

Finance, Construction, and Operating Agreement

This Finance, Construction, and Operating Agreement (“Agreement”), made, dated, and entered into this March __, 2018 (the “**Effective Date**”), by and among THE BARTER FOUNDATION, INCORPORATED, d/b/a BARTER THEATRE (“**Operator**”), an entity incorporated in the Commonwealth of Virginia and the CITY OF MOUNT AIRY, a North Carolina municipality, and its successors and assigns (“**City**”) (individually, a “**Party**,” and collectively, the “**Parties**”) sets out the agreement of the Parties for the finance, construction, and operation of a satellite theatre in Mount Airy, North Carolina at Spencer’s Mill (the “**Theatre**”).

ARTICLE 1 – FRAMEWORK OF AGREEMENT

1.1 **Background**. The proposed theater building will be part of a historic landmark property in the core of downtown Mount Airy, which property housed a textile manufacturing company known as Spencer’s Incorporated of Mount Airy, N.C., that was an active part of the City’s economy for almost 100 years (“**Spencer’s Mill**”). By deed dated December 22, 2017 appearing in Book 1618, Page 553, Surry County Registry, Mount Airy Park Place, LLC (“**Owner**”), purchased Lot 4 of the Spencer’s Mill subdivision, identified as Parcel Identification Number 5020-15-64-3984, in order to facilitate the rehabilitation of Spencer’s Mill. Other property within Spencer’s Mill is subject to a redevelopment and rehabilitation project to address Mount Airy’s housing and economic needs while supporting and strengthening the City’s rapidly growing tourism and recreation industry. The Theatre shall be housed in the mill building remaining on Lot 4, Parcel Identification Number 5020-15-64-3984.

1.2 **[DELETED]**

1.3 **Resident Opportunities**. Operator will make available discounted offers to Mount Airy residents and employees consistent with the discount programs offered at Barter Theatre in Abingdon, for example: (1) Barter Days, consisting of food in exchange for admission such that all food donated is to be given to the local food bank; (2) Pay-What-You-Can performances, in which residents can see the first performance of every production for an amount the resident can afford (minimum payment \$1.00); (3) Mount Airy Employee Discount of \$5.00 off single tickets for any show any time and for any employee of the City of Mount Airy; (4) Birthday Celebration Gift for Mount Airy Employees in which employees buy one ticket and get a free ticket for the same Performance; and (5) a special discounted Mount Airy Resident Subscription package.

1.4 **Financing Construction and Operation**. The City has agreed to contribute a certain amount of annual subsidy to fund the construction of the Theatre, and the Parties have agreed to conduct a Capital Campaign and contribute a minimum amount to support the construction of the Theatre.

1.5 **Previous Agreement**. Operator and the City entered into a nonbinding Letter of Intent (the “**Letter of Intent**”) on or around October 19, 2017, that set forth, among other provisions, the City’s responsibilities and use rights and the Operator’s

responsibilities, name and naming rights, and financial and construction agreements with respect to the Theatre.

1.6 **Desire to Enter Binding Agreement.** The City and Operator desire to commit to binding terms previously set forth in the Letter of Intent to redevelop and rehabilitate the Theatre. This Agreement shall modify and replace the Letter of Intent in its entirety.

In consideration of the mutual promises, covenants, and conditions contained herein, the Operator and City hereby agree as follows:

ARTICLE 2- DEFINITIONS

2.1 **Annual Independent Audit.** “**Annual Independent Audit**” shall mean the financial audit of the Theatre operations prepared by a firm of independent certified public accountants, or an independent certified public accountant, chosen by Operator, at the end of each calendar year.

2.2 **Audited Financial Statements.** “**Audited Financial Statements**” shall mean financial statements consisting of a balance sheet, an income statement, and a statement of cash flows, or equivalent financial statements, along with accompanying footnotes to the financial statements and an unmodified opinion of the independent auditor to the effect that the financial statements fairly present, in conformity with Generally Accepted Accounting Principles (GAAP), the financial position, results of operations, and cash flows of the Theatre for the calendar year.

2.3 **Barter Theatre in Abingdon.** “**Barter Theatre in Abingdon**” shall mean the Theatre operated by the Operator in Abingdon, Virginia.

2.4 **Box Office.** “**Box Office**” shall mean the personnel, systems, and maintenance for box office services.

2.5 **Capital Campaign.** “**Capital Campaign**” shall refer to the Parties’ private fundraising more particularly described in section 3.7(j).

2.6 **Naming Rights.** “**Naming Rights**” shall mean agreements pursuant to which the name will be incorporated into the title of the Theatre or into a component of the Theatre.

2.7 **Performance.** “**Performance**” or “**Performances**” shall mean any type of individual performance, function, or other activity at the Theatre which is open to the public and for which tickets must be purchased. For the purposes of determining whether Operator has achieved the 250 minimum Performances, City Use Days shall not be included.

ARTICLE 3- TERMS

3.1 **OWNERSHIP STRUCTURE.** The real property and structure of the Theatre shall be owned by Mount Airy Park Place, LLC. Both Parties agree to take all reasonable actions required for the construction and operation of the Theatre to qualify for New Market Tax Credits, Federal Historic Tax Credits, and North Carolina Mill Credits, as notified by Owner or City.

3.2 **PREVENTIVE MAINTENANCE PLAN.** The Parties shall enter into a mutually agreed upon plan for preventive maintenance of the Theatre prior to initiation of operation.

3.3 **NAME AND NAMING RIGHTS.** The word “Barter” shall be in the name of the Theatre. Operator shall have exclusive rights to sell advertising, sponsorship, and Naming Rights sponsorships for the Theatre or to lesser components of the Theatre (such as the stage or lobby) and retain all revenue as set forth in section 3.4. All Naming Rights names shall be subject to City approval, but such approval shall not be unreasonably withheld.

3.4 **SPONSORSHIPS AND RAISED REVENUE.** Operator shall have the right to market sponsorships, advertising, season ticket packages, and memberships, and to raise public and private donations to support construction, maintenance, and operating costs of the Theatre, and to retain all revenues raised, except as agreed otherwise as to construction and maintenance costs.

(a) To fairly account for allocation of donations, grants, and sponsorships, the following general principles are to be followed:

(i) If the donor’s intent is known or can be reasonably deduced, the intent of the donor shall be followed.

(ii) If the donor’s intent is not known or cannot be reasonably deduced, and the donor has previously contributed to one or the other of the two locations, an amount matching the previous donation shall be credited to the location of the previous donation.

(iii) If neither of the above principles yields an allocation of the donation (including amounts exceeding previous donations described in paragraph (a)(i) or (a)(ii) above), then donations originating from a donor in the state of North Carolina will go to the Theatre in Mount Airy, and donations originating from a donor in any state other than North Carolina will go to the Barter Theatre in Abingdon location.

(iv) If a donation results from a joint solicitation originating from both the Barter Theatre in Abingdon location and the Theatre in Mount Airy, and the donor gives no contrary instructions, the jointly solicited funds will be shared equally between the two locations.

(v) Notwithstanding the general principles above, any funds pledged or received as a result of the Capital Campaign to support the

construction, upfit, and equipping of the Theatre in Mount Airy shall be earmarked only for the capital costs of the Theatre in Mount Airy construction and the expenses of the Capital Campaign.

3.5 **CITY ADVISORY BOARD.** Operator will create a Mount Airy Advisory Board, two of whose members will be invited by the Operator's Board of Trustees to serve as a member of the Operator's Board.

3.6 **CITY RIGHTS AND RESPONSIBILITIES.**

(a) **Finance and Construction.** The City shall finance and construct, or cause to be financed and constructed, the Theatre as needed for debt issuance and qualification for tax credits and more specifically may borrow money or issue bonds for the construction of the Theatre to commence no later than June 18, 2018.

(b) **Maintenance of the Theatre Building.** City, or its successors and assigns, shall have primary responsibility for Maintenance of the Theatre building shell and exterior spaces, including the real property. The City shall direct the Owner to use the Capital Maintenance and Repair Fund to maintain the building shell and exterior spaces. The City shall maintain, or cause to be maintained, the portion of the exterior of the building housing the Theatre, along with repair and replacement, as necessary, of the roof, HVAC systems, major plumbing, or electrical, and major original and subsequent construction fixtures and equipment.

(c) **Insurance of the Building and Real Estate.** City, or its successors and assigns, shall adequately insure the building and real estate. The parties agree to cooperate to procure mutually agreed amounts and types of insurance. The parties may agree to procure separate or combined policies covering the Theatre in Mount Airy and Barter Theatre in Abingdon in an effort to secure lower total premium costs.

(d) **Capital Maintenance and Repair Fund.** The City shall establish a fund known as a "Capital Maintenance and Repair Fund" with revenue to come from the Facility Fee as described in 3.7(e). Subject to 3.6(b) herein, the Capital Maintenance and Repair Fund shall be used by the City and Owner in consultation with the Operator for maintenance, repair and replacement of the roof, building exterior, HVAC system, major plumbing or electrical, and replacement of major original construction fixtures, including seats, and equipment such as stage lighting, rigging, and sound system.

(e) **Facility Fee Allocation.**

(i) **Allocation Over First Five Years.** Starting in year one of operation of the Theatre, and for the four years following, the City shall allocate the \$7.50 Facility Fee, submitted to the City by the Operator on a monthly basis, at the City's sole discretion.

(ii) **Allocation Starting in Year Six.** Starting in the sixth year of operation, and for all years following, the City shall allocate the \$7.50 Facility Fee, submitted to the City by the Operator on a monthly basis, half

of the monthly total to be allocated by the City in its sole discretion, and half of the monthly total to capital maintenance pursuant to 3.6(d) above, to be disbursed in the City's discretion.

(iii) Sunset Clause. In the event the City or Surry County obtains a prepared Food and Beverage Tax that is available to the City of Mount Airy to defray debt payments and operating subsidies for the Theatre, the Parties agree to reduce the Facility Fee to an amount agreed to by all Parties.

(iv) Facility Fee. The Parties agree to modify the Facility Fee as necessary, and in an amount agreed to by all Parties, to take into consideration marketplace factors and sustainability of operation of the Theatre.

(v) Use of Capital Maintenance and Repair Fund. City will maintain the Capital Maintenance and Repair Fund (the "Fund") for the exclusive benefit of the Theatre. The Fund shall be used by the City solely for Theatre-related costs incurred as part of the City and/or Owner's fulfillment of its obligations under this Agreement, including capital expenditures, repairs and maintenance, debt service (including debt service arising out of any issuance of future debt for capital expenditures, improvements or new construction that benefit the Theatre exclusively). Notwithstanding the above, the City may also use the Fund to pay for other costs the City may incur in the future that are directly and solely related to the Theatre that are designed to cause a financial benefit to the Theatre. The City may not use the Fund to pay for any administrative costs or any allocations of management or overhead costs without the prior approval of Operator. The Fund at all times shall be owned by the City. The funds shall remain in the Facility Fund until used as permitted by this Section or until the termination or expiration of this Agreement.

(f) Operating Subsidies. The City shall fund operating subsidies pursuant to Section 3.11.

(g) Marketing. The City shall assist and support the Operator's marketing and development efforts as needed in the discretion of the City.

(h) Parking. The City shall provide, or cause to be provided, dedicated on-site parking for Operator personnel, and adequate public and private parking on-site or within reasonable walking distance for Theatre patrons.

(i) City Use Days. The City shall have the right to ten (10) days of use of the Theatre at actual direct costs with no additional charge for overhead or profit (the "**City Use Days**"). The City shall notify the Operator in writing of any desired City Use Day. Any conflicts between a desired City Use Day and Operator's Performances shall be resolved in favor of the Operator, but the City shall have access to the Theatre for a

City Use Day ahead of any outside facility rental events or touring acts not already booked at the time of the notification by the City once City has booked a date. The Parties may negotiate a schedule as mutually agreed to.

(j) Right to Assign. City shall not assign its rights to control and responsibilities to any third party without the express written consent of the Operator and Owner.

3.7 OPERATOR RIGHTS AND RESPONSIBILITIES.

(a) Exclusive Control. Except as otherwise provided herein, Operator shall have the sole responsibility for and the sole right to manage and operate the Theatre, including all rights to control and supervise employees of the Theatre and production of Performances.

(b) Right to Assign. Operator shall not assign its rights to control and responsibilities to any third party without the express written consent of the City and Owner.

(c) Minimum Performances. The Operator shall produce in the Theatre a minimum of two hundred fifty (250) Performances per year, beginning in Operating Year 2. The Operator will endeavor to provide the maximum feasible number of performances in Operating Year 1, which is defined herein as a partial year.

(d) Costs. The Operator shall be responsible for all costs of production of Performances, including salaries, housing, and transportation of personnel, set design and construction, box office operations, interior daily maintenance and repairs except as provided by 3.6(b), concessions and food and beverage operations, and fundraising.

(e) Facility Fee. The Operator shall charge an agreed "Facility Fee" of \$7.50 per ticket for individual admission into each Performance on behalf of the City to defray construction debt and maintenance costs. The Facility Fee shall be remitted to the City to be applied in accordance with section 3.6(e).

(f) Theatre Personnel. The Operator shall hire and support the personnel the Operator deems necessary to have on-site to manage, fundraise, and market the Theatre and Performances.

(g) Annual Review. The Operator shall prepare and submit the following on an annual basis to the City:

- (A) an annual budget for review, with any request for subsidies in accordance with Section 3.11 below;
- (B) an Annual Independent Audit;
- (C) proof of insurance as required by subsection (h).

(h) Insurance. The Operator shall adequately insure Operator-owned property in Mount Airy. In addition, the Operator shall cause to be in effect insurance coverage including Workers' Compensation Insurance, Commercial General Liability Insurance, Personal Injury Coverage, and Excess/Umbrella Liability. The Parties agree to cooperate to procure mutually agreed amounts and types of insurance. The Parties may procure separate or combined policies covering the Theatre in Mount Airy and Barter Theatre in Abingdon in an effort to secure lower total premium costs.

(i) Key Man Life Insurance. The Operator shall obtain Key Man Life Insurance for Richard Rose, for so long as he is employed as the Producing Artistic Director of the Theatre. Both the Operator and the Owner shall be named equal beneficiaries. In addition, the Owner shall have the right to obtain or increase insurance on the life of Richard Rose during the term of this Agreement in such amount as the Owner determines, in the name of the Owner and for its sole benefit, in the discretion of the Owner. Upon reasonable advance notice, Richard Rose will cooperate with any reasonable requirements to secure such insurance provided that no financial obligation or liability is imposed on him.

(j) Capital Campaign. Operator, in conjunction with the City, shall conduct a Capital Campaign for the Theatre design, development, construction, and furnishing, which will include at least two million dollars (\$2,000,000) net after fundraising expenses from private fundraising to be done with the cooperation of the Parties and utilizing Operator's non-profit status.

(k) Maintenance Responsibilities. The Operator shall have primary responsibility for the interior space of the Theatre.

(i) Routine Maintenance. The Operator shall be responsible for performing day-to-day routine maintenance for the Theatre facility. This includes, among other things, performing periodic visual inspections of the theatre facility and its equipment and components, including HVAC, plumbing and electrical equipment, building finishes, the roof, and the building envelope. Operator shall have discretion in determining the frequency of performing the periodic visual inspections, subject to its obligation to maintain the Theatre in accordance with the following standards (the "**Operating Standards**"): Operator shall perform regular routine maintenance that shall be (i) consistent with then current prudent business and management practices applicable to the operation, repair, maintenance, and management comparable to Barter Theatre in Abingdon, VA; (ii) consistent with keeping the facility in a clean, sanitary, and attractive condition; and (iii) reasonably calculated to protect and preserve the assets that comprise the Theatre.

(ii) Preventive Maintenance. Operator shall be responsible for performing the preventive maintenance tasks necessary to protect and preserve the Theatre and shall abide by the Preventive Maintenance Plan to be mutually agreed upon by the Parties. Operator shall conduct the

inspections required and shall maintain records of such inspections for a period of time as reasonably required by the City. Operator shall be responsible for day-to-day cleaning and upkeep.

3.8 EVENT CONCESSIONS, SOUVENIRS, AND CATERING.

(a) To the extent the City has the authority to grant such exclusive right to control by contract, Operator shall have the exclusive right to control the sale of concession items, including refreshments, alcoholic and non-alcoholic beverages, candies, food, snacks, souvenirs (T-shirts, buttons, CDs, program books, etc.), and event catering, if applicable, in connection with all events taking place in the Theatre.

(b) Operator shall have the responsibility to establish and manage a concession operation that offers concession items in connection with all Performances at the Theatre. Operator shall have the exclusive right and responsibility to determine which concession items, if any, will be offered for sale and the nature of the catering, if any, that will be provided for each Performance.

(c) The Operator shall staff and pay all costs to run concessions, and all funds from the sales of concession shall be credited to Operator.

3.9 CONSTRUCTION, PLANS, AND SPECIFICATIONS. Parties to agree on specifications for stage, rigging, seats, acoustical and lighting standards, dressing rooms, back stage, sufficient wing and trap space, spaces, shop spaces, box office, lobby, concessions areas, FF&E for Theatre Operations, and other building elements necessary to operate a professional theatre. A general quality standard for the overall project will be defined and agreed on. The Theatre shall be a state of the art facility, and all leasehold improvements, including sound system and lighting, shall be new and state of the art. General quality standard shall be measured against the Barter Theatre in Abingdon. Parties shall mutually agree on plans and specs prior to construction no later than April 15, 2018.

3.10 CONTINGENCIES. The Parties agree to the following contingencies:

(a) Capital Campaign. City obligation to contribute funding beyond the day prior to closing on the first City-obligated debt is contingent on:

(i) satisfactory projection of the ability of the Operator, with assistance and support from the City, to raise a minimum of \$2,000,000 (two million dollars) net after fundraising expenses in contributions and pledges. The Parties agree to cooperate in an effort to secure an underwriting guaranty for the Capital Campaign. Pledges must be obtained within twelve (12) months of Capital Campaign kickoff, said kickoff to be no later than sixty (60) days after the Effective Date;

(ii) a final construction contract, in accordance with this Agreement, being within agreed hard cap of cost. The proposed hard cap on construction cost is \$10 million dollars (\$10,000,000); and

(iii) either of the following be satisfied:

(A) City, at its expense, shall use its commercially reasonable efforts within five (5) days following the date of this Agreement to procure a loan or other sources of financing. If by May 01, 2018, the City has not been able to obtain a commitment for such financing, the City may elect to waive this contingency or terminate this Agreement by giving all Parties written notice of termination; or

(B) a minimum level of \$7,750,000 of tax credits approved for the Theatre from any or all of state historic mill renovation credits, federal historic property renovation tax credits, and New Market Tax Credits.

(b) Lease Agreement. Obligations of the Parties hereunder are contingent on the Owner and the Operator entering into a mutually agreeable written lease agreement for the Theatre.

(c) Local Government Commission. Financing is subject to all applicable law, including review and approval by the North Carolina Local Government Commission ("LGC").

(d) Parties May Negotiate Contingencies. In the event any contingency within this Section 3.10 fails to be met, any Party shall have the right to seek to renegotiate or terminate the Agreement according to Section 3.14.

3.11 FINANCIAL AGREEMENTS.

(a) Minimum Subsidy. Subject to subsection (g), no minimum subsidy is guaranteed, in that subsidies between zero and the agreed maximum will only be provided upon a reasonable showing by the Operator that an equivalent operating deficit exists. The Parties will cooperate to agree on a fair and reasonable operating definition of "operating deficit" to be used in determining the amount of subsidy necessary under this Agreement. Operator shall present to the City a sample formula for determining "operating deficit." Operator agrees to maximum caps on annual subsidies.

(b) Maximum Annual Subsidies. The maximum subsidies for years 1-5 shall be as follows:

- (i) Operations Year 1: no more than \$600,000
- (ii) Operations Year 2: no more than \$500,000
- (iii) Operations Year 3: no more than \$400,000
- (iv) Operations Year 4: no more than \$300,000

- (v) Operations Year 5: no more than \$220,000
- (vi) Operations Year 6 and after: See subsection (g) below.

(c) Subsidy Years Defined. For the purposes of subsidy distribution only, Operations Year 1 shall be defined as starting on or about July 1, 2019 and ending on December 31, 2020. Operations Year 2 shall begin on January 1, 2021. Starting with Operations Year 2 and continuing through all subsequent years of operation, each subsidy year shall be defined as a full calendar year beginning on January 1 and ending on December 31 of the same calendar year. The pre-Performance operating expenses shall be counted as costs toward the subsidy calculation for the Operations Year 1 as described in subsections (b) and (c) of this Section.

(d) Capital Campaign. The Capital Campaign shall be independent of Operations Year 1 and shall start on or about April 1, 2018. Expenses related to the Capital Campaign may be netted against and recovered by the City from the proceeds of the Capital Campaign.

(e) Surplus. In the event Operator has raised all funds necessary through earned income and contributed revenue in any year of the first five (5) years of operation to cover all operating expenses, the City shall not be obligated to provide any subsidy described in subsections (a) and (b) above for that year. In the event there is ever a surplus (year-end revenue above expenses), the Parties agree to split the amount equally, but with all such surplus going back into the Theatre operations, maintenance, or debt reduction in some manner. All determinations of surplus will be made with the Annual Operating Contribution described in subsection (g) viewed as earned income by Operator.

(f) Operating Deficits. City's assumption is that the operating deficits will decline over time and stabilize within a five (5) year time frame. Parties will work together to solicit donations, sponsorships, support of other governmental units, and grants for capital and operating support. Parties agree to negotiate amounts of annual subsidies to cover potential operating deficits, with the understanding that Operator has primary responsibility for reducing the deficits through private fundraising and budget control. All determinations of operating deficits will be made with the Annual Operating Contribution described in subsection (g) viewed as earned income by Operator.

(g) Annual Operating Contribution. Notwithstanding the provisions above, the City will make an annual operating contribution to Operator of \$100,000 beginning in Operating Year 6 and continuing through Operating Year 15 of the Term, after which Operator shall submit annual requests for operating support as part of the City's annual budget process. The Annual Operating Contribution will be paid by the City to the Operator bi-annually in October and in January.

(h) Advanced Costs. The City shall advance both pre-Performance operating costs and upfront Capital Campaign costs. Such advances by the City shall be made separately and accounted for separately.

(i) The City shall advance the first month's allocation for pre-Performance operating costs to Operator and pay each successive month's pre-Performance operating cost advance upon adequate substantiation of the previous month's expenditures. The agreed amount to be paid by the City to the Operator will be paid based on written cash flow projections provided to the City by the Operator no less than four months in advance.

(ii) The City shall advance the first month's allocation for Capital Campaign costs to the Operator and pay each successive month's Capital Campaign cost in advance upon adequate substantiation of the previous month's expenditures. The agreed amount to be paid by the City to the Operator will be paid based on written cash expenditure projections provided to the City by the Operator.

(i) Cost Recovery Fee for Productions at Mt Airy Location. There will be expenses for the use of staff and resources of the Barter Theatre in Abingdon that are attributable to the theatrical productions in Mount Airy. By way of illustration and not limitation, time spent by Producing Artistic Director and Barter (non-Mount Airy) supervisors and Abingdon staff, administration functions performed by Abingdon staff for Mount Airy, all accounting functions, payroll, bookkeeping, general legal support, box office services including all computer and ticketing systems provided by Barter for use in Mount Airy, Abingdon production department supervisors support and labor hours not included in direct costs, marketing, PR, sales, graphics, indirect cost related to productions, storage, notions, office space in Abingdon for Mount Airy employees and all related costs for employees working in Abingdon on Mount Airy productions and/or operations, and other services and support not included in direct expenses related to the Barter productions and operations in Mount Airy. The parties acknowledge that such shared staff and resources will provide cost savings and efficiencies for the Theatre reducing the overall cost of Mount Airy productions and operations.

In order to reimburse Operator for the indirect costs of shared staff and resources, the Operator shall be allowed to charge and collect a cost recovery fee equal to fifteen percent (15%) of the operating expenses for Barter's productions and operations at the Theatre (the "Cost Recovery Fee").

The Cost Recovery Fee shall be deemed an operating expense of the Theatre applicable to the computation of Annual Subsidies (Sec. 3.11) and Operating Deficits (Sec. 3.11(f)) and shall be netted against revenues before calculating any surplus (Sec. 3.11(e)).

(j) Grants. The City agrees to assist Operator in seeking state, federal, and private foundation funds or grants available to arts organizations for capital and operating costs.

3.12 **EVENTS OF DEFAULT.** Any material breach of this Agreement is an event of default, specifically including but not limited to:

(a) **For City:**

(i) failure to fund or construct, or cause to be funded and constructed, the Theatre;

(ii) failure to establish a Capital Maintenance and Repair Fund for maintenance;

(iii) failure to maintain or repair the exterior and other components of the building; and

(iv) failure to make any payments required by this Agreement.

(b) **For Operator:**

(i) failure to maintain required number of Performances;

(ii) failure to market the Theatre and engage in private fundraising activities;

(iii) failure to undertake or proceed through the Capital Campaign.

3.13 **TERM.** The Term shall begin on the Effective Date and terminate upon the last day of the twenty-second year following the Effective Date.

(a) **Option to Renew.** At the expiration of the Term, the Operator shall have the option to renew this Agreement for a period of ten (10) years ("**Option to Renew**"). In order to exercise the Option to Renew, the Operator must provide written notice to the City before one year prior to the expiration date of the then current term. Such Option to Renew does not restrict the City's right to terminate this Agreement in accordance with the provisions of Section 3.14.

3.14 **TERMINATION.** This Agreement shall terminate automatically at the end of the Term unless the Operator exercises the Option to Renew. The Parties shall each have the right to terminate this Agreement upon sixty (60) days' advance written notice in the event of a material breach or failure of a contingency pursuant to 3.10 of this Agreement by any other Party. The written notice must describe all of the reasons for the termination ("**Notice of Termination**").

(a) **Cure.** In the event of a Notice of Termination, the Agreement shall not terminate if the Party in breach cures or commences correction or cure, and diligently pursues correction, of all defaults described in the written notice within fifteen days (15) of receiving the notice. The Party in breach must provide prompt written notice to the terminating Party of its intent to cure the breach described in Notice of

Termination, specifically addressing each default (“**Intent to Cure**”). For the purposes of this Agreement, service of the Intent to Cure on the terminating party at the address listed in Section 3.16(h) within fifteen (15) days of receipt of the Notice of Termination shall constitute prompt notice. The Party receiving Notice of Termination must make substantial progress in curing all defaults during the sixty (60) day period prior to termination in order to prevent termination if no cure is possible within the sixty (60) days. Delays caused by Force Majeure shall toll the sixty (60) day period until such time that efforts to cure may reasonably commence.

(b) **Initial Period of Operation.** After an initial period of Operation covering Operation Year 1, Operation Year 2, and Operation Year 3 in the Theatre, either party may terminate the agreement if the operating deficit from Theatre operations totals a cumulative \$500,000.00, unreimbursed to Operator by the City, at any time during the Term.

(c) **Peaceful Surrender.** The Operator shall, upon the expiration or earlier termination of this Agreement for any reason, peacefully surrender to the Owner the Theatre. In the event of Expiration or Termination of this Agreement, the Operator shall be allowed a reasonable period of time to vacate the premises and secure the Operator’s property. Upon completion of surrender by the Operator, the City may install immediately an alternate operator.

(d) **Continuous Operation; Non-Abandonment.** Except as described in Section 3.14, regardless of other operational results, the Operator shall continuously operate the Theatre and comply with its obligations under this Agreement during the Term and shall not abandon the Theatre.

3.15 **ESTIMATED PROJECT TIMELINE.** It is anticipated that the Capital Campaign will begin on or before May 1, 2018, or as soon thereafter as possible. It is anticipated the City will commence construction no later than June 18, 2018, and complete construction no later than June 18, 2020. The first anticipated Performance in the Mount Airy Theatre is expected to be scheduled for summer of 2020.

3.16 **MISCELLANEOUS PROVISIONS.**

(a) **Indemnification.**

(i) To the extent allowed by law, Operator shall indemnify, defend, and hold harmless the City, its officers, elected and appointed officials, employees, agents, volunteers, independent contractors, and the City’s successors and assigns from and against all claims of third parties arising out of, relating to, or resulting from acts or omissions by the Operator or its agents with respect to the management, use, or operation of the Theatre.

(ii) To the extent allowed by law, City shall indemnify, defend, and hold harmless the Operator, its officers, trustees, directors, officials, employees, agents, volunteers, independent contractors, and the Operator’s successors and assigns from and against all claims of third parties arising out of, relating to, or

resulting from acts or omissions by the City or its agents with respect to the City's obligations and actions concerning the Theatre.

(b) Negligence Limitations. Neither the Operator nor the City is required to indemnify, defend, or hold harmless the other Party, its officers, elected and appointed officials, trustees, directors, employees, agents, volunteers, independent contractors, and the other Party's successors and assigns against any claims of third parties proximately caused by or resulting from, in whole or in part, the negligence or intentional act of the other Party, its officers, trustees, directors, elected and appointed officials, employees, agents, volunteers, independent contractors, and the other Party's successors and assigns.

(c) City Access. City shall have the right to access and inspect the Theatre at reasonable hours with reasonable advance notice to the Operator.

(d) Force Majeure. In addition to specific provisions of this Agreement, neither the Operator nor the City shall be responsible for any default, delay, or failure to perform if such default, delay, or failure to perform is due to causes beyond such Party's reasonable control, including, but not limited to, strikes, lockouts, actions or inactions of governmental authorities (excluding Parties to this Agreement), epidemics, wars, riots, civil unrest, embargoes, fires, hurricanes, floods, tornados, earthquakes, adverse weather, acts of God, or the default of a common carrier. In the event of a default, delay, or failure to perform due to causes beyond such Party's reasonable control, any dates or times by which the Parties are otherwise scheduled to perform, if any, shall be extended automatically for a period of time equal in duration to the time lost by reason of the cause beyond the reasonable control of such Party. If written notice of such delay is given to the other Party after the commencement of such delay, an extension of time for such cause shall be deemed granted and will be agreed to by the Parties in writing for the period of the enforced delay, or longer as may be mutually agreed.

(e) Disclaimer of Joint Venture, Partnership, and Agency. This Agreement shall not be interpreted or construed to create an association, joint venture, or partnership between the Operator and the City, or to impose any partnership obligation or liability upon such Parties. Neither the Operator nor the City shall have any right, power, or authority to enter into any agreement or undertaking for, or act on behalf of, or to act as or be an agent or representative of, or to otherwise bind, the other Party.

(f) No Third Party Beneficiaries. The Agreement is not intended to and does not confer any right or benefit on any third party that is not a Party.

(g) Legal Actions. In addition to any other rights or remedies, subject to the notice and right to cure provisions of this Agreement, any Party may institute legal action against a defaulting Party to cure, correct, or remedy any default or breach, to specifically enforce any covenants or agreements set forth in the Agreement, to enjoin any threatened or attempted violation of the Agreement, or to obtain any remedies consistent with the purposes of the Agreement. Legal actions shall be instituted in the Superior Court of the County of Surry, State of North Carolina, and the participating

Parties hereto submit to the personal jurisdiction of such court without application of any conflicts of law provisions of any jurisdiction.

(h) Notices. Unless specifically provided otherwise by this Agreement, any notice, demand, request, consent, approval, or communication which a Party is required to or may give to another Party hereunder shall be in writing and shall be delivered or addressed to the other at the address below set forth or to such other address as such Party may from time to time direct by written notice given in the manner herein prescribed. Such notice or communication shall be deemed to have been given or made when communicated by personal delivery or by independent courier service or by facsimile or by email with a hard copy to be delivered by independent courier service by the next business day. The Parties shall make reasonable inquiry to determine whether the names or titles of the persons listed in this Agreement should be substituted with the name of the listed person's successor.

All notices, demands, requests, consents, approvals, or communications to the City shall be addressed to:

Martin Collins
City of Mount Airy
300 S. Main St.
Mount Airy, NC 27030
336-786-3522 (fax)
mcollins@mountairy.org (email)

Barbara A. Jones
City Manager
City of Mount Airy
300 S. Main St.
Mount Airy, NC 27030
336-719-7506 (fax)
bajones@mountairy.org (email)

City Attorney
City of Mount Airy
300 S. Main St.
Mount Airy, NC 27030
336-719-1703 (fax)
hugh@clgnc.com (email)

All notices, demands, requests, consents, approvals, or communications to the Operator shall be addressed to:

Richard Rose
Producing Artistic Director
Barter Theatre
PO Box 867

Abingdon, VA 24212-0867
276.623.6283
artdirector@bartertheatre.com

Jeremy Wright
Managing Director
Barter Theatre
PO Box 867
Abingdon, VA 24212-0867
276.619.3302
managingdir@bartertheatre.com

(i) Entire Agreement. This Agreement sets forth and incorporates by reference all of the agreements, conditions, and understandings between the Parties relative to the subjects of this Agreement and supersedes all previous agreements. There are no promises, agreements, conditions, or understandings, oral or written, expressed or implied, among the Parties relative to the matters addressed herein other than as set forth or as referred to in this Agreement.

(j) Construction. The Parties agree that each Party has reviewed and revised this Agreement and that any rule of construction to the effect that ambiguities are to be resolved against the drafting Party shall not apply in the interpretation of this Agreement or any amendments or exhibits hereto.

(k) Governing Law. This Agreement shall be governed by the laws of the State of North Carolina.

(l) Counterparts. This Agreement may be executed in several counterparts, each of which shall be deemed an original and such counterparts shall constitute one and the same instrument.

(m) Agreement to Cooperate. In the event of any legal action instituted by a third party or other governmental entity or official challenging the validity of any provision of this Agreement, the Parties hereby agree to cooperate in defending such action; provided, however, each Party shall retain the right to pursue its own independent legal defense.

(n) No Deemed Waiver. Failure of a Party to exercise any right under this Agreement shall not be deemed a waiver of any such right and shall not affect the right of such Party to exercise at some future time said right or any other right it may have hereunder.

(o) Severability. If any term or provision herein shall be judicially determined to be void or of no effect, such determination shall not affect the validity of the remaining terms and provisions. The Parties agree that if any provision of this Agreement is judicially determined to be invalid because it is inconsistent with a provision of state or federal law, this Agreement shall be amended to the extent

necessary to make it consistent with state or federal law and the balance of the Agreement shall remain in full force and effect.

(p) Authority. Each Party represents that it has undertaken all actions necessary for approval of this Agreement, and that the person signing this Agreement has the authority to bind, respectively, the City and the Operator.

(q) Estoppel. Each of the Parties agree, from time to time, within twenty (20) days after request of the other Party, to deliver to the requesting Party or such Party's designee, an estoppel certificate stating that this Agreement is in full force and effect, the unexpired term of this Agreement, and whether or not, to such Party's knowledge, there are any existing defaults or matters which, with the passage of time, would become defaults under this Agreement. It is understood and agreed that the Parties' obligation to furnish such estoppel certificates in a timely fashion is a material inducement for the other's execution of this Agreement.

[Signature Pages to Follow]

Agreed to and accepted this the __ day of _____, 2018.

City of Mount Airy

Mayor David Rowe (SEAL)

ATTEST:

Nicki Brame, City Clerk

This instrument has been pre-audited in the manner required by the Local Government Budget and Fiscal Control Act.

Pam Stone, Finance Director, Mount Airy

The Barter Foundation, Inc.

By: (SEAL)