

**Terms for Development and Use
Agreements between City of Dallas and
Dallas Center for the Performing Arts**

**BRIEFING TO QUALITY OF LIFE
COMMITTEE**

September 26, 2005

Purpose of Briefing

Review proposed Development and Use Agreements between the Dallas Center for the Performing Arts Foundation (Arts Foundation) and City of Dallas for the development and operation of the Dallas Center for the Performing Arts (Center Project).

Background

The City spent \$12,105,266 to purchase land for the Center for the Performing Arts, of which \$9,153,950 (75%) were City bond funds and \$3,051,316 (25%) were funds donated to the City by the Dallas Center for the Performing Arts Foundation and Opera Foundation.

OCA Cultural Policy – Facility Development

The Cultural Policy establishes a maximum match of:

- 25% Private 75% Public for Pre-construction costs.
- 40% Private 60% Public for new construction.
- Each management contract is negotiated on a case-by-case basis.

OCA Cultural Policy – Facility Development

- The City's annual direct payments to a cultural organization together with indirect support for utilities and structural maintenance will not exceed an amount greater than 25% of the organization's prior year operating expenses.
- Organizations currently operating City-owned facilities are required to reduce their utility usage by 5% each year for each of the next five years (base year 2003) or pay the difference.

OCA Cultural Policy – Facility Development

The Use Agreement is being developed to provide a level of support following the guiding principles applied to other cultural facility tenants:

- Costs Supported include utilities, minor maintenance, landscape maintenance, insurance.
- Costs not supported include staff, telephones, technology, janitorial and security.

Recommended Terms for Dallas Center for the Performing Arts Foundation Development Agreement

Arts Foundation will:

- Design and construct the Winspear Opera House
- Design and construct the Wyly Theatre
- Landscape the Grand Plaza
- Design and construct a 600-space Underground Parking Garage

Recommended Terms - Development

Arts Foundation will:

- Relocate utilities and implement infrastructure development
- Redesign, renovate and improve Annette Strauss Artist Square.

Recommended Terms - Development

Arts Foundation will:

- Control the planning, design, engineering, construction and furnishing of the Center Project subject to:
 - applicable City building codes and similar restrictions
 - reasonable input from City on design and construction issues
 - legal requirements for expenditure of City Bond dollars

Recommended Terms - Development

Arts Foundation will:

- Control the selection, engagement, termination and replacement of the architects, engineers, construction consultants and contractors for all aspects and components of the Center Project.
- Comply with the City's Good Faith Effort Program.

Recommended Terms - Development

Arts Foundation will:

- Raise more than \$250,000,000 from private sources to be used, along with the Bond Funds, for the design, development, construction and operation of a first-class, multi-venue, multi-use performing arts complex in the Downtown Arts District.

Recommended Terms - Development

Arts Foundation will:

- Demonstrate leadership on sustainability through the design and construction of the Performing Arts Center
- Coordinate with the USGBC to register the center project as a LEEDs project.

Recommended Terms - Development

Arts Foundation will:

- Design and construct the center in a manner reasonably intended to qualify for the LEEDs Silver Certification
- Use commercially reasonable efforts after completion of the center to complete the LEEDs certification process for the center to the greatest extent reasonably practicable.

Recommended Terms - Development

City of Dallas will:

- On or before December 31, 2006, the City will sell bonds authorized under Propositions 5 and 12 of the City's May 2003 Bond Election totaling \$17,779,070 for payment or reimbursement of City-approved construction costs of the project.
 - Purchase option is DCPAF's sole remedy if Bonds are not sold.

Recommended Terms - Development

The City will:

- Designate the Director of Public Works and Transportation as the City liaison to the Arts Foundation's Vice President of Design and Construction.
- The City's liaison will take all actions permitted to be taken by the City's Department of Public Works to facilitate the construction of the project.

Recommended Terms - Development

The City will:

- Waive permit and inspection fees, if possible.
- The Arts Foundation and City will work together to determine and finalize an environmental remediation plan for the area.
- Design and construct the Municipal Performance Hall – failing which DCPAF will use and develop consistent with Arts District Plan.

Recommended Terms - Development

The City will:

- Ensure that no construction activity on the Municipal Performance Hall will adversely affect any stage of construction of the Center Project.
- Abandon public right-of-way including Leonard St. from Flora to Woodall Rodgers Freeway access road and Jack Evans St. from Ross Ave. to Woodall-Rodgers Freeway access road (subject to Council discretion).

Recommended Terms –Development

The City will:

- Endeavor to waive any provision in the Sasaki Plan or any applicable Planned Development District that conflicts with the plans selected by the Arts Foundation for the Center Project (subject to Council discretion).

Recommended Terms – Use Agreement

Arts Foundation will:

- Pay an annual base rent of \$1,000 per year.
- Provide programming and operation of the Center Project as a first-class cultural arts complex and facilities
- Improve, maintain and operate Annette Strauss Artist Square, the Plaza and the Garage as facilities open to general public use, when not otherwise being used for Arts Foundation events

Recommended Terms – **Use Agreement**

Arts Foundation will:

- Arts Foundation will hold a \$1.00 per ticket surcharge (with CPI escalator), in an escrow fund for capital maintenance of the center; capital maintenance will be undertaken with prior approval of the City.

Recommended Terms – **Use Agreement**

Arts Foundation will:

- Manage the use of all improvements on the Performing Arts Area, including, without limitation, the Opera House, the Theatre, the Center Parking Garage and the Plaza, and Annette Strauss Artist Square.
- Retain all revenues from the operation of any improvements managed by the Arts Foundation.

Recommended Terms – Use Agreement

The City will:

- Grant to the Arts Foundation the exclusive right to use the land comprising the Performing Arts Area, all buildings, parking facilities, infrastructure and other improvements constructed on the Performing Arts Area.

Recommended Terms – Use Agreement

The City will:

- Agree to an initial contract period (Primary Term) that includes the construction period plus 40 years from the date on which the last CO is issued.
- Agree to Renewal Options – 5 options to renew the term of the Use Agreement with each renewal period to be for an additional 10 years, upon the expiration of the Primary Term or any renewal term.

Recommended Terms – Use Agreement

The City will:

- **pay up to \$2,500,000 annually for:**
 - Ordinary maintenance
 - Landscaping and landscape maintenance
 - Electricity, water, gas, adjusted on an annual basis to account for actual increases in the utility costs (as opposed to usage) due to rate increases imposed by the utility providers (based on the average of the first three full years of operation)

Recommended Terms – **Use Agreement**

Option to Purchase:

- **During the primary term, if the City does not sell the bonds for construction, or does not pay the annual City contribution, or terminate for non-appropriation, the Arts Foundation, or its designee, shall have the right to purchase the Performing Arts Area and the improvements constructed thereon (as sole remedy).**

Next Steps

- September 26, 2005 – Recommendation from the Quality of Life Committee
- September 28, 2005 – Council Consideration to authorize City Manager to execute Development and Use Agreements with the Dallas Center for the Performing Arts Foundation
- November 2005- Groundbreaking
- Fall 2009 – Projected Grand Opening

ADDENDUM

- Attachment A – Development Agreement
- Attachment B – Use Agreement
- Attachment C – Site Plan

Attachment A

PERFORMING ARTS CENTER DEVELOPMENT AGREEMENT

between

THE CITY OF DALLAS

and

DALLAS CENTER FOR THE PERFORMING ARTS FOUNDATION, INC.

Dated as of _____, 2005

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Exhibit "A"
The Site
[to be attached]

Exhibit "B"
Project Scope Criteria
[to be attached]

Exhibit "C"
Development Schedule
[to be attached]

Exhibit "D"
Anticipated Bond Fund Expenditures
[to be attached]

Exhibit "E"
Use Agreement
[to be attached]

Exhibit "F"
Street Abandonment R-O-W
[to be attached]

PERFORMING ARTS CENTER DEVELOPMENT AGREEMENT

THIS PERFORMING ARTS CENTER DEVELOPMENT AGREEMENT (this “Agreement”) is entered into as of _____, 2005, by and between the City of Dallas, Texas, a municipal corporation of the State of Texas and a home rule city (the “City”), and The Dallas Center for the Performing Arts Foundation, Inc., a Texas non-profit corporation (the “DCPAF”).

RECITALS

A. The City is the owner of the approximately 4.3 acres of land (improved and unimproved) located within and/or adjacent to the area commonly known as the Downtown Arts District, more particularly identified and described on Exhibit “A”, which is attached hereto and incorporated herein for all purposes (the “Site”).

B. The DCPAF is a non-profit charitable foundation incorporated in the State of Texas and established for the purpose of supporting and promoting the performing arts, providing a first-class venue or venues for opera, theater and other cultural and entertainment events, and promoting the performing arts in venues in the Downtown Arts District. In furtherance of said purpose the DCPAF has undertaken to raise historic levels of donated funding from private sources for the design, development, construction, management and operation of a multi-venue, multi-use performing arts complex to be located on the Site.

C. The City recognizes the economic, cultural, social and civic benefits of having a dynamic, first-class arts district within its downtown core providing performance, cultural, education, civic and social opportunities to the City’s citizens.

D. On _____, 200__, the City Council of the City approved Ordinance No. _____ (the “Bond Ordinance”) calling a public election (the “Election”) for the City’s voters to vote on certain bond proposals, including proposals relating to development in the Downtown Arts District.

E. On May 3, 2003, the Election was held and Proposition 5 and Proposition 12 passed, providing for an aggregate of \$17,779,070 (the “Bond Funds”) to be used for a performing arts theater and related site improvements in the Downtown Arts District (Proposition 5) and for redesigning and reconstructing Annette Strauss Artist Square and related items (Proposition 12) (the “Bond Fund Purposes”).

F. The DCPAF has undertaken to raise more than \$250,000,000 from private sources to be used, along with the Bond Funds, for the design, development, construction and operation of a first-class, multi-venue, multi-use performing arts complex in the Downtown Arts District.

G. On May 25, 2005, the City Council of the City adopted Resolution No. 05-1625 authorizing the City Manager of the City to proceed with the negotiation and preparation of a comprehensive agreement with the DCPAF for the development and operation of a first-class

multi-venue, multi-use performing arts complex consisting of the Winspear Opera House, the Wyly Theater, the Grand Plaza, a 600-space parking garage, relocation (within the Site) and improvements to Annette Strauss Artist Square and supporting infrastructure, said agreement to be within the general parameters outlined in a terms sheet incorporated in said Resolution, to include such other terms as are determined to be necessary or convenient by the City, and to be submitted for final Council approval and approval as to form by the City Attorney before execution by the City Manager on behalf of the City.

H. The City and the DCPAF now desire to set forth in this Agreement the definitive terms and conditions pursuant to which the parties will undertake the design, development, construction, maintenance, management, use and operation, for the use and benefit of the public, the City of Dallas and its citizens, of a new and renovate multi-venue, multi-use performing arts complex in the Downtown Arts District, consisting of the following:

- (i) the approximately 2,200-seat Winspear Opera House (the “Opera House”);
- (ii) the approximately 600-seat Wyly Theatre (the “Theatre”);
- (iii) a landscaped Grand Plaza between the Opera House and the Theatre (the “Plaza”);
- (iv) an approximately 600-space underground parking garage (the “Center Parking Garage”) that will serve the new and renovated performing arts complex and the other adjacent performing arts facilities within the Downtown Arts District;
- (v) a redesigned, relocated (within the Site), reconstructed, renovated and improved Annette Strauss Artist Square (the “Renovated Artist Square”); and
- (vi) utilities and other above-ground and under-ground infrastructure supporting the Site and the cultural arts facilities located or to be located thereon (collectively, the “Center Infrastructure”),

I. The Opera House, the Theatre, the Plaza, the Center Parking Garage, the Renovated Artist Square, and some or all of the Center Infrastructure will be constructed on the Site.

J. The Opera House, the Theatre, the Plaza, the Center Parking Garage, the Center Infrastructure, the Renovated Artist Square and the surrounding portions of the Site are referred to collectively in this Agreement as the “Performing Arts Center”.

K. The City and the DCPAF intend for the Performing Arts Center to be designed, developed, constructed, maintained, managed, used and operated substantially in accordance with the criteria and procedures set forth herein.

L. The City and the DCPAF currently estimate that the total amount of Project Costs will be approximately \$275 million, funded as herein provided.

M. On _____, the City Council of the City approved Resolution No. _____ authorizing the City Manager to execute this Agreement as said final comprehensive agreement on behalf of and as the official act of the City.

A G R E E M E N T

NOW, THEREFORE, in consideration of the recitals set forth above and the mutual covenants and agreements contained herein and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged and confessed by each of the parties hereto, the parties hereto have agreed and do hereby agree as follows:

ARTICLE 1

Performing Arts Center Development

1.1 The Project. Subject to the terms and conditions set forth in this Agreement, (a) the City shall own the Performing Arts Center; (b) the DCPAF shall plan, design, construct complete and make operational the Performing Arts Center; (c) the City and the DCPAF shall enter into a use agreement whereby the DCPAF shall operate the Performing Arts Center for the benefit of the public as provided therein, and (d) the City and the DCPAF shall fund their respective funding commitments as contemplated herein.

1.2 Ownership of Performing Arts Center.

(a) Land and Improvements. The City owns the Performing Arts Center and all improvements (including without limitation, fixtures and equipment, as provided in Section 1.2(b)) existing or to be constructed thereon.

(b) Personal Property. (i) All items of personal property (if any) that are purchased with the City Construction Contribution will be owned by the City in accordance with the terms hereof. Items of personal property purchased with DCPAF funds that are attached to the improvements in the Performing Arts Center and/or that are reasonably necessary to the operation of any such improvement (for example, elevators, escalators, HVAC systems, security equipment, sound and lighting equipment, acoustic materials, curtains and stage rigging) will be owned by the City in accordance with the terms hereof. (ii) The DCPAF may place or install in or on the Performing Art Center other items of personal property (for example, furniture, trade fixtures and office equipment) as the DCPAF shall deem desirable for its operation. Such items of personal property placed by the DCPAF on or in the Performing Arts Center shall not become part of the real property, even if nailed, screwed, or otherwise fastened to the improvements or buildings, but shall retain their status as personal property. Such personal property may be removed by the DCPAF at any time, so long as the DCPAF is not in default under this

Agreement and so long as any damage occasioned by such removal is thereupon repaired. Likewise, such items of personal property purchased by performing arts groups or private citizens (for example and without limitation, musical instruments, sets, music, recordings and computers) shall not be owned by the City.

(c) Intellectual Property.

(1) “Intellectual Property” shall mean all intellectual property rights of any kind and reasonably related rights (e.g., sublicensable license rights to a third party’s intellectual property) including patent rights (whether design or utility), copyrights, trademark and service mark rights, trade dress rights, utility model rights, moral (personal) rights, rights of publicity, trade secret rights, and industrial design rights.

(2) The DCPAF hereby assigns to the City all right, title and interest the DCPAF has, now and in the future, in and to the Intellectual Property to the physical improvements that constitute the Performing Arts Center (the “Assigned Intellectual Property”), but specifically excluding any trademark, service mark and trade dress rights in the mark “Dallas Center for the Performing Arts” and any designs associated therewith. The DCPAF represents and warrants unto the City that it has the right and authority to transfer to the City all Assigned Intellectual Property, in each case to the extent such Assigned Intellectual Property is reasonably necessary for the City’s ownership, operation and full enjoyment of the Performing Arts Center, and that the Assigned Intellectual Property is all the intellectual property reasonably necessary for the ownership and operation of the Performing Arts Center.

(3) The City hereby grants the DCPAF an exclusive license to make, use, import, reproduce, distribute, create derivative works, perform and display publicly and otherwise exercise all rights to the Assigned Intellectual Property as if the DCPAF were the owner of such rights for so long as the Use Agreement is in effect. The City acknowledges that this license is exclusive as to the City and, for example, the DCPAF will have the sole and exclusive right to create and sell merchandise using the Assigned Intellectual Property. To the extent that any of the Assigned Intellectual Property constitutes trademarks, service marks or trade dress, the DCPAF shall maintain the products and services provided under such marks in order to preserve the City’s rights in such marks. The DCPAF shall take all reasonable steps to protect, preserve, and defend the Assigned Intellectual Property and the City’s interest in same; provided, however, the DCPAF shall not be required to register or otherwise make any filing on behalf of the City in respect of the Assigned Intellectual Property; provided, further, that the City shall reasonably assist the DCPAF and shall reasonably cooperate in such DCPAF efforts.

(4) The rights granted in Section (c)(2) above shall at all times be subject to, and the City agrees to be bound by, the restrictions and licenses contained in the agreements the DCPAF has with the creator, licensor or transferor of the Assigned Intellectual Property, to the extent disclosed by the DCPAF in advance and in writing; provided, however, that the City shall not be required by any such agreement to pay any amounts or to incur any substantial liability in respect of any such restrictions and licenses.

(5) In the event that the DCPAF purchases the Site pursuant to (a) Section 2.2(c) of this Agreement or (b) the Use Agreement, the City shall assign and otherwise transfer to the DCPAF, without any additional consideration, the Assigned Intellectual Property and, to the extent assignable, all other Intellectual Property owned or licensed by the City in and to the Performing Arts Center improvements to the DCPAF.

(d) Naming Rights, Sponsors and Signage. During the term hereof and thereafter pursuant to the Use Agreement, the DCPAF shall have exclusive authority, control and rights in selecting the name of the Performing Arts Center and each of its venues and their constituent parts, the sponsor or sponsors for which the Performing Arts Center and each of its venues and their constituent parts will be named from time to time, and the right to retain all proceeds and other benefits or consideration received from granting any such rights; provided, however, that the name given to the Opera House, the Theatre, the Plaza and the Center Parking Garage shall not include any reference to any proper geographic name, unless such reference (i) is to "Dallas" or the "City of Dallas" or (ii) is part of the proper name of a person or entity selected as a sponsor pursuant to this Section. If any such sponsor selected by the DCPAF as a name sponsor of the Opera House, the Theatre, the Plaza or the Center Parking Garage is a for-profit commercial entity and is not an individual, a trust, a non-profit organization or a similar charitable or philanthropic organization or entity, the DCPAF's selection of such for-profit commercial entity as a naming sponsor shall be subject to the prior consent of the City Manager, which consent shall not be unreasonably withheld or delayed and which consent shall be given without economic compensation to the City or other conditions. Any rejection by the City Manager of any such proposed for-profit commercial sponsor shall be given in writing and the reasons shall be specified in reasonable detail. If the City Manager has not delivered a notice rejecting a proposed commercial naming sponsor within thirty days after the DCPAF delivers written notice to the City Manager of such proposed commercial naming sponsor, then the DCPAF may complete its arrangements with such proposed sponsor and the City Manager's right to reject such sponsor shall be deemed terminated. The parties acknowledge that the City Manager's right to reject a proposed commercial sponsor is limited to significant commercial naming sponsors whose business (for example, a sexually oriented business), reputation for business ethics (for example a business that is under public investigation or indictment relating to bribery, public corruption or any similar offense) or similar attributes cause such commercial enterprise to be an improper commercial sponsor for a municipality such as the City of Dallas; provided, however, that such consent is not intended to be withheld by the City for any commercial enterprise primarily because such enterprise then is involved in a commercial dispute with the City, because such enterprise competes with an enterprise that has a commercial relationship with the City or because such enterprise is not located in or headquartered in the City. Any such sponsorship agreements entered into by the DCPAF shall be assumable by the City at its election upon any termination of this Agreement pursuant to which the DCPAF ceases to occupy and use the Performing Arts Center. The DCPAF shall not materially alter or supplement the name of the Renovated Artist Square without the City's prior written consent.

(e) Tax Exemption. It is the desire and intention of the parties that the components of the Performing Arts Center located on City-owned land and otherwise owned by the City shall be exempt from ad valorem taxes. The parties shall take all reasonable precautions to protect and preserve said exemption from ad valorem taxes. To the extent requested by the

DCPAF, the City shall cooperate with the DCPAF in seeking a ruling from the Comptroller of Public Accounts of the State of Texas confirming that items of tangible personal property (other than machinery or equipment and its accessories and repair and replacement parts not incorporated into the real property and leased or rented tangible personal property used in the performance of the construction) acquired by the City pursuant to this Agreement shall be exempt from sales tax. The City and the DCPAF shall take reasonable steps to establish and maintain the foregoing exemption, including without limitation, by (i) structuring construction contracts and subcontracts as “separated contracts” within the meaning of the Texas Tax Code, containing separately stated contract prices for materials and labor, (ii) executing and delivering an agreement or agreements between the City and the DCPAF providing for donation and assignment of items of tangible personal property (including without limitation materials, equipment and supplies) to the City as and when incorporated into the Performing Arts Center (subject to other applicable provisions of this Agreement regarding acceptance of improvements comprising the Performing Arts Center by the City, issuance of certificates of occupancy, compliance with construction codes, the timing of general and special warranties) or as and when delivered to the Site (including any staging area relating to the Performing Arts Center), except that the construction contracts DCPAF enters into with its contractors shall provide that for incorporated tangible personal property and for delivered tangible personal property stored on or away from the Site, (x) the risk of loss shall remain with the contractor until final completion and acceptance of the improvements; and (y) special warranties given for the tangible personal property incorporated or stored shall not commence until final completion and acceptance of the improvements, (iii) the City’s confirming in writing to the DCPAF the City’s acceptance of delivery of the donation of such tangible personal property, and (iv) the DCPAF’s issuing exemption certificates to its contractors and requiring that all contractors issue resale certificates to their subcontractors, in each case claiming appropriate exemption from tax. If, despite the best efforts of the parties, the Performing Arts Center or any part thereof is ultimately subject to taxation by any taxing authority, the DCPAF shall be responsible for and shall pay same as and when due.

1.3 Design and Construction of Performing Arts Center.

(a) DCPAF’s Role. Subject to the provisions of this Agreement, the DCPAF will, or will cause persons and entities engaged by the DCPAF to, plan, design, engineer, construct and furnish the Performing Arts Center. The DCPAF will furnish, or will cause persons and entities engaged by the DCPAF to furnish, all material, labor, facilities, furniture, fixtures and equipment, landscaping, signage and other items necessary to begin and fully complete the construction of the Performing Arts Center. The DCPAF will comply with, and will take commercially reasonable steps to cause its agents and contractors to comply with, all requirements of law applicable to the construction of the Performing Arts Center. The DCPAF will, or will cause persons and entities engaged by the DCPAF to, acquire any new utility service or increased capacity of existing utility services that it may need, and the City shall in good faith assist the DCPAF in these efforts.

(b) City’s Role. The City shall have no responsibility for the cost of planning, design, engineering construction, furnishing/equipping or operating the Performing Arts Center (before, during or after construction) except to the extent of the City’s Construction Contribution

provided below and obligations under the Use Agreement, regardless of whether or not such costs exceeds the DCPAF's construction cost estimates or budgets. The DCPAF will not hold the City responsible for any cost of the Performing Arts Center other than the City's Construction Contribution. The City shall have no liability for any claims that may arise out of design or construction of the Project, and the DCPAF shall cause all of its contractors, architects, engineers, and consultants to agree in writing that they will look solely to the DCPAF, not to the City, for payment of all costs and valid claims associated with the Performing Arts Center.

(c) Sustainability Standard. The DCPAF affirms the City's directive that buildings constructed by the City be designed and constructed in accordance with the Leadership in Energy and Environmental Design ("LEEDs") rating system of the U.S. Green Building Council (the "USGBC"). The parties acknowledge that although there currently are no comparable performing arts venues that are LEEDs certified anywhere in the United States, and no buildings in any category in Dallas that have completed the LEEDs certification process, the DCPAF wishes to demonstrate leadership on sustainability through the design and construction of the Performing Arts Center. In this regard, the Performing Arts Center is being designed by leading architects to include elements that are intended to efficiently assist in climate control and usability of the Performing Arts Center on a year-round basis (for example, the use of underground parking, the directional orientation of the buildings, the solar canopy over the outdoor spaces surrounding the Opera House, the siting of the renovated Artist Square and the landscaping in the Plaza). The DCPAF will coordinate with the USGBC to register the Performing Arts Center project as a LEEDs project, will design and construct the Performing Arts Center in a manner reasonably intended to qualify for the LEEDs silver certification standard of not fewer than 33 LEEDs points (to the extent the USGBC will evaluate the Performing Arts Center as a whole), will design and construct the Opera House and the Theatre in a manner reasonably intended to qualify for not fewer than the LEEDs certification standard of 23 points for each such building (and its surrounding grounds), and will use commercially reasonable efforts after completion of the Performing Arts Center to complete the LEEDs certification process for the Performing Arts Center (or, if required by the USGBC, for the Opera House and the Theatre) to the greatest extent reasonably practicable.

1.4 Architect(s) and Engineer(s). The DCPAF shall have all authority, control and rights in selecting, terminating and replacing the architect(s) (each an "Architect") and the engineer(s) (each an "Engineer") for the Performing Arts Center. The Architect and Engineers shall be individuals or firms experienced with performing arts venues of the nature contemplated herein. To the extent not already under binding contract as of the date of this Agreement, the DCPAF shall contractually obligate them to indemnify the DCPAF and the City as joint indemnitees and to maintain insurance (including errors and omissions coverage) for the benefit of the DCPAF and the City as additional insureds, in each case in form and substance not less than is customary for a City-operated design project with a similar scope.

1.5 General Contractor. The DCPAF shall have exclusive authority, control and rights in selecting, terminating and replacing the general contractor(s) (each, a "General Contractor") for each component of the Performing Arts Center.

1.6 City Participation in Project Design. In connection with designing the Performing Arts Center, the DCPAF shall reasonably consult with the City's Director of Public Works and Transportation (the "Director"), or the Director's authorized designee, as herein provided. The Director's participation in the design and construction shall be limited to (i) the enforcement of City code requirements applicable to the Performing Arts Center, (ii) verifying that the design conforms to applicable City codes and general construction ordinances and regulations, (iii) verifying that the design conforms to the provisions of this Agreement, including, but not limited to the Project Scope Criteria (defined below), (iv) approving all connections or tie-ins between the Performing Arts Center and existing City streets, storm sewers and utilities, (v) any matter involving an issue of public safety, and (vi) approving the proposed vehicle access and circulation in order to maximize efficient and effective traffic flow to and from public streets, during both event and non-event days. The City shall have the right to participate with the DCPAF and to approve the design of the Renovated Artist Square and the use and allocation of Bond Funds in connection therewith.

1.7 Project Scope Verification. The DCPAF will from time to time as reasonably requested by the Director, verify to the Director that the Performing Arts Center is being constructed substantially in accordance with the Project Scope Criteria identified on Exhibit "B" attached hereto (as adjusted from time to time, the "Project Scope Criteria"). To the extent the Director has material concerns about such verification that cannot be answered by the DCPAF, to the Director's satisfaction, the DCPAF will cause the appropriate architect, engineer or contractor to consult with the DCPAF and the Director regarding such concerns. The DCPAF may at any time or from time to time change any element of the Project Scope Criteria with notice to the Director; provided, however, that if any such proposed change in the Project Scope Criteria would result in (i) a material decrease in the capacity of any venue or the garage, (ii) a material net increase in the anticipated future operating and/or maintenance costs of any component of the Performing Arts Center upon completion, (iii) a material increase in the time to completion of any component of the construction, (iv) a negative impact on public safety or (v) a material reduction in the total Component Estimate (defined below) for Project Costs for any Component (defined below) of the Performing Arts Center, such change shall not be made by the DCPAF without first having been approved in writing by the Director, which shall not be unreasonably withheld or delayed. The parties acknowledge and agree that the DCPAF shall not be required to incorporate recommendations from the Director that would, in the DCPAF's good faith opinion, reduce the distinctive aesthetic design of any component of the Performing Arts Center, increase the cost to construct the Performing Arts Center or limit the flexibility and usefulness (from an operational perspective) of any component of the Performing Arts Center, unless such recommendations are made for the purpose of reducing or eliminating a potential hazard to public safety or a substantial structural integrity issue.

1.8 Joint Cooperation; Access for Planning and Development.

(a) Cooperation and Timely Response. During the planning, design, development and construction of the Performing Arts Center, the parties agree to cooperate and coordinate with each other, and to assign appropriate, qualified personnel to this project. To ensure that neither the design nor the construction of the Performing Arts Center is delayed due to delays in the delivery of the City responses or delays in other required City actions (as owner

as opposed to City actions as regulatory authority), the City shall cause the Director, his designee and other City personnel to respond in an expeditious manner to all submissions and requests by the DCPAF, the Architect, the Engineers or the General Contractor. If the City (as owner as opposed to as regulatory authority) fails to disapprove or inform the DCPAF in writing of the need for additional review time and/or materials within 14 days of receipt of a request for approval from the DCPAF, the City shall be deemed to have approved the request as submitted. The City will make reasonable efforts to accommodate urgent or emergency requests during construction.

(b) Access to Site and Site Records. The DCPAF shall have and the City does grant to the DCPAF reasonable access to the Site to facilitate testing, planning, the preparation of plans and specification, demolition, environmental remediation and construction. Upon reasonable advance notice to the City, the DCPAF may perform such testing and sampling (nondestructive and destructive) at the Site as it deems advisable; provided, however, the DCPAF will provide proof of insurance for any such activity at the Site. The City will allow the DCPAF and its consultants reasonable access to City's records related to the Site, during normal business hours, upon advance notice and scheduling with City's designated personnel

1.9 City Not Responsible. By performing the functions described in this Article, the Director shall not, and shall not be deemed to, assume the obligations or responsibilities of the DCPAF, Architect(s), Engineer(s) or General Contractor(s), whose respective obligations pursuant to their respective agreements with the DCPAF shall not be affected by the Director's exercise of the functions described in this Article. The City's review of any plans or specifications is solely for the City's own purposes, and the City does not make any representation or warranty concerning the appropriateness of any such plans or specifications for any purpose. The City's approval of (or failure to disapprove) any such plans and specifications shall not render the City liable for same, and the DCPAF assumes and shall be responsible for any and all claims arising out of or from the use of such plans and specifications.

1.10 Development Schedule. The DCPAF shall use commercially reasonable efforts to adhere to the development schedule set forth on Exhibit "C", attached hereto and incorporated herein. The City acknowledges and agrees that the Performing Arts Center project may be delayed by factors beyond the DCPAF's control, including without limitation weather, unavailability of materials or labor, necessary design changes and acts of war or terrorism.

1.11 Permits. The DCPAF shall contractually obligate and cause each General Contractor, architect, engineer and consultant working on the Performing Arts Center to obtain (and to contractually obligate their respective subcontractors to obtain), as applicable, all City permits, licenses and approvals required by law, rule, regulation or ordinance in connection with the construction of the Performing Arts Center and all other permits or approvals (if any) issued by other governmental agencies, to the extent required by law. The DCPAF shall cause all work on the Performing Arts Center to be performed in accordance with all applicable laws and all directions and regulations of all government bodies/agencies having jurisdiction and in a good and workmanlike manner. To the fullest extent permitted under applicable law, the City shall take all actions permitted to be taken by the City staff to facilitate the construction of the Performing Arts Center, including without limitation by granting permits, waiving requirements,

conducting inspections and granting waivers that are permitted to be granted, waived or conducted by any member of the City staff, but in no event compromising the public health, safety and welfare. Without limiting the foregoing, to the fullest extent permitted under applicable law, the City shall waive all city permit and inspection fees related to building permits and fees, building inspector fees, zoning and platting fees and public works inspection fees in connection with the construction of the Performing Arts Center. The City, as owner of the Site and not as the controlling municipal/regulatory authority, shall cooperate with the execution, of permit applications and other similar documents, as may be reasonably necessary for the work on the Performing Arts Center under this Agreement.

1.12 Good Faith Effort Program. The DCPAF confirms that it supports the objectives set forth in the City's Good Faith Effort Program ("GFE Program") for the hiring of minority and women-owned business enterprises, which are (i) "to provide minorities and women equal opportunity for participating in City construction, procurement and professional services programs" and (ii) "to provide procedures for monitoring compliance with [minority and women-owned business enterprises] requirements of City construction, procurement, and professional services programs." In connection with the design, development and construction of the Performing Arts Center, the DCPAF shall (i) comply with the terms of the GFE Program, including reporting requirements thereunder, (ii) contractually obligate each General Contractor to comply with the terms of the GFE Program, including reporting requirements thereunder, (iii) use good faith efforts (to the extent reasonably practicable) to utilize General Contractors with offices located in the City and (iv) contractually obligate each General Contractor to use good faith efforts to maintain a construction site at which no individuals are under the influence of illegal drugs. The DCPAF has hired and will utilize Joyce Foreman & Associates (the "GFE Coordinator") to assist the DCPAF in complying with the City's GFE Program in connection with the construction of the Performing Arts Center. The DCPAF shall cause the GFE Coordinator to consult regularly with the City regarding GFE Program matters and to provide in a timely fashion reasonable documentation of the DCPAF's compliance with GFE Program matters and obligations.

1.13 Construction Contracts. To the extent funded solely by the DCPAF's Construction Contribution, the DCPAF shall have the sole right and responsibility to negotiate and enter into all contracts necessary for the design, engineering, construction and completion of the Performing Arts Center; provided, however, that the DCPAF shall not be required to be a party to subcontracts between the General Contractor and any subcontractor or any other contractor and any subcontractor. The DCPAF shall grant the City reasonable access to any and all construction contracts to enable the City to monitor the design and construction of the Performing Arts Center as provided in this Agreement. All contracts relating to the design, development, renovation and construction of the Performing Arts Center shall: (i) contain language subordinating and subjecting such contract to the terms of this Agreement and exculpating the City from any obligations and liability thereunder, (ii) indemnify the City and its officers and employees against any costs or liabilities thereunder, and (iii) otherwise comply with the other requirements of this Agreement. In addition, the construction documents utilized by the DCPAF to govern construction of the Performing Arts Center shall be in such form and shall contain such terms as are customary for significant real estate development construction contracts in the north Texas area. The DCPAF shall reasonably consult with the Director

regarding the form of construction contract to be used by the DCPAF, including with respect to how the DCPAF's form of construction contract provides protections to the DCPAF and the City that are not substantially less than the protections in the comparable documents typically used by the City for similar projects.

1.14 General Contractor Assurances. The DCPAF shall contractually arrange for, or shall contractually require that each General Contractor (or subcontractor, as reasonably determined by the DCPAF) furnish appropriate payment and performance bonds signed by a corporate surety or sureties authorized to do insurance business in the State of Texas and licensed to issue surety bonds in the State of Texas, with the DCPAF and the City as joint obligees on the bonds (or other appropriate security), indemnification (which shall include commitments to defend and hold harmless) and insurance (including, as applicable, commercial liability, builders risks, workers compensation and auto liability coverage), in form and substance customary for a project with a scope similar to the Performing Arts Center. The performance and payment bonds shall be written on such bond forms and shall contain such terms as are customary for significant real estate development construction project performance and payment bonds in the north Texas area. The DCPAF shall reasonably consult with the Director regarding the form of performance and payment bond to be used by the DCPAF, including with respect to how the DCPAF's form of performance and payment bond provides protections to the DCPAF and the City that are not substantially less than the protections in the comparable documents typically used by the City for similar projects. Each such bond, indemnity and insurance policy shall inure to the benefit of both the DCPAF and the City; provided, however, that any funds received by the City or the DCPAF from any such bond, indemnity or insurance policy with respect to casualty losses or any failure to perform construction commitments relating to the Performing Arts Center shall be dedicated to payment of costs to complete the Performing Arts Center (or to repay debt that can be re-drawn to pay such costs). The DCPAF shall furnish to the City reasonable evidence of the performance and payment bonds, indemnification and insurance provided by each General Contractor (or subcontractor, as reasonably determined by the DCPAF). The parties acknowledge and agree that the DCPAF may structure a bonding and insurance program at the level of any General Contractor or (if commercially reasonable) at the subcontractor level to avoid unnecessary duplication and expense. Notwithstanding the foregoing, in no event shall the DCPAF forego any bonding at any General Contractor or subcontractor level unless the DCPAF has substantially equivalent coverage at the corresponding General Contractor or subcontractor level, as applicable.

1.15 Additional Requirements. In connection with the design and construction of the Performing Arts Center, the DCPAF shall take or contractually obligate the following entities or persons to take the following actions and to undertake the following responsibilities:

(a) the DCPAF shall provide to the Director copies (both hard copy and electronic format, to the extent the DCPAF has both formats) of schematic design, design development and construction plans and specifications for the Performing Arts Center (including revisions) as such plans and specifications are currently in existence and as completed after the date hereof;

(b) the DCPAF shall provide construction documents to the Director, signed and sealed by one or more registered professional architects or engineers licensed in the State of Texas;

(c) the architect(s) of record shall have on-site observation responsibilities of a standard as are customary for significant real estate development projects in the north Texas area;

(d) the DCPAF shall provide the Director with reasonable advance notice of regularly-scheduled construction meetings that involve the DCPAF, any General Contractor and the architect(s) or other similar engineering expert(s), and shall permit the Director to attend and observe such meetings (at the City's sole expense) as reasonably necessary to monitor the project and shall provide the Director with copies of such construction schedules as are discussed and reviewed at any such regularly-scheduled construction meeting; provided, however, that the Director shall not actively participate in any such meeting other than as and to the extent requested by the DCPAF; shall not interfere with the DCPAF's oversight or management of its employees, agents, General Contractors and subcontractors; shall not contact or communicate with such agents, General Contractors or subcontractors other than through the DCPAF regarding any aspect of the Performing Arts Center; and shall use commercially reasonable efforts in accordance with applicable law and City Code to not publicly disclose any confidential information, the disclosure of which could be detrimental to the DCPAF's efforts to complete the Performing Arts Center (for example, contractor pricing or similar information) without consulting in advance with the DCPAF;

(e) the DCPAF shall arrange for site security;

(f) the DCPAF shall comply with, and shall require that its agents and subcontractors comply with, all applicable laws regarding the use, removal, storage, transportation, disposal and remediation of hazardous materials (defined below);

(g) the DCPAF shall notify and obtain the Director's approval (which shall not be unreasonably withheld or delayed) for all field changes that directly result in material changes to preexisting plans for Performing Arts Center's connections with City streets, storm sewers and utilities;

(h) the DCPAF shall promptly repair, restore or correct, on a commercially reasonable basis, all damage caused by the General Contractor or its subcontractors to property or facilities of the City;

(i) the DCPAF shall provide the Director with copies of all building systems, training, operation and maintenance manuals and materials for the Performing Arts Center within a reasonable time following completion of construction;

(j) the DCPAF shall provide the Director one complete set of as-built drawings (hard copy and electronic format, to the extent the DCPAF has both formats) for the Performing Arts Center within a reasonable time following completion of construction;

(k) the DCPAF shall allow the Director to conduct a reasonable pre-final and final inspection of each major Component of the Performing Arts Center following substantial completion of construction of such Component. Following substantial completion of construction, the DCPAF shall make available to the Director, or his designee, the DCPAF's proposed punch list and shall reasonably consult with the Director regarding such punch list; provided, however, that the DCPAF shall not be required to add to such list any item proposed by the Director unless such item constitutes an item of material nonconformance to a technical specification set forth in the Project Scope Criteria or in this Agreement. After (i) the punch list items are performed to meet specifications, (ii) receipt of certification by the DCPAF's Architect that the construction performed conforms in all material respects with the approved plans and specifications, and (iii) a certificate of occupancy has been issued in accordance with City ordinances, the City shall accept the relevant Component of the Performing Arts Center, provided, however, that warranty obligations of the contractor(s) and correction of defective work shall not by such acceptance become the responsibility of the City, but shall remain the responsibility of the DCPAF and its General Contractor(s).

(l) the DCPAF shall promptly obtain correction of defective work and shall cause such work to be performed;;

(m) the DCPAF shall submit it's contractors' haul routes to the City for advanced approval; and

(n) the DCPAF shall cause to be performed any soils, construction and materials testing appropriate for a project of this nature by certified independent laboratories under contract to the DCPAF or any General Contractor, and paid by the DCPAF or such General Contractors. During construction of each Component, the DCPAF shall make available to the City copies of the results of all such tests relating to such Component. After substantial completion of each Component, the DCPAF shall deliver to the City the results of all such tests relating to such Component.

If any of the foregoing entities or persons shall fail in a material respect to perform any of its contractual obligations described above (or elsewhere under this Agreement), the DCPAF shall use commercially reasonable efforts to enforce such contractual obligations against such entities or persons.

1.16 City Police Powers. The DCPAF recognizes the authority of the City under its charter and ordinances to exercises its police powers in accordance with applicable laws to protect the public health, safety, and welfare. Such powers extend to the DCPAF's or its contractor's construction activity on City property, and the DCPAF recognizes the City's authority to take appropriate enforcement action in accordance with applicable laws to provide such protection. Whenever, in the City's judgment such action is required, the Director or his designee shall immediately notify the DCPAF to resolve the situation. No lawful action taken by the City pursuant to these police powers shall subject the City to any liability under this Agreement, including without limitation liability for costs incurred by the contractor(s) or the

DCPAF, and as between the DCPAF and the City, any such costs shall be the sole responsibility of the DCPAF and its contractor(s).

1.17 Title, Mechanic's Liens and Warranties.

(a) Title. The DCPAF agrees to do nothing before or during construction that would cloud or otherwise prejudice the City's ability to secure clear title to the Performing Arts Center and its constituent components; provided, however, that the DCPAF shall have the right to place a mortgage or deed of trust lien upon the DCPAF's leasehold interest in the Performing Arts Center, but such mortgage or deed of trust lien shall cover and affect only the DCPAF's leasehold interest in the Performing Arts Center and not the City's fee simple title to the Performing Arts Center and will be subject to this Agreement and the Use Agreement.

(b) Mechanic's Liens. The DCPAF agrees that the DCPAF will not permit any claim of lien made by any mechanic, materialman, laborer, or other similar liens to stand against the Performing Arts Center for work or materials furnished to the DCPAF in connection with any construction, improvements, renovation, maintenance or repair thereof made by the DCPAF or any contractor, agent or representative of the DCPAF. The DCPAF shall cause any such claim of lien to be fully discharged no later than thirty (30) days after the DCPAF's receipt of written notice of the filing thereof; provided, however, that in the event the DCPAF, in good faith, disputes the validity or amount of any such claim of lien, and if the DCPAF shall either (i) give to the City such security as the City may reasonably require to insure payment thereof and prevent any sale, foreclosure, or forfeiture of the Performing Arts Center or any portion thereof by reason of such nonpayment or (ii) cause such lien to be bonded around in accordance with Texas law, the DCPAF shall not be deemed to be in breach of this Section so long as the DCPAF is diligently pursuing a resolution of such dispute with continuity and, upon entry of final judgment resolving the dispute, if litigation or arbitration results therefrom, immediately discharges said lien.

(c) Warranties. All rights under construction warranties shall be assigned to the City as owner of the Performing Arts Center and shall be administered by the DCPAF on behalf of the City; provided, however, that any net funds received by the DCPAF after deduction of expenses by the parties in settlement or compromise of, or otherwise resulting from, rights associated with any of such warranties shall promptly be paid by the DCPAF to repair, replace or correct any properties or facilities of the Performing Arts Center to conform to approved plans and specifications. Any excess of such funds shall be paid to the City and shall be reserved for Capital Maintenance (as defined and required under the Use Agreement) and for no other purpose. The City shall take all commercially reasonable steps to facilitate the DCPAF's administration of the warranties.

1.18 City Consents. Any consent or approval by or on behalf of the City or the Director of Public Works (or any designee of any of them) required in connection with the design and construction of the Project shall not be unreasonably withheld. Any review associated with any determination to give or withhold any such consent or approval shall be conducted in a timely and expeditious manner with due regard to the cost to the DCPAF associated with delay.

1.19 Right of the City to Make Inspection. The Director (and his designee(s)) shall have the right, at reasonable times, and on reasonable notice, to enter the Performing Arts Center for the purpose of inspection; provided, however, the City shall comply with reasonable restrictions generally applicable to all visitors to the Site that are imposed by the DCPAF or its General Contractor(s) or subcontractors. If the DCPAF is in material default under this Agreement or in the event of an emergency which is not being timely addressed, the City may enter the Site to make any repairs to the Performing Arts Center or any improvements thereon, both interior and exterior, and of every kind or nature which are required of the DCPAF under the Agreement but which the DCPAF has failed to perform after reasonable notice (other than in the case of an emergency in which notice is impossible or impractical). Nothing contained in this paragraph shall be deemed to impose on the City any obligation to actually make repairs or alterations

1.20 Conditions to Commencing Construction.

(a) DCPAF's Right to Start Construction. The DCPAF shall not commence any construction unless and until the following are satisfied:

- (1) execution of this Agreement by both parties;
- (2) approval, to the extent provided in this Agreement and in accordance with the procedures set forth in this Agreement, of the plans and specifications for the major building component of the Performing Arts Center (consisting separately of the Opera House, the Theatre, the Center Parking Garage and the Renovated Artist Square) (each, a "Component") for which the DCPAF is requesting permission to commence construction;
- (3) the DCPAF shall have provided the City Manager with (i) an estimate of the total cost to construct such Component, certified as reasonable by the architect of record for such Component or by the DCPAF's third-party construction cost consultant (such estimate of total cost a "Component Estimate"), (ii) information reasonably satisfactory to the City Manager evidencing the availability to the DCPAF of the minimum amount of funds or financing necessary to construct such Component in accordance with such Component Estimate, and (iii) information reasonably satisfactory to the City Manager evidencing the existence of insurance and performance and payment bonds as required by this Agreement for such Component; and;
- (4) the DCPAF shall have obtained all building permits, zoning and other approvals required for the Component for which the DCPAF is requesting to commence construction.

(b) DCPAF's Obligation to Start Construction. The DCPAF shall have no obligation to commence construction unless and until the following are satisfied; provided, however, should it proceed with construction before said matters are addressed, it does so at its own risk (subject, however, to the remedies set forth in Section 2.2(c), which shall not be

deemed waived whether or not the DCPAF commences construction prior to the City's sale of the Bonds):

- (1) execution of this Agreement by both parties;
- (2) the City shall have deposited the Bond Funds into the City Project Cost Account (defined below); and
- (3) completion of the right-of-way abandonments contemplated in Section 3.7 hereof.

ARTICLE 2

Funding for Construction of the Performing Arts Center

2.1 DCPAF Construction Contribution. The DCPAF shall be responsible for all costs and expenses incurred to design, plan, develop, construct, maintain and operate the Performing Arts Center in excess of the City Construction Contribution and any amounts to be paid, reimbursed or funded by the City pursuant to the Use Agreement. The City and the DCPAF currently expect that the DCPAF will pay approximately \$257.0 million in private funds to plan, design and construct the Performing Arts Center (including certain amounts paid prior to the date hereof). The amounts paid and to be paid by the DCPAF in connection with the foregoing (exclusive of the City Construction Contribution) are referred to in this Agreement as the "DCPAF Construction Contribution".

2.2 City Construction Contribution.

(a) Obligation and Amount. The City's out-of-pocket financial contribution under this Agreement to the cost of designing, planning, developing and constructing the Performing Arts Center is and shall be limited to the amount of the Bond Funds, being a maximum amount of \$17,779,070.00. In no event shall the City have any obligation or commitment to fund more than said amount. The City's financial contribution to the cost of constructing the Performing Arts Center is referred to herein as the "City Construction Contribution". On or before December 31, 2006, the City shall raise the Bond Funds through the sale of general obligation bonds, as authorized by Proposition 5 and Proposition 12. The City shall deposit the Bond Funds into a separate account and shall reserve such funds for payment of Bond Eligible Project Costs (defined below) as requested from time to time by the DCPAF in accordance with this Article. The principal amount, structures, maturities, interest rates, provisions and special terms of the Bonds and any other City financing shall be as approved by the City; provided, however, in no event shall it be secured by a lien, security interest or any similar interest on the Performing Arts Center.

(b) Application of Bond Funds. The City Construction Contribution shall only be expended from Bond Funds on expenses incurred for Bond Purposes and in conformity with all legal requirements for expenditure of bond funds ("Bond Eligible Project Costs") substantially as follows:

(1) The DCPAF, from time to time during the course of this project, may identify portions of the Performing Arts Center Project Costs that it believes are eligible for the use and expenditure of Bond Funds. The DCPAF will submit said identified Project Cost item to the Director who shall verify whether or not said Project Cost can legally be paid or reimbursed with Bond Funds. The City's determination on this issue shall be final.

(2) The DCPAF currently anticipates that the Bond Funds will be spent on the items and in substantially the amounts set forth on Exhibit "D" attached hereto. The City confirms that, subject to confirmation through appropriate documentation at the time Bond Funds are to be paid as a Project Cost, the items on Exhibit "D" would be within the Bond Purposes.

(3) If the Director determines that the Project Cost in question would be eligible for payment or reimbursement from Bond Funds, the City will request that the DCPAF prepare a request for public bid. The DCPAF then will promptly prepare such request and will deliver the request to the City. The City will review the draft request to confirm that it conforms to applicable laws and City Code. If the City, in good faith, believes the request must be revised in any material respect, the City will consult with the DCPAF regarding such revisions. The City and the DCPAF each will use good faith efforts to promptly agree on the final form of each request for public bid; provided, however, the City's ultimate decision on this matter is determinative and final. The City then will advertise such request for public bid in conformity with its usual procedures for City projects. The contract for each such item to be paid for with Bond Funds will be publicly bid by the City in conformity with applicable state law and City Code.

(4) The City shall open the bids on the date specified. The DCPAF may have representatives attend said bid opening and the City shall reasonably consult with the DCPAF regarding the identification of the successful bidder. The City then shall award the contract to the successful bidder, as identified by the City or reject all bids in the exercise of its reasonable judgment and in compliance with applicable law and City Code.

(5) Upon the City's selection of the successful bidder, the DCPAF shall promptly prepare a draft contract for review by the City. The City will review the draft contract to confirm that it conforms to applicable law and City Code. If the City, in good faith, believes the draft contract must be revised in any material respect, the City will consult with the DCPAF regarding such revisions. The City and the DCPAF each will use good faith efforts to promptly agree on the form of such contract; provided, however, the City may require use of its standard form contracts and its decision in this regard shall be determinative and final. The DCPAF then shall enter into such contract with the successful bidder or, alternatively, if the City deems it preferable, the City shall enter into the contract with the successful bidder and assign same the contract to the DCPAF. Such assignment shall be in such form and substance as agreed to by the City and the DCPAF; provided, however, that such assignment shall provide that the DCPAF shall be the sole administrator of such contract and that the City (i) shall not interfere with the contractor's relationship with the DCPAF and (ii) shall not disburse any funds in

payment under such contract other than as and when requested by the DCPAF (and other than as may be required by law).

Bond Eligible Project Costs shall be paid or reimbursed from the Bond Funds up to but in no event exceeding an aggregate expenditure by the City of \$17,779,070. Any Bond Eligible Project Cost that is incurred in accordance with this Section 2.2(b) and that is paid by the DCPAF prior to the date on which the Bonds are sold shall be reimbursed from the Bond Funds (by payment of such amounts to the DCPAF) promptly (and in any event not later than ten days) after the Bond Funds are deposited into the City Project Cost Account, upon compliance with Section 2.5 hereof.

If at any time during the construction of the Performing Arts Center there is any development (for example, a change in applicable law or City Code) that the DCPAF believes might simplify the process for utilizing the Bond Funds in accordance with the Bond Purposes, the City shall consult in good faith with the DCPAF and will in good faith consider amending this Agreement to conform this Agreement to such new development.

(c) Remedy if Bonds Not Sold. In the event the City Council determines to not sell the Bonds or market conditions render the City unable to issue and sell the Bonds on or before December 31, 2006, the DCPAF may, as its sole and exclusive remedy, elect to terminate this Agreement and, at the DCPAF's election, purchase the Site and any improvements located thereon, upon the following terms and procedures:

(i) the DCPAF must notify the City of its termination of this Agreement and exercise of this option to purchase not later than 180 days after the first to occur of the City's notice to the DCPAF that the Bonds will not be sold or December 31, 2006. Said notice shall designate a place, date and time for closing; provided however, the place shall be within the City of Dallas and the date shall not be sooner than 30 days nor later than 180 days after the City's receipt of the notice;

(ii) the purchase price shall be paid by the DCPAF in cash or other immediately available funds and shall be an amount equal to the sum of the following (the "Purchase Price"):

(A) the amount actually paid by the City to purchase each portion of the Site that was acquired by the City after January 1, 2000, plus (without duplication) the fair market value (as of the date immediately prior to termination) of any portion of the Site that was owned by the City prior to January 1, 2000; and

(B) the aggregate amount actually spent by the City (if any) during the term of the Use Agreement for capital maintenance on the items or improvements located on the Site;

(C) at closing the City shall deliver to the DCPAF a Special Warranty Deed as to the Land and improvements which shall be subject to any and all matters of record applicable to the property conveyed, and otherwise conveying the Land and

improvements free and clear of all liens created by the City and otherwise on an “AS IS, WHERE IS, WITH ALL FAULTS BASIS” to the maximum extent allowed by law. In addition to any other matter, the Land and improvements conveyed shall include or be subject to deed restrictions in favor of and enforceable by the City restricting the Land and improvements to development and use consistent with the Downtown Arts District, maintaining and preserving the Renovated Artist Square and otherwise reasonably acceptable to the City; provided, however, that the DCPAF shall not be required to complete the purchase if the DCPAF is not satisfied with the deed restrictions proposed to be included by the City. The deed and deed restrictions must be approved as to form by the City Attorney and the DCPAF;

(D) the DCPAF may elect to secure a title policy and the City will reasonably cooperate with said effort; provided, however, all cost and expenses associated with same shall be borne by the DCPAF.

A purchase of the Site and any improvements located thereon pursuant to this Section 2.2(c) shall not terminate the City’s right to design and construct the Municipal Performance Hall (as defined below) on the Municipal Site (as defined below) on the terms and conditions set forth in Article 4 of this Agreement. If the City elects to deliver to the DCPAF the notice described in Section 4.1 and thereby remove the Municipal Site from the Site after the closing of a purchase by the DCPAF pursuant to this Section 2.2(c), (i) such notice shall be accompanied by a promise to pay (which must be binding on the City, secured by funds appropriated for such purpose and conditioned only on the delivery by the DCPAF of a deed to the Municipal Site substantially equivalent in form to the deed delivered to the DCPAF by the City) to the DCPAF an amount equal to the portion of the Purchase Price representing the value of the Municipal Site previously paid in connection with the exercise of the purchase option set forth in this Section 2.2(c), and (ii) the City and the DCPAF shall reasonably cooperate to transfer the Municipal Site to the City in exchange for such payment by the City to the DCPAF.

2.3 Project Costs. The costs of the Performing Arts Center (collectively, the “Project Costs”) shall include without limitation the following, whether incurred before or after the date of this Agreement:

(a) land preparation costs, including without limitation (i) all environmental testing, sampling and remediation necessary with respect to the Site; (ii) surveys, (iii) soils and hydrological testing and studies, (iv) engineering work and (v) the cost of designing and constructing or renovating utilities that will be necessary or convenient to service the Performing Arts Center;

(b) land planning, design, architectural and engineering costs incurred by the DCPAF for preparation of plans, specifications and designs for the Performing Arts Center and for appropriate construction oversight and assessments by the Architect, Engineers and other consultants;

(c) costs incurred by the DCPAF to construct, equip and furnish the Performing Arts Center;

(d) costs incurred for any related infrastructure not located on the Site, and including without limitation (i) costs incurred by the DCPAF for demolition, grading, paving, landscaping and installing lighting and (ii) costs of abandoning right-of-way for inclusion in and constructing the Performing Arts Center;

(e) permit, license and inspection fees incurred by the DCPAF (to the extent not waived by the City);

(f) fees and expenses of the General Contractor(s), subcontractors, consultants and similar persons incurred by the DCPAF, directly or indirectly in connection with the planning, design, engineering, construction, equipping and furnishing of the Project;

(g) costs incurred by the DCPAF in complying with the requirements of Article 1 hereof;

(h) costs incurred by the DCPAF in connection with removing, or providing security for, any material lien or encumbrance that arose in connection with the design, engineering, construction, equipping or furnishing of the Performing Arts Center;

(i) costs of the capital campaign and other fund raising and financing activities (but not interest on financing) pursuant to which the DCPAF will fund its obligations hereunder; and

(j) commercially reasonable general and administrative expenses of the DCPAF allocable to the administration or oversight of the activities contemplated in clauses (a) through (i) above and incurred by the DCPAF, directly or indirectly, in connection with the planning, design, engineering, construction, equipping and furnishing of the Performing Arts Center;

(k) such other costs and expenses as the parties hereto shall mutually approve in writing.

2.4 City Project Cost Account. The City shall establish (i) an account (the “City Project Cost Account”), into which account the Bond Funds shall be deposited, if sold, and out of which account funds shall be paid to satisfy the City’s obligations in connection with Bond Eligible Project Costs.

The City Project Cost Account shall be maintained at a current depository bank for City funds and shall not be commingled with any other funds of the City. The City acknowledges that the funds in the City Project Cost Account shall be dedicated solely to the payment of Bond Eligible Project Costs. The City Project Cost Account shall be administered and controlled (including signatory authority) by the City. Pending disbursement of funds in the City Project Cost Account, the City shall invest such funds only in investments permitted and authorized by the City’s investment policy as in effect from time to time. All income earned on such investments shall be the exclusive property of the City and shall be used by the City for the purpose of paying or retiring the Bonds or for creating a reserve fund therefore. If funds remain

in the City Project Cost Account after the completion of the Performing Arts Center and the payment of all Bond Eligible Project Costs pursuant to the terms hereof, then such funds shall thereafter be the exclusive property of the City and shall be used by the City for the purpose of paying or retiring the Bonds or for creating a reserve fund therefore.

2.5 DCPAF Project Cost Account(s). Subject to any requirements imposed by any lender to the DCPAF, the DCPAF shall establish one or more accounts (each, a “DCPAF Project Cost Accounts”) at one or more depository institutions that have one or more branches located in the City, into which account any cash amounts, including but not limited to any proceeds actually drawn from any financing, and any donations on hand, to be used for the DCPAF Construction Contribution and other purposes, along with any subsequent contributions by the DCPAF for Overruns (defined below), shall be deposited. The DCPAF acknowledges that funds in the DCPAF Project Cost Accounts shall be dedicated primarily to the payment of Project Costs. The DCPAF will furnish to the City a quarterly report of disbursements from the DCPAF Project Cost Accounts that are not Project Costs. The DCPAF Project Cost Accounts shall be administered and controlled (including signatory authority) by the DCPAF and funds in such account shall be disbursed by the DCPAF. Pending disbursement of funds in the DCPAF Project Cost Accounts, the DCPAF shall invest such funds only in appropriate investments permitted and authorized by the investment policy adopted by the DCPAF’s Board of Directors (or a committee thereof) as in effect from time to time. If funds remain in the DCPAF Project Cost Accounts after the completion of the Performing Arts Center and the payment of all Project Costs pursuant to the terms hereof, then such funds shall thereafter be used for operation of the Performing Arts Center, for establishment of endowment(s) for the benefit of the Performing Arts Center, or for repayment of indebtedness incurred by the DCPAF.

2.6 Disbursements To Pay Project Costs. Funds shall be periodically disbursed from the City Project Cost Account by the City in payment or reimbursement of Bond Eligible Project Costs, provided that a Payment Certificate authorizing such payment is duly completed in the manner described below.

“Payment Certificate” shall mean a written certificate prepared by the DCPAF, a copy of which is provided to the Director:

(1) which reasonably identifies Project Costs to be paid and represents that they are due and owing and authorized to be paid or reimbursed pursuant to such Payment Certificate, certifies that the Project Costs payable do not include contract retainages (other than those that are due) and identifies the basis on which any portion of such Project Costs are Bond Eligible Project Costs;

(2) which has attached to it a copy of an invoice(s) (and in the case of a Payment Certificate relating to a request for reimbursement, evidence of payment by the DCPAF of such invoice(s)) relating to such Project Costs which reasonably identify the payee (or payees), the goods, services and/or materials provided by such payee (or payees) and the total amount due and owing with respect to such goods, services and/or materials; and

(3) which has been executed by the DCPAF (and if reasonably requested by the City, includes a certification to the DCPAF by the architect(s) of record or General Contractor(s) on the project) to certify that the fees, costs, expenses and other charges reflected on the Payment Certificate constitute Project Costs and are due and owing.

If a Payment Certificate is otherwise completed and executed in accordance with items (1), (2), and (3) above and is submitted to the Director, the Director or his designee shall promptly prepare and submit, through normal payment procedures established for withdrawals from the City Project Cost Account, an appropriate directive for payment or reimbursement (as applicable) of the amount certified in the Payment Certificate for disbursement by the City. The City shall cause the Director or his designee to respond promptly and expeditiously to all requests by the DCPAF or its designee relating to Payment Certificates. The DCPAF shall promptly pay from one or more DCPAF Project Cost Accounts, or cause to be funded through its financing, the balance of the Project Costs.

2.7 Cost Overrun Funding Commitment. If the City reasonably determines at any time that the DCPAF funds remaining on hand, or available pursuant to the DCPAF's financing, in each case that are available for payment of Project Costs (after due regard for remaining Bond funds and Bond Eligible Project Costs) are clearly and materially insufficient to complete any Component of the Performing Arts Center then under construction in accordance with the Project Scope Criteria (as applicable to such Component) and the applicable Component Estimate, the City may deliver to the DCPAF a written notice (signed by the City Manager and describing in reasonable detail the basis on which the City has made such determination) requesting that the DCPAF either (a) furnish to the City reasonable evidence of the DCPAF's existing financial ability to complete such Component in accordance with this Agreement or (b) deposit funds or deliver reasonable evidence of additional financing, in an aggregate amount sufficient to cover the projected overage or to provide proof of the availability of sufficient DCPAF funds. Prior to delivering the notice described in the first sentence of this Section, the City may deliver to the DCPAF a written request signed by the City Manager that cites this Section, expresses that the City has a good faith concern about the DCPAF's financial ability to complete a Component as described in this Section, and requests reasonable access to DCPAF records in the possession and reasonable control of the DCPAF for the purpose of determining whether there is a sound basis for the City to invoke this Section. Upon receiving any such written request, the DCPAF shall reasonably cooperate with the City to make DCPAF records relating to the Project Costs expended, and the funding or financing, for such Component available for review by the City (at the DCPAF's offices during reasonable office hours on reasonable notice).

2.8 Audited Financial Statements; Quarterly Reports. During the period prior to the substantial completion of each Component of the Performing Arts Center, the DCPAF shall furnish to the City, as promptly as practicable after the completion thereof, (a) an audited annual balance sheet of the DCPAF, and (b) a quarterly report regarding each Component then under construction that describes, in reasonable detail, the amount of Project Costs (including without limitation any Bond Eligible Project Costs) that have been spent by the DCPAF in construction of such Component during the applicable fiscal quarter.

2.9 Financing. The DCPAF Construction Contribution and any overruns may be financed in any manner determined by the DCPAF; provided, however, such financing shall not be secured by, guaranteed by or payable by the City or any interest in the Performing Arts Center other than the leasehold mortgage provided in the Use Agreement and the DCPAF's license rights in the Performing Arts Center Intellectual Property and the City is reasonably satisfied with the availability of said funding as when needed.

2.10 City Assistance with DCPAF Financing. The DCPAF currently contemplates issuing private, tax-exempt bonds to finance a portion of the DCPAF Construction Contribution. The DCPAF will be the sole obligor for such bonds and the City's ownership interest in the Performing Arts Center shall not be pledged as security for such private bonds. Subject to future City Council approval (if required) and to applicable legal limitations, if requested by the DCPAF the City shall reasonably cooperate with the DCPAF to facilitate issuance of such private tax-exempt bonds, including without limitation by sponsoring a state-authorized conduit issuing authority to serve as the conduit through which the bonds will be issued and qualified as tax-exempt bonds. In no event shall the City be required to incur any cost or expense in said endeavor and the DCPAF shall reimburse the City for any such costs or expenses incurred by the City relating to said financing.

ARTICLE 3

The Site

3.1 City's Ownership of the Performing Arts Center. The City owns fee simple title to the Site, together with all rights and appurtenances relating thereto. The City will provide copies of its files on the Site, including without limitation, surveys, deeds, title policies, and environmental analysis and engineering reports, if any, upon DCPAF's request for same. From and after the date hereof, the City shall not grant or convey any interest in the Site (including without limitation any liens, encumbrances or City-controlled restrictions) that would materially adversely affect the design, engineering, construction, furnishing, equipping, operation or residual value of the Performing Arts Center and shall not use the Site for any purpose other than the Performing Arts Center. Notwithstanding the foregoing, the City shall be free to grant such easements, right-of-ways and access rights as it deem reasonably necessary to the development of the Performing Arts Area and the Downtown Arts District, including without limitation, the Municipal Performance Hall, and other properties in and around the Downtown Arts District that does not materially adversely affect the Performing Arts Center.

3.2 Condition of Property. **The DCPAF is responsible for and shall undertake its own due diligence investigation of the Site and accepts the Site for DCPAF's use on an "AS IS, WHERE IS, WITH ALL FAULTS" basis and subject to the existing physical conditions, matters of record and zoning. To the fullest extent permitted by law, the City hereby disclaims and the DCPAF hereby waives any and all warranties, express or implied, in any way regarding the Site, including without limitation the warranties of commercial habitability, merchantability, marketability, or fitness for a particular purpose. The DCPAF acknowledges that, having been given the opportunity to inspect the Site, the DCPAF is relying solely on its own investigation of the Site and not on any information**

provided or to be provided by the City and agrees to accept the Site for use and waives all objections or claims against the City arising from or related to the Site or to any hazardous materials (defined below) on the Site; provided, however, that this acknowledgement shall not limit the parties' commitments under Sections 3.4 and 3.5 of this Agreement. The DCPAF further acknowledges that any information provided or to be provided with respect to the Site was obtained from a variety of sources and that the City has not made any independent investigation or verification of such information and makes no representations as to the accuracy or completeness of such information. The City is not liable for or bound in any manner by any verbal or written statements, representations or information pertaining to the Site, or the operation thereof, furnished by any real estate broker, agent, employee, servant or other person.

3.3 Use Agreement. Contemporaneously herewith, the City and the DCPAF shall enter into a use agreement for the Site and the Performing Arts Center (the "Use Agreement"), in substantially the form attached hereto as Exhibit "E".

3.4 Demolition.

(a) Demolition Plan and Work. The DCPAF shall be responsible for performing, or causing to be performed, any demolition work that may be required or appropriate in connection with the development and construction at the Site (including without limitation the Municipal Site). As promptly as practicable after the execution and delivery of this Agreement, the DCPAF shall prepare and present to the City a detailed plan for the demolition and removal of existing structures, vegetation and other items on the Site (including without limitation the Municipal Site), and setting forth the schedule for such demolition and removal. The Director shall, and the City shall cause the Director to, promptly consult with the DCPAF regarding the demolition plan. The City and the DCPAF each shall reasonably cooperate in good faith to finalize the demolition plan as promptly as practicable after its initial delivery by the DCPAF. Such demolition shall be carried out in accordance with all applicable laws. The costs associated with the demolition shall constitute Project Costs; provided, however, the parties shall endeavor to have them qualify as Bond Eligible Project Costs. The City shall cause its employees to reasonably assist the DCPAF in completing the demolition plan. Notwithstanding the foregoing, the demolition plan shall not provide for the relocation or salvage of any building or other item currently located on the Site. In the event the City determines to attempt to relocate or salvage any such building or other item, the City (a) shall be solely responsible for completing such relocation or salvage in a manner that will not interfere or delay the design or construction of any other portion of the Performing Arts Center and (b) shall pay all costs of such relocation and salvage from funds other than the Bond Funds, and such excess cost, if any, shall not be considered a Project Cost.

(b) City Removal of Vegetation. The parties acknowledge that some of the trees currently existing on the Site may be suitable for relocation by the City to other City-owned locations. The City may, but is under no obligation to, elect to relocate such trees. The DCPAF will, and will cause its contractor(s) to, reasonably cooperate with the City (and/or any contractor(s) engaged by the City) to facilitate the City's relocation of any or all of the trees located on the Site should the City elect to relocate same. Any expense incurred by the City in

connection with such removal and relocation shall not constitute a Project Cost and shall not be counted against the City Construction Contribution. The Parties acknowledge that certain of the trees on the Site may need to be removed to facilitate the City's relocation of other trees and that a portion of the trees on the Site may not be suitable for relocation. In consideration of the DCPAF's reasonable cooperation with the City's tree relocation efforts, if the City elects to relocate trees, it shall complete any such relocation and shall remove all other trees on the Site on or before January 1, 2006. The City shall notify the DCPAF not later than October 14, 2005, whether the City intends to remove vegetation from the Site as described in this Section 3.4(b). In the event the City elects not to remove such vegetation, the DCPAF shall thereafter have the right to remove and salvage (or to have any third-party remove and salvage) any or all trees located on the Site, and to use, donate, sell or otherwise transfer such trees in any manner deemed prudent by the DCPAF.

3.5 Environmental Remediation. As promptly as practicable after the execution and delivery of this Agreement, the DCPAF shall present to the City a detailed plan for the environmental remediation of the Site, identifying steps to be taken and setting forth the schedule for such environmental remediation. The Director shall, and the City shall cause the Director to, promptly consult with the DCPAF regarding the environmental remediation plan. The City and the DCPAF each shall reasonably cooperate in good faith to finalize the environmental remediation plan as promptly as practicable after its initial delivery by the DCPAF. The final remediation plan shall result in clean up consistent with any remedy standard authorized by Subchapter B of 30 Texas Administrative Code Chapter 350 as being protective of human health and the environment. Such environmental remediation shall be carried out in accordance with all applicable laws. The DCPAF shall cause its contractors or agents to perform such environmental investigation and remediation work at the Site (including without limitation the Municipal Site). The City shall take all reasonable action to cooperate with the DCPAF and its contractors in conducting such environmental remediation, including without limitation by adopting any commercially reasonable restrictions on the Site required to meet the selected remedy. The costs associated with the environmental remediation shall constitute Project Costs; provided, however, the parties may endeavor to have them qualify as Bond Eligible Project Costs. The City shall cause its employees to reasonably assist the DCPAF in completing the environmental remediation plan.

3.6 Temporary Street Closures. To the extent reasonably requested by the DCPAF in connection with the construction of the Performing Arts Center, the City shall grant and issue to the DCPAF all necessary permits to authorize temporary closures of, and shall grant and issue to the DCPAF all necessary permits to make cuts or other perforations in, demolish and excavate all or portions of any street, alley or other public right-of-way that is under the reasonable control of the City and that is contained in whole or in part within the Site or that abuts any portion of the Site; provided however, all such actions are subject to the City's obligations to preserve and protect the public health, safety and welfare under applicable laws.

3.7 Street Abandonment. At the DCPAF's request, the City will consider closing, vacating and abandoning any streets, alleys, sidewalks or other public rights-of way that would constitute any portion of the Site. In this regard the City and the DCPAF agree that the Site will be best served by closing, vacating and abandoning portions of Leonard Street and Jack Evans

Street (and related alley, parkway, sidewalk or other public right-of-way) and incorporating said area into the Site, said proposed closure areas being more fully described on Exhibit “F” attached hereto and incorporated here for all purposes (the “Abandonment R-O-W”).

As promptly as practicable after the date of this Agreement, the City shall take all appropriate actions to submit and process applications to abandon the Abandonment R-O-W, including without limitation by publishing appropriate notices, holding appropriate hearings, presenting to the City Council or other appropriate City authority the reasons for abandoning such portions of right-of-way and, if requested by the DCPAF, permitting the DCPAF to reasonably participate in such proceedings. In no event will the City be obligated to pay for any underlying fee title or other interest or institute litigation to secure the abandonment. If abandonment of the Abandonment R-O-W is approved by the Dallas City Council, then the property under such street thereafter shall be deemed part of the Site for all purposes under this Agreement and the Use Agreement. Notwithstanding the foregoing, the parties acknowledge that the action of the City Council regarding approving such abandonments is strictly within the Council’s discretion.

3.8 Arts District Zoning. The parties acknowledge that the plans for the Performing Arts Center have been developed with a view to creating a multi-venue, multi-use performing arts center as part of the Downtown Arts District. The parties further acknowledge that the current plans for the Performing Arts Center differ from the Sasaki Plan for the Downtown Arts District, and may differ from other arts district plans that have been discussed or adopted from time to time. To facilitate the construction of the Performing Arts Center, the DCPAF and the City shall reasonably cooperate to initiate appropriate rezoning or amendment of such plans or planning requirements that are determined at any time to be applicable to the Site and that are inconsistent with, or that might reasonably prohibit, any portion of the Performing Arts Center as designed and constructed pursuant to this Agreement. The City shall take all reasonable steps to accommodate said rezoning or plan modification/amendment including without limitation presenting said action to the appropriate City authority for action; provided however, the parties acknowledge that any such action by the City Council, the City Planning and Zoning Commission or other appropriate City authority is strictly within said bodies’ independent discretion.

ARTICLE 4

Municipal Performance Hall

4.1 The Project. The parties acknowledge that the City intends to construct a municipal performance hall (the “Municipal Performance Hall”) on a portion of the Site as shown on Exhibit “A” (such area, the “Municipal Site”).

4.2 Use of Municipal Performance Hall Site. The parties acknowledge and agree that the Municipal Site initially shall be part of the Site and shall be controlled, developed, maintained, and used by the DCPAF pursuant to this Agreement and the Use Agreement. If, on or before the five-year anniversary of the Commencement Date, the City presents to the DCPAF written documentation that the City has completed the design of the Municipal Performance

Hall, has issued bonds or otherwise obtained all funds required to construct the Municipal Performance Hall, and has initiated the public bid process to collect bids from potential general contractors for the construction of the Municipal Performance Hall, then the Municipal Site shall automatically be removed from and shall not be part of the Site for purposes of this Agreement and the Use Agreement without need of further action by the parties. If the Municipal Site has not been removed from the Site as described above by the five-year anniversary of the Commencement Date, then the DCPAF shall thereafter be entitled to retain the Municipal Site as part of the Site and the DCPAF thereafter may (with the consent of the City Manager, which consent shall not be unreasonably withheld or delayed and which consent shall be given by the City Manager without economic compensation to the City or other conditions) use, develop and operate the Municipal Site for any use the DCPAF reasonably determines from time to time will benefit the Performing Arts Center, is consistent with the multi-venue, multi-use, public performing arts complex contemplated herein.

4.3 DCPAF Activities. Prior to the earlier of the removal from this Agreement and the Use Agreement of the Municipal Site and the five-year anniversary of the Commencement Date, (i) the DCPAF may develop and use the Municipal Site for paved surface parking, landscaping, lighting, sidewalks, fencing, planters or similar improvements consistent with and complimenting the Performing Arts Center and the Downtown Arts District as a whole, and (ii) the DCPAF will not construct on the Municipal Site any building or similar permanent improvement that would materially interfere with or increase the cost or time to complete the City's construction of the Municipal Performance Hall.

4.4 City Development. If the City exercises its right to remove the Municipal Site from this Agreement and the Use Agreement, it shall endeavor to coordinate its development of the Municipal Performance Hall with DCPAF so as to avoid development conflict. To ensure that the DCPAF has a reasonable opportunity to provide input during the design and construction process, the City shall keep the DCPAF reasonably informed about the designs, engineering plans and construction plans for the Municipal Performance Hall. The City will consider, in good faith, reasonable suggestions from the DCPAF that are intended to ensure that construction of the Municipal Performance Hall does not interfere with the construction or operation of the Performing Arts Center. The parties acknowledge and agree that the City shall not be required to consider recommendations from the DCPAF that would, in the City's good faith opinion, reduce the distinctive aesthetic design of any component of the Municipal Performance Hall, increase the cost to construct the Municipal Performance Hall or limit the flexibility and usefulness (from an operational perspective) of any component of the Municipal Performance Hall. In constructing the Municipal Performance Hall, the City shall not create any staging area or similar imposition on any portion of the Site (other than the Municipal Site) without the prior written consent of the DCPAF, which may not be unreasonably withheld. The City's construction costs relating to the Municipal Performance Hall are not Project Costs, except as otherwise provided under this Agreement.

ARTICLE 5

Default and Remedies

5.1 DCPAF Default. Each of the following events shall be an “Event of Default” by the DCPAF under this Agreement:

(a) the DCPAF shall fail to pay to the City any monetary sum hereby required of it as and when the same shall become due and payable and shall not cure such default within thirty (30) days after the later of the date on which written notice thereof is given by the City to the DCPAF and the date on which any dispute relating to such amount is resolved by agreement or adjudication;

(b) the DCPAF shall fail in any material respect to maintain any of the insurance or bonds required by this Agreement, and the continuation of the failure without cure for a period of thirty (30) days after the City notifies the DCPAF of the failure in writing in accordance with the notice provisions under this Agreement;

(c) the DCPAF shall fail to comply in any material respect with any term, provision or covenant of this Agreement, other than the payment of money to the City, and shall not cure such failure within ninety (90) days after written notice thereof is given by the City to the DCPAF (provided that if such default cannot reasonably be cured within ninety (90) days, then the DCPAF shall have an additional reasonable period of time within which to cure such default);

(d) there shall occur and remain uncured any DCPAF Event of Default under the Use Agreement; and

(e) a receiver or trustee is appointed to take possession of all or substantially all of the assets of the DCPAF; or if any action is taken or suffered by the DCPAF pursuant to an insolvency, bankruptcy, or reorganization act in respect of the DCPAF; or if the DCPAF makes a general assignment for the benefit of its creditors; and such appointment, action, or assignment continues for a period of sixty (60) days.

5.2 City’s Remedies. Upon the occurrence of an Event of Default by the DCPAF, the City may pursue any legal or equitable remedy or remedies, including, without limitation, specific performance, damages, and termination of this Agreement; provided, however, that the City shall have no right to terminate this Agreement unless the City delivers to the DCPAF a second notice which expressly provides that the City will terminate within thirty (30) days if the default is not addressed as herein provided. Termination or non-termination of this Agreement upon a DCPAF Event of Default shall not prevent the City from suing the DCPAF for specific performance, damages, injunctive relief or other remedies. Upon termination by the City, the City may occupy the Performing Arts Center, and the DCPAF shall assign to the City any of its contracts and agreements requested by the City to be so assigned. In the event the DCPAF fails to pay any of the expenses or amounts or perform any obligation specified in this Agreement, then to the extent such failure constitutes an Event of Default hereunder, the City may, but shall not be obligated to do so, pay any such amount or performing any such obligations and the amount so paid and the cost incurred in said performance shall immediately be due and payable by the DCPAF to the City and shall thereafter bear interest at the rate specified in this Agreement. All remedies of the City under this Agreement shall be cumulative.

5.3 City Default. Each of the following events shall be an “Event of Default” by the City under this Agreement:

(a) the City shall fail to pay to the DCPAF any monetary sum hereby required of it as and when the same shall become due and payable and shall not cure such default within thirty (30) days after the later of the date on which written notice thereof is given by the DCPAF to the City and the date on which any dispute relating to such amount is resolved or adjudicated;

(b) the City shall fail to comply in any material respect with any term, provision or covenant of this Agreement, other than the payment of money, and shall not cure such failure within ninety (90) days after written notice thereof is given by the DCPAF to the City (provided that if such default cannot reasonably be cured within ninety (90) days, then the City shall have an additional reasonable period of time within which to cure such default); and

(c) there shall occur and remain uncured any City Event of Default under the Use Agreement.

5.4 DCPAF’s Remedies. Upon the occurrence of any Event of Default by the City, the DCPAF may pursue any legal or equitable remedy or remedies, including, without limitation, specific performance, damages, and termination of this Agreement; provided, however, that the DCPAF shall have no right to terminate this Agreement unless the DCPAF delivers to the City a second notice which expressly provides that the DCPAF will terminate within thirty (30) days if the default is not addressed as herein provided.

5.5 Waiver. Forbearance by the non-defaulting party to enforce one or more of the remedies herein provided upon the occurrence of an Event of Default by the other party shall not be deemed or construed to constitute a waiver of such default. One or more waivers of a breach of any covenant, term or condition of this Agreement by either party hereto shall not be construed by the other party as a waiver of a different or subsequent breach of the same covenant, term or condition. The consent or approval of either party to or of any act by the other party of a nature requiring consent or approval shall not be deemed to waive or render unnecessary the consent to or approval of any other subsequent similar act.

ARTICLE 6

Condemnation

6.1 Definitions. Whenever used in this Article, the following words shall have the definitions and meanings hereinafter set forth:

(a) “Condemnation Proceedings”. Any action brought for the purpose of any taking of the Performing Arts Center, or any part thereof or any property interest therein (including, without limitation, the right to the temporary use of all or any portion of the Performing Arts Center), by competent authority as a result of the exercise of the power of

eminent domain, including a voluntary sale to such authority either under threat of condemnation or while such action or proceeding is pending.

(b) "Taking" or "Taken". The event and date of vesting of title to the Performing Arts Center or any part thereof or any property interest therein (including, without limitation, the right to the temporary use of all or any portion of the Performing Arts Center), pursuant to a Condemnation Proceeding.

6.2 Efforts to Prevent Taking. The City shall use its best efforts to cause all other competent authorities with the power of eminent domain to refrain from instituting any Condemnation Proceedings or exercising any other powers of eminent domain with respect to the Performing Arts Center, or any part thereof or any interest therein, during the term of this Agreement.

6.3 Entire Taking. If all or substantially all of the Performing Arts Center shall be Taken in Condemnation such that it may not be developed as contemplated in this Agreement, this Agreement shall terminate and from and after such date the DCPAF and the City shall not have any other obligations under this Agreement with respect to the Performing Arts Center. Any award, compensation, or damage by reason of said Taking shall be allocated between the City and the DCPAF as follows: (a) the portion of any award paid attributable to the taking of the improvements constructed pursuant to this Agreement shall be allocated in proportion to the amount of Projects Costs paid by each of the City and the DCPAF to the total Project Costs paid by both the City and the DCPAF as of the Taking; and (b) the balance of any award or payment (whether made as compensation for diminution of value of this Agreement, the City's fee interest in the Performing Arts Center, the DCPAF's interest in the Performing Arts Center under the Use Agreement, or otherwise), after deducting the award for improvements shall be paid to the City.

6.4 Partial Taking.

(a) Abatement for Part Taken. If less than all of the Performing Arts Center shall be Taken in Condemnation Proceedings, obligations attributable to the portion of the Center taken shall be abated from and after the date of such partial Taking, and from and after such date the DCPAF and the City shall not have any other obligations under this Agreement with respect to the portion of the Center that has been taken.

(b) Restoration Unreasonable. If a Taking involves all of a building, performance venue, or facility within the Performing Arts Center (but not the entire Performing Arts Center) such that it cannot be reasonably completed or restored to functional utility through reconstruction, reconfiguration and redesign, then the DCPAF may elect to terminate this Agreement, and from and after such date the DCPAF and the City shall not have any other obligations under this Agreement with respect to the Performing Arts Center. Such election to terminate must be exercised no later than 180 days after the date of such Taking. In the event of such termination by the DCPAF, any award, compensation or damage by reason of the Taking shall be allocated as provided for an Entire Taking in Section 6.3 above. If the DCPAF does not elect to terminate this Agreement upon any partial Taking as described in this paragraph, then (i)

the Performing Arts Center shall be reduced by the portion thereof Taken in the Condemnation Proceeding, and the obligations pertaining to the Taken portions shall cease, and (ii) the DCPAF shall commence and proceed with reasonable diligence to repair, reconfigure or reconstruct the remaining portions of any improvements on the Performing Arts Center; provided, however, the DCPAF's obligation to so repair, reconfigure or reconstruct shall be limited to the proceeds of the condemnation award actually received by the DCPAF. In the event of restoration the DCPAF and the City shall receive and shall hold in trust the entire portion of any such award, compensation and damage relating to improvements taken and shall disburse and apply same to the reasonable cost of such restoration. The balance of any award or payment (whether made as compensation for diminution of value of this Agreement, the City's fee interest in the Performing Arts Center, the DCPAF's interest in the Performing Arts Center under the Use Agreement, or otherwise and after deducting the portion of the award for the value of the improvements) shall be paid to the City.

(c) Restoration Reasonable. If a Taking involves less than all of a building, performance venue, or facility within the Performing Arts Center such that it can be reasonably restored to functional utility through reconstruction, reconfiguration and redesign, the DCPAF shall promptly and diligently proceed to restore the functionality and utility remainder of the Performing Arts Center and affected improvements. For such purpose the DCPAF and the City shall receive and shall hold in trust the amount of the award relating to the improvements taken and shall disburse such award to apply to the reasonable cost of such restoration. The balance of any award or payment (whether made as compensation for diminution of value of this Agreement, the City's fee interest in the Performing Arts Center, the DCPAF's interest in the Performing Arts Center under the Use Agreement, or otherwise and after deducting the portion of the award for the value of the improvements) shall be paid to the City. Notwithstanding the other provisions of this subsection, if the DCPAF and the City receive funds to be used for restoration of improvements under this subsection and the City Attorney advises the City and the DCPAF that such funds must be spent pursuant to public bidding and contracting procedures substantially as if such funds were Bond Funds under this Agreement, then the DCPAF shall have the right to require the City to promptly and diligently proceed to restore the functionality and utility of the remainder of the Performing Arts Center and affected improvements (to the extent of such funds) and such restoration shall not be the obligation of the DCPAF hereunder.

6.5 Temporary Taking. If any right of temporary (hereinafter defined) possession or occupancy of all or any portion of the Performing Arts Center shall be Taken, the construction obligations with respect to same shall be abated during the duration of such Taking in a fair and equitable manner. A Taking shall be considered "temporary" only if the period of time during which the DCPAF is deprived of usage of all or part of the Performing Arts Center as the result of such Taking does not materially interfere with the ability of the DCPAF to continue development of the Performing Arts Center. Any other Taking that is not "temporary" as described above shall be treated as an Entire Taking or as a Partial Taking under this Article.

ARTICLE 7

Miscellaneous

7.1 Further Agreements. The City and the DCPAF each will use their good faith efforts to complete and execute, as soon as practicable following the execution of this Agreement, all documentation necessary, appropriate or desirable to carry out the transactions agreed to by the parties in this Agreement.

7.2 GOVERNING LAW. THIS AGREEMENT SHALL BE INTERPRETED AND THE RIGHTS OF THE PARTIES DETERMINED IN ACCORDANCE WITH THE LAWS AND COURT DECISIONS OF THE UNITED STATES APPLICABLE THERETO AND THE LAWS AND COURT DECISIONS OF THE STATE OF TEXAS APPLICABLE TO AN AGREEMENT EXECUTED, DELIVERED AND PERFORMED IN SUCH STATE.

7.3 Venue for Actions. The venue for any legal action arising out of this Agreement shall lie exclusively in Dallas County, Texas.

7.4 Dispute Resolution. The parties commit to use commercially reasonable efforts to cooperate and resolve in good faith all issues and disputes that may arise out of this Agreement. Prior to instituting any legal action against the other in relation to any matter arising out of this Agreement, the DCPAF and the City shall submit each material dispute to non-binding mediation under reasonable and customary practices to be agreed to in each instance by the parties.

7.5 Obligations to Defend Validity of Agreement. If litigation is filed by a third party against the DCPAF or the City in an effort to enjoin either party's performance of this Agreement, the parties hereto shall take all commercially reasonable steps to support and defend the validity and enforceability of this Agreement. Either party may intervene in any such matter in which the other party hereto has been named as a defendant. Each party shall be responsible for its attorneys' fees and costs of litigation.

7.6 Successors and Assigns. This Agreement may not be assigned by either party without the express written consent of the other party. The provisions hereof shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

7.7 Entire Agreement; Amendment. This Agreement (including the Exhibits attached hereto) and the other documents delivered pursuant hereto and referenced herein constitute the full and entire understanding and agreement between the parties with regard to the subject matter hereof and thereof and supersede any prior or contemporaneous, written or oral agreements or discussions between the parties. Except as expressly provided herein, neither this Agreement nor any term hereof may be amended, waived, discharged or terminated, except by a written instrument signed by the parties hereto.

7.8 Waiver. No term or condition of this Agreement shall be deemed to have been waived, nor there any estoppel to enforce any provision of this Agreement, except by written instrument of the party charged with such waiver or estoppel.

7.9 Representatives. During the term of this Agreement, the City Manager (and, where expressly provided for in this Agreement, the Director or his designee) shall have full authority to administer this Agreement on behalf of the City. The DCPAF shall be entitled to rely on the authority of the City Manager (or, where indicated, the Director or his designee) for such purposes under this Agreement.

During the term of this Agreement, the DCPAF shall designate four individuals who shall have full authority (by joint action of two or more) to administer this Agreement on behalf of the DCPAF. The initial DCPAF representatives shall be _____, _____, _____ and _____. The DCPAF may designate a permanent or temporary replacement for any DCPAF representative by delivering a written notice to the City executed by the DCPAF.

7.10 Notices. Any notice required or desired to be given under this Agreement shall be in writing with copies directed as indicated herein and shall be personally served or given by mail. Any notice given by mail shall be deemed to have been given when deposited in the U.S. mails, certified mail – return receipt requested, postage prepaid, and addressed to the party to be served at the last address given by that party to the other party under the provisions of this Article. Notice given by courier, fax, or other form of personal delivery shall be deemed given only upon actual receipt. Any change in address shall be promptly given in writing to the other party pursuant to this notice provision. The initial addresses for notice are as follows:

If to the City: City of Dallas
 1500 Marilla
 4E North
 Dallas, Texas 75201
 Attn: City Manager
 Telephone: 214-670-4268
 Facsimile: 214-670-3946

with copy to: City of Dallas
 City Attorney's Office
 1500 Marilla, Room 7CN
 Dallas, TX 75201
 Attn: J. Arthur Hudman
 Telephone: 214-670-5940
 Facsimile: 214-670-0622

If to the DCPAF: Dallas Center for the Performing Arts Foundation, Inc.
2106 Boll Street
Dallas, Texas 75204
Attn: President and Chief Executive Officer
Telephone: 214-954-9925
Fax: 214-954-9936

with copies to: Haynes and Boone, L.L.P.
901 Main Street
Suite 3100
Dallas, Texas 75202
Attn: Michael M. Boone and Tom D. Harris
Telephone: 214-651-5630
Fax: 214-651-5940

7.11 Severability. If any provision of this Agreement shall be invalid, illegal or unenforceable, such provision shall be reformed to the extent necessary to permit enforcement thereof, and the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

7.12 No Third-Party Beneficiaries. The City and the DCPAF intend that this Agreement shall not benefit or create any right or cause of action in or on behalf of any third-party beneficiary, or any individual or entity other than the City, the DCPAF or assignees of such parties.

7.13 No Joint Venture. Nothing contained in this Agreement or any other agreement between the DCPAF and the City is intended by the parties to create a partnership or joint venture between the DCPAF, on the one hand, and the City on the other hand and any implication to the contrary is hereby expressly disavowed. It is understood and agreed that this Agreement does not create a joint enterprise, nor does it appoint either party as an agent of the other for any purpose whatsoever. Neither party shall in any way assume any of the liability of the other for acts of the other or obligations of the other. Each party shall be responsible for any and all suits, demands, costs or actions proximately resulting from its own individual acts or omissions.

7.14 Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be an original, but all of which together shall constitute one and the same instrument.

7.15 Titles and Subtitles. The titles of the articles, sections, paragraphs and subparagraphs of this Agreement are for convenience of reference only and are not to be considered in construing this Agreement.

7.16 Limited Recourse. No officer, director, employee, agent, attorney or representative of the DCPAF shall be deemed to be a party to this Agreement or shall be liable for any of the contractual obligations created hereunder. No elected official of the City and no

agent, attorney or representative of the City shall be deemed to be a party to this Agreement or shall be liable for any of the contractual obligations created hereunder.

7.17 Indemnity. The DCPAF shall indemnify and hold the City, its officers, agents, employees, and representatives, harmless against any and all claims, injuries (including death), demands, liabilities, causes of action, suits, judgments, damages and expenses (including reasonable attorneys' fees) asserted against the City by any third party and arising from (i) the negligence or intentional misconduct of the DCPAF or its officers, employees, agents, contractors and subcontractors in connection with the development, design and construction of the Performing Arts Center or (ii) the DCPAF's material breach of any provision of this Agreement, including without limitation any insurance obligations. This Section shall survive termination or expiration of this Agreement. The provisions of this Section are solely for the benefit of the City, and shall not be deemed to be for the benefit of any other person or entity. Notwithstanding the indemnity set forth in this Section, the City shall diligently and timely assert all reasonable defenses (including without limitation sovereign immunity and defenses otherwise available to the City as a municipal corporation) against any third-party claim that the City believes is covered by the indemnity in this Section.

7.18 Conflict of Interest. The following section of the Charter of the City of Dallas shall be one of the conditions, and a part of, the consideration of this Agreement, to wit (with the portions in brackets having been added for clarity of application in this Agreement):

“CHAPTER XXII. Sec. 11. FINANCIAL INTEREST OF EMPLOYEE OR OFFICER PROHIBITED --

(a) No officer or employee [of the City] shall have any financial interest, direct or indirect, in any contract with the City or be financially interested, directly or indirectly, in the sale to the City of any land, materials, supplies or services, except on behalf of the City as an officer or employee. Any violation of this section shall constitute malfeasance in office, and any officer or employee [of the City] guilty thereof shall thereby forfeit the officer's or employee's office or position with the City. Any violation of this section, with knowledge, express or implied, of the person or corporation contracting with the City shall render the contract involved voidable by the City Manager or the City Council.

(b) The alleged violations of this section shall be matters to be determined either by the Trial Board in the case of employees [of the City] who have the right to appeal to the Trial Board, and by the City Council in the case of other employees [of the City].

(c) The prohibitions of this section shall not apply to the participation by City employees in federally-funded housing programs, to the extent permitted by applicable federal or state law.”

7.19 Gift to Public Servant. The DCPAF shall not, and shall use commercially reasonable efforts to cause its contractors and agents to not, offer, or agree to confer any benefit upon a City employee or official that the City employee or official is prohibited by law from accepting.

For purposes of this section, “benefit” means anything reasonably regarded as pecuniary gain or pecuniary advantage, including benefit to any other person in whose welfare the beneficiary has a direct or substantial interest, but does not include a contribution or expenditure made and reported in accordance with law.

Notwithstanding any other legal remedies, the City may require the DCPAF to remove any employee or contractor of DCPAF from performance responsibilities under this Agreement who has violated the restrictions of this section or any similar state or federal law.

7.20 Hazardous Materials. The DCPAF and the City each shall comply with, and shall require that their respective agents, contractors and subcontractors comply with, all applicable laws regarding the use, removal, storage, transportation, disposal and remediation of “hazardous materials.” “Hazardous materials” means any substance, material or waste which is now or hereafter classified or considered to be hazardous, toxic or dangerous under any federal, state or local laws, rules and regulations affecting the Site relating to pollution or the protection or regulation of human health, natural resources or the environment, but shall exclude any such items that are necessary for the ordinary performance of the DCPAF’s business/construction activities, provided that such are used, stored and disposed of in compliance with all laws.

* * * *

This Agreement has been executed and delivered as of the date first written above.

CITY OF DALLAS
MARY K. SUHM, CITY MANAGER

By: _____
Name: _____
Title: _____

Approved as to form:
THOMAS P. PERKINS, JR., CITY ATTORNEY

By: _____
Name: _____
Title: _____

THE DALLAS CENTER FOR THE
PERFORMING ARTS FOUNDATION, INC.

By: _____
Name: _____
Title: _____

Exhibit “A”

The Site

[to be attached]

Exhibit “B”

Project Scope Criteria

[to be attached]

Exhibit “C”

Development Schedule

[to be attached]

Exhibit “D”

Anticipated Bond Fund Expenditures

[to be attached]

Exhibit “E”

Use Agreement

[to be attached]

Exhibit “F”

Street Abandonment R-O-W

[to be attached]

Attachment B

USE AGREEMENT

between

THE CITY OF DALLAS

and

DALLAS CENTER FOR THE PERFORMING ARTS FOUNDATION, INC.

Dated as of _____, 200_

**USE AGREEMENT
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Exhibits

- A Legal Description of the Land
- B Site Plan of the Land
- C Memorandum of Agreement

USE AGREEMENT

THIS USE AGREEMENT (this "Agreement") is made and entered into effective as of the ___ day of _____, 200__ (the "Effective Date"), by and between the CITY OF DALLAS, TEXAS, a municipal corporation of the State of Texas and a home rule city (the "City"), and DALLAS CENTER FOR THE PERFORMING ARTS FOUNDATION, INC., a Texas non-profit corporation (the "DCPAF").

RECITALS

A. The City and the DCPAF entered into a Performing Arts Center Development Agreement dated _____, regarding the design, development, construction and financing of the Performing Arts Center (hereinafter defined) as a multi-venue, multi-use entertainment, performing arts, civic and cultural complex in the City of Dallas, Texas for the use and benefit of the public.

B. The City is the owner of the Performing Arts Center, including the land comprising same and all improvements existing or to be constructed thereon, and is authorized to execute this Agreement upon such terms as it may deem advisable.

C. The City and the DCPAF desire that the Performing Arts Center provide a multi-venue, multi-use performance arts complex for opera, theater and other cultural and entertainment events.

D. The DCPAF has supplied or will be supplying approximately \$250 Million to fund the design, development and construction of the Performing Arts Center.

E. The DCPAF is a Texas non-profit corporation established and existing under Texas law and as a foundation under the Internal Revenue Code for the purpose of designing, developing, constructing, equipping, maintaining, operating, and managing the Performing Arts Center and promoting the performing arts in Dallas, Texas;

F. The City and the DCPAF desire to enter into a long-term use agreement whereby the DCPAF would have possession of and manage, maintain and operate the Performing Arts Center.

AGREEMENT

In consideration of the agreements hereinafter set forth to be kept and performed by the parties hereto, the City hereby demises and leases to the DCPAF, and the DCPAF hereby takes and leases from the City, the Premises hereinafter described, for the Term, at the rental and subject to and upon the following terms, conditions and agreements:

ARTICLE 1

Premises

1.1 Premises. The premises subject to this Agreement consist of those certain tracts or parcels of land (hereinafter collectively called the "Land") that are located in the Downtown Arts District in the City of Dallas, Dallas County, Texas, that are more particularly described on Exhibit "A" attached hereto and made a part hereof for all purposes, and that are reflected on the site plan (the "Site Plan") attached hereto as Exhibit "B" and made a part hereof for all purposes, together with all rights, privileges, easements and appurtenances belonging or in any way pertaining thereto and all of the City's right, title and interest in and to the airspace above the Land and the subsurface beneath the Land, and together with any buildings and other improvements, including without limitation the Opera House, Theatre, Plaza, Parking Garage, Renovated Artist Square and Center Infrastructure (as hereinafter defined), that may now or hereafter be erected thereon (such buildings and other improvements being hereinafter collectively called the "Improvements") and any personal property that may hereafter be located at the Land, owned by the City and being necessary to the operation of the Improvements (such personal property being hereinafter called the "Personal Property"). The Land, the Improvements, the Personal Property and all of the other rights, privileges, easements and appurtenances referenced hereinabove are referred to collectively in this Agreement as the "Premises". The Premises shall include the Municipal Performance Hall Site (as hereinafter defined) subject to its possible future removal and deletion from this Agreement as provided below.

ARTICLE 2

Term

2.1 Term. The primary term (hereinafter called the "Primary Term") of this Agreement shall commence on the Effective Date and expire on the last day of the month in which the forty (40) year anniversary of the Rent Commencement Date occurs unless earlier terminated in accordance with the provisions of this Agreement or renewed and extended as provided in this Agreement. The "Rent Commencement Date" of this Agreement shall be the earlier to occur of (i) the date on which the DCPAF has received a certificate of occupancy for the use of the Opera House (as hereinafter defined) and a certificate of occupancy for the use of the Theatre (as hereinafter defined) and (ii) January 1, 2011.

2.2 Renewal Options. The City hereby grants to the DCPAF the right and option to renew and extend the Term of this Agreement for five (5) consecutive renewal terms of ten (10) years each (hereinafter collectively called the "Renewal Terms" and individually called a "Renewal Term"), with the first Renewal Term to begin upon the expiration of the Primary Term and subsequent Renewal Terms to begin upon the expiration of the immediately preceding Renewal Term. All of the other terms, provisions and covenants of this Agreement shall apply to each Renewal Term. Unless the DCPAF delivers to the City written notice of the DCPAF's election to not exercise a renewal option no later than ninety (90) days prior to the expiration of the Primary Term as to the first Renewal Term and no later than ninety (90) days prior to the expiration of the Renewal Term then in effect as to the subsequent Renewal Terms, the DCPAF shall be deemed to have elected to exercise the renewal option and the Term shall automatically

be extended to include the next succeeding Renewal Term. The Primary Term and any Renewal Term, which has been exercised, shall hereinafter collectively be described as the "Term".

2.3 Termination. The City agrees to notify the DCPAF in the event of non-appropriation of funds by the City at the earliest practicable time prior to the end of the City's then current fiscal year. In the event of a non-appropriation by the City, the DCPAF, at the DCPAF's option, shall have the right to (a) terminate this Agreement by delivering written notice of termination to the City, in which event the parties shall have no further duties, obligations or liabilities under this Agreement, (b) waive such non-appropriation, in which event the City shall not be liable or required to thereafter fund such non-appropriation and this Agreement shall continue in full force and effect (provided that said non-appropriation shall not be an Event of Default by the City), and/or (c) exercise the purchase option provided in Section 15.5 below.

ARTICLE 3

Rent

3.1 Annual Base Rent. The DCPAF shall pay an annual base rent of One Thousand and No/100 Dollars (\$1,000.00) per year during the Term, with one such annual installment to be due and payable on or before the Rent Commencement Date and a like annual installment to be due and payable on or before each succeeding annual anniversary of the Rent Commencement Date during the Term. All payments of rent shall be made to the City as the same shall become due, by check, cashier's check, bank wire or automated clearinghouse credit, at the address specified herein for Notices, or to such other address as may hereafter be designated by the City by written notice delivered to the DCPAF at least twenty (20) days prior to the next ensuing rental payment date.

3.2 Additional Rent. All amounts to be paid by the DCPAF under the terms of this Agreement are deemed to be and shall be herein referred to as "additional rent."

3.3 Further Consideration. As further and additional consideration for this Agreement, the DCPAF has and will do the following:

- (a) Development. Design, develop, construct and finance the Performing Arts Center in accordance with the Performing Arts Center Development Agreement (defined below), including but not limited to the historic and magnanimous raising and supplying of approximately \$250 Million in private funds for same.
- (b) Programming. Operate, maintain, and manage the Performing Arts Center in accordance with this Agreement, including without limitation the establishment of a home for a first-class opera company, development of community and educational programs available to the public, operation of open spaces within the Performing Arts Center available to the public, operation of parking in support of the Performing Arts Center and the Downtown Arts District, and providing

professional services in developing and implementing programming for the efficient utilization of the Performing Arts Center.

3.4 Ticket Surcharge. As further and additional rent, the DCPAF shall collect and deposit into an escrow account (as agreed upon by the parties) (the "Surcharge Reserve Account"), for use by the DCPAF or the City (as provided below) a ticket surcharge of \$1.00 per ticket for events at the Center ("Initial Surcharge"). The DCPAF shall deposit the surcharge into the Surcharge Reserve Account on a quarterly basis within 30 days of the end of each calendar quarter. Beginning five (5) years after the Rent Commencement Date, the surcharge will be adjusted on each five (5) year anniversary of the Rent Commencement Date (the "Surcharge Adjustment Date") to reflect increases in the Consumer Price Index for "All Urban Consumers, U. S. City Average, All Items," issued by the Bureau of Labor Statistics of the United States Department of Labor. Adjustments will be determined by multiplying the Initial Surcharge by a fraction, the numerator of which is the index number for the last month before the Surcharge Adjustment Date and the denominator of which is the index number for the month of the Rent Commencement Date; provided, however, that each adjustment shall be to the nearest twenty-five cent (\$.25) increment so that each surcharge will at all times be increased or decreased only by multiples of twenty-five cents (\$.25). As an example and for illustration purposes only, if the adjustment on the first Surcharge Adjustment Date would increase the Initial Surcharge by thirty-six cents (\$.36), then the surcharge beginning on the five (5) year anniversary of the Rent Commencement Date would increase to \$1.25 and if the adjustment on the first Surcharge Adjustment Date would increase the Initial Surcharge by thirty-eight cents (\$.38), then the surcharge beginning on the five (5) year anniversary of the Rent Commencement Date would increase to \$1.50. If the product is greater than the Initial Surcharge, the DCPAF will collect and deposit this greater amount into the Surcharge Reserve Account as the surcharge until the next Surcharge Adjustment Date. The surcharge will never be less than the Initial Surcharge. The City will notify the DCPAF of each adjustment to the surcharge no later than sixty days after the Surcharge Adjustment Date. If the index is converted to a different standard reference base or otherwise revised, the determination of the index shall be made with the use of such conversion factor, formula or table for converting the index that may be published by the Bureau or, if the Bureau does not publish the same, then with the use of such conversion factor, formula or table as is published by any nationally recognized publisher of similar statistical information. If the index ceases to be published, then the City may substitute for it any independently published index of a reasonably comparable type. The DCPAF or the City shall thereafter retain and expend the amounts in such capital maintenance account only as Surcharge for Capital Maintenance (defined below) and for no other purpose.

3.5 No Abatement or Offset. Except as expressly provided in this Agreement, no happening, event, occurrence or situation during the Term, whether foreseen or unforeseen, and however extraordinary, shall relieve the DCPAF from its obligation to pay the rent or entitle the DCPAF to an abatement, reduction or right of offset as to the rent.

3.6 Independent Agreement Consideration. Concurrently with the execution of this Agreement, the DCPAF shall deliver to the City a check in the amount of Fifty and No/100 Dollars (\$50.00) (the "Independent Agreement Consideration"), which amount the parties have bargained for and agreed to as consideration for the City's execution and delivery of this

Agreement. The Independent Agreement Consideration is in addition to and independent of any other consideration or payment provided for in this Agreement, is non-refundable, and shall be retained by the City notwithstanding any other provision of this Agreement.

ARTICLE 4

Improvements

4.1 Improvements. The DCPAF shall be responsible for and shall effect the design, development, financing, construction and furnishing / equipping of the Improvements as provided in the Development Agreement, and currently consisting of the approximately 2,200-seat Winspear Opera House (the "Opera House"), the approximately 600-seat Wyly Theatre (the "Theatre"), a landscaped Grand Plaza between the Opera House and the Theatre (the "Plaza"), (iv) an approximately 600-space underground parking garage (the "Parking Garage") that will serve the Opera House, the Theatre and the other adjacent performing arts facilities, (v) certain other site improvements to the Land including, without limitation, relocating utilities and making other changes to the above-ground and underground infrastructure supporting the Land and the Improvements located thereon (the "Center Infrastructure") and (vi) redesigning, renovating and improving Annette Strauss Artist Square (the "Renovated Artist Square"). The Opera House and the Theatre are hereinafter collectively called the "Center Buildings". The Center Buildings, the Center Infrastructure, the Plaza, the Parking Garage, the Renovated Artist Square and the remaining portions of the Land are hereinafter collectively referred to as the "Performing Arts Center" and/or the "Center". The design, planning, development, financing, construction, and furnishing / equipping of the Performing Arts Center shall be performed by the DCPAF in accordance with that certain Performing Arts Center Development Agreement (the "Development Agreement") dated as of _____, 200__ between the City and the DCPAF.

4.2 Ownership. The City (and not the DCPAF) shall own title to the Improvements for public purposes upon completion of the Improvements; provided, however, that the DCPAF shall have the right to use the Premises (including, but not limited to, the Improvements) to the extent and as provided in this Agreement.

4.3 Condition of Property. **The DCPAF accepts the Premises for the DCPAF's use hereunder on an "AS IS, WHERE IS, WITH ALL FAULTS" basis and subject to all matters of record and zoning. The DCPAF hereby waives and the City hereby disclaims any and all warranties and representations not expressly made in this Agreement, including but not limited to the warranties of commercial habitability, merchantability, marketability, good and workmanlike construction, or fitness for a particular use or purpose. The DCPAF acknowledges that, having been given the opportunity to inspect the Premises, the DCPAF is relying solely on its own investigation of the Premises and not on any information provided or to be provided by the City and agrees to accept the Premises for use and waives all objections or claims against the City arising from or related to the Premises or to any hazardous materials (as defined below) on the Premises; provided, however, that this acknowledgment shall not limit the parties' commitment under Section 3.4 and 3.5 of the Development Agreement. The DCPAF**

further acknowledges that any information provided or to be provided with respect to the Premises was obtained from a variety of sources and that the City has not made any independent investigation or verification of such information and makes no representations as to the accuracy or completeness of such information. The City is not liable for or bound in any manner by any verbal or written statements, representations or information pertaining to the Premises, or the operation thereof, furnished by any real estate broker, agent, employee, servant or other person.

4.4 Alterations, Additions and Improvements.

(a) Material. Subject to written approval by the City of the proposed plans and specifications, proposed contractor(s), and the construction schedule (which approval shall not be unreasonably withheld or delayed) with respect to a Material Renovation (as hereinafter defined), the DCPAF may, at no cost to the City, undertake alterations, additions, future improvements and renovations to the Center consistent with the development, use and operation of the Premises as a multi-venue, multi-use performing arts complex; provided however, that the City's approval shall not be required for any alterations, additions, future improvements and renovations that are not a Material Renovation. All such additional, future improvements and renovations shall become the property of the City, free and clear of all liens and encumbrances subject to the terms of this Agreement. No improvements or any subsequent change, modification or addition to the Performing Arts Center shall be undertaken until the DCPAF shall have procured and paid for all required permits, licenses, and authorizations, as appropriate, and in the case of Material Renovations shall have furnished the City evidence thereof before beginning construction. All improvements and subsequent changes, modifications and additions shall be made in a good and workmanlike manner and in compliance with all applicable building and zoning codes and other legal requirements. If the work constitutes a Material Renovation, the DCPAF shall submit the proposed plans and specifications, proposed contractor(s), and the construction schedule to the Director for advance written approval (which approval shall not be unreasonably withheld or delayed). With respect to a Material Renovation and contracts in excess of \$25,000.00, (i) the contractor(s) performing the work shall meet the insurance, indemnification, and defend and hold harmless requirements of the City, (ii) the contractor(s) shall provide performance and payment bonds equivalent to what the City requires of its contractors on like projects, with the City to be named as an additional insured, indemnitee, and obligee, respectively, and (iii) if the City's funds are being used for such work, the DCPAF shall comply with the City's bidding requirements. Upon completion of construction on Material Renovation, the DCPAF shall furnish the City with a certificate of substantial completion executed by the architect or other supervising party for the project, and a complete set of as-built plans for the improvements. The DCPAF shall thereafter furnish the City with copies of the updated plans showing all changes and modifications thereto. The DCPAF shall also furnish to the City copies of Certificates of Occupancy or other similar documents issued to certify completion of construction in compliance with applicable laws

(b) Non-Material. The DCPAF shall have the right to repair, renovate, and/or improve the Center Buildings and the Center without the approval thereof by the City unless such repair, renovations and/or improvements would constitute a Material Renovation. For purposes hereof, a "Material Renovation" shall mean a renovation, or a series of related

renovations, which costs more than \$100,000.00 or alters the structural integrity, capacity, or fundamental character or appearance of the Center Buildings.

4.5 Easements and Dedications. In order to develop the Land for the Performing Arts Center and other improvements, it may be necessary or desirable that (i) street, water, sewer, drainage, gas, power lines, set back lines or other easements, dedications or similar rights be granted or dedicated over or within portions of the Center by plat, replat, grant, deed or other appropriate instrument or acquired on other properties, or (ii) existing street, sewer, drainage, gas, power lines, set back lines or other easements, dedications or similar rights on, in the vicinity of or affecting the Center or portions thereof be vacated or abandoned. With respect to the Land owned by the City, the City shall, on written request of the DCPAF, and subject to the City's reasonable discretion, join with the DCPAF in executing and delivering such documents or otherwise cooperating with or assisting the DCPAF (at the DCPAF's expense with respect to the City's actual out-of-pocket expenses incurred with respect thereto), from time to time throughout the Term, as may be appropriate or necessary for the development of the Center or to reasonably facilitate future Improvements on the Center. The City shall be free to grant such easements, right-of-ways and access rights as it deems reasonably necessary and /or convenient to the development of the Performing Arts Center and the Downtown Arts District, including without limitation the Municipal Performance Hall Site and other properties in and around the Downtown Arts District and this Agreement shall be subject to same.

4.6 Zoning and Permits. In the event that the DCPAF deems it necessary or appropriate to obtain use, zoning, site plan approval or any permit from any governmental entity having jurisdiction over the Center or any part thereof, the City, from time to time on request of the DCPAF and to the extent necessary as fee owner of the Center, shall reasonably cooperate with such efforts; provided, however, it shall not have to incur any cost or expense related to same.

4.7 Personal Property. All items of Personal Property (if any) that are purchased with the City Construction Contribution (as defined in the Development Agreement dated as of _____, 2005 between the City and the DCPAF) will be owned by the City in accordance with the terms hereof. Items of personal property purchased by the DCPAF that are attached to the Improvements in the Performing Arts Center that are essential to the operation of any such Improvements (for example, elevators, escalators, HVAC systems, sound and lighting equipment, acoustic materials, curtains and stage rigging) will be owned by the City in accordance with the terms hereof. The DCPAF may place or install in or on the Performing Arts Center other items of personal property (for example, furniture, removable trade fixtures and equipment) as the DCPAF shall deem desirable for its operation. Such items of personal property placed by the DCPAF on or in the Performing Arts Center shall not become part of the real property, even if nailed, screwed, or otherwise fastened to the improvements or buildings, but shall retain their status as personal property. Such personal property may be removed by the DCPAF at any time, so long as the DCPAF is not in default under this Agreement and so long as any damage occasioned by such removal is thereupon repaired. Items of personal property purchased by performing arts groups or private citizens (for example and without limitation, musical instruments, sets, music, recordings and computers) shall not be owned by the City.

ARTICLE 5

Municipal Performance Hall

5.1 The Project. The parties acknowledge that the City intends to construct a municipal performance hall (the "Municipal Performance Hall") on a portion of the Performing Arts Area as shown on Exhibit "B" (such area, the "Municipal Performance Hall Site").

5.2 Use of Municipal Performance Hall Site. The parties acknowledge and agree that the Municipal Performance Hall Site initially shall be part of the Performing Arts Area and shall be controlled, developed, maintained, and used by the DCPAF pursuant to the Development Agreement and this Agreement. If, on or before the five-year anniversary of the Commencement Date, the City presents to the DCPAF written documentation that the City has completed the design of the Municipal Performance Hall, has issued bonds or otherwise obtained all funds required to construct the Municipal Performance Hall, and has initiated the public bid process to collect bids from potential general contractors for the construction of the Municipal Performance Hall, then the Municipal Performance Hall Site shall automatically be deleted from and shall not be part of the Performing Arts Area for purposes of the Development Agreement and this Agreement without need of further action by the parties. If the Municipal Performance Hall Site has not been removed from the Performing Arts Area as described above by the five-year anniversary of the Commencement Date, then the DCPAF shall thereafter be entitled to retain the Municipal Performance Hall Site as part of the Performing Arts Area and the DCPAF thereafter may (with the consent of the City Manager, which consent shall not be unreasonably withheld or delayed and which consent shall be given by the City Manager without economic compensation to the City or other conditions) use, develop and operate the Municipal Performance Hall Site for any use the DCPAF reasonably determines from time to time will benefit the Performing Arts Center that is consistent with the multi-venue, multi-use, public performing arts complex contemplated herein.

5.3 DCPAF Activities. Prior to the earlier of the removal from the Development Agreement and this Agreement of the Municipal Performance Hall Site and the five-year anniversary of the Commencement Date, (i) the DCPAF may develop and use the Municipal Performance Hall Site for paved surface parking, landscaping, lighting, sidewalks, fencing, planters or similar improvements consistent with and complimenting the Performing Arts Center and the Downtown Arts District as a whole, and (ii) the DCPAF will not construct on the Municipal Performance Hall Site any building or similar permanent improvement that would materially interfere with or materially increase the cost or time to complete the City's construction of the Municipal Performance Hall. The DCPAF shall be responsible for the use, operation and maintenance of the Municipal Performance Hall Site along with the rest of the Performing Arts Center until such removal of the Municipal Performance Hall Site.

5.4 City Development. If the City exercises its right to remove the Municipal Performance Hall Site from the Development Agreement and this Agreement, the DCPAF shall have no further rights or responsibilities with respect to same. Upon request by the DCPAF, the

City will grant to the DCPAF reasonable easements for ingress, egress, utilities and other matters that may be necessary or advisable in the DCPAF's reasonable discretion in order for the DCPAF to continue to operate the Performing Arts Center as previously operated while the Municipal Performance Hall Site was part of the Land and subject to this Agreement. The DCPAF shall likewise consent to the City's granting of reasonable easements for ingress, egress, utilities and other matters as to the Center that may be necessary or advisable in the City's reasonable discretion in order for the City to operate the completed Municipal Performance Hall as an integrated part of the Downtown Arts District and the Performing Arts Center.

ARTICLE 6

Use, Revenues and Expenses

6.1 Use. During the Term, the DCPAF shall have the sole right, power, responsibility and authority to use, manage and operate the Premises as a public multi-venue, multi-use entertainment, performing arts and cultural facility and to retain any and all revenue, income, proceeds and other amounts that may be generated at or from the Premises. The DCPAF shall be liable and obligated to pay all of the costs to operate, maintain, repair and use the Premises during the Term except for those items expressly provided to be paid directly by the City or reimbursed to the DCPAF by the City.

6.2 Programming. The parties acknowledge that a primary objective of this Agreement is to provide a first-class venue for opera and other performing arts, including without limitation dance, music and theater events and productions. The DCPAF shall take all reasonable actions to efficiently utilize the Center's performance venues. The DCPAF shall also use reasonable efforts to institute programs of outreach to youth, seniors and underserved segments of the community and educational opportunities consistent with the public nature of the Center.

6.3 Revenues. The DCPAF shall have and control all revenue generating opportunities at the Center. The DCPAF shall use said opportunities in a manner consistent with the public, community entertainment, performing arts, and cultural events purpose of the Center and the DCPAF's non-profit foundation status.

6.4 Parking. The DCPAF shall operate and control the Parking Garage or may contract with an operator / manager for such services. The DCPAF may use the Parking Garage to accommodate Performing Arts Center patrons, visitors, personnel and performers when at the Performing Arts Center ("Center Parking"), including without limitation providing reserved and/or designated spaces as the DCPAF reasonably deems appropriate. When and to the extent not needed for Center Parking, the Parking Garage shall be made available to accommodate the parking needs of other public venues in the Downtown Arts District, including, without limitation, the Municipal Performance Hall (when constructed), the Meyerson Center and the Dallas Museum of Arts ("Arts District Parking"). When and to the extent not needed for Center Parking or Arts District Parking, the Parking Garage shall generally be made available to the general public, on an unassigned, unreserved, first-come, first-served basis. The DCPAF shall establish fees to be charged for parking in the Parking Garage not greater than the prevailing

market rates for comparable parking. All revenues derived from parking shall belong to the DCPAF, subject to this Agreement.

6.5 Grand Plaza, Artist Square and Other Open Areas. The DCPAF shall maintain, operate and control the Grand Plaza, Artist Square, and all other open areas in the Performing Arts Center. The DCPAF shall make every reasonable effort to institute and hold programs, activities and events utilizing the Grand Plaza, Artist Square and the other open areas in the Performing Arts Center, harmonizing and coordinating same with activities at the Center Buildings and within the Downtown Arts District. The DCPAF shall make every reasonable effort to maintain and make said areas available to the members of the public (individuals and groups) as open space subject to DCPAF programming and reasonable rules and regulations established by the DCPAF.

6.6 Compliance with Laws. The DCPAF agrees not to use the Center for any use or purpose in violation of any applicable law, regulation or ordinance of the United States, the State of Texas, the City of Dallas or other lawful governmental authority having jurisdiction over the Center, including, without limitation, the Americans with Disabilities Act of 1990, as amended; provided, however, there shall be no violation by the DCPAF of this provision (i) so long as the DCPAF shall, in good faith within a reasonable time after the DCPAF acquires actual knowledge thereof, by appropriate proceedings and with due diligence, contest the alleged violation or the validity or applicability of the law, regulation or ordinance; (ii) until the DCPAF has had a reasonable time after a final adjudication that such law, regulation or ordinance, in fact, has been violated; and (iii) so long as neither the City nor any portion of the Center, during the period of such contest, will be subject to any liability, loss, penalty or forfeiture. The DCPAF shall promptly comply with all governmental orders and directives for the correction, prevention, and abatement of nuisances caused by the DCPAF, its officers, agents, or employees, in or upon or connected with the Center, and shall pay for the costs of compliance.

6.7 Prohibited Uses. Without in any way limiting the foregoing Section, the DCPAF shall not permit the Center to be used in any manner that would render the insurance thereon void or the insurance risk more hazardous. The DCPAF shall not use or occupy the Center, or permit the Center to be used or occupied, (i) contrary to any statute, rule, order, ordinance, requirement, or regulation applicable thereto or (ii) in any manner which would violate any certificates of occupancy or permit affecting same, cause structural injury to then existing improvements, cause the usefulness of the Center to diminish, constitutes a public or private nuisance or waste or is a threat to the welfare of the general public. The DCPAF shall not use or occupy the Center or allow the Center to be used or occupied in any manner that would violate or otherwise invalidate the tax-exempt status of the Performing Arts Center, the DCPAF and/or the City.

6.8 Additional Requirements. The DCPAF shall be responsible for and shall take all reasonable action necessary for the operation, maintenance, and management of the Performing Arts Center, including without limitation the following:

- (a) manage and operate the Center as a first-class multi-venue, multi-use public entertainment and performance facility for the holding of opera, theater, dance, and concert performances and other events;
- (b) provide professional management to schedule and promote the efficient utilization of the Center;
- (c) provide tickets takers, ushers, security guards and other personnel necessary for the efficient and first-class operation of the Center;
- (d) establish operating policies and procedures for the Center;
- (e) pay all management, maintenance, repair, and operating expenses, and all other costs of the Center, except as otherwise expressly provided in this Agreement;
- (f) prepare and submit to the City annual financial reports, in accordance with this Agreement;
- (g) collect and account for all Center revenue, using all reasonable efforts to obtain all fees, rents and other amounts due from users, vendor, concessionaire, advertiser, sponsors and tenants and to achieve reasonable financial and operational success in light of the objectives of the City and the DCPAF for the Center;
- (h) commence, defend and settle in good faith, at no cost or liability to the City, such legal actions or proceedings concerning the management and operation of the Center as are necessary or required in the opinion of the DCPAF; provided, however, no such legal action by the DCPAF that requires joinder of the City will be required of the DCPAF unless the City so participates;
- (i) employ, pay, supervise and discharge all personnel the DCPAF determines to be necessary for the management, maintenance, and operation of the Center;
- (j) maintain and make available to the public a schedule of basic rates, fees and charges for the use of the Center and its related services and programs;
- (k) purchase and maintain all materials, tools, machinery, equipment, and supplies necessary for the management, maintenance and operation of the Center;
- (l) maintain the Center in a good, safe, attractive, sanitary order and repair consistent with the industry standards and practices;
- (m) establish, coordinate and administer a preventative maintenance program for the Center and its machinery and equipment;
- (n) arrange for all utility and other services for the Center and pay or caused to be

paid when due all charges for water, sewer, gas, lights, heat, telephone, electricity, refuse disposal, and other utilities and services rendered to or used in, on or about the Center, except as otherwise expressly provided in this Agreement;

- (o) maintain or cause to be maintained all necessary licenses, permits and authorizations for the operation of the Center;
- (p) pay all legally due taxes and assessments attributable to the Center or operation under this Agreement. In no event shall the City be obligated to pay any tax or assessment or any portion thereof levied or created during the Term, irrespective of whether such tax or assessment or any portion thereof was specifically allocated to the Center or the City's interest therein. All payments by the DCPAF of taxes and/or assessments shall be made by the DCPAF on or before thirty (30) days before the last day on which such payments may be made without penalty or interest; provided, however, the DCPAF shall have the right to contest such payment in good faith and to take all such action as it deems reasonable under the circumstances to vigorously contest such payment (including but not limited to litigation), and during the period of such contest the DCPAF shall not be obligated to make such payments. The DCPAF shall furnish to City receipts or other appropriate evidence establishing the payment of such amounts;
- (q) promptly furnish to the City such reports and other information concerning the Center and the management, maintenance and operation thereof as may be reasonably requested from time to time by the City;
- (r) procure and maintain in force all insurance policies relating to the Center and in connection with the DCPAF's operation of same, as may be required by this Agreement;
- (s) develop and implement a meaningful program of community outreach, enrichment and education in coordination with performance offerings and events at the Center, with a particular emphasis on youth, seniors, and historically underserved communities;
- (t) provide janitorial service and repair and maintenance of the interior and exterior areas of the Center;
- (u) maintenance of the heating, ventilation and cooling systems; and
- (v) maintenance of the Center grounds and structures in a good, safe, clean and attractive condition and in compliance with applicable laws.

6.9 Promotion. The DCPAF shall plan, prepare, implement, coordinate and supervise all advertising, public relations and other promotional programs for the Center and shall negotiate, execute (in its own name and not the name of the City) and perform all contracts for such Center promotions. Any such arrangements shall (i) either not exceed the Term of this

Agreement unless the City in writing waives this requirement or terminate upon the expiration of this Agreement, (ii) in no way obligate, commit or bind City unless assumed by the City, (iii) be of a first-class quality and suitable for public facilities of this nature, and (iv) be on commercially reasonable terms and consistent with industry standards and good practices. Cross-promotion of the Center with other Downtown Arts District venues, institutions and events is a prime objective and shall be exploited by the DCPAF whenever reasonably practical.

6.10 Concessionaire and Vendor Contracts. The DCPAF shall have the sole right to negotiate and execute (in its own name and not the name of the City) and perform vendor contracts involving the Center. The DCPAF may, by itself or through concessionaires and licensees, provide such concessions, products, services and facilities at the Center as it deems appropriate and consistent with the nature of the Center. Any and all concessionaires and licensees that operate within the Center under contract with the DCPAF shall (i) operate under contract terms commercially reasonable for the type of concession, product, service or facility offered, (ii) comply with all federal, state, and local laws concerning their operations, (iii) be subject to the terms of this Agreement, (iv) carry insurance appropriate to its activities and acceptable to the DCPAF, and (v) indemnify and hold harmless the City from and against any and all loss, cost, claim, liability, expense or damage, including without limitation attorney's fees and court costs, in any way related to or arising from its activity at the Center.

6.11 Naming and Sponsorship. During the Term of this Agreement, the DCPAF shall have exclusive authority, control and rights in selecting the name of the Performing Arts Center and each of its venues and their constituent parts, the sponsor or sponsors for which the Performing Arts Center and each of its venues and their constituent parts will be named from time to time, and the right to retain all proceeds and other benefits or consideration received from granting any such rights; provided, however, that the name given to the Opera House, the Theatre, the Plaza and the Center Parking Garage shall not include any reference to any proper geographic name, unless such reference (i) is to "Dallas" or the "City of Dallas" or (ii) is part of the proper name of a person or entity selected as a sponsor pursuant to this Section. If any such sponsor selected by the DCPAF as a name sponsor of the Opera House, the Theatre, the Plaza or the Center Parking Garage is a for-profit commercial entity and is not an individual, a trust, a non-profit organization or a similar charitable or philanthropic organization or entity, the DCPAF's selection of such for-profit commercial entity as a naming sponsor shall be subject to the prior consent of the City Manager, which consent shall not be unreasonably withheld or delayed and which consent shall be given without economic compensation to the City or other conditions. Any rejection by the City Manager of any such proposed for-profit commercial sponsor shall be given in writing and the reasons shall be specified in reasonable detail. If the City Manager has not delivered a notice rejecting a proposed commercial naming sponsor within thirty days after the DCPAF delivers written notice to the City Manager of such proposed commercial naming sponsor, then the DCPAF may complete its arrangements with such proposed sponsor and the City Manager's right to reject such sponsor shall be deemed terminated. The parties acknowledge that the City Manager's right to reject a proposed commercial sponsor is limited to significant commercial naming sponsors whose business (for example, a sexually oriented business), reputation for business ethics (for example a business that is under public investigation or indictment relating to bribery, public corruption or any similar offense) or similar attributes cause such commercial enterprise to be an improper

commercial sponsor for a municipality such as the City of Dallas; provided, however, that such consent is not intended to be withheld by the City for any commercial enterprise primarily because such enterprise then is involved in a commercial dispute with the City, because such enterprise competes with an enterprise that has a commercial relationship with the City or because such enterprise is not located in or headquartered in the City. Any such sponsorship agreements entered into by the DCPAF shall be assumable by the City at its election upon any termination of this Agreement pursuant to which the DCPAF ceases to occupy and use the Performing Arts Center. The DCPAF shall not materially alter or supplement the name of the Renovated Artist Square without the City's prior written consent.

6.12 Fees and Charges. The DCPAF may specify and control any and all fees, deposits, charges and consideration for goods, services, concessions, admission, use, advertising, sponsorship, naming rights or any other designated purposes involving the Center provided that they are commercially reasonable and consistent with industry standards and good industry practices. It is expressly understood and agreed that any and all revenue from such sources shall be applied by the DCPAF toward the design, development, construction, renovation, equipping, operation and maintenance of the Center and the DCPAF's promotion and operation of the performing arts at the Center and its performance under this Agreement; provided, however, that the DCPAF, at its option, shall have the right to use the revenue to establish a reserve for the benefit of the Center and/or to pay principal and interest relating to any loans secured in whole or in part by the DCPAF's interest in this Agreement and the Center.

6.13 Contracts Related to Management and Operation of the Center; General Provisions.

- (a) General Requirements. Subject to the terms of this Agreement, the DCPAF shall be the exclusive manager and operator of the Center with sole responsibility for, and full control and discretion in, the operation, direction, management, licensing and supervision of the Center and the Center staff. All the DCPAF contracts (sometimes hereinafter collectively referred to as the "Management Contracts") in connection with the operation and management of the Center, including without limitation major vendor and concessionaire contracts (but expressly excluding all employment contracts with the DCPAF and all contracts with performing arts groups) shall: (i) require the contractor to use good faith efforts to comply with the City's Good Faith Effort Plan, (ii) terminate upon termination of this Agreement unless the City, at its sole option, elects to assume the specific Management Contract, (iii) provide the right to the City to assume the contract upon termination of this Agreement without liability for any obligation arising prior to said assumption, (iv) if applicable, contain insurance requirements for coverages and limits not less than those which are customarily required by the City of its like contractors, naming the City and its officers and employees as additional insureds, (v) indemnify the City and its officers and employees against any costs or liabilities thereunder, using language substantially similar to the DCPAF's indemnification of the City found in this Agreement, (vi) if applicable, contain vendor qualification requirements sufficiently broad so as not to exclude minority vendors as a class and general contract specifications sufficiently broad

so as not to favor a single vendor, and (vii) contain the following provision (or substantially similar wording approved by the City) in bold print, underlined and uppercase lettering:

"THIS AGREEMENT IS SUBJECT TO THE TERMS AND PROVISIONS OF THE USE AGREEMENT FOR THE PERFORMING ARTS CENTER BETWEEN THE CITY OF DALLAS AND THE DCPAF (THE "USE AGREEMENT"), AND WILL TERMINATE, WITHOUT LIABILITY OR RECOURSE, IN THE EVENT OF THE TERMINATION OF THE USE AGREEMENT, UNLESS THIS AGREEMENT IS ASSUMED OR EXTENDED BY THE CITY. THE CITY OF DALLAS SHALL HAVE NO LIABILITY, OBLIGATION, OR RESPONSIBILITY UNDER THIS AGREEMENT, AND THE PARTIES HERETO RELEASE THE CITY OF DALLAS FROM LIABILITY FOR ANY CLAIMS, SUITS, OR JUDGMENTS IN CONNECTION WITH THIS AGREEMENT."

- (b) City Review. A current list of all Management Contracts, including the parties thereto, the primary purpose thereof and applicable contract, agreement or license fees, shall be maintained by the DCPAF, and, upon the request of the City, the DCPAF shall provide the City a copy of such list, delivery of which shall not be withheld or unreasonably delayed. The City shall be entitled to review the Management Contracts for compliance with the requirements of this Agreement at the DCPAF's office during normal business hours.
- (c) Commercial Reasonable. All Management Contracts shall be commercially reasonable and consistent with good practices and industry standards for facilities and operations of this type.

6.14 City Use. In addition to the rights of access reserved elsewhere herein, to the extent that the Center is available, as determined by the DCPAF, in its reasonable discretion, the City shall have the right to use and occupy the Center, or parts thereof, as provided in this Section 6.14. The City shall give the DCPAF not less than thirty (30) calendar days nor more than 180 calendar days written notice of its desire to use the Center. The notice shall describe the location, time and purpose of such use. The City's desired use shall not be unreasonably denied, hindered or delayed. For up to ten (10) days during each calendar year during the Term of this Agreement, the City may use the Center or a part thereof and the City shall not have to pay any use or rental fee but shall reimburse the DCPAF for costs incurred directly related to the City's use of the Center pursuant to this Section, including without limitation personnel and utility costs, damages to facilities, etc. except that the costs to be reimbursed by the City shall not be duplicated with the Annual City Operating Expenses paid by the City during such calendar year. If the City uses the Center or any part thereof more than ten (10) days during any calendar year during the Term of this Agreement, then, commencing on the eleventh (11th) day, for each subsequent use by the City, the City's use shall be on the same terms and conditions and at the same price as the DCPAF makes the Center available to unrelated not-for-profit third parties. The City shall coordinate its use through the DCPAF as manager of the Center; provided, however, the City shall have no right to use the Center or any part thereof if the Center or such

part has been booked by the DCPAF.

ARTICLE 7

Utilities and Impositions

7.1 Utilities. During the Term, the DCPAF shall be liable and obligated to pay all charges, fees, costs and assessments incurred for the use of all utilities and utility services at the Premises, including, without limitation, gas, electricity, water, sewer, telephone, telecommunications and cable. Said amounts shall constitute additional rental hereunder. Notwithstanding the DCPAF's ultimate obligation to pay utilities, the DCPAF shall undertake all reasonable efforts to minimize utility expenses at the Center and institute utility efficiencies.

7.2 Payment of Impositions. The DCPAF shall pay as additional rental all ad valorem taxes, assessments, other taxes and/or impositions relating to or arising from the Premises, this Agreement or the DCPAF's activities ("Impositions") before the same become delinquent, and the DCPAF, at the request of the City, shall furnish to the City receipts or copies thereof showing the payment of such Impositions. The DCPAF shall be entitled to pay any Impositions in installments as and to the extent permitted by the applicable taxing authority or claimant. The City agrees to cooperate with the DCPAF in seeking the delivery of all notices of Impositions to the DCPAF directly from the applicable taxing authorities. In no event shall the DCPAF be in default under this Agreement for failure to pay any Impositions before the same become delinquent for which the notice of such Impositions shall have been delivered to the City and not forwarded or delivered to the DCPAF at least 30 days before the date the same become delinquent.

7.3 Contest of Impositions. If the levy of any of the Impositions shall be deemed by the DCPAF to be improper, illegal or excessive, or if the DCPAF desires in good faith to contest the Impositions for any other reason, the DCPAF may, at the DCPAF's sole cost and expense, dispute and contest the same and file all such protests or other instruments and institute or prosecute all such proceedings for the purpose of contest as the DCPAF shall deem necessary or appropriate; provided, however, that the DCPAF shall not permit any lien which may be imposed against the Center for contested Impositions to be foreclosed and, within 60 days after the commencement of such contest, the DCPAF shall provide to the City reasonable security therefor. Subject to the foregoing, any item of contested Imposition need not be paid until it is finally adjudged to be valid. The City shall reasonably cooperate with the DCPAF's effort, but shall be under no obligation to incur any cost or expense in such effort.

7.4 Certain Provisions Related to Ad Valorem Taxes and Special Impositions.

(a) Intended Tax Exempt. The City and the DCPAF acknowledge that it is anticipated and intended that the Center and improvements constructed thereon be and remain exempt from ad valorem taxes, and it is the intention of the parties that during the Term, the DCPAF not incur any ad valorem taxes relating to the Center or the DCPAF's interest in the Center. The City, at the request and expense of the DCPAF, agrees to cooperate fully in seeking and preserving said

tax exempt status.

- (b) Change in Status. If the Center or the interest of the City or the DCPAF in and to any of the Center should no longer be exempt from ad valorem taxes, for any reason, including, but not limited to, a change of law, change of activity at the Center by the DCPAF, loss of the DCPAF's non-profit status, or change of the operating entity under this Agreement due to assignment or foreclosure or otherwise, then the DCPAF shall pay such taxes and Impositions before delinquent, subject to the DCPAF's right of contest as provided in this Article.

ARTICLE 8

City Funding Obligation

8.1 Annual City Operating Expense. The DCPAF shall be responsible for any and all operation, management, ordinary maintenance, repair and utilities ("Operation and Utilities Costs") for the Center. The City as the property owner and in consideration of the historic and magnanimous construction of the Center by the DCPAF, the professional services rendered by the DCPAF for the Center, and the management of the Center as provided in this Agreement shall pay a portion of the Operation and Utilities Cost of the Center ("Annual City Operating Expenses"). The Annual City Operating Expenses to be paid by the City (subject to the Annual Cap defined below and annual appropriation) shall be the amount of said expenses evidenced by DCPAF's paid receipts and/or invoices (or such other reasonable evidence of payment as the City shall deem appropriate) for the following category of expenses: (i) water, sewer, gas and electric utility costs ("Utility Costs") and (ii) ordinary maintenance and repair (including, but not limited to, landscaping). The City shall pay or reimburse said amounts on a quarterly basis within 30 days of the end of each such calendar quarter.

8.2 Annual Cap. Notwithstanding anything herein to the contrary, the Annual City Operating Expenses shall be limited to and shall under no circumstances exceed \$2,500,000 per calendar year ("Initial Annual Cap"); provided, however, that the Initial Annual Cap will be adjusted on an annual basis as follows: The City shall pay or reimburse the DCPAF for the actual amount paid by the DCPAF for Utility Costs for each of the first three full years of operation of the Center, subject to the Initial Annual Cap. After the end of the first three full years of operation, the average annual amount of actual Utility Costs for such three-year period shall be the "Baseline Utility Cost." Thereafter, the Initial Annual Cap shall be increased annually (on a cumulative basis) by the actual increase in Utility Costs over the Baseline Utility Cost based on the increase (if any) in utility rates paid by the DCPAF for such year (but not by increases in usage by the DCPAF during such year). During the first three full years of operation of the Center, the amount of the Annual City Operating Expense available to the DCPAF for permitted uses other than Utility Costs shall be an amount equal to \$2,500,000 minus the actual Utility Cost for such year. Beginning in the fourth full year of operation and at all times thereafter during the Term of this Agreement, the amount of the Annual City Operating Expenses available to the DCPAF for permitted uses other than Utility Costs shall be an amount equal to \$2,500,000 minus the Baseline Utility Cost as determined at the end of the third full

year of operation (such amount the "Baseline Other Operating Cost"). The Baseline Other Operating Cost shall not thereafter be decreased by increases in the Baseline Utility Cost that are calculated based on rate increases.

8.3 Start-Up Expenses. For the period from the date on which any of the Opera House, the Theatre or the Renovated Artist Square first becomes officially open for public performance until the official opening of all such venues for public performances ("Pre-opening Period"), the Annual City Operating Expenses shall be limited to an annual cap of \$2,500,000 (the "Pre-opening Cap") prorated based on the number of days actually elapsed in the Pre-opening Period, if fewer than 365 days, and prorated based on when the Opera House, the Theatre and the Renovated Artist Square first become officially open for public performance. For proration purposes, 50% of the Pre-opening Cap shall be allocable to the Opera House, 25% of the Pre-Opening Cap shall be allocable to the Theatre and 25% of the Pre-Opening Cap shall be allocable to the Renovated Artist Square. The City shall not be obligated to make any payments for Annual City Operating Expenses for or attributable to any period prior to the date on which all such venues first become officially open for public performance.

8.4 Total Funding. The Annual City Operating Expenses provided in this Article, the Capital Maintenance expense provided in Section 10.3, and the cost of property insurance provided in Section 9.1 represent the City's total funding requirements under this Agreement and are subject to annual appropriation and funding by City Council, in its discretion. All other necessary expenses of the Center shall be paid by the DCPAF. Notwithstanding the foregoing, the DCPAF from time to time may apply to Office of Cultural Affairs ("OCA") for additional funding for programs or special projects, all in accordance with OCA's established funding policy for cultural institutions, as such policy may change from time.

ARTICLE 9

Insurance and Indemnification

9.1 The City's Insurance Obligation. The City, at the City's expense, shall procure and at all times from and after the Rent Commencement Date maintain property insurance against loss or damage by fire and other casualties to the Premises (Improvements and the Personal Property) as are customarily included in the so-called "Extended Coverage Endorsement" in an amount not less than one hundred percent (100%) of the replacement value thereof and with such other endorsements and additions as the City may deem necessary or advisable. Such property insurance shall name the City and the DCPAF (and/or the DCPAF's lender, if any) as the named insureds and the loss payees and shall provide for payment of all of the proceeds jointly to the City and the DCPAF (and the DCPAF's lender, if any), which proceeds [together with applicable deductibles (which deductibles shall be paid by the City)] shall be deposited into a separate segregated escrow account and shall be applied and disbursed in accordance with Section 9.5.

9.2 The DCPAF's Insurance Obligation. As additional rent for the Premises, the

DCPAF shall, at the DCPAF's sole cost and expense, procure and maintain, or cause to be procured and maintained, during the Term of this Agreement, the insurance described in this Section (or if not available, then its available equivalent), issued by an insurance company or companies licensed to do business in the State of Texas.

- (a) Liability Insurance. The DCPAF agrees, at its sole expense, to obtain and maintain public liability insurance at all times during the Term of this Agreement with responsible insurance companies, legally authorized to transact business in the State of Texas for bodily injury (including death) and property damage with minimum limits of \$10,000,000 Combined Single Limit (but with a minimum limit of \$1,000,000 for business automobile insurance) protecting the City and the DCPAF against any liability, damage, claim or demand arising out of or connected with the condition or use of the Center. Such insurance shall include contractual liability, personal injury and advertising liability, business automobile (including owned, non-owned and hired) and independent contractor liability. Such insurance coverage must be written on an "occurrence" basis. It must be maintained by any combination of single policies and umbrella policies and may be obtained and maintained by the DCPAF with respect to that portion of the Center subleased by it through the respective subtenant. The City shall be named as an additional insured on all insurance policies required in this Section, whether provided by the DCPAF or by any subtenant, including policies providing higher limits of liability or other coverages. The DCPAF, at least every five years during the Term, shall adjust the above referenced limits of liability to reflect percentage increases during such period in similar coverages at comparable performance venues in the United States.
- (b) Workers' Compensation Insurance. The DCPAF agrees, at its sole expense, to obtain and maintain workers' compensation insurance, but only if and to the extent required by applicable law, during the Term, and if so required, with statutory limits and employer's liability with limits of \$100,000 each accident, \$100,000 disease each employee and \$100,000 disease per policy. The policy will be endorsed to provide a waiver of subrogation as to the City.
- (c) Property Insurance. At all times during the Term of this Agreement, the DCPAF shall, at its sole expense, keep all of its personal property located in the Center insured against "all risk" of loss for full replacement cost coverage, to include direct loss by fire, windstorm, hail, explosion, riot, civil commotion, aircraft, vehicles, smoke, boiler and machinery, and flood. Coverage must be written by responsible insurance companies legally authorized to transact business in the State of Texas.
- (d) Builder's Risk Insurance. Contingent liability and builder's all-risk insurance in an amount reasonably satisfactory to the City during construction of any improvements, renovations or additions to the Center and during any subsequent restorations, alterations, or changes in the Premises that may be made by the DCPAF at a cost in excess of Twenty-Five Thousand and No/100 Dollars

(\$25,000.00) per job.

9.3 Policies. All insurance policies required by this Article shall provide for at least thirty (30) days written notice to the City and the DCPAF before cancellation and certificates or copies of policies of insurance shall be delivered to the City and the DCPAF. If any blanket general insurance policy of the DCPAF complies with the terms of these provisions, the naming of the City therein as additional named insured shall be deemed compliance with the requirements for the insurance coverage provided in any such blanket policy. The City and the DCPAF hereby waive all claims, rights of recovery and causes of action that either party or any party claiming by, through or under such party by subrogation or otherwise may now or hereafter have against the other party or any of the other party's partners, directors, officers, employees, or agents, for bodily injuries (including death) to persons, or loss or damage to property of the City and the DCPAF whether caused by the negligence or fault of the City and the DCPAF or their partners, directors, officers, employees or agents or otherwise, to the extent that the injuries, loss or damages either (a) are covered by the proceeds of insurance policies maintained by either party or (b) should have been covered by an insurance policy that is required to be maintained under this Agreement.

9.4 Adjustment of Losses. At the request of the DCPAF at any time during the Term of this Agreement, any leasehold mortgagee contemplated by this Agreement may be named as a mortgagee or an additional insured, as appropriate, under any of said insurance policies required under this Article, as its interest may appear. Any loss under any such insurance policy shall be made payable to the parties jointly, to the end that the parties shall collect all money due under such insurance policies payable in the event of and by reason of the loss of or damage to the Center, to be applied pursuant to Section 9.5. Any accumulation of interest on the insurance proceeds collected shall be added to, and become a part of, the fund being held for the benefit of the City and the DCPAF. The adjustment of losses with the insurer shall be made by the City in coordination and cooperation with the DCPAF.

9.5 Application of Proceeds of Property Insurance. All proceeds payable pursuant to the provisions of any policies of property insurance required to be carried under the terms of this Agreement (net of reasonable expenses of collection) shall be received and held in trust in a separate segregated escrow account and applied and disbursed for the following purposes and in the following manner:

- (a) All such net proceeds shall first be made available and disbursed for the rebuilding, restoration and repair of the portion of the Center which has become destroyed or damaged for which such proceeds are payable; and
- (b) Following completion of all work under subsection (a) above or if the DCPAF elects not to rebuild, restore or repair the Center, any such proceeds not disbursed pursuant to subsection (a) above shall be paid over to and be the property of the City.

9.6 The City's Acquisition of Insurance. If the DCPAF at any time during the term fails to procure or maintain the insurance required of it under this Agreement or to pay the

premiums therefore, the City shall have the right to procure such substitute insurance as the City deems appropriate (but shall be under no obligation to do so) and to pay any and all premiums thereon, and the DCPAF shall pay to the City upon demand the full amount so paid and expended by the City together with interest thereon at the rate provided in this Agreement, from the date of such expenditure by the City until repayment thereof by the DCPAF.

9.7 **Indemnity.** During the Term, the DCPAF agrees to defend, indemnify and hold harmless the City, its officers, employees, representatives and agents from and against any and all claims, injuries (including death), demands, liabilities, causes of action, suits, judgments, damages and expenses (including reasonable attorneys' fees) arising from (i) the DCPAF's failure to perform its obligations under this Agreement, including any insurance obligation, and (ii) the negligence of the DCPAF, its officers, agents, employees, representatives or contractors. The City shall give the DCPAF written notice of any claim filed, made or asserted against the City by any person or entity other than the DCPAF that could result in liability of the DCPAF under the provisions of this Section ("Indemnity Liability") reasonably promptly after the City becomes aware that such claim has been filed, made or asserted against the City. The City, without the prior written consent of the DCPAF, shall not compromise or settle any claim that could result in Indemnity Liability or take any action that could materially interfere with, jeopardize or adversely affect the defense by the DCPAF or the City against any such claim. The City, to the extent reasonably requested by the DCPAF, and at the DCPAF's expense, shall cooperate with the DCPAF in the defense against any such third party claim and shall assert (and authorizes the DCPAF to assert) any good faith defenses that the City or the DCPAF may have against such third party claim. The DCPAF shall be subrogated to any and all rights of the City to assert any claim, right or action related to any claim that could or does result in Indemnity Liability. The provisions of this Section shall survive the termination of this Agreement and are solely for the benefit of the City and the DCPAF and shall not be deemed for the benefit of any other person or entity.

ARTICLE 10

Repair, Maintenance and Security

10.1 **DCPAF Obligation.** The DCPAF shall keep the Premises and all permanent Improvements that from time to time may be on or a part of the Center in a state of good, safe, and attractive repair on a regular and ongoing basis consistent with the standards of maintenance and repair of "Class A" commercial properties in Downtown Dallas, Texas and performance facilities comparable to the Center. At all times during the Term the DCPAF shall neither commit nor suffer any waste to the Center. In the event this Agreement shall terminate, the DCPAF shall deliver up the Center as then constituted in good condition, reasonable wear and tear, obsolescence, and loss by casualty and condemnation excepted (except to the extent that the DCPAF is required under this Agreement to repair casualty damage). If the Premises is not in substantial conformity with this Section, the City may, at its option and in addition to any other remedies under this Agreement, direct the DCPAF to remove non-complying improvements constructed by the DCPAF on the Center and return that portion of the Center to its condition existing on the Effective Date, and the DCPAF shall be obligated to promptly comply at its sole cost and expense.

10.2 Routine Maintenance and Security. The DCPAF shall maintain and provide janitorial, trash collection, landscaping and security service for the Premises during the Term, including repairs and Capital Maintenance (as hereinafter defined) to the interior, exterior and structural portions of the Improvements. The DCPAF further agrees to take care of the grounds at the Performing Arts Center, including without limitation, the mowing of grass, care of shrubs, and general landscaping.

10.3 Capital Maintenance. The City is not required, obligated or entitled to make any changes, alterations, additions, improvements, or repairs in, on, or about the Center, or any part thereof, during the Term without the DCPAF's prior written consent. The DCPAF (and not the City) shall be required to perform all Capital Maintenance that the DCPAF deems necessary or advisable with respect to the Premises during the Term; provided, however, that (subject to prior City approval of the timing, scope and cost of the Capital Maintenance and appropriation of funds by the City Council) the City (and not the DCPAF) shall be liable and obligated to pay for all Capital Maintenance (to the extent not covered by the Ticket Surcharge Account) to the Premises within thirty (30) days after completion of the Capital Maintenance by the DCPAF and the City's receipt of an invoice therefor; provided, however, that if the City has not then appropriated funds for such Capital Maintenance, then the City's payment obligation shall be delayed until the following year in which such funds have been appropriated in the City's budget. For purposes hereof, "Capital Maintenance" shall mean those certain repairs and improvements to the Premises, consistent with then-existing industry standards for "Class A" commercial properties in Downtown Dallas and performance facilities comparable to the Center, that the DCPAF, in its reasonable discretion, determines would increase the capacity or operating efficiency of an asset and would be treated as a capital item and not as an expense under generally accepted accounting principles; provided, however, that the determination as to whether a repair or improvement is Capital Maintenance shall be subject to the approval of the City, which approval shall not be unreasonably withheld, delayed or conditioned and shall be deemed approved by the City if the City fails to deliver to the DCPAF, within thirty (30) days after the City's receipt of a request for Capital Maintenance, written notice that the City has determined that any proposed repair or improvement is not Capital Maintenance.

Notwithstanding the foregoing, the DCPAF, at the DCPAF's option, shall have the right to request the City (subject to prior City approval of the timing, scope and cost of the Capital Maintenance and appropriation of funds by the City Council) to perform certain Capital Maintenance on behalf of the DCPAF, in which event the City shall perform such Capital Maintenance in a timely manner and the City shall not be required to pay the DCPAF for such Capital Maintenance performed by the City; provided, however, that the City may use and apply any funds then existing in the Surcharge Reserve Account.

10.4 The DCPAF's Repairs. The DCPAF shall make any and all additions, alterations or repairs in and about the Center that may be required or permitted by this Agreement in a good and workmanlike manner and shall otherwise observe and comply with all public laws, ordinances, and regulations that from time to time are applicable to the Center. Before the DCPAF commences a Material Renovation, plans and specifications for same shall be submitted to the City director for approval and the DCPAF shall furnish to City (i) an estimate of the cost

of the proposed work; (ii) satisfactory evidence of sufficient contractor's comprehensive general liability insurance covering the Center, builder's risk insurance, and workers' compensation insurance; (iii) a performance and payment bond satisfactory in form and substance to the director; and (iv) such other security as the City may reasonably require to insure completion of or payment for all work free and clear of liens.

10.5 Right of The City to Make Repairs. After reasonable prior notice to the DCPAF, the City, its agent and employees shall have the right to enter the Premises for the purpose of inspection or, if the DCPAF is in default after the expiration of any applicable cure period or in the event of an emergency, making any repairs or alterations to the Premises or any improvements thereon, both interior and exterior, and of every kind or nature which are required of the DCPAF under this Agreement but which the DCPAF has failed to perform; and the DCPAF shall not offer any obstruction, or hindrance to any such repairs or alterations; provided; however, that nothing contained in this Section shall be deemed to impose on the City any obligation to so act.

10.6 Equipment, Fixtures and Signs. The DCPAF shall have the right to erect, install, maintain and operate on the Premises such equipment, trade and business fixtures, signs and other personal property as the DCPAF may deem necessary or appropriate, and such shall not be deemed to be part of the Premises, but shall remain the property of the DCPAF unless necessary to the reasonable and efficient operation of improvements. At any time during the Term and within thirty (30) days after the expiration or termination of the Term, the DCPAF shall have the right to remove all or any part of the DCPAF's equipment, removable fixtures, signs and other personal property from the Premises. Any property remaining on the Premises after such thirty (30) day period shall be deemed to have been abandoned by the DCPAF and may be disposed of by the City at the DCPAF's cost.

ARTICLE 11

Casualty and Condemnation

11.1 Casualty.

- (a) Notice. If all of the Improvements, or any material part thereof, are destroyed or damaged by fire or other casualty, the DCPAF shall promptly deliver written notice thereof to the City.
- (b) Restoration Obligation. With regard to casualty damage to the Center, the DCPAF will as soon as practical, but in no event later than 180 days after the date on which the insurance company, the DCPAF and the City have reached an agreement concerning the amount of the insurance proceeds to be paid as a result of such casualty, commence the work of repair, reconstruction or replacement of the damaged Improvement, provided that the DCPAF's obligation in this regard shall be limited to the amount of insurance proceeds received by the parties. Notwithstanding the foregoing sentence, if the casualty occurs after the 40th year of this Agreement and the extent of damage to the Center is greater than 20% of

the then replacement value thereof (exclusive of the Land value), then the DCPAF shall have the option, within 180 days from the date of the occurrence of such casualty damage, to terminate this Agreement by giving written notice of such termination to the City within said 180-day period, in which event this Agreement shall terminate as of the termination date specified in such notice, which shall not be less than 30 days after the date of such notice, and the DCPAF shall pay all Base Rental for the year in which the Agreement is terminated and all other payments due and owing as of the termination date, the DCPAF shall not be required to repair the damage, and all insurance proceeds available as a result of such damage shall be paid to and be the property of the City.

- (c) Application of Proceeds. All insurance proceeds payable under insurance policies maintained by the City and/or the DCPAF by reason of the occurrence of such fire or other casualty to the Improvements shall be paid and applied as provided in Article 9 hereof. In the event the DCPAF is in default under the terms of this Agreement after the expiration of any applicable cure period at the time such damage or destruction occurs, the City may elect to terminate this Agreement and the City shall thereafter have the right to receive and retain all insurance proceeds payable as a result of such damage or destruction. Insurance proceeds in excess of the cost of such restoration shall be paid to and be the property of the City.
- (d) Precondition to Material Renovation. Before the DCPAF commences a Material Renovation, plans and specifications for same shall be submitted to the City for approval and the DCPAF shall furnish to the City (i) an estimate of the cost of the proposed work; (ii) satisfactory evidence of sufficient contractor's comprehensive general liability insurance covering the Center, builder's risk insurance, and workers' compensation insurance; (iii) a performance and payment bond satisfactory in form and substance to the Director; and (iv) such other security as the City may require to insure completion of or payment for all work free and clear of liens; provided, however, that the foregoing provisions of this Section 11.1(d) shall not apply to any repairs, renovations or improvements that are not a Material Renovation. The DCPAF shall diligently pursue any and all work in a good and workmanlike manner, and in conformity with all applicable laws, ordinances and codes.

11.2 Condemnation.

- (a) Definitions. Whenever used in this Section, the following words shall have the definitions and meanings hereinafter set forth:
 - (1) "Condemnation Proceedings." Any action brought for the purpose of any taking of the Performing Arts Center, or any part thereof or any property interest therein (including, without limitation, the right to the temporary use of all or any portion of the Performing Arts Center), by competent authority as a result of the exercise of the power of eminent domain, including a voluntary sale to such authority either under threat of

condemnation or while such action or proceeding is pending.

- (2) "Taking" or "Taken." The event and date of vesting of title to the Performing Arts Center or any part thereof or any property interest therein (including, without limitation, the right to the temporary use of all or any portion of the Performing Arts Center) pursuant to a Condemnation Proceeding.
- (b) Efforts to Prevent Taking. The City shall use its reasonable efforts to cause all other competent authorities with the power of eminent domain to refrain from instituting any Condemnation Proceedings or exercising any other powers of eminent domain with respect to the Center, or any part thereof or any interest therein, during the Term of this Agreement.
- (c) Entire Taking. If all or substantially all of the Performing Arts Center shall be Taken in Condemnation such that it may not be developed as contemplated in this Agreement, this Agreement shall terminate and from and after such date the DCPAF and the City shall not have any other obligations under this Agreement with respect to the Performing Arts Center. Any award, compensation or damage by reason of said Taking during the Primary Term shall be allocated between the City and the DCPAF as follows: (a) the portion of any award paid attributable to the taking of the Improvements constructed pursuant to this Agreement shall be allocated in proportion to the amount of Projects Costs paid by each of the City and the DCPAF to the total Project Costs paid by both the City and the DCPAF as of the Taking; provided, however, the DCPAF's portion of award attributable to improvements shall be reduced in proportion to the number of years elapsed versus 90 (the sum of the number of years in the Primary Term and the aggregate number of years in all of the Renewal Terms) and (b) the balance of any award or payment (whether made as compensation for diminution of value of this Agreement, the City's fee interest in the Performing Arts Center, the DCPAF's interest in the Performing Arts Center under this Agreement, or otherwise) after deducting the award for Improvements shall be paid to the City. Notwithstanding the foregoing, if the parties mutually agree, the DCPAF may provided, however, that notwithstanding the foregoing or anything in this Agreement to the contrary, the DCPAF, at its option, may undertake to build a new Performing Arts Center at another location within the city limits of the City of Dallas, which location and other details of the project shall be subject to the prior written approval of the DCPAF and the City, in which case all of such awards, compensation and/or damage attributable to the taking shall be made available to the DCPAF for the rebuilding of the Performing Arts Center at such other location. Any award, compensation or damage by reason of said Taking of all or substantially all of the Performing Arts Center during any Renewal Term shall be paid to the City unless the DCPAF, at its option, undertakes to build a new Performing Arts Center at another location within the city limits of the City as described hereinabove in this Section 11.2(c).

(d) Partial Taking

- (1) Abatement for Part Taken. If less than all of the Performing Arts Center shall be Taken in Condemnation Proceedings, obligations attributable to the portion of the Center taken shall be abated from and after the date of such partial Taking, and from and after such date the DCPAF and the City shall not have any other obligations under this Agreement with respect to the portion of the Center that has been taken.
- (2) Restoration Unreasonable. If a Taking involves all of a building, performance venue, or facility within the Performing Arts Center (but not the entire Performing Arts Center) such that the building, performance venue, or facility cannot be reasonably restored to functional utility through reconstruction, reconfiguration and redesign, then the DCPAF may elect to terminate this Agreement, and from and after such date the DCPAF and the City shall not have any other obligations under this Agreement with respect to the Performing Arts Center. Such election to terminate must be exercised no later than 180 days after the date of such Taking. If the DCPAF does not elect to terminate this Agreement upon any partial Taking, then (i) the Performing Arts Center shall be reduced by the portion thereof Taken in the Condemnation Proceeding, and the obligations pertaining to the taken portions shall cease, and (ii) the DCPAF shall commence and proceed with reasonable diligence to repair, reconfigure or reconstruct the remaining portions of and Improvements on the Performing Arts Center; provided, however, the DCPAF's obligation to so repair, reconfigure or reconstruct shall be limited to the proceeds of the condemnation award actually received by the parties. For such purpose, the City and the DCPAF shall receive and shall hold in trust the amount of the award relating to the improvements taken and shall disburse such award to apply on the cost of such restoration. If the DCPAF does not complete such restoration within a reasonable period after such taking or condemnation, then an Event of Default by the DCPAF shall have occurred and the City shall be entitled to exercise the remedies set forth in Section 15.2 of this Agreement and retain the award as partial liquidated damages. Any portion of the award that does not have to be expended for repair or restoration shall be paid to the City. Any award amount attributable to the fee title to real estate taken shall be paid over directly to the City and may be retained by the City unless the parties mutually agree to rebuild the Performing Arts Center in another location within the city limits of the City as described in Section 11.2(c) above.
- (3) Restoration Reasonable. If a Taking involves less than all of a building, performance venue, or facility within the Performing Arts Center such that it can be reasonably restored to functional utility through reconstruction, reconfiguration and redesign, the DCPAF shall promptly and diligently proceed to restore the functionality and utility of the remainder of the

Performing Arts Center and affected improvements. For such purpose the City and the DCPAF shall receive and shall hold in trust the amount of the award relating to the improvements taken and shall disburse such award to apply on the cost of such restoration. If the DCPAF does not complete such restoration within a reasonable period after such taking or condemnation, then an Event of Default by the DCPAF shall have occurred and the City shall be entitled to exercise the remedies set forth in Section 15.2 of this Agreement and retain the award as partial liquidated damages. Any portion of the award that does not have to be expended for repair or restoration shall be paid to the City. Any award amount attributable to the fee title to real estate taken shall be paid over directly to the City and may be retained by the City unless the DCPAF elects to rebuild the Performing Arts Center in another location within the city limits of the City.

- (e) Temporary Taking. If any right of temporary (hereinafter defined) possession or occupancy of all or any portion of the Performing Arts Center shall be Taken, the obligations under this Agreement with respect to same shall be abated during the duration of such Taking in a fair and equitable manner. A Taking shall be considered "temporary" only if the period of time during which the DCPAF is deprived of usage of all or part of the Performing Arts Center as the result of such Taking does not materially interfere with the ability of the DCPAF to continue use of the Performing Arts Center. Any other Taking that is not "temporary" as described above shall be treated as an Entire Taking or as a Partial Taking under this Article.

ARTICLE 12

Assignment and Subletting

12.1 Assignment and Subletting. The DCPAF shall have the right, at any time and from time to time during the Term, to assign this Agreement and/or to sublet all or any portion of the Premises without the City's prior consent; provided, however, that the DCPAF shall at all times during the Term remain primarily liable and responsible for all of the duties and obligations of the DCPAF under this Agreement, the DCPAF shall promptly deliver to the City written notice of each such assignment or sublease, and the subleases and assignments shall be subject the terms of this Agreement. Any assignment must be to another non-profit corporation and/or foundation organized and existing to further the same public purposes as the DCPAF Upon any such assignment, the assignee shall execute and deliver to the City a written assumption, in form and substance reasonably satisfactory to the City, of all of the obligations of the DCPAF pertaining to the Center and accruing under this Agreement after such assignment. Subleases may be made to concessionaires and other for-profit vendors to provide services, etc. in connection with operation of the Center.

ARTICLE 13

M/WBE Good Faith Efforts

13.1 M/WBE Good Faith Efforts. The DCPAF confirms that it supports the objectives set forth in the City's Good Faith Effort Program ("GFE Program") for the hiring of minority and women-owned business enterprises, which are (i) "to provide minorities and women equal opportunity for participating in the City construction, procurement and professional services programs", and (ii) "to provide procedures for monitoring compliance with [minority and women-owned business enterprises] requirements of the City construction, procurement, and professional services programs." In connection with the operations of the DCPAF at the Center following completion of construction, the DCPAF, during the Term, shall use reasonable efforts to (i) comply with the terms of the GFE Program, including reporting requirements thereunder, (ii) contractually obligate any third party operator that the DCPAF may engage to operate any aspect of the Center on the DCPAF's behalf and all Concessionaires (defined below) to comply with the GFE Program, including reporting requirements thereunder, provided that no party shall be required to implement bidding procedures in any respect; (iii) to the degree reasonably possible, utilize contractors with offices located in the City; and (iv) contractually obligate any contractors to use good faith efforts to maintain a work site at which no individuals are under the influence of illegal drugs. "Concessionaire" shall mean third-party service companies and suppliers that contract directly with the DCPAF to provide food and beverage service to the general public at the Center, to provide parking services to the general public at the Center, or to provide ordinary maintenance, merchandising, security and ticket operations at the Center.

ARTICLE 14

Financial Records

14.1 Financial Records. The DCPAF shall furnish to the City within one hundred twenty (120) days after the close of each of the DCPAF's fiscal years (i) its balance sheet as of the close of such fiscal year; (ii) its statement of operations for such fiscal year; and (iii) its statement of cash flows for such fiscal year. As developed, but not later than the beginning of each fiscal year, the DCPAF shall provide the City with a copy of its anticipated budget for the coming year. To the extent reasonably requested by the City, the DCPAF shall allow the City to review, at the City's expense, (at the DCPAF's offices during office hours upon advance notice to the DCPAF) records in the possession or reasonable control of the DCPAF relating to the operations of the Center (but excluding any such records as are protected by attorney-client, attorney work product or similar privileges).

ARTICLE 15

Default and Remedies

15.1 DCPAF Default. Each of the following events shall be an "Event of Default" by the DCPAF under this Agreement:

- (a) the DCPAF shall fail to pay any installment of rent or any other monetary amounts hereby required of it as and when the same shall become due and

payable and shall not cure such default within thirty (30) days after written notice thereof is given by the City to the DCPAF;

- (b) the DCPAF shall fail to maintain any of the insurance or bonds provided for herein, and the continuation of the failure without cure for a period of ten (10) days after the City notifies the DCPAF of the failure in writing in accordance with the notice provisions under this Agreement;
- (c) the DCPAF shall fail to comply in any material respect with any term, provision or covenant of this Agreement, other than the payment of any monetary amounts, and shall not cure such failure within ninety (90) days after written notice thereof is given by the City to the DCPAF (provided that if such default cannot reasonably be cured within ninety (90) days, then the DCPAF shall have an additional reasonable period of time within which to cure such default);
- (d) the DCPAF shall fail to comply with any term, provision or covenant in the Development Agreement and shall not cure such failure within any applicable cure period provided for in the Development Agreement; and
- (e) a receiver or trustee is appointed to take possession of all or substantially all of the assets of the DCPAF; or if any action is taken or suffered by the DCPAF pursuant to an insolvency, bankruptcy, or reorganization act; or if the DCPAF makes a general assignment for the benefit of its creditors; and such appointment, action, or assignment continues for a period of sixty (60) days.

15.2 City's Remedies. Upon the occurrence of a DCPAF Event of Default, the City may pursue any legal or equitable remedy or remedies, including, without limitation, specific performance, damages, and termination of this Agreement; provided, however, that the City shall have no right to terminate this Agreement unless the City delivers to the DCPAF a second notice which expressly provides that the City will terminate this Agreement unless the DCPAF commences to cure the DCPAF event of default within fifteen (15) days after the DCPAF's receipt of such written notice or fails to proceed thereafter with reasonable diligence to cure such DCPAF event of default. Termination or non-termination of this Agreement upon a DCPAF Event of Default shall not prevent the City from suing for specific performance, damages, injunctive relief or other remedies. Upon termination by the City, the City may occupy the Center, and the DCPAF shall assign to the City any of its contracts and agreements requested by the City to be so assigned. The DCPAF contracts and agreements not assumed by the City shall terminate immediately upon termination of this Agreement. The DCPAF does hereby appoint the City as its agent and attorney in fact for purpose of effecting said assignment(s), said appointment being coupled with an interest therein. In the event the DCPAF fails to pay any of the expenses or amounts or perform any obligation specified in this Agreement, the City may, but shall not be obligated to do so, pay any such amount or perform any such obligations and the reasonable amount so paid and the reasonable cost incurred in said performance shall immediately be due and payable by the DCPAF to the City and shall thereafter bear interest at the rate specified in this Agreement. In no event shall the City ever be entitled to receive or the DCPAF ever be liable for consequential, exemplary or punitive damages by reason of this

Agreement.

15.3 City's Default. Each of the following events shall be an "Event of Default" by the City under this Agreement:

- (a) the City shall fail to pay any sum payable to the DCPAF under this Agreement as and when the same shall become due and payable and shall not cure such default within thirty (30) days after written notice thereof is given by the DCPAF to the City;
- (b) the City shall fail to comply with any term, provision or covenant of this Agreement, other than the payment of a monetary amount to the DCPAF and shall not cure such failure within ninety (90) days after written notice thereof is given by the DCPAF to the City (provided that if such default cannot reasonably be cured within ninety (90) days, then the City shall have an additional reasonable period of time within which to cure such default); or
- (c) the City shall fail to comply with any term, provision or covenant in the Development Agreement and shall not cure such failure within any applicable cure period provided for in the Development Agreement.

15.4 DCPAF's Remedies. Upon the occurrence of a City Event of Default, the DCPAF may pursue any legal or equitable remedy or remedies, including, without limitation, specific performance, damages, and termination of this Agreement; provided, however, that the DCPAF shall have no right to terminate this Agreement except as provided in Section 15.5 below, unless the DCPAF delivers to the City a second notice which expressly provides that the City will terminate this Agreement unless the default is addressed as herein contemplated. In no event shall the DCPAF ever be entitled to receive or the City ever be liable for consequential, exemplary or punitive damages by reason of this Agreement.

15.5 DCPAF's Limited Remedy. Notwithstanding anything in Section 15.4 or elsewhere in this Agreement to the contrary, in the event the City fails to fund its obligations under Article 8, the DCPAF, as its sole and exclusive remedies, may (i) terminate this Agreement by delivering written notice of termination to the City, in which event the parties shall have no further duties, obligations or liabilities under this Agreement, (ii) waive such failure to fund by the City, in which event the City shall not be liable or required to thereafter fund such obligation and this Agreement shall continue in full force and effect (provided that such failure to fund by the City shall not be an Event of Default by the City), or (iii) exercise the purchase option provided in this Section 15.5. If during the Primary Term the DCPAF terminates for the City's failure to fund its obligations under Article 8, the DCPAF, or its designee, shall have the right and option, at its election, to purchase the Performing Arts Center and any improvements located thereon, upon the following terms and procedures:

- (a) Notice. The DCPAF must notify the City in writing of its exercise of this option to purchase within one (1) year after each failure to fund by the City. Said notice shall designate a place, date and time for closing; provided however, the place

shall be within the City of Dallas and the date shall not be sooner than 30 days after the City's receipt of the notice

- (b) Purchase Price. The purchase price shall be paid by the DCPAF in cash or other immediately available funds and shall be an amount equal to the sum of the following ("Purchase Price"):
- (1) the City's actual out-of-pocket cost to purchase the Performing Arts Area, plus the fair market value (as of the date immediately prior to the date on which construction commences on the Center Infrastructure or the Center Parking Garage, whichever is earlier) of any portion of the Performing Arts Area that was owned by the City prior to May 2003 [or that has been abandoned to the City for inclusion in the Performing Arts Area];
 - (2) the amount of the City Construction Contribution as defined in the Development Agreement, if any, actually spent by the City for items or improvements located on the Performing Arts Areas through the date of closing (plus any interest actually paid by the City to retire such portion of the Bonds as described in the Development Agreement);
 - (3) the aggregate amount actually spent by the City during the Term of this Agreement for Capital Maintenance at the Center; and
 - (4) The Purchase Price shall increase in proportion to the increase in the Consumer Price Index for "All Urban Consumers, U.S. City Average, All Items," issued by the Bureau of Labor Statistics of the United States Department of Labor over the time from the Effective Date of this Agreement or the City's expenditure of said amounts through closing (as applicable). The City Construction Contribution and the Capital Maintenance components of the Purchase Price will never be less than the amount originally expended by the City. If the index is converted to a different standard reference base or otherwise revised, the determination of the index shall be made with the use of such conversion factor, formula or table for converting the index that may be published by the Bureau or, if the Bureau does not publish the same, then with the use of such conversion factor, formula or table as is published by any nationally recognized publisher of similar statistical information. If the index ceased to be published, then the City may substitute for it any independently published index of a reasonably comparable type.
- (c) At closing the City shall deliver to the DCPAF a Special Warranty Deed as to the Land and Improvements which shall be subject to any and all matters of record on the Effective Date of this Agreement applicable to the property conveyed (except as provided below), and otherwise conveying the Land and improvements free and clear of liens created by the City and otherwise on an "AS IS, WHERE IS, WITH ALL FAULTS BASIS" to the maximum extent allowed by law. In

addition, the City shall deliver to the DCPAF a bill of sale similarly conditioned and/or qualified covering the Personal Property and all other portions of the Performing Arts Center that are not covered by the Deed. In addition to any other matter, the Land and improvements conveyed shall include or be subject to deed restrictions in favor of and enforceable by the City restricting the Land and improvements to use solely as a cultural/performing arts complex and/or other public use consistent with this Agreement and the Downtown Arts District and maintaining and preserving the Renovated Artist Square. The Deed and any related deed restrictions are subject to approval as to form by the City Attorney and the DCPAF.

- (d) The DCPAF may elect to secure a title policy and the City will reasonably cooperate with said effort; provided, however, all cost and expenses associated with same shall be borne by the City. Additionally, all costs of closing incurred by the DCPAF shall be borne by the DCPAF and all costs of closing incurred by the City shall be borne by the City.

15.6 No Waiver or Forbearance. Forbearance by the non-defaulting party to enforce one or more of the remedies herein provided upon the occurrence of an Event of Default by the other party shall not be deemed or construed to constitute a waiver of such default. One or more waivers of a breach of any covenant, term or condition of this Agreement by either party hereto shall not be construed by the other party as a waiver of a different or subsequent breach of the same covenant, term or condition. The consent or approval of either party to or of any act by the other party of a nature requiring consent or approval shall not be deemed to waive or render unnecessary the consent to or approval of any other subsequent similar act.

15.7 The City's Right to Perform the DCPAF's Covenants. If the DCPAF shall fail in the performance of any of its covenants, obligations or agreements contained in this Agreement, other than the obligation to pay Base Rental, and such failure shall continue without the DCPAF curing or commencing to cure such failure within all applicable grace and/or notice and cure periods, the City after 10 days additional written notice to the DCPAF specifying such failure (or shorter notice if any emergency [meaning that there is imminent danger to the safety of persons or of substantial damage to property] exists) may (but without any obligation so to do) perform the same for the account and at the expense of the DCPAF, and the reasonable amount of any payment made or other reasonable expenses (including reasonable attorneys' fees incurred by the City for curing such default) shall be payable by the DCPAF to the City on demand, or if not so paid, shall be treated at the City's option as a monetary default. This provision is not in lieu of, but is in addition to, any other rights or remedies the City may have with respect to any such failure of performance to the City.

15.8 The DCPAF's Right to Perform the City's Covenants. If the City shall fail in the performance of any of its covenants, obligations or agreements contained in this Agreement, and such failure shall continue without the City curing or commencing to cure such failure within all applicable grace and/or notice and cure periods, the DCPAF, after 10 days' additional written notice to the City specifying such failure (or shorter notice if any emergency exists), may (but without any obligation so to do) perform the same for the account and at the expense of the City,

and the reasonable amount of any payment made or other reasonable expenses (including reasonable attorneys' fees incurred by the DCPAF for curing such default) shall be payable by the City to the DCPAF on demand. This Section shall not apply to Events of Default covered by Section 15.5.

ARTICLE 16

Representations and Warranties

16.1 The City's Representations and Warranties. As a material inducement to the DCPAF for entering into this Agreement, the City hereby represents and warrants to the DCPAF that each of the following is true and correct in all respects:

- (a) Existence. The City is a home rule municipal corporation of the State of Texas duly incorporated and currently existing pursuant to the constitution and laws of the State of Texas, including the Texas Local Government Code and Texas Government Code.
- (b) Authority. The City has all requisite power and authority to own the Center, to execute, deliver and perform its obligations under this Agreement and to consummate the transactions herein contemplated and, by proper action in accordance with all applicable law has duly authorized the execution and delivery of this Agreement, the performance of its obligations under this Agreement and the consummation of the transactions herein contemplated.
- (c) Binding Obligation. This Agreement is a valid and binding obligation of the City and is enforceable against the City in accordance with its terms.
- (d) No Defaults. The execution by the City of this Agreement and the consummation by the City of the transactions contemplated hereby (i) do not, as of the Effective Date, result in a breach of any of the terms or provisions of, or constitute a default, or a condition which upon notice or lapse of time or both would ripen into a default, under the City's charter or any resolution, indenture, agreement, instrument or obligation to which the City is a party or by which the Center or any portion thereof is bound; and (ii) do not, to the knowledge of the City, constitute a violation of any law, order, rule or regulation applicable to the City or any portion of the Center of any court or of any federal or state or municipal regulatory body or administrative agency or other governmental body having jurisdiction over the City or any portion of the Center.
- (e) Consents. No permission, approval or consent by third parties or any other governmental authorities is required in order for the City to enter into this Agreement, make the agreements herein contained or perform the obligations of the City hereunder other than those which have been obtained.
- (f) Quiet Enjoyment. During the Term and subject to the terms of this Agreement,

the DCPAF shall have the quiet enjoyment and peaceable possession of the Center against hindrance or disturbance by the City or by any other person or entity, acting by, through or under the City, but not otherwise.

- (g) Proceedings. There are no actions, suits or proceedings pending or, to the reasonable best knowledge of the City, threatened or asserted against the City affecting the City or any portion of the Center, at law or in equity or before or by any federal, state, municipal or other governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign.
- (h) Impositions. The City has not received any notice of any condemnation actions, special assessments or increases in the assessed valuation of taxes or any Impositions of any nature that are pending or being contemplated with respect to the Center or any portion thereof.
- (i) Compliance with Laws. The City has not received any notice of any violation of any ordinance, regulation, law or statute of any governmental agency pertaining to the Center or any portion thereof.
- (j) Encumbrances. The City has not placed or granted any liens or security interests against the Center, and there are no actions pending, to the knowledge of the City, which would result in the creation of any lien on any portion of the Center, including, but not limited to, water, sewage, street paving, electrical or power improvements which give rise to any lien, completed or in progress. During the Term, the City shall not grant any lien, security interest, encumbrance, easement, restriction, covenant or other exception to title on all or any portion of the Center that unreasonably impairs the DCPAF's use of the Center without the prior written consent of the DCPAF, which consent shall not be unreasonably withheld or conditioned and with all due consideration to facilitating the further development of the Downtown Arts District (including without limitation the Municipal Site).
- (k) Limitations. Except as otherwise expressly provided herein, the Premises are leased by the City on an "**AS IS, WHERE IS, WITH ALL FAULTS**" basis, without representation or warranty of any kind, either express or implied, as to the condition of the Center, its merchantability, its condition or its fitness for the DCPAF's intended use or for any particular purpose.

16.2 The DCPAF's Representations, Warranties and Special Covenants. As a material inducement to the City for entering into this Agreement, the DCPAF hereby represents and warrants to the City that each of the following is true and correct in all respects:

- (a) Existence. The DCPAF is a duly organized and validly existing non-profit corporation and foundation under the laws of the State of Texas and the Internal Revenue Code and shall maintain said status during the Term of this Agreement.

- (b) Authority. The DCPAF has all requisite power and authority to own its property, operate its business, enter into this Agreement and consummate the transactions herein contemplated, and by proper action has duly authorized the execution and delivery of this Agreement and the consummation of the transactions herein contemplated.
- (c) Binding Obligations. This Agreement is a valid obligation of the DCPAF and is binding upon the DCPAF in accordance with its terms.
- (d) No Default. The execution by the DCPAF of this Agreement and the consummation by the DCPAF of the transactions contemplated hereby do not, as of the Commencement Date, result in a breach of any of the terms or provisions of, or constitute a default or condition which upon notice or lapse of time or both would ripen into default under, the organizational documents of the DCPAF or under any indenture, agreement, instrument or obligation to which the DCPAF is a party or is bound.
- (e) Consents. No other permission, approval or consent by third parties or any other governmental authorities is required in order for the DCPAF to enter into this Lease or consummate the transactions herein contemplated, other than those which have been obtained.
- (f) As-Is. Except as otherwise expressly provided herein, the Premises are accepted the DCPAF on an "**AS IS, WHERE IS, WITH ALL FAULTS**" basis, without representation or warranty of any kind, either express or implied, as to the condition of the Center, its merchantability, its condition or its fitness for the DCPAF's intended use or for any particular purpose.

ARTICLE 17

Holdover

17.1 Holding Over by the DCPAF. Should the DCPAF or any assignee, subtenant or licensee of the DCPAF holdover within the Center or any part thereof after the expiration of the Term, then, unless otherwise agreed in writing, such holdover shall constitute and be construed as a tenancy from month-to-month only, upon the same terms and conditions as during the Term; provided, however, the DCPAF shall pay a Base Rental equal to the fair market rental for the Center as determined by the City's appraiser and the City shall have no further obligation to fund its Annual City Operating Expenses otherwise provided in this Agreement.

ARTICLE 18

Notice

18.1 Notices and Payments. Any notice required or desired to be given under this Agreement shall be in writing with copies directed as indicated herein and shall be personally

served or given by mail. Any notice given by mail shall be deemed to have been given when deposited in the U.S. mails, certified mail, return receipt requested, postage prepaid, and addressed to the party to be served at the last address given by that party to the other party under the provisions of this Article. Notice given by courier, fax, or other form of personal delivery shall be deemed given only upon actual receipt. Any change in address shall be promptly given in writing to the other party pursuant to this notice provision. The initial addresses for notice are as follows:

If to the City: City of Dallas
1500 Marilla
4E North
Dallas, Texas 75201
Attn: City Manager
Telephone: _____
Facsimile: _____

With copy to: City of Dallas
City Attorney's Office
1500 Marilla 7CN
Dallas, TX 75201
Attn: J. Arthur Hudman
Telephone: 214-670-5940
Facsimile: 214-670-0622

If to the DCPAF: Dallas Center for the Performing Arts Foundation, Inc.
2106 Boll Street
Dallas, Texas 75204
Attn: President and Chief Executive Officer
Telephone: _____
Facsimile: _____

with copies to: Haynes and Boone, LLP
901 Main Street
Suite 3100
Dallas, Texas 75202
Attn: Michael M. Boone
Telephone: _____
Facsimile: _____

ARTICLE 19

DCPAF Financing

19.1 No Mortgage on the City's Interests. The DCPAF shall have no right, power or authority to place a mortgage, deed of trust lien or security interest of any sort upon any interest of the City in or to the Premises, including without limitation the fee title to same.

19.2 Mortgage by the DCPAF. The DCPAF shall have the right to place a mortgage, deed of trust lien or security interest upon the DCPAF's interest in and under this Agreement, but such mortgage, deed of trust lien or security interest shall cover and affect only the DCPAF's interest in the Agreement and not the City's fee simple title to the Premises. In addition, the City will take all actions reasonably requested by the DCPAF and/or the DCPAF's lender, if any, which holds a lien or mortgage covering the DCPAF's interest under this Agreement, in order to reflect that such lender or its foreclosure purchaser will succeed to the DCPAF's rights under this Agreement in the event of any lawful foreclosure by such lender.

- (a) City's Cooperation. The City will execute and deliver a reasonable estoppel certificate addressed to the DCPAF's mortgagee setting forth the material terms of this Agreement, confirming the terms of this Article, and providing the City's agreement to recognize the mortgagee or any purchaser of the mortgaged interest at foreclosure in the same manner as an assignee pursuant to Article 12 of this Agreement. The City agrees to accept commercially reasonable amendments of this Agreement which are requested by the DCPAF's mortgagee prior to the execution of its mortgage which are reasonably calculated to protect the mortgagee's interest in this Agreement under its mortgage and do not, in the reasonable opinion of the City, materially diminish the rights of the City under this Agreement or violate or would cause the City to be in violation of its City Code, City Charter, or state law. Notwithstanding the foregoing, no mortgagee shall acquire, by virtue of the mortgage, any greater right in the Center and in any building or improvements thereon than the DCPAF then had under this Agreement, and provided further that any mortgage shall at all times be and remain inferior and subordinate to this Agreement. In no event shall the DCPAF have the right to encumber, subordinate or render inferior in any way the City's fee simple title and reversionary interest in and to the Center.
- (b) Notices to DCPAF's Mortgagees. If at any time after execution and recordation of any mortgage in the Real Property Records of Dallas County, Texas, the mortgagee shall notify the City in writing that the mortgage on the DCPAF's interest in the Agreement has been given and executed by the DCPAF, and shall furnish the City at the same time with the address to which the mortgagee desires copies of notices to be given, the City hereby agrees that it will thereafter deliver in the manner specified in Article 18 to the mortgagee at the address so given, duplicate copies of any and all notices in writing which the City may from time to time give or serve upon the DCPAF under and pursuant to the terms and provisions of this Agreement and any and all pleadings in suits filed by the City against the DCPAF, as applicable. No notice to the DCPAF shall be effective as to the mortgagee unless duplicate copies thereof are delivered to such mortgagee.
- (c) Mortgagee's Right to Cure. If the City shall ever be entitled to exercise a right hereunder to terminate this Agreement (other than for non-appropriation) after the giving of notice and/or the passage of time, as applicable, the City shall deliver additional written notice to the DCPAF's mortgagee of the City's intention to so

terminate this Agreement and describing the existing defaults, and mortgagee thereafter shall have 30 days to cure the defaults described in such written notice. In the event (i) such default is not capable of cure within such 30-day period, this Agreement may not be terminated if mortgagee shall deliver to the City, within such 30-day period, written notice of mortgagee's intention to cure the specified defaults and shall commence and diligently pursue the cure of the specified defaults and such defaults are cured within 120 days of the date of such notice, or (ii) any mortgagee is not in actual possession of the Premises on the date of the additional notice given the mortgagee under this Section, and possession is necessary in order to cure any default, then the time within which such mortgagee may commence to cure such default shall be extended for a reasonable time, not to exceed 120 days, until such mortgagee can obtain actual possession of the Premises. No purported termination of this Agreement shall be effective until such written notice shall have been given to mortgagee and such 30-day period, or additional time period as provided above, shall have expired without the described defaults having been cured. Mortgagee may, at its option any time before the rights of the DCPAF under this Agreement shall have been terminated, pay any of the Base Rental and Additional Payments due hereunder, procure any insurance required hereunder, pay any Imposition required hereunder, make any repairs and improvements required hereunder, or do any other act or thing or make any other payment required of the DCPAF by the terms of this Agreement or which may be necessary and appropriate to comply with the covenants and conditions of this Agreement to prevent the termination of same. All payments so made and all things so done and performed by any such mortgagee shall be as effective to prevent a forfeiture of the rights of the DCPAF hereunder as if performed by the DCPAF.

- (d) Survival. The provisions of this Section shall survive the termination of this Agreement and shall continue in full force and effect thereafter to the same extent as if said Sections were a separate and independent contract among the City, the DCPAF and any mortgagee.
- (e) Mortgagee's Liability. No mortgagee shall be or become personally liable to the City as an assignee of this Agreement, for the payment or performance of any obligation of the DCPAF unless and until it expressly assumes by written instrument the payment or performance of such obligation, and no assumption of liability shall be inferred from or result from foreclosure or other appropriate proceedings in the nature thereof or as the result of any other action or remedy provided for by any mortgage, or from a conveyance or assignment pursuant to which any purchaser at foreclosure shall acquire the rights and interest of the DCPAF under the terms of this Agreement; provided, however, any such assignee or purchaser must timely and diligently perform all obligations of the DCPAF hereunder.
- (f) No Modification or Surrender. During such time as all or any portion of the DCPAF's interest in this Agreement is subject to a mortgage, this Agreement as to

such portion of the Center may not be modified or voluntarily surrendered without the prior written consent of the mortgagee, which consent shall not be unreasonably withheld, conditioned or delayed.

19.3 Bond. The DCPAF currently contemplates issuing private, tax-exempt bonds to finance a portion of the DCPAF's construction costs for the Performing Arts Center. Although the DCPAF will be the sole obligor for such bonds, the City hereby agrees to reasonably cooperate with the DCPAF to facilitate the issuance of such bonds, including, but not limited to, sponsoring a state-authorized conduit issuing authority to serve as the conduit through which the bonds will be issued and qualified as tax-exempt bonds.

ARTICLE 20

Miscellaneous

20.1 Commissions. The City and the DCPAF hereby represent and warrant to each other that (a) it has not contracted or entered into any agreement with any real estate broker, agent, finder or any other person or entity in connection with this transaction, and (b) it has not taken any action that would result in any real estate broker's, agent's, finder's or other fees or commissions being due to any person or entity with respect to this transaction.

20.2 Representatives. During the Term of this Agreement, the City Manager shall have full authority to administer this Agreement and provide the consents and approval provided for herein on behalf of the City. To facilitate this, the Manager may designate the Director of Public Works and Transportation and/or the Director of the Office of Cultural Affairs to act on the City Manager's behalf as to all aspects of this Agreement. The DCPAF shall be entitled to rely on the authority of the City Manager (or, when designated, the Directors) for such purposes under this Agreement.

During the Term of this Agreement, the DCPAF shall designate two individuals who shall have full authority (acting together and not alone) to administer this Agreement on behalf of the DCPAF. The initial DCPAF representatives shall be _____ and _____. The DCPAF may designate a permanent or temporary replacement for either DCPAF representative by delivering a written notice to the City executed by the DCPAF.

20.3 Copyright Indemnification. The DCPAF assumes full responsibility for complying with the Federal Copyright Law of 1978, as amended, (17 U.S.C. 101, et seq.) and any applicable regulations, including but not limited to the assumption of all responsibilities for paying royalties which are due for the use of copyrighted works in the Center's performances, transmissions or broadcasts, and the DCPAF agrees to defend, indemnify, and hold harmless the City, its officers, employees, and agents, for any claims or damages (including but not limited to court costs and reasonable attorney's fees) growing out of the DCPAF's infringement or violation of the copyright law or regulations.

20.4 Recording. Concurrently with the execution of this Agreement, the City and the DCPAF shall execute, acknowledge and deliver a Memorandum of this Agreement (the

"Memorandum of Agreement"), in the form attached hereto as Exhibit "C" and made a part hereof for all purposes, which Memorandum of Agreement shall be recorded by the DCPAF in the Real Property Records of Dallas County, Texas. The recording costs relating to the Memorandum of Agreement shall be paid by the DCPAF. Upon termination of this Agreement, the DCPAF shall execute and deliver to the City, at the City's request, an appropriate release in recordable form confirming termination of this Agreement and release of the DCPAF's interest under same.

20.5 Reserved.

20.6 Survival. Covenants in this Agreement providing for performance after termination of this Agreement shall survive the termination of this Agreement.

20.7 Captions. The captions used in this Agreement are for convenience only and shall not be deemed to amplify, modify or limit the provisions hereof.

20.8 Construction. Words of any gender used in this Agreement shall be construed to include any other gender, and words in the singular shall include the plural and vice versa, unless the context otherwise requires. This Agreement shall not be construed either for or against either party by reason of authorship.

20.9 Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns.

20.10 Entire Agreement. This Agreement contains the entire agreement of the parties hereto with respect to the subject matter hereof and can be altered, amended or modified only by a written instrument executed by all such parties. It is understood that there are no oral agreements or representations between the parties hereto affecting this Agreement, and this Agreement supersedes and cancels any and all previous negotiations, arrangements, agreements or representations and understandings, if any, between the parties hereto with respect to the subject matter hereof. There are no other representations or warranties between the parties hereto and all reliance with respect to representations is solely upon the representations and agreements contained in this document.

20.11 Invalidity. If any term or provision of this Agreement or the application thereof to any person or circumstances shall, to any extent, be invalid or unenforceable, the remainder of this Agreement or the application of such term or provision to persons or circumstances (other than those as to which it is held invalid or enforceable) shall not be affected thereby, and each term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

20.12 No Joint Ventures. Nothing herein contained, either in the method of computing rent or otherwise, shall create between the parties hereto, or be relied upon by others as creating, any partnership, association, joint venture or otherwise.

20.13 **Choice of Law.** The laws of the State of Texas shall govern the validity, performance and enforcement of this Agreement

20.14 **Inspection.** The DCPAF shall permit the City and its agents, upon reasonable advanced notice to enter into and upon the Center during normal business hours for the purpose of inspecting the same. Forty-eight (48) hour notice shall in any event be deemed to be reasonable. The City shall use reasonable good faith efforts to minimize interference with or disruption of the DCPAF's use.

20.15 **No Third Party Beneficiaries.** This Agreement is solely for the benefit of the parties hereto and their successors and assigns permitted under this Agreement, and no provisions of this Agreement shall be deemed to confer upon any other person any remedy, claim, liability, reimbursement, cause of action or other right.

20.16 **Estoppel Certificates.** The DCPAF and the City shall, at any time and from time to time upon not less than 30 days' prior written request by the other party, execute, acknowledge and deliver to said party, a statement in writing certifying (i) its ownership of its respective interest hereunder, (ii) that this Agreement is unmodified and in full force and effect (or if there have been any modifications, that the same is in full force and effect as modified and stating the modifications), (iii) the dates to which the Base Rental, Ticket Surcharge, and any other payments have been paid by the DCPAF, (iv) the dates to which and amount of the Annual City Operating Expenses paid year-to-date, and (v) that, to the current actual knowledge of the party, no default on the part of the other party exists (except that if any such default does exist, the certifying party shall specify such default).

20.17 **Force Majeure.** The time for performance by the City or the DCPAF of any term, provision or covenant of this Agreement shall be deemed extended by any time lost due to delays resulting from acts of God, strikes, unavailability of building materials, civil riots, floods, material or labor restrictions by governmental authority and any other cause not within the reasonable control of the City or the DCPAF, as the case may be.

20.18 **Waiver of the City's Lien.** The City hereby waives all of the City's rights to any contractual, statutory, constitutional or other lien or security interest on any of the DCPAF property or the property of any assignee or subtenant that may now or at any time hereafter be situated on the Premises.

ARTICLE 21

Environmental Matters

21.1 **Environmental Investigation and Remediation.** The DCPAF shall be responsible for performing any environmental investigation and remediation work which may be required in connection with the use and occupancy of the Center and which is caused by the presence of Hazardous Materials (defined below) on the Center, except to the extent such results from the act of the City or its officers, employees, representatives or agents. Such environmental investigation and remediation work shall be carried out in accordance with all applicable laws.

The DCPAF shall notify and advise the City of the remediation the DCPAF will undertake and the procedures to be used. The DCPAF shall complete the remediation with due diligence and shall comply with, and shall cause its agents and contractors to comply with, all applicable laws regarding the use, removal, storage, transportation, disposal and remediation of Hazardous Materials. The DCPAF's obligation as provided above to undertake environmental investigation and remediation of the Center shall be a continuing obligation of the DCPAF throughout the Term.

21.2 Presence and Use of Hazardous Materials. The DCPAF shall not, without the City's prior written consent, keep on or around the Premises, for use, disposal, treatment, generation, storage, or sale, any substance designated as, or containing components designated as hazardous, dangerous, toxic, or harmful, including without limitation Hazardous Materials, or is subject to regulation, by federal, state, or local law, regulation, statute, or ordinance, unless such use by the DCPAF is in compliance with all applicable federal, state or local laws, regulations, statutes and ordinances. With respect to any such Hazardous Materials, the DCPAF shall:

- (a) Comply promptly, timely, and completely with all government requirements for reporting, keeping, and submitting manifests, and obtaining and keeping current identification numbers.
- (b) Submit to the City true and correct copies of all reports, manifests, and identification numbers at the same time as they are required to be and/or are submitted to the appropriate government authorities.
- (c) Within thirty (30) days of the City's request, submit written reports to the City regarding the DCPAF's use, storage, treatment, transportation, generation, disposal, or sale of Hazardous Materials and provide evidence satisfactory to the City of the DCPAF's compliance with the applicable government regulations.
- (d) Allow the City or the City's agent or representative to come on the Premises at all times to check the DCPAF's compliance with all applicable government regulations regarding Hazardous Materials; provided, however, that the City shall at all times use reasonable efforts to minimize any disruption to the use of the Premises by the DCPAF.
- (e) Comply with all applicable government rules, regulations, and requirements regarding the proper and lawful use, sale, transportation, generation, treatment, and disposal of Hazardous Materials.

Any and all costs to the City and associated with the City's routine inspection of the Premises and the City's routine monitoring of the DCPAF's compliance with this Article, including the City's attorney fees and costs, shall be the obligation and liability of the City; provided, however, that if it is ever determined that Hazardous Materials are present at the Premises, then the DCPAF shall be required to reimburse the City for all of the reasonable costs incurred by the City with respect to the City's inspection of the Premises and the City's monitoring of the DCPAF's use, storage, treatment, transportation and disposal of the Hazardous Materials that are

located at the Premises.

21.3 Cleanup Costs, Default, and Indemnification. The DCPAF shall be fully and completely liable to the City for any and all cleanup costs, and any and all other charges, fees, and penalties (civil and criminal) imposed by any government authority with respect to the DCPAF's use, disposal, transportation, generation, and/or sale of Hazardous Materials, in or about the Center. If the DCPAF breaches its obligations under this Article and such breach is not cured following notice and within the applicable cure period, the City may take any and all action reasonably appropriate to remedy such breach, including taking all appropriate action to clean up or remediate any contamination resulting from the DCPAF's use, generation, storage or disposal of Hazardous Materials, and the DCPAF shall promptly pay all reasonable costs incurred by the City in connection therewith. The DCPAF shall defend, indemnify and hold harmless the City, its officers, agents, employees and representatives, from and against any and all claims, demands, liabilities, causes of action, suits, judgments, damages and expenses (including reasonable attorneys' fees and cost of clean up and remediation) arising from the DCPAF's failure to comply with the provisions of this Article. This indemnity provision shall survive termination or expiration of this Agreement.

21.4 "Hazardous Materials". The term "Hazardous Materials" means any substance, material or waste which is now or hereafter classified or considered to be hazardous, toxic or dangerous under any federal, state or local laws, rules and regulations affecting the Center relating to pollution or the protection or regulation of human health, natural resources or the environment, including, but not limited to, as defined in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, the Texas Hazardous Substances Spill Prevention and Control Act, as amended, the Resource Conservation and Recovery Act of 1976, as amended, and regulations promulgated thereunder.

[SIGNATURES APPEARING ON THE FOLLOWING PAGE]

Executed and effective as of the Effective Date.

THE DCPAF:

DALLAS CENTER FOR THE PERFORMING
ARTS FOUNDATION, INC., a Texas non-profit
corporation

By: _____
Name: _____
Title: _____

THE CITY:

CITY OF DALLAS, TEXAS
MARY K. SUHM, CITY MANAGER

By: _____
Name: _____
Title: _____

Approved as to form:
THOMAS P. PERKINS, CITY ATTORNEY

By: _____
Name: _____
Title: _____