LB
05/05/16
Item No. 12

AN ORDINANCE 2016-05-05-0322

AUTHORIZING A $50,000.00 AGREEMENT TO USE FUNDS WITH THE SYMPHONY SOCIETY OF SAN ANTONIO TO HELP THE ORGANIZATION DEVELOP AND IMPLEMENT A FINANCIAL STABILITY PLAN.

* * * * *

WHEREAS, in early 2016, the San Antonio Symphony leadership informed its major donors they had an operating deficit of $600,000.00 for Fiscal Year 2016 and since then, representatives from the Tobin Endowment, Kronkowsky Charitable Foundation, HEB, San Antonio Area Foundation, Bexar County, the City of San Antonio (collectively "Funders"), and the Symphony Society of San Antonio ("SAS") have collaborated to develop a plan that will eliminate the current deficit and assist with the financial sustainability for future fiscal years; and

WHEREAS, the Funders will collectively support the financial stability of SAS in the amount of $600,000.00; and

WHEREAS, the City proposes to provide SAS with $50,000.00 to develop and implement a financial stability plan to enable SAS to address their current $600,000.00 budget deficit: **NOW THEREFORE:**

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:

SECTION 1. The terms and conditions of an Agreement to Use Funds with the Symphony Society of San Antonio are authorized and approved. A copy of the Agreement, previously executed by SAS, is attached to this Ordinance as Exhibit I. The City Manager, or her designee, is authorized to execute the Agreement.

SECTION 2. Funding in the amount of $50,000.00 for this Ordinance is available in Fund 29006000, Cost Center 8520760001 and General Ledger 5407030, as part of the Fiscal Year 2016 Budget.

SECTION 3. Payment not to exceed the budgeted amount is authorized to the Symphony Society of San Antonio and shall be encumbered with a purchase order.

SECTION 4. The financial allocations in this Ordinance are subject to approval by the Director of Finance, City of San Antonio. The Director of Finance, may, subject to concurrence by the City Manager or the City Manager's designee, correct allocations to specific SAP Fund Numbers, SAP Project Definitions, SAP WBS Elements, SAP Internal Orders, SAP Fund Centers, SAP Cost Centers, SAP Functional Areas, SAP Funds Reservation Document Numbers and SAP GL Accounts as necessary to carry out the purpose of this Ordinance.

SECTION 5. This Ordinance shall take effect immediately upon the receipt of eight affirmative votes; otherwise it shall be effective ten days after its passage.

LB
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PASSED AND APPROVED this 5th day of May, 2016.

M A Y O R
Ivy R. Taylor

ATTEST:

Leticia M. Vacek
City Clerk

APPROVED AS TO FORM:

Martha G. Sepeda
Acting City Attorney

Agenda Item:	**12**
Date:	05/05/2016
Time:	10:50:39 AM
Vote Type:	Motion to Approve
Description:	An Ordinance authorizing a Funding Agreement in the amount of $50,000.00 with the Symphony Society of San Antonio to help the organization develop and implement a financial stability plan. [Lori Houston, Assistant City Manager; Debbie Racca-Sittre, Interim Director, Culture and Creative Development]
Result:	Passed

Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Ivy R. Taylor	Mayor		x				
Roberto C. Treviño	District 1		x				x
Alan Warrick	District 2		x				
Rebecca Viagran	District 3		x				
Rey Saldaña	District 4	x					
Shirley Gonzales	District 5			x			
Ray Lopez	District 6		x			x	
Cris Medina	District 7		x				
Ron Nirenberg	District 8		x				
Joe Krier	District 9		x				
Michael Gallagher	District 10		x				

Exhibit I

AGREEMENT TO USE FUNDS
of the City of San Antonio

THIS AGREEMENT is entered into by and between the City of San Antonio, a Texas Municipal Corporation ("City") acting by and through its Director of the Department for Culture and Creative Development and the **Symphony Society of San Antonio,** ("Recipient");

WITNESSETH:

WHEREAS, the Department for Culture and Creative Development is designated as the managing City department for the City; and

WHEREAS, City has provided certain funds from the Hotel Motel Tax Fund for the promotion of tourism and the convention and hotel industry through the encouragement, promotion, improvement, application and exhibition of the arts; and

WHEREAS, pursuant to Ordinance No. **2016-05-05-____**, passed and approved on May 5, 2016, the City Council authorized the expenditure of these funds for cultural arts activities that benefit the citizens of San Antonio and the tourism and hotel industry; and

WHEREAS, several public and private institutions, including the Tobin Endowment, Kronkowsky Charitable Foundation, HEB, San Antonio Area Foundation, Bexar County and City have agreed to provide funding totaling $600,000 to Recipient to help Recipient achieve financial stability and City will assist Recipient by providing **$ 50,000.00** to be used for the development and implementation of a financial stability plan ("Plan"), as described in **Attachment I –Letter Agreement**; and

WHEREAS City has allocated **$ 50,000.00** from the Department for Culture and Creative Development budget for the above-described arts-related expenditures; **NOW THEREFORE:**

For and in consideration of the following mutual promises and obligations, and for the benefit of the City of San Antonio and the tourism and hotel industry, the parties agree as follows:

1. In consideration of the payment of the sum of **$ 50,000.00** to Recipient by City, Recipient agrees to implement the financial stability plan in accordance with the terms and conditions as described in **Attachment I - Letter Agreement**. Recipient agrees to provide City with documentation to support its compliance with the terms and conditions set out in **Attachment I - Letter Agreement** no later than thirty (30) days from the date that Recipient complies with such terms and conditions.

2. Accounting records for all expenditures shall be maintained by Recipient in accordance with generally accepted accounting practices, and shall be subject to audit by City or its contracted auditor. These records shall be maintained for a period of four years from the termination date of this Agreement.

3. This Agreement will commence immediately upon execution and terminate upon the completion of all obligations herein contained or **September 30, 2019**, whichever is sooner.

4. This Agreement is not assignable and funds received as a result hereof shall only be used by the parties stated herein. The funds provided under this Agreement are separate and apart from any funding received under Recipient's current Arts Agency Contract executed by the parties.

5. In the event that all of the above-described funds are not used for the purposes set out in **Attachment I - Letter Agreement** or Recipient fails to comply with the requirements of **Attachment I - Letter Agreement** and with all terms and provisions of this Agreement, Recipient agrees to refund any amounts to City which were not used in accordance with these terms within thirty (30) days of notice from City.

6. None of the performance rendered hereunder shall involve, and no portion of the funds received hereunder shall be used, directly or indirectly, for the construction, operations, maintenance or administration of any sectarian or religious facility or activity, nor shall said performance rendered or funds received be utilized to benefit, directly or indirectly, any such sectarian or religious facility or activity.

7. INSURANCE
   Recipient shall be responsible for maintaining the insurance provided under its current Arts Funding Contract with City and ensuring that it provides all coverage necessary under this Agreement for the term of this Agreement.

   In no event will City be required to maintain any insurance coverage for Recipient.

   Any and all of the Recipient's employees, wherever located, while engaged in the performance of any work required by this Agreement shall be considered employees of the Recipient only, and not of City, and any and all claims that may arise from the Workers' Compensation Act on behalf of said employees while so engaged shall be the sole obligation and responsibility of Recipient.

8. INDEMNITY

RECIPIENT covenants and agrees to FULLY INDEMNIFY and HOLD HARMLESS, CITY and the elected officials, employees, officers, directors, volunteers and representatives of CITY, individually and collectively, from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, penalties, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal or bodily injury, death and property damage, made upon CITY directly or indirectly arising out of, resulting from or related to RECIPIENT'S activities under this AGREEMENT, including any acts or omissions of RECIPIENT, any agent, officer, director, representative, employee, consultant or subcontractor of RECIPIENT, and their respective officers, agents employees, directors and representatives while in the exercise of performance of the rights or duties under this AGREEMENT. The indemnity provided for in this paragraph shall not apply to any liability resulting from the negligence of CITY, its officers or employees, in instances where such negligence causes personal injury, death, or property damage. IN THE EVENT RECIPIENT AND CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS FOR THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.

The provisions of this INDEMNIFICATION are solely for the benefit of the parties hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity.

RECIPIENT shall advise CITY in writing within 24 hours of any claim or demand against CITY or RECIPIENT known to RECIPIENT related to or arising out of RECIPIENT'S activities under this AGREEMENT.

<u>Defense Counsel</u> - City shall have the right to select or to approve defense counsel to be retained by Recipient in fulfilling its obligation hereunder to defend and indemnify City, unless such right is expressly waived by City in writing. Recipient shall retain City approved defense counsel within seven (7) business days of City's written notice that City is invoking its right to indemnification under this Agreement. If Recipient fails to retain Counsel within such time period, City shall have the right to retain defense counsel on its own behalf, and Recipient shall be liable for all costs incurred by City. City shall also have the right, at its option, to be represented by advisory counsel of its own selection and at its own expense, without waiving the foregoing.

<u>Employee Litigation</u> – In any and all claims against any party indemnified hereunder by any employee of Recipient, any subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation herein provided shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for Recipient or any subcontractor under worker's compensation or other employee benefit acts.

9. **Non-Discrimination**. As a party to this Agreement, Recipient understands and agrees to comply with the *Non-Discrimination Policy* of the City of San Antonio contained in Chapter 2, Article X of the City Code and further, shall not discriminate on the basis of race, color, religion, national origin, sex, sexual orientation, gender identity, veteran status, age or disability, unless exempted by state or federal law, or as otherwise established herein.

10. Recipient shall provide to City, prior to or at the time this Agreement is executed, a list of each scheduled activity, program or event that could enhance and/or promote the visitor/tourism industry.

11. Recipient shall receive prior written approval from City before committing these funds as a match for any local funding.

12. Recipient agrees and understands that, it and all persons designated by it to provide services in connection with this Agreement, is (are) and shall be deemed to be an independent contractor(s), responsible for its (their) respective acts or omissions, and that City shall in no way be responsible for Recipients actions, and that none of the parties will have authority to bind the others or to hold out to third parties, that it has such authority.

13. For purposes of this Agreement, all official communications and notices among the parties shall be deemed sufficient if in writing and mailed, registered or certified mail, postage prepaid, to the addresses set forth below:

    CITY:

    Debbie Racca- Sittre, Interim Director
    Department for Culture and Creative Development
    115 Plaza de Armas, Suite 102
    San Antonio, Texas 78205

    RECIPIENT:

    David S. Gross, President
    Symphony Society of San Antonio
    711 Navarro Street
    San Antonio, TX 78205

    Notices of changes of address by either party must be made in writing delivered to the other party's last known address within five (5) business days of the change.

14. If any provision of this Agreement is for any reason held to be unconstitutional, void, or invalid, the remaining provisions or sections contained herein shall remain in effect and the section so held shall be reformed to reflect the intent of the parties.

15. The signer of this Agreement for Recipient represents, warrants, assures and guarantees that the he or she has full legal authority to execute this Agreement on behalf of Recipient and to bind Recipient to all of the terms, conditions, provisions and obligations herein.

16. Sections 2, 6 and 9 shall survive termination of this Agreement.

IN WITNESS OF WHICH this Agreement is effective upon full execution.

CITY OF SAN ANTONIO

_____

Lori Houston
Assistant City Manager

SYMPHONY SOCIETY OF SAN ANTONIO

David S. Gross
President

Approved as to Form: _____
Assistant City Attorney

Attachment I: Letter Agreement

Attachment I

April 29, 2016

The Board of Directors
Symphony Society of San Antonio
d/b/a San Antonio Symphony
San Antonio, Texas

Dear Ladies and Gentlemen of the Board of Directors:

The proposed funders listed in Exhibit A (the "Funders") to this letter agreement (this "Letter Agreement") are pleased to provide grants payable by each of the proposed Funders in the respective amounts opposite each proposed Funder's name in the attached Exhibit A, to the San Antonio Symphony ("SAS") for support, subject to the following terms and conditions:

(1) Grant of cash contribution in the amount of $500,000 to help fund the $600,000 operating deficit for FYE 8/31/2016 of the SAS, subject to the following terms and conditions:

We understand the SAS needs to fund an operating deficit of $600,000 (the "FY2016 Deficit") as soon as possible.

We also understand that the current members of the Board of Directors of SAS acknowledge their oversight responsibility of SAS management and thus have funded the first $100,000 to reduce the FY2016 Deficit. The Funders will make cash contributions to SAS in the respective amounts set forth for each Funder in Exhibit A under the column "FY2016 Operating Support," within thirty (30) days from the date of the confirmation letter that the SAS Board committed $100,000, in cash or written pledges, has been achieved, subject to compliance with all conditions in this Letter Agreement.

In summary, the entire SAS $600,000 operating deficit can be paid off in full as follows:

SAS Board member gifts, in aggregate:	$100,000
Funders' grants, in aggregate:	500,000
TOTAL	$600,000

Please understand that this $500,000 grant by the Funders is a one-time grant to help fund the FY2016 Deficit. SAS should not expect similar grants from the Funders for any future operating deficits.

In addition, the undersigned Chairman and President of SAS recognizes that the Tobin Center for the Performing Arts (the "Tobin Center") is the SAS's "home" and that SAS will use the Tobin Center for all Classics and Pops concerts except to the extent

that SAS requests dates in excess of the 22 weeks currently used by SAS and the Tobin Center is unable to make these requested excess dates available in a schedule that is reasonably acceptable to SAS. The current three performance series of the Holiday Pops and the Fiesta Pops will remain at the Tobin Center and the Tobin Center will be the preferred venue for any additional performances in either series. Only if and to the extent that the Tobin Center cannot make dates available for such additional performances will they be performed in any venue other than the Tobin Center.

(2) Pledge of grants for underwriting support of SAS's FY2017 season, subject to the following conditions:

The Funders will pledge grants in the respective amount for each Funder set forth in Exhibit A under the column "FY2017 Underwriting Support" for underwriting support for the FY2017 season, contingent upon:

A) SAS financial statements demonstrating the FY2016 Deficit has been totally paid and SAS is debt-free, except for current operating liabilities;
B) SAS Board shall develop a comprehensive business plan and approve an annual budget (being a balanced budget, in which expenses cannot exceed revenues) not to exceed $7,200,000 for FYE 2017, 2018. If at any time the SAS Board can demonstrate additional revenues to cover any additional proposed expenditures, the Board may review such facts with the Funders, who shall have sole discretion to decide whether to increase the $7,200,000 budget by the approved amount;
C) SAS Board will dedicate an additional $300,000 to pay down the $600,000 structural deficit and, thereafter, SAS Board shall prohibit utilization of deferred ticket sales revenue (for post-FY2018 performances) for future current fiscal year expenses.

PLEASE KNOW THAT THE FUNDERS PREFER THAT THE SIZE AND PAY RATE OF THE SAS ORCHESTRA REMAIN AT THE PRESENT OR HIGHER LEVEL THAT THE BUDGET CAN SUPPORT.

(3) Pledge of grants for underwriting support of SAS's FY2018 season, subject to the following conditions:

The Funders will pledge grants in the respective amount for each Funder set forth in Exhibit A under the column "FY2018 Underwriting Support" for underwriting support for the FY2018 season, contingent upon:

A) SAS financial statements demonstrating the FY2016 Deficit has been totally paid, no FYE 2017 operating deficit occurred, and SAS is substantially debt-free, except for current operating liabilities;
B) SAS Board shall develop a comprehensive business plan and approve an annual budget (being a balanced budget, in which expenses cannot exceed revenues) not to exceed $7,200,000 for FYE 2017, 2018 and 2019. If at any

time the SAS Board can demonstrate additional revenues to cover any additional proposed expenditures, then the Board may review such facts with the Funders, who shall have sole discretion to decide whether to increase the $7,200,000 budget by the approved amount;

C) SAS Board will dedicate $300,000 to pay off the $300,000 structural deficit and, thereafter, SAS Board shall prohibit utilization of deferred ticket sales revenue (for post-FY2018 performances) for the future current fiscal year expenses.

After FY 2018, the SAS Board of Directors will prohibit the use of the deferred ticket revenues from the following fiscal year being used for current spending to ensure no new operating deficits, and allow these ticket revenues to serve as cash "cushion" or reserve for future SAS operations.

(4) Restructuring of Board of Directors

The Funders recognize and support the current SAS Board's plans to realign and restructure the SAS Board of Directors in accordance with its Bylaws. In support of that plan, all grants referenced in paragraph 1, paragraph 2 and paragraph 3 above are contingent upon the restructuring of the SAS Board of Directors in a manner satisfactory to the Funders, to reasonably assure the Funders of proper management oversight of SAS financial performance to avoid future operating deficits. Specifically, the SAS Board shall take the necessary actions, no later than September 30, 2016 to:

A) Prior to payment of the grants under paragraph 1 above, and no later than September 30, 2016, SAS Board of Directors described in Section 2.1 of the SAS Bylaws will work with the Funders to reconstitute the Board of Directors of SAS from and after September 30, 2016, to promote oversight of ongoing financial performance; and

B) Prior to payment of the grants under paragraph 1 above, and no later than September 30, 2016, SAS Board of Directors will work with the Funders to select current members of the SAS Board and others, working with the Funders, to the SAS Advisory Board "to support the Board of Directors in fundraising activities, outreach, or for such other purposes as are necessary to fulfill the mission of SAS" as contemplated by Section 2.6.8 of the SAS Bylaws.

To avoid any doubt, we note that each Funder is responsible solely for the obligations set forth opposite that Funder's name in Exhibit A, i.e., there is no joint and several responsibility among the Funders.

Please confirm your acknowledgment and consent to the terms set forth in this Letter Agreement by signing where indicated below. The Funders look forward to achieving our shared objective of a financially stable and vibrant symphony for the people of San Antonio.

Very truly yours,

Funders as attached on Exhibit B, executing on behalf of and as the representative of the entities and individuals listed in Exhibit A attached to and made a part of this Letter Agreement.

ACKNOWLEDGED AND CONSENTED TO:

SYMPHONY SOCIETY OF SAN ANTONIO,
d/b/a San Antonio Symphony

By: _____ Date: 4/29/16, 2016
David Kinder, Chair

By: _____ Date: 4/29, 2016
David Gross, President

Exhibit A

Funder	FY2016 Operating Support	FY2017 *9 Underwriting Support	FY2018 *9 Underwriting Support
The Tobin Endowment	$200,000*1	$150,000	$150,000
The Kronkosky Charitable Foundation	$350,000*2	$250,000	$250,000
City of San Antonio*3	$50,000*4	$ TBD	$ TBD
Bexar County*5	$300,000	$ TBD	$ TBD
HEB	$225,000*6	$175,000	$150,000
San Antonio Area Foundation – John L. Santikos Charitable Foundation	$100,000*7	$100,000	$100,000
Dennert O. Ware*8	$25,000	$ TBD	$ TBD

*1$200,000 is for operating deficit reduction in FY2016.

*2$The $250,000 for FY2016 has been funded to SAS within the past 10 days and $100,000 is for operating deficit reduction in FY2016.

*3The FY 2016 additional support from the City is subject to City Council approval. Underwriting support for FY2017 and FY2018 will be determined by the competitive arts funding process that is underway and is subject to City Council approval.

*4$50,000 is for operating deficit reduction in FY2016

*5Bexar County Commissioner's Court authorized an additional $300,000 on January 12, 2016. Future funding from Bexar County will be determined through the FY budget process and is subject to Commissioner's Court approval.

*6$175,000 for FY 2016 has already been funded to SAS, $50,000 is for operating deficit reduction in FY2016

*7$100,000 is for operating deficit reduction in FY2016.

*8FY2016 operating support in total amount of $25,000, $10,000 of which has been paid

*9Subject to each Funders' review of agreement compliance by SAS

Exhibit B

FUNDERS:

The Tobin Endowment

By:_____
J. Bruce Bugg, Jr., Chairman and Trustee

Kronkosky Charitable Foundation

By:_____
J. Tullos Wells, Managing Director

San Antonio Area Foundation
For: John L. Santikos Charitable Foundation

By:_____
Dennis Noll, President

_____
Dennert O. Ware

City of San Antonio

By:_____
Lori Houston, Assistant City Manager

Bexar County, Texas

By:_____
Nelson W. Wolff, County Judge