

EXPANDED SUBSTITUTE ALTERNATE OVERTURE RESOLUTION: Version 4

File 20248

Acknowledging private ownership and operation of the Overture Center, Establishing a City commitment to future grants to Overture subject to annual appropriation, and Setting terms and conditions for such grants.

Whereas, a group of generous community members have come forward and reached an agreement with the Overture Center's lenders to resolve the Center's remaining debt, and,

Whereas, under that agreement, the 201 State Foundation or the Overture Development Corporation, or their successors, will become the owner and operator of the Overture Center facility upon payment to the Overture lenders before December 30, 2010, and,

Whereas, the City has been informed that the debt will be paid, which payment also will release the City from any potential liability on its limited pledge guaranty related to the Overture debt, and,

Whereas, an interest in the long-term success of the Overture Center is shared by everyone in our community, and City support for the arts serves a public purpose through increased cultural education and economic development.

Now therefore be it resolved that the city of Madison thanks the donors for their extraordinary generosity in supporting Overture as a vital community asset, and,

Be it further resolved that the city acknowledges the ownership change of the facility, and, contingent upon the debt on the Overture Facility being fully paid, waives and releases its option to purchase the facility for one dollar, and,

Be it further resolved that the city pledges its financial support for Overture in the form of a grant to 201 State Foundation, Inc., or its successors or assigns ("201"), subject to annual appropriation, starting at \$2.5 Million (Two Million Five Hundred Thousand Dollars) per year in 2012 and adjusted by the change in Consumer Price Index methodology in the State's Expenditure Restraint Program each year thereafter, the purpose of the grant being to support the Overture Arts Facility in an amount approximately equal to the former City subsidy (\$1.3 million per year) and an amount for long-term capital maintenance costs (\$700,000 per year), and,

Be it further resolved that as conditions of the grant, 201 shall provide the following to the city:

1. An annual payment in lieu of taxes (PILOT), starting at \$500,000 per year in 2012 and adjusted annually by the same method as the grant described above. In the event that the City grant falls short of the full amount as described above, 201 may reduce the amount of the PILOT by an amount equivalent to the shortfall.

2. An annual audit, performed by an independent CPA selected by 201 and conducted in accordance with GAAP.
3. An annual plan with objectives with respect to fund-raising, paid attendance, non-paid or reduced price attendance, seats sold, community programs and program diversity.
4. An annual report to the community comparing actual results of the objectives described in the annual plan, the causes of any failures to meet those objectives, and strategies to meet objectives in the future.
5. The other terms and conditions set forth on Exhibit A to this resolution.

Be it further resolved that the city intends to end its operation and cooperation agreement with the Madison Cultural Arts District as of June 30, 2012, with current employees staying under that agreement until that date, after which 201 State Foundation or Overture Development Corporation or their successors shall be the employer of any personnel working at Overture, and,

Be it further resolved, the City may negotiate MOUs with Local 60 to allow for bumping into City employment at any time during the transition period, and may negotiate a limit on applicants to Local 60 vacancies to Local 60 employees, and

Be it further resolved, the City may determine to make further payments to City employees who transfer to 201 to make up for lost accrued benefits such as sick leave, and,

Be it further resolved, that in future years, if 201 needs additional financial assistance for capital maintenance costs, 201 may request and the City will consider, subject to appropriation and approval of the Common Council, to make a loan or loan(s) to 201. Any such loan will be secured by a mortgage on the facility owned by 201, and repayment of the loan may be by a reduction in future grants from the City to 201. If payment is made by a reduction in grants, such reduction will not allow 201 to reduce its PILOT payment.

Be it finally resolved that the Mayor and city clerk are authorized to execute any and all documents with 201 State Foundation, Overture Development Corporation and the Madison Cultural Arts District, all in a form approved by the city attorney, as shall be necessary to accomplish the purposes of this resolution.

EXHIBIT A TO EXPANDED SUBSTITUTE ALTERNATE OVERTURE RESOLUTION
VERSION 4

1. The City and 201 State Foundation Inc., or its successors or assigns (“201”) will enter into two contracts. The first is a Long-Term Structural Contract further describing the terms and conditions of City support for Overture. The second will be an Annual Performance Contract containing terms that may change from year to year, but will establish measurable standards of performance for 201, as set forth herein.
2. **Long-Term Structural Contract:** The Structural Contract will contain the following terms and conditions:
 - A. The transition date to operations by 201 will be June 30, 2012, and the City grant will be pro-rated for that year.
 - B. The City and 201 recognize the likely use of a condominium project to allow MMoCA to own its museum as unit 1, with 201 owning the unit 2.
 - C. The City agrees to and acknowledges the naming rights limitations applicable to the Overture Center, and will not challenge those rights in the future.
 - D. The City will be granted a right of first refusal to purchase the unit 2 at the price agreed to by 201 should 201 ever seek to sell the facility in the future.
 - E. 201 will adopt a governance model as recommended by Professor Undercofler at pages 2-3 of his report of November 24, 2010, namely a 25 person Board of Directors with 4 public representatives chosen by the City of Madison. One public representative would be the Mayor or the Mayor’s designee. The remaining three public representatives would be appointed by the Mayor and confirmed by the Common Council. One of the public representatives, chosen by the City, would serve on the Executive Committee of the Board. The Board would have five standing committees: Executive, Nominating, Finance, Development and Audit. 201 would establish other procedures in its bylaws.
 - F. 201 will be subject to a public meeting policy, substantially on the following terms: As a private corporation, 201 is not subject to the Wisconsin Open Meetings Law. Nonetheless, 201 agrees to a public meeting policy in order to provide transparency and public access to its decision-making. Meetings of the 201 Board of Directors and Executive Committee will be open to attendance by the public unless otherwise determined by 201. The Board shall establish in its

bylaws the method and circumstances for holding meetings that are not open to the public for the following reasons: in the event the subject matter of that meeting or portion of the meeting includes deliberation concerning any judicial or quasi-judicial trial; hearing or proceeding, relates to personnel matters including but not limited to dismissal, demotion, discipline, compensation, performance evaluation or employment; negotiations or collective bargaining; deliberating or negotiating on the purchase of any property or entry into other contracts whenever competitive or bargaining reasons so require; consideration of unemployment or worker's compensation matters; consideration of any matters in which private personal information such as financial, medical, social or personal histories or discipline or other privacy rights may be at issue, including discussion of donors or potential donors; or conferring with counsel who is rendering legal advice. 201 also shall post on its website the time and location of its Board and Committee meetings.

- G. 201 will establish a Community Advisory Board (CAB) broadly representing the community in terms of culture, ethnicity, geography, age and socio-economic level. The CAB will meet at least quarterly to advise and make recommendations to 201 regarding free programming and educational outreach efforts, and such other matters related to the operation of Overture as the CAB determines. Recommendations from the CAB will be considered by the 201 Board at a public meeting. The CAB shall include 2 members recommended by the Mayor of Madison and 1 member from the resident companies.
- H. 201 will maintain its Resident Company Advisory Board (RCAB). The RCAB shall consider and make recommendations to 201 on all matters that impact the resident companies, including leases, rental rates, scheduling, and community benefit programs. Recommendations from the RCAB will be considered by the 201 Board at a public meeting.
- I. 201 agrees that it will not enter into any agreement with any locally-based promoter of events that restricts the promoter from scheduling events at facilities other than Overture.
- J. 201 accepts the report on the physical status of the Overture facility prepared by Andrew Statz and dated September 16, 2010 and the Mortenson Construction Report of November 5, 2010, and will use those reports as an initial capital maintenance plan.
- K. 201 agrees to the following with respect to the treatment of City employees currently working at Overture:

Staffing and Related Contracts: Except as provided in this Exhibit and in the final Agreement between the City and 201, 201 shall recruit, train and employ its own staff. The existing City Collective Bargaining Agreements (“CBA”) for any employees hired by 201 shall not be assumed or transferred to 201. 201 will negotiate the terms and provisions for any CBA directly with the related union or unions.

1. There shall be a eighteen month transition period, from 1/1/11 to 6/30/2012 unless completed earlier by mutual agreement, during which the current operations by MCAD with City employees continues unchanged, as does City’s subsidy, etc. Leave current agreements in effect. The transition period may be modified by mutual agreement of the parties.
2. Effective 7/1/12, 201 is the new manager. The City and MCAD will terminate the existing Operation and Cooperation Agreement as of that date. As of that date, no City employees will work for 201 or at Overture.
3. 201 will make an offer of employment, to be effective 07/01/12, to all permanent (full and part-time) employees (represented and non-represented) of the City working at the Overture Center as of 09/01/11. This is subject to them maintaining their employment status with the City until the date of transition. Every effort will be made to act similarly with respect to employees who are not permanent (hourly) employees, subject to staffing needs.
4. Although 201 will retain the right to establish initial terms and conditions of employment, wage rates for current employees transferring from the City shall be at a level not less than the level in effect on 01/01/12.
5. During the transition period, 201 will prepare job descriptions, number of persons to be hired at various positions, and establish initial terms and conditions of employment (including health and retirement benefits) (“Employment Terms”), for positions with 201 at Overture. 201 shall complete these Employment Terms and communicate them to City employees working at Overture no later than September 1, 2011. No later than January 1, 2012, 201 shall make job offers to permanent City employees at Overture for employment with 201. Those City employees who are offered jobs with 201 will move to those jobs effective 07/1/2012, subject to the terms and conditions of such offer. The benefit package to be offered by 201 shall be substantially similar to that now applicable to the City employees.
6. Any represented City employee offered a position with 201 may 1) accept the position, or 2) subject to any bumping or contractual rights as established by the City, determine to remain as a City employee by bumping into a City position not

at Overture. Represented employees shall have until March 31, 2012 to make this election.

7. The City will work with non-represented City employees who wish to remain City employees to determine if suitable positions are available at the City for application by the employee(s). Non-represented employees offered a position with 201 shall have until March 31, 2012, to accept such position.
8. 201 agrees to recognize IATSE Local 251 as the bargaining unit for all stagehands and may engage in bargaining at any time after January 1, 2011. 201 will seek to complete bargaining by August 1, 2011.
9. 201 agrees to recognize AFSCME as the bargaining unit for all positions currently represented by Local 60 and may engage in bargaining at any time after January 1, 2011. 201 will seek to complete bargaining by August 1, 2011.
10. During the Transition Phase, the City and 201 will work together to resolve issues involving the transition of City employees including sick leave, compensatory time, and other issues as they may present themselves. A number of these matters are liabilities of MCAD and, pursuant to paragraph L.3 of this Exhibit, will become liabilities of 201. The City and 201 agree to treat these liabilities as follows:
 - i. **Unfunded Prior Pension Liability:** The City has borrowed funds to fund an unfunded liability to the Wisconsin Retirement System for all City employees. MCAD's share of this liability is approximately \$385,000. 201 agrees to be responsible for fifty percent (50%) of this liability (\$192,500). 201 may pay this liability over a ten (10) year period in equal installments with the first installment due no later than December 30, 2013.
 - ii. **Accrued Vacation and Comp Time:** These liabilities are approximately \$150,000. City employees are entitled to a payout of these amounts on leaving City employment. All such accrued comp time will be paid out in the normal manner, and said payout will be the responsibility of the City. In the case of vacation payouts, 201 will be responsible for fifty percent (50%) of the payout, up to a maximum of \$57,500, payable over the same ten (10) year period as the unfunded pension liability payment referenced above, subject to the credit to 201 for vacation carried over to 201 as described herein. As a further accommodation, 201 agrees to grant those former City employees, accepting a position with 201, credit for their service time with the City for future vacation accrual purposes under 201's terms of employment. These new employees may also elect to forego some or all of the above vacation payout from the City and carry up to four (4) weeks of accrued vacation to 201. (Said vacation carryover to be taken within four (4) years from the date of hire.) 201 will

be given credit for fifty percent (50%) of the value of this carryover vacation in determining the amount owed to the City herein.

iii. The City and 201 may adjust these allocations during the transition period by mutual agreement.

11. Nothing in this Agreement is intended to or does change any employee rights under existing agreements with the City or under City ordinances.

L. The following other provisions in the original Termsheet will be included in the General Contract between the City and 201:

1. Personal Property: All personal property necessary for or associated with the operation of Overture will be transferred to 201. This includes existing operating systems, IT, temporary fixtures, furniture and equipment. 201 may place or install in or on Overture such additional personal property as 201 shall deem desirable for its operation and may remove such additional personal property so long as any damage occasioned by such removal is repaired and provided that any property removed that is necessary to the operation of Overture shall be replaced, and 201 shall inform the City of all dispositions of personal property.

2. Financial Reporting: 201 will submit an annual operating budget to the City for informational purposes. 201 will also make an annual report to the City regarding operating revenues and expenses. Interim reports, on a quarterly basis, in the form of traditional financial statements (income statement and balance sheet) will be provided to the appropriate City official. An annual audit, performed by an independent CPA selected by 201 and conducted in accordance with GAAP, will be provided to the City as such final audit report is approved by the 201 Board, but no later than 90 days after the end of 201's fiscal year. 201 agrees to make available for inspection by the City, upon request, all records and work papers supporting the audit. The City may, at its own expense and with reasonable notice to 201, conduct its own independent financial audit of the 201 operation, and 201 shall make available for inspection such records as the City requires for such audit. In addition to these reports, 201 will prepare an informational and estimated forecast on a calendar year basis, prepared in accordance with the schedule necessary for preparation of the City's annual operating budget, and to be submitted to the City on the schedule necessary for the City's adoption of its annual budget.

3. Accounting. The parties agree that, upon 201 undertaking operation of Overture pursuant to this Agreement, a final accounting and settlement of liabilities

between the City and MCAD shall be made. 201 will be responsible to the City for such liabilities, upon terms to be agreed upon.

- 4. Default and Remedies:** In the event either party defaults in its obligations under this Agreement, the other party may give a notice of default. The defaulting party shall have the right to remedy the default. The remedy and cure period shall be defined to be a specific period that is related to the nature of the default. By way of illustration and not limitation, failure to provide insurance coverage must be cured within 10 days; failure to provide a copy of an audit shall be cured within 45 days. If not remedied within that time, the other party may pursue any and all legal remedies, including termination of this Agreement. If no other time is established for remedy of a default, the default must be remedied within 60 days. Failure to remedy a default provides the non-defaulting party with the right to pursue all legal remedies, including termination of this Agreement.
- 5. City Ordinance Requirements:** 201 shall be subject to the Living Wage, Prevailing Wage, Non-discrimination, Sweatshop and Affirmative Action requirements of City's ordinances, according to their terms.
- 6. Indemnification:** Each party agrees to indemnify, defend, and hold harmless the other party and its respective affiliates, officers, directors, employees and agents from and against all claims, damages or losses incurred or suffered by an Indemnified Party arising from or related to: any inaccuracy or breach of any representation or warranty made by the indemnifying party in this Agreement, any Schedule to this Agreement or any document contemplated by this Agreement; and any breach by an indemnifying party of any of its covenants, obligations, and agreements contained in this Agreement, and any wrongful or negligent acts of its own officers, directors, employees or agents.
- 7. Insurance:** 201 State will be required to show evidence of insurance pursuant to the usual terms established by the City's risk manager.
- 8. City Access to Records.** Upon reasonable notice, the City may inspect any records of 201 related to the operation of Overture, and may, at the City's expense, conduct an operational or performance audit of 201.
- 9. Assignment and Subletting.** This General Contract may not be assigned by either party without the written consent of the other party. Neither party may sublet the premises without the prior written consent of the other party provided, however, that 201 may enter into agreements related to the housing of the Klais organ and may, without the prior written consent of City, enter into temporary rental and use agreements for space with persons desiring the use of space for events, banquets, weddings and other special events. Further, 201 may enter into agreements with resident companies regarding use and occupancy of space without the prior written consent of the City.

10. Destruction of Facility. If any part of Unit 2 of the Overture Center becomes damaged or is destroyed by any cause, the damaged portion shall be repaired or reconstructed in accordance with the Block 65 Condominium Declaration.

11. No Waiver; Approvals; The failure by one party to require performance of any provision of this Agreement will not affect that party's right to require performance of any provision of this Agreement at any time thereafter, nor shall a waiver of any breach or default of this Agreement constitute a waiver of any subsequent breach or default or a waiver of the provision itself.

12. Governing Law. This Agreement is being delivered and accepted within the State of Wisconsin, and shall be deemed to be a contract governed by the laws of the State of Wisconsin and shall be interpreted, construed, and enforced in accordance with the laws of the State of Wisconsin without regard to the principles of conflicts of laws.

13. Jurisdiction. The parties hereby consent to the exclusive jurisdiction of any state or federal court situated in Dane County, Wisconsin, and waive any objection based on *forum non conveniens*, with regard to any actions, claims, disputes or proceedings relating to this agreement, the collateral, any other document, or any transactions arising therefrom, or enforcement and/or interpretation of any of the foregoing.

14. Waiver of Jury Trial. The parties hereby jointly and severally waive any and all right to trial by jury in any action or proceeding relating to the agreement and related documents, the obligations thereunder or any transaction arising therefrom or connected thereto. The parties each represents to the other that this waiver is knowingly, willingly and voluntarily given.

15. Severability. Whenever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement shall be prohibited by or invalid under applicable law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

16. Entire Agreement; Amendments. This Agreement, the Exhibits attached hereto, and the Related Documents contain the entire understanding of the parties with respect to the subject matter hereof, and supersede all other understandings, oral or written, with respect to the subject matter hereof. No amendment, modification, alteration, or waiver of the terms of this Agreement or consent required under the terms of this Agreement shall be effective unless made in a writing, which makes specific reference to this Agreement and which has been signed by the party against which enforcement thereof is sought. Any such amendment, modification, alteration, waiver or consent shall be effective only in the specific instance and for the specific purpose for which given.

17. Counterparts; Headings. This Agreement may be executed in several counterparts, each of which shall be deemed an original, but such counterparts shall together constitute but one and the same agreement. The descriptive headings in this Agreement are inserted for convenience of reference only and shall not affect the construction of this Agreement. All pronouns and any variations thereof shall be deemed to refer to the masculine, feminine, neuter, singular or plural as the identity of the person or persons may require.

18. Notices. All communications or notices required under this Agreement shall be deemed to have been given on the date when deposited in the United States mail, postage prepaid, and addressed as follow (unless and until any of such parties advises the other in writing of a change in such address): (a) if to the 201, with the full name and address as shown in this Agreement below; and (b) if to the City, with the full name and address of the City as shown in this Agreement below, to the attention of the officer of the City executing the form of acceptance of this Agreement.

201 State Foundation, Inc.: [list address]

City of Madison: [list address]

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3. **Annual Performance Contract:** 201 and the City will annually enter into a contract that sets forth the City financial support for 201, and establishes measurable performance standards for 201. The Performance Contract may incorporate some or all of the annual plan prepared by 201, and will include at least the following elements:
- a. 201's commitment to develop and revise a strategic plan.
 - b. 201's commitment to community programming including free or reduced programs, with measurable objectives for meeting its goals.

- c. Goals for fund-raising from outside sources.
- d. Goals for community outreach and educational programming with measurable objectives.
- e. A commitment to create an endowment fund and estimated times and amounts to be raised for the fund.
- f. Standards for financial viability modeled on those suggested by Professor Undercofler at page 4 of his Report of November 24, 2010, or as set out in paragraph 21(b)(ii) of the original Termsheet of November 4, 2010.
- g. Creation of an institutional marketing plan and annual measurable objectives toward meeting that plan.

On at least an annual basis, City staff and 201 staff will review progress toward the goals, objectives and standards set out in the agreement, and may modify the agreement on an annual basis as needed.