

SEVENTH AMENDMENT TO CAPITOL THEATRE OPERATING AGREEMENT

THIS SEVENTH AMENDMENT TO CAPITOL THEATRE OPERATING AGREEMENT (the "Seventh Amendment"), made and entered into this ____ day of _____, 2016, 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 (Reserve Fund) for the term of the Agreement and provided for the disbursement of funds from the 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 requested to modify the scheduled payments to the Reserve Fund; and

WHEREAS, the City and REH entered into the 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 Sixth Amendment revised the time frame for the first and subsequent Reserve Fund reviews as provided in Section 11 of the Agreement as Amended; and

WHEREAS, The City and REH met to review the status of the Reserve Fund as provided in Section 11 as amended and determined that the current Reserve Fund balance of \$1,500,000 is sufficient at present time and that Section 11 should be amended to eliminate the annual payments into the Reserve Fund; and

WHEREAS, In addition to the Reserve Fund, in order to provide additional certainty that the Capitol Theatre will continue to be appropriately maintained, REH will annually budget, maintain and fund a separate Capitol Theatre Capital Improvements Projects Fund in the amount of \$99,665 annually until 2036; and

WHEREAS, in order to enhance the return on investment of the Reserve Fund, the City and REH wish to have the Reserve Fund transfer to and administered by the Raymond James Trust Company under certain terms and conditions;

NOW, THEREFORE:

Section 1. The parties agree to amend Section 7(h)(2) as follows:

(2) Annually. No later than August 1 of each year of the Term, REH shall prepare and submit to the City Manager a Management Plan, Capital Improvement Plan and Budget for the following Fiscal Year of operation for approval. Commencing with this Seventh Amendment and continuing through 2036, the Budget shall include a separate Capitol Theatre Capital Improvement Projects Fund account(CIP Fund). REH commits to annually budgeting and funding \$99,665 for the CIP Fund for 20 years(2036).

(a) Management Plan. The Management Plan shall contain such information as required by the City Manager, including, but not limited to: an updated

Staff Plan, Event Plan (including programming opportunities, scheduled events, and marketing and promotional plans), a comprehensive Maintenance Plan, and a final financial forecast of Gross Revenue and Costs of Operation.

(b) Capital Improvement Plan. The Capital Improvement Plan shall contain a description, estimated cost and schedule of Capital Projects and replacement of capital assets necessary for the maintenance of the Facility over a ten (10) year period.

(c) Budget. A proposed Operating Budget and Capital Improvement Budget to include the CIP Fund for the Capitol Theatre Facility, including a projection of the performances and events to be held at the Capitol Theatre Facility.

Section 2. 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 created and administered, and REH funded an operating reserve fund (the "Reserve Fund").

(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. Receipt of such payment is hereby acknowledged.

(b) **Transfer of Reserve Fund.** Commencing with this Seventh Amendment, REH has requested and the City has agreed to transfer the Reserve Fund to Raymond James Trust Company(RJTC) to be held in an investment account in the name of REH. The Reserve Fund Account (RF Account) shall be subject to all terms and conditions of this Agreement as amended. Transfer of the Reserve Fund to the RF Account is subject to execution by RJTC and the parties of a Consent and Joinder or other document satisfactory to the City indicating acceptance of the terms and conditions contained herein.

(c) **Maintenance of Reserve Account balance by REH.** The City currently holds \$1,500,000 in the Reserve Fund. Upon transfer to the RF Account, REH shall be required to maintain the Account balance as follows: (i) Minimum RF Account Balance. The RF Account shall at all times contain a minimum amount therein of \$1,250,000 (the Floor Amount). If, at any time, there are less funds in the RF Account than the Floor Amount, REH will have a grace period of up to three months following notification of the deficiency to place additional proceeds into the RF account so that the funds therein are equal to or in excess of the floor amount. (ii) Maximum RF Account amount. If, at any time the funds in the RF Account are greater than \$1,500,000 (the ceiling amount) REH may withdraw any funds in excess of the ceiling amount upon written request to RJ TC. (iii) Account Reports. At all times during the term of the operating agreement RJ TC agrees to provide jointly to REH and the City all monthly, quarterly, and/or annual statements concerning the RF Account, any other periodic information concerning the investments in the RF Account and if requested by REH or the city and additional information concerning the RJ TC account for proceeds or investments therein.

(d) **Use of Reserve Fund Monies.** The monies in the Reserve Fund are to be used exclusively to meet the Costs of Operation and Maintenance of, and to pay for City approved Capital Improvements to, the Capitol Theatre Facility to the extent there are insufficient Gross Revenues generated by the activities conducted by REH at the Capitol Theatre Facility to fully fund those costs (in which case, there are no Net Revenues). At any time during a Fiscal Year, REH can draw monies in the Reserve Fund to pay the Costs of Operation and Maintenance for which insufficient Gross Revenues have been received by REH

in such Fiscal Year, provided however, that at any one time, REH may not withdraw, on an aggregate basis, an amount in excess of twenty five percent (25%) of the amount that should be on deposit in the Reserve Fund determined in accordance with the schedule of deposits in subsection (a) above. Each withdrawal from the Reserve Fund shall be repaid to the Reserve Fund within twenty-four (24) months following the date of each such withdrawal in not less frequent than two (2) annual installments.

(e) **Disbursement from Reserve Fund.** REH may request a withdrawal from the Reserve Fund as of the end of each Fiscal Year quarter. REH shall make a written application to the City for the Costs of Operation and Maintenance. The written application shall contain (i) information on the Gross Revenues of REH derived from the operation of the Capitol Theatre Facility, (ii) the Costs of Operation and Maintenance, (iii) the items of Costs of Operation and Maintenance to which the withdrawn funds will be applied by REH, (iv) the reason why Gross Revenues are not sufficient to pay all Costs of Operation and Maintenance, and (v) the plan of REH to improve Gross Revenues or reduce Costs of Operation and Maintenance to address the current shortfall and avoid such shortfalls in future years. All Disbursement Requests initiated by REH shall be in writing and shall be sent to RJTC, and to the Director, Parks and Recreation Department, City of Clearwater (the “City Designee”). The City Designee must agree in writing to all Disbursement Requests. The City Designee shall have a period of five (5) days following its receipt of each Disbursement Request to accept, deny, or revise any Disbursement Request. If the City Designee does not consent in writing to any Disbursement Request, RJTC shall not disburse the Disbursement Request until the City and REH resolve the dispute, and jointly agree in writing, directed to RJTC, to fund, not fund, or partially fund, the Disbursement Request. With respect to all Disbursement Requests, the City and REH agree to work quickly, and in a commercially reasonable manner, to attempt to resolve all disputes concerning any Disbursement Request.

* * * * *

(f) **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.

(g) **Disposition of Reserve Fund upon Termination.** Upon the termination of this Agreement, whether at the end of a Term or upon earlier Termination, the City shall make an assessment of the then physical condition of the Capitol Theatre Facility and the Capitol Theatre Inventory, and shall be entitled to use the funds on deposit in the Reserve Fund to restore the Capitol Theatre Facility and the Capitol Theatre Inventory to the condition it was in upon

initial completion of the Capitol Theatre Project, and if the Agreement is terminated prior to the end of the Term, the City shall be entitled to use the funds on deposit in the Reserve Fund to pay the ongoing Cost of Operation and Maintenance until a successor operator of the Capitol Theatre Facility has entered into an operating agreement with the City to operate the Capitol Theatre Facility on behalf of the City. Following such uses, any funds then remaining in the Reserve Fund shall be released by the City and delivered to REH if REH is then in existence and is continuing to operate as an exempt organization.

Section 3. 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