RESOLUTION NO. 2007-662

Adopted by the Sacramento City Council

September 11, 2007

AUTHORIZING THE CITY MANAGER TO EXECUTE A MEMORANDUM OF UNDERSTANDING WITH THEATRE FOR CHILDREN, INC FOR THE B STREET THEATRE PROJECT AS PART OF THE COMMUNITY REINVESTMENT CAPITAL IMPROVEMENT PROGRAM

BACKGROUND

A. On October 11, 2005 City Council authorized the City Manager to identify projects for a Community Reinvestment Capital Improvement Program (CRCIP) bond issuance.

B. On April 18, 2006, City Council approved the Final Tier 1 and Tier 2 project list and bridge financing

C. On May 23, 2006, City council authorized the issuance of approximately $150 million in 2006 bonds, authorized funding for the Tier 1 CRCIP projects and adopted policy directives. Policy directive number three requires that agreements or MOUs with grantee organizations be put in place to ensure project objectives will be met before funding is awarded.

BASED ON THE FACTS SET FORTH IN THE BACKGROUND, THE CITY COUNCIL RESOLVES AS FOLLOWS:

Section 1. The City Manager or his designee is authorized to execute the attached Memorandum of Understanding (MOU) between the City of Sacramento and the Theatre for Children, Inc.

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Exhibit A: Memorandum of Understanding

Adopted by the City of Sacramento City Council on September 11, 2007 by the following vote:

Ayes: Councilmembers Cohn, Fong, Hammond, McCarty, Pannell, Sheedy, Tretheway, and Waters .

Noes: None.

Abstain: None.

Absent: Mayor Fargo.

Kevin McCarty, Vice-Mayor

Attest:

Shirley Concolino, City Clerk

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MEMORANDUM OF UNDERSTANDING
BETWEEN
THE CITY OF SACRAMENTO
AND THEATRE FOR CHILDREN, INC.
REGARDING A $1 MILLION PROJECT DEVELOPMENT GRANT

This memorandum of understanding ("MOU") is entered into as of _____, 2007, by and between the **CITY OF SACRAMENTO**, a municipal corporation ("City"), and the **THEATRE FOR CHILDREN, INC.** ("TFC"), a nonprofit corporation. The City and the TFC shall be referred to herein collectively as the "Parties" and individually as "Party."

RECITALS

This MOU is entered into by and between the Parties in consideration of the following:

On May 23, 2006, the Sacramento City Council authorized the 2006 Community Reinvestment Capital Improvement Program ("CRCIP"). The CRCIP provides for the issuance of Capital Improvement Revenue Bonds ("Bonds") to fund various CRCIP community projects, including the Children's Theatre of California Complex ("Theatre").

The Theatre will serve as a community cultural resource, a generator of economic activity, and an educational institution for the region's children and families. The new, two-theatre complex will provide dedicated space for the Children's Theatre of California (B Street Theatre's family and school performance series), which will be the premier theatre for children and their families in California. The Theatre will also serve as a major economic, cultural, and artistic resource for the City of Sacramento.

The Parties anticipate that the development and construction of the Theatre will occur over a period of years and require considerable public and private resources. Therefore, the long-term and unified commitment to the Theatre by the Parties as stakeholders is crucial.

In order to ensure fiscal responsibility and accountability in the management of the CRCIP and the Project (as defined below), the City Council has adopted six policy directives regarding the use of Bond proceeds. These directives state:

1. Preliminary Work: Projects that have not begun preliminary work which may include acquisition, community outreach, environmental, design, etc. within twelve (12) months of July 1, 2006, will be reassessed for continued funding or substitution of other projects.

2. External Funding Sources: City bond funds will not be advanced until such time that fifty percent (50%) of the needed external funding is achieved.

3. Grant Funds: Agreements or MOUs with grantee organizations should be put in place to ensure project objectives will be met before funding is awarded.

4. General Fund Loans: Loan or Development Agreements with grantee organizations must be put in place prior to award of funding.

5. Contingency: Contingency is earmarked for Tier 1 construction projects and should not be reprogrammed to Tier II or other projects until assurance can be made that all Tier I projects have sufficient funding to be completed; and the contingency can be reduced at the time of bond sale of an amount not less than twelve percent (12%) of the Tier I projects that have a contingency, if such reduction is necessary to maintain project funds for all Tier I projects originally approved by City Council. City Council must approve all use of contingency.

6. Bond Proceeds Management: The City Treasurer's Office will report back to City Council semi-annually on the availability and programming of investment earnings and the status of projects as they relate to compliance with tax-exempt regulations and Policy Directives, and City Council authorize the use of investment earnings from the 2006 CIRB (excluding the SHRA component) unspent lease revenue bond funds to restore all Tier I projects should interest rates increase prior to the bond issue and a reduction in contingency funds previously described not be sufficient to offset the loss of project funds due to potential interest rate increases.

The Parties enter into this MOU for the purpose of completing the Project in accordance with the directives, objectives and goals of the City as stated herein. Accordingly, and in consideration of the mutual covenants and promises contained herein, **THE PARTIES AGREE AS FOLLOWS:**

1. **Project Description.** The project is limited to the design and planning phases of the Theatre, including program confirmation and revision, schematic design, design development, environmental analysis, cultural resources analysis, and engineering (the "Project").

2. **Project Budget.** The cost of the Project, as defined above, is currently estimated at $2 million, which includes all phases of site planning, programming, design, engineering, environmental analysis and other predevelopment activities. As of the date of this MOU, TFC has secured pledges of $1 million for this use from the following sources: $750,000 of in-kind planning and design work from

SKK Developments, John F. Otto, Inc. and Ankrom Moisen Architects and $250,000 from TFC's Board of Directors. In addition, Sutter Medical Center, Sacramento has pledged a site for the project at 2710 Capitol Avenue, $500,000 in cash support and site preparation and development work, which is currently underway.

3. **City Funding.** TFC represents that Project Costs, as defined below, are estimated at $2 million. City agrees to provide up to $1 million in CRCIP Bond funds ("City Funds") to TFC to be used to offset Project Costs only. These funds will be disbursed as follows:

The City will pay $750,000.00 to TFC upon the City's Project Manager's ("Project Manager") approval of the scope of services to be provided under TFC's agreement with SKK Developments, John F. Otto, Inc. and Ankrom Moisen Architects for Project design and planning services. TFC shall be responsible for the payment of all costs and services rendered under this agreement and all other Project related agreements.

The remaining funding in the amount of $250,000.00 will be disbursed as follows: a) $125,000.00 shall be paid upon proof of TFC's receipt of $125,000.00 in donations for the Project; b) $125,000.00 shall be paid upon proof of an additional $125,000.00 in donations for the Project. Proof of the receipt of $250,000.00 in donations for the Project shall be provided to the City no later than July 31, 2008.

In the event City Funds exceed 50% of the actual Project Costs at Project Completion, TFC shall promptly reimburse to the City an amount equal to one-half of the difference between the actual Project Costs and $2 million. If TFC's agreement with SKK Developments, John F. Otto, Inc. and Ankrom Moisen Architects for Project design and planning services is terminated before the completion of services under the agreement, TFC shall promptly notify the City of the termination and reimburse to the City the difference between $750,000.00 and 50% of the actual costs incurred under the agreement within 30 days of the termination of the agreement.

A. **Project Costs.** "Project Costs" shall mean and include costs related to all contracts for the Project, and costs associated with all other contracts for professional and other services necessary, in the City's judgment, to implement and complete the various planning and design phases, together with all planning and design costs. Project Costs also shall include, but not be limited to, the engineering estimates and the Project elements included therein, and whichever of the following costs or fees, if any, may be applicable: environmental documentation (whether prepared by outside consultants or City staff), City and TFC project administration, plan check and inspection fees.

4. **Project Completion.** TFC shall complete the Project by July 31, 2008.

5. **Project Schedule.** TFC shall submit a Project schedule to the Project Manager ("Project Manager") no later than September 30, 2007 for review and approval. The schedule shall include all phases of the Project. TFC shall notify the Project Manager in writing if it cannot meet the Project schedule.

6. **Project Execution.** Contracts shall include: (i) with the exception of the competitive bidding process, provisions mandating compliance with all requirements applicable to work on a "public project" under the Sacramento City Code, as well as all other applicable laws and regulations, including without limitation the payment of prevailing wages and compliance with all applicable provisions of the Americans With Disabilities Act; and (ii) bonding, insurance and indemnity provisions as may be required by the City. All work shall be performed in a good and worker like manner and shall substantially comply with any plans and specifications approved by the City. TFC shall obtain building permits for the Project.

7. **TFC Reporting Requirements.** TFC shall submit the following reports to the Project Manager in both written and electronic forms:

   A. Project budget prior to funding of the Project by the City and no later than October 15, 2007. Thereafter, a monthly Project budget report by the 15th of each month for the preceding month.

   B. Project income and expense statements in conformance with generally accepted accounting principles by the 15th of each month for the preceding month.

   C. Semi-annual Project status reports, including a brief narrative of activities, due on the first day of January and July of each year.

   D. Final Project status report, including documentary evidence of completed Project and proof of payments to be submitted within 30 days of Project completion.

8. **Maintenance and Inspection of Records.** Bond funds shall be used for the Project only and for which there shall be a separate accounting of City funds by TFC. During performance of this MOU, and for a period of three (3) years after completing the Project, TFC shall maintain all accounting and financial records related to the Project and this MOU and shall keep and make such records available for inspection and audit by representatives of the City upon reasonable written notice.

9. **Licenses, Permits, Etc.** TFC represents and warrants that TFC has all licenses, permits, City Business Operations Tax Certificate, qualifications, and approvals

of whatsoever nature that are legally required for TFC to perform the terms of this MOU. TFC represents and warrants that TFC shall, at its sole cost and expense, keep in effect or obtain at all times during the term of this MOU any licenses, permits, and approvals that are legally required for TFC to provide such performance.

10. Indemnity and Hold Harmless.

A. Indemnity: TFC shall indemnify and save harmless, City, its officers and employees, and each and every one of them, from and against all actions, damages, costs, liability, claims, demands, losses, judgments, penalties, costs and expenses of every type and description, including, but not limited to, any fees and/or costs reasonable incurred by City's staff attorneys or outside attorneys and any fees and expenses incurred in enforcing this provision (hereafter collectively referred to as "Liabilities"), to the extent such Liabilities are caused by or arise from any negligent act or omission, recklessness or willful misconduct of TFC, its contractors, subcontractors or agents, and their respective officers and employees, in connection with the performance or nonperformance of this MOU, whether or not (i) such Liabilities also are caused in part by the passive negligence of the City, its officers or employees, (ii) the City, its officers or employees reviewed, accepted or approved any service or work product performed or provided by the TFC, its contractors, subcontractors or agents, and their respective officers and employees, or (iii) such Liabilities are litigated, settled or reduced to judgment.

B. Obligation to Defend: TFC shall, upon City's request, defend at TFC's sole cost any action, claim, suit, cause of action or portion thereof that asserts or alleges Liabilities caused by or arising from any negligent act or omission, recklessness or willful misconduct of TFC, its contractors, subcontractors or agents, and their respective officers and employees, in connection with the performance or nonperformance of this MOU, whether such action, claim, suit, cause of action or portion thereof is well founded or not.

C. Insurance Policies; Intellectual Property Claims: Except as may be expressly provided in this Section, the existence or acceptance by City of any of the insurance policies or coverages described in this MOU shall not affect or limit any of City's rights under this Section, nor shall the limits of such insurance limit the liability of TFC hereunder. The provisions of this Section shall survive any expiration or termination of this MOU.

11. Insurance. During the entire term of this MOU, TFC shall maintain the insurance coverage described in this Section.

TFC, at its sole cost and expense and for the full term of this MOU, shall obtain

and maintain at least all of the following minimum insurance requirements prior to commencing any activities under this MOU.

It is understood and agreed by TFC that its liability to the City shall not in any way be limited to or affected by the amount of insurance coverage required or carried by TFC in connection with this MOU.

A. Minimum Scope & Limits of Insurance Coverage

(1) Commercial General Liability Insurance, providing coverage at least as broad as ISO CGL Form 00 01 on an occurrence basis for bodily injury, including death, of one or more persons, property damage and personal injury, with limits of not less than one million dollars ($1,000,000) per occurrence. The policy shall provide contractual liability and products and completed operations coverage for the term of the policy.

(2) Automobile Liability Insurance providing coverage at least as broad as ISO Form CA 00 01 on an occurrence basis for bodily injury, including death, of one or more persons, property damage and personal injury, with limits of not less than one million dollars ($1,000,000) per occurrence. The policy shall provide coverage for owned, non-owned and/or hired autos as appropriate to the operations of the TFC.

No automobile liability insurance shall be required if TFC completes the following certification:

> "I certify that a motor vehicle will not be used in the performance of any work or services under this MOU." _____ (TFC initials)

(3) Workers' Compensation Insurance with statutory limits, and Employers' Liability Insurance with limits of not less than one million dollars ($1,000,000). The Worker's Compensation policy shall include a waiver of subrogation for contracts involving construction or maintenance, or if required by the City by selecting the option below:

> _____ Workers' Compensation waiver of subrogation in favor of the City is required for all work performed by the TFC.

No Workers' Compensation insurance shall be required if TFC completes the following certification:

> "I certify that my business has no employees, and that I do not employ anyone. I am exempt from the legal

requirements to provide Workers' Compensation insurance." _____ (TFC initials)

B. Additional Insured Coverage

(1) Commercial General Liability Insurance: The City, its officials, employees and volunteers shall be covered by policy terms or endorsement as additional insureds as respects general liability arising out of activities performed by or on behalf of TFC, products and completed operations of TFC, and premises owned, leased or used by TFC. The general liability additional insured endorsement must be signed by an authorized representative of the insurance carrier for contracts involving construction or maintenance, or if required by the City by selecting the option below:

__X___ Additional insured endorsement must be signed by an authorized representative of the insurance carrier.

If the policy includes a blanket additional insured endorsement or contractual additional insured coverage, the above signature requirement may be fulfilled by submitting that document with a signed declaration page referencing the blanket endorsement or policy form.

(2) Automobile Liability Insurance: The City, its officials, employees and volunteers shall be covered by policy terms or endorsement as additional insureds as respects auto liability.

C. Other Insurance Provisions

The policies are to contain, or be endorsed to contain, the following provisions:

(1) Except for professional liability, TFC's insurance coverage shall be primary insurance as respects City, its officials, employees and volunteers. Any insurance or self-insurance maintained by City, its officials, employees or volunteers shall be in excess of TFC's insurance and shall not contribute with it.

(2) Any failure to comply with reporting provisions of the policies shall not affect coverage provided to City, its officials, employees or volunteers.

(3) Coverage shall state that TFC's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

(4) City will be provided with thirty (30) days written notice of

cancellation or material change in the policy language or terms.

D. Acceptability of Insurance

Insurance shall be placed with insurers with a Bests' rating of not less than A:V. Self-insured retentions, policy terms or other variations that do not comply with the requirements of this Section must be declared to and approved by the City Risk Management Division in writing prior to execution of this MOU.

E. Verification of Coverage

(1) TFC shall furnish City with certificates and required endorsements evidencing the insurance required. The certificates and endorsements shall be forwarded to the Project Manager. Copies of policies shall be delivered to the City on demand. Certificates of insurance shall be signed by an authorized representative of the insurance carrier.

(2) The City may withdraw its offer of contract or cancel this MOU if the certificates of insurance and endorsements required have not been provided prior to execution of this MOU. The City may withhold payments to TFC and/or cancel the MOU if the insurance is canceled or TFC otherwise ceases to be insured as required herein.

F. Consultants and Contractors

TFC shall require and verify that all consultants, sub-consultants, contractors and subcontractors maintain insurance coverage that meets the minimum scope and limits of insurance coverage specified in subsection A, above.

12. Regulations and Ordinances. TFC shall, at all times, comply with and abide by all pertinent or applicable regulations and ordinances of the City of Sacramento and County of Sacramento and the laws of the State of California and the United States insofar as the same or any of them are applicable and shall obtain and keep in effect all necessary permits and licenses required for any and all operations permitted herein.

13. Equal Employment Opportunity. During the performance of this MOU, TFC, for itself, its assignees and successors in interest, agrees as follows:

A. Compliance With Regulations: TFC shall comply with the Executive Order 11246 entitled "Equal Opportunity in Federal Employment", as amended by Executive Order 11375 and 12086, and as supplemented in Department of Labor regulations (41 CFR Chapter 60), hereinafter collectively referred to as the "Regulations".

B. Nondiscrimination: TFC, with regard to the Project, shall not discriminate on the ground of race, color, religion, sex, national origin, age, marital status, physical handicap or sexual orientation in selection and retention of consultants, contractors and subcontractors, including procurement of materials and leases of equipment. TFC shall not participate either directly or indirectly in discrimination prohibited by the Regulations.

C. Solicitations for Contractors or Subcontractors, Including Procurement of Materials and Equipment: In all solicitations either by competitive bidding or negotiations made by TFC for work to be performed under any contract or subcontract, including all procurement of materials or equipment, each potential contractor or subcontractor or supplier shall be notified by TFC of TFC's obligation under this MOU and the Regulations relative to nondiscrimination on the ground of race, color, religion, sex, national origin, age, marital status, physical handicap or sexual orientation.

D. Information and Reports: TFC shall provide all information and reports required by the Regulations, or by any orders or instructions issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information and its facilities as may be determined by the City to be pertinent to ascertain compliance with such Regulations, orders and instructions. Where any information required of TFC is in the exclusive possession of another who fails or refuses to furnish this information, TFC shall so certify to the City, and shall set forth what efforts it has made to obtain the information.

E. Sanctions for Noncompliance: In the event of noncompliance by TFC with the nondiscrimination provisions of this MOU, the City shall impose such sanctions as it may determine to be appropriate including, but not limited to:

(1) Withholding of Bond funds to TFC until TFC complies;

(2) Cancellation, termination, or suspension of the MOU, in whole or in part.

F. Incorporation of Provisions: TFC shall include the provisions of subsections A through E, above, in every contract and subcontract, including procurement of materials and leases of equipment, unless exempted by the Regulations, or by any order or instructions issued pursuant thereto. TFC shall take such action with respect to any contract or subcontract or procurement as the City may direct as a means of enforcing such provisions including sanctions for noncompliance; provided, however, that in the event TFC becomes involved in, or is threatened with, litigation with a contractor, subcontractor or supplier as a result of such direction, TFC may request City to enter such litigation to protect the interests of City.

14. **Waiver.** Neither City approval of the Project, nor grant of Bond funds for the Project, nor any acceptance by the City of the performance of the TFC, its contractors, subcontractors or agents, and their respective officers and employees under this MOU, nor any waiver by City of any default, breach or condition precedent, shall be construed as a waiver of any provision of this MOU, nor as a waiver of any other default, breach or condition precedent or any other right hereunder.

15. **Severability.** If any portion of this MOU or the application thereof to any person or circumstance shall be held invalid or unenforceable, the remainder of this MOU shall not be affected thereby and shall be enforced to the greatest extent permitted by law.

16. **Assignment Prohibited.** TFC shall not assign any right or obligation pursuant to this MOU without the written consent of the City. Any attempted or purported assignment without City's written consent shall be void and of no effect.

17. **No Agency.** Neither party, nor any of its agents, contractors or employees are or shall be considered to be the agents of any other party in connection with the performance of any of act under this MOU.

18. **No Partnership Relationship.** It is understood and agreed that TFC is an independent organization and that no relationship of employer-employee, partnership or joint venture exists between the Parties hereto for any purpose whatsoever. Except as expressly provided in this MOU, TFC and TFC's personnel shall have no authority, express or implied, to act on behalf of City in any capacity whatsoever as an agent, nor to bind City to any obligations whatsoever. City shall not control the activities of TFC, and City and City's personnel shall have no authority, express or implied, to act on behalf of TFC in any capacity whatsoever as an agent, nor to bind TFC to any obligations whatsoever.

19. **Change in use of Theatre.** TFC agrees that if the Children's Theatre of California ever changes its primary use from a children's theatre to a use other than a use the City Manager determines is a public use, TFC shall return to the City all bond proceeds received from the City within thirty (30) days from the date of the change in use. This paragraph 19 shall survive the termination of this MOU.

20. **Binding Effect.** This MOU shall be binding on the heirs, executors, administrators, successors and assigns of the Parties, subject to the provisions of Section 16, above.

21. **Time of Essence.** Time is expressly declared to be in the essence of this MOU. City shall designate this Project as a Tier 1 project and shall use its best efforts to expedite reviews and Project approvals.

22. **California Environmental Quality Act ("CEQA").** This project is subject to the environmental review process as part of the approval of the development application.

23. **Entire Agreement.** This document contains the entire agreement between the Parties concerning the Project and supersedes whatever oral or written understanding they may have had prior to the execution of this MOU. No alteration to the terms of this MOU shall be valid unless approved in writing by TFC, and by City, in accordance with applicable provisions of the Sacramento Municipal Code.

24. **Term; Suspension; Termination.**

    A. This MOU shall become effective on the date that it is approved by both Parties, and shall continue in effect until both Parties have fully performed their respective obligations under this MOU, unless sooner terminated as provided herein.

    B. City shall have the right to terminate this MOU at any time by giving a written notice of termination to TFC. If the City terminates this MOU:

        (1) TFC shall, not later than 15 days after such notice of termination, deliver to City copies of all writings, documents or reports prepared pursuant to this MOU.

        (2) Return all City Funds received from the City within 30 days of the notice of termination.

25. **Dispute Resolution.** The Parties shall attempt to resolve any disputes they may have in good faith, beginning with the Project Manager and TFC's Project Representative. Should they be unable reach resolution, they shall refer the dispute to the City Manager or his designee. Should the Parties be unable to reach resolution, they shall refer the dispute to non-binding mediation before a mutually agreeable mediator. If the Parties are unable to agree upon the mediator, the Parties will request appointment of a mediator by the American Arbitration Association. Each Party shall pay its own costs and be responsible to pay one-half of the mediator's costs.

26. **Notices.** All notices under this MOU shall be given to the other Parties at the addresses set forth below or such other addresses as the Parties may designate by written notice to the other Parties in an appropriate and reasonable period of time in advance.

CITY OF SACRAMENTO
Jim Rinehart
Project Manager
915 I Street, 5th Floor
Sacramento, CA 95814
916.808.5704
Facsimile: _____

THEATRE FOR CHILDREN, INC.
Roger M. Busfield, III
CEO and Producing Artistic Director
2711 B Street
Sacramento, CA 95816
916.443.5391
Facsimile: 916.443.0874

26. Authority. The person signing this MOU for TFC hereby represents and warrants that he/she is fully authorized to sign this MOU on behalf of TFC and to bind TFC to the performance of its obligations hereunder.

CITY OF SACRAMENTO

APPROVED AS TO FORM:

_____
Ray Kerridge
City Manager

_____
Angela Casagranda
Senior Deputy City Attorney

ATTEST:

_____
City Clerk

THEATRE FOR CHILDREN, INC.
A Not-For-Profit California Corporation

_____
Laura Lyon, President
Board of Directors

_____
Roger M. Busfield, III
CEO and Producing Artistic Director