

AN ORDINANCE 2014 - 08 - 21 - 0605

**AUTHORIZING A THIRD AMENDMENT TO THE GRANT AND DEVELOPMENT AGREEMENT WITH BEXAR COUNTY AND THE BEXAR COUNTY PERFORMING ARTS CENTER FOUNDATION TO PROVIDE A CONTRIBUTION FROM THE CITY AND BEXAR COUNTY OF UP TO \$5,000,000.00 EACH TOWARDS CONSTRUCTION OF A PARKING FACILITY TO SERVE THE TOBIN CENTER FOR PERFORMING ARTS.**

\* \* \* \* \*

**WHEREAS**, in June 2008, City Council approved a Grant and Development Agreement (“Agreement”) with Bexar County and the Bexar County Performing Arts Center Foundation (“Foundation”) whereby: (i) the City of San Antonio conveyed title of the former Municipal Auditorium and San Antonio Fire Department Headquarters to the Foundation for the Foundation’s construction and operation of the Tobin Center for Performing Arts (“Tobin Center”); (ii) Bexar County contributed \$100,000,000.00 towards construction costs from visitor tax revenues; and (iii) the City contributed \$500,000.00 per year for five years to the Reserve Fund that the Foundation was required to establish pursuant to the Agreement; and

**WHEREAS**, the Foundation has raised \$47 million of the \$54 million it was required to raise from the private sector for the balance of construction costs and the Reserve Fund to help pay for operating costs. The Tobin Center is scheduled to open on September 4, 2014; and

**WHEREAS**, the Tobin Center will feature a state-of-the-art, multi-purpose 1,759-seat (2,100-seat with flat-floor configuration) performance hall, a 250-seat studio theater, and an outdoor performance plaza connected to the River Walk; and

**WHEREAS**, in order to provide parking for the daytime patrons of the Tobin Center, the Foundation has entered into a long-term ground lease with the First Baptist Church of San Antonio for the construction by the Foundation of a parking facility to consist of approximately 510 parking spaces and retail space, which facility is within walking distance from the Tobin Center and is estimated to cost between \$13,000,000.00 and \$15,000,000.00; and

**WHEREAS**, in order to ensure the success of the Center, the City of San Antonio and Bexar County desire to contribute up to \$5,000,000.00 each towards the construction of the parking facility, provided the following conditions are met: (1) the Foundation establishes a design review committee that includes representation from the City, Bexar County, the Foundation, and First Baptist Church; (2) first floor retail is incorporated into the construction of the parking facility; (3) the Foundation operates the parking facility and funds its continued

operation and maintenance; and (4) the City and Bexar County retain an ownership interest in the parking facility; **NOW THEREFORE:**

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

**SECTION 1.** The terms and conditions of the Third Amendment to the Grant and Development Agreement with Bexar County and the Bexar County Performing Arts Center Foundation to provide for a contribution from the City and Bexar County of up to \$5,000,000.00 each towards construction of a parking facility to serve the Tobin Performing Arts Center are hereby approved.

**SECTION 2.** The City Manager, or her designee, is authorized to execute said Amendment, a copy of which is in substantially final form and set out in **Attachment 1**.

**SECTION 3.** The amount of \$5,000,000.00 is appropriated in SAP Fund 53007000, River Bend Garage Sale Fund, SAP Internal Order # 390000001773, SAP GL account 6102100 - Interfund Transfer out entitled Transfer to 19-00016-90-14-01. The amount of \$5,000,000.00 is authorized to be transferred to SAP Fund 53099000.

**SECTION 4.** The budget in SAP Fund 53099000, Parking Capital Projects, SAP Project Definition 19-00016, Tobin Garage, shall be revised by increasing SAP WBS element 19-00016-90-14-01 entitled Transfer from IO# 390000001773, SAP GL account 6101100 - Interfund Transfer In, by the amount \$5,000,000.00.

**SECTION 5.** The amount up to \$5,000,000.00 is appropriated in SAP Fund 53099000, Parking Capital Projects, SAP Project Definition 19-00016, Tobin Garage, SAP WBS Element 19-00016-05-02-01, entitled Construction Costs, SAP GL Account 5201040.

**SECTION 6.** Payment in the amount not to exceed \$5,000,000.00 in SAP Fund 53099000, Parking Capital Projects, SAP Project Definition 19-00016, Tobin Garage, is authorized to be made to The Bexar County Performing Arts Center Foundation, for construction services in accordance with the Third Amendment.

**SECTION 7.** 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.

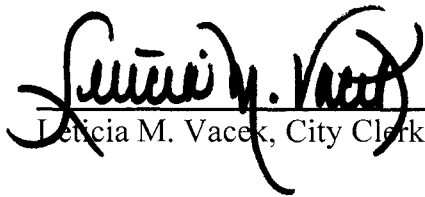
**SECTION 8.** This Ordinance is effective immediately upon the receipt of eight affirmative votes; otherwise, it is effective ten days after passage.

VMZ/lg  
08/21/14  
Item No. 25


PASSED AND APPROVED this 21<sup>st</sup> day of August, 2014.

  
M A Y O R  
Ivy R. Taylor

ATTEST:

  
Leticia M. Vacek, City Clerk

APPROVED AS TO FORM:

  
Robert F. Greenblum, City Attorney

<b>Agenda Item:</b>	25 ( in consent vote: 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19A, 19B, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33 )
<b>Date:</b>	08/21/2014
<b>Time:</b>	09:14:51 AM
<b>Vote Type:</b>	Motion to Approve
<b>Description:</b>	An Ordinance authorizing a Third Amendment to the Grant and Development Agreement between the City of San Antonio, Bexar County, and The Bexar County Performing Arts Center Foundation to provide a contribution from the City and the County of up to \$5,000,000.00 each towards construction of a parking garage to serve the Tobin Performing Arts Center. [Carlos Contreras, Assistant City Manager; Lori Houston, Director, Center City Development & Operations]
<b>Result:</b>	Passed

Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Ivy Taylor	Mayor		x				
Diego Bernal	District 1		x				
Keith Toney	District 2		x				
Rebecca Viagran	District 3		x				
Rey Saldaña	District 4		x				
Shirley Gonzales	District 5		x				
Ray Lopez	District 6		x				x
Mari Aguirre-Rodriguez	District 7		x				
Ron Nirenberg	District 8		x				
Joe Krier	District 9		x				
Michael Gallagher	District 10		x			x	

### **THIRD AMENDMENT TO GRANT AND DEVELOPMENT AGREEMENT**

This THIRD AMENDMENT TO GRANT AND DEVELOPMENT AGREEMENT (the "Third Amendment") is entered into between BEXAR COUNTY, TEXAS ("COUNTY") and BEXAR COUNTY PERFORMING ARTS CENTER FOUNDATION ("FOUNDATION"), and CITY OF SAN ANTONIO, TEXAS ("CITY") for the limited purpose provided below, as of the Execution Date.

#### **RECITALS**

A. COUNTY, FOUNDATION and CITY entered into that certain Grant and Development Agreement dated June 30, 2008, with respect to the design, development, and construction of the Tobin Center for the Performing Arts in San Antonio, Texas (the "Tobin Center").

B. COUNTY and FOUNDATION amended the Grant and Development Agreement through the First Amendment to Grant and Development Agreement dated June 23, 2009 ("First Amendment") and CITY joined in the execution of the First Amendment in order to confirm its agreement to the terms of the First Amendment.

C. COUNTY and FOUNDATION further amended the Grant and Development Agreement through the Second Amendment to Grant and Development Agreement dated April 19, 2011 ("Second Amendment") and CITY joined in the execution of the Second Amendment in order to confirm its agreement to the terms of the Second Amendment.

D. Unless otherwise specifically defined in Exhibit A, attached hereto, each of the capitalized terms appearing in this Third Amendment shall have the same meaning ascribed to such term in the Grant and Development Agreement, as amended by the First Amendment and Second Amendment (as amended, "Development Agreement").

E. COUNTY, CITY and FOUNDATION desire to further amend the Development Agreement to set forth their mutual agreements and undertakings concerning the design, construction and funding of a public parking garage facility (collectively, the "Parking Garage Project") on the premises ("Parking Garage Premises") leased to FOUNDATION's wholly-owned subsidiary company, TPAC Parking Services LLC ("Parking Garage Tenant"), pursuant to the Ground Lease dated effective August 13, 2014 ("Parking Garage Lease"), between Parking Garage Tenant, as tenant, and First Baptist Church of San Antonio ("Church"), as landlord, a fully executed copy of which is attached to this Third Amendment as Exhibit B,

F. COUNTY, CITY and FOUNDATION, in addition, desire to confirm their agreement with respect to the general scope of costs associated with the Parking Garage Project as set forth in a budget attached hereto as Exhibit C and incorporated herein (the "Parking Garage Budget") and the sources and uses of funds to be contributed by each Party for such purpose.

G. The Tobin Center is an approved venue project within the meaning of Chapter 334 of the Texas Local Government Code. The COUNTY has designated the Parking Garage

Project as related infrastructure to the Tobin Center and as part of the approved venue project, although it will not be paid for with venue funds.

NOW THEREFORE, for and in consideration of the mutual benefits accruing hereunder, the Parties agree to the following amendments to the Development Agreement relating to the Parking Garage Project, with the understanding that, to the extent that the terms of this Third Amendment are in conflict with the terms of the Development Agreement, this Third Amendment will be the controlling expression of the agreements of the Parties with respect to the subject matter of this Third Amendment.

## ARTICLE 1

### REQUIRED CONTRIBUTIONS OF CITY, COUNTY AND FOUNDATION TO FUND THE PARKING GARAGE PROJECT COSTS

1.1 Creation of the Parking Garage Project Disbursement Fund. The Parties shall establish a Parking Garage Project Disbursement Fund as a fund separate and apart from any other funds of the FOUNDATION and Parking Garage Tenant, to receive and disburse the Foundation Contribution, the City Contribution and the County Contribution in accordance with this Third Amendment. The Parking Garage Project Disbursement Fund shall include two (2) separate subaccounts for deposit of the Foundation Contribution, as set forth in Section 1.3, below (“Foundation Contribution Subaccounts”).

1.2 Contributions. Subject to the Funding Conditions (herein so called) described in Section 1.3 and Section 1.4, below, the Parking Garage Project Costs shall be funded by COUNTY, CITY and FOUNDATION, as follows:

1.2.1 County Contribution. COUNTY agrees to pay Five Million Dollars (\$5,000,000.00) in accordance with this Third Amendment (the “County Contribution”) to the Parking Garage Project Disbursement Fund. The County Contribution may be funded from a combination of net proceeds of tax-exempt obligations and taxable obligations (“County Obligations”) or from any other legally available funds of COUNTY which it decides to use for such purpose. Any County Obligations will have such terms and provisions determined by COUNTY in its sole discretion. The County Contribution will be paid to the Parking Garage Project Disbursement Fund if and when all Funding Conditions have been fully satisfied, in accordance with this Third Amendment.

1.2.2 City Contribution. CITY agrees to pay Five Million Dollars (\$5,000,000.00) in accordance with this Third Amendment (the “City Contribution”) to the Parking Garage Project Disbursement Fund, which may be funded from any legally available funds of CITY which it decides to use for such purpose. The City Contribution will be paid to the Parking Garage Project Disbursement Fund if and when the Funding Conditions have been fully satisfied, in accordance with this Third Amendment.

1.2.3 Foundation Contribution. FOUNDATION agrees to pay all Parking Garage Project Costs in excess of Ten Million Dollars (\$10,000,000.00) to the Foundation

Contribution Subaccounts (the “Foundation Contribution”) and shall fund all Parking Garage Project Costs in excess of Ten Million Dollars (\$10,000,000.00).

1.3 Funding of Foundation Contribution. As a condition precedent to the funding of the City Contribution and the County Contribution, the Foundation shall have deposited the Foundation Contribution in an amount equal to the total Parking Garage Budget, less Ten Million Dollars (\$10,000,000.00) into the Foundation Contribution Subaccounts, as follows:

1.3.1 Church Sublease Subaccount. FOUNDATION has estimated the cost of all financial obligations of the Parking Garage Tenant with respect to the Church Sublease Space under the terms of the Parking Garage Lease (in accordance with specifications set forth in Exhibit “G” to the Parking Garage Lease), as reflected on the Parking Garage Budget. This allocated amount shall be deposited in the “Foundation Contribution – Church Sublease Subaccount” to fund the construction and finish-out of the Church Sublease Space; and

1.3.2 Garage Construction Subaccount. The remainder of the Foundation Contribution shall be deposited in the Foundation Contribution – Garage Construction Subaccount (herein so called). Any excess funds remaining in the Foundation Contribution - Church Sublease Subaccount after completion of the Church Sublease Space shall be deposited in the Foundation Contribution – Garage Construction Subaccount to the extent necessary to cover Parking Garage Cost Overruns not previously funded pursuant to Section 1.6 or, if there are no then existing unfunded Parking Garage Cost Overruns, such excess funds shall be disbursed as then directed by the FOUNDATION.

1.4 Funding Conditions. The obligations of CITY and COUNTY to fund the City Contribution and County Contribution, respectively, are subject to the following additional conditions (collectively, with the conditions set forth in Section 1.3, above, the “Funding Conditions”):

1.4.1 FOUNDATION shall have provided confirmation acceptable to CITY and COUNTY that the funding of the Foundation Contribution will not result in the balance of the Reserve Fund to be less than Ten Million Dollars (\$10,000,000.00) and that no part of the FOUNDATION’s Reserve Fund has been used for purposes of a loan or as collateral for a loan to fund any obligation of Parking Garage Tenant under the Parking Garage Lease and the Sublease (as defined in Section 3.3, below);

1.4.2 The City Representative and the County Representative shall have participated in the design review process for the Parking Garage Project by attending design review meetings scheduled by FOUNDATION and shall have reviewed and approved the Parking Garage Plans and Specifications in accordance with Article 4 of this Third Amendment;

1.4.3 CITY and COUNTY shall have reviewed and approved a parking garage operating plan and budget;

1.4.4 CITY and COUNTY shall have reviewed and approved the Parking Garage Construction Contract between Parking Garage Tenant and a General Contractor reasonably acceptable to CITY and COUNTY;

1.4.5 FOUNDATION shall have provided confirmation reasonably acceptable to CITY and COUNTY that FOUNDATION has available funds (not including the Foundation Contribution and in excess of the \$10,000,000.00 in its Reserve Fund) to satisfy all of the monetary obligations (exclusive of Parking Garage Project Costs) of Parking Garage Tenant under the Parking Garage Lease and the Sublease that will accrue and become payable prior to the Rent Commencement Date (as therein defined) and that such funds will be made available to Parking Garage Tenant;

1.4.6 The absence of any material adverse change in the COUNTY's capacity to incur County Obligations and the COUNTY's ability to sell County Obligations upon terms reasonably acceptable to COUNTY;

1.4.7 Parking Garage Tenant, as assignor, shall have assigned to CITY and COUNTY, as assignees, certain of its rights, duties and obligations pursuant to the Partial Assignment of Lease described in Section 3.1, below;

1.4.8 CITY and COUNTY, as sublandlords, and Parking Garage Tenant, as subtenant, shall have executed the Sublease described in Section 3.3, below;

1.4.9 The Inspection Period (as defined in the Parking Garage Lease) shall have expired;

1.5 Draw Requirements. Prior to the initial draw of the City Contribution or County Contribution, the CITY and COUNTY shall be provided with the Acknowledgement of Partial Assignment substantially as described in Section 3.2 below and the Acknowledgement of Sublease substantially as described in Section 3.4 below. At the time of each draw from the City Contribution or County Contribution, (a) the Parking Garage Lease and Sublease (as hereafter defined) shall be in full force and effect, (b) no notice of material default thereunder that remains uncured shall have been given under the Parking Garage Lease or Sublease, (c) neither CITY nor COUNTY shall have actual notice of the existence of a material default thereunder that remains uncured, and (d) neither FOUNDATION nor Parking Garage Tenant shall have breached any agreement or obligation to be performed by it pursuant to the Development Agreement, as amended by this Third Amendment.

1.6 Parking Garage Project Cost Saving and Overruns. The Parking Garage Project Costs are the estimated line items and costs for the Parking Garage Project for which the Foundation Contribution, City Contribution and County Contribution are anticipated to be expended; it being expressly understood that the Parking Garage Budget will be amended at the time the Parking Garage Construction Contract is entered into and will be amended from time to time, as determined by FOUNDATION in its reasonable discretion to reflect changes in the Parking Garage Project Costs, provided that the City Contribution and the County's Contribution will not be increased. CITY, COUNTY and FOUNDATION agree that to the extent the actual Parking Garage Project Costs exceed \$10,000,000.00 (such excess, the "Parking Garage Cost Overruns"), FOUNDATION shall be solely responsible for payment of all such Parking Garage Cost Overruns and shall deposit such additional funds into the appropriate Foundation Contribution Subaccount of the Parking Garage Project Disbursement Fund as necessary to cover all such Parking Garage Cost Overruns within thirty (30) days of the date CITY or COUNTY



have been informed as to the existence of such Parking Garage Cost Overruns. Should the Parking Garage Project Costs decrease below the Project Cost Budget, the CITY and COUNTY agree to make the full City Contribution and County Contribution and the Foundation Contribution shall be decreased by the cost reduction, but not below the amount needed for the Church Sublease Space.

## ARTICLE 2

### **PARKING GARAGE PROJECT DISBURSEMENT FUND**

2.1 Disbursing Agent. Funds in the Parking Garage Project Disbursement Fund shall be disbursed by the Disbursing Agent to the Parking Garage Tenant (or to third parties, on its behalf) to pay the Parking Garage Project Costs upon receipt of a properly completed Parking Garage Payment/Reimbursement Request for the Parking Garage Project (each, a "TPAC Garage Payment/Reimbursement Request") submitted in accordance with the procedures outlined in this Third Amendment.

#### 2.2 TPAC Garage Payment/Reimbursement Requests.

2.2.1 TPAC Garage Payment/Reimbursement Requests submitted by the Parking Garage Tenant for labor performed and materials furnished to the Parking Garage Project (the "Parking Garage Work") shall be marked "TPAC Parking Garage" and shall only include invoices or other supporting documentation for the Parking Garage Project Costs and other items identified on the Parking Garage Budget.

2.2.2 On the first (1<sup>st</sup>) day of the calendar month following the satisfaction of the Funding Conditions, and the first (1<sup>st</sup>) of each succeeding calendar month during the progress of the Parking Garage Work (and thereafter to the extent Parking Garage Project Costs are payable or reimburseable following completion of the Parking Garage Work), Parking Garage Tenant will submit a TPAC Garage Payment/Reimbursement Request to the Foundation Representative, the undersigned County Auditor and the City Representative, with a copy to all Parties and the Disbursing Agent. Any such submission may contain reference to information available for inspection at the Foundation Office. FOUNDATION, CITY and COUNTY will promptly review the TPAC Garage Payment/Reimbursement Request, and if all or part of the TPAC Garage Payment/Reimbursement Request is approved, FOUNDATION (to the extent of the Foundation's Portion), the CITY (to the extent of City's Portion) and COUNTY (to the extent of County's Portion), but subject to Section 2.2.4, below, with respect to Parking Garage Project Costs related to the Church Sublease Space, shall forward the TPAC Garage Payment/Reimbursement Request to the Disbursing Agent and all Parties, indicating their approvals or the portion thereof that has been approved, within thirty (30) days of submission.

2.2.3 If there is a rejection of all or part of the TPAC Garage Payment/Reimbursement Request, the accepted portion of the payment or reimbursement request shall be processed as provided in this Third Amendment and the rejected portion will be returned to Disbursing Agent and all Parties within ten (10) Business Days from the date of submission with a reasonable and detailed explanation of the Party's rejection; provided, however, it shall not be reasonable for CITY or COUNTY to reject a submission based solely upon insufficient

information if such information was specifically made available to CITY and COUNTY, respectively, for review at the Foundation Office as permitted above. If a submission from Parking Garage Tenant relies upon information located at the Foundation Office, the thirty (30) day period for accepting or rejecting the a TPAC Garage Payment/Reimbursement Request as provided herein above shall not begin until such information is made available at the Foundation Office and CITY and COUNTY are notified of such availability.

2.2.4 Upon approval of the TPAC Garage Payment/Reimbursement Request or any portion thereof, the Disbursing Agent shall pay from the Parking Garage Project Disbursement Fund to the Contractors or, at the election of Parking Garage Tenant (from time-to-time as it may direct), jointly to both the Contractor(s) and Parking Garage Tenant (or on its behalf) the amounts approved in the TPAC Garage Payment/Reimbursement Request. The TPAC Garage Payment/Reimbursement Request shall separately identify any portion of such request attributable to the Church Sublease Space. Notwithstanding anything set forth in this Article 2, all costs related to the Church Sublease Space shall be funded solely from the Foundation Contribution – Church Sublease Subaccount.

2.2.5 Payment requests submitted for payment or reimbursement of Parking Garage Project Costs shall include (a) an unconditional waiver or partial waiver as the case may be of liens for the general contractor and a conditional waiver of liens, with the only condition being payment of the amount requisitioned, for each subcontractor or other appropriate evidence of full payment indicating the party has fully paid for all items invoiced for which reimbursement is requested, and (b) an invoice for services rendered for all items invoiced for which payment is requested. Accompanying each new requisition shall be unconditional waivers of lien or partial waivers as the case may be of all subcontractors paid from the prior requisition. No waiver of lien shall be required from parties who do not have the ability to place a lien on the Parking Garage Project, and because the Parking Garage Construction Contract is to be bonded, it is not anticipated that lien waivers will be required in all instances. Subject to the Funding Conditions, CITY and COUNTY shall fund TPAC Garage Payment/Reimbursement Requests only up to the maximum combined amount of Ten Million Dollars (\$10,000,000.00).

2.3 Unfunded City Contribution and County Contribution; Excess Funds. All obligations of CITY to make the City Contribution and all obligations of COUNTY to make the County Contribution shall terminate upon the earlier to occur of (a) completion of the Parking Garage Project and payment or reimbursement of all Parking Garage Project Costs (other than Parking Garage Cost Overruns) or (b) termination of the Parking Garage Lease. All Parking Garage Cost Overruns will be the sole responsibility of FOUNDATION. If excess funds remain in the Foundation Contribution Subaccounts following completion of the Parking Garage Project and payment or reimbursement of all Parking Garage Project Costs, such funds shall be disbursed by the Disbursing Agent as directed by the FOUNDATION.

### ARTICLE 3

#### PARTIAL ASSIGNMENT AND SUBLEASE

3.1 Partial Assignment of Parking Garage Lease. By Partial Assignment of Lease (herein so called) reasonably acceptable to CITY, COUNTY and FOUNDATION, Parking

Garage Tenant, as assignor, shall assign its rights, duties and obligations as tenant under the Parking Garage Lease to CITY and COUNTY, as assignees, and CITY and COUNTY shall accept such assignment but shall not assume the Parking Garage Tenant's obligations under the Parking Garage Lease. The Partial Assignment of Lease shall confirm the absence of default of Parking Garage Tenant and Landlord under the Parking Garage Lease.

3.1.1 Exclusions from Partial Assignment of Lease. The Partial Assignment of Lease shall exclude from the scope of the assignment (a) the Church Sublease Space and all related rights, remedies, duties and obligations including (without limitation) rent, operating expenses and finish contributions and/or allowances, (b) Parking Garage Tenant's duty to obtain and maintain insurance policies as set forth in the Parking Garage Lease, (c) Parking Garage Tenant's duty to pay real estate taxes; (d) all obligations of Parking Garage Tenant to pay expenses of operating, maintaining and repairing the Parking Garage Project, (e) all obligations of the Parking Garage Tenant to indemnify, hold harmless or defend, and (f) all rights of Parking Garage Tenant to terminate the Parking Garage Lease so long as Parking Garage Tenant, as subtenant, is not in default under the Sublease, and all termination rights of Parking Garage Tenant during the Due Diligence Period (as defined in Parking Garage Lease). Prior to attempting to enforce any of the obligations of the landlord under the Parking Garage Lease, CITY and COUNTY shall consult with Foundation and request Foundation to enforce such obligations against the landlord. In such event, or at the request of Foundation following a failure of the landlord to perform its obligations under the Parking Garage Lease, COUNTY and CITY will assign Foundation sufficient rights to enforce such obligations under the Parking Garage Lease.

3.1.2 Nonrecourse. The Partial Assignment of Lease shall include Parking Garage Tenant's recognition that neither CITY nor COUNTY will have any personal liability for the performance of the assigned obligations and duties of the Tenant under the Parking Garage Lease, substantially as follows:

**"No Personal Liability. The Assignees have not assumed the obligations of the Tenant under the Assigned Lease. The Assignees and their respective officers, directors, managers, employees, elected officials, agents and representatives (collectively, the "Assignee Parties") shall neither have nor incur any liability for the performance of the Parking Garage Tenant's obligations under the Assigned Lease, and Assignor shall not seek any damages of any kind or character arising or accruing under the Assigned Lease against any of the Assignee Parties. The liability of each Assignee for any obligations arising or accruing under the Assigned Lease, directly or indirectly, shall not exceed and shall be strictly limited to the value of its interest in the Assigned Lease. Assignor acknowledges that this Partial Assignment of Lease does not and cannot create general obligations of the Assignees and waives all claims and causes of action against the Assignees for failure to perform any of Parking Garage Tenant's obligations under the Parking Garage Lease. The non-recourse provisions of this Partial Assignment of Lease shall survive any termination or expiration of the Assigned Lease."**

3.1.3 Right to Cure. As part of the Partial Assignment of Lease, CITY and COUNTY shall grant Parking Garage Tenant an opportunity to cure any all defaults of tenant under the Parking Garage Lease.

3.2 Acknowledgement of Partial Assignment. Parking Garage Tenant shall obtain from the Church an Acknowledgement of Partial Assignment of Lease, in form and content reasonably acceptable to CITY and COUNTY, which acknowledges that, by accepting the partial assignment of the Parking Garage Lease, neither CITY nor COUNTY shall have any personal liability for the performance of the assigned obligations and duties of the Parking Garage Tenant under the Parking Garage Lease, substantially as follows and shall provide that all notices given by Church pursuant to the Parking Garage Lease shall be sent to Parking Garage Tenant, CITY and COUNTY.

“No Personal Liability. **The Assignees have not assumed the obligations of the Tenant under the Assigned Lease. The Assignees and their respective officers, directors, managers, employees, elected officials, agents and representatives (collectively, the “Assignee Parties”) shall neither have nor incur any liability for the performance of the Tenant’s obligations under the Assigned Lease, and Landlord shall not seek any damages of any kind or character arising or accruing under the Assigned Lease against any of the Assignee Parties.** The liability of each Assignee for any obligations arising or accruing under the Assigned Lease, directly or indirectly, shall not exceed and shall be strictly limited to the value of its interest in the Assigned Lease. Landlord acknowledges that this Partial Assignment of Lease does not and cannot create general obligations of the Assignees and waives all claims and causes of action arising or accruing under the Assigned Lease against the Assignees, other than the right to seek to terminate the Assigned Lease. The non-recourse provisions of this Consent to Partial Assignment of Lease shall survive any termination or expiration of the Assigned Lease.”

The Acknowledgement to Partial Assignment shall confirm, to the knowledge of the Church, the absence of default of Parking Garage Tenant and Landlord under the Parking Garage Lease.

3.3 Sublease. CITY and COUNTY, each as sublandlord, and Parking Garage Tenant, as subtenant, shall enter into a sublease in form reasonably acceptable to such parties, covering the portion of the Parking Garage Premises covered by the Partial Assignment of Lease (“Sublease”). The Sublease shall be upon the same terms and conditions set forth in the Parking Garage Lease, to the extent assigned, but shall include a provision limiting the liability of CITY and COUNTY, as sublandlords, substantially as follows:

“No Personal Liability. **The Sublandlords and their respective officers, directors, managers, employees, elected officials, agents and representatives (collectively, the “Sublandlord Parties”) shall neither have nor incur any liability for the performance of the Sublandlords’ obligations under this Sublease, and Subtenant shall not seek any damages of any kind or character, arising or accruing under this Sublease, against any of the Sublandlord Parties.** The liability of each Sublandlord for any obligations arising or accruing under this Sublease, directly or indirectly, shall not exceed and shall be strictly limited to the value of that Sublandlord's interest in the subleased

premises, and Subtenant shall not look to any other property or assets of any of the Sublandlord Parties in seeking either to enforce this Sublease or to satisfy a judgment for any Sublandlord's failure to perform such obligations. Subtenant acknowledges that the Sublease does not and cannot create general obligations of the Sublandlord Parties and waives all claims and causes of action against the Sublandlord Parties for failure to perform any of Sublandlord's obligations under the Sublease except for the right to enforce the Sublease. The non-recourse provisions of this Sublease shall survive any termination or expiration of this Sublease.”

3.4 Acknowledgement of Sublease. An Acknowledgement of Sublease (“Acknowledgement of Sublease”) shall be provided by the Church to CITY and COUNTY, that (a) acknowledges that Parking Garage Tenant is required pursuant its continuing obligations under the Parking Garage Lease and pursuant to the terms of the Sublease to perform all of the obligations of tenant under the Parking Garage Lease, (b) acknowledges that pursuant to the Partial Assignment of Lease, the Church is required to provide to CITY, COUNTY and Parking Garage Tenant notice of an event of default under the Parking Garage Lease and that the Church shall accept the cure of any default thereunder by any of the CITY, COUNTY or Parking Garage Tenant and (c) acknowledges the rights of the Parking Garage Tenant as subtenant under the Sublease. The Acknowledgement of Sublease shall be reasonably acceptable to CITY and COUNTY and shall include a provision limiting the liability of the Sublandlord Parties, substantially as follows.

“No Personal Liability. Landlord acknowledges that the Sublease does not and cannot create general obligations of the Sublandlord Parties and waives all claims and causes of action against the Sublandlord Parties arising or accruing under the Sublease. The non-recourse provisions of this Sublease are personal to the Sublandlord Parties and will not inure to the benefit of any assignee, sublessee, licensee or designee of either Sublandlord, but shall survive any termination or expiration of this Sublease.”

The Acknowledgement of Sublease shall be reasonably acceptable to CITY and COUNTY and shall confirm, to the knowledge of the Church, the absence of default of Parking Garage Tenant with respect to the obligations, duties and agreements of the tenant under the Parking Garage Lease not included in the Partial Assignment of Lease.

## ARTICLE 4

### APPROVAL OF PARKING GARAGE PLANS AND SPECIFICATIONS

4.1 Review of Parking Garage Plans and Specifications. FOUNDATION shall provide to the CITY, by and through the City Representative, and COUNTY, by and through the County Representative, for their respective review and approval, the Parking Garage Conceptual Design Documents and the Parking Garage Design Drawings (collectively described herein as the “Parking Garage Plans and Specifications”). The review and approval of the Parking Garage Plans and Specifications by CITY and COUNTY shall be limited to confirming that Parking Garage Plans and Specifications substantially conform to the Parking Garage Quality Standard

and the requirements of this Third Amendment. A notice of disapproval identifying such deviation and/or non-conformance shall be given by CITY or COUNTY, as applicable, to the FOUNDATION within fifteen (15) Business Days after its receipt of complete and correct copies of such documents. FOUNDATION and Parking Garage Tenant will use commercially reasonable efforts to address any such comments. If no notice of deviation and/or non-conformance is provided by CITY or COUNTY within fifteen (15) Business Days after its receipt of complete and correct copies of such documents, CITY and COUNTY shall be deemed to have approved such Parking Garage Plans and Specifications. The Parking Garage Plans and Specifications approved pursuant to this Section may not be materially changed or altered without prior notice to and approval by CITY and COUNTY, if such change would cause the Parking Garage Project to not conform or comply with the Parking Garage Quality Standard.

4.2 Review of Parking Garage Construction Contract. FOUNDATION shall provide to the CITY, by and through the City Representative, and COUNTY, by and through the County Representative, for their respective review and approval, complete copies of the Parking Garage Construction Contract. The City Representative and the County Representative each shall have the right to review the Parking Garage Construction Contract (or the applicable portion thereof) and may object to the contents thereof if (i) the Parking Garage Construction Contract has been determined to deviate from the Parking Garage Plans and Specifications or the requirements of this Third Amendment, and (ii) in the case of the deviation from the Parking Garage Plans and Specifications, such deviation is inconsistent with the Parking Garage Quality Standard. Notice of objection, if any, shall be given by CITY or COUNTY, as applicable, to the FOUNDATION within fifteen (15) Business Days after its receipt of complete and correct copies of the Parking Garage Construction Contract. FOUNDATION and Parking Garage Tenant will use commercially reasonable efforts to address any such comments. If no notice of deviation or non-conformance is provided by CITY or COUNTY within fifteen (15) Business Days after its receipt of complete and correct copies of such documents, CITY and COUNTY shall be deemed to have approved such Parking Garage Construction Contract. The Parking Garage Construction Contract approved pursuant to this Section may not be materially changed or altered without prior notice to and approval by CITY and COUNTY, if such change would cause the Parking Garage Project to not conform or comply with the Parking Garage Quality Standard or this Third Amendment.

4.3 Document Submission Requirements. FOUNDATION shall use reasonable efforts to submit to CITY and COUNTY all Parking Garage Plans and Specifications and Parking Garage Construction Contract for which approval of CITY and COUNTY is required. Such documents shall be submitted under cover of a request which (a) contains the heading or caption "TIME SENSITIVE REQUEST FOR REVIEW/APPROVAL OR CONSENT" (or similar phrase), (b) states the date of submission to the CITY or COUNTY, as applicable (which date shall be presumed to be the Business Day following the date of dispatch by the FOUNDATION if properly addressed and sent by same day messenger service or by Federal Express or other reliable overnight courier service for delivery on the morning of the next Business Day), (c) states the date by which a response is required under the terms of this Article 4, (d) identifies the provision of this Development Agreement pursuant to which review and approval is sought, and (e) identifies (by document or drawing title, identifying number and revision date, or other clear description) all enclosures to such request with respect to which review and approval is then being sought. CITY and COUNTY shall review the documents and

shall, within the applicable time period specified in either Section 4.1 or 4.2, above) give the FOUNDATION notice of its approval or disapproval. All submissions to the COUNTY shall be delivered to the County Visitors Tax Project Office unless otherwise directed in writing to FOUNDATION by the County Representative. All submissions to the CITY shall be delivered to the Center City Development and Operations Department unless otherwise directed in writing to FOUNDATION by the City Representative.

4.4 Disputes. CITY, COUNTY and FOUNDATION agree to attempt in good faith to resolve expeditiously any disputes concerning the approval of or consent to any matter submitted to each Party for approval or acceptance hereunder.

4.5 Contractor Selection Process. FOUNDATION issued a Request for Proposal (“RFP”) for the construction of the Parking Garage Project on the basis of a guaranteed maximum price. Four general contractors have responded to the RFP with proposals, which are being evaluated by the FOUNDATION on the basis of cost, project experience, MWBE utilization, personnel qualifications, management plan, schedule management and other factors. One contractor was selected to perform pre-construction services. The FOUNDATION will continue this process before recommending a general contractor for CITY and COUNTY approval.

## ARTICLE 5

### OPERATIONAL REQUIREMENTS

5.1 Public Parking Garage. The portion of the Parking Garage Project funded with County Contribution and the City Contribution shall be continuously operated as a public parking garage open and available to the residents of Bexar County to the extent required under state law.

5.2 Operations by Parking Garage Tenant. Upon completion of the Parking Garage Project, the Parking Garage Tenant shall operate the Parking Garage Premises and fund its continuing operations and on-going maintenance, in its capacities as tenant under the Parking Garage Lease and as subtenant under the Sublease, without additional financial contribution from CITY or COUNTY.

## ARTICLE 6

### MISCELLANEOUS

6.1 Notices. Pursuant to the terms of this Third Amendment, the name and address for the City Representative, Foundation Representative and County Representative are:

City Representative:

Director, Center City Development and  
Operations Office  
100 Military Plaza  
San Antonio, Texas 78207

Foundation Representative:

Michael J. Fresher  
President & Chief Executive Officer  
115 Auditorium Circle  
San Antonio, Texas 78205

County Representative:

Michael J. Sculley  
Community Venues Program Director  
Paul Elizondo Tower  
101 W. Nueva Street, #955  
San Antonio, Texas 78205-3042

6.2 Counterparts. This Third Amendment may be signed in any number of counterparts, each of which shall constitute an original and all of which, together, shall constitute but one document.

6.3 Approval Rights. In making any determination(s) regarding acceptability or approval required of CITY or COUNTY in this Third Amendment, such determination(s) shall be at the sole discretion of CITY and COUNTY, as applicable. Approval or acceptance by CITY or COUNTY of a matter submitted to it shall neither (a) relieve the FOUNDATION or the Parking Garage Tenant of its duties, obligations or responsibilities with respect to the subject matter so submitted, nor (b) shift the duties, obligations or responsibilities of FOUNDATION or Parking Garage Tenant to CITY or COUNTY with respect to the subject matter so submitted. The effect of any approval or acceptance will be limited solely to the stated purpose of review by CITY and COUNTY as set forth in this Third Amendment.

6.4 Continuation of Development Agreement. Notwithstanding Section 2.01 of the Development Agreement to the contrary, the Term of the Development Agreement shall not terminate as to the subject matters addressed in this Third Amendment until completion of the Parking Garage Project and payment or reimbursement of all Parking Garage Project Costs.

6.5 Other Terms. Except as modified hereby and by the First Amendment, the Second Amendment and this Third Amendment, all of the terms and provisions of the Development Agreement shall remain in full force and effect in accordance with the terms and provisions thereof, including, without limitation, Section 6.06 and Exhibit H, which the Parties acknowledge as being applicable to the Parking Garage Project.

6.6 Binding Effect. This Third Amendment shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

6.7 Ratification. Except as expressly amended by this Third Amendment, all terms and provisions of the Development Agreement remain unmodified and in full force and effect. The Development Agreement, as hereby amended, and all rights and powers created pursuant thereto, are in all respects ratified and confirmed. From and after the Execution Date, all references to the Development Agreement shall be deemed to mean the Development Agreement, as amended hereby.



*[Remainder of page intentionally blank; signatures appear on following pages.]*

EXECUTED this \_\_\_\_ day of \_\_\_\_\_, 2014 (the "Execution Date").

FOUNDATION:

BEXAR COUNTY PERFORMING ARTS  
CENTER FOUNDATION

By: \_\_\_\_\_  
MICHAEL J. FRESHER  
President & Chief Executive Officer

By: \_\_\_\_\_  
J. BRUCE BUGG, JR.  
Chairman

COUNTY:

COUNTY OF BEXAR

By: \_\_\_\_\_  
NELSON W. WOLFF  
County Judge

ATTEST:

\_\_\_\_\_  
GERARD RICKHOFF  
County Clerk

APPROVED AS TO LEGAL FORM:

FULBRIGHT & JAWORSKI LLP

By: \_\_\_\_\_  
JAMES P. PLUMMER  
Partner

APPROVED AS TO FINANCIAL CONTENT:

\_\_\_\_\_  
County Auditor

\_\_\_\_\_  
DAVID SMITH  
Executive Director/Budget Officer  
Planning & Resource Management Dept.

CITY:

CITY OF SAN ANTONIO, TEXAS  
Municipal Corporation

By: \_\_\_\_\_  
\_\_\_\_\_ City Manager

ATTEST:

\_\_\_\_\_  
City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
City Attorney

**JOINDER BY TPAC PARKING SERVICES LLC**

TPAC Parking Services LLC hereby joins in the execution of this Third Amendment for the sole and limited purpose of confirming its agreement to perform the obligations and agreements required of it under the terms of the Third Amendment.

TPAC PARKING SERVICES LLC

By: BEXAR COUNTY PERFORMING ARTS  
CENTER FOUNDATION, its sole Member

By: \_\_\_\_\_  
MICHAEL J. FRESHER  
President & Chief Executive Officer

By: \_\_\_\_\_  
J. BRUCE BUGG, JR., Chairman

**EXHIBIT A**  
**TO**  
**THIRD AMENDMENT TO GRANT AND DEVELOPMENT AGREEMENT**

1. "Church" means as defined in Recital E.
2. "Church Sublease Space" means the portion of the improvements to be constructed on the Parking Garage Premises which will be subleased by Parking Garage Tenant, as sublandlord, to the Church, as subtenant, as set forth in the Parking Garage Lease, being approximately 7,700 square feet of multi-purpose area and 6,100 square feet of interior storage area.
3. "City Contribution" means, solely for purposes of this Third Amendment, as defined in Section 1.2.2.
4. "City Representative" means the person so identified in Section 5.1.
5. "City's Portion" means a percentage of each approved TPAC Garage Payment/Reimbursement Request equal to \$5,000,000 divided by the total Parking Garage Budget.
6. "County Contribution" means, solely for purposes of this Third Amendment, as defined in Section 1.2.1.
7. "County Obligations" means as defined in Section 1.2.1.
8. "County Representative" means the person so identified in Section 5.1.
9. "County's Portion" means a percentage of each approved TPAC Garage Payment/Reimbursement Request equal to \$5,000,000 divided by the total Parking Garage Budget.
10. "Development Agreement" means as defined in Recital D.
11. "Disbursing Agent" means the person designated by the COUNTY and CITY, and reasonably approved by FOUNDATION, to receive, manage, supervise, control and disburse the Parking Garage Project Disbursement Fund.
12. "Execution Date" means the date first appearing on Signature Page 1 of this Third Amendment.
13. "First Amendment" means as defined in Recital B.
14. "Foundation Contribution" means, solely for purposes of this Third Amendment, as defined in Section 1.2.3.
15. "Foundation Contribution Subaccounts" means as defined in Section 1.1.

16. "Foundation Contribution – Church Sublease Subaccount" means as defined in Section 1.3.1.
17. "Foundation Contribution – Garage Construction Subaccount" means as defined in Section 1.3.2.
18. "Foundation Office" the business office of FOUNDATION located at 115 Auditorium Circle, San Antonio, Texas, or as may be relocated by FOUNDATION from time to time.
19. "Foundation Representative" means the person so identified in Section 5.1.
20. "Foundation's Portion" means a percentage of each approved TPAC Garage Payment/Reimbursement Request equal to (a) the total Parking Garage Budget minus \$10,000,000 *divided by* (b) the total Parking Garage Budget; but in all events an amount sufficient to pay for the Church Sublease Space.
21. "Funding Conditions" means the conditions to the funding of the City Contribution and the County Contribution, as described in Section 1.4.
22. "General Contractor" means such general contractor(s) or construction manager(s) who shall be responsible for the supervision, coordination, and construction of the Parking Garage Project.
23. "Parking Garage Budget" means the budget attached to this Third Amendment as Exhibit C as amended when the Parking Garage Construction Contract is entered into and from time to time as needed to reflect the expected costs of the Parking Garage Project.
24. "Parking Garage Conceptual Design Documents" means the drawings and other documents that establish the conceptual design of the Parking Garage Project, illustrating the scale and relationship of the Parking Garage Project components. The Conceptual Design Documents shall include any site plan, schematic drawings, preliminary building plans, sections and elevations, study models, perspective sketches, electronic modeling or combinations of these media. Preliminary selections of major building systems and construction materials shall be noted on the drawings or described in writing.
25. "Parking Garage Construction Contract" means a guaranteed maximum price construction contract for the construction of the Parking Garage Project in accordance with the Parking Garage Plans and Specifications for a total contract price within the approved Parking Garage Budget and requiring a payment bond and performance bond of the General Contractor.
26. "Parking Garage Cost Overruns" means as stated in Section 1.6.
27. "Parking Garage Design Drawings" means the drawings and other documents based on the Parking Garage Conceptual Design Documents that illustrate and describe the refinement of the design of the Parking Garage Project, establishing the scope, relationships, forms, size and appearance of the Parking Garage Project and the improvements to be constructed as part of the Parking Garage Project by means of plans, sections and elevations, including specifications that identify major materials and systems and establish in general their quality levels.

28. "Parking Garage Lease" means as defined in Recital E.
29. "Parking Garage Plans and Specifications" means the Parking Garage Conceptual Design Documents, the Parking Garage Design Drawings and the architectural drawings, specifications, and other documents, as amended from time to time, setting forth the design of the Parking Garage Project and the requirements for its construction in sufficient detail to establish the costs of construction of the Parking Garage Project.
30. "Parking Garage Premises" means Lots 1 through 8, inclusive, Block 8, NCB 430, and a portion of Lot 17, Block 5, NCB 412, as more fully described on Exhibit "A" to the Parking Garage Lease.
31. "Parking Garage Project" means as defined in Recital E.
32. "Parking Garage Project Costs" means the estimated costs of the Parking Garage Project, as set forth in the approved Parking Garage Budget.
33. "Parking Garage Project Disbursement Fund" means the fund created pursuant to Section 1.1.
34. "Parking Garage Quality Standard" means the substantially similar standard of quality of design and materials as are included in \_\_\_\_\_. In applying the Parking Garage Quality Standard, it is not anticipated or required that the Parking Garage Project have the same appearance or include the same materials as the \_\_\_\_\_, but rather that the design and materials of the Parking Garage Project be comparable to those contained in the \_\_\_\_\_.
35. "Parking Garage Tenant" means TPAC Parking Services LLC, a Texas limited liability company.
36. "Parking Garage Work" means as defined in Section 2.2.1.
37. "Second Amendment" means as defined in Recital C.
38. "Third Amendment" means this Third Amendment to Grant and Development Agreement.
39. "Tobin Center" means as defined in Recital A.
40. "TPAC Garage Payment/Reimbursement Request" means as defined in Section 2.1.

**EXHIBIT B**  
**TO**

**THIRD AMENDMENT TO GRANT AND DEVELOPMENT AGREEMENT**

PARKING GARAGE LEASE

[TO BE ATTACHED]



**EXHIBIT C**

**TO**

**THIRD AMENDMENT TO GRANT AND DEVELOPMENT AGREEMENT**

PARKING GARAGE BUDGET

[TO BE ATTACHED.]