

CAPITAL PROJECT FUNDING AGREEMENT

Ruth Eckerd Hall

THIS AGREEMENT (“Agreement”) is made and entered into as of the ____ day of _____, 2017 (“Effective Date”), by and between Pinellas County, a political subdivision of the State of Florida (“County”) and the City of Clearwater a Florida Municipal Corporation (“City”) (collectively, the “Parties” or individually a “Party”).

WHEREAS, in accordance with Section 118-32 Pinellas County Code and Florida Statutes §125.0104, the County is authorized to utilize Tourist Development Tax revenues to fund statutorily eligible capital projects; and

WHEREAS, in order to equitably and consistently evaluate capital project funding requests, the County adopted Capital Project Funding Guidelines, which established both the requisite criteria, documents, studies and related financial information to be submitted by a capital funding applicant, as well as the capital project funding application and review process; and

WHEREAS, as part of the review and evaluation process, the County hired a consultant to review capital project funding applications and to provide a report of same to both the County and the Tourist Development Council for their consideration when evaluating capital project funding applications; and

WHEREAS, after due consideration of the capital project funding applications, the Consultant’s report and the recommendations of its Tourist Development Council, the County has approved the funding of certain capital projects determined to best promote tourism in Pinellas County; and

WHEREAS, the County, through its Board of County Commissioners agrees to provide the City with funding for the Capital Project, as defined herein, in the amount and in accordance with the terms and conditions described herein; and

WHEREAS, this Agreement sets forth the rights and obligations of the Parties related to the capital project, funding, and related matters.

NOW, THEREFORE, in consideration of the foregoing recitals, the mutual promises contained herein and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties agree as follows:

1. RECITALS. The above recitals are true and correct and are adopted as an integral part of this Agreement.

2. DEFINITIONS. In addition to other capitalized terms or phrases that may be defined elsewhere in this Agreement, the following capitalized terms shall have the meaning set forth as follows:

A. "Capital Project" or "Project" means the improvements to that certain statutorily eligible project/facility commonly known as Ruth Eckerd Hall located in Clearwater, Pinellas County, Florida ("Facility") set out in the Project budget described in Exhibit A attached hereto and incorporated herein by reference. The Facility is owned by the City and operated by Ruth Eckerd Hall, Inc., a Florida Non-profit corporation ("REH").

B. "Tourist Promotion Benefits" means any and all tourism promotion and/or marketing benefits provided by the City through REH to market/promote the destination through Visit St. Petersburg Clearwater ("VSPC") as part of the consideration for the County funding of the Project, as further described in Exhibit B attached hereto and incorporated herein by reference.

C. "Tourist Tax Revenues" means any legally available tourist tax revenues levied and collected by the County pursuant to Section 125.0104, Florida Statutes, for capital funding of the Project in accordance with the County's Tourist Development Plan.

3. TERM. The term of this Agreement shall commence on the Effective Date and continue in full force and effect through September 30, 2020 ("Term"), unless otherwise terminated as provided herein.

4. CONDITIONS PRECEDENT TO CAPITAL PROJECT FUNDING. The disbursement of, and any continued funding for the Capital Project herein, is subject to the following conditions precedent during the Term:

A. The City of Clearwater continues to own and Ruth Eckerd Hall, Inc. continues to operate the facility.

B. The City, through Ruth Eckerd Hall, provides to the County the Tourism Promotion Benefits.

C. The Plan authorizes Tourist Tax Revenues to be expended for such capital improvements.

D. The Capital Project is completed no later than September 30, 2020.

E. The City and REH matching funds must be maintained and County must be notified immediately if those matching funds are lost or become unavailable.

F. Any and all funds utilized to complete the Capital Project funded herein must be expended first before County funds are expended on the Project in accordance with the reimbursement requirements in Section 5.A.

5. COUNTY'S RESPONSIBILITIES. Upon providing documentation establishing satisfaction of the conditions precedent as required in Section 4 required by the County, the County agrees to pay to the City Capital Project funds in the sum of not to exceed Five Million Five Hundred Thousand Dollars (\$5,500,000.00), from legally available Tourist Tax Revenues and from no other revenue source of the County, subject to the adjustments as provided in Sections 6.C. and 7, as follows:

A. Reimbursement Payments shall be made in annual payments of not exceeding Two Million Seven Hundred and Fifty Thousand Dollars (\$2,750,000.00) during the County's FY 2017/2018 and FY 2018/2019 fiscal years which commence on October 1 and end on September 30 of the fiscal year, upon receipt of a payment request from the City directed to the VSPC at the address set out in Section 11.A., with such documentation as reasonably required herein or by the VSPC Director. At a minimum, the payment request shall include documentation detailing (i) the work completed that the City is seeking reimbursement for; (ii) proof of payment for the work; (iii) a certification from either the contractor, design professional, or the City certifying the work has been completed and paid for before submittal of the payment request. The payment requests shall be no more frequent than quarterly after compliance with the requirements of Section 4 herein.

B. County's contributions of Capital Project funds herein shall in no event exceed any amount agreed to herein and any and all excess project costs are the sole responsibility of City.

C. The Capital Project Funds shall be paid in accordance with Section 218.70 et seq., Florida Statutes, "The Local Government Prompt Payment Act."

6. CITY'S RESPONSIBILITIES. During the Term of this Agreement, the City shall:

A. Manage, supervise, oversee, pay all costs and expenses related to, and be solely responsible for completing the Project including, but not limited to securing all permits and approvals required for the Project, contracting and/or subcontracting with all third parties necessary to complete the Project, and operate the project/facility.

B. Utilize all commercially reasonable efforts to complete the Project within the Project Budget on an agreed upon date, but in any event, no later than the term of this agreement. The City may elect to increase the Project Budget or any component part thereof with notice to the County, and shall be solely responsible for the additional costs and expenses, including any cost overruns, on the Project.

C. Notify County of any project cost savings or changes in scope of work that reduces project costs so County may reduce its contribution on a pro rata basis.

D. Provide the Tourism Promotion Program benefits for a period of ten years from the completion of the Project.

E. Operate, maintain, repair, replace, and insure the Facility in a manner consistent with other comparable performing arts auditoriums in Pinellas County.

7. DEFAULTS AND REMEDIES.

A. Events of Default. Each of the following shall constitute an event of default (each, an "Event of Default") hereunder:

1. A breach by the City of any material term, covenant, obligation or agreement under this Agreement, and the continuance of such breach for a period of thirty (30) days after written notice thereof shall have been given to City except for a breach of those provisions described in subsection 4, 5 or 6 below, which will entitle the County to immediately exercise the available remedies;

2. The City voluntary filing of or consent to a petition under any bankruptcy, insolvency, or reorganization law, failure to secure the dismissal of an involuntary bankruptcy petition within 60 days of filing, or a determination by a court of competent jurisdiction that is insolvent and unable to pay its debts when due;

3. A payment request containing a material misrepresentation;

4. The City or REH ceases operations of the Capital Project or Facility during the period set out in Section 6.D. herein.

5. The Tourist Tax Revenues legally available to pay this obligation are repealed or expire as provided by law.

6. The City fails to pay taxes and/or assessments, if any, when due.

B. Remedies. Upon or at any time after the occurrence of an Event of Default which has not been cured if authorized herein:

1. The County may withhold, temporarily or permanently, any or all unpaid portion of the Capital Project Funds and/or may terminate this Agreement by giving seven (7) calendar days' notice to the City. The County shall then have no further funding obligation under this Agreement;

2. If the County has paid any Capital Project Funds, the City shall repay to the County all Capital Project Funds received by it for the Project;

3. Additionally the County may exercise any right, power, or remedy as provided in law or equity pursuant to Florida law.

C. No consent or waiver, express or implied, by the County to or of any breach or default by the City in the performance of its obligations under this Agreement shall constitute a consent to or waiver of any similar breach or default by the City. The failure of the County to complain of any act or omission to act by the City or to declare the City in default, irrespective of how long such failure continues, shall not constitute a waiver by the County of its rights under this Agreement.

8. COMPLIANCE WITH LAWS. The Parties shall comply with all applicable federal, state, and local laws, ordinances, rules and regulations, the federal and state constitutions, and the orders and decrees of any lawful authorities having jurisdiction over the matter at issue including but not limited to applicable public records laws.

9. DUE AUTHORITY. Each party to this Agreement represents and warrants to the other party that: (i) it has the full right and authority and has obtained all necessary approvals to enter into this Agreement; (ii) each person executing this Agreement on behalf of the party is authorized to do so; and (iii) this Agreement constitutes a valid and legally binding obligation of the party, enforceable in accordance with its terms.

10. ASSIGNMENT. No party to this Agreement may assign any rights or delegate any duties under this Agreement without the prior written consent of the other party.

11. NOTICES.

A. Unless and to the extent otherwise provided in this Agreement, all notices, demands, requests for approvals and other communications which are required to be given by either party shall be in writing and shall be deemed given and delivered on the date delivered in person to the authorized representative of the recipient provided below, upon the expiration of five (5) days following the date mailed by registered or certified mail, postage prepaid, return receipt requested, to the authorized representative of the recipient provided below, or upon the date delivered by overnight courier (signature required) or emailed to the authorized representative of the recipient at the email provided below:

TO THE COUNTY:
David Downing, Director
Visit St. Petersburg/Clearwater
8200 Bryan Dairy Rd. Suite 200
Largo, FL 33777
David@visitspc.com

TO THE CITY:
Kevin Dunbar, Director
Parks and Recreation Dept.
P.O. Box 4748
Clearwater, FL 33758
Kevin.Dunbar@myclearwater.com

B. Either party may change its authorized representative or address for receipt of notices by providing the other party with written notice of such change. The change shall become effective ten (10) days after receipt by the non-changing party of the written notice of change.

12. WAIVER. No act of omission or commission of either party, including without limitation, any failure to exercise any right, remedy, or recourse, shall be deemed to be a waiver, release, or modification of the same. Such a waiver, release, or modification is to be effected only through a duly executed written modification to this Agreement.

13. GOVERNING LAW. This Agreement shall be construed in accordance with the Laws of the State of Florida.

14. JURISDICTION AND VENUE. Venue for any action brought in state court shall be in Pinellas County, Clearwater Division. Venue for any action brought in federal court shall be in the

Middle District of Florida, Tampa Division, unless a division shall be created in Pinellas County, in which case the action shall be brought in that division. Each party waives any defense, whether asserted by motion or pleading, that the aforementioned courts are an improper or inconvenient venue. Moreover, the Parties consent to the personal jurisdiction of the aforementioned courts and irrevocably waive any objections to said jurisdiction.

15. BINDING EFFECT. This Agreement shall inure to the benefit of and be binding upon the Parties' respective successors and assigns.

16. NO THIRD PARTY BENEFICIARY. Persons not a party to this Agreement may not claim any benefit hereunder or as third party beneficiaries hereto.

17. HEADINGS. The paragraph headings are inserted herein for convenience and reference only and in no way define, limit, or otherwise describe the scope or intent of any provisions hereof.

18. NO CONSTRUCTION AGAINST PREPARER OF AGREEMENT. This Agreement has been prepared by County and reviewed by the City and its professional advisors. The County, the City, and their professional advisors believe that this Agreement expresses their understanding and that it should not be interpreted in favor of, or against either party merely because of their efforts in preparing it.

19. ENTIRE AGREEMENT. This Agreement constitutes the entire agreement between the Parties and no change will be valid unless made by supplemental written agreement executed by the Parties.

20. SEVERABILITY. Should any paragraph or portion of any paragraph of this Agreement be rendered void, invalid or unenforceable by any court of law for any reason, such determination shall not render void, invalid or unenforceable any other paragraph or portion of this Agreement.

21. FUNDING OBLIGATION. This Capital Project Funding Agreement is not a general obligation of the County. The obligations of the County as to any funding required pursuant to this Agreement shall be limited to an obligation in any given year to budget and appropriate sufficient funding that is required during that year from legally available Tourist Tax Revenues after funding for secured obligations, essential and necessary tourism services, and Tourist Development Taxes restricted as to use by the Plan have been budgeted and appropriated. Notwithstanding the foregoing, the County shall not be prohibited from pledging any legally available Tourist Development Taxes for any obligations heretofore or hereafter incurred, which pledge shall be prior and superior to any obligation of the County pursuant to this Agreement.

22. INDEPENDENT CAPACITY.

A. The Parties agree that the City its officers, agents, and employees, in performance of this Agreement, will act in the capacity of an independent contractor and not as an officer, employee, or agent of the County. The City agrees to take such steps as may be necessary to ensure that any third-party City contracts with, will be deemed to be an independent contractor and will not be considered or permitted to be an agent of the County.

B. The City has no authority to, and shall not pledge the County's credit or make the County a guarantor of payment or surety for any contract, debt, obligation, judgment lien, or any form of indebtedness.

23. DAMAGES. In no event shall either party be liable to the other (nor to any person claiming any right, title, or interest derived from, or as a successor to the agreement) for incidental, consequential, or special damages of any kind, including without limitation, lost profits, or loss of business arising out of this funding agreement irrespective of whether the parties have advance notice of the possibility of such damage.

24. PUBLIC RECORDS.

A. The City acknowledges that information and data relating to its services may be public records in accordance with Chapter 119, Florida Statutes and Pinellas County Public Records Policies. The City agrees that prior to providing services it will implement policies and procedures to maintain, produce, secure, retain, and transfer public records in accordance with applicable laws, regulations, and County policies including but not limited to the Sec. 119.0701, Florida Statutes. Notwithstanding any other provision of this Agreement relating to compensation, the City agrees to charge the County, and/or any third parties requesting public records only such fees allowed by Section 119.07, Florida Statutes and County policy for locating and producing public records during the term of this Agreement.

B. If the City has questions regarding the application of Chapter 119, Florida Statutes, to the duty to provide public records relating to this contract, contact Pinellas County Convention and Visitors Bureau (CVB/VSPC) custodian of public records at 727-464-7200, Tim@visitspc.com, or send your questions by mail to: Pinellas County Convention and Visitors Bureau, Tim Ramsberger, 8200 Bryan Dairy Rd., Suite 200, Largo, FL 33777.

25. TIME IS OF THE ESSENCE. Time is of the essence with respect to all provisions of this agreement and attachments hereto that specify a time for performance; provided, however, that the foregoing shall not be construed to limit a party's grace period allowed herein.

26. SURVIVAL. The terms and obligations Section 6, 7, 21, and 23 shall survive the termination of this Agreement.

<Signature page follows>

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorized representatives on the date first above written.

Countersigned:

CITY OF CLEARWATER, FLORIDA

By: _____
George N. Cretokos
Mayor

By: _____
William B. Horne, II
City Manager

Approved as to Form:

Attest:

By: _____
Matthew M. Smith
Assistant City Attorney

By: _____
Rosemarie Call
City Clerk

ATTEST:
KEN BURKE, CLERK OF COURT

PINELLAS COUNTY, FLORIDA, by and
through its Board of County Commissioners

By: _____
Deputy Clerk

By: _____
Chair

APPROVED AS TO FORM
OFFICE OF THE COUNTY ATTORNEY

By: Mzas

EXHIBIT A

Pro-Forma Budget: "Expanding the Experience" Capital Campaign - All		
Phase	Area of	Cost/Estimat
1	Capitol Theatre Renovation COMPLETED	\$ 10,839,60
2	HVAC Replacement at Main Facility - COMPLETED Existing Closed Loop DX + New Code Fresh Added Scope: Stainless Steel Equip. & Chemical Water	\$ 2,500,00
3	Murray Theatre Renovation - COMPLETED	\$ 1,500,00
4	Margarete Heye Great Room Renovation - COMPLETED	\$ 1,500,00
5	External & Internal Improvements to Main	
	West Lobby & Dress	\$ 5,278,00
	Ticket Canopy/Renov. Box	\$ 182,000
	Ticket Kiosk & Marquee	\$ 104,000
	Marcia P. Hoffman Stage (Lighting, Sound &	\$ 93,600
	Site Work, Landsape, Plaza	\$ 1,950,00
	Parking & Road and Building Entrance Signage (No	
	Major Intersection Added Turn	TBD
	Marcia P. Hoffman Administration	\$ 364,000
	Move AC to New	\$ 15,600
	Grand Concourse (& Existing	\$ 135,200
	Owner's	\$ 305,000
	Owner's Bar/Food Service - West Lobby/Dress	\$ 100,000
	Owner's Misc. AV	\$ 50,000
	Owner, CM & Design	\$ 400,000
	Design & Engineering Fees Incl.	\$ 300,000
	Design & Engineering	\$ 135,000
	Add Back Entry Road	\$ 93,600
	AV & Lighting Package - Lighting, Displays, Projectors,	\$ 78,000
	Staff Wish List	\$ 52,000
	Exterior Repaint Masonry &	\$ 166,400
	Exterior Repaint Pipe Fascia & Repair Deteriorated	\$ 130,000
	Re-roof Balance of Building	\$ 260,000
	Resurface Existing W Parking/Asphalt (No New	\$ 208,000
	Rework Existing W Parking Curbing &	\$ 130,000
	Rework W Parking Striping &	INCL
	Resurface Existing N Parking/Asphalt (No New	TBD
	Replace Site	\$ 130,000
Total Budget - All Campaign		\$ 27,000,00

EXHIBIT B

Ruth Eckerd Hall agrees to provide the following Tourism Benefits as part of the Capital Project Funding Agreement for a period of ten years from the completion of the Project or as otherwise specified herein:

1. A permanent dedicated location of at least 10' x 15' inside the REH lobby in a prominent area as mutually agreed to by REH and VSPC for a VSPC digital welcome center, which may include but not be limited to digital equipment (provided by VSPC) and amenities such as a desk and display racks, for staff activity and distribution of VSPC promotion information and marketing collateral/literature.
2. Promotional opportunities for up to 20 events at REH on an annual basis, both pre and post event activation outdoors at the Facility to include, but not be limited to a VSPC branded activations vehicle and/or a tent and equipment for promotions activations.
3. Placement of VSPC branding on all REH event tickets or passes, except for third party vendor tickets that prohibit placement on the ticket by agreement with REH.
4. One full page full color advertisement to be placed in each printed playbill/program, or the equivalent that is produced and distributed (VSPC will provide the ad at its expense).
5. Inclusion of the VSPC logo and link to the VSPC website in a prominent location on the main page of the REH website.
6. Joint REH and VSPC promotion and marketing through social media, advertising, direct sales, public relations and other programs as mutually agreed to by REH and VSPC.