

RESOLUTION NO. _____

A RESOLUTION AUTHORIZING THE MAYOR OR HIS DESIGNEE TO ENTER INTO A LEASE AND OPERATIONS AGREEMENT, SUBJECT TO A MANDATORY REFERRAL, WITH THE TIVOLI THEATRE FOUNDATION, INC. IN SUBSTANTIALLY THE FORM ATTACHED HERETO LEASING THE TIVOLI THEATRE, THE SOLDIERS AND SAILORS MEMORIAL AUDITORIUM, AND THE COMMUNITY THEATRE ("VENUES") TO FOUNDATION AND PAYMENT TO THE FOUNDATION FOR MANAGING THE VENUES FOR THE AMOUNTS DESCRIBED IN THE AGREEMENT WITH ONE HUNDRED SEVENTY-FIVE THOUSAND DOLLARS (\$175,000.00) ALLOCATED FOR CAPITAL AND SEVEN HUNDRED FIFTY THOUSAND DOLLARS (\$750,000.00) FOR OPERATIONS.

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF CHATTANOOGA, TENNESSEE, That the Mayor or his designee is hereby authorized to enter into a Lease and Operations Agreement, subject to a mandatory referral, with the Tivoli Theatre Foundation, Inc. in substantially the form attached hereto leasing the Tivoli Theatre, the Soldiers and Sailors Memorial Auditorium, and the Community Theatre ("Venues") to Foundation and payment to the Foundation for managing the Venues for the amounts described in the Agreement with \$175,000.00 allocated for Capital and \$750,000.00 for Operations.

ADOPTED: _____, 2015

/mem

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

THIS LEASE AND OPERATING AGREEMENT (“Agreement”) is entered into this ___ day of _____, 2015 (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 Market 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, City has determined that it would be in the best interest of City to enter into this Agreement with Foundation to lease the Venues to Foundation and allow Foundation to provide for operation of all of the Venues under the terms and conditions set forth herein; and

NOW, THEREFORE, for and in consideration of the mutual efforts of the parties to promote and support the development and operation 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 and the improvements located thereon, for such purposes as are consistent with the above-stated purpose of this Agreement. Foundation shall not use or permit the Venues or said improvement to be used for any other purpose without the prior written consent of 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 personal property and equipment currently in use at the Venues and necessary to the operation and maintenance of the Venues, a list of which is attached as Exhibit 1 (the "Personal Property") for such purposes as are consistent with the above-stated purpose of this Agreement. Foundation shall not use or permit the Personal Property to be used for any other purpose without the prior written consent of City.

City hereby authorizes Foundation and any of its employees and contractors to use and operate the Personal Property provided that the use and operation 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 necessary for the operation of the Venues in Foundation's reasonable discretion. All Personal Property so obtained by Foundation during the term of this Agreement for use at the Venues shall become City property upon termination of this Agreement. Further, Foundation agrees to comply with all state laws and reasonable City policies and procedures for the disposal of the Personal Property.

2. **TERM OF AGREEMENT.**

2.1 **Term.** This Agreement shall be for an initial term of five (5) years (the "Initial Term"), commencing on the Effective Date of this Agreement. The Parties agree to meet in January of each year during the term of the Agreement to discuss (a) changes in City's Management Fee and Capital Appropriation (each hereinafter defined) for the Foundations' use for the Venues and Personal Property; and (b) other budgetary concerns.

2.2 **Extended Term.** Foundation shall have the option to extend the Initial Term for two (2) additional five (5) year periods commencing at the end of the Initial Term and then at the end of the first extended term. If Foundation exercises that option, it must be exercised at least six (6) months prior to the end of the Initial Term or renewal term, as the case may be. At that time the option is exercised, during the following six (6) month period the Parties shall negotiate in good faith the terms and conditions of this Agreement for applicable extension period.

3. **NAME.** The name of the Venues shall remain the "Tivoli Theatre" and the "Soldiers and Sailors Memorial Auditorium," during the term of this Agreement, unless both Parties agree to a name change in writing.

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

5. **ANNUAL MANAGEMENT FEE OR APPROPRIATION.**

5.1 **Payment of Annual Management Fee.** As compensation for all of Foundation's services in operating the Venues and Personal Property pursuant to this Agreement, and for payment by Foundation of all operating expenses, City shall pay Foundation an annual management fee (hereinafter "Management Fee") in the following manner:

FY2016 \$750,000
FY2017 \$750,000
FY2018 \$750,000
FY2019 \$750,000
FY2020 \$500,000

The Management Fee shall be paid to Foundation (or its designee, which is currently expected to be the Community Foundation of Greater Chattanooga, Inc., for the benefit of the Foundation, until the Foundation obtains its tax-exempt status under Section 501(c)(3) of the Internal Revenue Code) in twelve (12) equal monthly installments on or before the fifteenth (15th) day of each month, with the first payment beginning on July 1, 2015.

5.2 **Payment of Annual Capital Appropriation.** City shall pay Foundation an annual appropriation (hereinafter "Capital Appropriation") for capital improvements in the following manner:

FY2016 \$175,000
FY2017 \$250,000
FY2018 \$250,000
FY2019 \$250,000
FY2020 \$500,000

The Capital Appropriation shall be paid to Foundation (or its designee, which is currently expected to be the Community Foundation of Greater Chattanooga, Inc., for the benefit of the Foundation) upon written request by Foundation to City. Each capital improvement request must include a description of the proposed capital improvement and a written quote for the cost of the capital improvement. Capital improvement requests must be approved by the Director of General Services and shall be in accordance with terms established under Section 9 of this Agreement. Notwithstanding anything contained in the foregoing to the contrary, Capital Appropriation may only be made to the extent allowed by the City budget for each fiscal year of the term of this Agreement.

5.3 **Funding of Management Fee and Capital Appropriation.** City intends to fund the payment of the Management Fee and Capital Appropriation in each City fiscal year as part of the City's General Services Department ("General Services"). The payment of the Management Fee and Capital Appropriation in any City fiscal year shall also be governed and subject to budgetary and fiscal constraints of City. In the event City is unable to pay one or more of the Management Fee or Capital Appropriation due to budgetary and fiscal constraints, City shall be entitled to terminate this Agreement as set forth in Section 12 of this Agreement.

6. **EMPLOYEES.** All employees of City currently employed at the Venues will remain in those positions as City employees until the close of business on July 1, 2015. As of the close

of business on July 1, 2015, all City employee positions at the Venues shall be eliminated. Prior to or on that date, any affected City Venue employees will have the opportunity to: (a) apply for other open City positions; (b) obtain employment with the Foundation or its management company in lateral positions for a minimum ninety (90) days probationary period; or (c) obtain employment elsewhere. After the ninety (90) day probationary period, employees will be evaluated by the Foundation or its management company for permanent employment. For a period of two (2) years following the effective termination date of July 1, 2015, affected City employed Venue employees may apply and be considered for both internal and external City job postings. Foundation or Foundation's management company shall control and supervise the conduct, demeanor and appearance of its employees and shall train its employees to render a high degree of courteous and efficient customer service to the public. Foundation and Foundation's management company shall comply with all applicable federal, state and local laws, ordinances and regulations pertaining to all of its employees. Foundation or Foundation's management company shall be responsible for paying for any employment benefits available Foundation and Foundations management company employees, including health insurance benefits.

7. USE OF VENUES.

7.1 **Permitted Use.** Foundation shall use the Venues and Personal Property during the term of this Agreement solely as public venues, for related and incidental purposes, and for no other purpose. City shall be allowed to use the Venues for special events upon reasonable notification to Foundation and Foundation's management company 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 or Foundation's management company employee over-time. City shall have unrestricted access to the Venues upon notice to Foundation and Foundation's management company to inspect the Venues and Personal Property or for any other purpose, and Foundation shall provide a complete set of all keys and access codes for the Venues to General Services.

7.2 **Days and Hours of Operation.** The specific opening and closing times for the Venues shall be established by Foundation and Foundation's management company and provided to the City.

7.3 **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 City or County ordinances or 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 operation of the Venues and Personal Property as an independent contractor and to perform the specific duties set forth in this Agreement.

9. **CAPITAL IMPROVEMENTS AND ALTERATIONS.**

9.1 **Improvements and Alterations.** 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 operate the Venues; provided, however, that, other than routine maintenance and repairs or any capital expenditures of Fifty Thousand Dollars (\$50,000.00) or less, Foundation shall not make any expenditures of funds for a capital improvement or alteration to the Venues or the Venues facilities without the express written permission of the Director of General Services and the City Mayor. Upon completion of any such project, Foundation shall provide copies of the final as-built plans and specifications to General Services. 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 all required permits for such alterations and capital improvements, at its expense. Foundation shall maintain records of all capital projects and provide a report of all capital projects to General Services on a semi-annual basis.

9.2 **Title to Improvements.** All appurtenances, fixtures, improvements, equipment, additions and other property attached to or installed in the Venues during any term of this Agreement shall be and remain the property of City and shall not be removed by Foundation.

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 this Agreement. Any management company or 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 management company's or contractor's operations and naming the City as an additional insured.

11. **FISCAL MATTERS.**

11.1 **Capital Campaign.** Foundation shall use reasonable efforts to initiate and complete a fund-raising campaign each year commencing as soon as reasonably possible after Foundations obtains its tax-exempt status under Section 501(c)(3) of the Internal Revenue Code. Funds so raised would be used to rehabilitate and to finance the construction of capital improvements at one or more of the Venues.

11.2. **Revenue and Payment of Expenses.** Foundation shall collect and manage through its accounts all earned revenue produced from the operation of the Venues. Such revenue shall be used to fund the future operation 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/or Foundation's management company and reported to General Services. All operating expenses 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 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 or Foundations' management company. All prices and fees must be displayed and visible by Venues patrons. All prices and fees must be reported in writing by Foundation to General Services on an annual basis.

11.4. **Annual Budget.** On or before March 15 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 review an annual financial and performance report and budget (in form mutually acceptable to the Parties) setting forth a summary of the operations of the Venues and the services provided by Foundation at the Venues, and the estimated gross revenues, operating expenses, and capital expenses for the Venues for the following fiscal year. The City Council may, at 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 Management Fee or Capital Appropriation or other gross revenues are projected to be expended or have been expended for purposes other than under this Agreement. If the submitted budget is not approved following discussion between the Parties, this Agreement may be terminated as set forth in Section 12.

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. Foundation shall deliver to the City Council and City Mayor a signed copy of each such annual audit within ninety (90) days after the end of the fiscal year covered by the audit.

11.6 **Annual Reporting Requirements.** If Foundation elects to apply for financial assistance from City and City approves the Management Fee and Capital Appropriation, 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, and T.C.A § 5-9-109, et seq. as to Hamilton County 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 Lease and any holdovers or extensions. Foundation must, within ninety (90) days of the end of each fiscal year that it spends the Management Fee or Capital Appropriation, submit to City a copy of its annual audited financial report for that fiscal year.

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 recipient, purpose, and use of funds expended.

11.8 **Records Audit.** City or its assign may audit all of Foundation's financial and related records (including digital) associated with the terms of this Agreement, including but not limited to 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 by Foundation 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 and/or its management company and any subcontractors or suppliers of goods or services to the extent that those subcontracts or agreements relate to fulfillment 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 (and all such misappropriations) 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. City shall be the sole judge of non-performance. Further, either party may terminate this Agreement with or without cause by giving the other party not less than ninety (90) days written notice of such intent.

On the termination of this Agreement for any reason, City shall have full authority to re-enter and take full possession of the Venues without the necessity of obtaining any legal process. Foundation stipulates that City shall not be liable to prosecution or for damages for resuming possession of the Venues. On the termination of this Agreement for any reason, Foundation shall quit and surrender the Venues and Personal Property 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; (b) the filing of an involuntary bankruptcy petition against Foundation which is not withdrawn or dismissed within thirty (30) days; (c) a consenting by Foundation to the appointment of a receiver or trustee of all or part of Foundation's assets; (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 of any violation of this Agreement by Foundation, or if 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 any person, City shall have the right to immediately terminate this Agreement and remove Foundation and its employees from the Venues.

Upon any termination, the Parties shall cooperate with one another in responsibly transitioning the duties of the Foundation hereunder to the City or the City's designee.

13. **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 or the public.

14. **LIMITATION OF CITY'S LIABILITY.**

City shall not be liable for any claim or liability resulting from Foundation's operation of the Venues or from use of the Venues by the public.

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 from prompt and punctual performance of each and all of the covenants to be performed herein by Foundation.

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.

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

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. **INSURANCE.** The 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 the Venues and operation of the Venues; 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 or Foundation's management company's employees meeting statutory limits in compliance with all then applicable State and Federal laws.
- C. **Automobile Insurance:** Vehicles leased or owned and used by Foundation's or Foundation's management company's employees for business purposes relating to the Venues' operations 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 \$100,000 per occurrence.
- D. **Errors and Omissions:** Insurance covering errors and omissions by Foundation Board members or directors.

Special Requirements: Notwithstanding the foregoing, if the minimum amount of insurance required by the laws of State of Tennessee exceeds any of the foregoing amounts, the Corporation shall maintain the minimum required by those laws. 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 15 (A), (C), and (D) of this Agreement. Current, valid insurance policies meeting the requirement herein identified shall be maintained by Foundation and its management company during the duration of this Agreement. Renewal certificates shall be sent to General Services at least thirty (30) days prior to any expiration date. There shall be a thirty (30) day notification to City prior to cancellation or modification of any required insurance coverage.

16. **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 Market Street, Suite 200
Chattanooga, Tennessee 37403
Attention: Chairman

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
General Services Administration
274 E. 10th Street
Chattanooga, TN 37402
Attention: Director

A courtesy copy of any notice sent to City shall be mailed to 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

17. **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 the 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.

18. **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 Director of General Services prior to any adoption or publication. 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 Venues' property, outside employment, comprehensive accounting, and financial policies, cash disbursements, travel expenditures, employee leave and payroll documentation.

19. **ASSIGNMENT.** Foundation may not assign this Agreement, or any part hereof, without prior written approval of the City Council. Any attempt to assign without such approval shall be void and shall constitute grounds for the cancellation of this Agreement at the option of the City. Foundation agrees that without prior written consent of the City, no owner of any interest in the Foundation shall sell, assign, transfer or convey his/her ownership interest (except by operation of law), nor shall Foundation issue any additional ownership interests, if any such transfer or issuance will effectively change the ownership of Foundation without City's consent. Foundation warrants and represents that there are no ownership interests in the Foundation as of the Effective Date.

20. **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 for up to six (6) months following the execution of this Agreement. Any amounts paid during this six (6) month period for utilities and fees by the City will be deducted from the Operating Appropriation paid to Foundation.

21. **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 any term contained in this Agreement regardless of the knowledge of City of the prior existing breach at the time of the acceptance of such services.

22. **FORCE MAJEURE.** In the event the Venues or Personal Property are damaged by fire, flood, civil disorder, acts of God or other casualty to such an extent, that in City's sole opinion, the continued operation of such Venues and use thereof by the Parties as a venue is not practicable or desirable, City may immediately terminate this Agreement. City shall not be responsible for any profits lost by Foundation due to such partial or complete destruction of the Venues.

23. **REMOVAL OF PROPERTY.** Foundation shall not remove from the Venues any of the Personal Property or any replacements thereto, except with the express written permission of the Director of General Services. Upon termination of this Agreement for any reason, Foundation may remove its own personal property, and shall do so within fifteen (15) days following the termination of this Agreement. All personal property remaining at the Venues shall thereupon become the sole and exclusive property of City.

24. **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 performance reports to the City Council on an annual basis.

25. **REPRESENTATIONS AND WARRANTIES.**

25.1 **Experience.** Foundation is not experienced in the operation and management of public venue facilities but shall employ a management company with that experience and hereby agrees to apply its best efforts and most efficient methods in the operations and management of the Venues.

25.2 **Formation.** Foundation is a non-profit corporation duly incorporated, validly existing and in good standing under the laws of the State of Tennessee. Foundation shall use its best efforts after the Effective Date to obtain and maintain all times during the term of this Agreement tax-exempt status under Section 501(c)(3) of the Internal Revenue Code.

25.3 **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 of this Agreement.

26. **NO LIENS.** Foundation will not suffer or through its actions or by anyone under its control or supervision, cause to be filed against the Venues any lien or encumbrance of any kind. In the event any lien is filed, Foundation shall cause such lien to be discharged within ten (10) business days after written notice to do so from City and any such lien shall be cause for termination of this Agreement by the City.

27. **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 use or 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 on the Venues that are customary in operating Venues. In all cases, dangerous materials and other potentially harmful equipment will be stored in a locked area.

28. **NON-DISCRIMINATION.** There shall be no discrimination as to race, gender, religion, color, creed, or national origin against any worker, employee or applicant or any member of the public in the operations referred to by this Agreement; and further, there shall be no discrimination regarding any use, service, maintenance, or operation of the Venues, nor will Foundation allow any management company or contractor to so discriminate. All facilities located on the Venues shall be made available to the public, subject to the right of Foundation to establish a usage schedule and enforce rules and regulations to provide for the safety, orderly operation and security of the Venues.

29. **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. It is understood Foundation will use the security systems currently existing in the Venues.

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

31. **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.

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

33. **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.

(Signatures on Next Page)

IN WITNESS WHEREOF, City and Foundation have caused this Agreement to be executed in duplicate on this ____ day of June, 2015.

ACCEPTED AND AGREED TO:

THE TIVOLI THEATRE FOUNDATION, INC.

By: _____

Printed Name: W. Keith Sanford

Title: Chairman

CITY OF CHATTANOOGA

By: _____

Printed Name: _____

Title: _____

Exhibit 1

List of Personal Property

[TO BE COMPLETED BY PARTIES]