

**CITY OF LEADVILLE, COLORADO
RESOLUTION NO. 17
SERIES OF 2022**

**A RESOLUTION APPROVING A PAYMENT MANAGEMENT AGREEMENT WITH THE
TABOR OPERA HOUSE PRESERVATION FOUNDATION FOR PHASE 2 OF THE TABOR
OPERA HOUSE REHABILITATION OF EXTERIOR ENVELOPE PROJECT**

WHEREAS, the City of Leadville (“City”) has the authority to enter into contracts for any lawful municipal purpose pursuant to C.R.S. § 31-15-101; and

WHEREAS, the City has secured grant funding from the Department of Local Affairs for a significant portion of Phase 2 of the rehabilitation of the exterior envelope of the City’s historic Tabor Opera House (“Project”); and

WHEREAS, the Tabor Opera House Preservation Foundation (“Foundation”) leases the Tabor Opera House from the City and maintains and operates the Tabor Opera House pursuant to that certain theater operating agreement dated May 10, 2017 between the City and the Foundation (“Operating Agreement”); and

WHEREAS, Section 3 of the Operating Agreement permits the Foundation to manage and oversee renovation efforts to benefit the Tabor Opera House and to manage and administer grants and other funding sources for the operation, maintenance and renovation of the Tabor Opera House; and

WHEREAS, Section 4 of the Operating Agreement permits the parties to contract to allow the Foundation to administer grants awarded to the City to benefit the Tabor Opera House; and

WHEREAS, the Foundation is a non-profit corporation that is eligible for historic preservation income tax credits and has agreed to contribute funds toward the Project; and

WHEREAS, the City and the Foundation desire for the Foundation administer and manage the payment of all contractors completing services or other work related to the Project; and

WHEREAS, the City Council therefore desires to approve a Payment Management Agreement with the Foundation in substantially the form attached hereto as **Exhibit 1**.

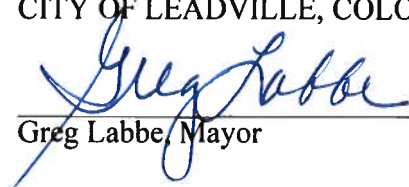
NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Leadville, Colorado, as follows:

Section 1. **Contract Approval.** The Leadville City Council hereby: (a) approves the Payment Management Agreement (“Agreement”) in substantially the form attached hereto as **Exhibit 1**; (b) authorizes the City Attorney to make such changes to the Agreement as may be necessary that do not materially increase the obligations of the City; and (c) authorizes the Mayor to execute the Agreement on behalf of the City when in final form.

Section 2. **Effective Date.** This Resolution shall take effect upon its approval by the City Council.

ADOPTED this 3rd day of May 2022 by a vote of 7 in favor, 0 against,
0 abstaining, and 0 absent.

CITY OF LEADVILLE, COLORADO:



Greg Labbe, Mayor

ATTEST:



Deputy City Clerk

EXHIBIT 1

PAYMENT MANAGEMENT AGREEMENT

(see attached document)

City of Leadville, Colorado
PAYMENT MANAGEMENT AGREEMENT

Project: Tabor Opera House Rehabilitation of Exterior Envelope – Phase 2

THIS PAYMENT MANAGEMENT AGREEMENT (“Agreement”) is made and entered into by and between the City of Leadville, a municipal corporation of the State of Colorado, with an address of 800 Harrison Avenue, Leadville, Colorado 80461 (the “City”), and the Tabor Opera House Preservation Foundation, Inc., a Colorado non-profit corporation whose address is 308 Harrison Avenue, Leadville, CO 80461 (“Foundation”) (each individually a “party” and collectively the “parties”).

RECITALS

WHEREAS, the Tabor Opera House (“TOH”), located in Leadville, Colorado, is owned by the City and is listed as a contributing building in the Leadville National Historic Landmark District as noted on the National Register of Historic Places and as a National Treasure by the National Trust for Historic Preservation; and

WHEREAS, the Foundation leases and occupies the TOH pursuant to that certain Lease Agreement by and between the City and the Foundation dated June 30, 2017; and

WHEREAS, the Foundation also operates the TOH pursuant to that certain Theater Operating Agreement by and between the City and the Foundation dated May 10, 2017 (“Operating Agreement”); and

WHEREAS, Section 3 of the Operating Agreement permits the Foundation to manage and oversee renovation efforts to benefit the TOH and to manage and administer grants and other funding sources for the operation, maintenance and renovation of the TOH; and

WHEREAS, Section 4 of the Operating Agreement permits the parties to contract to allow the Foundation to administer grants awarded to the City to benefit the TOH; and

WHEREAS, the City has secured grant funding for a significant portion of Phase 2 of the rehabilitation of the exterior envelope of the TOH (“Project”); and

WHEREAS, the Foundation desires to contribute additional funding toward the completion of the Project; and

WHEREAS, Hoehn Architects, P.C. is providing bidding and construction administration services to the City for the Project; and

WHEREAS, the City will also contract with construction contractor for the construction work for the Project (“Construction Contractor”); and

WHEREAS, the Foundation desires to assume responsibility for payment of invoices from Hoehn Architects, P.C. and the Construction Contractor (together, the “Contractors”) related to

services and work completed for the Project so the Foundation will be eligible to receive historic preservation, rehabilitation and other state tax credits; and

WHEREAS, the parties desire to establish a process for payment of the Contractors subject to the terms of this Agreement and set forth the financial contributions of each party for the Project.

The Parties therefore agree as follows:

I. RECITALS INCORPORATED

The foregoing recitals are hereby incorporated into the Agreement as if set forth fully herein.

II. EFFECTIVE DATE AND TERMINATION

The Agreement shall be effective upon the date of its mutual execution by the parties. The Agreement shall terminate upon completion of the final payments by the Foundation to Contractors for the Project.

III. PAYMENT MANAGEMENT

A. Foundation Responsibilities. The Foundation agrees to accept all applications for payment from the Construction Contractor and invoices from Hoehn Architects, P.C. related to the Project. The Foundation will invoice the City for the amounts in the applications for payment and invoices received from the Contractors that are eligible for payment by the City. The Foundation shall send such invoice to the City within five (5) business days of receipt of an approved pay application or invoice from a Contractor. Such invoice shall reflect the amounts required to pay the Contractors only and no additional amounts. Following payment to the Foundation from the City pursuant to such invoices, the Foundation will promptly pay the Contractors. The Foundation shall not cause any delays in payment such that the Contractors fail to receive payment in substantial accordance with the payment terms set forth in the Contractors' contracts with the City; however, the Foundation shall not have any obligation to make such payments to the Contractors prior to receipt of payments from the City.

B. City Responsibilities. The City agrees to pay invoices from the Foundation within ten (10) business days of receipt of an invoice from the Foundation. The City shall not pay the Foundation any amounts in addition to the payments required and approved to pay the Contractors for their services or work. The total amount paid by the City to the Foundation under this Agreement shall not exceed the City Contribution, as defined below.

IV. FINANCIAL CONTRIBUTIONS

A. City Contribution. The City shall contribute an amount not to exceed **Six Hundred Thousand Dollars and No Cents (\$600,000.00)** toward the Project ("City Contribution"). The City Contribution is funded by Grant No. EIAF 9461 in the amount of \$600,000.00 awarded to the City from the Colorado Department of Local Affairs ("DOLA"). Any additional City expenditures

requested for the Project must be authorized in accordance with the City's Purchasing Policy and are subject to annual appropriation.

B. Foundation Contribution. The Foundation shall contribute an amount not to exceed **Seven Hundred Thousand Dollars and No Cents (\$700,000.00)** toward the Project ("Foundation Contribution"). The Foundation Contribution is funded by the Gates Family Foundation in the amount of \$50,000.00, the Colorado State Historical Fund in the amount of \$250,000.00, and the Foundation in the amount of \$400,000.00.

V. INSURANCE

The Foundation shall obtain and maintain the types, forms, and coverage(s) of insurance deemed by the Foundation to be sufficient to meet or exceed the Foundation's minimum statutory and legal obligations arising under this Agreement, if any.

VI. INDEMNIFICATION

A. By Foundation. Foundation agrees to indemnify, defend, and hold harmless the City and its officers, insurers, volunteers, representatives, agents, employees, heirs and assigns from and against all claims, liability, damages, losses, expenses and demands, including reasonable attorneys' fees, on account of injury, loss, or damage, including without limitation claims arising from bodily injury, personal injury, sickness, disease, death, property loss or damage, or any other direct loss of any kind whatsoever, which result from the Foundation's performance of this Agreement if such injury, loss, or damage is caused in whole or in part by, the negligent act, omission, error, professional error, mistake, negligence, or other fault of Foundation, or any officer, employee, representative, or agent of Foundation, or which result from a worker's compensation claim of any employee of Foundation.

B. By the City. To the extent permitted by law, the City agrees to indemnify, defend, and hold harmless Foundation and its officers, insurers, volunteers, representatives, agents, employees, heirs and assigns from and against all claims, liability, damages, losses, expenses and demands, including reasonable attorneys' fees, on account of the City's breach of its payment obligations under this Agreement.

VII. MISCELLANEOUS

A. Independent Contractor. Foundation understands and agrees that the Foundation shall perform its obligations under this Agreement as an independent contractor and not as an employee of the City. Foundation acknowledges that its personnel performing under this Agreement are not on the City's payroll or social security or tax withholding rolls. Notwithstanding any other provision of this Agreement, all personnel assigned by Foundation to perform work under the terms of this Agreement shall be, and remain at all times, employees or agents of Foundation for all purposes. Foundation shall make no representation that it is an employee of City for any purposes. The Foundation shall be solely responsible for all compensation, benefits, insurance and employment-related rights of any of its personnel providing services hereunder during the course of or arising or accruing as a result of any employment, whether past or present, with the Foundation, as well as all direct legal costs

including reasonable attorney’s fees incurred by the City in the defense of any conflict or legal action resulting from such employment or related to the corporate amenities of such employment.

B. Retention and Open Records Act Compliance. All records of the Foundation related to the provision of Services hereunder, including public records as defined in the Colorado Open Records Act (“CORA”), and records produced or maintained in accordance with this Agreement, are to be retained and stored in accordance with the City’s records retention and disposal policies. Those records which constitute “public records” under CORA are to be at the City offices or accessible and opened for public inspection in accordance with CORA and City policies. Public records requests for such records shall be processed in accordance with City policies. Foundation agrees to allow access by the City and the public to all documents subject to disclosure under applicable law. For purposes of CORA, the Deputy City Clerk is the custodian of all records produced or created as a result of this Agreement. Nothing contained herein shall limit the Foundation’s right to defend against disclosure of records alleged to be public.

C. Governing Law and Venue. This Agreement shall be governed by the laws of the State of Colorado, and any legal action concerning the provisions hereof shall be brought in Lake County, Colorado.

D. Integration and Modification. This Agreement constitutes the entire agreement between the parties, superseding all prior oral or written communications. This Agreement may only be modified or amended upon written agreement signed by the parties.

E. Assignment. Neither this Agreement nor any of the rights or obligations of the parties hereto, shall be assigned by either party without the written consent of the other.

F. Notice. Unless otherwise provided in this Agreement, any notice under this Agreement shall be in writing, and shall be deemed sufficient when directly presented, sent via pre-paid, first-class United States Mail, or sent via electronic mail to the party at the addresses set forth below.

<u>If to the City:</u>	<u>If to Foundation:</u>
City of Leadville Attn: City Administrator 800 Harrison Avenue Leadville, Colorado 80461 cityadmin@leadville-co.gov	Tabor Opera House Preservation Foundation, Inc. Attn: Jennifer Buddenberg P.O. Box 1004 Leadville, CO 80461 president@taboroperahouse.net
With Copy to: Leadville City Attorney Michow Cox & McAskin LLP 6530 S. Yosemite Street, Suite 200 Greenwood Village, Colorado 80111 christiana@mcm-legal.com	With Copy to:

G. Severability. If any provision of this Agreement is found by a court of competent jurisdiction to be unlawful or unenforceable for any reason, the remaining provisions hereof shall remain in full force and effect.

H. Assignment. Neither this Agreement nor any of the rights or obligations of the parties hereto, shall be assigned by either party without the written consent of the other.

I. Rights and Remedies. Any rights and remedies of a party under this Agreement are in addition to any other rights and remedies provided by law. The expiration of this Agreement shall in no way limit a party's legal or equitable remedies, or the period in which such remedies may be asserted.

J. Binding Effect. The parties agree that this Agreement, by its terms, shall be binding upon the successors, heirs, legal representatives, and assigns; provided that this subsection VII.J shall not authorize assignment.

K. No Third-Party Beneficiaries. Nothing contained in this Agreement is intended to or shall create a contractual relationship with, cause of action in favor of, or claim for relief for, any third party, including any agent, sub-consultant or subcontractor of Foundation. Absolutely no third-party beneficiaries are intended by this Agreement. Any third party receiving a benefit from this Agreement is an incidental and unintended beneficiary only.

L. Survival. Any terms and conditions of the Agreement that require continued performance, compliance, or effect beyond the termination date of the Agreement shall survive such termination date and shall be enforceable in the event of a failure to perform or comply.

M. Annual Appropriation. Consistent with Article X, § 20 of the Colorado Constitution, any financial obligation of the City not performed during the current fiscal year is subject to annual appropriation, and thus any obligations of the City hereunder shall extend only to monies currently appropriated and shall not constitute a mandatory charge, requirement, debt or liability beyond the current fiscal year. The parties agree that should the City not appropriate funds to cover payments owed to Contractors under their respective contracts with the City, Foundation shall have no obligation to make such payments on behalf of the City unless or until it receives payment from the City for the same.

N. Force Majeure. Neither the Foundation nor the City shall be liable for any delay in, or failure of performance of, any covenant or promise contained in this Agreement, nor shall any delay or failure constitute default or give rise to any liability for damages if, and only to extent that, such delay or failure is caused by "force majeure." As used in this Agreement, "force majeure" means acts of God, acts of the public enemy, acts of terrorism, unusually severe weather, fires, floods, epidemics, pandemics, quarantines, strikes, labor disputes and freight embargoes, to the extent such events were not the result of, or were not aggravated by, the acts or omissions of the non-performing or delayed party.

O. Governmental Immunity. The City, its officers, and its employees, are relying on, and do not waive or intend to waive by any provision of this Agreement, the monetary limitations

or any other rights, immunities, and protections provided by the Colorado Governmental Immunity Act, C.R.S. § 24-10-101, *et seq.*, as amended (“CGIA”), or otherwise available to the City and its officers or employees.

P. Protection of Personal Identifying Information. In the event the obligations under this Agreement include or require the City to disclose to Foundation any personal identifying information as defined in C.R.S. § 24-73-101, Foundation shall comply with the applicable requirements of C.R.S. §§ 24-73-101, *et seq.*, relating to third-party services providers.

Q. Authority. The individuals executing this Agreement represent that they are expressly authorized to enter into this Agreement on behalf of the City of Leadville and the Foundation and bind their respective entities.

R. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall constitute an original and all of which shall constitute one and the same document. In addition, the parties specifically acknowledge and agree that electronic signatures shall be effective for all purposes, in accordance with the provisions of the Uniform Electronic Transactions Act, Title 24, Article 71.3 of the Colorado Revised Statutes.

SIGNATURE PAGES FOLLOW

THIS AGREEMENT is executed and made effective as provided above.

CITY OF LEADVILLE, COLORADO:

By: 

Printed Name: GREG LABBE

Title: MAYOR

Date of execution: 5/19/22

ATTEST:


Deputy City Clerk

APPROVED AS TO FORM (*excluding exhibits*):

City Attorney

