


TO: Mayor Jerry L. Demings
and
Board of County Commissioners

FROM: Fred Winterkamp, Fiscal & Business Services Division Manager 

DATE: December 12, 2019

RE: **Consent Agenda Item - January 14, 2020**
Tourist Development Tax Grant Application Review Committee Funding Agreement for Winter Park Canopy Project

On November 29, 2016, the Board of County Commissioners (“Board”) adopted Ordinance No. 2016-30 (“Ordinance”), which amended the County’s Tourist Development Plan to authorize funding from available unallocated Tourist Development Tax (TDT) revenue for legally authorized capital projects and events pursuant to a grant application process set forth in Section 25-147 of the Orange County Code (Code). Pursuant to the Ordinance, on October 31, 2017, the Board adopted Resolution No. 2017-M-44, which established the Tourist Development Tax Grant Application Review Committee (ARC) to serve in an advisory capacity to the Board by evaluating applications for excess TDT revenue funding pursuant to established application review criteria and to make recommendations on same.

At its March 15, 2019 meeting, the ARC considered an application from the City of Winter Park for excess TDT revenue and performed an evaluation of the proposal that requested up to \$6,000,000 toward construction of the “Canopy” project. Following its evaluation of the grant application, the ARC approved recommending the funding request to the Orange County Tourist Development Council (TDC). On March 27, 2019, the TDC approved recommending the funding request to the Board. Then, on April 23, 2019, the Board approved the funding request recommended by ARC and TDC and directed staff to develop a funding agreement. The City of Winter Park has executed the Canopy funding agreement for which final Board approval is now requested.

The Board appropriated \$8,000,000 per year beginning in Fiscal Year 2017-18 through Fiscal Year 2022-23 for applicants that apply for funding to the ARC pursuant to Section 25-147 of the Code. The use of TDT revenues for auditoriums is authorized pursuant to section 125.0104(5)(a)1.a, Florida Statutes. If approved, the Comptroller will disburse TDT funds in accordance with the terms of the funding agreement.

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Re: Tourist Development Tax Grant Application Review Committee Funding Agreement for Winter Park Canopy Project

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If you have any questions, please contact me at (407) 836-2920.

ACTION REQUESTED:

Approval and execution of Agreement between Orange County, Florida and City of Winter Park, Florida The Winter Park Canopy 1050 West Morse Blvd., Winter Park, Florida 32789

FMW

C: Byron Brooks, County Administrator
Jeffrey Newton, County Attorney
Randy Singh, Deputy County Administrator
Lila McHenry, Senior Assistant County Attorney

APPROVED BY ORANGE
COUNTY BOARD OF COUNTY
COMMISSIONERS

BCC Mtg. Date: January 14, 2020

AGREEMENT
between
ORANGE COUNTY, FLORIDA
and
CITY OF WINTER PARK, FLORIDA

THE WINTER PARK CANOPY
(1050 West Morse Blvd., Winter Park, Florida 32789)

THIS AGREEMENT, made and entered into as of the date of last execution below, by and between ORANGE COUNTY, FLORIDA, a charter county and political subdivision of the State of Florida ("County"), and CITY OF WINTER PARK, a Florida municipal corporation ("City").

WITNESSETH:

WHEREAS, the County currently collects the tourist development taxes authorized by Section 125.0104(3)(c), (d), and (m), Florida Statutes ("Tourist Development Tax" or "TDT") and authorized uses of such Tourist Development Tax include the construction of publicly owned and operated auditoriums within the boundaries of the county in which such tax is levied; and

WHEREAS, on November 29, 2016, the Orange County Board of County Commissioners ("Board") adopted Ordinance No. 2016-30 ("Ordinance"), which amended the Tourist Development Plan to authorize funding from legally available unallocated TDT revenue for legally authorized capital projects and events pursuant to a grant application process set forth in Section 25-147 of the Orange County Code ("Code"); and

WHEREAS, the City applied for TDT capital funding for the construction of the event center/auditorium component of the Winter Park Canopy, the City's new library and events center ("the Canopy"), an authorized expenditure pursuant to the Local Option Tourist Development Act, § 125.0104, Florida Statutes (2019); and

WHEREAS, on March 15, 2019, the County's TDT Application Review Committee ("ARC"), evaluated the City's application and recommended approval to the Tourist Development Council ("TDC"); and

WHEREAS, on March 27, 2019, the TDC recommended approval of the City's application.

NOW, THEREFORE, in consideration of the mutual covenants and conditions contained herein, the County and the City agree as follows:

1. Recitals. The recitals set forth above are true and correct and are incorporated herein and made a part of this Agreement.

2. County Contribution. Subject to all terms and conditions set forth in this Agreement, the County agrees to contribute a total aggregate amount not to exceed Six Million Dollars (\$6,000,000.00) ("County Contribution") from Excess TDT Revenue pursuant to the installment schedule set forth in Section 5 herein. For purposes of this Agreement, "Excess TDT Revenue" shall mean those TDT revenues appropriated by the Board in 2018 in the amount of \$8,000,000.00 per year beginning in Fiscal Year 2017-18 through Fiscal Year 2022-23 for capital projects that apply for funding to the ARC pursuant to Section 25-147 of the Code.

3. Restrictions on Use of County Contribution. The City shall use the County Contribution only to pay for capital costs associated with the construction of the event center/auditorium component of the Canopy in accordance with Section 125.0104(5)(a)1.a., Florida Statutes, as generally described in the City's "Orange County Tourist Development Tax Grant Application" dated November, 2018 ("Grant Application") to ensure the event center/auditorium component of the Canopy is constructed materially as described in the Grant Application. Capital costs shall include: construction and furnishings, fixtures and equipment for the event center/auditorium component of the Canopy. The County Contribution shall not be used for construction cost overruns; operating costs; or maintenance costs of any type whatsoever in connection with the construction or operation of the Canopy; and shall not be used for any other aspect of the Canopy construction not directly related to the events center/auditorium component. Furthermore, the County Contribution shall not be used or pledged to secure any debt whatsoever.

4. Limitations on County's Obligation. The County's obligation to make the County Contribution shall not constitute a lien on Tourist Development Taxes and will not be on parity with any existing or future debt of the County. The obligations of the County under this Agreement are limited solely to Excess TDT Revenue and no general fund revenues or other funds whatsoever of the County are obligated. Nothing provided herein shall obligate or require the County to levy any ad valorem taxes, fees or assessments whatsoever. This Agreement and any payments provided for in this Agreement are contingent upon the availability of Excess TDT Revenues derived from the tax levied under Section 25-136 of the Code and made available under Section 25-147 of the Code to make the payments hereunder. The County shall not cause such Excess TDT Revenues to be unavailable as a result of dilution of the funds made available through the application process set forth in Section 25-147 of the Code through funding other projects through such process.

5. Disbursement of County Contribution. The County Contribution shall be disbursed according to the schedule set forth below after the City submits to the County cost requisition(s) supported by proof of valid construction costs with certification from the contractor that work invoiced has been satisfactorily performed. Any such requisition shall be signed by an authorized representative of the City and accompanied by invoices or receipts evidencing completion of work. Cost requisitions shall be substantially similar to the form attached hereto as **EXHIBIT "A."** All requisitions shall be submitted to the County Administrator or designee with a copy to the Orange County Comptroller ("Comptroller") at the notice address set forth in Section 8 herein. After review and approval of each requisition, the County Administrator or designee shall instruct the Comptroller to make payment to the City within 15 business days thereafter.

Upon approval of requisition(s) by the County Administrator or designee, the Comptroller is authorized to disburse the County Contribution to the City according to the following installment schedule:

- (a) Not to exceed \$3,000,000.00 on or after October 1, 2021;
- (b) Not to exceed \$6,000,000.00 in the aggregate on or after October 1, 2023.

No later than 45 days following a disbursement for unpaid invoices, the City shall provide the County with evidence of payment demonstrating that any such invoice was paid.

6. Commemorative Plaque. Upon completion of the construction of the Canopy, the City agrees that a plaque shall be prominently displayed on the Canopy property acknowledging the names of the Orange County Mayor and Board of County Commissioners and their contribution to the construction of the Canopy.

7. Audit. The County and the Comptroller (or designee) shall have the right to audit from time to time for compliance with the terms, conditions, obligations, limitations, restrictions and requirements of this Agreement, the use of the County Contribution for the construction of the Canopy. Such right shall extend for a period of five (5) years after completion of the Canopy. The City agrees to provide reasonable assistance in providing documents, materials, data, information and records to the County and the Comptroller or designee in the performance of these audits as requested by the Comptroller or County during the course of this contract and for a period of five (5) years after the final payment hereunder. In those situations where records have been generated from computerized data (whether mainframe, mini-computer, or PC based computer systems), the Comptroller's representatives shall be provided with extracts of data files in computer readable format on data disks or suitable alternative computer exchange formats. Such activity shall be conducted during normal business hours.

8. Notices. Any notices required or allowed hereunder shall be in writing and given by certified mail with return receipt requested, to the addresses below, or in person with proof of delivery to the addresses below, or such other address as either party shall have specified by written notice to the other party delivered in accordance herewith:

County:	Orange County Administrator 201 S. Rosalind Avenue, 5 th Floor Orlando, Florida 32801
The City:	City of Winter Park 401 Park Avenue South Winter Park, FL 32789 Attention: Randy Knight, City Manager
Comptroller:	Orange County Comptroller Director of Finance & Accounting 201 S. Rosalind Avenue, 4 th Floor Orlando, Florida 32801

9. Indemnification. To the extent permitted by law, each party agrees to defend, indemnify and hold harmless the other party, its officials and employees from all claims, actions, losses, suits, judgments, fines, liabilities, costs and expenses (including attorney's fees) attributable to its negligent acts or omissions, or those of its officials and employees acting within the scope of their employment, or arising out of or resulting from the indemnifying party's negligent performance under this agreement. Nothing contained herein shall constitute a waiver of sovereign immunity or the provisions of Section 768.28, Florida Statutes. The foregoing shall not constitute an agreement by either party to assume any liability for the acts, omissions and/or negligence of the other party. This provision shall survive termination of this Agreement.

10. Recordkeeping; Accounting. The City will utilize accounting procedures and practices in the maintenance of the records of receipts and disbursements of the funds contributed by the County, as well as all its receipts and disbursement of funds, and such procedures and practices shall be in accordance with generally accepted accounting principles. The County and the County Comptroller or their designees shall have access to all books, records, subcontract(s), financial operations, and documents of the City, its lessee(s), contractors, and its subcontractors, as required to comply with this paragraph, for the purpose of inspection or audit anytime during normal business hours during the term hereof, and for a period of five (5) years after completion of the construction of the Canopy or the termination of this Agreement, whichever shall occur later. Any cost incurred by the City as a result of a County audit shall be the sole responsibility of and shall be borne by the City. This provision shall survive termination of this Agreement.

11. Term; Termination. This Agreement shall become effective upon execution by both parties hereto and shall continue for a period of five years following completion of the Canopy. This Agreement may be amended, modified or terminated at any time during the term of this Agreement by the mutual written agreement of the Parties.

12. Default by the City. The occurrence of any of the following constitutes an Event of Default by the City:

- (a) The City's failure to complete construction of the Canopy within three years from the date of this Agreement;
- (b) Any material representation made by the City in any communication submitted to the County in an effort to induce the disbursement of Excess TDT Revenues is determined by the County to be materially false, misleading, or incorrect;
- (c) The City's default in the performance of any material term or covenant of this Agreement not otherwise provided for in this section for a period of more than 30 days after its receipt of a notice of default provided however that if the nature of the default is such that it cannot reasonably be cured within such 30-day period then the City shall have a reasonable period of time to cure such default provided that it diligently undertakes and pursues such cure; and
- (d) The City's vacating or abandoning the Canopy.

In the event of a default by the City, the County, may, at its option, exercise any one or more of the following remedies: (i) declare this Agreement terminated or (ii) exercise any and all remedies available at law and in equity.

13. Default by the County. The following shall constitute a default by the County: the County's continued default in the performance of a material term of this Agreement including but not limited to its obligations for disbursement of the County Contribution in accordance with the requirements of this Agreement for a period of more than 30 days from its receipt of written notice of such default from the City. In the event of a default by the County, then the City, at its option, may exercise any one or more of the following remedies: (i) declare this Agreement terminated; or exercise the remedy of mandamus to require the County's performance under the terms and conditions of this Agreement and/or an action for specific performance. The City hereby acknowledges and agrees that the only remedies available to the City other than termination are those of mandamus and specific performance and the County shall bear no liability for direct, indirect or consequential damages.

14. Entire Agreement. This Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof; any representations or statements heretofore made with respect to such subject matter, whether verbal or written, are merged herein. No other agreement whether verbal or written, with regard to the subject matter hereof shall be deemed to exist.

15. No Assignment. The City may not assign its rights hereunder, without the prior written consent of the County. Failure to comply with this section may result in immediate termination of this Agreement.

16. No waiver. Continued performance by either party hereto, pursuant to the terms of this Agreement, after a default of any of the terms, covenants or conditions herein shall not be deemed a waiver of any right to terminate this Agreement for any subsequent default, and no waiver of such default shall be construed or act as a waiver of any subsequent default.

17. Severability. The provisions of this Agreement are declared by the parties to be severable. However, the material provisions of this Agreement are dependent upon one another, and such interdependence is a material inducement for the parties to enter into this Agreement. Therefore, should any material term, provision, covenant or condition of this Agreement be held invalid or unenforceable by a court of competent jurisdiction, the party protected or benefited by such term, provision, covenant, or condition may demand that the parties negotiate such reasonable alternate contract language or provisions as may be necessary either to restore the protected or benefited party to its previous position or otherwise mitigate the loss of protection or benefit resulting from holding.

18. Governing Law; Venue. Any litigation occurring as a result of this Agreement shall be held in the courts of Orange County, Florida. This Agreement shall be governed by the laws of the State of Florida.

19. Headings. The headings or captions of sections or paragraphs 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.

20. **Counterparts.** This Agreement may be executed in separate counterparts, all of which taken together shall be deemed to constitute one and the same instrument.

IN WITNESS WHEREOF, the parties have executed this Agreement as indicated below:

ORANGE COUNTY, FLORIDA

By: Board of County Commissioners

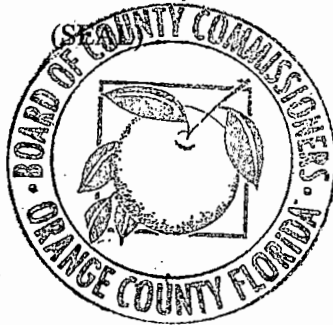
By: *Jerry L. Demings*
Jerry L. Demings
Orange County Mayor

Date: *16 January 2020*

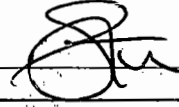
ATTEST:

Phil Diamond, CPA, County Comptroller
As Clerk of the Board of County Commissioners

By: *Katie Smith*
Deputy Clerk



CITY OF WINTER PARK, FLORIDA

By: Steve Leary 
Its: Mayor
Date: November 26, 2019

ATTEST:

Rene Cranis 
Rene S. Cranis, City Clerk

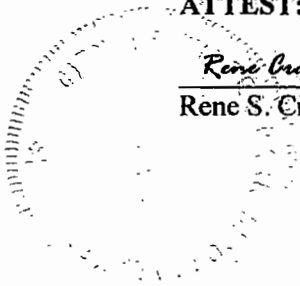


EXHIBIT "A"

**FORM CONSTRUCTION COST REQUISITION
THE CANOPY**

Date: _____

TO: Orange County Administrator
Orange County Comptroller

The City of Winter Park hereby requests, pursuant to the Agreement between Orange County, Florida and the City of Winter Park, regarding the construction of the Canopy, effective _____, 2020 (the "Agreement"), disbursement of the following amounts:

Name of Vendor	Nature of Disbursement	Vendor Invoice No.	Amount
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The undersigned does hereby certify to the County that as of the date hereof: 1) there is no existing breach of the Agreement; 2) the above listed items are properly included as authorized construction costs of the Canopy as set forth in the Agreement; 3) attached hereto are invoices for the costs requested hereby 4) that the inspecting architect or engineer has made an inspection of and approved the work completed as represented in this requisition; 5) all work being constructed is in accordance with land use restriction agreements, covenants, restrictions, codes or ordinances affecting the site of the Canopy; 6) the work for which payment is being requested above has been performed and there has been no previous request and disbursement from TDT Revenues for payment of the work.

By: _____
City of Winter Park
Authorized Representative