



BOARD OF SUPERVISORS

SCOTT HAGGERTY
SUPERVISOR, FIRST DISTRICT

November 9, 2012

Alameda County Board of Supervisors
Administration Building
1221 Oak Street
Oakland, CA 94612

Dear Board Members:

Subject: FUND REQUEST FOR FOUR HUNDRED THOUSAND DOLLARS (\$400,000) TO LIVERMORE VALLEY PERFORMING ARTS CENTER UTILIZING FUNDING PROVIDED THROUGH THE MARIPOSA LLC ENERGY PROJECT COOPERATION AGREEMENT

Recommendation:

1. That the Board determine that the request of the Livermore Valley Performing Arts Center (LVPAC) for a loan in the amount of \$400,000 for operations from the fund established by the Mariposa LLC Energy Project Cooperation Agreement is consistent with the criteria set forth in the cooperation agreement.
2. If found to be consistent with the Cooperation Agreement, approve the loan agreement with the LVPAC for a maximum of \$400,000 of funding for the development of their 2,000 seat theatre, which will be repaid by LVPAC by December 31, 2015.

SUMMARY:

CDA staff through District 1 has received a request from LVPAC for a loan of \$400,000 for the following reasons:

- Livermore Valley Performing Arts Center (LVPAC) has developed and operates the 500-seat Bankhead Theater in downtown Livermore.
- Pursuant to a Disposition and Development Agreement (DDA) among LVPAC, the City of Livermore and the Livermore Redevelopment Agency, LVPAC is to develop and operate a 2,000 seat regional performing arts theater. The regional theater will provide substantial economic and cultural benefits to the entire Tri-Valley region and beyond.

1221 OAK STREET * SUITE 536 * OAKLAND, CALIFORNIA 94612 * 510 272-6691 * FAX 510 208-3910
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- As a result of issues created by the dissolution of redevelopment agencies in California, LVPAC is experiencing delays in the financing and development of its regional theater.
- LVPAC desires to borrow a total of Four Hundred Thousand Dollars (\$400,000.00), which will permit LVPAC to continue operations while it seeks the approvals needed to finance the construction of the regional theater pursuant to the DDA.

BACKGROUND

Diamond Generating / Mariposa LLC made application to the California Energy Commission (CEC) in July 2009 to construct a new gas-fired peaker power plant in eastern Alameda County near the community of Mountain House. The CEC, under State Law, typically acts as lead agency and approves the project with local input. Traditionally, the power operator and the County enter into an agreement to provide local benefits. Local benefit funds are discretionary funds used to fund local programs that allow the county to expand and enhance existing services that otherwise might be unfunded.

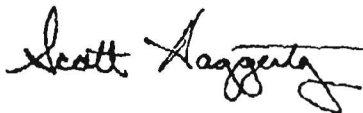
Services can include third parties or other districts that provide a community benefit. Such is the case here where there is a pressing need to issue a loan to the Livermore Valley Performance Arts Center for its operations as it seeks completion of negotiations to finance the construction of its planned 2000 seat regional theater. As outlined in the loan agreement, LVPAC has agreed to repay the loan by December 31, 2015.

Alameda County and Mariposa LLC entered into an agreement in June, 2010 that authorized community benefit funds for limited purposes. Mariposa has agreed to expand the permissible uses of the community benefit funds, and the proposed revision of the agreement is on your November 20, 2012 agenda. If you approve the revisions, Article 4 of the Agreement will provide for several categories of funding, including a line item of \$600,000 to support any such community benefit in East County. There is sufficient funding to enter into the agreement with LVPAC for this loan.

FISCAL IMPACT:

There is no financial impact to the County. The source of all funding for this request would be the Fund Account established by the Mariposa Energy Project Cooperation Agreement (updated on November 20, 2012).

Sincerely,



Scott Haggerty
First District Supervisor

C: Donna Ziegler, County Counsel
Brian Washington, Office of the County Counsel
Chris Bazar, Director Community Development Agency

LOAN AGREEMENT

THIS LOAN AGREEMENT, entered into as of _____, 2012, between the COUNTY OF ALAMEDA, a political subdivision duly organized and existing under and by virtue of the Constitution and laws of the State of California (the "**County**"), and LIVERMORE VALLEY PERFORMING ARTS CENTER, a California nonprofit public benefit corporation ("**LVPAC**"), is made under the following circumstances:

RECITALS

A. LVPAC has developed and operates The Bankhead Theater, a 500 seat community theater in Livermore, California. Pursuant to a Disposition and Development Agreement dated as of February 14, 2011 among LVPAC, the City of Livermore (the "**City**") and the Livermore Redevelopment Agency (the "**RDA**"), LVPAC plans to develop and operate a 2,000 seat regional performing arts theater.

B. As a result of issues created by the dissolution of redevelopment agencies in California, LVPAC is experiencing delays in the financing and development of its regional theater.

C. LVPAC desires to borrow from the County the total sum of Four Hundred Thousand Dollars (\$400,000.00), and the County is willing to lend such sum, upon the terms and conditions set forth in this Agreement.

AGREEMENT

In consideration of the respective representations, warranties, covenants and agreements contained in this Agreement, the parties to this Agreement hereby agree as follows:

1. Loan Amount. The County shall, on the terms and subject to the conditions of this Agreement, loan to LVPAC the total sum of Four Hundred Thousand Dollars (\$400,000.00) (the "**Loan**" or "**Loan Amount**"). The Loan Amount shall be disbursed in accordance with the following schedule, except that upon the written request of LVPAC, the schedule below may be accelerated in whole or in part and the Loan Amount may be advanced to LVPAC earlier than provided below:

<u>Date</u>	<u>Amount of Loan Disbursement</u>
February 1, 2013	\$150,000.00
April 1, 2013	\$150,000.00
July 1, 2013	<u>\$100,000.00</u>
Total	\$400,000.00

2. Promissory Note. The Loan shall be evidenced by an Unsecured Subordinated Promissory Note in the form attached hereto as Exhibit A (the "**Promissory Note**"). The Promissory Note shall be executed by LVPAC and delivered to the County before the date of the first advance under this Agreement.

3. Interest Rate. The interest rate on the Promissory Note and on all subsequent advances shall be equal to the quarterly apportionment rate on the California Local Agency Investment Fund (LAIF).

4. Payments. LVPAC shall repay the Loan, together with interest thereon, in accordance with the terms of the Promissory Note.

5. Guaranty. All indebtedness of LVPAC to the County pursuant to this Agreement shall be guaranteed by **the** Guarantors (the "**Guarantors**"), as evidenced by and subject to the terms of a Guaranty in the form of Exhibit B attached to this Agreement (the "**Guaranty**"). The County shall keep the names of the Guarantors confidential, except that (a) the County shall comply with all applicable requirements of the Public Records Act and any other law, (b) the County shall comply with any order or request of any court or regulatory body, and (c) the County shall not be obligated to do so if an Event of Default (as defined below) occurs, the Guarantors do not perform their obligations under the Guaranty within twenty-one (21) days after their receipt of written notice of default from the County, and the County elects to enforce its remedies under the Guaranty. In approving this Agreement, the Board of Supervisors authorizes the County Administrator or her designee, in conjunction with the Office of the County Counsel, to approve the guarantors, after confirming their creditworthiness, and to assure that the Guarantors sign the Guaranty.

6. Conditions Precedent. The obligation of the County to make each disbursement described in Section 1 of this Agreement is subject to the satisfaction of each of the following conditions:

a. Promissory Note and Guaranty. LVPAC shall have executed and delivered the Promissory Note, and the Guarantors shall have executed and delivered the Guaranty;

b. Compliance. The representations and warranties of LVPAC in this Agreement shall be true in all material respects on and as of the date of the proposed disbursement; and

c. No Default. On the date of any proposed disbursement, no Event of Default shall exist.

7. Representations and Warranties of LVPAC. LVPAC hereby represents and warrants that:

a. Corporate Status and Authority. LVPAC is duly incorporated, validly existing and in good standing under the laws of the State of California. LVPAC has corporate power and corporate authority to enter into and perform this Agreement and the Promissory Note, and to borrow under this Agreement.

b. Authorization; No Breach or Violation. The execution and delivery by LVPAC of this Agreement, the performance of LVPAC's obligations hereunder and the consummation of the transactions contemplated hereby have been duly authorized by all necessary corporate action of LVPAC. This Agreement and the Promissory Note will not violate any provision of law or of the articles of incorporation or bylaws, or result in a breach of, or constitute a default or require any consent under, or result in the creation of any lien, charge, or encumbrance upon the property or assets of LVPAC, any indenture or other agreement or instrument to which LVPAC is a party or to which LVPAC or its properties may be bound or affected, other than as specifically provided herein.

c. Enforceability. This Agreement and the Promissory Note have been duly authorized, executed and delivered and constitute legal, valid and binding obligations of LVPAC, enforceable against LVPAC in accordance with their respective terms, subject to the effect of bankruptcy, insolvency, reorganization, moratorium or similar laws now or hereafter in effect generally affecting creditors' rights.

d. Litigation. There are no actions, suits or proceedings pending or, to the knowledge of LVPAC, threatened against or affecting LVPAC, or any of its assets, properties or rights, at law or in equity, by or before any court, arbitrator, administrative or governmental body or other person which, if determined adversely, would have a material adverse effect on the business, properties, condition (financial or otherwise) or operations of LVPAC.

e. Compliance With Laws. LVPAC is not in violation or default with respect to any applicable law or regulation which affects the business, properties, condition (financial or otherwise) or operations of LVPAC, default under or violation of which might have a material adverse effect on the business, properties, condition (financial or otherwise) or operations of LVPAC or might result in the acceleration of the maturity of any of its indebtedness.

f. Authorized Officers. The officers of LVPAC executing this Agreement and the Promissory Note are duly and properly in office and fully authorized to execute such agreements or instruments.

g. No Event of Default. No event has occurred and is continuing which constitutes an Event of Default, or which, upon a lapse of time or notice or both, would become such an Event of Default.

8. Covenants of LVPAC. LVPAC covenants and agrees that until full and final payment of the Promissory Note and the performance of all of LVPAC's obligations under this Agreement, it shall:

a. Repay the Loan and interest thereon according to the terms of this Agreement and the Promissory Note;

b. Maintain and preserve the corporate existence of LVPAC and all rights, privileges and franchises now enjoyed, conduct its business in an orderly, efficient and customary manner, keep all its properties in good working order and condition, and from time to time make all needed repairs, renewals or replacements thereto and thereof so that the efficiency of such property shall be fully maintained and preserved;

c. Pay and discharge all indebtedness, liens, charges, taxes, assessments and governmental charges or levies imposed upon it or upon its income or profits, or upon any assets and properties belonging to it, prior to the date on which penalties attach thereto, and all lawful claims, which, if unpaid, would become a lien upon any of its properties; provided that LVPAC shall not be required to pay any such tax, assessment, charge, levy or claim which is being contested in good faith by appropriate proceedings, and with respect to which reserves in conformity with generally accepted accounting principles have been provided on the books of LVPAC; and

d. Comply with the requirements of all applicable laws, rules, regulations and orders of any governmental authority having jurisdiction, and the terms of any indenture, contract or other instrument to which it is a party or under which it or its properties may be bound.

9. Events of Default. The occurrence of any of the following events ("**Events of Default**") shall constitute a material default and breach of this Agreement by LVPAC:

a. Any failure by LVPAC to make any payment when due under this Agreement or the Promissory Note, if the default continues for more than ten (10) days after written notice of default;

b. Any representation or warranty made by LVPAC in this Agreement shall be false in any material respect or shall omit any material fact on the date as of which made;

c. LVPAC shall fail to perform or observe any other material term, covenant or agreement contained in this Agreement or the Promissory Note, if the failure continues for more than ten (10) days after written notice of default;

d. An Event of Default, as defined in the Amended and Restated Reimbursement Agreement between LVPAC and The Bank of New York Mellon dated as of June 1, 2012 (the "**Reimbursement Agreement**"), shall occur, and The Bank of New York Mellon shall enforce any remedy which materially impairs LVPAC's operations or future prospects;

e. LVPAC shall commence a voluntary case or other proceeding under the laws of any jurisdiction seeking liquidation, reorganization, or other relief with respect to itself or its debts under any bankruptcy, insolvency, or other similar law, or seeking the appointment of a trustee, self trusteeship, receiver, custodian, or other similar official of it or any substantial part of its property; or shall consent to any such relief or to the appointment of, or taking possession by, any such official in an involuntary case or other proceeding commenced against it; or shall make an assignment for the benefit of creditors; or shall generally not pay its debts as they become due or not be able to pay its debts as they become due; or admit in writing its inability to pay its debts as they become due; or shall take any corporate action to authorize any of the foregoing; or

f. An involuntary case or other proceeding shall be commenced under the laws of any jurisdiction against LVPAC seeking liquidation, reorganization, or other relief with respect to it or its debts under any bankruptcy, insolvency, or other similar law now or hereafter in effect, or seeking the appointment of a trustee, receiver, custodian, or other similar official of it or any substantial part of its property, and such involuntary case or other proceeding shall remain undismissed and unstayed for a period of thirty days or a trustee, receiver, custodian or other official shall be appointed in such involuntary case.

10. Remedies. Upon the occurrence of any Event of Default, the County may at any time thereafter, with or without notice and demand and without limiting the County in the exercise of any right or remedy at law or in equity which the County may have by reason of such default or breach:

a. Immediately accelerate payment of the Promissory Note and demand payment in full thereon without set off other than of payments made, and the County shall be entitled to be reimbursed by LVPAC for all costs of such action as well as reasonable attorneys' fees; and

b. Exercise any and all other rights or remedies which are otherwise available at law or in equity or by statute.

11. Waiver of Set-Off Right. Notwithstanding any other provision of this Agreement to the contrary, the County waives any right which it otherwise may have to set off and apply any amounts payable by the County to or for the benefit of LVPAC (including without limitation any amounts payable in connection with the Variable Rate Demand Bonds (Livermore Valley Performing Arts Center Project) Series 2006 issued by the California Health Facilities Financing Authority) to amounts payable by LVPAC pursuant to this Agreement or the Promissory Note.

12. Remedies Cumulative. The remedies set forth in this Agreement and the Promissory Note shall be cumulative.

13. Severability Clause. Each and every clause of this Agreement shall be applied individually and should any court of competent jurisdiction determine any clause

hereunder to be invalid, such determination shall have no effect on the validity of the remainder of this Agreement, which shall then be interpreted as if such clause had never been included.

14. Survival of Representations, Warranties, Covenants, and Agreements. The representations, warranties, covenants and agreements contained in this Agreement shall survive the execution and delivery of this Agreement.

15. Applicable Law; Jurisdiction and Venue. This Agreement and all provisions and covenants herein contained shall be governed by the laws of the State of California. If a dispute arises under this Agreement, jurisdiction and venue shall rest exclusively in the state courts located in Alameda County. Either party to this Agreement may file a copy of this Agreement with the clerk or judge of any court having jurisdiction as evidence of the parties' waiver of the right to a jury trial.

16. Amendment. This Agreement and each provision hereof may be amended, changed, waived, discharged or terminated only by an instrument in writing signed by the parties hereto.

17. Notices. Except as provided herein, all notices, requests, demands or other communications to or upon the respective parties hereto shall be deemed to have been given or made when deposited in the mail, postage prepaid, addressed to LVPAC or to the County, as the case may be, at their respective addresses as follows:

To the County: County of Alameda
c/o County Administrator's Office
1221 Oak Street, Room 555
Oakland, CA 94612
Attn: County Administrator

To LVPAC: Livermore Valley Performing Arts Center
2400 First Street
Livermore, CA 94550
Attention: Executive Director

With a copy to: Carr, McClellan, Ingersoll, Thompson & Horn
216 Park Road
Burlingame, CA 94010
Attention: Edward J. Willig, Esq.

or at such other address as any of such parties may hereafter specify in writing to the other, except that any communication with respect to a change of address shall be deemed to be given or made when received by the parties.

18. Interpretation. Unless the context otherwise indicates, words of the masculine gender shall be deemed and construed to include the correlative words of the feminine and neuter genders. The singular shall include the plural and vice versa.

19. Waiver. No failure or delay on the part of the County in exercising any right, power or privilege under this Agreement or the Promissory Note and no course of dealing between LVPAC or any other person and the County shall operate as a waiver hereof or thereof; nor shall any single or partial exercise of any right, power or privilege preclude any other further exercise of any other right, power or privilege. No notice to or demand on LVPAC in any case shall entitle LVPAC to any other or further notice or demand in similar or other circumstances or constitute a waiver of the right of the County to any other or further action in any circumstances without notice or demand.

20. Further Assurances. The parties shall execute and deliver all such further documents, agreements and instruments and take such other and further action as may be necessary or appropriate to carry out the purposes and intent of this Agreement.

21. Descriptive Headings. The descriptive headings of this Agreement are inserted for convenience only and shall not be deemed to affect the meaning or construction of any of the provisions hereof.

22. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument.

23. Benefit of Agreement. This Agreement shall be binding upon each of the parties hereto, its successors and assigns. LVPAC may not transfer or assign any or all of its rights or obligations hereunder without the prior written consent of the County.

24. Attorneys' Fees. If any litigation is commenced regarding this Agreement by one party to this Agreement against another party, the party against whom such claim or contest was resolved shall pay all reasonable attorneys' fees incurred by both parties as a result of such claim or contest, together with interest on any amount recovered (other than attorneys' fees).

25. Entire Agreement. This Agreement and the Promissory Note constitute the entire agreement and supersede all other prior agreements and understandings, both written and oral, between the parties with respect to the subject matter of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in two or more original counterparts on the date set forth in the initial paragraph.

COUNTY OF ALAMEDA

LIVERMORE VALLEY PERFORMING
ARTS CENTER
a California nonprofit
public benefit corporation

By _____

By _____

Name & Title: _____

Name & Title: _____

"the County"

"LVPAC"

Approved as to Form

DONNA R. ZIEGLER, County Counsel

By  _____

Print Name _____

EXHIBIT A

UNSECURED SUBORDINATED PROMISSORY NOTE

\$400,000.00

_____, 2012

FOR VALUE RECEIVED, LIVERMORE VALLEY PERFORMING ARTS CENTER, a California nonprofit public benefit corporation ("LVPAC"), promises to pay to the order of THE COUNTY OF ALAMEDA (the "**County**"), the principal sum of Four Hundred Thousand Dollars (\$400,000.00), or such lesser amount as shall equal the outstanding balance of disbursements made by the County to LVPAC under that certain Loan Agreement dated as of the date of this Note between LVPAC and the County (the "**Loan Agreement**"), together with interest thereon from the date of each advance.

The interest rate shall be equal to the quarterly apportionment rate on the California Local Agency Investment Fund (LAIF). The foregoing notwithstanding, in no event shall the amount of interest paid under this Note exceed the maximum rate of interest on the unpaid principal balance of this Note allowable by applicable law. If any sums are collected in excess of the applicable maximum rate, the excess collected shall be applied to reduce the principal amount. The entire unpaid balance of principal and all accrued and unpaid interest shall be due and payable on December 31, 2015 (the "**Maturity Date**").

This Note is issued pursuant to, and is the Promissory Note referred to in, the Loan Agreement. Upon the occurrence and continuance of an "Event of Default", as defined in the Loan Agreement, the County shall have the right at its sole discretion, without further notice or demand of any kind, to do any one or more of the following: (1) make all sums of interest and principal and any other sums owing under this Note immediately due and payable; and (2) exercise any other right or remedy provided by contract or applicable law.

Failure to exercise the foregoing option to accelerate this Note shall not constitute a waiver by the County of the right to exercise the option in the event of any subsequent default.

This Note is a general unsecured obligation of LVPAC.

This Note may be prepaid at any time or from time to time in whole or in part without penalty.

LVPAC hereby waives presentment, demand for payment, notice of dishonor and any and all other notices and demands in connection with the delivery, acceptance, performance, default, or enforcement of this Note.

LVPAC agrees to pay the County's reasonable costs in collecting and enforcing this Note, including reasonable attorneys' fees.

No reference in this Note to the Loan Agreement and no provision of this Note or the Loan Agreement shall alter or impair the obligation of LVPAC, which is absolute and unconditional, to pay the principal and interest of this Note, at the respective times herein prescribed.

This Note shall be construed in accordance with the laws of the State of California as applied to contracts entered into by California residents within the State of California, which contracts are to be performed entirely within the State of California.

LIVERMORE VALLEY PERFORMING ARTS CENTER
a California nonprofit public benefit corporation

By: _____

Name & Title: _____

EXHIBIT B

GUARANTY

[NAMES OF GUARANTORS] (“**Guarantors**”) hereby absolutely and unconditionally guarantee, on an unsecured basis, the prompt payment in full when due of the obligations of Livermore Valley Performing Arts Center, a California nonprofit public benefit corporation (“**LVPAC**”), under that certain Unsecured Subordinated Promissory Note dated _____, 2012 representing the obligation of LVPAC payable to the order of The County of Alameda (the “**County**”) in the principal amount of up to \$400,000.00 (the “**Note**”).

If all or any part of such obligations shall not be paid when due, according to the terms of the Note, Guarantors, immediately upon the written demand of the County, shall pay to the County the amount due and unpaid, in like manner and as if such amount constituted the direct and primary obligation of Guarantors.

Guarantors expressly waive the following: presentment and demand for payment, protest, notice of protest and dishonor or nonpayment of any instrument evidencing indebtedness, and any right to require suit or other action against LVPAC or any other party before enforcing this Guaranty.

Guarantors further agree, without demand, immediately to reimburse the County for all costs and expenses, including attorneys’ fees, if litigation is commenced to enforce this Guaranty.

This Guaranty shall be construed in accordance with the laws of the State of California.

[NAME OF GUARANTOR]

[NAME OF GUARANTOR]