



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Matt Cano
John Ristow

SUBJECT: SEE BELOW

DATE: May 24, 2021

Approved

Date

5/26/2021

COUNCIL DISTRICT: 3, 4 & 6

SUBJECT: COOPERATIVE AGREEMENTS FOR BART SILICON VALLEY PHASE II EXTENSION PROJECT

RECOMMENDATION

- (a) Approve Cooperative Agreement #1 with the Santa Clara Valley Transportation Authority (“VTA”) addressing design, construction and reimbursement obligations arising from VTA’s BART Silicon Valley Phase II Extension Project (“Project”).
- (b) Adopt a resolution authorizing the City Manager or their designee to negotiate and execute future Cooperative Agreements, at no cost to the City, pursuant to the Master Agreement with the VTA for the BART Silicon Valley Phase II Extension Project (Attachment A) that address future design reviews, construction inspection and testing requirements and similar project-related issues.
- (c) Adopt a resolution for the adoption of the VTA’s Final Supplemental Environmental Impact Statement/Subsequent Environmental Impact Report (“FSEIS/SEIR”), and applicable Mitigation Monitoring Reporting Program (“MMRP”).

OUTCOME

Approval of Cooperative Agreement #1 will enable the City and VTA to continue to pursue Federal Transit Administration (“FTA”) funding for the Project and establish guidelines and procedures for City and VTA staff to resolve key elements concerning design reviews, construction mitigation, community outreach, and VTA’s funding obligation for City staff costs. Authorizing the City Manager or their designee to negotiate and execute future cooperative agreements will support VTA in meeting significant milestones associated with the FTA Expedited Project Delivery (“EPD”) Project schedule and satisfy FTA requirements for agreements between the VTA and City that addresses the Project’s overarching elements.

Adoption of the FSEIS/SEIR and MMRP will provide environmental clearance for the City's actions in support of the project, including agreements, review, inspection of portion of the project that occur on the City owned property or right-of-way.

BACKGROUND

The VTA's BART Silicon Valley Extension is a planned 16-mile, six-station extension of the existing 104-mile Bay Area Rapid Transit (BART) system into San José and Silicon Valley. The project will bring travelers into San José and Silicon Valley with convenient connections to numerous transit systems, including commuter rail, light rail and bus services that serve major employment districts, residential areas, and other City and regional destinations.

VTA's Board of Directors certified the first Final Environmental Impact Report (FEIR) and approved the 16-mile project on December 9, 2004. As preliminary engineering progressed, a number of design changes were identified, and supplemental documents were prepared to evaluate the environmental impacts. VTA's Board of Directors certified a Final Second Supplemental Environmental Impact Report (FSEIR) and approved the 10-mile Phase I extension on March 3, 2011 and the 6-mile Phase II extension on April 5, 2018.

BART Phase I, the Berryessa Extension, was a two-station extension south from the Warm Springs Station in Fremont, through Milpitas and to the Berryessa/North San José Station. On June 22, 2010, Council approved a Master Agreement with VTA for Phase I ("Master Agreement #1). Master Agreement #1 established a framework for the on-going interaction between both parties and allows for subsequent agreements to address specific project issues and future City funding. Phase I was completed and opened for revenue service on June 13, 2020.

On October 16, 2020, the City and VTA entered into a Master Agreement for the Project ("Master Agreement #2). Similar to Master Agreement #1, Master Agreement #2 provides a framework for cooperative efforts between the two agencies to advance the Project, including the key elements of design, issue resolution, outreach, and funding, while anticipating subsequent cooperative agreements that address specific project issues.

BART Phase II is an extension from the Phase I terminus at the Berryessa/North San José station to the City of Santa Clara, which includes a 5-mile long subway tunnel through Downtown San José. Four stations are planned for Phase II: 28th Street/Little Portugal, Downtown San José, Diridon Station, and Santa Clara Station.

The estimated cost of the Phase II project is approximately \$6.86 billion, and the funding plan includes a mix of local (2000 Measure A & 2016 Measure B), State (Regional Measure 3, Transit and Intercity Rail Capital Program (TIRCP), Traffic Congestion Relief Program (TCRP)), and Federal (FTA Expedited Project Delivery) funds. A requirement for the approval of Federal funding is to show that the local jurisdictions and VTA have established guidelines and procedures as part of their working relationship to assure delivery of the Project. The FTA

requires an agreement between the VTA and City that addresses the overarching elements of the project and provides direction to both City and VTA staff on key elements of design, issue resolution, outreach, funding, and future agreements. With this in mind, staff requests Council approval of Cooperative Agreement #1.

ANALYSIS

Cooperative Agreement #1 and future cooperative agreements will support VTA in meeting significant milestones associated with the Expedited Project Delivery (EPD) project schedule and satisfy requirements for agreements between the VTA and City that addresses the Project's overarching elements. Cooperative Agreement #1 focuses on key areas, including VTA's commitment to provide funding for City staff for support in the design and construction of the project, and VTA's proposal for a construction outreach and mitigation plan in lieu of the City's Construction Impact Mitigation Plan requirements contained in Municipal Code Chapter 13.36. Additional topic areas include betterments (as defined below), City infrastructure, design standards, and City services supporting Pre-RFP project activities.

Staff Funding

City staff provides a significant level of support to the VTA and their consultants to plan, design, and construct regional projects in San Jose. In the past, VTA has reimbursed City staff the cost for internal review of VTA plans for regional projects. Given the extraordinary scope of the Project, City and VTA staff have discussed issues related to the level of City staff assistance needed to effectively support the Project. Project support may include public contact and meeting facilitation, design review, construction and right-of-way encroachment permitting, construction inspection, as well as acceptance of public works facilities to be owned by City upon completion of work. As a result of these discussions, VTA has agreed that the City will be reimbursed to cover City staff costs related to the design, construction, and inspection for work within City rights-of-way and for relocation of City-owned facilities. The scope of the costs will be determined as part of this and subsequent cooperative agreements pursuant to the Master Agreement between the City and VTA for specific elements of the Project.

Betterments

Cooperative Agreement #1 defines Betterments as upgrades that are not attributable to construction of the Project and are made solely for the benefit, and at the election, of the City. The agreement also lists several City standards and plans that, if approved prior to the Project's Final Design, shall not be considered Betterments, including Urban Village Plans, Multimodal Transportation Improvement Plans, the Downtown Transportation Plan, and the Diridon Station Area Plan.

Cooperative Agreement #1 provides that the City and VTA will enter into a separate agreement(s) to address construction of Betterments, including cost. If City staff and VTA

contemplate Betterments, City staff will return to Council for approval of an agreement addressing the construction of the proposed Betterments.

Community Outreach Management Program (COMP)

Part 2 of Chapter 13.36 of the San Jose Municipal Code (Construction Impact Mitigation Plans Ordinance) provides measures to help residents and businesses located in San Jose through the temporary disruption of major construction projects by requiring, among other things, the owners of such projects to communicate with the surrounding neighborhood and businesses prior to and throughout the construction period of the project. Section 13.36.240 defines "major construction project" as totaling \$10 million and (i) will impact two or more signalized intersections, or (ii) sidewalk access will be precluded for the length of a block, or (iii) the project is located within the lesser of five hundred feet or one block of another project located in the right-of-way. The Project is a "major construction project" under Chapter 13.36.

The Construction Impact Mitigation Plan Ordinance requires an owner of a major construction project to submit for Council approval a detailed Construction Impact Mitigation Plan ("Plan") as a condition of an encroachment permit to be issued by the Director of Public Works. Section 13.36.220 states that the Plan shall include, among other things, a detailed description of the project, construction schedule, analysis of potential impact to residents and businesses, and detail of mitigation measures to be taken to mitigate each of the impact. Additionally, the Plan must include a communication plan setting forth a schedule of regular meetings with residents and businesses addressing their concerns. However, Subsection B. of Section 13.36.210 provides that if a cooperative agreement with the City contains terms requiring a Construction Impact Mitigation Plan, that agreement controls over the Plan requirements contained in Section 13.36.220.

VTa has expressed support of the City's goal to minimize construction impacts and provide appropriate communication, but expressed concerns to providing a Construction Impact Mitigation Plan due to their federal funding process and proposed design- build delivery method. Therefore, Staff and VTA have negotiated a Community Outreach Management Program ("COMP") that will take the place of the Construction Impact Mitigation Plan required by Chapter 13.36.

The COMP will be incorporated into all contract plans and specifications and includes the following three plans (and illustrated in Chart 1 below):

1. Construction Education and Outreach Plan (CEOP)
The CEOP outlines communication during construction between VTA, cities of San José and Santa Clara, and the public.
2. Construction Transportation Management Plan (CTMP)
The draft CTMP provides the framework for circulation and access needs within and around the construction areas for all transportation options. The Contractor will provide

specific construction staging, traffic handling, alternate routes, and temporary roadway/intersection improvements to finalize the CTMP.

3. Emergency Services Coordination Plan (ESCP)

The ESCP outlines emergency services coordination to minimize impact to emergency service routes and response times due to construction activities.

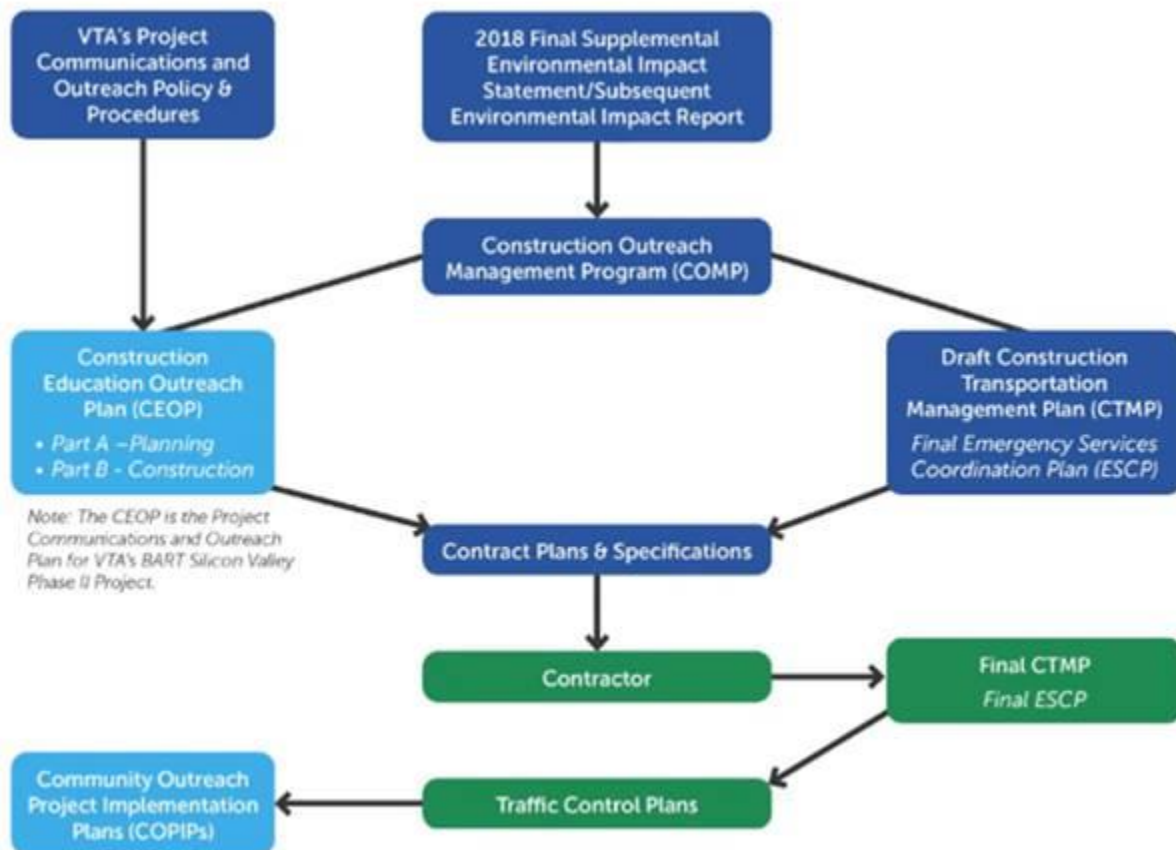


Chart 1: Community Outreach Management Program (COMP) Development Flow Chart

The key elements in proposed COMP that differ from the CIMP ordinance are as follows:

- **Construction Impacts** - The ordinance requires a detailed analysis of the potential physical, environmental, and other impacts of the construction activities on residents and businesses within a 500-foot radius of the project. VTA has completed an impact analysis report as part of their environmental documents and will incorporate any required mitigation. As an environmental mitigation, VTA is required to develop and implement the COMP. The purpose of the COMP is to minimize and reduce construction related transportation impacts and inform the public and other stakeholders of the construction schedule and associated activities. VTA's COMP meets the construction impact ordinance requirements of the CIMP.

- Potential Impacts to Businesses - The City's CIMP ordinance requires certain potential impacts to businesses be analyzed. These potential impacts include but are not limited to: (1) reduced patronage and parking; (2) forced temporary closures and (3) force permanent closures. The COMP meets this analysis requirements. Additionally, the City's CIMP ordinance lists several potential, but not required, mitigation measures to alleviate impacts to business including limiting construction hours, marketing assistance, and financial assistance. The CEOP provides a) activities and resources that support community and stakeholder outreach and construction impact communications throughout the Phase II Project; b) strategies and tactics for coordinating construction activities with existing business operations and other development projects to minimize disruption and delays; and c) processes for addressing concerns of businesses and their customers, property owners, residents, and commuters. The CEOP does not directly address financial assistance. In conclusion, the CEOP meets all the analysis requirements for the City's CIMP ordinance, and the CEOP proposes the implementation of a majority of the potential mitigation measures, with the exception of financial assistance.

In conjunction with the Project's Final Supplemental Environmental Impact Statement / Supplemental Environmental Impact Report (FSEIS/SEIR), Mitigation Monitoring and Reporting Program ("MMRP") requirements, staff believe the COMP will adequately address construction impacts during the course of the Project and meets the spirit of the Construction Impact Mitigation Plan Ordinance.

Future Cooperative Agreements

Future Cooperative Agreements may include but is not limited to funding for City design review, funding for City construction inspection and testing, confirmation of design elements for City facilities, approval of and amendments to the COMP, construction impacts to City facilities and streets, and VTA conveyance of Right-of-Way/easements.

CONCLUSION

Cooperative Agreement #1 and subsequent cooperative agreements will address critical areas of cooperation between the City and VTA on the Project and represent the best approach to establish a commitment to cooperate and effectively resolve issues. VTA will pay for all City staff costs in direct support of the Project. VTA commits to provide new infrastructure at no cost to City, including construction outreach and mitigation before and during the construction of the BART project. Subsequent cooperation agreements will focus on additional key areas of the Project, including communication and coordination, future agreements, dispute resolution, and design review and approval as well as City infrastructure, traffic maintenance and detours, and other impact mitigation.

EVALUATION AND FOLLOW-UP

Master Agreement #1 is the basis for this and subsequent agreements to further establish details in mitigating project impacts on City residents and City facilities. The construction of the Project will have a formal outreach process managed by the VTA and coordinated with City staff. Progress reports on the BART project will be provided on a regular basis to the Transportation and Environmental Committee.

CLIMATE SMART SAN JOSE

The recommendation in this memo aligns with one or more Climate Smart San José energy, water, or mobility goals.

PUBLIC OUTREACH

This memorandum will be posted on the City's Council Agenda website for the May 18, 2021 Council Meeting. The City of San José has worked in close coordination with VTA as it conducted outreach on the BART Phase II extension. City staff participated in Community Working Groups for the 28th Street/Little Portugal and Downtown/Diridon stations over the past few years. These covered a wide range of project topics, including tunneling, construction approaches, and mitigation strategies. VTA will continue to conduct stakeholder outreach and outreach to the public on the proposed project as appropriate.

COORDINATION

This item has been coordinated with the Department of Transportation, the City Attorney's Office, the City Manager's Budget Office, and the Department of Planning, Building and Code Enforcement.

COMMISSION RECOMMENDATION/INPUT

No commission recommendation or input is associated with this action.

FISCAL/POLICY ALIGNMENT

The BART project aligns with the City's Envision 2040 goals to facilitate increased travel by transit and the Transportation & Aviation Services CSA goals to provide transportation choices that support a strong economy.

HONORABLE MAYOR AND CITY COUNCIL

May 24, 2021

Subject: Cooperative Agreements for BART Silicon Valley Phase II Extension Project

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COST SUMMARY/IMPLICATIONS

The design and construction of City infrastructure, with the exception of Betterments, will be fully funded by the BART project. City staff costs incurred for direct support of the project will be reimbursed by the VTA and are included in the 2021-2025 Adopted Capital Improvement Program. The project will construct new and modified City infrastructure which is not expected to have a significant cumulative effect on ongoing maintenance and operations.

CEQA

Santa Clara Valley Transportation Authority's Final Supplemental Environmental Impact Statement/Subsequent Environmental Impact Report.

/s/

MATT CANO

Director of Public Works

/s/

JOHN RISTOW

Director of Transportation

For questions, please contact J. Guevara, Deputy Director of Public Works, at (408) 807-1801.

Attachment A:

Master Agreement Between the Santa Clara Valley Transportation Authority and the City of San Jose Relating to VTA'S BART Silicon Valley Phase II Extension Project, Oct. 16, 2020.

MASTER AGREEMENT
BETWEEN
THE SANTA CLARA VALLEY TRANSPORTATION AUTHORITY
AND
THE CITY OF SAN JOSE
RELATING TO VTA'S BART SILICON VALLEY PHASE II EXTENSION PROJECT

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This Master Agreement (hereinafter “Agreement”) is entered into between the Santa Clara Valley Transportation Authority (hereinafter “VTA”) and the City of San José (hereinafter “CITY”). This Agreement is entered into this 16th day of October, 2020 (the “Effective Date”). VTA and CITY are sometimes hereinafter referred to individually as a “Party” and collectively as the “Parties.”

RECITALS

- A. WHEREAS, VTA intends to construct an extension of the Bay Area Rapid Transit (“BART”) system rail line within Santa Clara County, under the project entitled: VTA’s BART Silicon Valley Phase II Extension Project (“PROJECT”), as further defined below in Section 3 of this Agreement.
- B. WHEREAS, VTA has undertaken a program of activities leading to the aforementioned extension of BART service, to be constructed by VTA and operated by BART.
- C. WHEREAS, VTA, in coordination with FTA, has prepared the Final Supplemental Environmental Impact Statement/ Subsequent Environmental Impact Report (“Final SEIS/SEIR”) for the PROJECT and has adopted the Mitigation Monitoring and Reporting Program (“MMRP”) which includes certain mitigation measures in the City of San José. As part of the Final SEIS/SEIR process, CITY reviewed the environmental documents and provided comments and suggestions on, and proposed revisions to, the PROJECT.
- D. WHEREAS, NEPA and CEQA require, among other things that each significant adverse environmental impact of a project be identified in that project’s environmental impact statement/environmental impact report and that feasible mitigation measures or alternatives be identified and implemented. The Final SEIS/SEIR identifies each significant adverse environmental impact of the PROJECT. A comprehensive list of mitigation measures associated with the PROJECT is set forth in the MMRP.
- E. WHEREAS, VTA is seeking Federal and State financial assistance to implement the PROJECT.

- F. WHEREAS, such Federal and State financial assistance imposes certain obligations on VTA regarding construction, financing, ownership, maintenance, and operation of the PROJECT.
- G. WHEREAS, VTA and CITY, acknowledging the mutual benefit to be derived from the PROJECT, desire to consult and cooperate with one another on the preliminary engineering, final design, and construction of those portions of the PROJECT affecting CITY Infrastructure.

NOW THEREFORE, VTA and CITY, in consideration of the foregoing, hereby agree as follows:

AGREEMENT

SECTION 1. DEFINITIONS

In addition to those terms defined in context elsewhere in this Agreement, the following definitions apply to all capitalized terms in this Agreement, including any Exhibits hereto.

- A. “CEQA” means the California Environmental Quality Act set forth in California Public Resources Code Section 21000 *et. seq.*
- B. “CITY” means the City of San José, a municipal corporation under the State of California, including its officers, employees, agents, consultants, and contractors.
- C. “CITY Infrastructure” means CITY streets (including but not limited to curbs, gutters, and sidewalks), traffic control devices, storm drains, sanitary sewers, water lines, hydrants, electroliers, landscaping, irrigation systems, public art, and all other CITY-owned facilities and appurtenances.
- D. “Contract Documents” means the executed construction contract and the associated contract drawings, construction drawings and construction specifications, design criteria, contract bonds, addenda, change orders, and/or additional documents incorporated by express reference into the construction contract.
- E. “Final SEIS/SEIR” means the February 2018 Final Supplemental Environmental Impact Statement/ Subsequent Environmental Impact Report for the PROJECT.
- F. “FTA” means the Federal Transit Administration, an operating administration of the United States Department of Transportation.

- G. “MMRP” means the Mitigation Monitoring and Reporting Program for the PROJECT, which identifies the mitigation measures associated with the PROJECT and discusses the timing and party responsible for implementation of such mitigation measures.
- H. “NEPA” means the National Environmental Policy Act.
- I. “Plans and Specifications” means drawings, documents, plans, specifications, general and special conditions, and related construction documents for the PROJECT.
- J. “ROD” means the Record of Decision issued by FTA for the PROJECT, indicating FTA’s acceptance of the Final SEIS/SEIR and the conclusion of the environmental review process for the PROJECT.
- K. “Standard Specifications” means the standard construction details, drawings, general and special conditions, and construction methods usually and customarily utilized by CITY for public works projects.
- L. “VTA” means the Santa Clara Valley Transportation Authority, a public agency organized as a special district under California law, including its officers, employees, agents, consultants, and contractors.

SECTION 2. PURPOSE OF AGREEMENT

- A. This Agreement embodies the general provisions for interaction, consultation, and cooperation between the Parties for preliminary engineering, final design, and construction of the PROJECT. The Agreement defines the Parties’ respective rights and obligations, ensures cooperation between VTA and CITY in connection with the PROJECT, and provides a framework for ongoing interaction between the Parties, to be supported by subsequent agreements about specific issues related to the PROJECT, as necessary.
- B. This Agreement may be supplemented during design or construction of the PROJECT to implement cost-sharing or other cooperative arrangements by the mutual consent of the Parties, subject to appropriate approvals of each Party’s governing body. The Parties recognize that this Agreement may not reasonably anticipate all aspects of the PROJECT and changes thereto which may occur due to unforeseen circumstances. Accordingly, the Parties acknowledge their respective obligations to act reasonably and in good faith and to modify the terms hereof when necessary to accomplish their mutual goals.

- C. The Parties acknowledge that the PROJECT is funded in part with funds made available by FTA. Accordingly, this Agreement and the obligations imposed on the Parties hereby will be interpreted in a manner consistent with any applicable requirements of Federal and State laws and regulations, including the requirements of 49 U.S.C. Section 5309, and any grant agreements or guidelines as part of any funding for the PROJECT.

SECTION 3. PROJECT DESCRIPTION

The PROJECT is the second phase of a program VTA has undertaken to extend BART service into Santa Clara County. The PROJECT will consist of an approximately 6-mile extension of the BART system from the Berryessa/North San José BART Station in the City of San José to the proposed Santa Clara BART Station located at the end of Brokaw Road in the City of Santa Clara. The PROJECT will include (a) an approximately 5-mile tunnel or subway through downtown San José; (b) four stations, including (i) 28th Street/Little Portugal, (ii) Downtown San José, (iii) Diridon, and (iv) Santa Clara; (c) two mid-tunnel ventilation/emergency egress facilities located at (i) Santa Clara Street/13th Street and (ii) Stockton Avenue/Schiele Avenue; and (d) the Newhall Maintenance Facility located in San José and Santa Clara.

SECTION 4. OPERATIVE DATE

The term of this Agreement will commence on the Effective Date and continue through December 31, 2030. The parties may mutually agree, in writing, to extend the agreement until December 31, 2032.

SECTION 5. SPECIFIC MITIGATION MEASURES

Environmental mitigation measures are described in the MMRP. VTA will comply with and implement the requirements of the MMRP and perform all required environmental review for the PROJECT. At VTA's request, CITY must provide reasonable assistance in order to allow VTA to comply with the requirements of the MMRP for the PROJECT.

SECTION 6. GENERAL COMMITMENTS

- A. The Parties will consult and cooperate in negotiating and executing any additional agreements required to modify and/or relocate CITY Infrastructure that may be affected by the PROJECT. VTA acknowledges that such agreements may require approval by CITY's

City Council. The Parties will cooperate with one another to identify (i) CITY Infrastructure that may be affected and (ii) cost-effective designs for the modified or relocated CITY Infrastructure.

- B. The Parties will develop procedures to ensure careful and continued cooperation between them, including: (1) procedures for finalizing any necessary design, construction, and operation relating to CITY Infrastructure; (2) procedures to avoid unnecessary delays to either the contracting or construction process; and (3) procedures for inspecting the construction, relocation, and replacement, as necessary, of CITY Infrastructure.
- C. VTA is pursuing federal funding from FTA, which is an essential component of the financial plan for the PROJECT. The Parties acknowledge the necessity of complying with FTA requirements and agree to cooperate in the effort to secure said funding.
- D. After development of final construction documents, VTA will provide CITY with plan(s) addressing delivery routes for CITY review and approval, which review and approval must not be unreasonably withheld or delayed.
- E. During construction of the PROJECT, VTA shall provide CITY with a list of VTA personnel to be contacted in the event of an emergency on the PROJECT construction sites within the CITY's jurisdiction.
- F. Construction Impact Mitigation Plan (CIMP). Part 2 of Chapter 13.36 of the San José Municipal Code provides measures to help residents and businesses located in San José through the temporary disruption of major construction projects by requiring, among other things, the owners of such projects to communicate with the surrounding neighbors prior to and throughout the construction period, and to modify their approach to such projects by implementing appropriate mitigation measures in an attempt to avoid or lessen potential impacts arising from the construction. VTA supports the City's goal of minimizing construction impacts. However, some aspects of the City's Ordinance would pose challenges for VTA with respect to the PROJECT because the federal funding process requires VTA to minimize any changes of scope late in the PROJECT development process. To address these concerns, as a condition to the issuance of any encroachment permit by CITY to VTA for the construction of the PROJECT, VTA will satisfy its

obligations for construction impact mitigation through the Construction Outreach Management Program.

G. Construction Outreach Management Program (COMP). As a condition precedent to the issuance of any encroachment permit by CITY to any of VTA's contractors for the construction of the PROJECT, VTA shall incorporate the COMP into the Contract Documents of all construction and design-build contracts through which the PROJECT will be implemented. The COMP will be subject to CITY approval, which approval will not be unreasonably withheld, and must include the following elements:

1. A detailed PROJECT description, including site maps.
2. A detailed description of (i) the potential physical, environmental, and other impacts of the construction activities on residents, businesses, commuters, and other potentially impacted parties and (ii) the anticipated duration of such activities.
3. A detailed description of the mitigation measures proposed to be undertaken by VTA, to the extent reasonably practicable, to mitigate each of the construction impacts identified.
4. Construction Education and Outreach Plan (CEOP). VTA will develop a CEOP in coordination with CITY to foster communication between VTA, CITY, and the public during construction of the PROJECT. The CEOP must include the following components:
 - a. Appropriately timed public workshops, meetings, or webinars for community members, surrounding businesses, and residents adhering to VTA's Project Communications and Outreach Policy and Procedures ("PCOPP") throughout all phases of the PROJECT.
 - b. A display of maps and construction schedule information posted in PROJECT field office(s) and around the construction area.
 - c. Establishment of field office(s) or office space accessible to the public with dedicated community outreach staff with defined hours.
 - d. A 24 hours per day/7 days per week project hotline for emergencies that begins operation upon commencement of construction.

- e. Preconstruction operational surveys of businesses located adjacent to construction areas to identify hours of operation, access, deliveries, customer base, special circumstances, and key contacts.
 - f. CITY-provided information (to be updated throughout the life of the PROJECT) about upcoming adjacent construction projects and development plans to minimize disruptions and delays.
 - g. A plan to inform and engage partnering agencies, stakeholders (including PROJECT Community Working Groups), business organizations, business owners, tenants, the media, and the public throughout the life of the PROJECT.
 - h. Project information and advanced construction notification distributed and posted via VTA's website, social and traditional media, signage, face-to-face visits, flyers, mailers, emails, and other communication methods as appropriate.
 - i. A PROJECT signage program identifying the PROJECT corridor, station areas, construction timeline, and funding.
 - j. Signage, website postings, and other communication methods to increase visibility of alternative parking and access.
 - k. The designation of a VTA community outreach coordinator to serve for the duration of the construction of the PROJECT.
 - l. A plan, utilizing the business resource study conducted for property and business owners in the station and ventilation structure areas, to promote access to businesses during construction. This plan may include any combination of enhanced signage, marketing assistance, technical business support, and cross-promotional efforts to encourage customers to shop at businesses during construction.
 - m. Time requirements for notification to the relevant stakeholders of scheduled utility outages per VTA PCOPP.
5. Construction Transportation Management Plan (CTMP). VTA will develop and implement the CTMP in partnership with CITY to coordinate location-specific circulation and access within and around the construction areas for all modes, including automobiles, trucks and construction vehicles, bicycles, pedestrians, and

public transportation such as bus and light rail. The CTMP will be organized according to all the major PROJECT elements along the PROJECT alignment and will be tailored to address the site-specific circumstances and sequencing of construction at each major project site. The CTMP must be incorporated into all Contract Documents of all construction and design-build contracts through which the PROJECT will be implemented. The CTMP must include but not limited to the requirements listed below, which are the primary CTMP requirements for the PROJECT. Additional CTMP requirements that may be added must not require changes to the CTMP following issuance of the final RFP for the earlier of the Tunnel and Trackwork contract or Underground Stations contract.

- a. A sequencing schedule depicting the proposed location and timing of construction activities on a routine basis for the duration of each project.
- b. Proposed phasing of construction, anticipated lane and street closures, (sidewalk, bike lanes, vehicle, and/or transit lanes) detours, and/or temporary sidewalk and lane adjustments, temporary signals, and street reconfiguration, including duration and signage requirements.
- c. Construction staging area
- d. Identification of truck haul routes.
- e. Identification of construction staging areas.
- f. A special event mitigation plan to minimize access and circulation construction impacts (e.g. Christmas in the Park, parades, and marathons).
- g. A requirement to comply with the following Downtown San José requirements:
 - i. Holiday Moratorium.
 - ii. Downtown Lane Closure Request Form.
 - iii. Lunchtime restrictions.
 - iv. Coordination with Downtown San José and SAP Center events (permitted special events will take precedence).
 - v. Coordination with Downtown San José Construction Coordinator, participation in monthly Downtown San José Construction Coordination Meetings, and compliance with Downtown Construction Guidelines.

- h. Dust control requirements.
- i. Required permits.
- j. Traffic Control Plans (TCPs). Following completion of the CTMP, VTA will develop individual TCPs for specific design elements at each major project site and throughout the duration of construction. The TCPs must comply with all applicable local and state laws and standards and will address all modes of transportation. The TCPs must be approved by CITY prior to construction of the specific design element, which approval will not be unreasonably withheld. The TCPs must include the following, in addition to CITY TCP requirements:
 - i. Alternative access routes (where practicable) and wayfinding signage for all detours affecting roadway users, including vehicular traffic, trucks and construction vehicles, bicyclists, and pedestrians.
 - ii. Early and advanced changeable message signage of potential construction delays for all roadway users that encourage them to choose alternate routes.
 - iii. Requirements to provide safe travel routes for pedestrians and bicyclists within and through construction areas or provide detour routes.
 - iv. A plan that has been coordinated with and approved by VTA and other transit providers that ensures that any necessary re-routing of bus routes and temporary relocation of bus stops during construction is done in a way to minimize impacts on bus riders.
 - v. Early and advanced signage informing transit riders of potential transit delays so that they may plan trips accordingly.
 - vi. Requirements for VTA's contractors to notify CITY and VTA outreach personnel regarding lane and road closures that would affect both off-street and on-street parking.
 - vii. Post maps of all public off-street and on-street parking that will be (a) removed during construction, (b) still available during construction and (c) schedule of removal and restoration of each parking area.

- viii. Post construction parking capacity restoration plans to the extent feasible and desirable and consider TOJD staging and parking needs, if they are known, prior to restoration.
 - ix. Coordinate with street sweeping no parking requirements
 - x. Designated areas for construction worker parking.
- 6. Emergency Services Coordination Plan (ESCP). VTA will coordinate with CITY fire and police services to develop the ESCP to minimize the effect of construction activities on local emergency service routes and response times. The ESCP will be incorporated into the Contract Documents of all construction and design-build contracts through which the PROJECT will be implemented. VTA will:
 - a. Inform the CITY fire and police departments of the construction schedule and potential lane and road closures.
 - b. Coordinate with emergency providers to ensure emergency access to residents and businesses and maintain the cities' emergency service response times.
 - c. Coordinate with the CITY fire and police departments on the detour routes.
 - d. Provide (i) road signage for detours and (ii) manual traffic control on detour routes as necessary.
 - e. Incorporate emergency access requirements in TCPs.
- H. **Architectural Historic Properties:** VTA and CITY must, (i) adhere to the stipulations included in the *Programmatic Agreement between the FTA and the California State Historic Preservation Officer Regarding the BART Silicon Valley-Phase II Extension Project in Santa Clara County, California* (the "PA"), which is incorporated herein by this reference as if fully set forth herein and may be made available to CITY upon request to VTA, and (ii) coordinate with one another in implementation of the MMRP measures supporting the PA for architectural historic properties.
 - 1. **Protected Architectural Resources:** There are Protected Architectural Resources (each, a "PAR") within the PROJECT's Area of Potential Effect ("APE") within the City of San José, including the Downtown Commercial District Historic District, also known as the San José Commercial District ("Commercial District").

- a. **Qualified Professional:** VTA has retained the services of the Historic Qualified Professional(s) (each, a “QP”) in the architectural history field to review project designs and design changes adjacent to architectural historic properties within the Commercial District. VTA included CITY in the selection of the QPs in 2019. The QPs’ review will ensure the preservation of character-defining features of the historic properties and historic fabric of the historic district.
- b. **Design Changes:** If any proposed design changes have the potential to affect any PAR, FTA, VTA, and the QP(s) will develop and evaluate measures intended to avoid, minimize, or mitigate adverse effects on historic properties and forward the relevant reports, documents, and/or deliverables to CITY for review in accordance with the PA.
- c. **Reporting Requirements and Review Procedures:** For reports, documents, and deliverables related to the PAR located within the City of San José, CITY must submit written comments to VTA within thirty (30) calendar days following CITY’s receipt of each such draft report, document, and deliverable. VTA will consider CITY’s written comments that are provided within the aforementioned review period in the revision of the reports, documents, and deliverables. Failure of CITY to respond within the required time frame will not preclude VTA from revising the draft reports, documents, and deliverables or proceeding to the next steps. VTA may modify the draft reports, documents, and deliverables as VTA deems appropriate. VTA will distribute copies of the final technical reports, documents, and deliverables to CITY.
- d. **Late Discoveries and Unanticipated Effects:** If, during construction of the PROJECT, FTA and VTA determine that the PROJECT may (i) affect a previously unidentified PAR or (ii) affect a known PAR in an unanticipated manner, FTA and VTA will notify CITY of the actions proposed to avoid, minimize, or mitigate adverse effects. CITY must provide any comments on such proposed action within forty-eight (48) hours of CITY’s receipt of the aforementioned notification. FTA and VTA will consider the CITY’s comments prior to implementing the proposed actions to avoid, minimize, or mitigate adverse effects, and FTA will ensure that the recommendations are

taken into account prior to granting approval of the actions that VTA will implement to resolve adverse effects. FTA and VTA will provide CITY notification of the actions to be implemented. FTA and VTA will carry out the actions prior to resuming construction activities for the PROJECT that have the potential to affect the architectural historic property(ies) in the location of the type of discovery described herein.

- e. Dispute Resolution for PAR: Should CITY object at any time to any actions proposed or the manner in which the VTA implements the PA, FTA shall resolve the objection as outlined in the PA.
- f. Programmatic Annual Report: VTA will distribute the PA Annual Report to CITY, and all parties to the PA, as required by the PA.

H. The provisions of this Section 6 apply only to the PROJECT and do not apply to or in any way affect other VTA projects in the City of San José or other agreements between the Parties unrelated to the PROJECT.

SECTION 7. CITY INFRASTRUCTURE

- A. As part of the construction of the PROJECT, certain CITY Infrastructure will be required to be modified, relocated, and/or removed. VTA will coordinate any such effort with CITY and acknowledges and agrees that all cost associated with the modification, relocation, and/or removal of CITY Infrastructure will be at VTA's sole cost. Any modification, relocation, and/or removal of CITY Infrastructure is subject to CITY's prior written approval, which must not be unreasonably withheld, and any necessary agreements or applicable encroachment permits or fees.
- B. Construction Standards: Prior to the development of any Plans and Specifications affecting CITY Infrastructure, CITY will provide VTA with all the necessary standards and regulations for modification, relocation, and/or removal of CITY Infrastructure; this includes, but is not limited to, the City of San Jose Complete Streets Design Standards and Guidelines. If any modifications and/or changes to the applicable standards or regulations have occurred during design development, these changes will be presented in writing by CITY to VTA during the review period and prior to permit issuance. CITY and VTA will

discuss any modifications and/or changes to the applicable standards or regulations. To the extent reasonably practicable, VTA will endeavor to accept and incorporate modifications and/or changes to the applicable standards and regulations.

C. CITY Review of PROJECT Plans and Specifications:

1. During each major milestone of PROJECT design development (e.g., preliminary engineering and final engineering), VTA will provide CITY with Plans and Specifications showing work to be performed on or directly affecting CITY Infrastructure for CITY's review and approval, which approval must not be unreasonably withheld; provided, however, that CITY approval is required only for elements of the PROJECT (i) located within City of San José city limits or within its jurisdiction, (ii) affecting CITY Infrastructure, and (iii) affecting other facilities and appurtenances to be built and conveyed to CITY. VTA will coordinate with CITY for the design development schedule for CITY Infrastructure to provide CITY sufficient time to mobilize personnel for design review. VTA will meet with CITY every other week (or pursuant to a frequency as mutually agreed upon between CITY and VTA) to ensure CITY receives updates regarding submittals and reviews of Plans and Specifications.
2. VTA will conduct comment resolution meetings to address CITY comments and reach a satisfactory resolution. VTA will incorporate mutually agreeable CITY comments regarding the CITY Infrastructure into the PROJECT Plans and Specifications.
3. Following VTA's approval of its contractor's baseline construction schedule, VTA will provide CITY with a construction schedule regarding CITY Infrastructure. VTA will also provide periodic construction progress schedules as they are developed for CITY's review. To the extent reasonably practicable, VTA will keep CITY informed of any delays in the construction schedule, changes to the construction schedule, significant milestones and deliverables for the PROJECT, and any changes in the scope of the PROJECT.

4. Pursuant to Public Utilities Code Section 100130.5, VTA is subject to the land use and zoning regulations of CITY for any transit-oriented joint development project created under that section. In the event that VTA pursues such joint development of VTA properties, VTA or its developer shall pay CITY for costs that are reimbursable as part of the development process in accordance with the City of San José Municipal Code, policies, and procedures, including but not limited to: City staff work involving rezoning, general plan amendments or other planning activities for the joint development; all as customarily provided by the CITY under fee to private developers.
 5. VTA agrees to fully reimburse CITY for the CITY to procure and retain Qualified Professional(s) with expertise(s) not currently available within CITY, to review the agreed-upon project designs and design changes related to the PROJECT. VTA and CITY agree that, at a minimum, a Qualified Professional with expertise in the potential impacts of the underground work on the CITY infrastructure will be procured by the CITY and reimbursed by VTA. VTA and CITY agree to negotiate in good faith a separate cooperative agreement to set parameters for the procurement, compensation, and roles and roles and responsibilities of the Qualified Professionals.
- D. Permits: Subject to the provisions of this Agreement and as further defined in future cooperative agreements, VTA or its contractors will obtain all necessary encroachment permits for traffic control and the modification, relocation, and/or removal of CITY Infrastructure in accordance with the City of San José Municipal Code, policies, and procedures. VTA or its contractors will be responsible for full payment of applicable fees charged by CITY for such permits and related inspection services.

E. Construction Impacts to CITY Infrastructure Other Than Streets:

VTA is responsible for the repair, relocation, replacement, or removal of CITY Infrastructure (other than CITY streets) affected by construction of the PROJECT, as required under the terms set forth in the applicable construction encroachment permit.

VTA, in consultation with CITY, shall perform a pre-construction survey, including photographs or video recordings of all CITY Infrastructures (other than streets) which will be affected by construction of the PROJECT. VTA shall provide CITY with a written survey of, along with photographs and video recordings of, all CITY Infrastructure which may be repaired, relocated, replaced, removed, or otherwise impacted by the PROJECT. CITY will review and provide written approval to VTA within 10 working days of the repair, relocation, replacement, or removal of any CITY Infrastructure.

F. Construction Impacts to CITY Streets:

VTA shall be responsible for the repair, reconstruction, and/or repaving of CITY streets affected by the construction of the PROJECT. These requirements will be further defined in future cooperative agreements between the parties prior to the issuance by VTA of the contract documents in the Final RFP for each of its contracts so that VTA may include the appropriate requirements within the contract documents.

G. Betterments:

VTA and CITY acknowledge that there may be improvements requested of VTA or its contractors by CITY that may constitute a “betterment” as that term is commonly understood in the architectural, engineering, and construction industries. VTA and CITY will negotiate in good faith a further cooperative agreement(s) to define “betterment” in the context of the PROJECT and to allocate financial responsibility for betterments.

H. Construction Management and Inspection:

1. VTA, at its sole cost, shall perform all construction management, inspection, and testing services necessary to ensure that all modifications, relocations, and/or removals of CITY Infrastructure are performed in accordance with the Contract

Documents and Standard Specifications. VTA shall provide test results and construction documentation to CITY prior to VTA's acceptance of any such work to enable CITY to review the adequacy of such work during construction and to permit timely acceptance of the completed work. Any completed work on CITY Infrastructure must be approved pursuant to Section 7(I) below.

2. VTA will pay CITY all applicable inspection and testing fees charged by CITY for any inspection, oversight services and testing services necessary to ensure that all modifications, relocations, and/or removals of CITY Infrastructure are performed in accordance to the encroachment permits and as further defined in future cooperative agreements between the parties. CITY retains the right and duty to exercise control over the employment, compensation, and discharge of its personnel. CITY must coordinate all inspections and/or testing by CITY personnel with VTA. Nothing in this Section 7(H)(2) renders VTA an employer or joint employer of any CITY personnel receiving payment for services performed under this Section 7(H)(2).
3. VTA Agrees to fully reimburse CITY to procure and retain Qualified Professional(s) with expertise(s) not currently available within CITY to provide agreed-upon construction management and inspection related to the PROJECT. VTA and CITY agree that, at a minimum, a Qualified Professional with expertise in the potential impacts of the underground work on the CITY infrastructure will be procured by the CITY and reimbursed by VTA. VTA and CITY agree to negotiate in good faith a separate cooperative agreement to set parameters for the procurement, compensation, and roles and roles and responsibilities of the Qualified Professionals.

I. Completion and Acceptance:

Upon completion of construction, reconstruction, enlargement, expansion, or relocation of any CITY Infrastructure, VTA will notify CITY of such completion. Within ten (10) working days of VTA's notification, CITY must (i) complete its inspection of the CITY Infrastructure associated with the completed work and (ii) in writing, either confirm

acceptance of the CITY Infrastructure or notify VTA of an observed deficiency in the CITY Infrastructure (“Initial Notice”). If CITY determines the CITY Infrastructure (including any work performed pursuant to a change order) was performed in accordance with the applicable Contract Documents and in accordance with Standard Specifications, CITY must confirm acceptance of such City Infrastructure. If CITY determines there is deficiency, CITY must provide VTA a detailed description of such deficiency, along with supporting documentation, within ten (10) working days from CITY’s discovery of the deficiency. Thereafter, VTA will investigate and correct the claimed deficiency to CITY’s reasonable satisfaction prior to CITY acceptance. CITY will become responsible for all aspects of such CITY Infrastructure upon acceptance thereof, with the exception of any claims of warranty as set forth below in Section 14.

J. As-Built Drawings:

Upon completion of work by VTA on CITY Infrastructure and acceptance of such work by CITY, VTA shall provide to CITY, after completion of each construction contract, electronic files compatible with the latest version of AutoCAD and a full size PDF set of as-built drawings and any parts, operations, and maintenance manuals that are available for CITY Infrastructure showing the completed work in place. Such as-built drawings must be in an electronic format with a level of detail as mutually agreed upon by both Parties.

SECTION 8. TRAFFIC MAINTENANCE AND DETOURS

- A. VTA is responsible for maintaining all traffic detours during construction of the PROJECT with approval of the TCP(s) by CITY. The TCP(s), which include traffic control, lane closure, and detour plans, must be submitted to CITY for approval prior to commencement of any phase of construction requiring either traffic control or detour(s), which approval must not be unreasonably withheld by CITY. The traffic control, lane closure, and detour plans will specify (i) the length of time that portions of CITY streets will be closed, (ii) the proposed detours, and (iii) other information as may be required by applicable local and state laws.
- B. Although certain CITY streets will be partially closed out of necessity for some period during construction of the PROJECT, VTA shall, to the extent reasonably practicable, take

all appropriate actions to ensure safe operations of the work and the continuance of service of all CITY streets and related CITY Infrastructure in service within the limits of the PROJECT.

1. CITY reserves the right to stop the work if (i) VTA fails to comply with the TCPs prepared hereunder or (ii) VTA performs the work in a manner that CITY reasonably believes compromises the health and safety of the public.
 2. Notwithstanding the foregoing Section 8(B)(1), CITY must (i) first consult with VTA prior to stopping any work to attempt in good faith to resolve the issue without stopping the work and (ii) identify with particularity the (a) alleged failure to comply with the TCPs or (b) work that CITY reasonably believes to compromise the health and safety of the public.
 3. Upon VTA receiving notice from CITY of the (i) alleged TCP non-compliance (non-compliance citation) or (ii) work that is allegedly compromising public health and safety, VTA will take all reasonable steps to cure the behavior at issue within a period of time as mutually agreed between VTA and CITY.
- C. In its Contract Documents for PROJECT-related construction and design-build contracts, VTA will require its contractor(s) to submit traffic plans showing haul routes, temporary closures, and the method of traffic maintenance and staging to CITY for prior approval before any construction commences. VTA will also require its contractor(s) to provide CITY with three (3) working days' notice prior to submitting traffic plans. CITY must approve or disapprove the plans no later than ten (10) working days following CITY's receipt of such plans.
- D. In its Contract Documents for PROJECT-related construction and design-build contracts, VTA will, prior to the temporary closure to traffic of all or part of any street, sidewalk, or other public access, require that its contractor(s) provide at least ten (10) working days' notice of such closure to CITY. Deviation from this ten (10) working day requirement may be permitted in emergency situations as mutually agreed upon by CITY and VTA.
- E. At least ninety-six (96) hours prior to the temporary closure to traffic of all or part of any street, sidewalk, or other public access, VTA will initiate electronic public notification of

such closure via media outlets and provide closure information flyers to all residents, schools, and businesses within a 500-foot radius of any such closure. To the extent reasonably practicable, VTA shall provide advance copies of such notices to CITY.

SECTION 9. STORM WATER POLLUTION CONTROL

VTA and CITY are regulated under separate National Pollutant Discharge Elimination System (“NPDES”) permits for Municipal Separate Storm Sewer System (“MS4”) stormwater discharges issued by the State Water Resources Control Board and Regional Water Quality Control Board, respectively. VTA is a Non-Traditional MS4 under the Phase II General Permit for Storm Water Discharges from Small MS4s, and CITY is a Traditional Phase I MS4 under the Municipal Regional Permit (“MRP”). All construction work over one (1)-acre of disturbance is additionally regulated under the Statewide Construction General Permit (“CGP”) for Stormwater, with VTA as the Legally Responsible Party as defined in the CGP. No CITY MS4 oversight is necessary for VTA stormwater runoff during-construction or post-construction, since VTA is a separately regulated MS4 entity.

- A. Construction Stormwater: VTA is fully responsible for all CGP and State Water Resources Control Board requirements. VTA will require its contractors to comply with all CGP provisions, including but not limited to implementing a Storm Water Pollution Prevention Plan(s).
- B. Post-Construction Stormwater: The MS4 NPDES permits have different post-construction requirements; however, compliance with the post-construction requirements in VTA’s MS4 permit is equivalent to compliance with CITY’s MRP. VTA may discharge to CITY’s MS4 drainage system without the need for further stormwater treatment. VTA’s MS4 permit does not cover impacts within the CITY’s right-of-way or to the CITY’s MS4 drainage system. In the event that the PROJECT causes modification to the CITY facilities outside the VTA’s MS4 jurisdictional boundaries (e.g. at the VTA right of way boundary or manhole where the VTA storm drain connects to the City’s MS4), compliance to the CITY’s Provision C.3 through City’s Council Policy 6-29 will be required.

SECTION 10. PAYMENT TERMS

The Parties acknowledge that CITY will incur costs arising from its work in support of the PROJECT. These costs will be reimbursed by VTA to CITY subject to the following limitations:

- A. In the event that CITY and VTA mutually agree to utilize CITY staff to perform any analysis, review, design, construction work, conveyance of properties or creation of public art related to the PROJECT, such work and any reimbursement will be governed by a separate agreement for such work. Each separate agreement must contain a schedule of hourly rates for CITY staff or City consultant assigned to the work and a budget to complete the work, including all authorized PROJECT costs and expenses.
- B. All payments made under each separate agreement must comply with all applicable Federal and State funding guidelines and will be subject to audit pursuant to the terms set forth in Section 19, below. CITY must provide VTA with invoices on a monthly basis and no later than forty-five (45) days after performance of the work reflected and requested for reimbursement in the invoice. VTA shall remit payment for a proper, fully documented invoice complying with the requirements set forth herein within sixty (60) days of receipt of such invoice.
- C. Invoices must be in PDF format and submitted electronically to VTA's Accounts Payable department at VTA.AccountsPayable@vta.org.
- D. Reimbursements under this provision will be strictly limited to costs directly arising from PROJECT-related tasks performed by CITY staff, as required in this Agreement and any subsequent cooperative agreement(s) executed under this Agreement.

SECTION 11. DESIGNEES OF THE PARTIES

CITY contact person for all matters related to this Agreement will be the CITY's Directors of Transportation and Public Works or their designees. VTA's contact person for all matters related to this Agreement will be VTA's Chief BART Program Delivery Officer or his or her designee.

SECTION 12. CONTRACT DOCUMENTS INDEMNITY

For any construction or design-build work performed on the PROJECT and within the City of San José's limits, VTA will require in its Contract Documents that all of the PROJECT's contractors, to the extent allowed by law, defend, indemnify and hold harmless the CITY and its officers and employees against any liability arising out of any acts or omissions of each such contractor relating to the PROJECT and that all such contractors include the CITY, its elective and appointed officers, employees, and agents as additional insured in any insurance policies obtained by them, at no cost to CITY. VTA shall also require all contractors working on any construction or design-build contract for the PROJECT to name CITY as an additional insured on all policies of insurance for such contracts. Such insurance must, at a minimum, comply with City's insurance requirements.

For any work performed on the PROJECT by CITY, CITY will require in its Contract Documents that CITY's contractors, to the extent allowed by law, defend, indemnify and hold harmless VTA and its directors, officers, and employees against any liability arising out of any acts or omissions of each such contractor relating to the PROJECT and that all such contractors include VTA, its directors, officers, employees and agents as additional insured in any insurance policies obtained by them, at no cost to VTA. CITY shall also require all contractors working on any construction or design-build contract for the PROJECT to name VTA and BART as additional insured on all policies of insurance for such contracts. Such insurance must, at a minimum, comply with VTA's insurance requirements.

SECTION 13. INDEMNIFICATION

Neither VTA, BART, nor any officer or employee thereof will be responsible for any damage or liability arising out of or relating to CITY's negligence, recklessness, or willful misconduct under or in connection with any work, authority or jurisdiction associated with the Agreement. In addition, pursuant to Government Code §895.4, CITY will fully indemnify and hold VTA and BART harmless from any liability imposed for injury (as defined by Government Code §810.8) arising out of or relating to CITY's negligence, recklessness, or willful misconduct under or in connection with any work, authority or jurisdiction delegated to CITY under this Agreement.

Neither CITY nor any officer or employee thereof will be responsible for any damage or liability arising out of or relating to VTA's or BART's negligence, recklessness, or willful misconduct under or in connection with any work, authority or jurisdiction associated with the Agreement. In addition, pursuant to Government Code §895.4, VTA will fully indemnify and hold CITY harmless from any liability imposed for injury (as defined by Government Code §810.8) arising out of or relating to VTA's or BART's negligence, recklessness, or willful misconduct under or in connection with any work, authority or jurisdiction delegated to VTA under this Agreement.

SECTION 14. WARRANTIES

For any construction or design-build work performed on the PROJECT and within the City of San José's limits, VTA will require warranties from its contractors for work performed and for all contractor-installed equipment and materials supplied. VTA will also require that such contractors provide a warranty covering any items of CITY Infrastructure in accordance with City of San José Standard Specification Section 7-1.23, "Final Guarantee", as may be amended from time to time. VTA acceptance of all construction work performed for each construction contract associated with the PROJECT and for all contractor-installed equipment and materials supplied in connection with CITY Infrastructure for each construction contract will be conditioned upon CITY acceptance of such work, equipment, and materials for such construction contract as described in Section 7. Upon written request by CITY, VTA will pursue all reasonable remedies under those warranty provisions for correction of any defects in materials and/or workmanship discovered within the warranty period. VTA will commence correction of such defects in the work performed for CITY within thirty (30) days of written notification to VTA by CITY, so long as the notification is within the warranty period.

SECTION 15. RESOLUTION OF DISPUTES

- A. Either Party may give the other Party written notice of any dispute (each a "Dispute"). The notice must state in detail the basis of the Dispute.
- B. During the course of construction of any construction or design-build contract subject to this Master Agreement, either Party may designate a Dispute as an "Urgent Dispute." In the event of an Urgent Dispute, VTA's Chief BART Program Delivery Officer and the

CITY's Public Works Director (or such other person having sufficient technical knowledge and experience as the Public Works Director may designate) must confer within 24 hours after delivery of the notice specified in Section 15(A). If the Parties are unable to resolve the Urgent Dispute during that conference, the Parties must meet within 72 hours of the notice specified in Section 15(A) with a mutually acceptable neutral third party. If the Parties are unable to resolve the Urgent Dispute with the assistance of the neutral third party,

- C. For all Disputes other than Urgent Disputes, the following procedures apply:
1. Within five (5) working days after delivery of the notice specified in Section 15(A), the CITY's Director of Public Works and VTA's Chief BART Program Delivery Officer shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to exchange information and to attempt in good faith to promptly resolve the dispute ("Initial Discussions").
 2. If the matter has not been resolved within twenty (20) working days after the commencement of the Initial Discussions, either Party may, after providing written notice to the other Party, initiate a mediation to resolve the Dispute. The Parties must mutually agree on the mediator. Except as otherwise provided herein, neither Party may initiate litigation of a Dispute (other than an Urgent Dispute) until at least one mediation has been conducted.
 3. California Evidence Code sections 1115 et seq. relating to mediation, and sections 1152 and 1154 regarding the inadmissibility of certain evidence will apply to any mediation between the Parties.
- D. Notwithstanding the foregoing provisions, a Party may seek a preliminary injunction or other provisional judicial remedy or commence litigation if that Party believes in good faith that such injunction, provisional judicial remedy, or litigation is necessary to prevent or mitigate (i) irreparable damage, (ii) a loss of or injury to life or property, or (iii) the disruption of essential public services.

- E. Each Party is required to continue to perform its obligations under this Agreement or any subsequent cooperative agreement pending final resolution of any Dispute arising out of or relating to this Agreement or any subsequent cooperative agreement.

SECTION 16. TERMINATION

The Parties may terminate the Agreement upon mutual written consent. Additionally, either Party may terminate this Agreement with sixty (60) days written notice to the other Party. In the event that any Party terminates this Agreement prior to the expiration of the Agreement, VTA, at its sole discretion, may either (i) complete all construction of CITY Infrastructure that is actively under construction, if any, or (ii) restore CITY Infrastructure to its original condition. “Actively under construction”, as used in this Section 16, means that (i) a notice to proceed has been issued by VTA for construction and (ii) VTA has actually commenced construction of CITY Infrastructure.

SECTION 17. NOTICES

All notices required hereunder may be given by personal delivery, US Mail, courier service (e.g. FedEx), or facsimile transmission. Notices will be effective upon receipt at the following addresses:

To VTA: Santa Clara Valley Transportation Authority
2099 Gateway Place, 7th Floor
San José, CA 95110
Attention: Chief BART Program Delivery Officer
Phone: 408-321-5623
Fax: 408-321-5715

To Director of DOT: City of San José
Director of Transportation
200 East Santa Clara Street, 8th Floor
San José, CA 95113
Phone: 408-535-3845
Fax: 408-292-6092

To Director of DPW: City of San José
Director of Public Works
200 East Santa Clara Street, 5th Floor
San José, CA 95113
Phone: 408-535-8300
Fax: 408-292-6292

SECTION 18. PARTIES NOT CO-VENTURERS

Nothing in this Agreement is intended to nor does it establish the Parties as partners, co-venturers, or principal and agent with one another.

SECTION 19. FURTHER ASSURANCES, TIME PERIODS, AND RECORDS

- A. Each Party shall execute and deliver to the other all such additional instruments or documents as may be necessary to carry out this Agreement or to assure and secure to the other Party the full and complete enjoyment of its rights and privileges under this Agreement, subject to appropriate approvals of each Party's governing body.
- B. Should unforeseen circumstances occur, VTA and CITY shall negotiate in good faith to reach agreement on any amendment(s) that may be necessary to fully effectuate the Parties' respective intentions in entering into this Agreement.
- C. The Parties must establish and maintain records pertaining to the fiscal activities of this Agreement and any related cooperative agreement, which records must show the actual time devoted and the costs incurred by the Parties with respect to any work performed under this Agreement. The accounting systems of the Parties must conform to generally accepted accounting principles, and all records must provide a breakdown of total costs charged pursuant to this Agreement, including properly executed payrolls, time records, invoices, and vouchers. Upon written request, each Party shall, at a mutually convenient time, permit the other Party to inspect, examine, re-examine, and copy the books, records, accounts, and any and all data relevant to this Agreement for the purpose of auditing and verifying statements, invoices, or bills submitted by the Party pursuant to this Agreement, and shall provide such assistance to the other Party as may be reasonably required in the course of such inspection.
- D. The Parties reserve the right to examine and re-examine such books, records, payrolls, accounts, and data during the ten-year period after final payment under this Agreement and until all pending matters are closed, and the Parties must not dispose of said books, records, payrolls, accounts, and data in any manner whatsoever for ten (10) years after the final payment under this Agreement or until all pending matters are closed, whichever is later.

- E. The PROJECT financing includes significant federal and potential private funding. VTA may be subject to audits or requests for information from FTA (or other federal entities with jurisdiction over the PROJECT), and CITY must cooperate in furnishing any required information as part of any such audit or request.

SECTION 20. NON-LIABILITY OF OFFICIALS, EMPLOYEES, AND AGENTS

No director, member, official, employee or agent of CITY or VTA will be personally liable to any Party to this Agreement or any successor in interest in the event of any default or breach of this Agreement or for any amount which may become due on any obligation under the terms of this Agreement.

SECTION 21. HEADING AND TITLES

Any titles of the Sections of this Agreement are inserted for convenience of reference only and will be disregarded in construing or interpreting any part of its provisions.

SECTION 22. APPLICABLE LAW

This Agreement will be interpreted under and pursuant to the laws of the State of California and applicable federal law, without regard to any choice-of-law or choice-of-venue principles that would lead to the application of the law other than that of the State of California or the United States federal system. The jurisdiction and venue of any dispute between the Parties to this Agreement will be the Superior Court of Santa Clara County, or if federal jurisdiction is appropriate, the United States District Court, Northern District of California, San José, California.

SECTION 23. SEVERABILITY

If any term, provision, covenant, or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions will continue in full force and effect.

SECTION 24. BINDING UPON SUCCESSORS

This Agreement will be binding upon and inure to the benefit of the transferees, successors and assigns of each of the Parties to it, except that there must be no transfer of any interest by any of the Parties to this Agreement except pursuant to the terms of the Agreement.

SECTION 25. REMEDIES NOT EXCLUSIVE

No right or remedy conferred upon or reserved to VTA or CITY under this Agreement is intended to be exclusive of any other right or remedy, except as expressly stated in this Agreement, and each and every right or remedy will be cumulative and in addition to any other right or remedy given under this Agreement or now or hereafter existing at law or in equity or by statute, except such rights or remedies as are expressly limited in this Agreement.

SECTION 26. FORCE MAJEURE

In addition to specific provisions of this Agreement, performance by either Party will not be deemed to be in default where delays or defaults are not reasonably foreseeable at the execution of this Agreement due to war, insurrection, strikes, lockouts, riots, floods, earthquakes, fires, quarantine restrictions, casualties, acts of God, acts of the public enemy, epidemic, government restrictions on priorities, freight embargoes, shortage of labor or materials, unusually inclement weather, lack of transportation, court order, or any other similar causes beyond the control or without the fault of the Party claiming an extension of time to perform. An extension of time for any cause will be deemed granted if notice by the Party claiming such extension is sent to the other Party within thirty (30) days from the commencement of the cause and such extension is not rejected in writing by the other Party within thirty (30) days of receipt of the notice. Time for performance under this Agreement may also be extended by mutual agreement, signed by both Parties.

SECTION 27. INTEGRATION

This Agreement represents the full, complete, and entire agreement of the Parties with respect to the subject matter hereof, and supersedes any and all other communications, representations, proposals, understandings, or agreements, whether written or oral between the Parties hereto with respect to such subject matter. This Agreement may not be modified or amended, in whole or in part, except by in writing signed by an authorized officer or representative of each of the Parties hereto.

SECTION 28. NO PRECEDENT SET BY AGREEMENT

Except as otherwise provided herein, and as specifically stated elsewhere in this Agreement, the Parties agree not to use this Agreement to urge the establishment of any precedent, principle, or rule for other projects by VTA in the jurisdiction of CITY.

SECTION 29. APPROVALS BY LEGISLATIVE BODY

The parties acknowledge that the legislative bodies of the CITY and VTA may be required to implement some of the provisions of this Agreement.

Signatures of Parties on following page.

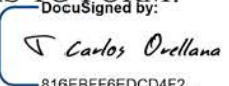
This Agreement is made and entered into as of the Effective Date.

SANTA CLARA VALLEY
TRANSPORTATION AUTHORITY

By: 
Nuria Fernandez
General Manager


Signature Date: 10/16/2020

APPROVED AS TO FORM:

By: 
J. Carlos Orellana
Deputy General Counsel

Signature Date: 10/16/2020

CITY OF SAN JOSÉ

By: 
David Sykes
City Manager

Signature Date: _____

APPROVED AS TO FORM:

By: EJM
Ed Moran
Assistant City Attorney

Signature Date: _____