

FREDERICTON PLAYHOUSE AGREEMENT: REPLACEMENT VENUE DESIGN
(the “**Agreement**”)

THIS AGREEMENT made as of the 22nd day of March, 2021,

BETWEEN:

FREDERICTON PLAYHOUSE INC., a company incorporated under the *Companies Act* of the Province of New Brunswick (“**Playhouse**”)

OF THE FIRST PART

-and-

THE CITY OF FREDERICTON, a local government under the *Local Governance Act*, SNB 2017, c.18 of the Province of New Brunswick (“**Local Government**”)

OF THE SECOND PART

(when used herein, “**Party**” shall mean each of the Playhouse and the Local Government individually and “**Parties**” shall mean both the Playhouse and the Local Government)

WHEREAS:

1. The Playhouse is a non-profit organization which owns a venue located at 686 Queen Street, Fredericton, NB where live performances are held (the “**Existing Venue**”);
2. The Playhouse and the Local Government are parties to an Operating Agreement dated March 12, 2012 setting obligations of the Parties for the operation and maintenance of the Existing Venue (the “**Operating Agreement**”);
3. The Playhouse is desirous in having the Existing Venue replaced with a performing arts center to meet its current and future needs to be owned and managed in the same manner as the Existing Venue (the “**Replacement Venue**”); and
4. The Local Government is supportive of the Playhouse’s desire for the Replacement Venue and is willing to engage in steps, as described herein, in support thereof.

NOW THEREFORE, IN CONSIDERATION of the premises and mutual covenants herein set forth and provided for, the Parties covenant and agree as follows:

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| 1. | Obligations of the Parties |
| | (1) The Local Government and the Playhouse agree that the Local Government shall complete, on behalf of the Playhouse, all procurement for the design of the Replacement Venue. |
| | (2) The Local Government agrees to assign, and the Playhouse agrees to accept the assignment, of all rights and obligations of the Local Government under an agreement for architectural services (the “ Architect Agreement ”) with Diamond Schmitt Architects Incorporated (the “ Architect ”) for the Replacement Venue; |
| | (3) The Local Government and the Playhouse agree that: |
| | (a) All decisions to be made under the Architect Agreement or any other agreement in connection with the design of the Replacement Venue shall be approved by the representative of the Local Government before agreed to by the Playhouse; and |
| | (b) All actions taken by the Local Government prior to the date of this agreement for the design for the Replacement Venue shall be deemed to be actions taken at the request of and on behalf of the Playhouse and the Playhouse agrees with all such actions and decisions made by the Local Government. |
| | (4) The Local Government agrees to provide a grant in the amount of \$1,078,477 to the Playhouse to be used for the purpose of paying for Architectural Services for the current phase of the project under the Architect Agreement (which amount is inclusive of expenses which the architect is permitted to claim under the Architect Agreement), such grant shall be conditional upon: |
| | (a) the completion of the work under the Architect Agreement by the Architect, such completion to be acceptable to the Local Government; |
| | (b) the grant shall only be advanced in such amounts equal to invoices issued by the Architect under the Architect Agreement and accepted by the Playhouse in accordance with the Architect Agreement and this Agreement; |
| | (c) no invoice issued by the Architect under the Architect Agreement shall be accepted by the Playhouse for payment or submitted by the Playhouse for advance of the grant payment under this Agreement until such time as the Local Government has reviewed and confirmed acceptability of such invoice; |

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| | (d) the Playhouse shall cause the Architect to provide all such reports and information requested by the Local Government from time to time and comply with all instructions provided by the Local Government; |
| | (e) the Playhouse shall comply with all policies and directions pertaining to the architectural services being provided as given to it by the Local Government; and |
| | (f) the Playhouse shall not be in breach of any of its obligations under this Agreement. |
| (5) | With respect to any future phases of the project, the Local Government may approve further grants for architectural services under the Architect Agreement at the time of agreeing to proceed with such phase. |
| (6) | For the avoidance of doubt, this Agreement is for the limited purpose of the completion the design for the Replacement Venue. This Agreement shall not govern the construction or any future phases of the Replacement Venue. |
| (7) | The Local Government agrees to provide a grant to the Playhouse for the purpose of hiring an "Playhouse Advisory Committee Representative" to oversee the design of the Replacement Venue (the " PACR "), the amount of such grant shall be equal to the amount payable by the Playhouse to the PACR under such agreement and such grant to be conditional upon: |
| | (a) the choice of the PACR shall be jointly selected by the Playhouse and the Local Government; |
| | (b) the contract entered into between the Playhouse and the PACR shall be in a form, for an amount and on such terms and conditions as approved by the Local Government; |
| | (c) the completion of the work by the PACR, such completion to be acceptable to the Local Government; |
| | (d) the grant shall only be advanced in such amounts equal to invoices issued by the PACR under its contract with the Playhouse and accepted by the Playhouse in accordance with the contract with the PACR and this Agreement; |
| | (e) no invoice issued by the PACR under its agreement with the Playhouse shall be accepted by the Playhouse for payment or submitted by the Playhouse for advance of the grant payment under this Agreement until such time as the Local Government has reviewed and confirmed acceptability of such invoice; |

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| | (f) the Playhouse shall cause the PACR to provide all such reports and information requested by the Local Government from time to time and comply with all instructions provided by the Local Government; |
| | (g) the Playhouse shall comply with all policies and directions pertaining to the PACR services being provided as given to it by the Local Government; and |
| | (h) the Playhouse shall not be in breach of any of its obligations under this Agreement. |
| | (8) The Playhouse shall cooperate, and cause the Architect, the PACR and all such third parties hired by the Playhouse in connection with the design of the Replacement Venue to cooperate, with the Local Government in such manner as requested by the Local Government including, but not limited to, providing access to the Existing Venue, and the Playhouse shall not, without the written approval of the Local Government, amend any agreement with the Architect, the PACR or any other party engaged with the design of the Replacement Venue. |
| | (9) The Parties agree that the Local Government entering into this Agreement, providing the within grants to the Playhouse, completing procurement on behalf of the Playhouse, participating in discussions and decisions for the development of the Replacement Venue, providing assistance in the management of the Playhouse's contracts with the Architect, PACR and other third parties, making applications for funding for the Replacement Venue (either in its own name or on behalf of the Playhouse) or any other action taken under this Agreement or otherwise shall not bind the Local Government to participate in any further phases of the development of the Replacement Venue and that the Local Government may suspend or terminate its support for the Replacement Venue at any time for any reason without any obligation of the Local Government to provide such reasons to the Playhouse or any obligation for the Local Government to be reasonable in making such decision |
| | (10) The Local Government may, in its sole discretion, carry out such other steps as it deems necessary for the development of the Replacement Venue. Such steps may include, but are not limited to, seeking sources of funding (in either its name or on behalf of the Playhouse) and hiring such parties and/or contractors as it deems necessary to further the objective of the development of the Replacement Venue (on either its behalf or on behalf of the Playhouse). |

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| | (11) The Parties shall work cooperatively toward the shared goal of developing the Replacement Venue. The Parties shall provide each other such information and/or support requested by the other Party from time to time in support of any applications for funding from other levels of government or any other third parties. |
| | (12) The Parties shall comply with the terms of any provincial or federal funding received, including, without limiting the generality of the foregoing, restrictions regarding the ownership and/or use of the Replacement Venue for a period of time after its construction. |
| 2. | Management of Design of Replacement Venue |
| | (1) The Parties agree that they may, by mutual agreement, form and constitute an advisory committee (" Advisory Committee ") which shall have responsibility for providing advice to the Parties on such matters that the Parties request. The terms of reference for the Advisory Committee shall be agreed on by the Parties. |
| | (2) Reporting. The Advisory Committee shall cause to be prepared and shall deliver to the Parties such information concerning its activities as requested by the Parties. |
| 3. | Grants to be Recognized as Local Government Contributions for Replacement Venue |
| | (1) All grants approved by the Local Government under section 1 of this Agreement as well as any future grants approved by the Local Government to support the construction of the Replacement Venue, both monetary and in-kind, shall cumulatively be recognized as the Local Government's contribution toward the Replacement Venue. |
| 4. | Replacement Venue to Proceed in Phases |
| | (1) The Parties agree that the design of the Replacement Venue shall proceed in a multi-phased approach. The first phase shall consist of the retention of the Architect and the PACR and the completion of the design plans under the Architect Agreement and set out in this Agreement. The Parties agree that there is no guarantee or commitment to proceed to further phases at this time and that to proceed to the next phase of the development and construction of the Replacement Venue will require agreement of the Parties. For the avoidance of doubt, this Agreement is not for the purpose of the construction of the Replacement Venue. |
| 5. | Representations and Warranties |
| | (1) Representations and warranties of the Playhouse. The Playhouse hereby represents and warrants as follows: |

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| | (a) that it is a duly incorporated company incorporated under the <i>Companies Act</i> , RSNB 1973, c. C-13, validly existing in good standing under the laws of the Province of New Brunswick; |
| | (b) that it has full right, power and authority to enter into and carry out this Agreement and has been and is on the date of this Agreement duly authorized by all necessary and appropriate corporate or other action to execute this Agreement; |
| | (c) that it has no prior commitments, arrangements or agreements with any other person which might interfere with, or preclude the carrying out of its obligations under this Agreement; and |
| | (d) that the signatory(ies) to this Agreement has(ve) been duly authorized to execute and deliver this Agreement. |
| | (2) Representations and warranties of the Local Government. The Local Government hereby represents and warrants as follows: |
| | (a) that it is a “local government” under the Local Governance Act, SNB 2017, c.18, validly existing in good standing under the laws of the Province of New Brunswick; |
| | (b) that it has full right, power and authority to enter into and carry out this Agreement and has been and is on the date of this Agreement duly authorized by all necessary and appropriate action to execute this Agreement; and |
| | (c) that the signatory(ies) to this Agreement has(ve) been duly authorized to execute and deliver this Agreement. |
| 6. | Term and Termination |
| | (1) The term of this Agreement shall begin on the date first above written and shall continue until the earlier of: |
| | (a) such time as the completion of the design of the Replacement Venue; or |
| | (b) the termination of this Agreement by either Party, as provided for herein. |
| | (2) Termination Without Cause Stipulation. The Parties agree that it will not be a violation of the implied covenants of good faith or fair dealing for the Local Government to exercise its right to terminate this Agreement at any time, either with or without a breach of this Agreement, or with or without explanation, cause or reason. |

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| | <p>(3) Termination by the Local Government. The Local Government may terminate this Agreement with fifteen (15) days written notice to the Playhouse in the event that the Local Government determines it does not wish to continue to pursue the development of the Replacement Venue. The Local Government will indemnify the Playhouse for the actual costs of termination of the Agreement incurred by the Playhouse for the Architect or PACR.</p> |
| | <p>(4) Termination by the Playhouse. The Playhouse may terminate this Agreement with fifteen (15) days written notice to the Local Government in the event that the Local Government abandons the pursuit of the development of the Replacement Venue. Prior to giving such written notice, the Playhouse will advise the Local Government that it believes the Local Government has abandoned the development of the Replacement Venue and giving the Local Government fifteen (15) days to respond confirming that it continues to pursue the development of the Replacement Venue.</p> |
| | <p>(5) Upon termination of this Agreement, the obligation, terms and conditions of the Operating Agreement shall continue, unamended, and any term of the Operating Agreement amended or suspended for the purpose of the Replacement Venue in this Agreement, other than a provision of this Agreement which is intended to continue beyond termination, shall revert to the provisions stated in the Operating Agreement for all purposes.</p> |
| <p>7. No Agency, Partnership, Joint Venture, etc.</p> | |
| | <p>(1) No provision of this Agreement and no action by the Parties will establish or be deemed to establish a partnership, joint venture, principal-agent relationship or employer-employee relationship in any way or for any purpose whatsoever.</p> |
| | <p>(2) The Playhouse will not represent itself as a partner, employee or agent of the Local Government.</p> |
| <p>8. No Authority to Represent</p> | |
| | <p>Nothing in this Agreement is to be construed as authorizing any person to contract for or to incur any obligation on behalf of the Local Government or to act as an agent for the Local Government.</p> |

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| 9. | Notices |
| | <p>(1) Any notice required to be given hereunder shall be deemed to have been properly given if delivered personally or sent by pre-paid registered mail as follows:</p> <p>(a) to the Playhouse: 686 Queen Street Fredericton, NB E3B 1C2 Attention: Executive Director</p> <p>(b) to the Local Government: 379 Queen Street Fredericton, NB E3B 1B5 Attention: Chief Administrative Officer</p> <p>and if sent by registered mail, shall be deemed to have been received on the 4th business day of uninterrupted postal service following the date of mailing. Either Party may change its address for notice at any time by giving notice to the other Party pursuant to the provisions of this Agreement.</p> |
| 10. | Miscellaneous |
| | <p>(1) The miscellaneous terms to the Agreement are attached hereto as Schedule "A" and incorporated into the within Agreement.</p> |
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PROVINCE OF NEW BRUNSWICK

COUNTY OF YORK

AFFIDAVIT OF CORPORATE EXECUTION

I, Murray Jamer, P.Eng., of the City of Fredericton, in the County of York and Province of New Brunswick, **MAKE OATH AND SAY AS FOLLOWS:**

1. I am the President of the Fredericton Playhouse Inc., one of the parties named in the foregoing instrument and as such I have personal knowledge of the matters herein deposed to.
2. The seal affixed to the foregoing instrument purporting to be the seal of Fredericton Playhouse Inc. is the Corporate Seal of the Fredericton Playhouse Inc. and was so affixed by order of the City Council.
3. The signature "Tim Yerxa" subscribed to the foregoing instrument is the signature of Tim Yerxa, the Executive Director of the Fredericton Playhouse Inc., and the signature "Murray Jamer" subscribed thereto is my signature.
4. The President and the Executive Director are the officers of the Fredericton Playhouse Inc. duly authorized to execute the foregoing instrument.

SWORN TO BEFORE ME at the)
 City of Fredericton, in the County)
 of York and Province of New)
 Brunswick, this ____ day of)
 March, 2021.)
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 A Commissioner of Oaths)
 Being a Solicitor)

 Murray Jamer, P.Eng.

PROVINCE OF NEW BRUNSWICK

COUNTY OF YORK

AFFIDAVIT OF CORPORATE EXECUTION

I, Jennifer Lawson Murray, of the City of Fredericton, in the County of York and Province of New Brunswick, **MAKE OATH AND SAY AS FOLLOWS:**

1. I am the City Clerk of the City of Fredericton, one of the parties named in the foregoing instrument and as such I have personal knowledge of the matters herein deposed to.
2. The seal affixed to the foregoing instrument purporting to be the seal of the City of Fredericton is the Corporate Seal of the City of Fredericton and was so affixed by order of the City Council.
3. The signature "Michael G. O'Brien" subscribed to the foregoing instrument is the signature of Michael G. O'Brien, the Mayor of the City of Fredericton, and the signature "Jennifer Lawson Murray" subscribed thereto is my signature.
4. The Mayor and City Clerk are the officers of the City of Fredericton duly authorized to execute the foregoing instrument.

SWORN TO BEFORE ME at the)
 City of Fredericton, in the County)
 of York and Province of New)
 Brunswick, this 22nd day of)
 March, 2021.)
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 A Commissioner of Oaths)
 Being a Solicitor)

 Jennifer Lawson Murray

| <u>SCHEDULE "A"</u> FREDERICTON PLAYHOUSE AGREEMENT | |
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| (1) | <p><u>Entire Agreement and waiver</u></p> <p>This Agreement constitutes all of the agreements between the Playhouse and the Local Government pertaining to the subject-matter of it and supersedes all prior agreements, undertakings, negotiations and discussions, whether oral or written, of the Parties to it and there are no warranties, representations or other agreements between the Parties to it in connection with the subject-matter of it except as specifically set forth or referred to in this Agreement. No supplement, modification, waiver or termination of this Agreement shall be binding unless executed in writing by the Party hereto to be bound thereby. No waiver of any other provisions of this Agreement shall be deemed or shall constitute a waiver of any other provisions (whether or not similar) nor shall the waiver constitute a continuing waiver unless otherwise expressly provided.</p> |
| (2) | <p><u>Alterations</u></p> <p>No alteration, amendment waiver, cancellation or other change in any term or condition of this Agreement shall be valid or binding on either Party unless the same has been agreed in writing by all Parties. If at any time during the continuance of this Agreement the Parties shall deem it necessary or expedient to make any alterations or additions to this Agreement they may do so by means of an executed written agreement between them which shall be supplemental to and form part of this Agreement.</p> |
| (3) | <p><u>Headings</u></p> <p>Headings are not to be considered part of this Agreement, are included solely for convenience and are not intended to be full or accurate descriptions of the content of the paragraphs.</p> |
| (4) | <p><u>Interpretation</u></p> <p>In this Agreement, words importing the singular number include the plural and vice versa, words importing the masculine gender include the feminine and neuter genders; and words importing persons include individuals, sole proprietors, corporations, partnerships, trusts and unincorporated associations.</p> |

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| | <p>(5) <u>Applicable law</u></p> <p>This Agreement shall be governed by and constructed in accordance with the laws of the Province of New Brunswick and the laws of Canada in force therein. Where there is a conflict of laws, the Parties agree that the laws of the Province of New Brunswick shall prevail.</p> |
| | <p>(6) <u>Invalidity of provision</u></p> <p>The invalidity or unenforceability of any provision of this Agreement or any covenant in it shall not affect the validity of enforceability of any other provision or covenant in it and the invalid provision or covenant shall be deemed to be severable.</p> |
| | <p>(7) <u>Assignment</u></p> <p>Neither Party shall assign this Agreement, or any of its rights or obligations hereunder, without first receiving the written consent of the other Party. In no event will a Party be liable for damages arising from withholding its consent. Where a Party is improperly withholding consent, the only remedy available to the Party seeking consent is for the requesting Party to obtain court ordered consent. Any assignment in contravention of this section will be null and void as <i>ab initio</i>.</p> |
| | <p>(8) <u>Contra Proferentem Rule Not Applicable</u></p> <p>Should any provision of this Agreement require judicial interpretation, mediation or arbitration, it is agreed by the Parties that the court, mediator or arbitrator interpreting or construing the same shall not apply a presumption that the terms thereof shall be more strictly construed against one Party by reason of the rule of construction that a document is to be construed more strictly against the Party who itself or through its agent prepared the same, it is agreed that both Parties, directly or through their agents, have participated in the preparation hereof.</p> |
| | <p>(9) <u>Force Majeure</u></p> <p>The Parties shall not be liable or responsible for any failure or delay in the performance of any obligations hereunder caused by acts of God, flood, fire, war, terrorism, blockades, strikes, labour disputes, civil commotion, epidemic, pandemic, stop-work order, injunction or other causes beyond their reasonable control, each of which shall be considered a force majeure event.</p> |

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| | <p>(10) <u>Dispute Resolution</u></p> <p>In the event of a dispute, the Chief Administrator Officer of the Local Government and the President of Playhouse shall meet to resolve the dispute. In the event of a failure to resolve the dispute, the Parties shall proceed to mediation. In the event of a failure to resolve at mediation, the Parties shall proceed to an Arbitration pursuant to the Arbitration Act, RSNB 2014, c 100.</p> |
| | <p>(11) <u>Enurement</u></p> <p>This Agreement shall enure to the benefit of and shall be binding on and enforceable by the Parties, and where the context so permits, their respective successors and permitted assigns.</p> |
| | <p>(12) <u>Survival</u></p> <p>Neither the expiration nor the earlier termination of this Agreement shall relieve, or be deemed to relieve, a Party from any duties, obligations or liabilities hereunder that accrued prior to such expiration or termination, or which by their nature are intended to survive the performance, expiration or termination of this Agreement.</p> |
| | <p>(13) <u>RTIPPA</u></p> <p>It is understood that the Local Government is subject to RTIPPA, and as such, disclosure and confidentiality obligations are governed thereunder.</p> |
| | <p>(14) <u>Independent Legal Advice</u></p> <p>The Parties acknowledge and agree that they have had the opportunity to have this Agreement reviewed by their respective legal counsel prior to execution and that they have obtained such advice or determined that they do not require such advice.</p> |

(15) Counterparts

This Agreement may be executed by the different Parties in separate counterparts and each such counterpart shall be an original and when taken together with the other counterparts shall constitute one and the same agreement. A counterpart of this Agreement delivered by facsimile or by electronic transmission in portable document format (PDF) is effective delivery of the Agreement and such counterpart shall be an originally executed counterpart of this Agreement for all purposes. A counterpart of this Agreement executed by an electronic signature and/or electronic imaging and transmission of a handwritten signature agreement is a reliable signature method and is binding on the Parties, will have the same force and effect as an original handwritten signature, and will be deemed an original for all purposes.