

**Lease and Operating Agreement
Between the City of Kelowna and
Kelowna Visual and Performing Arts Centre
Society**

January 2023

Table of Contents

Lease and Operating Agreement.....	1
1. OBJECTIVES.....	2
2. GENERAL DUTIES AND OBLIGATIONS OF THE SOCIETY	2
3. TERM	3
4. PREVIOUS AGREEMENTS	3
5. USE AND OCCUPATION OF BUILDING	3
6. FEES AND EXPENSES FOR USE OF BUILDINGS	7
7. FINANCIAL AND REPORTING OBLIGATIONS	8
8. REPAIRS, MAINTENANCE AND CHANGES TO THE BUILDING	11
9. ENVIRONMENTAL MATTERS.....	18
10. MANAGEMENT OF THE BUILDING AND PROVISION OF SERVICES.....	21
11. SOCIETY INSURANCE.....	23
12. SOCIETY INDEMNITY	26
13. DEFAULTS, TERMINATION AND EXPIRATION.....	26
14. GENERAL TERMS	29
15. INTERPRETATION	33
Schedule A – Rotary Centre for the Arts, License and Common Area	XXXV
Schedule B - Administration and Programming Requirements	XXXVI
Schedule C - Legal Notices and Encumbrances	XXXVIII
Schedule D - Building Maintenance and Operations Responsibility Checklist.....	XXXIX
Schedule E - Insurance Certificate	XLIII
Schedule F - Society Maintenance Limit Clarification	XLIV

Lease and Operating Agreement

THIS AGREEMENT made as of the _____ day of _____, 2023

BETWEEN:

CITY OF KELOWNA, a municipality incorporated under the laws of the Province of British Columbia, having an office at 1435 Water Street, Kelowna, British Columbia, V1Y 1J4

(the "City")

AND:

KELOWNA VISUAL AND PERFORMING ARTS CENTRE SOCIETY (Inc. No. S32185), a Society duly registered pursuant to the Societies Act of the Province of British Columbia, having its offices at 421 Cawston Avenue, Kelowna, B.C. V1Y 6Z1

(the "Society")

WHEREAS:

A. The City is the registered owner in fee simple of the lands in the City of Kelowna, British Columbia, legally described as:

- PID: 031-303-552
Lot A, District Lot 139, Osoyoos Division, Yale District, Plan EPP95954
(the "Lands");

and the City owns the building located on the Lands identified in the attached Schedule A (the "Building");

- B. The City wishes to provide a venue for the exhibition, promotion, and advancement of the visual and performing arts for the City and region, and its residents and visitors;
- C. The City wishes to contract with a society that can manage and operate the venue as an anchor cultural institution in the Cultural District of downtown Kelowna specifically, and throughout the community in general, as well as to facilitate the exhibition, promotion, and advancement of the visual and performing arts in the venue for the residents and visitors of the City;
- D. The Society wishes to cooperate and collaborate with the City in furthering the appreciation of the arts in Kelowna; and

- E. The City recognizes the valuable contribution that the Society provides to the Cultural District specifically and the City as a whole.

NOW THEREFORE THIS AGREEMENT is evidence that in consideration of the mutual promises and payments provided for in this Agreement and the payment of one dollar (\$1.00) from the Society to the City and other good and valuable consideration (the receipt and sufficiency of which the City hereby acknowledges) the parties covenant and agree as follows:

1. OBJECTIVES

Through this Agreement, the City and the Society seek to achieve the following shared objectives:

- a) provision of the wide range of programs and services described in Schedule B - Administration and Programming Requirements, which facilitates the exhibition, promotion, and advancement of the visual and performing arts for the City and the surrounding region, and its residents and visitors;
- b) cost-effective, viable, and prudent long-term tenure, operation, and maintenance of City-owned lands and buildings;
- c) increased leverage of City resources through the development of community partnerships and diverse funding sources, including donations, sponsorship, grants, and fees; and
- d) contributing to the appreciation of the visual and performing arts in Kelowna and the surrounding region.

2. GENERAL DUTIES AND OBLIGATIONS OF THE SOCIETY

In addition to the other covenants and obligations to be performed by the Society under this Agreement, the Society covenants and agrees that it will, at all times:

- a) continue to be a registered charity, in good standing with the Government of Canada and a registered society in the Province of British Columbia;
- b) perform promptly and safely all its obligations under this Agreement;
- c) be just and faithful in the performance of its obligations under this Agreement and in its dealing with the City under this Agreement;
- d) operate the Building under the name "Rotary Centre for The Arts", with no additions or variations, and enter into any naming rights only concerning internal spaces within the Building in a manner consistent with the social and cultural objectives outlined in Schedule B. All revenue generated from naming will be retained by the Society so long as this Agreement remains in force;
- e) maintain Bylaws that permit all residents of Kelowna to become members of the Society;

- f) abide by the purposes identified in its member-approved Constitution and Bylaws;
- g) be solely responsible for determining the themes and content of all exhibitions, programs, special events, and their related initiatives in the Building;
- h) permit a City designate to attend all meetings of the Society's Board of Directors as the City's liaison: to address matters between the City and the Society, and to act as the first point of contact for inquiries (the "City Liaison");
- i) be responsive to the changing community needs and evolving practices with regard to the preservation, documentation, exhibition, and interpretation of art;
- j) not make substantive changes to its name or its purposes in its Constitution without the express written consent of the City, which shall not be unreasonably withheld;
- k) provide to the City a true copy of its current Constitution and Bylaws upon execution of this Agreement, and thereafter to provide true copies of all amendments to the said Bylaws; and
- l) not take any action, or permit its officers, employees, contractors, or agents to take any action, which is intended, or would reasonably be expected, to harm the City's reputation, or which would reasonably be expected to lead to unwanted or unfavorable publicity to the City; provided, however, the foregoing limitation shall not apply to compliance with any legal process or statements made in response to an authorized inquiry from a court or regulatory body.

3. TERM

The term of this Agreement shall be for five (5) years commencing on January 1, 2023 (the "Commencement Date") and expiring on December 31, 2027 (the "Term"), subject to earlier termination as provided herein.

4. PREVIOUS AGREEMENTS

This Agreement replaces any and all previous agreements, whether written or not, between the City and the Society, and the parties agree that any and all previous agreements shall be terminated and be of no further force and effect as of the Commencement Date.

5. USE AND OCCUPATION OF BUILDING

5.1 Grant of Leases

The City hereby leases the Building to the Society (the "Lease") for the Term on the terms and conditions of this Agreement and for the purposes set out in this Agreement. The Society acknowledges that this Agreement is subject to the legal notations and charges registered against the title to the Lands as per Schedule C – Legal Notices and Encumbrances.

5.2 Licenses

The City hereby grants to the Society a non-exclusive right and license to enter onto and use the Lands surrounding the Building for the sole purposes of accessing the Building for the Term; including, without limitation, the outdoor steps, patios, walkways, pathways, loading areas, roofs, and adjacent areas necessary for pedestrian and vehicle access, and appropriate exhibit and programming functions related to the Building as per Schedule A (collectively, the "License Areas").

5.3 Common Area

The Society shall have a non-exclusive right to use the Common Area adjacent to the License Areas, as identified in the attached Schedule A (the "Common Area"); provided, however, that the Society's use of the Common Area shall be subject to such rules and regulations as the City shall make from time to time. The City reserves the right, at its sole discretion, to:

- a) utilize portions of the Common Area for such purposes that, in the City's judgment, tend to attract the public;
- b) change the shape, size, location, and extent of improvements on the Common Area;
- c) eliminate or add any improvements to the Common Area; and
- d) temporarily close any portion of the Common Areas for repairs, maintenance, alteration, private events, or for any other reason deemed sufficient by the City.

5.4 Permitted Uses

The Society will only use and occupy the Building and the License Areas to provide the services outlined in Schedule B.

5.5 Accessibility of the Building

The Society shall operate the Building so that it is open to the public during ordinary hours of operation, that its programs are available to the public, and so that the Building is fixtured and maintained to be accessible to persons with diverse abilities. The Society and the City will work in cooperation should significant improvements to the Building be required to improve access.

5.6 Smoking and Vaping

The Society shall operate the Building as a non-smoking, non-vaping building.

5.7 Acknowledgement and Agreements of the Society

The Society acknowledges and agrees that:

- a) the Society leases the Building and licenses the License Areas on an "as is" basis, and the City has not made any representations, warranties, or agreements as to the environmental condition of the Buildings or the Lands;

- b) it is the sole responsibility of the Society to satisfy itself concerning the environmental conditions of the Building and the Lands, including, without limitation, by conducting any reports, inspections, tests, investigations, studies, audits, surveys, and other inquiries as the Society, in its sole discretion, considers necessary to satisfy itself as to the environmental condition of the Building and the Lands;
- c) the City has made no representations or warranties concerning the Lands and the Building including, without limitation, concerning the condition or suitability of the Lands and the Building for the Society's intended use;
- d) by entering into this Agreement, it is satisfied that the Building and License Areas are suitable for the Society's purposes; and
- e) all resolutions and other corporate prerequisites for this Agreement have been duly passed and the persons executing this Agreement on its behalf are authorized to do so.

5.8 Covenant to Operate

The Society shall ensure that, unless prevented by applicable regulatory authorities or for reasons of repair or maintenance, the Building and License Areas shall remain open to and accessible to the public throughout the Term, subject to the Society's right to close the Building at the Society's discretion, in accordance with the Society's published schedules and as the parties otherwise agree in writing.

5.9 Compliance with Laws

The Society shall carry on and conduct its activities in, on, and from the Building and License Areas in compliance with any and all statutes, laws, regulations, enactments, bylaws, and orders from time to time in force, shall comply with the terms of any charges registered against title the Lands, shall obtain all required approvals and permits thereunder, and shall not to do or omit to do anything in, on, or from the Building or License Areas in contravention thereof. The Society shall carry on and conduct its activities in compliance with the collection of all applicable Goods and Services Tax ("GST"), Provincial Sales Tax, and other taxes as the relevant legislation in force dictates.

5.10 Public Safety

The Society shall take all reasonable precautions to ensure the safety of all persons using the Building.

5.11 No Waste or Nuisance

The Society shall not:

- a) commit, suffer, or permit any wilful or voluntary waste, spoilage, or destruction of the Building or the License Areas; or

- b) do or permit to be done in, on, or from the Building or License Areas anything that may be or become a nuisance or annoyance to the owners, occupiers, or users of other parts of the Lands, adjoining lands, or to the public, including the accumulation of rubbish or unused personal property of any kind.

5.12 Furniture and Equipment

The Society acknowledges and agrees that:

- a) all equipment and furnishings (the "Facility Property") placed or installed in the Building shall be the property of the Society until the earlier of the dissolution of the Society, the expiry of this Agreement, or the termination of this Agreement pursuant to Section 13, at which time ownership of all Facility Property shall revert to the City;
- b) the Society shall maintain a record of all Facility Property, in a form acceptable to the City, and shall deliver the same to the City upon request;
- c) during the Term of this Agreement the Society shall maintain insurance for the Facility Property in accordance with Section 11;
- d) the Society shall create and implement a disposal policy for Facility Property in a form acceptable to the City; and
- e) the Society must notify the City of the disposition of any Facility Property with an estimated value of two thousand five hundred dollars (\$2,500.00) or more.

5.13 Right to Inspect

The City or its authorized representative may enter the Building at all reasonable times in order to inspect the Building.

5.14 Emergency Use

The Society shall make all or part of the Building available for use in the event of a community emergency, as determined by the City in accordance with applicable enactments. The City shall solely be responsible for determining whether the Building can safely be used at the time of the emergency, and shall:

- a) be responsible for any direct expense incurred or damage caused to the Building as a result of such use;
- b) be responsible for any and all liabilities, costs, expenses, suits, or claims arising as a result of such use;
- c) compensate the Society for all increased operating costs incurred during such use by the City; and
- d) compensate the Society for uninsured business losses arising out of such use, provided that the Society must act reasonably in re-arranging bookings and events to minimize the extent of any business losses during such use.

5.15 Vacant Building

If directed to cease services and operations by an applicable regulatory authority for public safety reasons, such as natural disaster, pandemic, or other significant public concern, the Society shall continue to maintain responsibility of the Building and endeavour to take the necessary steps to ensure the Building is kept safe. This may include, but is not limited to, routine internal and external inspections of the Building. The Society may seek direction and support from the City as required.

5.16 Access for Telecommunication Antenna Systems

Upon request from the City, the Society shall grant access to the Building for the installation and maintenance of telecommunication antenna systems. Such installation shall occur in consultation with the Society and shall not interfere with the operations of the Society.

6. FEES AND EXPENSES FOR USE OF BUILDINGS

6.1 Rent

The Society shall pay to the City:

- a) annual rent in the amount of one dollar (\$1.00), plus any and all applicable taxes, payable on the first day of the Term and each anniversary thereafter (the "Base Rent"); and
- b) all additional sums of money to be paid by the Society to the City under this Agreement (the "Additional Rent"),

(collectively, the "Rent"). The Society shall pay Additional Rent monthly, plus any and all applicable taxes, within fifteen (15) days of the Society's receipt of an invoice from the City.

6.2 Contributions to Reserve Fund

In addition to the Rent, the Society shall make monthly contributions to a building contingency reserve fund (the "Reserve Fund") in the amount of one thousand five hundred dollars (\$1,500.00), to an annual total of eighteen thousand dollars (\$18,000.00), plus any and all applicable taxes, to be adjusted annually starting January 1, 2024 by the British Columbia Consumer Price Index (the "BC CPI") annual average for the prior year (the "Reserve Fund Contribution"). In any calendar year, should the BC CPI be a negative, no change shall occur. The Reserve Fund Contribution will be held by the City in a reserve account and collected monthly from the Society using Pre-Authorized Debit ("PAD").

The Reserve Fund will be used by the City to fulfill its responsibility as a Landlord: to perform capital improvements and maintain the building reserve envelope.

6.3 No Deductions

The Society shall pay the Base Rent, the Reserve Fund Contribution, and the Additional Rent without deduction, abatement, set-off, or withholding whatsoever, despite any law or statute now or in the future to the contrary. The Society's obligation to pay the Base Rent, the Reserve

Fund Contribution, and the Additional Rent survives the expiry or earlier termination of this Agreement.

6.4 Payment of Taxes, Utilities and other Expenses

The Society covenants and agrees with the City to pay all charges, costs, duties, expenses, rates, sums, assessments, taxes (including property taxes), telephone, electrical, gas water, sewage garbage disposal, internet, Cablevision, security systems, and other utility charges and payments for work and materials in any way relating to the Building and the License Areas, and that in the event of any such amounts remaining unpaid after they come due, such amounts shall be deemed as Additional Rent and may be collected by the City as Rent. In addition, the Society agrees to pay the City any and all applicable taxes in respect of Base Rent, Additional Rent, or any other services that may be paid from time to time.

7. FINANCIAL AND REPORTING OBLIGATIONS

7.1 Operating Grant from the City

During the Term the City will pay to the Society an annual operating grant of three hundred thirty three thousand and three hundred dollars (\$333,300.00), to be adjusted annually starting January 1, 2024, by the BC CPI annual average for the prior calendar year (the "Operating Grant"). In any calendar year, should the BC CPI be negative, no adjustment will occur. The Operating Grant will be payable in semi-annual installments, on March 1st and October 1st of each calendar year. The City and the Society acknowledge and agree that the Operating Grant is provided to support the Society's programs and services, which are delivered for a public purpose and the public good, and facility maintenance (the "Core Programs and Services").

7.2 Additional Funds

The Society will not seek or request additional operating grant funds from the City, except in accordance with Section 7.3, or in the case of unanticipated exceptional need or emergency, the reason for which is to be fully stated. The Society is not precluded from applying for other City grants through established programs, provided that it meets program eligibility requirements.

7.3 Funding Increases through Annual Budget Process

Through submission of a business case, the Society may, from time to time, seek supplemental operating grant funds from the City, in addition to the Operating Grant, to enhance the programs and services it offers. The City will, at its sole discretion, consider the business case in support of the supplemental funding request as part of its annual financial planning process for the following calendar year. The City has no obligation to approve the request for supplemental funds, and approval of the request is at the sole discretion of the City.

7.4 Annual Reporting – Format & Content

By March 31 of each year during the Term, the Society will provide to the City an annual report, in the City's prescribed format, which includes, but is not limited to, the following information relating to the prior calendar year (the "Annual Report").

- a) Professionally prepared audited annual financial statements, approved by the Society's Board of Directors, for the most recent fiscal year-end;
- b) Proof of insurance as specified in Section 11;
- c) Current year operating and capital budget, as approved by the Society's Board of Directors, with actuals or forecast to March 31;
- d) Program information, in a form acceptable to the City, which includes;
 - List of City locations, and the programs and services provided;
 - Statistical summary of people served by the Society in the prior year, which may take the form of registration, attendance, visitation, participation, membership, or a combination thereof;
 - Highlights of particular achievements and successes in the prior calendar year with a focus on the impact of the Society's programs in the community; and
 - Identification of active partnerships or collaborations, and the beneficial outcomes of same.
- e) Governance and planning information, which includes:
 - A list of the Society's directors;
 - An organizational chart indicating key management and staff roles and staffing levels;
 - Objectives for the current calendar year; and
 - A realistic self-assessment, including identification of areas where improvements can be made in the areas of programming, organization governance, and financial oversight, along with strategies and processes to achieve improvements. This may be in the form of a strategic plan, program evaluation, or consultant's report, and may include information about trends, external threats, or other factors which influence the Society's planning and results.
- f) For the Building, provide a:
 - Summary of operational expenses for gas, water, and electrical utility data (as applicable), indicating consumption and costs;
 - Summary of janitorial costs;

- List of maintenance and repair tasks carried out by the Society, with costs and contractors/trades identified;
- Inspection reports as listed in Section 8.4, along with upcoming capital expenses/projects that the Society intends to undertake in the coming year; and
- Inspection reports as listed in Schedule D - Building Maintenance and Operations Responsibility Checklist.

g) any other information as requested.

The City will provide the Society with the prescribed format of the Annual Report no later than January 31 of each year.

The City may request, at its sole discretion, that the Society provide a public-in-attendance report to the City's Council in a prescribed format, which will reflect the reporting information listed in this section.

7.5 City Feedback on Reporting

Upon reviewing the Annual Report, in each calendar year the City may, at its sole discretion, make specific recommendations and requests to be fulfilled by the Society (the "Recommendations"). The Recommendations are intended to be constructive and offered in the spirit of learning and improvement. The Society shall review the Recommendations and provide the City with notice of their agreement to implement the Recommendations, such agreement not to be unreasonably withheld, and a timeline for implementation of the Recommendations.

In the event the Society is unwilling to agree to implement any particular Recommendations, the Society will provide the City with written notice of the same, along with the reasons implementation is not feasible for the on-going operation of the facility. Upon the delivery of such notice, the Society and the City shall exercise good faith efforts to seek a mutually satisfactory resolution to any dispute arising in relation to the Recommendations.

Should the parties fail to agree on the implementation of the Recommendations within sixty (60) days of the Recommendations being made, the matter shall be referred to a single arbitrator pursuant to the *Commercial Arbitration Act* [SBC 1986] Chapter 3, as amended from time to time (the "*Commercial Arbitration Act*"). The arbitrator will be selected by agreement of the parties, or, failing agreement of the parties, appointed pursuant to the *Commercial Arbitration Act*, and the arbitrator's decision shall be binding upon both parties. The costs of the arbitration shall be borne in equal parts by both parties.

Should the Society not implement the agreed upon Recommendations within the agreed, or arbitrator-determined, timeline, the City may at its sole discretion adjust any payments owed

to the Society to allow for the City to implement the Recommendations, including the Operating Fund, or terminate this Agreement in accordance with Section 13.

Recommendations and requests made by the City under this section or during other discussions, meetings, or communications between the Society staff, officers, or board members and the City do not constitute direction or instructions by the City staff, agents, or Council. The Society is responsible for the direction and governance of all its operations.

7.6 Accounts

The Society shall, at all times during the Term:

- a) Keep, or cause to be kept, true and accurate records and accounts regarding the management and operation of the Building, including without limitation:
 - Core Programs and Services records: financial reports and records, (in accordance with generally accepted accounting principles), accident and incident reports, program registration reports, and customer comments; and
 - Building records: any WorkSafeBC safety inspection records, energy consumption logs, emergency lighting inspection records, annual building inspection reports, health department inspections and reports, preventative maintenance records, fire and emergency drill records, or other such similar records that the Society may acquire from time to time.
- b) on seventy-two (72) hours' notice, permit the City, its accountants, and other representatives, at the City's expense and at all reasonable times, to examine and make copies of any and all documents listed in this section, and any other documents under the control of the Society that relate to the Building, and to audit the same; and
- c) upon termination or expiration of this Agreement, and within the limitations of privacy legislation, surrender all records, except those relating to the Society's staff, to the City.

8. REPAIRS, MAINTENANCE AND CHANGES TO THE BUILDING

8.1 Routine Maintenance and Repairs

Throughout the Term, the Society shall, at its sole expense, clean, maintain, and keep the Building and the License Areas, and all fixtures and appurtenances thereon, in good repair, consistent with standards of repair generally accepted in British Columbia with respect to comparable premises.

Routine maintenance means any action taken that can prolong the life expectancy of facility equipment, including plumbing and electrical, and prevents premature operations failures.

Repair costs are defined as the costs incurred to bring an asset back to an earlier condition or to keep the asset operating at its present condition. Any individual repair that costs more than the residual value should result in a replacement, as opposed to a repair.

The Society is responsible for and must complete all routine maintenance, inspections, and repairs according to Schedule D, and adhere to all Technical Safety BC regulations with respect to the Building and the License Areas necessary for the Society's use, occupation, and operation of the Building and the License Areas.

The Society must make such repairs in a timely manner. If the Society fails to fulfil its maintenance responsibilities following any provision in this Agreement, the City may, at its sole discretion, declare the Society to be in default of this Agreement. At the end of the Term, the Society must surrender the Building and the License Areas to the City in good repair, excepting reasonable wear and tear.

8.2 Society Maintenance Limit

For electrical, plumbing, and building fabric, the Society is responsible for the repairs and maintenance up to the amount specified below for each event (the "Society Maintenance Limit"). Costs over and above the Society Maintenance Limit are the responsibility of the City. For clarity, in 2023 the Society would be responsible for the first one thousand five hundred dollars (\$1,500.00) of an electrical repair, and the City would be responsible for the remainder of the expense.

Year	Society Maintenance Limit per event
2023	\$1,500.00
2024	\$1,550.00
2025	\$1,600.00
2026	\$1,650.00
2027	\$1,700.00

a) Electrical

Electrical maintenance and repairs including the replacement of all light bulbs, fixtures, fuses, circuit breakers, switches, and related electrical control components.

b) Plumbing

Plumbing maintenance, repair, and replacement.

c) Building Fabric

Building fabric repair and replacement, including all interior doors, interior windows and glass, floor, fixtures, walls, ceilings, building infrastructure, and all related hardware that controls entry or exit from all internal areas.

Clarification of this section is provided in Schedule F - Society Maintenance Limit Clarification.

8.3 Substantial Maintenance and Repairs

The City, in consultation with the Society, will maintain and repair the Building's structural members, foundations, roofs, external facades, doors, and windows using funds from the Reserve Fund described in Section 6.2, at the time of the proposed maintenance or repair.

8.4 Inspections Performed by the Society

The Society covenants and agrees to conduct, at a minimum, the inspections for the Building as outlined below:

a) Electrical

The Society's contractor shall act as the Field Safety Representative (the "FSR") for the Building, and the Society shall provide the City with an annual inspection report from the FSR as part of the annual reporting process. The report will document the observed status of the electrical system, confirmation of completed preventative maintenance, and any recommended capital repairs.

The Society shall complete inspections of the generator associated with the electrical system at a minimum in accordance with the applicable legislation.

b) Plumbing

The Society shall provide an annual inspection report from a contractor documenting the observed status of the plumbing systems, confirmation of completed preventative maintenance, and any recommended capital repairs.

All completed inspection reports under this section must be submitted to the City upon receipt by the Society and are also required to be submitted as part of the annual reporting process.

8.5 Contractors

All maintenance and repair work completed on the Building and License Areas must be performed by qualified and approved contractors as defined in this section, not volunteers.

For work on electrical and plumbing components and systems, the Society will exclusively engage contractors that have been selected by the City. The City will provide an update list of the selected contractors annually.

All other building contractors must be approved by the City and:

- a) be qualified to perform such work;
- b) carry a minimum of two million dollars (\$2,000,000.00) of commercial liability insurance;
- c) carry valid WorkSafeBC coverage; and
- d) act as the Prime Contractor for all work to be done.

8.6 Restoration Work / Non-Fire Building Emergencies

The Society acknowledges and agrees that upon identifying a Building emergency, including, but not limited to, flooding or structural concerns, the Society shall:

- a) take immediate steps to respond to the emergency to the extent that any immediate risk to the safety of any persons or property is alleviated; and
- b) notify the City of the emergency as soon as practicable, but in any event no later than four (4) hours from the discovery of the emergency; failure to do so may result in the Society being financially responsible for any damage incurred.

A City representative can be reached by calling the non-emergency line at the fire department 250-469-8577, 24 hours a day, 7 days a week.

8.7 Minimum Work Standards

The Society must ensure that any repairs or work with respect to the Building and the License Areas done by or on behalf of the Society:

- a) do not affect any Building systems or the License Areas;
- b) meet or exceed the standards of material and construction employed in the original construction of the Building and the License Areas; and
- c) comply with all applicable laws, statutes, enactments, regulations, bylaws, and orders from to time in force, including the applicable building code and bylaws of the City.

8.8 Annual Onsite Meeting

The Society and the City shall meet annually to conduct an onsite walk through the Building to identify items that require maintenance and future capital replacement.

The walk-through will be organized by the City, and meeting minutes and action items will be distributed to all attendees. The Society consents to complete the action items as per a mutually agreed upon time frame. If the Society fails to complete the action items, any contingent damage as a result of the deferred repairs is the responsibility of the Society.

8.9 Keys and Access

The Society is to provide the City access to the Building upon request, within a reasonable time frame. The Society is to also provide the City with master key(s) and necessary security information for the Building.

If, in the City's sole opinion, the Society does not provide adequate Building access, the City reserves the right to take over the management of the keys and access to the Building. Should the City take over the management of the Building keys, the Society covenants that it will not change the locks on the building, copy the keys, or hand them out. The City will maintain a

record of the keys and to whom they have been issued. If the locks need repair or replacement, the Society will inform the City.

8.10 Environmental Stewardship and Sustainability

The Society must strive to operate the Building in an environmentally sensitive manner and pursue "green" initiatives through the implementation of innovative and responsible environmental practices. This includes taking active steps to reduce its carbon footprint, reduce waste, promote energy conservation, and ensure the on-going efficiency of the operation of the Building.

The Society covenants with the City:

- a) that the Society will co-operate with the City in the conservation of all forms of energy in the Building;
- b) that the Society will comply with all laws, bylaws, regulations, and orders relating to the conservation of energy and affecting the Building; and
- c) that the Society will, at its own cost, comply with reasonable requests and demands of the City made with a view of such energy conservation.

8.11 Energy Expense Reporting

The Society agrees to grant permission to the utility providers (i.e. FortisBC) to provide the City with all utility billing reporting information pertaining to the Building.

8.12 Video Monitoring and Security

The Society is solely responsible for the installation and ongoing operations and maintenance of all internal video monitoring and security systems. Installation requires City consultation with regard to penetrating the building envelope. The Society shall take all reasonable steps to ensure that the Building, equipment, staff, volunteers, and visitors are secure at all times, with the use of a monitored alarm system, security guards when appropriate, and other measures the Society considers necessary. Further, it is the responsibility of the Society to ensure all video monitoring and security systems consider all the appropriate legislation governing their use. The Society shall grant the City access to the security footage upon request.

8.13 Capital Improvements and Use of the Reserve Fund

The Society and the City agree that the Reserve Fund may be used for capital improvements, including maintenance or repair costs incurred by the City. The City agrees that it is obligated to consult with the Society for use of the Reserve Fund for the following purposes:

- a) any substantial maintenance or repair to the Building to be performed by the City under Section 8.3; and
- b) any landlord responsibilities.

8.14 Society's Construction of Buildings, Structures and Other Improvements

The Society must not construct, erect, or install or cause to be constructed, erected, or installed any buildings, structures, improvements, extensions, installations, alterations, additions, renovations, fixtures, signage, or other constructions in, on, over, under, around, and to the Building or the License Areas, or alter the existing state of the Building in any way, without the prior written consent of the City, which consent may be withheld for any reason at the City's sole discretion. If the City gives such consent, the Society must obtain the City's prior approval of drawings and specifications for such work, must do such work strictly in accordance with the approved drawings and specifications, and must comply with any conditions the City imposes with that approval. The Society is responsible for applying for the required permits and requesting the necessary construction inspections, including the final sign-off. The cost of construction and design of the improvements are the sole responsibility of the Society.

8.15 Ownership of Improvements at Termination

At the expiry of the Term or earlier termination of this Agreement, any improvements, extensions, installations, alterations, renovations, or additions to the Building and the License Areas, whether done by or on behalf of the Society or not, are forfeited to and become the permanent property of the City.

8.16 Builders Liens

The Society shall promptly discharge any builders' lien or other lien or claim of lien which may be filed against the title to the Lands relating to any improvements, work, or construction that the Society undertakes on the Lands, and to comply at all times with the *Builders Lien Act* [SBC 1997] Chapter 45, as amended from time to time, in respect of any improvements, work, or construction undertaken on the Lands.

8.17 Capital Expenditures

The City acknowledges responsibility for the long-term operational effectiveness of the Building.

- a) The City will include appropriate funding in the City's capital planning consistent with other City public buildings over the life of this Agreement. Future capital expansion, renovation, and building development not identified in this Agreement will be cooperatively and collaboratively discussed, and facilitated by the City and the Society.
- b) The Society shall not make any application for grant funding for capital expansion or renovation of the Building without first receiving express written approval from the City.

8.18 Future Plans For the Building

- a) The parties acknowledge and agree that the City's future plans for the Building may require the demolition of the facility or a portion thereof, and the repurposing of the site(s), which may or may not include the construction of new buildings.

- b) The Society hereby acknowledges and agrees that at any time during the Term, the City may, in its sole discretion and upon providing at least twelve (12) months' written notice to the Society, demolish any building and/or structure on the Lands, notwithstanding any other provision of this Agreement.
- c) If the City exercises its right to demolish in accordance with this section:
- the City will work collaboratively with the Society to review options for alternative locations but is under no obligation to provide the Society with alternative space;
 - within twelve (12) months of receiving the notice under 8.18 (b), the Society will fully vacate and cease occupation of the facility to be demolished;
 - this Agreement will automatically be amended by deleting all references to the demolished facility, thereby terminating associated rights and obligations relating to the demolished facility, and provision of programs in the demolished facility; and
 - all other terms and conditions of this Agreement shall remain in force and binding on the parties.

8.19 City's Construction of Buildings, Structures, and Other Improvements

The Society acknowledges and agrees that the City may, in consultation with the Society, construct or cause to be constructed certain leasehold improvements in, on, over, under, around, or to the Building ("Future Construction"), the design, construction, and performance of which is in the sole discretion of the City. If the City undertakes any Future Construction, the Society:

- a) acknowledges and agrees that the Future Construction may be performed during the Term;
- b) shall grant full access to the Building to the City and its elected officials, officers, employees, contractors, agents, and others for purposes relating to the Future Construction; and
- c) acknowledges and agrees that the Future Construction may result in the temporary closure, in whole or in part, of the Building and/or the License Areas, and may require the interruption, disruption, rescheduling, or cancellation of regularly scheduled programs and services offered at the Building.

8.20 Damage or Destruction of the Building

If, during the Term, the Building is damaged or destroyed by any cause whatsoever, or if a major building system in the Building fails such that in the opinion of the City the Building is rendered unfit for use by the Society, the City may or may not, in its sole discretion, repair, rebuild, or replace the building system or the Building.

If the City chooses not to repair, rebuild, or replace the building system or the Building, the City will work collaboratively with the Society to review options for alternative locations. If the City and the Society cannot agree on an alternative location, then the City may, in its sole discretion:

- a) provide three (3) months' written notice to the Society that this Agreement is terminated, and the Society shall vacate the Building as if this Agreement had expired or been terminated for cause; or
- b) negotiate the continuation of this Agreement deleting all references and obligations related to the destroyed Building and the provision of programs and services.

8.21 Expropriation

If an authority with expropriation power expropriates all or a material part of the Building, the City may give reasonable notice to the Society, but in no case less than thirty (30) days, and the Society shall have no claim for compensation against the City or the expropriating authority for any interest in land, except that where compensation is available for disturbance, in which case the Society may make such a claim to the expropriating authority.

8.22 No Capital Liabilities

Despite any other provision of this Agreement, nothing in this Agreement obligates the City to make any expenditure of a capital nature and nothing in this Agreement shall be interpreted in a manner that results in the City having expressly or implicitly incurred a 'liability of a capital nature' as that phrase is used in the *Municipal Liabilities Regulation*, B.C. Reg. 201/2015, as amended from time to time.

9. ENVIRONMENTAL MATTERS

9.1 Definitions

In Section 9, the below terms shall have the following meanings:

- a) "**Contaminants**" is defined in the *Environmental Management Act* [SBC 2003] Chapter 53, as amended from time to time, as: "any biomedical waste, contamination, effluent, pollution, recyclable material, refuse, hazardous waste or waste and any radioactive materials, asbestos materials, urea formaldehyde, underground or above ground tanks, pollutants, contaminants, deleterious substances, dangerous substances or goods, hazardous, corrosive or toxic substances, special waste or waste of any kind or any other substance the storage, manufacture, disposal, treatment, generation, use, transport, remediation or Release into the Environment of which is now or hereafter prohibited, controlled or regulated under Environmental Laws";
- b) "**Environment**" includes the air (including all layers of the atmosphere), land (including soil, sediment deposited on land, fill, and lands submerged under water), and water (including oceans, lakes, rivers, streams, ground water, and surface water);

- c) **"Environmental Laws"** means any past, present, or future common laws, enactments, statutes, laws, regulations, orders, bylaws, standards, guidelines, permits, and other lawful requirements of any federal, provincial, municipal, or other governmental authority having jurisdiction relating in any way to the Environment, environmental protection, health, occupational health and safety, product liability, or transportation of dangerous goods, including the principles of common law and equity; and
- d) **"Release"** includes any release, spill, leak, pumping, pouring, emission, emptying, discharge, injection, escape, leaching, migration, disposal, or dumping.

9.2 Society's Representations and Warranties

The Society represents and warrants to the City, and acknowledges that the City is relying on such representations and warranties in entering into this Agreement, that as of the date of this Agreement:

- a) except as disclosed to the City in writing, the Society is not, and has never been, subject to any charge, conviction, a notice of defect or non-compliance, work order, pollution abatement order, remediation order, or any other proceeding under any Environmental Laws; and
- b) except as disclosed to and approved in writing by the City, the Society's business at the Building, the License Areas, or the Lands does not involve the sale, storage, manufacture, disposal, handling, treatment, generation, use, transport, refinement, processing, production, remediation, Release into the Environment of, or any other dealing with any Contaminants.

If any of the representations and warranties contained in this section are untrue or incorrect in any material respect, the same shall constitute a breach of this Agreement by the Society and shall be subject to the provisions of Section 13 of this Agreement.

9.3 Condition of the Building

The Society acknowledges and agrees that the City has made no representations or warranties with respect to the environmental condition of the Building, the License Areas, or the Lands, and is leasing the Building to the Society under this Agreement on an "as is, where is" basis with respect to its environmental condition. Prior to taking possession of the Building under this Agreement, the Society has performed such investigations of the Building, the License Areas, and the Lands as it considered appropriate and is satisfied as to their environmental condition.

9.4 Compliance with Environmental Laws and Use of Contaminants

The Society covenants and agrees with the City to:

- a) carry on and conduct its activities in, on, and from the Building, the License Areas, and the Lands in compliance with all Environmental Laws;

- b) not permit the storage, use, handling, manufacture, unloading, loading, treatment, disposal, or introduction into the Environment of any Contaminants in, on, under, or from the Building or the License Areas, or the Lands, except in compliance with all Environmental Laws;
- c) immediately notify the City of the occurrence of any of the following and provide the City with copies of all relevant documentation in connection therewith:
 - a Release of Contaminants in, on, or about the Building, the License Areas, the Lands, or any adjacent land; or
 - the receipt of any citation, directive, order, claim, litigation, investigation, proceeding, judgment, letter, or other communication from any person that is related to any Environmental Law;
- d) promptly provide to the City a copy of any environmental site assessment, audit, report or test results relating to the Building, the License Areas, or the Lands conducted at any time by or for the Society;
- e) if the City suspects that the Society has not complied with its obligations under this section, obtain from an independent environmental consultant approved by the City an environmental site assessment, audit, report, or testing of the Building or the License Areas, and conduct or cause to be conducted any additional investigations that the environmental consultant may recommend all in order to determine compliance of the Building or the License Areas with Environmental Laws; and
- f) promptly remove any Contaminants arising from the Society's use or occupation of the Building, the License Areas, or the Lands in a manner that conforms to Environmental Laws governing their removal.

9.5 Confidentiality of Environmental Reports

The Society shall maintain all environmental site investigations, assessments, audits, and reports relating to the Building, the License Areas, or the Lands in strict confidence and shall not disclose their terms or existence to any third party (including without limitation, any governmental authority) except as required by law, to the Society's professional advisers and lenders on a need-to-know basis or with the prior written consent of the City, which consent may be unreasonably withheld.

9.6 Authorizations

The Society shall promptly provide to the City, on request, such written authorizations as the City may require from time to time to make inquiries of any governmental authorities regarding the Society's compliance with Environmental Laws.

9.7 Ownership of Contaminants

Notwithstanding any rule of law to the contrary, any Contaminants or leasehold improvements or goods containing Contaminants brought onto, used at, or Released from, the Building, the License Areas, or the Lands by the Society or any person for whom it is in law responsible shall be and remain the sole and exclusive property of the Society and shall not become the property of the City, notwithstanding the degree of their affixation to the Building, the License Areas, or the Lands, and notwithstanding the expiry or earlier termination of this Agreement. This section supersedes any other provision of this Agreement to the contrary.

9.8 Survival of Society's Obligations

The obligations of the Society under this Section 9 (including, without limitation, the Society's indemnity, its obligation to remove and remediate Contaminants, and its covenant of confidentiality) shall survive the expiry or earlier termination of this Agreement.

10. MANAGEMENT OF THE BUILDING AND PROVISION OF SERVICES

10.1 No Discrimination

The Society hereby covenants and agrees to provide the Core Programs and Services, and any other services offered at the Building, in accordance with the *Human Rights Code* [RSBC 1996] Chapter 210, as amended from time to time, and best practices related to equity and inclusion.

10.2 Employee Standards

The Society shall hire, train, supervise, and remunerate, or cause to be hired, trained, supervised, and remunerated, all employees, contractors, and volunteers required for the provision of the Core Programs and Services.

10.3 WorkSafeBC Coverage

The Society shall, in its use of and activities on the Building and the Lands, comply with the *Workers Compensation Act* [RSBC 2019] Chapter 1 (the "WCA"), as amended from time to time, and all regulations and orders from time to time in force thereunder, including the *Occupational Health and Safety Regulation*, B.C. Reg. 222/2021; and, upon request from the City, provide evidence of any required registration under that WCA and evidence of compliance with any requirement under that WCA to make any payments or pay assessments. In addition, the Society shall be the "prime contractor" for the Building under the WCA, and shall fulfill all associated obligations, including ensuring that the activities of any employers, workers, or other persons in, on, or under the Building relating to occupational health and safety are coordinated; and further, by doing everything that is reasonably possible to establish and maintain a process that shall ensure compliance with the WCA and regulations thereunder, including the *Occupational Health and Safety Regulations*, B.C. Reg. 222/2021.

10.4 Incidental Rights

The Society may:

- a) offer programs and services at the Building in addition to the Core Programs and Services, to reflect community needs or respond to unique market opportunities;
- b) enter into sponsorship, media, or advertising agreements ("Endorsements") involving the Building or the Core Programs and Services, provided that the Endorsements are:
 - appropriate for families and children;
 - consistent with the parties' joint values of equality, accessibility, health, respect, and the dignity of the individual;
 - respectful of the neighbourhoods surrounding the Building and all scheduled programs and services at the Building;
 - appropriate to the aesthetics of the Building; and
 - the Society has the written consent of the City and adheres to the requirements of Council Policy 376 – Corporate Sponsorship and Advertising and Council Policy 343 – Civic Community Facility Naming Policy, as amended from time to time, prior to entering into any naming agreement for any portion of the Building. This requirement does not apply to any interior room in the Building which was named prior to the execution of this Agreement.
- c) undertake fundraising activities at the Building for the Society's benefit; and
- d) use the Building for the Society's office and headquarters during the Term.

10.5 City Acknowledgement

The Society will acknowledge the facility's relationship to and the operating support of the City through the following:

- a) **Building Contribution:** The City's contributions to the Building, or ownership of the Building as an asset, will be acknowledged in the form of an external plaque or signage, as determined and produced by the City. All costs associated with the production and placement of external recognition signage is to be incurred by the City.
- b) **Operational Grant Contribution:** Financial contributions from the City funding operational needs of the Society should be recognized at a consistent level with all other major funding contributors on any internal collateral that is used to recognize financial contributors (i.e. donor wall, plaque or signage at the information desk). The City can also work with the Society and discuss what further acknowledgement may be appropriate, based on funding levels and available space within the Building.

Example: The Rotary Centre for the Arts gratefully acknowledges the financial assistance of City of Kelowna.

In addition, operational funding contributions from the City should be recognized on the Society's primary website, as well as in any principal collateral, such as the Society's

annual report, main brochure, and any materials that would not otherwise be produced without the City's funding.

- c) **Project or Program Grant Contribution:** Financial contributions from the City funding specific programs or projects (i.e. Project Grants) should be recognized at a consistent level with all other project or program funding contributors.

This includes City recognition of any materials that are exclusively or primarily produced because of the funding that the City provides.

Example: *This program/project is made possible with financial support from the City of Kelowna.*

11. SOCIETY INSURANCE

11.1 Society to Provide

The Society shall procure and maintain during the Term, at its own expense and cost, the insurance policies listed in Section 11.2 of this Lease. For clarity, the insurance requirements set out in Section 11.2 are minimum requirements and are not to be interpreted in a manner that limits the Society's obligations under this Agreement. The Society shall be responsible for obtaining and maintaining such additional insurance as would a prudent tenant, having similar obligations to those of the Society under the terms of this Agreement. Further, all insurance policies held pursuant to this Agreement shall contain an undertaking by the insurer to notify the City in writing not less than thirty (30) days before any material change, cancellation, or termination.

11.2 Society's Insurance Obligations

At a minimum, the Society shall, without limiting its obligations or liabilities under any other contract with the City, procure and maintain, at its own expense and cost, the following insurance policies:

- a) Directors and Officers Liability Insurance;
- b) Comprehensive General Liability Insurance including the following terms:
 - providing for an inclusive limit of not less than five million dollars (\$5,000,000.00) for each occurrence or accident;
 - providing for all sums which the Society shall become legally obligated to pay for damages because of bodily injury (including death at any time resulting there from) sustained by any person or persons, or because of damage to or destruction of property caused by an occurrence or accident arising out of or related to this Agreement, services and/or occupancy under this Agreement, or any operations carried out in connection with this Agreement;

- coverage for Products/Completed Operations, Blanket Contractual, Contractor's Protective, Personal Injury, Contingent Employer's Liability, Broad Form Property Damage, and Non-Owned Automobile Liability; and
 - a Cross Liability clause providing that the inclusion of more than one Insured shall not in any way affect the rights of any other Insured hereunder, in respect to any claim, demand, suit, or judgement made against any other Insured.
- c) All risks (including flood and earthquake, as required by the City) property insurance (contents, tenant improvements, etc.) in an amount equal to one hundred percent (100%) of the full replacement cost.
- insuring all property owned by the Society, or for which the Society is legally liable, or installed by or on behalf of the Society, and located within the Building including, but not limited to, fittings, installations, alterations, additions, partitions, and all other leasehold improvements. In the event of loss or damage, the Society shall, if so requested by the City, forthwith replace such lost or damaged equipment or chattels;
 - insuring the Society's inventory, furniture, and movable equipment to the extent that such insurance is commercially available;
 - providing business interruption insurance to the Society for loss of revenue resulting from or due to loss or damage to equipment or the Building;
 - providing a period of indemnity which shall not be less than twelve (12) months from the date of loss or damage; and
 - naming the City as a first loss payee with respect to any loss or damage to the permanent collection maintained by the Society on the policy required by this section.
- d) Insurance upon all plate glass in or which forms a boundary of the Building in an amount sufficient to replace all such glass.

The policy(s) set out in Section 11.2 shall contain a waiver of any subrogation rights that the Society's insurer may have against the City. The Society hereby waives its rights of subrogation against the City.

11.3 City's Insurance Obligations

The City shall maintain, through the Term, in those reasonable amounts and with those reasonable deductions that a prudent owner of similar property would maintain, having regard to the size, age, and location:

- a) All risk insurance on the Building, License Areas, and the Common Area, including all machinery, boilers, and equipment contained therein and owned by the City (excluding property that the Society is required to insure pursuant to this Agreement);

- b) General liability insurance with respect to the City's operations at the Building; and
- c) Whatever other forms of insurance the City considers advisable.

11.4 Automobile Liability Insurance

The Society shall procure and maintain insurance policies covering all motor vehicles owned, operated, and used or to be used by the Society directly or indirectly related to this Agreement, services and/or occupancy under this Agreement, or any operations carried out in connection with this Agreement. The limit of liability shall not be less than five million dollars (\$5,000,000.00) inclusive of loss or damage, including personal injuries and death resulting from any one accident or occurrence.

11.5 The City Named as Additional Insured

The policies required by Section 11.2 shall provide that the City is named as an "Additional Insured" thereunder and that said policies are primary, without any right of contribution from any insurance otherwise maintained by the City.

11.6 Society's Subcontractors and Subleasees

The Society shall require each of its subcontractors and subleasees to provide comparable insurance to that set out in Schedule E – Insurance Certificate.

11.7 Certificates of Insurance

The Society agrees to submit certificates of insurance in the form attached as Schedule E (the "Certificates of Insurance") for itself and all of its subcontractors to the City before the commencement of this Agreement, the occupancy of the Building, the provision of services, and/or the use of the Building, Lease Areas, Common Area, and Lands under this Agreement. No review or approval of any insurance certificate or insurance policy by the City derogates from or diminishes the City's rights under this Lease.

11.8 Other Insurance

After reviewing the Society's Certificates of Insurance, the City may require other insurance or alterations to any applicable insurance policies in force during the Term and will give notifications of such requirements. Where other insurances or alterations to any insurance policies in force are required by the City and result in increased insurance premiums, such increased premium shall be at the Society's expense.

11.9 Additional Insurance

The Society may take out such additional insurance, as it may consider necessary and desirable. All such additional insurance shall be at no expense to the City. The Society shall ensure that all of its subcontractors are informed of and comply with the City's requirements set out in Schedule E.

11.10 Insurance Companies

All insurance, which the Society is required to obtain with respect to this Agreement, shall be with insurance companies registered in and licensed to underwrite such insurance in the Province of British Columbia.

11.11 Failure to Provide

If the Society fails to do all or anything which is required of it with regard to insurance, the City may do all that is necessary to effect and maintain such insurance in the name and at the expense of the Society, and the Society shall repay any and all costs expended by the City within twenty one (21) days of receipt of an invoice. For clarity, the City has no obligation to obtain any insurance required to be maintained by the Society under this Agreement.

11.12 Non-Payment of Losses

The failure or refusal to pay losses by any insurance company providing insurance on behalf of the Society or any subcontractor shall not be held to waive or release the Society or subcontractor from any of the provisions of the insurance requirements or this Agreement with respect to the liability of the Society otherwise. Any insurance deductible maintained by the Society or any subcontractor under any of the insurance policies is solely for their account and any such amount incurred by the City will be recovered from the Society as stated in Section 11.11.

12. SOCIETY INDEMNITY

The Society must save harmless, release, and indemnify the City and its elected and appointed officials, officers, employees, agents, successors and assigns, from any and all liabilities, actions damages, claims, losses, costs and expenses whatsoever (including without limitation, the full amount of all legal fees, costs, charges and expenses whatsoever) in any way directly or indirectly arising from the occupation, use, activities or actions of the Society in, on or from the Building, License Areas, Common Area, or the Lands, or any act or omission of the Society. The obligations of the Society under this Section 12 shall survive the expiry or earlier termination of this Agreement.

13. DEFAULTS, TERMINATION AND EXPIRATION

13.1 City May Cure Default

If the Society fails to observe, comply with, keep, or perform any of its covenants, agreements, or obligations under this Agreement, the City may, but is not obliged to, at its discretion and without prejudice, take all steps considered necessary to rectify or cure the default and all costs of so doing, including the costs of retaining professional advisors, shall be payable immediately by the Society upon receipt of an invoice. Nothing in this Agreement obligates the City to rectify or cure any default of the Society, but should the City choose to do so, the City shall not

be liable to the Society for any act or omission in the course of rectifying or curing or attempting to rectify or cure any default.

13.2 Termination Due to Default

If and whenever:

- a) the Society does not fully observe, keep, or perform each and every term, covenant, agreement, stipulation, obligation, condition, and provision of this Agreement to be observed, kept, and performed by the Society, and persists in such default for thirty (30) days after written notice by the City;
- b) the Society ceases to exist as a non-profit Society in good standing in the records of the British Columbia Corporate Registry;
- c) any proceedings towards dissolution or winding up of the Society are initiated;
- d) the term or any of the goods or chattels in the Building are at any time seized or taken in execution or attachment by any creditor of the Society or under a bill of sale or chattel mortgage;
- e) a writ of execution is issued against the goods and chattels of the Society;
- f) the Society makes any assignment for the benefit of creditors or becomes insolvent or bankrupt;
- g) the Society is in default in the payment of Rent, the Reserve Fund Contributions, or any other amount payable under this Agreement, and the default continues for thirty (30) days after written notice by the City to the Society;
- h) the Building or the Lands, or any part of it, is destroyed or damaged by any cause so that in the opinion of the City the Building is no longer reasonably fit for use by the Society for the purposes set out in this Agreement for any period over sixty (60) days; or
- i) the Society vacates or abandons the Building or any part of it, or uses or permits or suffers the use of the Building for any purpose other than the purposes permitted by this Agreement, and such default persists for fourteen (14) consecutive days after written notice by the City,

then the City may, in its sole discretion, terminate this Agreement, at which time: the Rent, the Reserve Fund Contributions, and all outstanding levies and charges shall become immediately due and payable; the Term shall immediately become forfeited and void; and, the Society must immediately cease all use and occupation of the Building and the Lease Areas and vacate, deliver up possession of the Building and License Areas. The City may, without notice or any form of legal process, and without any adherence to public law duties or procedural fairness or the principles of natural justice, forthwith re-enter the Building and take possession of the Building.

13.3 Distress

If the Rent or Reserve Fund Contributions payable by the Society are in arrears for thirty (30) days or more, the City or a person authorized in writing by the City may enter upon or into the Building and seize any goods or chattels and may sell the same.

13.4 Termination without Cause

Notwithstanding the rest of this Agreement, either party may terminate this Agreement upon at least six (6) months' written notice to the other party.

13.5 Return of Operating Grant

The Society shall immediately upon expiration of the Term or the earlier termination of this Agreement, release, relinquish, and return pro rata portion of the Operating Grant to the City, to be calculated based upon the date of expiration of the Term or the termination of the Agreement, whichever applies.

13.6 Overholding

If the Society continues to occupy any or all of the Building after the expiration of the Term or the earlier termination of this Agreement, such holding over will not constitute a renewal of this Agreement. In such case, the City, at its option, may elect to treat the Society as one who has not vacated at the end of the Term and to exercise all of its remedies in that situation, or may elect to construe such holding over as a tenancy from month to month, subject to all the terms and conditions of this Agreement except as to the Term. For clarity, this section does not authorize or permit the Society to overhold.

13.7 Compensation Upon Termination

The Society shall not make any claim for compensation, in damages or otherwise, upon the termination or expiry of this Agreement. If the City terminates this Agreement, the City retains the right to proceed at law against the Society for all of the Rent and Reserve Fund Contributions and other loss or damage and costs, including all prospective losses or prospective damages suffered or to be suffered by the City arising from the default of the Society under this Agreement.

13.8 State of the Building and Lands at Termination

If the Society fails to leave the Building and the Licence Areas in a condition the same or largely similar to the condition the Building and License Areas were in immediately following the most recent inspection by the City, notwithstanding reasonable wear and tear, the City may take such action as the City deems necessary to rectify such breach on behalf the Society. In that instance, the Society must, on demand, compensate the City for all costs incurred by the City.

13.9 Vacate Upon Termination, Survival

At the termination of this Agreement, whether by effluxion of time or otherwise, the Society shall vacate and deliver up possession of the Building in good repair and in a clean, safe, and uncontaminated condition, and the Society shall surrender all keys to the Building to the City.

13.10 Additional Rights of Re-Entry

If the City shall re-enter the Building or terminate this Agreement, then:

- a) notwithstanding any such termination or the Term thereby becoming forfeited and void, the provisions of this Agreement relating to the consequences of termination shall survive;
- b) the City may re-enter and retake possession of the Building and the Collection, and the Society hereby releases the City from all actions, proceedings, claims, and demands whatsoever for or in respect of any such entry or any loss or damage in connection therewith or consequential thereupon; and
- c) the City may re-let the Building or any part thereof for a term or terms, which may be less or greater than the balance of the Term, and may grant reasonable concessions in connection therewith.

13.11 Delivery of Information

At the expiry or earlier termination of this Agreement, the Society will deliver to the City a detailed list of all computer software, with the assignment of all rights, for management and recording of all original paper and electronic information about the Facility and its operations and maintenance.

13.12 Remedies Cumulative

No reference to or exercise of any specific right or remedy by the City prejudices or precludes the City from any other remedy, whether allowed at law or in equity, or expressly provided for in this Agreement.

14. GENERAL TERMS

14.1 Assignment and Subleasing or Sublicensing

The Society shall not assign this Agreement and may not mortgage this Agreement by assignment or sublease. The Society may only rent or sublet interior portions of the Building, and may retain all revenues derived therefrom, to provide a wider variety of amenities and further the objectives of the Society. A rental or sublet of the Building to a subleasee may only occur on the following basis:

- a) the Society establishes and adheres to policies and guidelines which ensure a fair process for individuals and organizations wishing to obtain a rental or sublease;

- b) the Society ensures that rental and sublease rates are fair, reasonable, and consistent with the operation of a first-class art centre;
- c) the Society sublease rates include payment of property tax as part of the rent;
- d) the Society requires the subleasees to enter into a rental contract or sublease in a form acceptable to the City;
- e) the Society ensures that no rental or sublease agreement has a term that exceeds the Term of this Agreement; and
- f) the Society requires that subleases, at all times, have insurance in place pursuant to Section 11.6 of this Agreement.

14.2 Society's Representations and Warranties

The Society represents and warrants that it:

- a) is a not-for-profit Society validly incorporated and in good standing under the laws of British Columbia and does not conduct its activities with a view to obtaining, and does not distribute, profit or financial gain to its members;
- b) has the power and capacity to enter into and carry out its obligations under this Agreement; and
- c) has completed all necessary resolutions and other preconditions to the validity of this Agreement.

14.3 City's Powers Unimpaired

Nothing contained or implied in this Agreement affects or prejudices the City's rights, powers, duties, or obligations in the exercise of its functions pursuant to the *Local Government Act* [RSBC 2015] Chapter 1, the *Community Charter*, or its rights and powers under any enactment, to the extent the same apply to the Building or the Lands, all of which may be fully and effectively exercised concerning the Building or the Lands as if this Agreement had not been fully executed and delivered.

14.4 Freedom of Information

The parties acknowledge, agree, and consent to the disclosure of this Agreement as a matter of public record, and further acknowledge and agree that applicable laws may require disclosure of information, provided by one party to the other pursuant to or in connection with this Agreement.

14.5 Entire Agreement

The provisions in this Agreement constitute the whole of the agreement between the parties and supersede all previous communications, representations, warranties, covenants, and agreements, whether verbal or written, between the parties with respect to the subject matter of this Agreement.

14.6 Amendment

This Agreement may not be modified or amended except in writing signed by the City and the Society.

14.7 Enurement

This Agreement shall enure to the benefit of and be binding upon the City and the Society and their respective successors and permitted assigns, if any.

14.8 City Interests

The Society acknowledges and agrees that the City may assign, transfer, mortgage, subdivide, and otherwise deal with its interests in the Building, the License Areas, Lands or any portion thereof, whether land or improvement, without the consent of the Society.

14.9 Attornment

If any person shall, through the City, succeed to the rights of the City under this Agreement or to ownership of the Building then, upon the request of the party succeeding to the City's rights hereunder, the Society shall attorn to and recognize the new owner(s) as the landlord of the Society under this Agreement and shall promptly execute and deliver any instrument that such party may reasonably request to evidence the attornment. In the event of any other transfer of interest of the City hereunder, upon the written request of the transferee and the City, the Society shall attorn to and recognize the transferee as the landlord of the Society under this Agreement and shall promptly execute and deliver any instrument that the transferee and the City may reasonably request to evidence the attornment, provided that the transferee agrees with the Society to become the landlord hereunder and to assume the obligations of the City hereunder that are to be performed by the transferee after the transfer.

14.10 Certificates

The City and the Society agree that at any time and from time to time upon not less than thirty (30) days prior request by the other party, each will execute, acknowledge, and deliver to the other a statement in writing certifying:

- a) that this Agreement is unmodified and in full force and effect or, if there have been modifications, that the same is in full force and effect as modified and identifying the modifications;
- b) the dates to which the Rent, Reserve Fund Contributions, and other charges or fees have been paid;
- c) that, so far as the maker of the statement knows, without having conducted any searches or made any particular inquiries, the party who requests the statement is not in default under any provisions of this Agreement or, if in default, the particulars thereof; and
- d) any other reasonable information which is requested.

14.11 Not in Registrable Form

The Society acknowledges and agrees that the City is under no obligation at any time to deliver this Agreement or any instrument creating this Agreement to the Society in a form registrable in the Land Title Office.

14.12 Notice

Any notice, request, direction, or other communication (any of which is a "Notice") that is to be given or made by a party under this Agreement, shall be in writing, and if to the City, either delivered to an executive officer of the City or delivered or mailed (by prepaid registered mail) to the City at the address set out on page 3 of this Agreement, or if the City has given the Society Notice of another address in Canada to which notices to the City under this Agreement are to be given, then to the last such address of which the Society has been given Notice or sent by e-mail; and if to the Society, either delivered to the Society personally (or to a partner or officer of the Society if the Society is a firm or corporation) or delivered or mailed (by prepaid registered mail) to the Society at the Building or sent by email, addressed as follows:

- a) To the City: City of Kelowna
E-mail Address: culture@kelowna.ca
Attention: Manager of Cultural Services
- b) To the Society: Kelowna Visual and Performing Arts Centre Society
E-mail Address: director@rotarycentreforthearts.com
Attention: Executive Director

Every such Notice shall be deemed to have been given when delivered or, if mailed as aforesaid, upon the third business day after the day of mailing thereof in Canada, provided that if mailed, should there be a mail strike, slowdown, or other labour dispute which might affect delivery of such notice between the time of mailing and the actual receipt of notice, then such notice shall only be effective if actually delivered. Any Notice sent by e-mail is to be considered given on the day it is sent if that day is a business day, and if that day is not a business day, it is to be considered given on the next business day after the date it is sent.

14.13 Waivers

A waiver by a party of any default by the other party shall not be deemed to be a waiver of any subsequent default. A waiver is effective only if it is in writing.

14.14 Further Assurances

The parties shall execute and do all such further deeds, acts, things, and assurances as may be reasonably required to carry out the intent of this Agreement.

14.15 Own Cost

The Society shall perform all obligations, covenants, and agreements under this Agreement solely at its own cost.

14.16 Joint Venture

Nothing in this Agreement creates the relationship of principal and agent or partnership, joint venture, business enterprise, or entity between the parties, or gives the Society any power or authority to bind the City in any way.

14.17 Independent Contractor

The parties have entered into an arm's length contract for the provision of the services set out in this Agreement; the Society is an independent contractor, not an employee of the City.

14.18 Legal Advice

The Society acknowledges and agrees that the City has recommended that it receive independent legal advice concerning this Agreement, and that the City has provided the Society with adequate time to do so.

14.19 Time is of the Essence

Time is of the essence of this Agreement.

15. INTERPRETATION

15.1 Headings and Table of Contents

The division of this Agreement into sections, the insertion of headings and the provision of a table of contents are for convenience only and do not form a part of this Agreement and will not be used to interpret, define, or limit the scope, extent, or intent of this Agreement.

15.2 Schedules

The following schedules are attached to and form part of this Agreement:

- a) Schedule "A" - Administration and Programming Requirements
- b) Schedule "B"- Rotary Centre for the Arts Lease and License Area
- c) Schedule "C"- Legal Notices and Encumbrances
- d) Schedule "D"- Building Maintenance and Operations Responsibility Checklist
- e) Schedule "E" - Insurance Certificate
- f) Schedule "F" - Society Maintenance Limit Clarification

15.3 Number and Gender

Unless otherwise specified, words importing the singular include the plural and vice versa, and words importing gender include all genders.

15.4 Use of the Word "Including"

The word "including" when following any general term or statement will not be construed as limiting the general term or statement to the specific matter immediately following the word "including" or to similar matters, and the general term or statement will be construed as referring to all matters that reasonably could fall within the broadest possible scope of the general term or statement.

15.5 Governing Law

This Agreement and each of the documents contemplated by or delivered under or in connection with this Agreement are governed exclusively by, and are to be enforced, construed and interpreted exclusively in accordance with the laws applicable and in force in British Columbia.

15.6 Severability

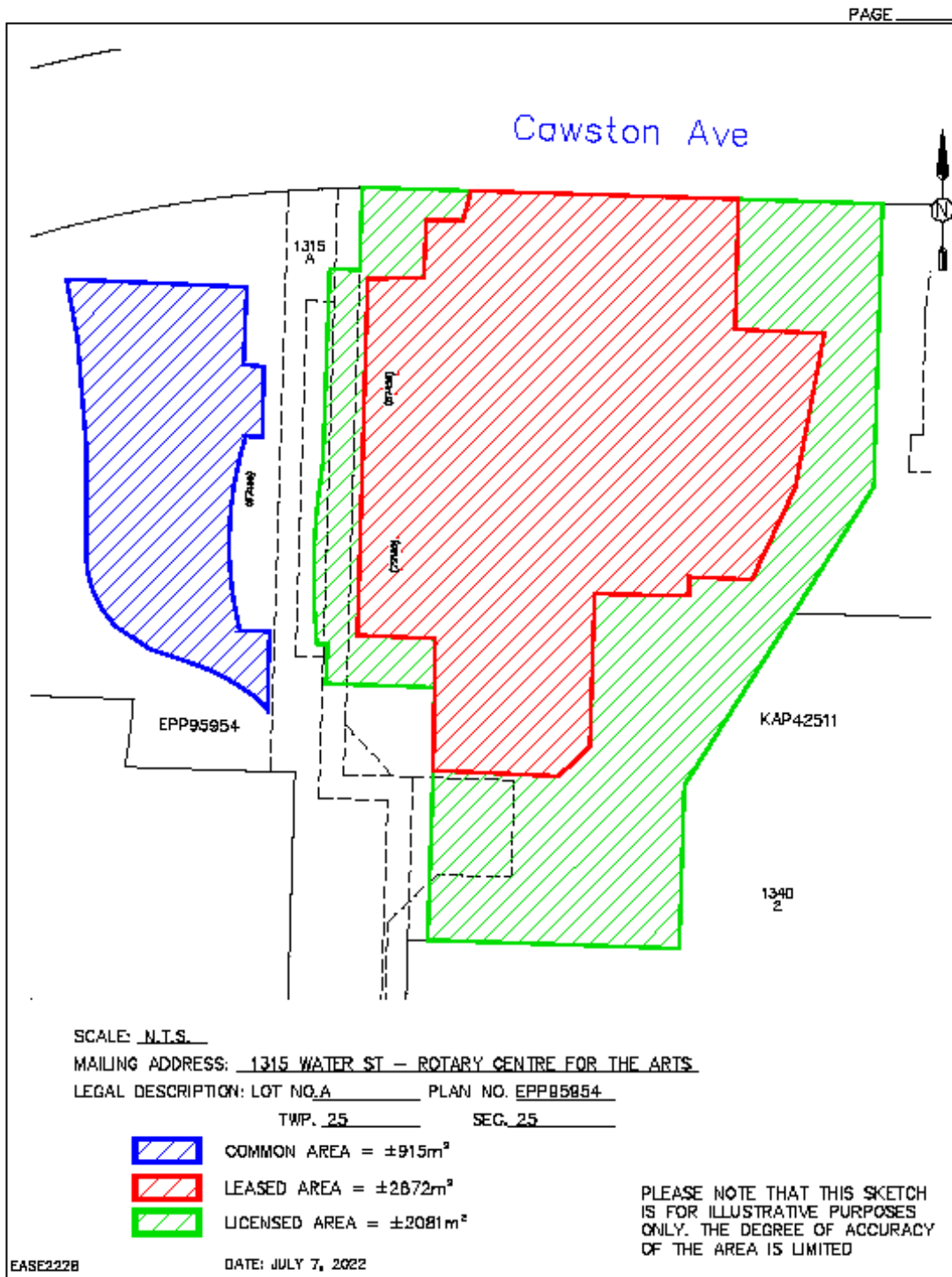
If any portion of this Agreement is held invalid by a court of competent jurisdiction, the invalid portion shall be severed and the decision that it is invalid shall not affect the validity of the remainder of this Agreement.

IN WITNESS WHEREOF the City and the Society have executed this Agreement on the date first above written.

CITY OF KELOWNA by its authorized)
signatories:)
)
_____)
Mayor)
)
_____)
City Clerk)

**KELOWNA VISUAL AND PERFORMING)
ARTS CENTRE SOCIETY)
by its authorized signatory:)
)
_____)
Signature)
)
_____)
Print Name)**

Schedule A – Rotary Centre for the Arts, License and Common Area



Schedule B - Administration and Programming Requirements

The Society conveys to the City that during the term of the Agreement it will fulfill the following requirements.

1. USE OF THE BUILDING:

The Society shall use the Building for:

1. The operation and maintenance of a visual and performing arts centre for the perpetual benefit of the city and citizens of the City of Kelowna and the surrounding areas;
2. Holding arts and culture special events and exhibitions throughout the year;
3. The provision of arts and cultural programs, activities, events and services consistent with the KVPACS mandate and any City of Kelowna Cultural Plan and Cultural Policy as may be in place during the term of this Agreement;
4. The provision, through subleases and rentals, of the studio, gallery, performance, meeting room, and activity spaces within the Building for use by individuals and groups for purposes consistent with the terms of this Agreement with proceeds from revenue-generating activities to help support mission-driven activities
5. The lease of or operation of a bistro, including but not limited to, counter service and catering services;
6. The holding of and the responsible third-party assignment of a Liquor Primary Licence;
7. Such other uses as are customarily incidental to an art and cultural centre providing activities for the education and enjoyment of the community; and
8. Providing open public access and offerings that are diverse and inclusive and foster belonging

2. COVENANT TO OPERATE

The Society shall throughout the Term continuously operate, occupy, and utilize the entire Building for the purpose set out herein, but specifically as a first-class art centre in keeping with the standards maintained by similar centres in British Columbia.

3. GENERAL ADMISSION FEE

The Society may charge an admission fee to the Building at rates that are generally affordable to the residents of the City.

4. PROGRAM AND SERVICE FEES

The Society may charge market rates for programs, special events, and other services offered.

5. STAFFING

The Society shall always provide appropriately trained staff to operate and maintain the Building.

6. SUPERVISION

The Society shall be responsible for supervising and controlling the activities of its members, directors, officers, employees, volunteers, and members of the public who are managing or utilizing the Building.

7. CULTURAL DISTRICT SUPPORT

The Society shall provide support through marketing, programming, and development of heritage, arts, and cultural projects within the scope of this Agreement, to support the success of initiatives within the Cultural District by co-operating and collaborating with the City and various organizations in the community.

8. COMMON AREA

1. The Society is aware that the Common Area as shown in Schedule A, known as the Rotary Arts Common, is a public park space maintained by the City of Kelowna and open to the enjoyment and use of all citizens, and that the Society cannot restrict access to the Park;
2. The Common Area is primarily for use by the general public and is not for the exclusive use of the Society. Long-term placement of equipment is not permitted in the Common Area without the written consent of the City.
3. The Society may use the Common Area for pre-approved, signature events and other short-term activities and programs carried out by the Society, as listed below:
 - a) educational activities and programs;
 - b) cultural initiatives; and
 - c) special events open to the general public.
4. The Society's use of the Common Area is subject to meeting the City's scheduling and usage requirements.
5. No permit fees will apply for the Society's use of the Common Area.
6. If the operation of the Common Area has an adverse effect on the neighborhood, the City reserves the right to impose additional operations restrictions, including restricting the use of the Common Area entirely, at the City's sole discretion.

Schedule C - Legal Notices and Encumbrances

The Society acknowledges that this Lease and Operating Agreement is subject to the following legal notations and charges registered against the title to the Land:

- a. Permit, See DF KC35326
- b. Permit, See KM38661
- c. Permit, See KM38662
- d. Permit, See KN110593
- e. Permit, See LB369777
- f. Statutory Right of Way LB485502

and, the Society agrees to comply with the obligations within those documents, and within such other charges, interests and rights which the City may grant from time to time in the future, provided the interest of the Society under this Lease and Operating Agreement is not materially affected, and the Society shall execute any associated documents and plans.

Schedule D - Building Maintenance and Operations Responsibility Checklist

Building Maintenance and Operations Responsibility Checklist			
Kelowna Visual and Performing Arts Centre Society	Rotary Centre for the Arts		
NOTE	Provided by the City, Cost borne by the City	Provided by the Society, Cost borne by the Society	Does Not Apply
Backflow Preventor testing – Repair / Replacement	X		
Boiler operating permits			X
Card Access Rotary Centre for the Arts		X	
Electrical Field Safety Representative (FSR)		X	
Electrical operating permit		X	
Electrical system, including generator – annual inspection report		X	
Electrical system, including generator - preventative maintenance		X	
Electrical system, including generator - repairs (in accordance with Section 8.2)		X	
Electrical/lights - lamp & tube replacement		X	
Elevator equipment repairs		X	
Elevator maintenance contract		X	
Elevator operating permits		X	
Emergency lighting testing & repairs	X		
Exterior doors, windows, facades, etc. (in accordance with Section 8.2)		X	
Fire alarm system repairs	X		
Fire alarm system testing & inspection contracts	X		
Fire extinguisher monthly & annual inspections	X		
Fire safety plan		X	

Building Maintenance and Operations Responsibility Checklist			
Kelowna Visual and Performing Arts Centre Society	Rotary Centre for the Arts		
NOTE	Provided by the City, Cost borne by the City	Provided by the Society, Cost borne by the Society	Does Not Apply
Fire safety drills		X	
Fire sprinkler system repairs	X		
Fire sprinkler system testing & inspection contracts	X		
Furnishings (maintain & replace)		X	
Garbage & recycling program		X	
Grease trap annual service			X
HVAC – annual inspection report	X		
HVAC - preventative maintenance	X		
HVAC - repairs	X		
Insurance – Automotive		X	
Insurance – Collection, archives & records		X	
Insurance - Liability		X	
Insurance - Property, building	X		
Insurance – Society-owned operational equipment, computers		X	
Interior intercom system		X	
Interior walls, flooring, doors, ceilings, windows, etc.		X	
Internet		X	
Janitorial services & supplies in leased spaces		X	
Janitorial services & supplies in public washrooms		X	
Keys – providing City with master keys, access codes, and emergency access contact information		X	
Keys & locks - repair & maintenance		X	

Building Maintenance and Operations Responsibility Checklist			
Kelowna Visual and Performing Arts Centre Society	Rotary Centre for the Arts		
NOTE	Provided by the City, Cost borne by the City	Provided by the Society, Cost borne by the Society	Does Not Apply
Kitchen equipment repair & maintenance - Landlord Owned			X
Kitchen equipment repair & maintenance - Tenant Owned		X	
Kitchen exhaust hood annual cleaning			X
Kitchen exhaust hood repairs			X
Kitchen hood fire suppression system preventative maintenance			X
Kitchen hood fire suppression repairs			X
Kitchen hood fire suppression testing			X
Landscape maintenance	X		
Licenses			
Business License		X	
Liquor License		X	
IHA Food Operating Permit/ Food Safe Certification		X	
Overhead Doors – maintenance and repairs (in accordance with Section 8.2)		X	
Painting - Exterior	X		
Painting - Interior		X	
Parking lots – parking lines, sweeping, asphalt, signage, etc.	X		
Pest control		X	
Plumbing system – annual inspection report		X	
Plumbing system - preventative maintenance		X	
Plumbing system - repairs (in accordance with Section 8.2)		X	
Property taxes		X	

Building Maintenance and Operations Responsibility Checklist			
Kelowna Visual and Performing Arts Centre Society	Rotary Centre for the Arts		
NOTE	Provided by the City, Cost borne by the City	Provided by the Society, Cost borne by the Society	Does Not Apply
Roof – annual inspection report	X		
Roof - preventative maintenance and repairs	X		
Security and Video Monitoring System – interior only		X	
Signage		X	
Site drainage	X		
Snow removal Snow removal and ice control (shared responsibility) City to include public sidewalks, the Society to include the Building entrances and emergency exits.	X	X	
Telephone		X	
Tenant improvements		X	
Tenant improvements – repair, maintenance & replacement		X	
Tree removal	X		
Utilities – electricity		X	
Utilities – natural gas		X	
Utilities – propane			X
Utilities – water, sewer		X	
Vandalism (exterior)	X		
Vandalism (interior)		X	
Window cleaning (exterior)		X	
Window cleaning (interior)		X	

Schedule F - Society Maintenance Limit Clarification

Scope of the Clause

The Society Maintenance Limit only applies to repairs and maintenance expenses for plumbing, electrical, and building fabric that are the responsibility of the Society, in accordance with Schedule D and in excess of the Society Maintenance Limit.

The Society remains responsible for interior electrical, plumbing, or building fabric upgrades, renovations, and renewals as a result of operational changes. The collaborative undertaking of these types of projects may be possible in accordance with clause 8.18.

Process

When required maintenance and repair work identified by the Society is likely to exceed the Society Maintenance Limit:

1. The Society shall connect with its City Liaison to identify the required repair;
2. The City Liaison shall submit a service request through the appropriate internal system to Building Services for investigation;
3. Building Services shall send a representative to investigate the required repair and determine the appropriate course of action (i.e. repair is required and work is to be completed internally by a City staff tradesperson or work is to be completed externally by a City approved contractor);
4. An estimate(s) for the work shall be obtained by the Society from a City-approved contractor or provided by Building Services*;
5. Before the start of any work, the Society shall obtain written pre-approval and authorization for the expense from the Building Services Manager, through their City Liaison; via email is sufficient. Regardless of the course of action discussed with the City staff tradesperson, written preapproval of any expense to be reimbursed is required. Failure to obtain preapproval may result in the expense not being reimbursed. To obtain pre-approval the Society shall request authorization by providing the quote via email to the City Liaison;
6. The work shall commence;
7. Once the work has been completed, the Society shall provide the City Liaison with:
 - a) pre-approval email;
 - b) copy of the invoice(s) from the contractor(s);
 - c) confirmation that the invoice has been paid in full; and
 - d) an invoice to the City of Kelowna from the Society for the amount in excess of the Society Maintenance Limit.
8. The City Liaison shall review the package of materials for completeness and forward it to Building Services for approval;
9. Building Services shall review the package and arrange for payment of the invoice to the Society.

* Where deemed possible, more efficient, and more cost-effective, work may be completed by a City staff tradesperson. This is at the sole discretion of the Building Services Manager. A work estimate must be provided in advance of the work and the Society will be invoiced by the City up to the maximum of the Society Maintenance Limit.

Further Clarification

- An "event" is defined as the full resolution of a maintenance and repair issue, including investigation and remediation of the cause of the issue. The resolution of a single event may involve multiple contractors and/or invoices.
- All contractor invoices must be paid in full by the Society, no late charges or accrued interest will be reimbursed.
- City-approved contractors must be used for all facility work.