

ORDINANCE NO. _____

AN ORDINANCE AUTHORIZING THE CITY MANAGER TO EXECUTE AN AGREEMENT BETWEEN THE CITY OF DENTON AND THE DENTON FESTIVAL FOUNDATION, INC. FOR THE PAYMENT AND USE OF HOTEL TAX REVENUE; AND PROVIDING AN EFFECTIVE DATE.

THE COUNCIL OF THE CITY OF DENTON HEREBY ORDAINS:

SECTION 1. The City Manager, or his designee, is hereby authorized to execute an agreement between the City of Denton and the Denton Festival Foundation, Inc. for the payment and use of hotel tax revenue, under the terms and conditions contained in the agreement, a copy of which is attached hereto and made a part hereof.

SECTION 2. This ordinance shall become effective immediately upon its passage and approval.

PASSED AND APPROVED this the _____ day of _____, 2017.

CHRIS WATTS, MAYOR

ATTEST:
JENNIFER WALTERS, CITY SECRETARY

BY: _____

APPROVED AS TO LEGAL FORM:
AARON LEAL, CITY ATTORNEY

BY: _____


**AGREEMENT BETWEEN THE CITY OF DENTON AND
THE DENTON FESTIVAL FOUNDATION, INC. (PY2018)
PROVIDING FOR THE PAYMENT AND USE OF HOTEL TAX REVENUE**

THIS AGREEMENT made between the City of Denton, Texas, a municipal corporation (the "CITY"), and the Denton Festival Foundation, Inc. a legal entity incorporated under the laws of the State of Texas (the "FOUNDATION"):

WHEREAS, TEX. TAX CODE §351.002 authorizes the CITY to levy by ordinance a municipal hotel occupancy tax ("hotel tax") not exceeding seven percent (7%) of the consideration paid by a hotel occupant; and

WHEREAS, by ordinance, the CITY has provided for the assessment and collection of a municipal hotel occupancy tax in the City of Denton of seven percent (7%); and

WHEREAS, TEX. TAX CODE §351.101(a) authorizes the CITY to use revenue from its municipal hotel occupancy tax to promote tourism and the convention and hotel industry by advertising and conducting solicitations and promotional programs to attract tourists and convention delegates or registrants to the municipality or its vicinity; and

WHEREAS, the FOUNDATION is well equipped to perform those activities; and

WHEREAS, TEX. TAX CODE §351.101(c) authorizes the CITY to delegate by contract with the FOUNDATION, as an independent entity, the management and supervision of programs and activities of the type described hereinabove funded with revenue from the municipal hotel occupancy tax;

NOW, THEREFORE, in consideration of the performance of the mutual covenants and promises contained herein, the CITY and the FOUNDATION agree and contract as follows:

I. HOTEL TAX REVENUE PAYMENT

1.1 Consideration. For and in consideration of the activities to be performed by the FOUNDATION under this Agreement, the CITY agrees to pay to the FOUNDATION a portion of the hotel tax revenue collected by the CITY at the rates and in the manner specified herein (such payments by the CITY to the FOUNDATION sometimes herein referred to as the "agreed payments" or "hotel tax funds").

1.2 Amount of Payments.

(a) As used in this Agreement, the following terms shall have the following specific meanings:

(i) The term "hotel tax revenue" shall mean the gross monies collected and received by the City as municipal hotel occupancy tax at the rate of seven percent (7%) of the price paid for a room in a hotel, pursuant to Texas Tax Code §351.002 and City

Ordinance. Hotel tax revenue will include penalty and interest related to the late payments of the tax revenue by the taxpayer.

(ii) The term "Collection period" will mean the collection period for the CITY's fiscal year. It will include hotel tax revenue due to the City for the relevant fiscal year and collected through the 22nd day of the month following the close of the relevant fiscal year.

(iii) The term "base payment amount" shall mean a net amount of money equal to the total hotel tax revenue collected by the CITY during any relevant period of time (*i.e.*, fiscal year or fiscal quarter), less: (1) attorney and auditing costs incurred during such relevant period of time for costs of collection or auditing of hotel taxpayers (attorney and auditing costs include fees paid to attorneys or agents not in the regular employ of the CITY for which attorneys or agents effect compliance or collection of the hotel tax from taxpayers); and (2) court costs and other expenses incurred in litigation against or auditing of such taxpayers.

(iv) The term "contract quarter" shall refer to any quarter of the calendar year in which this Agreement is in force. Contract quarters will end on March 31st, June 30th, September 30th, and December 31st of each contract year.

(b) In return for satisfactory performance of the activities set forth in this Agreement and all attachments hereto, the CITY shall pay to FOUNDATION an amount of money in each contract year equal to the lesser amount of Three and Thirteen Hundredths percent (3.13%) of the annual base payment amount, or the fixed contract amount of One Hundred Three Thousand Dollars (\$103,000). This amount will be divided into quarterly payments equal to 25% of the annual fixed contract amount, unless the CITY can show with reasonable certainty that the annual base payment amount will be less than originally estimated for the fiscal year. The fourth quarterly payment will represent 25% of the fixed contract amount or the unpaid remainder of 3.13% of the base payment amount, whichever is less. If CITY's Chief Financial Officer determines that hotel tax receipts by the CITY are not meeting the anticipated budget projection, CITY may reduce the FOUNDATION's current budget at any time during the contract period. Each quarterly payment is subject to refund of any unused or improperly expended funds from the prior contract period, and CITY's timely receipt of the required quarterly reports.

1.3 Dates of Payments.

(a) The term "quarterly payments" shall mean payments by the CITY to the FOUNDATION of those amounts specified in ¶1.2, above, as determined by the hotel tax revenue collected.

(b) Each quarterly payment shall be paid upon receipt of the required reports and after the 25th day following the last day of the contract quarter. If any quarterly financial report is not received within thirty (30) days of the end of the applicable contract quarter, the recipient may be held in breach of this Agreement. The CITY may withhold the quarterly payment(s) until the appropriate reports are received and approved, which approval shall not be unreasonably withheld.

1.4 Other limitations regarding consideration.

(a) The funding of this project in no way commits the CITY to future funding of this program beyond the current contract period. Any future funding is solely the responsibility of the FOUNDATION.

(b) It is expressly understood that this contract in no way obligates the General Fund or any other monies or credits of the CITY.

(c) CITY may withhold further allocations if CITY determines that FOUNDATION's expenditures deviate materially from their approved budget.

II. USE OF HOTEL TAX REVENUE

2.1 Use of Funds. For and in consideration of the payment by CITY to FOUNDATION of the agreed payments of hotel tax funds specified above, FOUNDATION agrees to use such hotel tax funds only for (1) advertising and conducting solicitations and promotional programs to attract tourists and convention delegates or registrants to the municipality or its vicinity, as authorized by TEX. TAX CODE §351.101(a); and (2) encourage promotion, improvement, and application of the arts, including instrumental and vocal music, dance, drama, folk art, creative writing, architecture, design and allied fields, painting, sculpture, photography, graphic and craft arts, motion pictures, radio, television, tape and sound recording, and other arts related to the presentation, performance, execution, and exhibition of these major art forms, as authorized by TEX. TAX CODE §351.101(a)(4). Funds for any calendar year which are unused by midnight December 31st of that year shall be refunded to CITY within sixty (60) days.

Advertising materials purchased with the hotel occupancy tax funds must be targeted to reach audiences outside the Denton city limits. These materials include, but are not limited, to signs, posters, postcards, newsletters and print advertising.

2.2 Administrative Costs. The hotel tax funds received from the CITY by the FOUNDATION may be spent for day-to-day operations, office supplies, salaries, travel expenses, and other administrative costs allowed by TEX. TAX CODE §351.101(e), but only if specified in FOUNDATION's budget (Exhibit "A") and each are directly attributable to work on programs which promote tourism and the hotel and convention industry, and if each promotes at least one of the six statutory purposes enumerated within TEX. TAX CODE §351.101(a).

2.3 Specific Restrictions on Use of Funds.

(a) That portion of total administrative costs of the FOUNDATION for which hotel tax funds may be used shall not exceed that portion of the FOUNDATION's administrative costs actually incurred in conducting the activities specified in ¶2.1 above.

(b) Hotel tax funds may not be spent for travel for a person to attend an event or conduct an activity the primary purpose of which is not directly related to the promotion of local tourism and the convention and hotel industry or the performance of the person's job in an efficient and professional manner.

III. RECORDKEEPING AND REPORTING REQUIREMENTS

3.1 Budget.

(a) The FOUNDATION shall adhere to the budget (Exhibit "A") as approved by the City Council for each calendar year, for all operations of the FOUNDATION funded by hotel tax revenues. In other words, the CITY should be able to audit specifically the purpose of each individual expenditure of hotel tax funds from the separate account relating to hotel tax funds. The CITY shall not pay to the FOUNDATION any hotel tax revenues as set forth in Section I of this contract during any program year of this Agreement unless a budget for such respective program year has been approved in writing by the Denton City Council, authorizing the expenditure of funds.

(b) The FOUNDATION acknowledges that approval of the budget (Exhibit "A") by the Denton City Council creates a fiduciary duty in the FOUNDATION with respect to the hotel tax funds paid by the CITY to the FOUNDATION under this Agreement. The FOUNDATION shall expend hotel tax funds only in the manner and for the purposes specified in this Agreement, TEX. TAX CODE §351.101(a), and in the budget as approved by the CITY.

(c) Upon the application or consent of FOUNDATION, the City Manager or his designate may authorize minor amendments to the approved budget as necessary to carry out the intent of this Agreement, in a manner consistent with efficient use of public funds, and in accordance with State law. Such minor amendments may not increase the overall funding set forth in ¶1.2(b), extend the term, or otherwise alter the performance obligations of FOUNDATION, without approval of the City Council by ordinance.

3.2 Separate Accounts. The FOUNDATION shall maintain any hotel tax funds paid to the FOUNDATION by the CITY in a separate account or with segregated fund accounting, such that any reasonable person can review the source of expenditures of tax funds.

3.3 Financial Records. The FOUNDATION shall maintain complete and accurate financial records of each expenditure of the hotel tax funds made by the FOUNDATION. These funds shall be classified as restricted funds for audited financial purposes, and may not be used for contracted services, including, but not limited to, auditing fees and attorney fees. Upon reasonable advance written request of the Denton City Council, the City Manager or designate, or any other person, shall make such financial records available for inspection and review by the party making the request. FOUNDATION understands and accepts that all such financial records, and any other records relating to this Agreement shall be subject to the Public Information Act, TEX. GOV'T CODE, ch. 552, as hereafter amended.

3.4 Quarterly Reports. After initial receipt of hotel tax funds and within thirty (30) days after the end of every contract quarter, FOUNDATION shall furnish to CITY: (1) a completed financial report, (2) a list of the expenditures or copies of the invoices or receipts made with regard to hotel tax funds pursuant to TEX. TAX CODE §351.101(c), and (3) a copy of all financial records (e.g., copies of front and back cleared checks or bank statements, and other relevant documentation). Both the financial and expenditure reports will be in a form either determined or approved by the City Manager or designate. The FOUNDATION shall respond promptly to any

request from the City Manager of the CITY, or designate, for additional information relating to the activities performed under this Agreement.

3.5 Notice of Meetings. The FOUNDATION shall give the City Manager of the CITY, or his designate, reasonable advance written notice of the time and place of all meetings of FOUNDATION's Board of Directors, as well as any other meeting of any constituency of the FOUNDATION at which this Agreement or any matter the subject of this Agreement shall be considered. This provision shall not be deemed to require the FOUNDATION to give notice of any executive session of the Executive Committee of the FOUNDATION.

IV. TERM AND TERMINATION

4.1 Term. The term of this Agreement shall commence on January 1, 2018 and terminate at midnight on January 31, 2019. However, the program period shall commence on January 1, 2018 and terminate at midnight on December 31, 2018. Only those expenditures authorized by Chapter 351 of the Texas Tax Code and the program guidelines, which are actually incurred during the program period, for events and activities taking place within the program period, are eligible for funding under this agreement, and any ineligible expenditures or unspent funds shall be forfeited to CITY upon termination of the Agreement.

4.2 Termination Without Cause.

(a) This Agreement may be terminated by either party, with or without cause, by giving the other party sixty (60) days advance written notice.

(b) In the event this contract is terminated by either party pursuant to ¶4.2(a), the CITY agrees to reimburse the FOUNDATION for any contractual obligations of the FOUNDATION undertaken by the FOUNDATION in satisfactory performance of those activities specified in ¶¶2.1 and 2.2 above and that were approved by the Council through the budget, as noted in ¶3.1. This reimbursement is conditioned upon such contractual obligations having been incurred and entered into in the good faith performance of those services contemplated in ¶¶2.1 and 2.2 above, and further conditioned upon such contractual obligations having a term not exceeding the full term of this Agreement. Notwithstanding any provision hereof to the contrary, the obligation of the CITY to reimburse the FOUNDATION or to assume the performance of any contractual obligations of the FOUNDATION for or under any contract entered into by the FOUNDATION as contemplated herein shall not exceed 66 2/3% of the current quarterly payment.

(c) Further, upon termination pursuant to ¶4.2(a), the FOUNDATION will provide the CITY: 1) within ten (10) business days from the termination notification, a short-term budget of probable expenditures for the remaining sixty (60) day period between termination notification and contract termination. This budget will be presented to Council for approval within ten (10) business days after receipt by CITY. If formal approval is not given within ten (10) business days and the budget does not contain any expenditures that would be prohibited by the Texas Tax Code, and is within the current contractual period approved budget; the budget will be considered approved; 2) within thirty (30) days, a full accounting of all expenditures not previously audited by the City; 3) within five (5) business days of a request from the CITY, a

listing of expenditures that have occurred since the last required reporting period; 4) a final accounting of all expenditures and tax funds on the day of termination. The FOUNDATION will be obligated to return any unused funds or funds determined to be used improperly. Any use of remaining funds by the FOUNDATION after notification of termination is conditioned upon such contractual obligations having been incurred and entered into in the good faith performance of those services contemplated in ¶¶2.1 and 2.2 above, and further conditioned upon such contractual obligations having a term not exceeding the full term of this Agreement.

4.3 Automatic Termination. This Agreement shall automatically terminate upon the occurrence of any of the following events:

- (a) The termination of the legal existence of the FOUNDATION;
- (b) The insolvency of the FOUNDATION, the filing of a petition in bankruptcy, either voluntarily or involuntarily, or an assignment by the FOUNDATION for the benefit of creditors;
- (c) The continuation of a breach of any of the terms or conditions of this Agreement by either the CITY or the FOUNDATION for more than thirty (30) days after written notice of such breach is given to the breaching party by the other party; or
- (d) The failure of the FOUNDATION to submit a financial quarterly report which complies with the reporting procedures required herein and generally accepted accounting principles prior to the beginning of the next contract term, or quarterly as required by ¶1.3 hereof.

4.4 Right to Immediate Termination Upon Litigation. Notwithstanding any other provision of this Agreement, to mitigate damages and to preserve evidence and issues for judicial determination, either party shall have the right to terminate this Agreement upon immediate notice to the other party in the event that any person has instituted litigation concerning the activities of the non-terminating party, and the terminating party reasonably believes that such activities are required or prohibited under this Agreement.

4.5 In the event that this Agreement is terminated pursuant to ¶¶4.3 or 4.4, FOUNDATION agrees to refund any and all unused funds, or funds determined by the CITY to have been used improperly, within thirty (30) days after termination of this Agreement.

V. GENERAL PROVISIONS

5.1 Subcontract for Performance of Services. Nothing in this Agreement shall prohibit, nor be construed to prohibit, the agreement by the FOUNDATION with another private entity, person, or organization for the performance of those services described in ¶2.1 above. In the event that the FOUNDATION enters into any arrangement, contractual or otherwise, with such other entity, person or organization, the FOUNDATION shall cause such other entity, person, or organization to adhere to, conform to, and be subject to all provisions, terms, and conditions of this Agreement and to TEX. TAX CODE Ch. 351, including reporting requirements, separate funds maintenance, and limitations and prohibitions pertaining to expenditure of the agreed payments and hotel tax funds.

5.2 Independent Contractor. The FOUNDATION shall operate as an independent contractor as to all services to be performed under this Agreement and not as an officer, agent, servant, or employee of the CITY. The FOUNDATION shall have exclusive control of its operations and performance of services hereunder, and such persons, entities, or organizations performing the same and the FOUNDATION shall be solely responsible for the acts and omissions of its directors, officers, employees, agents, and subcontractors. The FOUNDATION shall not be considered a partner or joint venturer with the CITY, nor shall the FOUNDATION be considered nor in any manner hold itself out as an agent or official representative of the CITY.

5.3 Indemnification. THE FOUNDATION AGREES TO INDEMNIFY, HOLD HARMLESS, AND DEFEND THE CITY, ITS OFFICERS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS OR SUITS FOR INJURIES, DAMAGE, LOSS, OR LIABILITY OF WHATEVER KIND OR CHARACTER, ARISING OUT OF OR IN CONNECTION WITH THE PERFORMANCE BY THE FOUNDATION OF THOSE SERVICES CONTEMPLATED BY THIS AGREEMENT, INCLUDING ALL SUCH CLAIMS OR CAUSES OF ACTION BASED UPON COMMON, CONSTITUTIONAL OR STATUTORY LAW, OR BASED, IN WHOLE OR IN PART, UPON ALLEGATIONS OF NEGLIGENT OR INTENTIONAL ACTS OF FOUNDATION, ITS OFFICERS, EMPLOYEES, AGENTS, SUBCONTRACTORS, LICENSEES AND INVITEES.

5.4 Assignment. The FOUNDATION shall not assign this Agreement without first obtaining the written consent of the CITY.

5.5 Notice. Any notice required to be given under this Agreement or any statute, ordinance, or regulation, shall be effective when given in writing and deposited in the United States mail, certified mail, return receipt requested, or by hand-delivery, addressed to the respective parties as follows:

CITY

City Manager
CITY OF DENTON
215 E. McKinney
Denton, TX 76201

FOUNDATION

Carol Short
DENTON FESTIVAL FOUNDATION, INC.
P.O. Box 2104
Denton, Texas 76202

5.6 Inurement. This Agreement and each provision hereof, and each and every right, duty, obligation, and liability set forth herein shall be binding upon and inure to the benefit and obligation of the CITY and the FOUNDATION and their respective successors and assigns.

5.7 Application of Laws. All terms, conditions, and provisions of this Agreement are subject to all applicable federal laws, state laws, the Charter of the City of Denton, all ordinances passed pursuant thereto, and all judicial determinations relative thereto.

5.8 Exclusive Agreement. This Agreement contains the entire understanding and constitutes the entire agreement between the parties hereto concerning the subject matter contained herein. There are no representations, agreements, arrangements, or understandings, oral or written, express or implied, between or among the parties hereto, relating to the subject matter of this Agreement,

which are not fully expressed herein. The terms and conditions of this Agreement shall prevail notwithstanding any variance in this Agreement from the terms and conditions of any other document relating to this transaction or these transactions.

5.9 Duplicate Originals. This Agreement is executed in duplicate originals.

5.10 Headings. The headings and subheadings of the various sections and paragraphs of this Agreement are inserted merely for the purpose of convenience and do not express or imply any limitation, definition, or extension of the specific terms of the section and paragraph so designated.

5.11 Severability. If any section, subsection, paragraph, sentence, clause, phrase or word in this Agreement, or application thereof to any person or circumstance is held invalid by any court of competent jurisdiction, such holding shall not affect the validity of the remaining portions of this Agreement, and the parties hereby declare they would have enacted such remaining portions despite any such invalidity.

5.12 Insurance. The FOUNDATION shall provide insurance as follows:

1. \$500,000 Commercial General Liability, or \$1,000,000 Event Insurance, covering all events taking place on City-owned property,
2. Statutory Workers' Compensation and Employers' Liability (\$100,000/\$500,000/\$100,000), and
3. \$500,000 Liquor/Dram Shop Liability for any event occurring on City-owned property where alcohol will be provided or served.

CITY must be named as an additional insured on all policies (except Workers' Compensation), and proof of coverage shall be submitted prior to any payment by the CITY.

EXECUTED this _____ day of _____, 2017.

THE CITY OF DENTON, TEXAS

By: _____
TODD HILEMAN,
CITY MANAGER

ATTEST:

APPROVED AS TO LEGAL FORM:

By: _____
JENNIFER WALTERS,
CITY SECRETARY

By: _____
AARON LEAL,
CITY ATTORNEY

DENTON FESTIVAL FOUNDATION, INC.

By: Carol Short
Chairman/Director

ATTEST:

APPROVED AS TO LEGAL FORM:

By: _____
Secretary

By: _____

Denton Festival Foundation, Inc.***Denton Arts & Jazz Festival*****Program Year 2018**

Advertising

Brochures	\$	6,000
Magazines		6,000
Newspaper & Internet		5,000
Commercials / Photography		8,000
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	\$	25,000

Art

Musicians	\$	51,000
Site Operations		27,000
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	\$	78,000

\$ 103,000