

AMENDED AND RESTATED STRUCTURAL AGREEMENT

This Amended and Restated Structural Agreement (this “**Agreement**”) is entered into as of this 1st day of January, 2023, by and between the CITY OF MADISON, a municipal corporation (the “**City**”) and OVERTURE CENTER FOUNDATION, INC., a Wisconsin non-profit corporation (“**OCF**” and together with the City, the “**Parties**”). This Agreement amends and restates that certain Structural Agreement By and Between the City of Madison and 201 State Foundation, Inc. dated as of December 31, 2010 and effective as of January 1, 2011 (as amended, the “**Original Agreement**”).

WITNESSETH:

WHEREAS, Overture Development Corporation (“**ODC**”) is the owner of the property at 201 State Street, including Unit 2, Block 65 Condominium (the “**Overture Unit**”) and the Overture Center for the Arts (the “**Overture Center**”), and leases the Overture Unit and Overture Center to OCF; and

WHEREAS, ODC has entered into a First Right of Refusal with the City, dated December 28, 2010, granting the City the right to match any bona fide offer to sell the property at 201 State Street, which the City and OCF acknowledge; and

WHEREAS, OCF is the operator of the Overture Center; and

WHEREAS, as of December 31, 2010 but effective as of January 1, 2011, the City and OCF (under its previous name, 201 State Foundation, Inc.) entered into the Original Agreement setting forth the broad structural terms and conditions regarding: the transfer of Overture Center operations to OCF; the governance structure of OCF; City support for the Overture Center (both in terms of operations and capital expenditures); and an annual performance contract to be entered into between the City and OCF as its operator, all in furtherance of their shared interest in the long-term success of the Overture Center; and

WHEREAS, as of January 1, 2011, and every January 1 since then, the City and OCF have entered into an Annual Performance Contract addressing the specific amount of the City Grant in support of the Overture Center for that fiscal year and containing other terms that may change from year to year, the last of which is dated December 29, 2021 (“**Annual Performance Contract**”); and

WHEREAS, OCF has transformed the arts scene in downtown Madison and made the arts broadly accessible to many residents of the City and beyond, engaging 700,000 separate arts experiences per year prior to the COVID-19 pandemic, roughly 300,000 of which were free; and

WHEREAS, OCF has exceeded expectations as the operator of the Overture Center, successfully growing its philanthropic base, earned revenue base, and broad positive community impact since 2011, weathering financial and pandemic challenges with the support of the City, to be a linchpin of vitality and an economic driver for both downtown and the greater Madison area; and

WHEREAS, the initial term of the Structural Agreement ended on December 31, 2020, and without other action by the Parties would have been renewed for an additional five year term, but the Parties agreed to instead extend the Original Agreement for two successive one year periods pursuant to an Amendment to Structural Agreement between the Parties dated as of December 7, 2020 .and by a Second Amendment to Structural Agreement between the Parties dated as of December 29, 2021; and

WHEREAS, the City and OCF could continue to operate under the Original Agreement, but the Original Agreement is outdated and needs to be revised; and

WHEREAS, the Parties desire to update the Original Agreement and extend it for an additional term; and

WHEREAS, given OCF's proven track record, the Parties desire to streamline the extensive reporting that originally was required during the transition operations from the City to OCF; and

WHEREAS, the interest of the long-term success of the Overture Center is shared by ODC, OCF, the City and residents of Madison and Dane County;

NOW, THEREFORE, in consideration of the foregoing, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and subject to the covenants and agreements contained in this Agreement, it is hereby agreed as follows:

ARTICLE I LONG-TERM STRUCTURAL AGREEMENT

The Structural Agreement between the City and OCF is subject to the following terms and conditions:

1. **Term of Agreement**: This Agreement shall commence and become effective as of the 1st day of January, 2023 (the "**Commencement Date**") and shall continue in effect for an initial ten (10) year term ending on the 31st day of December, 2032 (the "**Initial Term**"). This Agreement shall then automatically renew for successive five- (5) year periods (the "**Renewal Term(s)**") (the Initial Term and all Renewal Terms are referred to herein as the "**Term**"), unless otherwise terminated as provided in this Agreement.

2. **City Grant**: The City commits to an annual grant to OCF in an amount of Two Million Three Hundred Sixty-five Thousand and no/100 Dollars (\$2,365,000.00) subject to annual appropriation by the City and subject to the Parties entering into an Annual Performance Contract as set forth in Article II of this Agreement (the "**City Grant**"). Subject to the annual appropriation, the City Grant shall be adjusted annually by the change in the Consumer Price Index methodology in the State's Expenditure Restraint Program ("ERP"). The City Grant shall be used by OCF for operations and capital expenses.

3. **Oversight and Reporting**. OCF shall comply with requirements to submit information and reports to the City as provided in the Annual Performance Contract.

4. **Restrictions**: The City agrees to and acknowledges the naming rights limitations and recorded restrictions applicable to the Overture Center, and will not challenge those rights in the future.

5. **Right of First Refusal**: The City has been granted a right of first refusal to purchase the Overture Unit that is leased by OCF under the terms and provisions of a recorded Right of First Refusal. Transfers of the property between ODC, MCAD or OCF shall not trigger the City's right of first refusal.

6. **Governance During The Term Of This Agreement: Board of Directors**: During the Term of this Agreement, the Board of Directors of OCF (the "**Board**") will consist of not less than 20 nor more than 25 directors, including directors appointed by the City as provided herein. The City may appoint a number of directors proportionate to the City's net financial contribution to the total annual operating expenses of the Overture Center (the "**City Percentage**"), provided, however, that the number of directors appointed by the City shall be at least three (3). One of the directors appointed by the City will be the Mayor or the Mayor's designee. The remaining directors appointed by the City will be appointed by the Mayor and confirmed by the Common Council. The City may designate one of the directors appointed by the City to serve on the Executive Committee of the Board. A

vacancy among the directors appointed by the City shall not be counted for the purpose of determining a quorum of the Board or a quorum of the Executive Committee.

7. Bylaws and Meetings: As a private corporation, OCF is not subject to the Wisconsin Open Meetings Law. Nonetheless, OCF agrees voluntarily to adopt a meeting policy in substantially the following form:

Meetings of the OCF Board of Directors will be open to attendance by the public unless otherwise determined by OCF. The Board of Directors may conduct all or any portion of a meeting at which the public is not permitted to attend 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 deliberations; deliberating or negotiating on the purchase of any property 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; conferring with counsel who is rendering advice; considering any matters related to business activities, fundraising, donors and donor relations, contracts or acts which, if discussed publicly, could adversely affect the business of OCF or negotiations or strategy. Nothing herein is intended to subject OCF to any open meetings law.

OCF also shall post on its website the time and location of its Board meetings.

8. Community Advisory Council: OCF has established and will maintain a Community Advisory Council (the "CAC"). The CAC currently consists of a not less than 10 nor more than 20 members. The CAC will broadly represent the community in terms of culture, ethnicity, geography, age and socio-economic level. The CAC will meet at least quarterly to facilitate outreach efforts such as town hall meetings, and to advise and make recommendations to OCF regarding free programming and educational outreach efforts and such other matters related to the operation of Overture as the CAC determines. Recommendations from the CAC will be considered by the OCF Board at the public portion of an OCF Board meeting. The CAC membership will include a number of members proportionate to the City Percentage appointed by the Mayor of Madison and confirmed by the Common Council, provided, however, that the number of members appointed by the City shall be at least two (2). A vacancy among the members of the CAC appointed by the City shall not be counted for the purpose of determining any quorum requirements that may apply to the CAC.

9. Resident Company Advisory Council: OCF has established and will maintain its Resident Company Advisory Council (the "RCAC"). The RCAC may consider and make recommendations to OCF on all matters that impact the resident companies. Recommendations from the RCAC will be considered by the OCF Board at the public portion of an OCF Board meeting.

~~10. Financial Reporting. An annual financial audit, performed by an independent CPA selected by OCF, and conducted in accordance with GAAP, will be provided to the City as such final audit report is approved by the OCF Board, but no later than 90 days after the end of OCF's fiscal year. OCF agrees to make available for inspection by the City, upon request, all records and work papers supporting the audit.~~

~~11.10. Insurance: OCF will provide the City with evidence of insurance pursuant to the usual terms established by the City's risk manager for grant recipients.~~

~~12.11. 12.~~ Indemnification: OCF shall be liable to and hereby agrees to indemnify, defend and hold harmless the City, and its officers, officials, agents, and employees against all loss or expense (including liability costs and attorney's fees) by reason of any claim or suit, or of liability imposed by law upon the City or its officers, officials, agents or employees for damages because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons or on account of damages to property, including loss of use thereof, arising from, in connection with, caused by or resulting from OCF acts or omissions in the performance of this agreement, whether except to the extent caused by or contributed to by the negligence or willful misconduct or recklessness of the City, its officers, officials, agents, or its employees. Notwithstanding any other provision in this Agreement to the contrary, any claim and any recovery of damages shall be limited to direct damages, and in no event shall either party be liable to the other for any punitive, speculative, incidental, consequential or any other type of damages.

~~13.~~ City Access to Records. Upon reasonable notice [which shall vary depending on the scope and timing of the request but in any event shall not be less than 10 business days], the City may inspect records of OCF reasonably related to the operation of Overture, and may, at the City's expense, conduct an operational or performance audit of OCF. The access to records shall not subject OCF to the Wisconsin Open Records Law.

~~14.12.~~ Assignment. The Structural Contract may not be assigned by either party without the written consent of the other party, provided that the City is providing financial support to OCF. Such consent is not to be unreasonably withheld.

~~15.13.~~ Termination: This Agreement may be terminated at any time by written mutual agreement of the parties, provided all applicable laws and regulations are complied with.

ARTICLE II ANNUAL PERFORMANCE CONTRACT

1. Annual Performance Contract: OCF and the City will annually enter into a contract (the "**Annual Performance Contract**") that sets forth the City's financial support for OCF, and that establishes measurable performance standards for OCF, as the City does with other grant recipients from the City. OCF will apply for the City Grant on or before August 1 of each calendar year. The Annual Performance Contract will be attached to the grant request. The City and OCF shall meet to negotiate and finalize the terms of the Annual Performance Contract on or before January 1 of each year.

2. Annual Performance Contract Terms: The Annual Performance Contract may incorporate some or all of the annual plan prepared by OCF, and shall include other terms mutually agreed between the parties, including the following:

- A. OCF shall operate the Overture Center using standards for financial viability.
- B. OCF shall maintain an endowment or capital reserve fund with estimated times and amounts to be raised for the fund.
- C. OCF shall develop and revise a strategic plan periodically as set forth in the Annual Performance Contract.
- D. OCF shall continue its commitment to arts, educational and community programming, including free or reduced cost programs and outreach, and include measurable objectives for meeting its goals.

- E. OCF shall prepare an Annual Community Report within 90 days of the close of its fiscal year, and will invite the public to a meeting on the report, encouraging community input. OCF will prepare performance projections for the following year based on the most recent OCF Annual Community Report and OCF's Annual Commitment to Arts, Educational and Community Budget Report ("Annual Community Arts Budget Report"). The baseline for establishing goals and measuring performance shall be based on the Annual Community Arts Budget Report for OCF's fiscal year.
- F. OCF shall be subject to and agrees to abide by the City's non-discrimination, affirmative action, prevailing wage, weapons prohibition, living wage, equal benefits, gender identity, and sweatshop-free requirements, as they may be applicable, from time to time, to OCF as a recipient of a City Grant.

3. Annual Review: On at least an annual basis, MAC, City staff and OCF staff will collaboratively review progress toward the goals, objectives and standards set out in the Annual Performance Contract, and, subject to the terms of this Agreement, may modify the Annual Performance Contract on an annual basis as needed. The Annual Performance Contract may be presented to the Common Council for approval prior to consideration of the City's Operating Budget.

ARTICLE III MISCELLANEOUS PROVISIONS

1. Early Termination. This Agreement shall automatically terminate upon the failure of the parties to enter into an Annual Performance Contract as provided in Article II or upon the failure of the City to provide the Grant.

2. No Waiver; Approval. 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.

3. 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.

4. 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 or interpretation of any of the foregoing.

5. 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 this Agreement and related documents, the obligations thereunder or any transaction arising therefrom or connected thereto. The parties each represent to the other that this waiver is knowingly, willingly and voluntarily given.

6. 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.

7. 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.

8. Counterparts; Headings. This Agreement may be executed in several counterparts, each of which shall be deemed to be an original, but such counterparts shall together constitute but one and the same agreement. A duplicate copy of this Agreement, signed by all parties shall be valid and binding as if one original of the Agreement was signed by all parties. An electronic scanned copy (.pdf), photographic or facsimile (fax) copy of the signature(s) of the undersigned will be deemed to be equivalent to the original hereof and may be used as a duplicate original. 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.

9. 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 OCF, 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.

OCF Foundation, Inc.:

OCF Foundation, Inc.
c/o Overture Center for the Arts
201 State Street
Madison, WI 53703

With a copy to:

Attorney Laura S. Peck
Axley Brynson, LLP
2 E. Mifflin Street, Ste 200
Madison, WI 53703

City of Madison:

Finance Director
City of Madison
210 Martin Luther King Jr. Blvd., Room 406
Madison, WI 53703

With a copy to:

City Attorney
City of Madison
210 Martin Luther King Jr. Blvd., Room 401
Madison, WI 53703

Dated as of the first day above written.

Signatures on next pages continued.

**[Signature page to Structural Agreement Between
OCF Foundation, Inc. and the City of Madison]**

CITY OF MADISON

By: _____
Satya Rhodes-Conway, Mayor

Attest: _____
Maribeth Witzel-Behl, Clerk

Approved:

Approved as to Form:

David P. Schmiedicke, Finance Director

Michael Haas, City Attorney

Execution of this Structural Agreement by the Mayor and Clerk was authorized by Enactment
Number RES-20-_____ adopted on December ___, 2022.

Signatures on next pages continued.

**[Signature page to Structural Agreement Between
OCF Foundation, Inc. and the City of Madison]**

OVERTURE CENTER FOUNDATION, INC.

By: _____