

**AMENDMENT TO OPERATIONS AND MANAGEMENT AGREEMENT**

**by and between**

**THE CITY OF SEATTLE**

**and the**

**SEATTLE AQUARIUM SOCIETY**

**regarding the**

**Ocean Pavilion**

*dated as of \_\_\_\_\_, 20\_\_*

## AMENDMENT TO OPERATIONS AND MANAGEMENT AGREEMENT

This AMENDMENT TO OPERATIONS AND MANAGEMENT AGREEMENT regarding the Ocean Pavilion (“OMA Amendment”), dated as of \_\_\_\_\_, 2022, amends that certain Operations and Management Agreement, dated January 26, 2010 (the “Original OMA”), by and between THE CITY OF SEATTLE (the “City”), a first class city organized under the laws of the State of Washington (the “State”), and the SEATTLE AQUARIUM SOCIETY (“SEAS”), a Washington nonprofit corporation (together, the “Parties”). Unless otherwise stated, all capitalized terms used in this OMA Amendment have the same meanings given in the Original OMA. The Original OMA, as amended by this OMA Amendment, is referred to as the “OMA.”

The City and SEAS agree to execute this OMA Amendment for the purpose of addressing increased City capital investment in City-owned Aquarium facilities by adding a new Enhanced Facility Fee (“EF Fee”) payable by SEAS to City.

The City and SEAS enter into this OMA Amendment for the purpose of addressing increased City capital investment in Aquarium facilities costs by adding the EF Fee payable by SEAS to City, pursuant to Section 6.6 of the OMA and is authorized by resolution of the SEAS Board of Directors adopted on \_\_\_\_\_, 2022, and by Ordinance \_\_\_\_\_ of the City passed by the City Council on \_\_\_\_\_, 2022.

### RECITALS

The following facts and circumstances form the background of this OMA Amendment:

(a) The City agreed, through Section 6.6 of the OMA, to consider issuing debt for Aquarium capital purposes if requested by SEAS. SEAS has requested that the City issue debt to support the Ocean Pavilion Project (“Ocean Pavilion” or “Project”), a capital improvement project for aquarium and waterfront purposes, as more fully described in the Ocean Pavilion Funding Agreement, dated June 30, 2020, by and between the Parties (the “Original Funding Agreement”), as amended by the Funding Amendment described below.

(b) As set out in the Amendment to Ocean Pavilion Funding Agreement (“Funding Amendment”) to be executed on the date of this OMA Amendment, Clerk No. \_\_\_\_\_, the City will increase the City’s Financial Commitment (as defined in Section 7.2.1 of the Original Funding Agreement) for the Project by \$20 million to support eligible capital project costs (the increased amount is referred to as the “Increased Funding Commitment”). The City currently intends to finance the Increased Funding Commitment by issuing debt in the form of City general obligation bonds (the “Project Bonds”). For purposes of clarity, the Parties note that, while the City may opt to issue the Project Bonds as a portion of a larger issue of various purpose general obligation bonds, the term “Project Bonds” as used throughout this document will refer only to that portion of bonds issued by the City as are allocated to funding the Increased Funding Commitment.

(c) The Project furthers the purposes of SEAS by providing an enhanced facility to be utilized in fulfilling its mission in education, conservation and recreation, and serves the public interest by improving the Aquarium facilities owned by the City, providing benefits to residents of and visitors to Seattle and the region, and continuing the City’s history of developing the Aquarium as an important civic asset, cultural resource, and public amenity, and as a focal point of a revitalized and redeveloped waterfront.

(d) The Parties further recognize that the EF Fee imposed under this amendment is consistent with the City’s historical approach to the City-owned Aquarium facility, and in the best interest of the City, its residents, and taxpayers, in order to ensure that additional investment by the City in its asset is offset by receiving a portion of the increased revenues that SEAS expects to generate by operating an enhanced facility on the City’s revitalized waterfront.

(e) Under the OMA, SEAS currently pays, and continues to pay through July 15, 2025 pursuant to Exhibit 6 of the OMA (as most recently revised as of \_\_\_\_\_, 2022), the City Debt Service Reimbursement to compensate the City for certain capital costs that were associated with the existing Premises. Pursuant to this OMA Amendment, SEAS will pay an additional EF Fee reflecting the amounts necessary to make the City whole for its Increased Funding Commitment, including the principal amount borrowed by the City to fund its Increased Funding Commitment (including funding any deposit to the EF Fee Reserve Account, as may be required hereunder) plus interest thereon, and such costs and fees as are associated with and allocable to the Project Bonds.

(f) The Project will develop the Ocean Pavilion as additional Aquarium facilities to be operated pursuant to the OMA. The improved Aquarium facilities are more valuable than the state of the Premises when the Original OMA was executed.

(g) The City and SEAS have determined to execute this OMA Amendment to address the increased value of the Premises based on the pending Ocean Pavilion construction.

## AMENDMENT TERMS

The Parties agree as follows:

**1. Condition Precedent.** SEAS obligation to pay the EF Fee set out in this OMA Amendment is contingent on City and SEAS executing the Funding Amendment. Unless specified in a separate written agreement or subsequent amendments to the OMA and Funding Agreement, the City shall be under no obligation to issue any additional debt for the Project or any other Aquarium capital purpose.

**2. Definitions.** The term “Premises,” as used in the Original OMA and in this OMA Amendment, is hereby amended to include the Project, as defined herein to include the Ocean Pavilion as part of the City’s Aquarium Facility. All references to “this Agreement” in the OMA shall henceforth refer to the OMA, as amended by this OMA Amendment and the exhibits hereto,

and as it may in the future be amended by the Parties in accordance with its terms. Unless otherwise defined, other capitalized terms used herein have the meanings given in the OMA.

**3. SEAS to pay Monthly EF Fee.** The Original OMA is hereby amended to add a new Section 6.8, as follows:

Section 6.8 Enhanced Facilities Fee (“EF Fee”).

(a) SEAS agrees to pay the monthly EF Fees in the amounts and at the times set forth in Exhibit 8 (the “EF Fee Payment Schedule”). SEAS shall make its payments according to the EF Fee Payment Schedule, as it may be adjusted as permitted in Section 6.8(b), below, and the City will not provide invoices to SEAS. EF Fees shall be paid to the City (to the Parks and Recreation Department, or as otherwise directed in writing by the City). Payment shall be made on or prior to the first business day of each month (as to each payment date, an “EF Fee Due Date”).

(b) The City currently intends to issue limited tax general obligation debt (the “Project Bonds”) to finance its Increased Funding Commitment to the Project, including paying the costs and fees incurred in connection with issuing the debt and, if necessary, the funding of the reserve deposit described herein. SEAS acknowledges and agrees that (a) the EF Fees payable hereunder are estimated and are intended to be sufficient to offset in full the City’s costs to pay the principal of (including premium, if any) and interest on the Project Bonds as the same shall come due; (b) the Project Bonds may be issued in one or more series and are intended to be issued in an aggregate amount sufficient to provide for (i) the City’s Increased Funding Commitment (as identified in Section 3 of the Funding Amendment), (ii) the costs and fees incurred in connection with the issuance of the Project Bonds, including without limitation, bond counsel fees and financial advisory fees, and (iii) the funding of a deposit to the EF Fee Reserve Account, as set forth in Exhibit 9. If the City includes the Project Bonds as part of a larger general obligation City bond issuance (“General Obligation Bonds”), the Project Bonds shall bear an allocable share of the costs of issuing the General Obligation Bonds that will be reflected in the EF Fee charged to SEAS. For purposes of clarity, the EF Fee is intended to reflect the costs of issuance of the Project Bonds, including the fees of the City’s bond counsel for work attributable to the Increased Funding Commitment. At the request of SEAS, these costs and fees may be included in the par amount of the Project Bonds and reflected in the EF Fee.

(c) SEAS further acknowledges and agrees that the total EF Fees payable have been determined by City to be sufficient to pay in full all of the costs set forth in subsection (b) above, and that the EF Fee also includes amounts payable prior to the issue date of the Project Bonds, which amounts are fixed, based on the disbursement schedule established under the Funding Amendment, to include (i) the interest accrued by the City to provide these funds in advance of

the issuance of the Project Bonds, plus (ii) a monthly amount necessary (if any) to fund a portion of the deposit to the EF Fee Reserve Account.

(d) Upon issuance of the Project Bonds (if the City determines to issue such bonds), the City shall adjust the EF Fee Payment Schedule to reflect the City's actual rather than estimated financing costs (including actual principal amount issued, actual interest rates and terms of the borrowing, and allocable fees and costs) associated with the Project Bonds. If the City determines to fund the Increased Funding Commitment through sources other than the issuance of the Project Bonds, the EF Fee Payment Schedule will be adjusted to reflect the City's actual cost of funds. Future adjustments to the EF Fee Payment Schedule (i) are required upon a partial prepayment by SEAS of EF Fees consistent with subsection (e), below, and (ii) are permitted in the City's reasonable discretion to reflect changes in the City's financing costs resulting from any refinancing of the Project Bonds, consistent with subsection (f), below.

(e) SEAS may prepay all or a portion of the EF Fees due through the end of the OMA term by providing the City with 30 days' notice of such prepayment. Any prepayment shall be credited against the costs to defease or redeem a corresponding portion of the Project Bonds at the earliest economically feasible opportunity. There shall be no penalty for prepayment of the EF Fee, but SEAS acknowledges that it shall be responsible for any costs incurred by the City in causing an early redemption of the Project Bonds. The City shall adjust the EF Fee Payment Schedule to reflect the prepayment, taking into account the full cost to redeem the Project Bonds prior to maturity, including any call premium and escrow costs.

(f) In the event of an optional redemption, defeasance, or refunding of all or a portion of the Project Bonds (other than in conjunction with a prepayment of the EF Fees under subsection (e), above), the City may, but need not, adjust the EF Fee Payment Schedule to reflect the City's current financing costs for the Increased Funding Commitment. The City shall provide SEAS with at least 90 days' prior notice of any proposed refunding or restructuring of the Project Bonds that may change any redemption price or redemption dates on the Project Bonds. Within 30 days of such notice SEAS shall confirm whether it intends to prepay the EF Fees prior to the date of such refunding or restructuring of the Project Bonds, based on the redemption prices and dates applicable prior to such refunding or restructuring.

(g) At all times until all EF Fees have been paid in full, SEAS agrees to satisfy the Compliance Commitments set forth in Exhibit 9 attached hereto. SEAS understands and acknowledges that City is relying on SEAS fulfillment of these Compliance Commitments in determining whether it is feasible to issue bonds for

purposes set out in Section 6.8(a) and to maintain compliance with requirements and undertakings associated with such bonds.

(h) Notwithstanding the provisions of subsections 6.8(b) – 6.8(g) of the OMA, City is under no obligation to issue the Project Bonds to finance its fulfillment of the Increased Funding Commitment. The City reserves the right, in its sole discretion, to use any funding mechanism it deems prudent, including but not limited to direct appropriation or interfund loans. In the event City declines to issue the Project Bonds, City will provide SEAS written notice of the alternative source of funds for the Increased Funding Commitment. SEAS's obligation to pay the EF Fees according to the EF Payment Schedule will remain in full force and effect, as will SEAS's right to prepay all or a portion of the EF Fees without penalty.

**4. Additional Remedies.** The Original OMA is hereby amended by adding a new Section 21.3 in the following form:

**21.3 Corrective Action Plan; Additional Remedies.**

(a) In addition to the remedies available elsewhere in the OMA in an Event of Default, for so long as the EF Fee remains payable under the OMA and in addition to any other remedies available, if any Corrective Action Event has occurred under this OMA, the Parties shall develop a Corrective Action Plan as set forth in Exhibit 9. Unless otherwise specified, the applicable cure period for any Corrective Action Event under this OMA Amendment (including attachments hereto) shall be 30 days.

(b) If on the date that is 30 days prior to any debt service payment date on the Project Bonds, the amount of EF Fees paid over the preceding six-month period is insufficient to reimburse the City for the debt service next coming due on the Project Bonds, the City Director of Finance shall direct the Depository to transfer funds from the EF Fee Reserve Account to the City's debt service accounts with respect to the Project Bonds prior to the Project Bond debt service payment date. If the amount in the EF Fee Reserve Account is insufficient for this transfer, the City Director of Finance may redirect any funding provided by the City to SEAS in connection with its operation of the Aquarium facility to remedy any delinquency in the payment of EF Fees and may redirect such funds to replenish the EF Fee Reserve Account.

**5. EF Fee Payment Schedule.** The Original OMA is hereby amended by adding a new Exhibit 8 in the form attached to this Amendment and incorporated herein.

**6. Compliance Commitments and Accountability.** The Original OMA is hereby amended by adding a new Exhibit 9 in the form attached to this OMA Amendment and incorporated herein. The City shall have access, at reasonable times and upon reasonable notice, to any SEAS books, records, documents, accounts, files, reports and other property and papers of SEAS relating to

the Project and pursuant to the terms and conditions of this OMA Amendment for the purpose of making audits, surveys, examinations, excerpts, and transcripts as further provided in Exhibit 9. SEAS agrees to cooperate, fully and promptly, with the City or any of its designees in providing relevant information to enable the City to monitor SEAS's compliance with this OMA Amendment.

**7. No Other Changes to OMA; Other Agreements Not Affected.** Except as otherwise expressly provided in this OMA Amendment, all of the terms and conditions of the Original OMA remain unchanged and in full force and effect. Furthermore, SEAS and the City acknowledge that the City and SEAS have entered into, and may in the future enter into, separate agreements with SEAS relating to the Facility, the Project, or related facilities, including without limitation those agreements listed in Section 4.8. Nothing in this OMA Amendment shall be construed as altering or limiting the terms or conditions of any such separate agreements between the City and SEAS, and such agreements, and the parties' interests thereunder, are expressly not merged with their respective interests under this OMA Amendment.

*[Signature page follows.]*

**8. Counterparts.** This OMA Amendment may be executed in counterparts, and each such counterpart shall be deemed to be an original instrument. All such counterparts together will constitute one and the same OMA Amendment.

ORAL AGREEMENTS OR ORAL COMMITMENTS TO LEND MONEY, EXTEND CREDIT, OR FORBEAR FROM ENFORCING REPAYMENT OF A DEBT ARE NOT ENFORCEABLE UNDER WASHINGTON LAW.

IN WITNESS WHEREOF, the City and SEAS have caused this OMA Amendment to be executed in their respective names by their duly authorized officers and have caused this OMA Amendment to be dated as of the date set forth on the first page hereof.

THE CITY OF SEATTLE, a Washington municipal corporation

By \_\_\_\_\_  
Its Director of the Office of the Waterfront

and

By \_\_\_\_\_  
Its Acting Superintendent of Parks and Recreation

and

By \_\_\_\_\_  
Its [Interim] Director of Finance

Pursuant to Ordinance \_\_\_\_\_

SEATTLE AQUARIUM SOCIETY,  
a Washington non-profit corporation

By \_\_\_\_\_  
Its President and CEO

Pursuant to Resolution: \_\_\_\_\_



**Exhibit 8 – EF Fee Payment Schedule**  
to the Aquarium Operations and Management Agreement,  
as amended by the OMA Amendment

**Enhanced Facility Fee Payment Schedule**

**EF Fee Payment Schedule**  
(Payable by SEAS to City)

EF Fee Due Date	Allocable to Principal	Allocable to Interest	Total
	(1)		

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**TOTAL**

(1) Monthly principal component payments to commence six months in advance of the first anticipated Project Bond principal payment. *[At the time of ordinance adoption, the first Project Bond principal payment is anticipated, subject to market conditions, to occur in 2024.]*

**Exhibit 9 – Ocean Pavilion Funding Compliance Commitments**  
to the Aquarium Operations and Management Agreement,  
as amended by the OMA Amendment

SEAS agrees to satisfy the following commitments as an essential element of the OMA Amendment and the Increased Funding Commitment to the Project to be provided by the City in connection with the OMA Amendment and the Funding Amendment. Failure to satisfy these commitments shall constitute an Event of Default under the OMA as if set forth in the OMA.

**1. Representations, Warranties and Obligations of SEAS Relating to the Ocean Pavilion**

1.1 Representations, Warranties and Covenants. As an inducement to the City to execute the OMA Amendment and the Funding Amendment, and in addition to the representations, warranties, and covenants set forth elsewhere in the OMA, SEAS hereby repeats and affirms all representations and warranties set forth in Section 18.1 and 18.3 of the OMA and reasserts each covenant set forth in the OMA (including, without limiting the foregoing, the fiscal covenants set forth in Section 6). All such representations and warranties are deemed given as of the date hereof and as of every date hereafter for so long as the EF Fees are due under the OMA and may be relied upon by the City. SEAS shall fully comply with and abide by all such covenants at all times throughout the term of this OMA Amendment.

1.2 Obligations of SEAS. For so long as the EF Fees are due under the OMA (as amended by the OMA Amendment), the obligations of SEAS shall include, without limitation, the following:

(a) SEAS agrees to pay the EF Fees at the times and in the amounts required under the EF Fee Payment Schedule (as such schedule may be adjusted from time to time in accordance with the OMA Amendment) and to perform and observe the other obligations on its part contained in the OMA Amendment. Such obligations shall be absolute and unconditional, and shall not be subject to diminution by setoff, counterclaim, abatement or otherwise. SEAS's obligations shall continue in effect and shall survive the satisfaction of any other SEAS obligations to the City until such time as all EF Fees have been paid, together with any costs owed to the City pursuant to indemnification provisions under the OMA.

(b) SEAS agrees to continue its corporate existence in good standing, to operate the Aquarium facilities and the Project consistent with the OMA, and to do everything reasonably within its power establish and maintain available Aquarium revenues sufficient (together with other funds available for this purpose) to permit the payment when due of all EF Fees and to establish, use and maintain the EF Fee Reserve Account, consistent with paragraph \_\_, below.

(c) The City will establish and maintain an EF Fee Reserve Account in the custody of a depository selected by the City (the "Depository") under a Depository Agreement to be executed by the Depository, the City and SEAS. No later than the issue date of the Project Bonds, the EF Fee Reserve Account shall be fully funded in accordance with paragraph \_\_, below.

## 2. Funds and Accounts; EF Fee Payment Mechanics.

2.1 Monthly EF Fee Payments. It is acknowledged and understood by the Parties that SEAS will make monthly payments of EF Fees to the City in the manner directed by the City. Monthly payments commencing on the first day of the first calendar month following execution of the OMA Amendment and the Funding Amendment through the first day of the first calendar month following the issue date for the Project Bonds shall be in an amount calculated to cover the City's cost to provide funds under the Funding Agreement in advance of the Project Bond issuance, plus an amount agreed upon by the Parties for deposit to the EF Fee Reserve Account. Upon issuance of the Project Bonds, the EF Fee Payment Schedule shall be adjusted so that each monthly payment is equal to  $1/6^{\text{th}}$  of the interest next coming due on the Project Bonds, plus  $1/12^{\text{th}}$  of the principal next coming due on the Project Bonds. EF Fees shall be considered delinquent only on the date that is the first day of each month prior to a debt service payment date with respect to the Project Bonds (or such other semiannual date as is selected by the Parties, if the City determines not to finance the Increased Financial Contribution by the issuance of Project Bonds).

2.2 EF Fee Reserve Account; Final Disposition. To secure SEAS's obligations to the City under the OMA Amendment, and for so long as any obligation of SEAS under the OMA Amendment remains outstanding, SEAS agrees to maintain a deposit in the EF Fee Reserve Account equal to the maximum annual EF Fee Payment amount, where the annual EF Fee Payment amount is the sum of all monthly EF Fee Payments due in each calendar year. The amounts held in the EF Fee Reserve Account shall be invested as directed in the Depository Agreement and retained in that account. Interest earnings in excess of the minimum required deposit (less any fees required to pay the costs of the Depository's services) may be released to SEAS no more frequently than once per year, in accordance with the Depository Agreement. When the total amount of all EF Fees due is equal to or less than the amount in the EF Fee Reserve Account, then the amounts therein shall be used to make the transfers to the City's fiscal agent in respect of the Project Bonds and no further EF Fees shall be due. If any funds remain in the EF Fee Reserve Account after all EF Fees have been paid and no Project Bonds remain outstanding, then any funds in the EF Fee Reserve Account shall be remitted to SEAS by the Depository.

2.3 Payment Mechanics. EF Fees shall be due and payable to the Department of Parks and Recreation on the first business day of each month. EF Fees not paid in full as of the date that is the first day of each month prior to each City debt service payment date with respect to the Project Bonds shall be deemed delinquent and shall thereafter bear interest at a rate of 12%.

(a) Delinquent EF Fees; EF Fee Reserve Account. The Parties acknowledge that the EF Fees are intended to be sufficient to fully cover the City's debt service payments with respect to the Project Bonds. As of the first business day of each month preceding each Project Bond debt service payment date, the City shall confirm that the EF Fee receipts since the most recent Project Bond debt service payment date are in an amount at least equal to the amount of Project Bond debt service then coming due. If there is a shortfall in the amount of EF Fees received to date, the City shall direct the Depository to draw on the EF Fee Reserve Subaccount, for transfer to the fiscal agent for the Project Bonds, an amount sufficient to cover that shortfall. Immediately

following a draw on the EF Fee Reserve Account, the City shall notify SEAS of the amount of such draw, and SEAS agrees to replenish the EF Fee Reserve Account within 30 days. After 30 days, if SEAS has failed to replenish the EF Fee Reserve Account, the City shall redirect any funding to be provided by the City to SEAS in connection with its operation of the Aquarium Facility to replenish the EF Fee Reserve Account until that account is fully replenished. The City Director of Finance, in such Director's discretion, may alternatively determine to adjust the EF Fee Payment Schedule such that the City is fully reimbursed over time, not to exceed one year. A longer repayment period may be utilized only upon approval of the City Council.

(b) Insufficiency in EF Fee Reserve Account. If the amount in the EF Fee Reserve Account is insufficient as of 10:00 am (Pacific) on the second Business Day preceding any Project Bond debt service payment date to make up a shortfall as described in subparagraph (a), the Depository shall provide written notice of the amount of such shortfall to the Parties in accordance with the Depository Agreement. If SEAS fails to deposit sufficient funds into the EF Reserve Account to make up the shortfall by 10:00 am (Pacific) on the Project Bond debt service payment date, the City shall be entitled to reimbursement by SEAS for any amounts that are necessary to make up the shortfall. SEAS shall be obligated to reimburse such amounts plus interest accruing at a rate of 12% per annum, calculated on the basis of a 360 day year of 30 day months. This reimbursement obligation shall survive the termination of the OMA.

**3. Continuing Disclosure.** It is anticipated that SEAS may be treated as an “obligated person” (within the meaning of Rule 15c2-12 of the Securities and Exchange Commission) with respect to the Project Bonds, and SEAS agrees to enter into a written undertaking to provide continuing disclosure, if determined to be necessary. Failure of SEAS to comply with such undertaking shall not be considered an Event of Default under the OMA. However, the City, or its dissemination agent, may (and, at the request of the Owners of at least a majority in aggregate principal amount of the then-outstanding Project Bonds, accompanied by indemnity satisfactory to it, shall) or any owner of such bonds may, take such actions as may be necessary and appropriate, including seeking specific performance by court order, to cause SEAS to comply with its obligations under this paragraph or the Undertaking.

**4. Tax Covenants.** If the City determines, in its sole discretion, to fund all or a portion of the Increased Funding Commitment through the issuance of the Project Bonds, or any portion thereof, that are issued on a tax-exempt or tax-advantaged basis, SEAS agrees to execute such certificates or other documents as may be necessary to establish the basis for such tax treatment. Furthermore, for so long as the Project Bonds (or any portion thereof) remain outstanding, SEAS agrees not to take, or permit to be taken on its behalf, any action which would result in the interest paid on the tax-exempt or tax-advantaged Project Bonds becoming taxable, and shall take all actions necessary or required to preserve the tax-exempt or tax-advantaged status of the interest paid on those Project Bonds. SEAS further covenants and agrees to pay or cause to be paid for the benefit of the City, to the Internal Revenue Service, within 10 days of receipt by SEAS of a written demand therefor, such amounts as have been determined to be necessary to be delivered to the Internal Revenue Service as a rebate amount for the Project Bond proceeds (and for any other amounts treated as “gross proceeds” of the Project Bonds) pursuant to Section 148

of the Code. In the event that the interest on the Project Bonds becomes taxable as a result of actions or omissions of SEAS not approved in writing by the City, SEAS shall indemnify and hold the City, its officers, and agents harmless from any additional interest payments and penalties which arise from SEAS' actions or omissions.

## **5. Accountability and Reporting.**

5.1 Annual Report. SEAS shall provide to the Director of Finance with copies of all reports required to be provided to the City under sections 16.2 (Annual Report to City Council Parks Committee), 16.3 (Monthly Report to Superintendent) and 16.4 (Annual Plan to Parks Board and Superintendent), and other sections of the OMA, and Section 2.3 of the Funding Agreement and Section 8 of the Construction Agreement. If not set forth in these reports, SEAS shall additionally provide to the Director of Finance a report on the planned and actual operations of the Project, which report shall include:

(a) An annual report on the financial and operating aspects of the Aquarium facilities, including the Project; and

(b) Copies of SEAS' adopted capital and operating budgets for the upcoming fiscal year, within 60 days of adoption, including a comparison of the prior fiscal year budget to actual, and any final or adopted financial projections prepared in connection with the budgeting process for the Project and for the Aquarium facilities; and

(c) On an annual basis, SEAS shall provide to the City a copy of its audited financial statements, as required under Section 16.5 of the OMA; and

(d) In addition to and without limiting the rights to require audits and conduct inspections generally under the OMA, the City shall have the right, but not obligation, upon reasonable notice to review necessary to understand Project finances, to assist the City in complying with City financial management and accounting policies, to assist the City in complying with obligations to third parties regarding City accounting or financial management, or to maintain good standing for the Project Bonds or other City financial instruments. In that case, SEAS shall provide all requested documentation and otherwise reasonably cooperate to allow the City to effectively and efficiently conduct the audit, subject to the procedures applicable to the review of donor information set forth in Section 2.3 of the Funding Agreement to the extent that such procedures are consistent with and responsive to the auditors' requests; and

(e) As part of the annual report provided under subparagraph (a), the Annual Plan required to be provided under the OMA, annual Fundraising Plan required to be provided under the Funding Agreement, or Project information and updates required to be provided under the Construction Agreement, SEAS will provide City with information regarding (i) its fundraising efforts conducted in connection with SEAS funding commitment for the Ocean Pavilion, including securing grants and philanthropy, including a plan of projections and records of performance compared to the plan; (ii) payment of the EF Fee; and (iii) the status of Project construction and expenses. Additionally, if requested in writing by City, SEAS will within 30 days of such request

provide a written response detailing progress towards fundraising goals, including pledges, accounts receivable, and actual payments to date.

5.2 Corrective Action Plan.

(a) Corrective Action Events. The following are Corrective Action Events:

- (1) Any withdrawal from the EF Fee Reserve Account that is not replenished to the minimum required amount within 30 days or in accordance with a replenishment schedule approved in writing by the City Director of Finance (other than the transfer of amounts remaining once the reserve deposit exceeds the total amount of EF Fees due); or
- (2) Any material adverse change in the financial or operating condition of SEAS or the Facility, including but not limited to a material adverse change in SEAS Revenue, other revenues, expenditures, or fund balance, which SEAS or the City reasonably believes will impact SEAS ability to make timely payments of the EF Fee; or
- (3) Receipts of pledges, grants and other fundraising efforts for the Project in any year below anticipated fundraising projections contained in the plans and projections reported by the City under paragraph 5.1(e), to the extent that such shortfall could reasonably be expected to result in SEAS' failure to deliver the Project as required under the Construction Agreement or in SEAS' failure to comply with its obligations under the OMA or this Agreement; or
- (4) A written request by SEAS (other than in conjunction with its annual budget request) to amend or update the requested amount of City financial support in a manner reasonably deemed by the City Director of Finance to have significant budgetary impacts on the City or the Metropolitan Park District; or
- (5) Notice given by SEAS to the City of any event which will or is likely to substantially delay construction or the issuance of the Certificate of Occupancy for the Project; or
- (6) Any substantial draw on or reduction in the levels of SEAS' operating reserves that is not anticipated in the annual plans and projections provided to the City under paragraph 5.1; or
- (7) Issuance of notice of cancellation of any insurance policy maintained pursuant to the OMA; or
- (8) Any other Event of Default under the OMA, subject to any applicable cure period.

(b) Permissible Corrective Action Plan Contents. The City Director of Finance may, but is not required to, convene a Financial Oversight Committee, consisting of equal representation from the City and SEAS plus the Director of Finance (or such Director's designee), to monitor, review and assist in the development of any Corrective Action Plan and take such other actions as are required or permitted under this OMA Amendment. Corrective Action Plans may include different elements depending on the Corrective Action Event or events prompting them. Upon receipt or delivery of notice of a Corrective Action Event, SEAS shall promptly prepare and submit

a plan to the City (and to the Financial Oversight Committee, if one is formed) proposing the specific steps being taken to correct the specified deficiencies (the "Proposed Corrective Action Plan"). The specific steps to be proposed by SEAS shall be appropriate to correct the specified deficiencies and may include amendments to the Fundraising Plan, identification of additional sources of funding, use of SEAS reserves, development of an alternative financing plan, budget adjustments, identification and implementation of other measures reasonably likely to result in timely completion of the Project, or other steps. The Proposed Corrective Action Plan shall be submitted to the City (and Financial Oversight Committee, if any) within 30 days after the date that notice of the Corrective Action Event was delivered or received. The Proposed Corrective Action Plan shall specify a proposed prompt completion date for correcting the specified deficiencies, which completion date shall not be more than 180 days from the date the City receives the Proposed Corrective Action Plan, unless the City, in its sole discretion, specifies in writing an extension in the number of days to complete the corrective actions. The City (and the Financial Oversight Committee, if any) shall review the Proposed Corrective Action Plan and notify SEAS, in writing of the City's determination as to the sufficiency of the Proposed Corrective Action Plan. If SEAS does not propose a Proposed Corrective Action Plan within the time required in this subsection, or if the Proposed Corrective Action Plan is not determined to be sufficient by the City, SEAS agrees to work in good faith with the City (and the Financial Oversight Committee, if any) to develop a Corrective Action Plan that the City reasonably determines to be sufficient. Upon the City's determination of sufficiency of a Proposed Corrective Action Plan, SEAS shall implement the Corrective Action Plan and complete the Corrective Action Plan by the time specified therein. Any Corrective Action Plan should include a Monitoring Program providing for frequent periodic review of SEAS' financial situation, including receipts of grants, proceeds of fundraising from donations and other private sources, and projections regarding cash flows and revenue receipts. The Monitoring Program may be undertaken by City and/or SEAS staff for reporting to a Financial Oversight Committee, if any, and/or the City Director of Finance.

(c) Responsibility to Identify and Report Corrective Action Events; Failure to Implement Corrective Action Plan. It shall be the responsibility of SEAS to promptly identify and report to the City Director of Finance the occurrence of any Corrective Action Event. It shall be the responsibility of the City Director of Finance to identify Corrective Action Events that the Director may reasonably have cause to be aware of or may otherwise identify in course of performance of the obligations hereunder. The City Council shall be notified of the implementation of any Corrective Action Plan. The failure of SEAS to submit, implement, and comply with an acceptable Corrective Action Plan as required herein shall constitute an Event of Default hereunder.

(d) Corrective Action Plan; When Proposed and Imposed. SEAS shall notify the City upon the occurrence of any Corrective Action Event and provide the City with such information as the City may request concerning such occurrence. No action required under this section may in any manner whatsoever adversely affect the exemption from federal income taxation of interest on any Project Bonds issued on a tax-exempt or tax-advantaged basis. Taking action under this section shall not be a condition to the City's exercise of its rights and remedies set

forth in the OMA, and any action the City may take pursuant to this section shall not diminish or abrogate the City's rights and remedies available under this OMA Amendment.

5.3 Accounting. SEAS agrees to establish and/or maintain accounting procedures and systems and maintain its accounting books and records in accordance with generally accepted accounting procedures consistent with the OMA and the Funding Agreement.

5.4 Assignment. This OMA Amendment shall inure to the benefit of the City and SEAS and shall be binding upon the City and SEAS, and their successors. No party shall assign any of its rights or delegate any of its duties under this OMA Amendment without the express written approval of the other parties.

5.5 City Approval. The Superintendent of Parks and Recreation (or that officer's successor, delegee, or assignee, within or without the Parks and Recreation Department) or such other individual as the City may designate in writing, is the agent of the City for the purposes of all approvals, notices, and releases of funds required pursuant to this OMA Amendment. Unless specifically otherwise provided for herein, all consents, approvals and other decisions of the City hereunder shall be binding only if made in writing by the Superintendent of Parks and Recreation, or that officer's successor or designee. No approval, consent, or decision of the City for purposes of this OMA Amendment shall be effective for purposes of any other agreement or instrument to which the City is a party or beneficiary, or for any regulatory or other purpose.

5.6 Amendments to the OMA and to Other Documents. No amendment to the OMA, the Funding Agreement, the Depository Agreement, or any documents appended to or incorporated into such documents, or any other documents or agreements relating to the issuance of the Project Bonds, shall be valid without the written consent of the City.

5.7 Severability. In the event any provision of the OMA Amendment shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof.

5.8 Counterparts. This Exhibit 9 to the OMA Amendment may be executed in counterparts, and each such counterpart shall be deemed to be an original instrument. All such counterparts together will constitute one and the same OMA Amendment.

ORAL AGREEMENTS OR ORAL COMMITMENTS TO LEND MONEY, EXTEND CREDIT, OR FORBEAR FROM ENFORCING REPAYMENT OF A DEBT ARE NOT ENFORCEABLE UNDER WASHINGTON LAW.



IN WITNESS WHEREOF, the City and SEAS have caused this Exhibit 9 to be executed in their respective names by their duly authorized officers and have caused this OMA Amendment to be dated as of the date set forth on the first page hereof.

THE CITY OF SEATTLE, a Washington municipal corporation

By \_\_\_\_\_  
Its Director of the Office of the Waterfront

and

By \_\_\_\_\_  
Its Acting Superintendent of Parks and Recreation

and

By \_\_\_\_\_  
Its [Interim] Director of Finance

Pursuant to Ordinance \_\_\_\_\_

SEATTLE AQUARIUM SOCIETY

By \_\_\_\_\_  
Its President and CEO  
Pursuant to Resolution: \_\_\_\_\_