

SIXTH AMENDMENT TO CAPITOL THEATRE OPERATING AGREEMENT

THIS SIXTH AMENDMENT TO CAPITOL THEATRE OPERATING AGREEMENT (the "Sixth Amendment"), made and entered into this ____ day of _____, 2015, by and between **CITY OF CLEARWATER, a municipal corporation**, whose mailing address is: Attn: William B. Horne II, City Manager, Post Office Box 4748, Clearwater, FL 33758-4748, hereinafter referred to as "**City**", and **Ruth Eckerd Hall, Inc., a Florida not-for-profit corporation**, whose mailing address is: Attn: Zev Buffman, 1111 McMullen-Booth Road, Clearwater, FL 33759 hereinafter referred to as "**REH**";

WHEREAS, the City and REH entered into the Capitol Theatre Operating Agreement dated September 20, 2012, herein after referred to as "the Agreement"; and

WHEREAS, City and REH established an operating reserve fund for the term of the Agreement and provided for the disbursement of funds from the operating reserve fund in order to ensure the Capitol Theatre Facility is well maintained as provided in Section 11 of the Agreement; and

WHEREAS, REH experienced unexpected expenses for the maintenance of Ruth Eckerd Hall and construction of the Capitol Theatre; and

WHEREAS, REH and the City agreed to the Third Amendment to the Agreement dated January 24, 2014, to allow the initial One Million Dollar (\$1,000,000) deposit into the Reserve Fund to be made over a period of one year, which payments were completed in December 2014; and

WHEREAS, pursuant to Section 11 of the Agreement as Amended, REH was required to pay \$500,000.00 into the Reserve Fund by the first anniversary of the Reserve Fund(December 17, 2014); and

WHEREAS, the City and REH agreed to the Fifth Amendment to the Agreement dated December 5th, 2014 which modified the Section 11 requirement to reduce the First Anniversary payment to \$250,000.00 to be paid in ten (10) equal payments of \$25,000. The first payment was made on December 31, 2014. The last payment was made on September 17, 2015; and

WHEREAS, the Fifth Amendment also amended Section 11(d) of the Agreement to accelerate the review of the Reserve Fund to after the Third Anniversary of the Reserve Fund and every five years thereafter; and

WHEREAS, pursuant to Section 11 of the Agreement as Amended, REH was required to pay \$500,000.00 into the Reserve Fund by the second anniversary of the Reserve Fund (December 17, 2015); and

WHEREAS, REH has requested to modify the scheduled payments to the Reserve Fund; and

WHEREAS, the City and REH agree to this Sixth Amendment to the Agreement to modify Section 11 to reduce the Second Anniversary payment to \$250,000.00 and increase the Third Anniversary payment to \$250,000.00 to be paid in 10 consecutive monthly payments of \$25,000.00 commencing January 19th 2016.

WHEREAS, THE City and REH desire to revise the time frame for the first and subsequent Reserve Fund reviews; now, therefore:

Section 1. The parties agree to amend Section 11 the Agreement as amended as follows:

11. Operating Reserve Fund. In order to provide assurance that the commitment of City and REH will meet the needs of the community in the future as a result of a well operated and maintained facility, and to fulfill REH's obligation to provide funds for such purposes, City shall create and administer, and REH shall fund an operating reserve fund (the "Reserve Fund") meeting the following requirements.

(a) **Contributions to the Reserve Fund.** Prior to obtaining a certificate of Occupancy for the renovated Capitol Theatre Facility from City, REH will deposit the sum of One Hundred Thousand Dollars (\$100,000) with the City which deposit will be held by the City in a Treasurer's Escrow Agency Fund and designated the "Capitol Theatre Reserve Fund" or "Reserve Fund". Receipt of such payment is hereby acknowledged. Commencing April 17th 2014 and on the 17th of each month thereafter through and including December 2014, REH will deposit the sum of One Hundred Thousand Dollars (\$100,000) with the City which deposit will be held by the City in the Capitol Theatre Reserve Fund. Additionally, following the first anniversary of the creation of the Reserve Fund, REH shall deposit \$250,000.00 in ten equal monthly payments of \$25,000.00, The first payment shall be made on December 31, 2014. Subsequent payments will be made on the 17th day of each month beginning January 17, 2015 and ending on September 17, 2015. Receipt of such payment is hereby acknowledged. On the second anniversary of the creation of the Reserve Fund, REH will add an additional Two

Hundred Fifty Thousand Dollars (\$250,000.00) to the Reserve Fund, however, the parties agree that REH will have until January 19th 2016 to make the 2nd anniversary payment. Commencing with the third anniversary of the creation of the Reserve Fund, REH shall deposit \$250,000.00 in ten equal monthly payments of \$25,000.00, The first payment shall be made on December 17th, 2016. Subsequent payments will be made on the 17th day of each month ending on September 17, 2017, so that prior to the fourth anniversary (December 17, 2017) REH will have deposited a total of One Million Seven Hundred Fifty Thousand Dollars (\$1,750,000.00) into the Reserve Fund. Beginning with the fourth anniversary of the creation of the Reserve Fund and each year thereafter until the thirteenth anniversary, REH will add One Hundred Thousand Dollars (\$100,000) to the Reserve Fund, subject to the review referred to in subsection (d) below. Investment earnings on funds credited to the Reserve Fund shall be credited to and retained in the Reserve Fund.

* * * * *

(d) Fourth Year Review. Since both parties agree that the initial Reserve Fund amount was an estimate not based on any historical data, City and REH will meet within sixty (60) days of the end of the third anniversary of the Reserve Fund (December 17, 2016) to review the status of the Reserve Fund. The purpose of the review will be to see how the monies in the Reserve Fund have been utilized over the three (3) year period and to determine whether the balance in the Reserve Fund needs to be increased or decreased and whether there is a need for the One Hundred Thousand Dollar (\$100,000) contributions to the Reserve Fund to be increased or decreased past the fourth (4th) year. In making a decision on these issues, the following factors will be considered by City and REH:

1. Actual historical operating statements for the three (3) preceding years.
2. A set of future projections more factually estimating the realistic and practical reserve level needed taking into account historical and anticipated increases in the Cost of Operation and Maintenance and Capital Improvement needs.

City recognizes that retaining monies in the Reserve Fund is intended to provide protection for the continued operation of the Capitol Theatre so its intended community purpose can be achieved. If based on the review City determines a reduction in the deposits set forth in 11(a), Reserve Fund will not risk the intended objective of maintaining a successful performing arts theater, such adjustment shall be made within

thirty (30) days of the determination. If based on the review City believes additional monies are to be contributed to the Reserve Fund by REH, REH will contribute the amount estimated to meet the needs for operations and maintenance over the following five year period within sixty (60) days of City's request.

3. During the term of the Agreement, each five (5) years after the first three(3) year review, City and REH shall meet to review the status of the Reserve Fund and follow the process set out in 11(c) to determine if changes should be made to the monies in the Reserve Funds.

4. Upon termination of the Agreement, any funds remaining in the Reserve Fund which are not required to meet REH's obligations under this Agreement shall be the property of REH.

Section 2. This amendment will become effective upon adoption by the City Council.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed the day and year first above written.

RUTH ECKERD HALL, INC., a Florida non-profit corporation

Witness - Signature

By: _____
Name: _____
Title: _____

Witness - Print Name

Countersigned:

CITY OF CLEARWATER, FLORIDA

George N. Cretekos
Mayor

By: _____
William B. Horne II
City Manager

Approved as to form:

Attest:

Pamela K. Akin
City Attorney

Rosemarie Call
City Clerk