. § 6-54-111 and Chattanooga City Code Sec. 2-526 as to City appropriations, outlining the procedures for receiving appropriations from governmental entities. All reports required by state and local law shall be submitted by March 1 of each year during the Term of this Agreement and any holdovers or extensions.

11.7 **Books and Records.** Foundation shall establish and maintain books, records and systems of account relating to the Venues' gross revenues, operating expenses, and capital funds in accordance with generally accepted accounting principles. Such books, records and systems of account shall be retained by Foundation in accordance with generally accepted accounting practices and all applicable laws, and, upon termination of this Agreement, all retained books, records and systems of account shall be delivered to City. All Foundation revenues shall be supported by documentation of a daily reconciliation process of pre-numbered receipts (electronic data processing system generated at the point of sale being acceptable). Foundation shall provide a receipt to any person or entity remitting funds to Foundation. All Foundation expenditures shall

be supported with documentation and information to clearly identify the payee, purpose and use of funds expended.

11.8 **Records Audit.** City or its assigns may audit all financial and related records (including digital) associated with the terms of this Agreement including timesheets, reimbursable out of pocket expenses, materials, goods, and equipment claimed by Foundation. City may further audit any Foundation records to conduct performance audits (to identify waste and abuse or to determine efficiency and effectiveness of the contract or agreement) or to identify conflicts of interest.

Foundation shall at all times during the Term of this Agreement and for a period of seven (7) years after the end of this Agreement, keep and maintain records of the work performed pursuant to this Agreement. This shall include proper records of quotations, contracts, correspondence, invoices, vouchers, timesheets, and other documents that support actions taken by the Foundation. Documents shall be maintained by the Foundation necessary to clearly reflect all work and actions taken. All such records shall be maintained in accordance with generally accepted accounting principles. Foundation shall at its own expense make such records available for inspection and audit (including copies and extracts of records as required) by City at all reasonable times and without prior notice.

The obligations of this Section shall be explicitly included in any subcontracts or agreements between the Foundation, any managers, subcontractors or suppliers of goods or services to the extent that those subcontracts or agreements relate to fulfilment of the Foundation's obligations to City. Costs of any audits conducted under the authority of this Section and not addressed elsewhere will be borne by the City unless the audit identifies significant findings of misappropriation of City funds or property. Foundation shall reimburse City for the total costs of an audit that identifies significant findings that would benefit City. This Section shall not be construed to limit, revoke, or abridge any other rights, powers, or obligations relating to audit which City may have by federal, state, or municipal law, whether those rights, powers, or obligations are express or implied.

12. **TERMINATION.** Should the Foundation be found to have failed to perform its services in a manner satisfactory to City as per the specifications and requirements of this Agreement, City may terminate this Agreement immediately for cause upon Foundation's failure to cure any such failure after City has provided at least thirty (30) days' notice and opportunity to cure the failure. City, in its reasonable discretion, shall be the sole judge of non-performance. The investor under the Tax Credit Programs agreements (the "Investor") shall be given notice of the default at the same time as Foundation and the Investor shall have the same right, but not the obligation, to cure any default under this Agreement. On the termination of this Agreement for any reason, City shall have full authority to re-enter and take full possession of the Venues, Personal Property and Foundation's Personal Property without the necessity of obtaining any legal process. Foundation stipulates that City shall not be liable for prosecution or for damages for resuming possession of same. Foundation shall quit and surrender same to which the City holds title in as good or better condition as when accepted by Foundation, reasonable wear and tear excepted.

Except to the extent prohibited by applicable law, the occurrence of any one or more of the following events is grounds for immediate termination of this Agreement hereunder, at the election of City: a) the filing by Foundation of a voluntary petition in bankruptcy or the making of an assignment for the benefit of creditors, or b) the filing of an involuntary bankruptcy petition against Foundation which is not withdrawn or dismissed within sixty (60) days, or c) a consent by Foundation to the appointment of a receiver or trustee of all or part of Foundation's assets, or d) the filing by Foundation of a petition or answer seeking an arrangement or reorganization under the Federal Bankruptcy Act or any other applicable state or federal law, or e) the filing by Foundation of a petition to take advantage of any insolvency act or law.

In the event City or its authorized representative shall deem any conduct on the part of Foundation to be unlawful or a danger to safety and/or health of Foundation, its employees or any other person, City shall have the right to immediately terminate this Agreement and remove Foundation and its employees from the Venues.

Upon termination or expiration of this Agreement all obligations which have accrued under this Agreement and remain unpaid or unsatisfied shall survive such termination or expiration and shall be paid or satisfied.

13. **TRANSITION**. In the event City or Foundation terminates this Agreement, and such termination causes a termination of any agreement between Foundation and a manager or subcontractor(s), City and Foundation agree to cooperate for an orderly transition with each other and with the manager or subcontractor(s) in order to preserve and advance the Venues in the process of becoming the best rated performance and cultural venues in in a mid-sized city. As part of said transition, City will have the option to transition the obligations undertaken by Foundation to the then current manager (provided manager is not in default under any agreement with Foundation beyond a cure period). Foundation and City agree to use their best efforts to honor and facilitate completion of existing contracts and bookings and the terms of the management by a designee, successor, assign or entity, governmental or otherwise, that undertakes the role of the Foundation vis a vis the Venues, subject to the terms of this Agreement.

14. **INDEMNIFICATION**. Foundation agrees to protect, defend, indemnify and hold City and its officers, employees and agents free and harmless from and against any and all losses, penalties, damages, settlements, costs, charges, professional fees or other expenses or liabilities of every kind and character, including reasonable attorneys' fees, arising out of or relating to any and all claims, liens, demands, obligations, actions, proceedings or causes of action of every kind and character in connection with or arising directly or indirectly out of this Agreement and/or the use of the Venues by Foundation. This indemnification provision shall survive the expiration or termination of this Agreement.

15. **LIMITATION OF CITY'S LIABILITY**. City shall not be liable to Foundation in any manner whatsoever for failure to furnish or delay in furnishing any service or services provided for in this Agreement and no such failure or delay shall constitute actual or constructive

eviction of Foundation nor operate to relieve Foundation from prompt and punctual performance of each and all of the covenants to be performed herein by Foundation.

15.1 City shall not be liable to Foundation, its sublessees, vendors, patrons or guests for damage to person or property caused by defects in the cooling, heating, electric, water or other apparatus or systems located in, on or about the Venues.

15.2 City shall not be liable for any theft or loss of property of Foundation, its sublessees, patrons, guest or vendors.

15.3 City shall not be liable to Foundation, its sublessees, vendors, patrons or guests for injury or damage to person(s) or property sustained or claimed to have been sustained as a result of alcohol consumption at the Venues.

15.4 In no event shall City's liability exceed the limits under the Tennessee Governmental Tort Liability Act, T.C.A. § 29-20-101 *et seq.*

16. **INSURANCE**. Foundation shall procure the following insurance with insurance companies licensed in the State of Tennessee and shall file evidence of such insurance with City's Manager of Real Property.

- A. **Commercial General Liability**: Coverage shall have minimum limits for bodily injury of \$5,000,000 Per Occurrence, Combined Single Limit for Bodily Injury Liability and Property Damage Liability. This shall include Venues and use; independent contractors; products and completed operations and contractual liability. Minimum liability requirements are subject to adjustment by City, upon thirty (30) days written notice to Foundation.
- B. **Workers' Compensation**: Insurance covering all Foundation's employees meeting statutory limits in compliance with all then applicable state and federal laws.
- C. **Automobile Insurance**: Vehicles owned and used by Foundation and its employees for business purposes relating to the use and operation of the Venues under this Agreement shall at all times be insured against loss or damage resulting to persons with minimum liability limits of \$500,000 per occurrence, \$1,000,000 aggregate and against loss or damage to property with minimum liability limits of \$1,000,000 per occurrence.
- D. **Errors and Omissions**: Insurance covering errors and omissions by Foundation's officers and directors.

Special Requirements: City shall be listed as the Certificate Holder and included as an additional insured on the Comprehensive General Liability, Automobile and Errors and Omissions policies, as required by Section 16(A) (C) and (D) of this Agreement.

Current, valid insurance policies meeting the requirements herein identified shall be maintained by Foundation during the duration of this Agreement. Renewal certificates shall be sent to the City's DPW at least thirty (30) days prior to any expiration date. There shall be a thirty (30) day notification to City in the event of cancellation or modification of any required insurance coverage.

17. **NOTICES**. All notices from City to Foundation shall be deemed duly served if mailed, postage prepaid, by registered or certified mail to Foundation at the following address:

The Tivoli Theatre Foundation, Inc.
701 Broad Street, Suite 200
Chattanooga, Tennessee 37402
Attention: Executive Director or Chairman/ President

A courtesy copy of any notice sent to City shall be mailed to the following address:

Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.
633 Chestnut Street, Suite 1900
Chattanooga, Tennessee 37450
Attention: Susan E. Rich

A copy of any default notice sent to City shall be mailed to the following address:

_____ (the "Investor")

All notices from Foundation to City shall be deemed served if mailed, postage prepaid, by registered or certified mail to City at the following address:

City of Chattanooga
Department of Public Works
100 E. 11th Street, Suite G4
Chattanooga, TN 37402

A courtesy copy of any notice sent to City shall be mailed to the City Attorney at the following address:

Chattanooga City Attorney
100 E. 11th Street, Suite 200
Chattanooga, Tennessee 37402

City Finance Officer
101 E. 11th Street
Chattanooga, Tennessee 37402

18. **NO PARTNERSHIP OR AGENCY.** Nothing herein contained shall create or be construed as creating a partnership between City and Foundation. Foundation is not an agent of City. It is understood and agreed by the Parties that the relationship of Foundation and City is to be and shall remain that of an independent contractor with respect to all services performed under this Agreement.

19. **RULES OF OPERATION.** Foundation agrees to draft, adopt and publish rules for the use of the Venues by the public. The rules shall include, at a minimum, requirements for Venues' visitor conduct, hours of operation, and daily schedule. All rules adopted by Foundation shall be in accordance with existing City Code provisions and must be approved by the City's Director of DPW prior to any adoption or publication of Venues' rules. Foundation shall draft, adopt, publish and enforce written policies to ensure ethical and prudent business practices. Such policies should include, but not be limited to the following topics: conflicts of interest, nepotism, fraternization, related party transactions, personal use of the Venues, the Personal Property, Foundation's Personal Property, outside employment, comprehensive accounting and financial policies, cash disbursements, travel expenditures, and employee leave and payroll documentation

20. **ASSIGNMENT.** Foundation acknowledges that the City is entering into this transaction because of the City's confidence that Foundation has the fundraising ability, business experience and community support that are necessary to carry out and complete the Projects and to fulfill the terms of this Agreement throughout the entire Term. Foundation acknowledges that the City shall not be expected to consent to a proposed assignment by Foundation of its interests under this Agreement to any person or entity in whom the City does not have similar confidence. Any attempt by Foundation to assign or otherwise transfer its interests under this Agreement to a third party, without the City's prior written consent, except as provided in Section 31 and below, shall be null and void and shall, at the option of the City, constitute a default of Foundation under this Agreement. The foregoing notwithstanding, Foundation may need to transfer its interests under this Agreement to an Affiliate, in connection with financing of the Projects contemplated in this Agreement. As used in the preceding sentence, an "Affiliate" means another entity which, directly or indirectly, controls or is controlled by Foundation, or is under common control with Foundation, or of which Foundation or its Affiliate, is the managing member. In such situation the City's consent (not to be unreasonably conditioned, delayed or denied) shall still be required. Also, if Foundation or its Affiliate are in default under the Tax Credit Programs the Investor shall also be a permissible assignee of this Agreement, subject to the City's consent (not to be unreasonably conditioned, delayed or denied). Foundation shall give City ninety (90) days' written notice of any such assignment requests mentioned in this Section 20.

The City hereby consents to Foundation's subletting of space within the Venues to restaurants and other food service providers, and other businesses, solely for the purposes complimentary to and consistent with the permitted uses described in Section 7 above and on commercially reasonable terms and conditions as determined by Foundation, provided that the term of each such sublease shall not extend beyond the Term of this Agreement. Upon the City's request, Foundation shall provide the City with copies of subleases then in effect. If the sale of beer and other alcoholic beverages for purchase by adult patrons is allowed on the Venues, the sublease shall require that the sublessee procure all necessary permits and shall comply with all applicable laws and regulations. The sublease shall also require that the sublessee maintain and provide liquor liability coverage naming the City as an additional insured.

21. **UTILITIES AND FEES.** Foundation shall be responsible for paying all utility expenses and fees for the Venues, including but not limited to water, sewer, electric, telephone, water quality fees, and information services. However, City will, at the option of Foundation, be responsible for paying all utilities following the execution of this Agreement. Any amounts paid for utilities and fees by the City will be deducted from any Appropriations paid to Foundation.

22. **WAIVER.** The waiver by City of any breach of any term contained in this Agreement shall not be deemed to be a waiver of such term for any subsequent breach of the same or any other term. The subsequent acceptance of services under this Agreement by City shall not be deemed to be a waiver of any prior occurring breach by Foundation of anything contained in this Agreement regardless of the knowledge of City of the prior existing breach at the time of the acceptance of such services.

23. **FORCE MAJEURE.** The parties shall not be deemed to have defaulted or failed to perform hereunder if that party's default or inability to perform shall have been caused by an event or events beyond the control and without the fault of that party, including (without limitation) acts of God, acts of government, fire, flood, dangerous weather conditions, failure to obtain a required permit (provided such failure was not due to the acts or omissions of the applicable party), explosions, strikes, labor disputes, or sabotage, acts of war or a public enemy, terrorist acts, civil riots or commotions, or acts of military authority, epidemic or pandemic (each, a "Force Majeure Occurrence"). If the Force Majeure Occurrence continues more than sixty (60) days or otherwise materially affects a party's or the parties' ability to present an Event or perform its obligations as contemplated by this Agreement, then the parties will negotiate in good faith as to whether this Agreement shall be terminated or otherwise modified to account for the Force Majeure Occurrence. In the event this Agreement is terminated due to a Force Majeure Occurrence, then (i) each party hereby waives any claim for damages or compensation from the other party by reason of such termination and (ii) neither party shall be liable to the other for failure to perform their obligations as a result of a Force Majeure Occurrence and such obligations hereunder shall be fully excused without any additional obligations.

24. **REMOVAL OF PROPERTY.** Foundation shall not remove from the Venues any of the Personal Property belonging to City except such items as may be removed with the express written permission of the City's Director of DPW. Upon termination of this Agreement for any reason, Foundation may remove the Foundation's Personal Property, and shall do so within thirty (30) days following the termination of this Agreement. Thereafter, any Foundation's Personal Property remaining at the Venues shall thereupon become the sole and exclusive property of City.

25. **COOPERATION AND PERFORMANCE REPORTS.** Foundation agrees to cooperate with City to conduct surveys, as needed, and to provide reports of visitor usage of all Venues' services. Foundation agrees to provide reports containing such information to the City Council on an annual basis with the information described in Section 11.4 above.

26. **REPRESENTATIONS AND WARRANTIES.**

26.1 **Experience.** Foundation has gained over the last five (5) years, experience in the use, management and improvement of public venue facilities but still needs to employ a

management company with that experience and hereby agrees to apply its best efforts and most efficient methods in the use, management and improvement of the Venues.

26.2 **Formation.** Foundation is a non-profit corporation duly incorporated, validly existing and in good standing under the laws of the State of Tennessee. Foundation agrees to maintain its good standing status with the Tennessee Secretary of State's Office during the term of this Agreement. Foundation shall maintain at all times during the Term of this Agreement its tax-exempt status under Section 501(c)(3) of the Internal Revenue Code.

26.3 **Authority.** Foundation has full power and authority to enter into this Agreement and to consummate the transactions contemplated by it. This Agreement has been duly authorized by all necessary action on the part of Foundation and, no other corporate or other action on the part of Foundation is necessary to authorize execution and performance of this Agreement.

27. **NO LIENS.** Foundation will not suffer or through its actions or by anyone under its control or supervision or cause to be filed upon the Venues, Personal Property or the Foundation's Personal Property, any lien or encumbrance of any kind. In the event any lien is filed, Foundation shall cause such lien to be discharged within thirty (30) days after receipt of written notice to do so from City and any such failure to remove the lien shall be cause for immediate termination of this Agreement.

28. **NO DANGEROUS MATERIALS.** Foundation shall not use or permit in the Venues the storage of illuminating oils, oil lamps, turpentine, benzine, naphtha, or other similar substances, hazardous materials or explosives of any kind, or any substance or articles prohibited in the standard policies of fire insurance companies doing business in the State of Tennessee, nor operate any machinery that may cause damage to the Venues. Nothing contained in this Section shall preclude Foundation from maintaining material and equipment for conducting activities within the Venues that are customary in using such Venues. In all cases, dangerous materials and other potentially harmful equipment will be stored in a locked area.

29. **NON-DISCRIMINATION.** There shall be no discrimination as to age, race, gender, religion, color, creed, national origin, disability, protected veteran or military status, sexual orientation, gender identity, ethnic origin, political affiliations, genetic information, marital status, or any other protected basis in accordance with applicable City ordinances and resolutions, state and federal laws (except where such category or class constitutes a bona fide occupational qualification), against any worker, employee or applicant or any member of the public in the operations referred to in this Agreement; and further, there shall be no discrimination regarding any use, service, maintenance, or improvement of the Venues, nor will Foundation allow any subcontractors to so discriminate. All facilities located on the Venues shall be made available to the public, subject to the right of Foundation to establish and enforce rules and regulations to provide for the safety, orderly operation and security of the Venues.

30. **SECURITY.** Foundation agrees to provide security services for the Venues through contracted security agencies between the hours of 4:00 p.m. and 5:00 a.m., seven (7) days per week. Foundation also agrees to provide any necessary security or alarm systems and provide monitoring and repairs associated with those security systems.

31. **PERMITTED LEASEHOLD MORTGAGE.**

- A. Permitted Mortgages. The Parties acknowledge and agree that: (i) Foundation has obtained or will obtain one or more loans in connection with the Projects, and (ii) following the Parties' execution of this Agreement, Foundation may, with the City's prior written consent (not to be unreasonably withheld or delayed), grant to its lenders a leasehold mortgage with respect to Foundation's leasehold possessory interest in the Venues, the related fixtures and the Foundation's Personal Property as security for the repayment of such loans (herein, a "**Permitted Mortgage**", with the holder of each such Permitted Mortgage being referred to herein as a "**Permitted Mortgagee**"). Prior to executing a Permitted Mortgage, Foundation shall provide the City with the form of the proposed Permitted Mortgage and such other financial and other information about the proposed Permitted Mortgage as the City may reasonably request. The City shall review such information and documentation for the purpose of determining whether the form of the proposed Permitted Mortgage is commercially reasonable and whether the proposed Permitted Mortgagee is financially capable of performing the obligations of Foundation hereunder should it succeed to the interests of Foundation hereunder upon foreclosure of the Permitted Mortgage. The City shall use reasonable efforts to notify Foundation of the City's determination within thirty (30) business days after receiving Foundation's request for approval and all requested pertinent information. The failure of the City to respond shall be deemed as a denial of approval. Under no circumstances shall City be required to mortgage its fee estate to any Permitted Mortgagee or to subordinate its fee interest to the Permitted Leasehold Mortgage. Notwithstanding anything in this Agreement to the contrary, at the end of the Term, Foundation shall surrender the Venues to the City free and clear of all Permitted Mortgages.
- B. Notice to Permitted Mortgagees and Opportunity to Cure. If the City sends a notice of default to Foundation under this Agreement and intends to exercise any right it may have under this Agreement to terminate this Agreement by reason of such default, the City shall, prior to exercising such right, send a copy of such notice of default to each Permitted Mortgagee, but only if the Permitted Mortgagee shall have previously provided the City with the address to which such notices to the Permitted Mortgagee shall be sent. The City shall send notices to the Permitted Mortgagees in the same manner in which the City sends notices to Foundation under this Agreement. Notwithstanding anything contained in this Agreement to the contrary, the City shall permit each Permitted Mortgagee a reasonable opportunity to cure Foundation's default; *provided, however*, that if the Permitted Mortgagee has not notified the City in writing, within thirty (30) business days after receiving a copy of the notice of default, that the Permitted Mortgagee has commenced to cure the default (by way of instituting foreclosure proceedings or otherwise), or if the Permitted Mortgagee notifies the City in writing, within thirty (30) business days after receiving a copy of the notice of default, that the Permitted Mortgagee has commenced to cure the default, but the Permitted Mortgagee fails to completely cure the default to the City's reasonable satisfaction within sixty (60) business days after receiving a copy of the notice of default, the City shall be free to exercise its

right to terminate this Agreement. Nothing in this Agreement shall be construed as requiring any Permitted Mortgagee to cure defaults of Foundation under this Agreement. If the nature of the default is such that the Permitted Mortgagee determines that, in order to cure such default, it is necessary to hire a contractor or other third party to do work on-site, all such persons and companies shall be subject to the City's prior written approval and shall perform such work in accordance with all applicable laws and regulations.

- C. Foundation's Default under Permitted Mortgages. If Foundation receives a notice of default from any Permitted Mortgagee, Foundation shall promptly send a copy of each such notice to the City. If, as a result of Foundation's default under a Permitted Mortgage, the Permitted Mortgagee exercises any right that it may have under the Permitted Mortgage to institute foreclosure proceedings on Foundation's leasehold possessory interest, the acquisition of Foundation's leasehold estate by the Permitted Mortgagee or purchaser at foreclosure shall not be effective unless and until: (i) if Foundation is then in default under this Agreement, all rent and other amounts then owed by Foundation under this Agreement shall have been paid and all nonmonetary defaults under this Agreement that are capable of being cured shall have been cured, (ii) the City shall have received financial and business information that establishes to the City's satisfaction that such Permitted Mortgagee or purchaser at foreclosure has the financial strength and business experience to satisfactorily perform the obligations of Foundation under this Agreement, and (iii) the City shall have received a copy of the fully-executed instrument evidencing such acquisition containing an express assumption by the Permitted Mortgagee or purchaser at foreclosure of all of Foundation's obligations and liability under this Agreement. The City may waive any or all of the requirements in the preceding sentence at its sole discretion. Foundation shall reimburse the City for any and all out-of-pocket costs incurred by the City in connection with any such foreclosure.
- D. Landlord Lien Waiver with Respect to Foundation's Personal Property. The City agrees to subordinate any landlord's lien, security interest, or other interest the City may have in any of the Foundation's Personal Property, whether for rent or otherwise, to the security interest of the Permitted Mortgagee in the Foundation's Personal Property.
- E. City's Transfer of its Interest in the Venues. If, during the Term of this Agreement, the City sells or otherwise transfers its interest in the Venues to a third party, such sale or transfer shall be subject to this Agreement and to the rights of each Permitted Mortgagee hereunder.
- F. Rights of Permitted Mortgagees. Notwithstanding the City's termination rights provided for in paragraph (B) above, prior to exercising such termination rights, the City shall provide each Permitted Mortgagee with notice and an opportunity to cure.

32. TAX CREDITS. If Foundation determines that the cooperation of the City (as the landlord under this Agreement) in Foundation's application for New Markets Tax Credits and/or

Historic Tax Credits is necessary or would be useful, the City agrees to cooperate in such application, provided, however, that the City shall not be required to incur any expenses or assume any liability in connection therewith.

33. **TENNESSEE LAW.** This Agreement shall be governed by and construed in accordance with the laws of the State of Tennessee.

34. **SEVERABILITY.** If any provision of this Agreement is held by a court of competent jurisdiction to be illegal or in conflict with any applicable law, the validity of the remaining provisions of this Agreement shall not be affected thereby.

35. **NO THIRD-PARTY BENEFICIARIES.** No persons or entities shall be a beneficiary of this Agreement except the Parties.

36. **ENTIRE AGREEMENT.** This Agreement contains the sole and entire agreement of the Parties and no prior or contemporaneous oral or written representation or agreement between the Parties shall have legal effect. No provision of this Agreement shall be waived unless such waiver is expressly made in writing and signed by an authorized representative of such party

37. **AMENDMENTS.** This Agreement may not be amended without the prior written consent of the City and Foundation.

(Signatures on Next Page)

[SIGNATURE PAGE TO LEASE AGREEMENT BETWEEN CITY OF CHATTANOOGA AND THE TIVOLI THEATRE FOUNDATION, INC.]

IN WITNESS WHEREOF, City and Foundation have caused this Agreement to be executed in duplicate on this ____ day of _____, 2020, to be effective July 1, 2020.

ACCEPTED AND AGREED TO:

THE TIVOLI THEATRE FOUNDATION, INC.

By: _____
Printed Name: Nick Wilkinson
Title: Executive Director

By: _____
Printed Name: W. Keith Sanford
Title: Chairman

CITY OF CHATTANOOGA

By: _____
Printed Name: _____
Title: _____

EXHIBIT "A" – Description of the Projects

