

EXHIBIT A

INTERGOVERNMENTAL AGREEMENT

**Between
City of Portland Office of Management and Finance
And
Metro
For the
Arlene Schnitzer Concert Hall Sewer Reconnection Project**

THIS INTERGOVERNMENTAL AGREEMENT (this “Agreement”), dated this 15th day of December, 2021 (the “Effective Date”), is made by and between City of Portland, Office of Management and Finance (“the City”) and Metro, a Oregon metropolitan service district organized under the laws of the State of Oregon and the Metro Charter (“Metro”). The City and Metro may be referred to jointly in this Agreement as the “Parties” and individually as a “Party.”

RECITALS

- A. The City, through its Office of Management and Finance (“OMF”) owns the Arlene Schnitzer Concert Hall as part of the Portland’s Centers for the Arts group of venues. The Arlene Schnitzer Concert Hall originally opened in 1928 as the Portland Publix Theatre and later was renamed the Paramount Theatre before being acquired by the City in the early 1980s. The theater is listed on the National Register for Historic Places and recognized as an excellent example of Italian rococo revival architecture. Thanks to a generous donation from Portland residents Arlene and Harold Schnitzer it was restored and reopened as Portland’s premiere symphony concert hall in 1984. It is located at 1037 SW Broadway.
- B. Metro is an elected regional government that covers three counties and twenty-four cities in the Greater Portland region and operates the Portland’s Centers for the Arts under the *Amended Consolidation Agreement of Regional Convention, Trade, Spectator and Performing Arts Facilities Owned and Operated by the City of Portland and Metro*. The Metropolitan Exposition Recreation Commission (“MERC”) oversees this Agreement and provides expertise, governance, and policy direction regarding the business of operating the venues.
- C. The Portland’s Centers for the Arts is the fifth largest performing arts center in the United States. It operates five theaters in three separate buildings in downtown Portland. The historic Arlene Schnitzer Concert Hall is one of these five venues. With over 2,700 seats, it is the region’s premiere large concert hall and serves as home to the Oregon Symphony.
- D. To date, Portland’s has invested \$23.2 million into their performing arts facilities from Fiscal Year 2017 – Fiscal Year 2021.
- E. As a nearly 100-year-old building, it is not uncommon that the Arlene Schnitzer Concert Hall’s mechanical systems would need periodic upgrades.

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F. The Arlene Schnitzer Concert Hall’s connection to the public sanitary sewer is via private lateral in the public right-of-way. This arrangement does not comply with current City Code.

G. The City’s Bureau of Environmental Services (BES) is preparing to reline and stabilize the existing SW Taylor Street sewer main serving the building during calendar year 2023. As part of that project, BES is requiring that the building must abandon the use of its private sewer lateral and connect to the available public sewer line in SW Salmon Street. BES is unable to construct or pay for construction of improvements on property, even if the property is owned by the City.

H. The SW Salmon Street sewer main is much shallower than the main on SW Taylor and because of the deep sub-basement in the concert hall, extensive plumbing changes including installation of a large holding tank and pumping system are required within the building in order to connect to it. Preliminary, low-confidence estimates place the total cost of the project at as much as \$960,000.

I. Portland’s revenues from events and transient lodging taxes from the Visitor Facilities Intergovernmental Agreement (“VFIGA”) were severely impacted by the long COVID-19 venue closure and ongoing declines in tourism. Roughly 70% of staff was let go during the closure, and despite receiving emergency financial assistance from the City, Metro and other sources, Portland’s fund balance (used for both operating costs and capital projects) has declined from over \$13 million in 2019 to approximately \$2 million in fall of 2021. Portland does not have the financial capacity to take on this urgent, City-required project without assistance.

J. In furtherance of the City’s commitment to the Portland’s venues and recovery of the City’s performing arts ecosystem, the City will provide Metro \$150,000 to fund preconstruction and design for the planning of this work during FY 2021-22. The City may provide additional funds to help pay for construction of the project later in the fiscal year, or during subsequent years.

K. Metro will serve as the agent on behalf of the City to manage the construction project contract and complete the sewer reconnection project at the Arlene Schnitzer Concert Hall.

L. After consultation with City Council offices and the City of Portland Chief Administrative Officer, the City and Metro have agreed to the following terms and conditions regarding the Arlene Schnitzer Concert Hall Sewer Reconnection Project (the “Project”).

AGREEMENT

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and the conditions, covenants and agreements set forth below, the Parties hereby agree as follows:

ARTICLE 1 CITY OF PORTLAND FUNDING TERMS

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1.1 **City Funding Amount.** On the terms and conditions of this Agreement, City agrees to disburse funds in a total amount not to exceed ONE HUNDRED AND FIFTY THOUSAND DOLLARS (\$150,000) for design, preconstruction, and permitting work subject to forecasted availability. Metro shall use the funds solely for the Project and on the terms and conditions set forth herein. Both Parties will be responsible for determining financial resources over and above the initial amount through subsequent amendment to this Agreement to cover any and all remaining Project costs and Metro will be responsible for managing the completion of the Project.

Disbursement. The City shall disburse the one-time payment of funds to Metro. Additional future funds may be provided by the City through amendment to this Agreement.

1.1.1 **Timing of Availability of Funds.** The funds may be available for issuance to Metro as soon as January 15, 2022 if all the conditions are met. The City will provide the requested funds within thirty (30) days of the request.

1.1.2 **Eligible Uses of Funds.** City funds disbursed to Metro under this Agreement may be used for contractor or consultant or subconsultant costs including, but not limited to design, construction project management, project scoping, scheduling, permitting, deposits on materials and equipment, equipment rental fees, materials testing and initial construction activities. Funds may not be used to compensate Metro/Portland's staff time or reimburse Metro/Portland's for event revenues lost due to construction activities.

1.1.3 **Conditions Precedent to Payment.** The disbursement of the payment is subject to the following conditions prior to disbursement:

- (a) City shall have determined, in its sole discretion, that there is sufficient budget appropriation and availability to pay Metro the full payment. As of the date of the execution of this Agreement, the City warrants that it has the funds available for Metro as required under this Agreement;
- (b) Metro has shared a complete scope of work for the project with all sources and uses (including a reasonable contingency) and a project schedule demonstrating the work will be completed by December 31, 2022.
- (c) No litigation is pending that prevents Metro from performing their respective obligations under this Agreement; and
- (d) No Event of Default shall have occurred.

1.3.4 **Breach of Agreement.** If City breaches a material provision of this Agreement, whether by action or inaction, and such breach continues and is not remedied within thirty (30)

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days after City receives written notice from Metro specifying the breach it shall be an Event of Default under this Agreement. In the case of a breach that cannot with due diligence be cured within a period of thirty (30) days, it shall be an Event of Default under this Agreement if City does not commence the cure of the breach within thirty (30) days after City receives written notice from Metro and thereafter diligently prosecute to completion such cure within sixty (60) days unless such cure requires additional time as is reasonably necessary.

ARTICLE 2 METRO'S REPRESENTATIONS AND WARRANTIES

2.1 Metro represents and warrants to the City as follows:

2.1.1 **Authority.** Metro has full power, authority, and legal right to execute and deliver this Agreement and to incur and perform its obligations hereunder. The execution and performance by Metro of this Agreement has been duly authorized by all necessary action of Metro.

2.1.2 **No Violations or Default.** No event has occurred, and no condition exists that constitutes an Event of Default (as hereinafter defined) by Metro. Each of the following shall constitute an "Event of Default":

- a) **Breach of Agreement.** If Metro breaches a material provision of this Agreement, whether by action or inaction, and such breach continues and is not remedied within thirty (30) days after Metro receives written notice from the City specifying the breach it, shall be an Event of Default under this Agreement. In the case of a breach that cannot with due diligence be cured within a period of thirty (30) days, it shall be an Event of Default under this Agreement if Metro does not commence the cure of the breach within thirty (30) days after Metro receives written notice from the City of Portland and thereafter diligently prosecute to completion such cure within sixty (60) days unless such cure requires additional time as is reasonably necessary; or
- b) **Misuse of Funds.** It shall also be an Event of Default under this Agreement and the City shall be irreparably harmed by such default, if Metro uses any portion of the City funds in a manner materially inconsistent with the purposes of this Agreement or in violation of applicable laws, statues, or rules.

2.1.3 **Return of Unspent Funds.** In the event that Metro spends less than the total amount of City funds provided under this Agreement on eligible expenses related to the project, Metro shall return the unspent balance to the City of Portland immediately regardless of whether the non-expenditure is due to lower than anticipated costs, failure to complete the Project, or otherwise.

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ARTICLE 3 CITY'S AGREEMENT AND ACKNOWLEDGMENT

3.1 The City acknowledges that the City funds are being made for the City's benefit, and that the Arlene Schnitzer Concert Hall is an important City asset. The City will fully cooperate in all respects with Metro as needed for implementation and completion of the Project.

3.2 City's Obligation to Indemnify. To the extent permitted by law and within the limitations of the Tort Claims Act and the Oregon Constitution, the City shall defend, save, hold harmless, and indemnify the Metro and their respective officers, employees and agents from and against all claims, suits, actions, losses, damages, liabilities, costs and expenses of any nature whatsoever, including attorneys fees, resulting from, arising out of, or relating to the activities of the City or its officers, employees, subcontractors, or agents under this Agreement. The City shall have control of the defense and settlement of any claim that is subject to this paragraph. However, neither the City nor any attorney engaged by the City shall defend the claim in the name of the Metro or any department of Metro, nor purport to act as legal representative of Metro or any of their respective Department, without first receiving from the Metro Attorney, authority to act as legal counsel for Metro, nor shall the City settle any claim on behalf of either entity without the approval of the Metro Attorney. Metro may, at its election and expense, assume its own defense and settlement.

ARTICLE 4 METRO'S AFFIRMATIVE COVENANTS

4.1 Metro covenants and agrees as follows:

4.1.1 Records and Inspection. Metro shall keep proper books of account and records on all activities associated with the Project and this Agreement (collectively, the "Records"). Metro shall maintain the Records in accordance with generally accepted accounting principles. Metro shall permit the City and/or its duly authorized representatives, to inspect, review and make excerpts and transcripts of the Records with respect to the receipt and disbursement of funds, provided that any such examinations and audits shall be at the reviewing party's sole expense. Access to the Records is not limited to the required retention period. The authorized representatives shall have access to the Records at any reasonable time for as long as the Records are maintained. This Section 4.1.1 shall survive any termination of this Agreement.

4.1.2 Audits. The City, either directly or through a designated representative, may conduct financial and performance audits of the use of the proceeds at any time at City's expense; provided, however, that to the extent that an audit reveals any intentional malfeasance, Metro shall reimburse the City for any costs associated with the audit and Metro shall correct any deviations discovered as a result of the audit. Audits will be conducted in accordance with generally accepted auditing standards as promulgated in *Government Auditing Standards* by the Comptroller General of the United States General Accounting Office. In the event of an audit,

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Metro agrees to provide the designated auditor with reasonable access to Metro's employees and make all such financial, performance and compliance records available to the auditor. This Section 5.1.2 shall survive any termination of this Agreement.

4.1.3. **Green Building.** If a Green Building Policy is applicable to the scope of work under this Agreement, Metro will adhere to the City's Green Building Policy. It is understood by the Parties that the Green Building Policy does not apply to the Project scope as anticipated by the Parties. However, if the scope of the Project changes, the parties will reanalyze the applicability of the Green Building Policy.

4.1.4 **Metro's Obligation to Indemnify.** To the extent permitted by law and within the limitations of the Tort Claims Act and the Oregon Constitution, Metro shall defend, save, hold harmless, and indemnify the City and their respective officers, employees and agents from and against all claims, suits, actions, losses, damages, liabilities, costs and expenses of any nature whatsoever, including attorneys fees, resulting from, arising out of, or relating to the activities of Metro or its officers, employees, subcontractors, or agents under this Agreement. Metro shall have control of the defense and settlement of any claim that is subject to this paragraph. However, neither Metro nor any attorney engaged by Metro shall defend the claim in the name of the City or any bureau of the City, nor purport to act as legal representative of the City or any of their respective bureaus, without first receiving from the City Attorney, authority to act as legal counsel for the City, nor shall Metro settle any claim on behalf of either entity without the approval of the City Attorney. The City may, at its election and expense, assume its own defense and settlement.

ARTICLE 5 RIGHTS AND REMEDIES UPON EVENT OF DEFAULT

5.1 **Rights and Remedies.** Upon the occurrence of an Event of Default and at any time thereafter, the non-defaulting party may, at its option, exercise any one or more of the following rights and remedies:

5.1.1 **Repayment.** Either party may declare the entire City funding pursuant to this Agreement, to be immediately due and payable in full and, upon such declaration, the defaulting party shall pay to the non-defaulting party the amount declared to be immediately due and payable. This provision will not apply if the parties dispute whether there is an Event of Default.

5.1.2 **No Election Required.** The non-defaulting party shall have any other right or remedy provided in this Agreement, or available at law, in equity, or otherwise in such order and manner as it may select.

5.1.3 **Rights and Remedies Cumulative.** All rights and remedies described in this Article 5 are cumulative and in addition to any other remedy the non-defaulting party may have by agreement, at law, or in equity. Partial exercise of any right or remedy shall not limit or

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restrict any party's subsequent exercise of such right or remedy nor shall it restrict any party's contemporaneous or subsequent exercise of any other right or remedy.

5.1.4 **No Waiver.** No failure on the part of any party to exercise, and no delay in exercising, any right, power, or privilege under this Agreement shall operate as a waiver of that right or any other right. No modification or waiver of any provision of this Agreement shall be effective unless in writing, and then only in specific instance and for the purpose given. No notice or demand on any party shall entitle that party to any other notice or demand in other similar circumstances.

ARTICLE 6 MISCELLANEOUS

6.1 **Counterparts.** This Agreement may be executed in any number of counterparts, and any single counterpart or set of counterparts signed, in either case, by the Parties hereto shall constitute a full and original instrument, but all of which shall together constitute one and the same instrument.

6.2 **Survival.** All agreements, representations, and warranties shall survive the execution and delivery of this Agreement, any investigation at any time made by the City or on its behalf and the making of the City funding.

6.3 **Notice.** Any notice required or permitted under this Agreement shall be in writing and shall be deemed effective (1) when actually delivered in person, (2) one business day after deposit with a commercial courier service for "next day" delivery, (3) two business days after having been deposited in the United States mail as certified or registered mail, or (4) when transmitted by facsimile (answer back or receipt confirmed), addressed to the receiving Party as follows (with copies to any other Parties):

If to the City:

City of Portland
Office of Management and Finance
Chief Administrative Officer
1120 SW 5th Avenue #1250
Portland, OR 97204

If to Metro:

Metro
Chief Operating Officer
600 NE Grand Avenue
Portland, OR 97232

6.4 **Successors and Assigns.** Neither the City nor Metro may assign this Agreement, in whole or in part, without the prior written consent of the other Party. This Agreement shall be

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binding upon and shall inure to the benefit of the Parties and their respective permitted successors and assigns.

6.5 Governing Law, Jurisdiction, Venue. This Agreement shall be governed by and construed in accordance with the laws of the State of Oregon, without regard to its conflicts of law principles. Any legal action regarding this Agreement must be brought and conducted in the federal or state court, as appropriate, serving Multnomah County, Oregon, and the parties hereby consent to the jurisdiction and venue of such courts.

6.6 Validity; Severability. If any provision of this Agreement is held to be invalid, such event shall not affect, in any respect whatsoever, the validity of the remainder of this Agreement, and the remainder shall be construed without the invalid provision so as to carry out the intent of the Parties to the extent possible without the invalid provision.

6.7 Time of Essence. Time is of the essence of this Agreement.

6.8 Relationship of the Parties. Nothing contained in this Agreement or any acts of the Parties hereto shall be deemed or construed to create the relationship of principal and agent, or of partnership, or of joint venture or of any other association other than that of independent contracting parties.

6.9 No Third-Party Beneficiary Rights. No person not a party to this Agreement is an intended beneficiary of this Agreement, and no person not a party to this Agreement shall have any right to enforce any term of this Agreement.

6.10 Funding Acknowledgement / Signage. Any oral reports made to neighborhood, business, or other civic organizations, as well as to any members of the press should acknowledge work being done is based on a partnership between the City and Metro.


6.11 Amendments. This Agreement may only be amended by a written agreement signed by the City and Metro. The City's Chief Administrative Officer and Metro's Chief Operating Officer and their respective designees are authorized to take all actions necessary to implement the terms of this Agreement and may authorize amendments of this Agreement without further action by City of Portland's City Council and Metro Council, respectively, so long as any additional City funding has been explicitly approved by the City Council through a formal budget approval or amendment process.

6.12 Merger Clause. This Agreement contains the entire agreement between the City and Metro with respect to the subject matter thereof. It supersedes all prior written or oral discussions or agreements concerning work to be performed by either Party.

[Signature Page Follows]

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IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

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| <p>City of Portland</p> <p>By _____ Tom Rinehart, Chief Administrative Officer</p> <p>APPROVED AS TO FORM: APPROVED AS TO FORM  By _____ Sr. Deputy City Attorney City Attorney</p> | <p>Metro</p> <p>By _____ Marissa Madrigal, Chief Operating Officer</p> <p>APPROVED AS TO FORM:</p> <p>By _____ Metro Attorney</p> |
|---|--|