

## GRANT FUNDING AGREEMENT

This Grant Funding Agreement ("**Agreement**") is made on November 28, 2018, ("**Effective Date**") between the City of Emeryville, a municipal corporation, (hereinafter "**City**"), and the Emeryville Transportation Management Association (hereinafter "**ETMA**"), a non-profit public benefit corporation, and collectively referred as the "**Parties**".

### RECITALS

A. ETMA operates a shuttle bus service, known as the "Emery-Go-Round" ("**Shuttle**") which provides shuttle services between commercial and residential sites in the City of Emeryville and the MacArthur BART Station in Oakland.

B. The ETMA has successfully operated the Shuttle since 1997. Funding for the Shuttle was initially provided by various members of the ETMA some of whose participation in the ETMA is a result of obligations undertaken in the separate agreements with CITY or the Emeryville Redevelopment Agency related to the development of their properties.

C. In July 2001, City formed a Property Based Business Improvement District ("**PBID**"), pursuant to Street and Highway Code Section 36600 *et seq.* to fund the Shuttle and other transportation services. The PBID created a city-wide assessment on certain business properties in Emeryville found to receive a special benefit from the service for the purpose of funding the Shuttle and other transportation services, following the approval of the assessment by a majority vote of the affected property owners.

D. In July 2006, following the submittal of a petition to renew the PBID by business owners and a successful vote to extend it, the City renewed the PBID for a ten-year period.

E. In 2015, the City Council added Title 3, Chapter 9, Article 1 to the City of Emeryville's Municipal Code, which allowed an assessment on residential properties under a PBID.

F. On August 4, 2015, the City Council called for and duly held an assessment ballot proceeding for the new PBID pursuant to the applicable provisions of state law and the California Constitution. The tabulation of ballots returned indicated that no majority protest was made and accordingly the City Council adopted a resolution (Resolution No. 15-103) establishing the PBID for the next fifteen years, for a term effective FY2015-2016 (EGR Service Year 2016) and ending in FY2029-2030 (EGR Service Year 2030).

G. On January 1, 2017, under the authority of City Council Resolution No. 16-170, the Parties entered into a **Shuttle Bus Funding Agreement**, in which ETMA will

operate the Shuttle using funds from the PBID, and which is incorporated by reference.

H. On May 21, 2018, under the authority of City Council Resolution No. 17-153, the City and the Bay Area Air Quality Management District ("**BAAQMD**") entered into a Transportation Fund for Clean Air Funding Agreement ("**BAAQMD TFCA Funding Agreement**"), of which a true and correct copy is attached hereto as Exhibit A, and incorporated by reference.

I. The BAAQMD Funding Agreement provides that BAAQMD will provide Transportation Funds for Clean Air ("**TFCA**") to the City for the Emery-Go-Round Watergate Express Project, in an amount not to exceed \$677,083.

J. The Parties wish to provide a mechanism to direct the TFCA funds to the ETMA.

Now, therefore, in consideration of the foregoing, the Parties agree as follows:

## **SECTION ONE. INCORPORATION OF RECITALS AND PRIORITY OF PRIOR AGREEMENTS**

The Parties agree that the foregoing recitals are true and correct and are incorporated by reference. To the extent there is an irreconcilable conflict between this Agreement and the BAAQMD TFCA Funding Agreement, the BAAQMD TFCA Funding Agreement shall prevail. To the extent that there is an irreconcilable conflict between this Agreement and the Shuttle Bus Funding Agreement, this Agreement shall prevail solely to the extent that TCFA is at issue in the conflict, but in all other instances, the Shuttle Bus Funding Agreement shall prevail.

## **SECTION TWO. PROJECT DESCRIPTION**

The ETMA will operate the Emery-Go-Round Watergate Express Project, as is more fully described in Attachment A of the BAAQMD TFCA Funding Agreement in a manner that is compliant with the terms and conditions as specified in the BAAQMD TFCA Funding Agreement ("**Project**").

## **SECTION THREE. SPECIAL CONDITIONS**

ETMA agrees to comply with all of the Project Sponsor's obligations set forth in the BAAQMD TFCA Funding Agreement, which includes, but is not limited to, Paragraph 8 of Attachment A and Paragraph 8) of Section II of the BAAQMD TFCA Funding Agreement. In addition, ETMA shall comply with all TFCA Program requirements as set forth in BAAQMD's "Board Adopted TFCA Regional Fund Policies and Evaluation Criteria for FYE 2018."



#### **SECTION FOUR. BUDGET AND PAYMENT PROCESS**

The total amount paid to ETMA by the City under this Agreement shall not exceed the amount that the City receives as reimbursement from BAAQMD under the BAAQMD TCFA Funding Agreement. ETMA may only seek reimbursement for Eligible Costs as described in Paragraph 4 of Attachment B of the BAAQMD TFCA Funding Agreement. ETMA shall submit to the City a request for reimbursement no more frequently than once each quarter, with supporting documentation, in accordance with the quarterly payment schedule as may be set by BAAQMD. All requests for reimbursement shall be prepared on BAAQMD's General Invoice Form, and shall include BAAQMD's number for the Project, an itemized list of all expenses incurred, specifying which are Eligible Costs and dates labor was performed, the total funds being requested, supporting documentation of reimbursement, such as copies of receipts, invoices from vendors, and time sheets documenting hourly labor costs incurred, and the passenger capacity, GCWR and CARB Executive Order for each vehicle included in Section 9 of Attachment A of the BAAQMD TCFA Funding Agreement. The City will request TFCA funds within 30 days of receiving invoices from the ETMA, provided such request is timely under the BAAQMD TCFA Funding Agreement and will disburse reimbursement funds to the ETMA within 30 days of receiving reimbursement from BAAQMD.

#### **SECTION FIVE. REPORTING OF PERFORMANCE**

The ETMA will provide the City with the semi-annual and final reports specified in Attachment C of the BAAQMD TFCA funding agreement. Beginning 45 days after the Effective Date of this Agreement, every April 1 and October 1, ETMA shall submit semi-annual reports until a final report is due. The final report shall be due March 1, 2019.

#### **SECTION SIX. RECORDS AND AUDIT**

ETMA shall prepare and maintain all necessary Project records to document Project activities and performance, including invoicing documentation set forth in Section 5 of Attachment B of the BAAQMD TFCA Funding Agreement, documentation to support the Project's reporting requirements as set forth in Attachment C of the of the BAAQMD TFCA Funding Agreement, and insurance documentation set forth in SECTION Seven of this Agreement (collectively referred to as "**Project Records**"). Project Records shall also include documentation that verifies compliance with the requirements set forth in Section II 8 of the of the BAAQMD TFCA Funding Agreement. ETMA shall keep Project Records in one central location for a period of three (3) years after the later of a) the date of the City's final payment, or b) the end of the operational period for the Project. ETMA shall allow the City and the BAAQMD, or their respective authorized representative(s) to conduct performance and fiscal audits of the Project at any time during the term of this Agreement. ETMA shall cooperate with such audits and shall make available to the City or the

BAAQMD all records relating to Project performance and expenses incurred in the implementation of the Project. The ETMA shall allow the City, BAAQMD or their respective authorized representatives to inspect the Project at any time during the operational period of the Project. ETMA shall cooperate with such inspections.

## **SECTION SEVEN. INSURANCE**

(a) Insurance. ETMA shall ensure that its contractor shall procure and maintain the following types of insurance:

- (1) Worker's Compensation and ETMA Liability Insurance. ETMA's contractor(s) shall procure and maintain Worker's Compensation Insurance and Employer's Liability Insurance in accordance with the laws of the State of California. Employer's Liability Insurance shall have coverage for a minimum of two (2) million dollars covering its employees engaged in the work. ETMA shall insure the procurement and maintenance of such insurance by all contractors engaged in provision of the Project.
- (2) Liability Insurance. ETMA's contractors(s) shall procure and maintain the following kinds of liability insurance, which shall include as additional insured the City, BAAQMD, and their representatives, officials, officers, employees, agents and volunteers while acting in such capacity, and their successors or assignees, as they now, or as they may hereafter be constituted, singly, jointly, and severally:
  - (A) Commercial General Liability insurance providing both injury and property damage coverage with a combined single limit of at least ten (10) million dollars each occurrence or claim and a general aggregate limit of at least ten (10) million dollars. This insurance coverage shall include, but is not limited to premises and operations; contractual liability; produces and completed operations; broad form property damage.
  - (B) Automobile Liability Insurance providing bodily injury and property damage with a combined single limit of at least ten (10) million dollars each occurrence or claim. This insurance shall provide contractual liability covering all motor vehicles including owned, non-owned and hired vehicles and mobile equipment to the extent it may be excluded from general liability insurance.

In the event ETMA operates the Project directly (without utilizing a contractor) it shall provide insurance equivalent to that stated above.

(b) During the term of this Agreement, ETMA shall maintain the following types of insurance:

- (1) Workers Compensation and Employer's Liability Insurance. If it has any employees, ETMA shall procure and maintain Worker's Compensation Insurance and Employer's Liability Insurance in accordance with the laws of the



State of California. Employer's Liability Insurance shall have coverage for a minimum of one (1) million dollars covering its employees engaged in the work. ETMA shall insure the procurement and maintenance of such insurance by all contractors engaged in provision of the Project.

- (2) ETMA procure and maintain the following kinds of liability insurance, which shall include as additional insured the City, BAAQMD, and their representatives, officials, officers, employees, agents and volunteers while acting in such capacity, and their successors or assignees, as they now, or as they may hereafter be constituted, singly, jointly, and severally:

(A) Commercial General Liability insurance providing both injury and property damage coverage with a combined single limit of at least one (1) million dollars each occurrence or claim and a general aggregate limit of at least two (2) million dollars. This insurance coverage shall include, but is not limited to premises and operations; contractual liability; produces and completed operations; broad form property damage.

(B) If ETMA owns or operates any vehicles, it shall maintain Automobile liability insurance providing bodily injury and property damage with a combined single limit of at least one (1) million dollars each occurrence or claim. The insurance shall provide contractual liability covering all motor vehicles including owned, non-owned and hired vehicles and mobile equipment to the extent it may be excluded from general liability insurance.

- (c) Prior to commencing the Project, ETMA shall file a Certification(s) of Insurance with the City's Risk Manager evidencing the required coverages and endorsement(s) and, upon request, a certified duplicate original of any of those policies. Said certificate(s) shall stipulate:

(1) The insurance company(s) issuing such policy(ies) shall give written notice to the City's Risk Manager of any of the materials alteration, or reduction in aggregate limits, if such limits apply, and provide at least thirty (30) days' notice of cancellation or modification.

(2) That the policy(ies) is Primary Insurance and the insurance company(ies) providing such policy(ies) shall be liable thereunder for the full amount of any loss or claim which ETMA (or contractor) is liable up to and including the total limit of liability, without right of contribution from any other insurance which is in effect for the benefit of the City, BAAQMD, and their representatives, officials, officers, employees, agents and volunteers .

(3) The policy shall also stipulate: inclusion of the City, BAAQMD, and their representatives, officials, officers, employees, agents and volunteers shall not in any way affect the rights of such individual insured and with respect to any claim or demand, suit or judgment made, brought or recovered against the ETMA, and shall protect them in the same manner as though a separate policy has been issued to each, but nothing in said policy shall operate to increase the insurance company's liability as set forth in its policy beyond the amount or amounts shown or to which the insurance company would have been liability if only one interest had been named as an insured.

(d) The insurance policy(ies) shall be written by an insurance company(ies) acceptable to the City. Such insurance company(ies) shall be authorized to transact business in the state of California.

(e) ETMA shall also assure that any third party contractor engaged by ETMA to operate the Project shall, at its own expense, procure and maintain during the term of this Agreement, comprehensive public liability (including bodily injury, property damage, and automobile liability) insurance coverage for its operation of the Project in an amount equaling or exceeding the minimum amounts required as a condition to each transportation provider's authority to operate by the Public Utility Commission or other city, municipality, agency or governing body conferring said authority, shall further assure that the City BAAQMD, and their representatives, officials, officers, employees, agents and volunteers are named as additionally insureds on such policy(ies). Prior to the operation of the Project by such a contractor, ETMA shall obtain from said contractor a Certificate of Insurance evidencing the above-specified coverage. The Certificate shall further provide the contractor's policy is primary over any insurance carried by the City, BAAQMD, and their representatives, officials, officers, employees, agents and volunteers and that the policy will not be cancelled or the coverage reduced without thirty (30) days prior notice in writing being given to ETMA. ETMA will furnish the City with a copy of the Certificate of Insurance of each contractor prior to that contractor's operation of the Project.

#### **SECTION EIGHT. INDEPENDENT CONTRACTOR**

The ETMA hereby covenants and declares that it is an independent agency and agrees to perform the work as an independent agency and not as the agent or employee of the City. The ETMA agrees to be solely responsible for its own matters relating to the time and place the services are performed; the instrumentalities, tools, supplies and/or materials necessary to complete the services; hiring of consultants, agents or employees to complete the services; and the payment of employees, including compliance with Social Security, withholding and all other regulations governing such matters. The ETMA agrees to be solely responsible for its own acts and those of its subordinates and employees during the life of this Agreement.

**SECTION NINE. INDEMNIFICATION** To the fullest extent permitted by law, the ETMA shall indemnify, defend, and hold harmless City, BAAQMD, and their representatives, officials, officers, employees, agents and volunteers (collectively referred to as "**City Indemnitees**"), from and against any and all claims, losses, liabilities of every kind, nature and description, damages, injury (including without limitation injury to or death of an employee of the ETMA), costs and expenses of any kind, whether actual, alleged or threatened, including, without limitation, incidental and consequential damages, court costs, reasonable attorneys' fees, litigation expenses, and fees of expert consultants or expert witnesses incurred in connection therewith and the costs of investigation, to the extent arising out of, pertaining to, or relating to, directly or indirectly, in whole or in part, the negligence, recklessness, or willful misconduct of the ETMA or anyone directly or indirectly



employed by them or anyone that they control, in connection with the Project or this Agreement, whether or not there is alleged to be concurrent negligence on the part of the City, but, to the extent required by law, excluding liability caused by the conduct of the City. This indemnification obligation is not limited in any way by any limitation on the amount or type of damages or compensation payable to or for the ETMA. This obligation to indemnify and defend the City, and City Indemnitees shall survive termination of this Agreement.

## **SECTION TEN. TERM AND TERMINATION**

This Agreement shall be terminated by either Party only for cause by giving twenty-one (21) days prior written notice to the other in the manner provided below. Cause for termination would include, but is not limited to: failure of the City to render payment as set forth in Section Four above, EMTA's substantial failure to operate the Project as required by this Agreement, BAAQMD's termination or notice of breach of the BAAQMD TFCA Funding Agreement, misappropriation of funds, malfeasance or a violation of law in connection with the management or expenditure of the funds received by ETMA. This Agreement shall terminate without further notice once the TCFA under the BAAQMD TFCA Funding Agreement have been exhausted.

## **SECTION ELEVEN. AMENDMENTS**

This Agreement may not be changed, modified, or rescinded except in writing and signed by all parties. Any attempt at oral modification of this Agreement shall be void and of no effect.

## **SECTION TWELVE. NOTICE**

Any notice which may be required under this Agreement shall be in writing and shall be given to the following addresses:

CITY  
City Manager  
City of Emeryville  
Planning and Building Department  
1333 Park Avenue  
Emeryville, CA 94608  
Phone (510) 596-4335

ETMA  
Veronica Hattrup  
Executive Director, ETMA  
Gray-Bowen-Scott  
1211 Newell Avenue., Suite 200  
Walnut Creek, CA 94596  
Phone (925) 937-0980 x212  
[roni@gray-bowen.com](mailto:roni@gray-bowen.com)  
Fax (925) 947-3177

### SECTION THIRTEEN. ASSIGNMENTS

This Agreement may not be assigned by the ETMA without the prior written consent of the City.

### SECTION FOURTEEN. SEVERABILITY

If any term or provision of this Agreement is in contravention of law or void as against public policy, the remainder of this Agreement shall remain in full force and effect.

### SECTION FIFTEEN. FORCE OF LAW

This Agreement shall be governed by, and construed in accordance with, the laws of the State of California.

### SECTION SIXTEEN. DISPUTES

In the event that either party institutes any actions, suit, or other dispute resolution proceeding based on this Agreement against the other party, the prevailing party is entitled to receive from the losing party all costs or expenses of the proceeding, including but not limited to reasonable attorney fees and court costs. Venue for any litigation arising out of this Agreement shall be Alameda County Superior Court.

Executed in Emeryville, California.


THE CITY OF EMERYVILLE  
A California Municipal Corporation

By:

  
\_\_\_\_\_  
City Manager

Date: November 28, 2018

Approved as to form:

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

Date: \_\_\_\_\_



**EMERYVILLE TRANSPORTATION MANAGEMENT ASSOCIATION:**

By:

  
\_\_\_\_\_  
Authorized Signature

Date: 10/2/18

Executive Director  
\_\_\_\_\_  
Title

**ETMA Authorized Signatory's Name**

Veronica Hattrop  
\_\_\_\_\_  
(Please type or print)