



COUNTY ATTORNEY'S OFFICE
JEFFREY J. NEWTON, *County Attorney*

201 South Rosalind Avenue ■ 3rd Floor
Reply To: Post Office Box 1393
Orlando, FL 32802-1393
407-836-7320 ■ Fax 407-836-5888

Consent Agenda Item

MEMORANDUM

TO: Mayor Jerry L. Demings
and
County Commissioners

FROM: Jeffrey J. Newton, County Attorney *JJN*
Lila I. McHenry, Senior Assistant County Attorney
Contact: (407) 836-7320

DATE: December 16, 2019

RE: **Consent Agenda Item for Board Meeting on January 14, 2020**
Approval of Funding Agreement among Orange County, Florida and
City of Orlando, Florida and Dr. Phillips Center for the Performing Arts,
Inc. Dr. Phillips Performing Arts Center.
(Related to Ordinance Pertaining to Taxation Tourist Development Plan)

I. EXPLANATION & SUMMARY:

On December 6, 2019, the Tourist Development Council unanimously recommended that the County authorize additional funding for the completion of the Dr. Phillips Performing Arts Center. This funding requires an amendment to the TDT Plan and a public hearing for the amendment has been scheduled for the afternoon of January 14, 2020. This agreement will be pulled from the consent agenda for consideration after the public hearing on the Plan amendment.

If you have any questions, please contact Lila McHenry or me at 407-836-7320.

II. ACTION REQUESTED:

Approval and execution of Funding Agreement Among Orange County, Florida and City of Orlando, Florida and Dr. Phillips Center for the Performing Arts, Inc. Dr. Phillips Performing Arts Center.

Attachment

- c: Byron W. Brooks, AICP, County Administrator
- Randy Singh, Deputy County Administrator
- Chris Testerman, Deputy County Administrator
- Fred Winterkamp, Manager Fiscal and Business Services

Deputy County Attorney

Joel D. Prinsell

Senior Assistant County Attorneys

Elaine M. Asad

Lila McHenry

Assistant County Attorneys

Roberta Alfonso

Cristina T. Berrios

Whitney E. Evers

Erin E. Hartigan

Georgiana Holmes

Aleas Koos

Katherine W. Latorre

Scott McHenry

Sawsan Mohiuddin

Dylan Schott

Scott Shevenell

Stephanie Stone

Adolphus Thompson

Legal Administrative Supervisor

Anna M. Caban

Senior Paralegal

Kimberly Cundiff

Paralegals

Melessia Lofgren

Maria Vargas, ACP

Gail Stanford

FUNDING AGREEMENT

Among

ORANGE COUNTY, FLORIDA

and

CITY OF ORLANDO, FLORIDA

and

DR. PHILLIPS CENTER FOR THE PERFORMING ARTS, INC.

DR. PHILLIPS PERFORMING ARTS CENTER

THIS FUNDING AGREEMENT (this "Agreement"), is made and entered into as of the date of last execution below, by and among **ORANGE COUNTY, FLORIDA**, a charter county and political subdivision of the State of Florida, ("County"), the **CITY OF ORLANDO, FLORIDA**, a municipal corporation created and existing under the laws of the State of Florida (the "City"), and **DR. PHILLIPS CENTER FOR THE PERFORMING ARTS, INC.**, a not-for-profit corporation organized and existing under the laws of the State of Florida ("DPAC").

WITNESSETH:

WHEREAS, the City owns the Dr. Phillips Performing Arts Center ("Performing Arts Center" or "PAC") a multipurpose development containing performance halls and other practice, educational and rehearsal spaces; and

WHEREAS, DPAC is a not-for-profit corporation and 501(c)3 organization which operates and manages the Performing Arts Center pursuant to that certain Orlando Performing Arts Center Agreement between the City, City of Orlando Florida Community Development Agency (the "Agency") and the DPAC dated June 20, 2007, as amended ("PAC Agreement"); and

WHEREAS, the financing and construction of the Performing Arts Center required a combination of public funds from the State of Florida, the County, the City, the Agency and private contributions; and

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 such Tourist Development Taxes are authorized to be used to construct, extend, enlarge, remodel, repair, improve auditoriums that are publicly owned but are operated by organizations

that are exempt from federal taxation pursuant to 26 U.S.C. section 501(c)(3) and open to the public; and

WHEREAS, the County, the City and the Agency previously entered into that certain interlocal agreement, dated August 6, 2007 wherein the County provided \$130 million in TDT revenues for construction of the Performing Arts Center (the "Project"); and

WHEREAS, subsequent to the execution of such interlocal agreement, the economic downturn caused the completion of Project to be delayed and split into two phases; and

WHEREAS, such interlocal agreement was amended on July 16, 2012, to provide an approximate \$7.4 million cost escalator from the County for the Project; on October 22, 2013, to provide an additional \$25 million from the County for the Project; and on November 1, 2016 to provide an additional \$45 million from the County for the Project, thereby bringing the aggregate County contribution provided for the PAC to approximately \$207.4 million (such interlocal agreement, as amended, is hereinafter referred to as the "Interlocal Agreement"); and

WHEREAS, certain State of Florida grant funding originally allocated for the Project was reallocated by the Legislature and the delay and phasing of the Project caused certain construction cost increases and value-engineering of certain critical building components, thereby creating a Project budget gap in the amount of \$19 million; and

WHEREAS, to ensure timely completion of the construction of the Project, the County now desires to address such budget gap through a separate additional \$19 million contribution of TDT funds and thereby bring the County's total contribution for the Project to \$226.4 million; and

WHEREAS, on January 14, 2020 the Orange County Board of County Commissioners ("Board") held a public hearing and adopted Ordinance No. 2020-__ ("Ordinance"), which amended the Tourist Development Plan in order to authorize funding from TDT revenues in an amount not to exceed nineteen million dollars (\$19,000,000) for project costs associated with the completion of construction of the Project pursuant to the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and conditions contained herein, the County, the City and DPAC 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 nineteen million dollars (\$19,000,000.00) solely from excess TDT revenues for completion of the Project ("County Contribution"). Such County Contribution shall be disbursed to the City solely for deposit in the "PAC Construction Fund" as defined in and established by the PAC Agreement.

3. Restrictions on Use of County Contribution. The City and DPAC shall use the County Contribution solely to pay for those costs permitted by Section 125.0104(5)(a)(1)(b) Florida Statutes, this Agreement, and completion of construction of the Project ("Permitted

Costs"). The County Contribution shall **not** be used for and the County shall **not** be responsible for: (i) any costs other than Permitted Costs; (ii) construction cost overruns in excess of the County Contribution; (iii) operating, administrative or maintenance costs of any type whatsoever; (iv) salary, overtime, or other similar compensation or benefits of employees or contract employees of the County, the City, or any other governmental agency in connection with the construction or operation of the PAC; or (v) compensation of outside consultants performing indirect services for the County or the City, as determined by generally accepted accounting principles. After the disbursement the City shall provide the County with a detailed report of expenditures made with respect to the County Contribution. The County Contribution shall not be used or pledged by the City or DPAC 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 the TDT revenues to be deposited in the PAC Construction Fund 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. The County's obligation under this Agreement is limited to providing the County Contribution to the City for deposit in the City's PAC Construction Fund and the County shall not be liable for any construction cost overruns or operating subsidies of any type whatsoever in connection with the construction or operation of the Performing Arts Center.

5. Disbursement of County Contribution. The County Contribution shall be disbursed by the County in one installment within 30 days after submission of a cost requisition signed by an authorized representative of the City certifying that the County Contribution of nineteen million dollars together with funds on deposit in the PAC Construction Fund and funds secured by a direct pay commercial letter of credit pursuant to the PAC Agreement will be sufficient to complete construction of the Project. Such requisition shall be provided to the County Administrator and the Orange County Comptroller ("Comptroller") and DPAC at the notice addresses set forth herein.

6. DPAC and City Representations and Obligations. DPAC and the City shall (i) diligently proceed with the completion of the Project in a financially responsible and commercially reasonable manner; (ii) use and maintain the PAC as a publicly owned auditorium as contemplated under Section 125.0104(5)(a)(1)(b) Florida Statutes; and (iii) shall comply with all federal, state, and local laws, ordinances, rules and regulations relating to the design, construction, funding, operation and maintenance of the PAC. The City and DPAC covenant, represent and warrant to the County that the City and DPAC have and will have the financial capability and resources to support and fund the operational costs of the PAC on an ongoing basis and that the County will not be requested to provide and will have no responsibility for any operating costs or costs other than Permitted Costs. The City and DPAC confirm that, consistent with Section 6.4.5 of the Interlocal Agreement, the City and DPAC shall continue to accord the County the same benefits as are accorded the City, if any. Furthermore, DPAC and City shall ensure that the County's total aggregate contribution pursuant to both the Interlocal Agreement and this Agreement is acknowledged in a manner fully commensurate with the County's contribution in relation to the total construction cost of the PAC and equal to the acknowledgement of the City's and Agency's contribution, in press releases, permanent and

temporary commemorative signage and plaques as well as in events commemorating completion of the PAC.

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 completion of Project. Such right shall extend for a period of five (5) years after completion of the Project and shall survive termination of this Agreement. 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 completion of the Project. 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
City:	Chief Financial Officer City of Orlando, Florida 400 S. Orange Avenue, 4 th Floor Orlando, Florida 32801
With a copy to:	City Attorney City of Orlando, Florida 400 South Orange Avenue, 3 rd Floor Orlando, Florida 32801
DPAC:	President and CEO 155 E. Anderson Street Orlando, FL 32801
With a copy to:	Chief Financial Officer 155 E. Anderson Street Orlando, FL 32801
Comptroller:	Orange County Comptroller Director of Finance & Accounting

201 S. Rosalind Avenue, 4th Floor
Orlando, Florida 32801

9. Indemnification. The City, to the extent permitted by law, agrees to defend, indemnify, and hold harmless the County, its officials and employees from all claims, actions, losses, suits and judgments, fines, liabilities, costs and expenses (including attorney's fees) each attributable to its own negligent acts or omissions or those of its officials and employees acting within their scope of their employment or connected in any way or arising from performance under this Agreement. The foregoing shall not constitute an agreement by any party to assume any liability for the acts, omissions and/or negligence of any other party. This provision shall survive termination of this Agreement. Nothing herein is intended to act as a waiver of the City's sovereign immunity pursuant to Section 768.28, Florida Statutes, and notwithstanding anything in this Agreement to the contrary, under no circumstances shall City be liable to County under any contract, negligence, strict liability, or other legal or equitable theory for any amounts in excess of those limits per claim and per occurrence set forth for tort liability in Section 768.28, Florida Statutes, which limits are hereby made applicable to all manner of claims against the County related to this Agreement and are not confined to tort liability.

10. Recordkeeping; Accounting. The County and City agree that their respective rights and obligations set forth in Article IX of the Interlocal Agreement relating to Validity, Records, Reports and Audits (Sections 9.1, 9.3 and 9.4) shall also govern their respective rights and obligations under this Agreement.

11. Effective Date; Amendment or Termination. This Agreement shall become effective upon execution by all parties hereto. This Agreement may be amended, modified or terminated at any time during the term of this Agreement by the mutual written agreement of all of the Parties.

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

(a) Failure to complete construction of the Project within two years from the date of this Agreement;

(b) Any material representation is made by DPAC or the City (in each case, a default by said party) in any communication submitted to the County or the Comptroller in an effort to induce the disbursement of TDT Revenues is determined by the County to be materially false, misleading, or incorrect;

(c) DPAC's or the City's default (in each case, a default by said party) 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 DPAC and/or the City, as applicable, shall have a reasonable period of time to cure such default provided that such cure is diligently undertaken and pursued by DPAC and/or the City, as applicable;

(d) By the City if the City takes steps to convey, vacate or abandon the PAC within fifteen (15) years from the effective date of this Agreement.

In the event of a default by DPAC or 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 against such defaulting party.

13. Default by the County. The County's failure to disburse the County Contribution when due as set forth in Section 2 hereof shall constitute a default by the County. In the event of a default by the County, then the City or DPAC, at their 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 and DPAC hereby acknowledge and agree that the only remedies available to the City and DPAC other than termination are those of mandamus and specific performance and the County shall bear no liability for direct, indirect or consequential damages.

14. Interlocal Agreement. This Agreement shall not be deemed to modify or amend the Interlocal Agreement.

15. No Assignment. Neither the City nor DPAC may 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 such 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.

21. No Waiver of Sovereign Immunity. Nothing contained in this Agreement shall constitute, or be in any way construed to be, a waiver of either the City's or the County's sovereign immunity or the protections and provisions of Section 768.28, Florida Statutes.

[SIGNATURE PAGES TO FOLLOW]

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

ORANGE COUNTY, FLORIDA

By: Board of County Commissioners

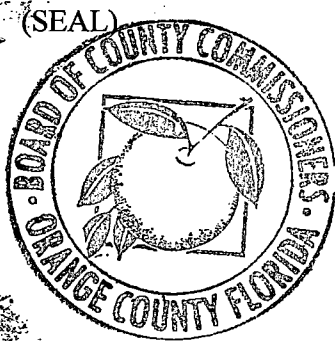
By: *Jerry L. Demings*
Jerry L. Demings
Orange County Mayor

Date: *16 January 2020*

ATTEST:

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

By: *Jessica Vaughn*
for Deputy Clerk



B-8

**CITY OF ORLANDO
COUNCIL AGENDA ITEM**

Items Types:
Business and Financial Services
District: ALL
Contract ID:
Exhibits: Yes
Grant Received by City?: No

For Meeting of:
January 13, 2020
From:
Document Number:
On File (City Clerk) : Yes **Draft Only:** No

Subject:
Funding Agreement for the Dr. Phillips Center for the Performing Arts

Summary:

On January 14, 2020, the Orange County Board of County Commissioners is expected to hold a public hearing and adopt an Ordinance which will amend the County's Tourist Development Plan in order to authorize funding from Tourist Development Tax revenues in an amount not to exceed \$19,000,000 for project costs associated with the completion of construction of the Dr. Phillips Center for the Performing Arts. The attached Funding Agreement between the County, the City and the Dr. Phillips Center for the Performing Arts, Inc., provides for the additional County contribution.

No additional financial contribution from the City is required.

Fiscal & Efficiency Data: The additional TDT funding from Orange County in the amount of \$19,000,000 will be deposited to the PAC Construction Fund and used for project costs associated with the completion of construction of the Dr. Phillips Center for the Performing Arts.

Recommended Action:

Approval of the Funding Agreement, substantially as attached hereto, subject to final review and approval by the City Attorney's Office and authorization for execution by the Mayor and City Clerk.

Agenda Item attachment(s) on file in the City Clerks Office.

Note: All agenda items must be in the City Clerk's office by Noon Friday, six(6) business days prior to the regular Monday City Council meeting.

Contact: Christopher McCullion, CFO Christopher.McCullion@cityoforlando.net

Approved By:

Department
Budget Outside Routing Approval
City Clerk

Date and Time
1/2/2020 11:25 AM
1/2/2020 11:31 AM

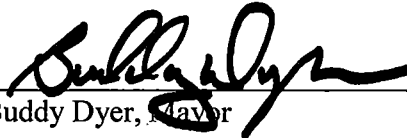
City Council Meeting: 1-13-2020
Item: B-8 Documentary: 200113B08

ATTACHMENTS:

Name:	Description:	Type:
<input type="checkbox"/> 2020DPACFunding_Agmtfinal.pdf	Funding Agreement - DPC	Backup Material
<input type="checkbox"/> Fiscal-Impact-Statement DPAC.docx	Fiscal Impact Statement	Backup Material

"Enhance the quality of life in the City by delivering public services in a knowledgeable, responsive and financially responsible manner."

CITY OF ORLANDO, FLORIDA

By: 
Buddy Dyer, Mayor

Date: 1/13/2020

ATTEST:

By: 
City Clerk

APPROVED AS TO FORM AND LEGALITY
for the use and reliance of City of
Orlando, Florida only

January 13 2020


Assistant City Attorney

City Council Meeting: 1-13-2020
Item: B-8 Documentary: 200113B08

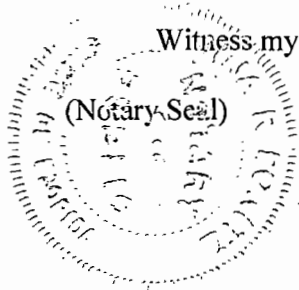
DR. PHILLIPS CENTER FOR THE PERFORMING ARTS, INC.

By: Katherine Ramsberger
Its: President & CEO
Date: 9 Jan 2020

**STATE OF FLORIDA
COUNTY OF ORANGE**

I HEREBY CERTIFY, that on this 9TH day of JANUARY, 2020, before me personally appeared KATHERINE RAMSBERGER, PRES. & CEO of Dr. Phillips Center for the Performing Arts, Inc., to me known to be, or who has produced D.L. as identification, and did (did not) take an oath, the individual and officer described in and who executed the foregoing conveyance and acknowledged the execution thereof to be his/her free act and deed as such officer thereunto duly authorized, and that the official seal of said corporation is duly affixed thereto, and the said conveyance is the act and deed of said corporation.

Witness my hand and official seal this 9TH day of JANUARY, 2020.



Gina R. Ponitz
Notary Signature



City Council Meeting: 1-13-2020
Item: B-8 Documentary: 200113B08