THE CORPORATION OF THE CITY OF PETERBOROUGH

BY-LAW NUMBER 10-058

BEING A BY-LAW TO AUTHORIZE THE EXECUTION OF AN AGREEMENT BETWEEN THE CITY OF PETERBOROUGH AND MARKET HALL PERFORMING ARTS INCORPORATED (MHPAI) FOR A $700,000 CONTRIBUTION FROM MHPAI TO THE RENOVATION PROJECT AT MARKET HALL

THE CORPORATION OF THE CITY OF PETERBOROUGH BY THE COUNCIL THEREOF HEREBY ENACTS AS FOLLOWS:

That the Mayor and Clerk be hereby authorized to execute an agreement between The Corporation of the City of Peterborough and Market Hall Performing Arts Incorporated in the form attached hereby as Schedule “A”, and to affix the Seal of the Corporation thereto.

By-law read a first, second and third time this 12th day of April, 2010.

(Sgd.) D. Paul Ayotte, Mayor

(Sgd.) Kevin Arjoon, Deputy Clerk
THIS AGREEMENT made in quadruplicate this ___ day of __________ 2010

BETWEEN:

THE CORPORATION OF THE CITY OF PETERBOROUGH
(“the City”)

and

MARKET HALL PERFORMING ARTS INC.
A duly incorporated non-profit charitable corporation
(“the Theatre”)

WHEREAS the City and the Theatre have undertaken mutually beneficial cost and facility sharing arrangements related to the performing arts premises owned by the City, known as The Market Hall located on George Street (herein referred to as “Market Hall”) in the City of Peterborough;

AND WHEREAS the Theatre carries out operations in Market Hall pursuant to a lease agreement between the parties dated the first day of September 2007 (the “Lease”);

AND WHEREAS the City wishes to carry out additional restoration and rehabilitation work at Market Hall, at an estimated cost of 9.686 million dollars and the Theatre has agreed to contribute certain funds towards the cost of such work, in accordance with and subject to the terms of this agreement;

AND WHEREAS the City’s share of the Project is 33.33% (the “City’s Share”);

AND WHEREAS the Theatre’s share of the Project is 21.68% of the City’s Share;

AND WHEREAS the parties also wish to confirm their continuing agreement with respect to the restoration and rehabilitation work to be completed by the City to
Market Hall as well as the use by the Theatre of Market Hall subject to the Lease and in accordance with the terms and conditions set out herein;

AND WHEREAS the restoration and rehabilitation work at Market Hall is expected to be substantially completed by 31 March 2011 in order that the Theatre may re-commence occupancy of Market Hall on 1 April 2011;

AND WHEREAS the parties agree that the Theatre’s Contribution, as hereinafter defined, will be paid in full to the City by way of seven annual payments commencing on 15 December 2011

NOW THEREFORE THE PARTIES HERETO AGREE AS FOLLOWS:

1. THE CITY’S OBLIGATIONS

1.1 The City shall carry out or cause to be carried out the necessary work to (i) restore and repair the exterior façade; (ii) replace the roof and HVAC system; and, (iii) perform certain renovations to the interior of Market Hall (the “Project”) in accordance with the Infrastructure Stimulus Fund Contribution Agreement between the City and Her Majesty the Queen in Right of Ontario which was approved by City Council on the 5th day of October, 2009 and the Construction Contract between the City and its General Contractors (collectively, the “Construction Contracts”)

2. THE THEATRE’S OBLIGATIONS

2.1 Provided the Project meets Substantial Completion (as such term is defined in the Construction Lien Act) thereby permitting the Theatre to occupy Market Hall in accordance with the Lease, the Theatre shall contribute Seven Hundred Thousand Dollars ($700,000), (the “Theatre’s Contribution”) to the cost of the Project, by paying the said sum in full to the City on or before December 15, 2017. Until such time as the Theatre’s Contribution is paid in full, the Theatre shall, commencing:
a. On 31 March 2010, provide written quarterly progress reports to the City’s Manager of Facilities and Special Projects concerning the status of their fund-raising campaign;

b. In 2010, provide the City’s Manager of Facilities and Special Projects with a copy of each annual audited financial statement within 30 days of its receipt of same;

c. On 15 December 2011, make the first of seven annual payments of not less that $100,000.00 to the City. Each annual payment shall be made on or before 15 December until the Theatre’s Contribution is paid in full. In the event any annual payment made by the Theatre exceeds $100,000.00, the amount of any subsequent payment may be reduced, provided that the Theatre pays, on average, $100,000.00/year to the City;

d. On 1 January 2012, the City shall commence calculating the carrying changes on the outstanding balance. The carrying charges shall be based on the Royal Bank’s prime daily rate, less 0.25%, compounded monthly, and shall become due and payable in full to the City no later than 31 March 2018; and

e. There shall be no penalty for paying the Theatre’s Contribution, including carrying charges accumulated to date, in full, before 15 December 2017.

2.2 Prior to 28 February, in each year during which the Theatre’s Contribution remains outstanding, the City shall provide the Theatre with an annual accounting of the outstanding balance of the Theatre’s Contribution, such accounting shall include a separate calculation of the carrying charges owed to the City.
2.3 Upon conclusion of the Project and after all bills and invoices incurred in relation to the Project have been paid, the City shall provide the Theatre with a financial statement of the total final cost of the Project.

2.4 Notwithstanding Article 2.1 above, the Theatre’s share shall be adjusted, either up or down, by 21.68% of the City’s share of the total final cost of the Project.

2.5 Provided that the Theatre is not in breach of its obligation to make payment to the City in accordance with Article 2.1 or Article 2.4 above, then the Theatre shall during the term of this agreement and the Lease enjoy quiet possession of Market Hall, at its own risk and expense, and shall have full and exclusive use of Market Hall for the purpose of theatrical, social and educational activities and special events.

3. EFFECT OF BREACH

3.1 In the event the Theatre is obligated to make the Theatre Contribution (meaning the Work has met Substantial Completion and Market Hall may be occupied by the Theatre) and the Theatre Contribution is not paid in full on or before 15 December 2017, the parties agree that the Lease is amended to the extent necessary to permit the City to evict the Theatre, without penalty, upon providing reasonable notice.

4. TERM

4.1 This agreement shall commence on the date it is executed by the Theatre, and shall continue in full force and effect until 31 March 2018, provided that either party may, in the following circumstances, terminate this agreement:
a. The Theatre may, provided it has paid all of its obligations under this agreement, terminate this agreement by giving written notice of termination on or before 31 December in any year, in which case the termination shall be effective as of 31 December of that year; and

b. The City may, in the event the Theatre is in default of its obligations to make annual payments under this agreement, which default has existed for a continuous period of sixty (60) calendar days after written notice of such default has been given to the Theatre, terminate this agreement forthwith upon written notice of termination.

5. CITY IS OCCUPIER DURING THE PROJECT

5.1 The City agrees that, for the period of time during which the Project is being performed, during which time the Theatre is not paying rent to the City pursuant to the Lease, the Theatre is not an occupier of Market Hall for the purposes of the *Occupier’s Liability Act*. For greater clarity, the parties agree that the Theatre shall be an occupier of Market Hall, for the purposes of the *Occupier’s Liability Act*, upon the Theatre resuming its tenancy following substantial completion of Project.

6. SUCCESSORS

6.1 This agreement is binding on the successors and assigns of the parties hereto.

7. RELATIONSHIP OF PARTIES

7.1 Nothing in this Agreement creates the relationship of principal and agent, employer and employee, partnership or joint venture between the parties. The parties agree that they are and will at all times remain independent and are not
and shall not represent themselves to be the agent, employee, partner of, or in joint venture with, the other. No representations will be made or acts taken by either party which could establish any apparent relationship of agency, employment, partnership or joint venture and no party shall be bound in any manner whatsoever by any licenses, warranties or representations made by the other party to any other person nor with respect to any other action of the other party.

8. **NOTICE**

8.1 Any notice or other writing required or permitted to be given under this Agreement or for the purposes of it, to any party, shall be valid only if delivered in writing in accordance with this clause. Notices can be provided to:

In respect of the Theatre:

Name: General Manager

Address: 336 George Street North
P.O. Box 281
Peterborough, ON  K9H 6Y8

Fax: 705.749.3606

In respect of the City:

Ms. Nancy Wright-Laking
City Clerk
City of Peterborough
500 George Street North
Peterborough, ON  K9H 3R9

Fax: 705.742.3947
8.2 The Parties may change their respective addresses and addresses for delivery by delivering notices if such changes as provided below. Notice sent accordingly shall be deemed delivered and received:

a. If delivered by hand, upon receipt;

b. If delivered by facsimile, 48-hours after the time of transmission, excluding from the calculation weekends and public holidays;

c. If delivered by overnight courier four (4) days after the couriering thereof; and

d. If delivered by registered mail, six (6) days after the mailing thereof, provided that if there is a postal strike or lockout such notice shall be delivered by hand, courier or facsimile.

9. SEVERABILITY

9.1 If any provision of this Agreement is declared invalid or unenforceable by any competent authority such provision shall be deemed severed and shall not affect the validity or enforceability of the remaining provisions of this Agreement, unless such invalidity or unenforceability renders the operation of this Agreement impossible.

10. OTHER INFORMATION

10.1 Each party shall at the other's party's request and expense execute and do all such further acts and things as may be necessary to carry out the full intent and meaning of this Agreement and the transactions contemplated thereby.
11. NON-ASSIGNMENT

11.1 Neither this Agreement nor any rights, remedies, liabilities or obligations arising under it or by reason of it shall be assignable by the Theatre without the prior written consent of the City.

12. ENTIRE AGREEMENT

12.1 This Agreement and any schedules attached hereto constitutes the entire agreement between the City and the Theatre with respect to the matters herein and supercede any and all prior oral or written representations and agreements.

13. AMBIGUITIES

13.1 The parties agree and warrant that they have had the benefit of consultation with legal counsel prior to entering into this Agreement, such that all language herein shall be construed equally against the Parties, and the Theatre waives any right, claim, argument or defence that any language of this Agreement should be construed strictly against the City.

14. HEADINGS

14.1 The Headings or captions of articles, sections or subsections used in this Agreement are for convenience of reference only and are not intended to define or limit their contents, nor are they to affect the construction of or to be taken into consideration in interpreting this Agreement.
IN WITNESS WHEREOF the parties hereto have hereunto set their respective hands and seals.

SIGNED, SEALED AND DELIVERED

THE CORPORATION OF THE
CITY OF PETERBOROUGH

D. Paul Ayotte, Mayor

John Kennedy, Deputy Clerk

MARKET HALL PERFORMING
ARTS INC.

Date of Signature (dd/mm/yyyy)

Date of Signature (dd/mm/yyyy)

I/We have the authority to bind the Theatre