

LICENSE AGREEMENT

THIS LICENSE AGREEMENT (“License”) is entered into this _____ day of _____, 2011 (the “Effective Date”), by and between the **SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT**, (“BART”), a rapid transit district, and the **CITY OF ALBANY** (“City”), a body politic and municipal corporation.

THE PARTIES ENTER INTO THIS LICENSE on the basis of the following facts, understandings, and intentions:

WITNESSETH:

WHEREAS, BART owns certain property located in the City of Albany, County of Alameda, State of California highlighted in blue in **Exhibit A**, attached hereto and incorporated herein by reference (the “Premises”) and commonly known as the Ohlone Greenway;

WHEREAS, City desires to improve, maintain and use a portion of the Premises for bicycle and pedestrian pathway and landscape purposes, in a manner that will not interfere with any of BART’s uses of the Premises;

WHEREAS, BART is willing to allow City to use the Premises for bicycle and pedestrian pathway and landscape purposes, subject to the terms and conditions contained herein;

NOW, THEREFORE, BE IT MUTUALLY AGREED, that for and in consideration of the premises herein and the covenants hereinafter contained and the mutual benefits to be derived by both parties, the parties agree as follows:

1. LICENSE. BART hereby confers upon City a license and privilege to use the Premises, subject to BART’s superior and paramount rights of ownership, possession and use, for the purposes of improving, maintaining and using a portion of the Ohlone Greenway, and City accepts this license and privilege.
2. TERM. This License shall commence upon execution by all parties and shall expire on December 31, 2036. This License is non-assignable and non-transferable.
3. NON-EXEMPTION. This License does not and shall not be interpreted to grant City any rights to proceed with any improvement, maintenance or use of the Premises without compliance with all applicable Federal or State laws or local ordinances or the obtaining of permits or authorizations required by any other public agency, nor shall it be construed as authorizing any zoning variance or establishing any precedent for similar variance except as may be provided herein.

4. **LIMITING CONDITIONS.** City acknowledges that the real property comprising the Premises has been acquired by and for the use of BART. BART retains the right to use, sell or change areas of the Premises, subject to the City's right of first refusal in the event of a sale.

5. **NATURE OF USE.** This License is granted solely for the purpose of authorizing City to provide such improvements, maintenance and use of said portions of the Ohlone Greenway for general public use without discriminatory practices as defined by the law. Such use by City or public shall be at all times subject to the primary use of the Premises by BART. City shall not install permanent buildings, structures or facilities within or upon Premises without written authorization from BART. BART maintains all rights of entry to the subject site, including the right to alter, repair, maintain and operate its facilities. BART shall have the right to enter the Premises upon or through adjacent property thereto owned by the City for the purpose of maintaining BART facilities located on the Premises. BART shall notify the City a minimum of 48 hours in advance of any entry for purpose of maintenance activities which requires the closure of the Ohlone Greenway pathway. BART shall sign appropriate detour routes around any such closure and comply with all applicable encroachment requirements.

6. **CITY PLANS.** With the exceptions identified in this Section, prior to the installation of any permanent or non-permanent structure, facility, grading modification or improvement ("Improvements"), City shall submit plans and specifications for the proposed Improvements to BART for BART's approval. Work on structures, facilities, grading or Improvements shall not be initiated by City until written approval is executed by BART, which approval shall not be unreasonably withheld. Plans and specifications must show that the Improvements are for bicycle and pedestrian pathway or associated landscaping purposes as an integral part of the local transportation system and are compatible with Section 7 herein.

Non-permanent structures that are excluded from the requirement to obtain prior BART approval includes but is not limited to trash receptacles, benches, sign installations, and similar structures. Permanent structures are defined as any structure that a person can enter, such as a restroom. Grading that is excluded from the requirement to obtain prior BART approval includes but is not limited to addition or removal of mulch or minor grade changes for routine landscape maintenance such as the addition of soil amendments, landscape soil or the breaking of the surface for the purpose of digging holes for sign and bench installation or anything of a similar kind.

Landscaping and irrigation activities that are excluded from the requirement to obtain prior BART approval include removal or planting of new or existing vegetation and plants with the exceptions noted in this section. Landscaping and irrigation improvements shall be selected and located according to public safety and traffic engineering best practices, in a manner that protects the security and safety of pathway users by maintaining line of sight to the pedestrian and bicycle pathways from adjacent roadways. Landscaping and irrigation improvements

- shall be installed in a manner that allows regular maintenance of the BART elevated trackway and prevents vegetation from either growing up into the trackway from below or overhanging onto the trackway from above. No species of tree or vegetation shall be planted under the BART tracks such that the mature growth height of such trees or vegetation will come within ten (10) feet, measured vertically, from the underside of the elevated trackway structure to the top of the tree canopy or vegetation. For vegetation not located under the trackway structure, no species of tree shall be planted such that, at the highest point of the elevated trackway structure, the mature growth of such trees will come within ten (10) feet, measured horizontally from the outermost edge of the elevated trackway structure to the outermost edge of the tree canopy. For the purposes of taking measurements as described in this Paragraph 6, the “elevated trackway structure” is defined as the horizontal portion of the elevated structure directly supporting the tracks, excluding the vertical support pillars.
7. MAINTENANCE AND OPERATION. City shall be responsible for maintenance and operation of all of its facilities and improvements related to the Ohlone Greenway and adjacent landscaping and pathway lighting. Such responsibilities include routine and major maintenance of the pathway surface, landscaping and lighting mounted on the underside of BART’s aerial track structure. Removal of graffiti on BART’s structures shall continue to be the responsibility of BART, per existing BART graffiti removal practices. City shall maintain and operate said portions of Ohlone Greenway as shown in Exhibit A in an orderly, safe, and sanitary manner. BART shall remove signs, posters, graffiti or any other item upon BART’s aerial piers promptly upon occurrence, per existing BART practices.
 8. INDEMNIFICATION. City shall indemnify and hold BART, its directors, officers, agents and employees harmless from all claims, demands, suits, loss, damages, injury and liability (direct or indirect, including any and all costs and expenses in connection therewith) but only in proportion to and to the extent arising out of anything done or omitted to be done by the City, its officers, agents and employees under or in connection with any work, authority or jurisdiction delegated to the City. BART acknowledges that the obligation to indemnify and hold harmless does not include claims that result from BART’s Night Maintenance, regular maintenance and seismic retrofit activities, or the omission to perform those services.
 9. MASS TRANSIT CORRIDOR PURPOSES. The City acknowledges and agrees that as an express condition of BART's grant of the License: (i) notwithstanding any other provision herein, BART reserves the Premises for future use for mass transit corridor purposes and reserves the right to terminate the License as necessary, in BART's sole judgment, for such purposes, upon notice as provided in Article 15 herein; (ii) the Premises are to be used solely for a bicycle and pedestrian pathway, allow access to BART’s associated stations, and, for purposes of Section 4(f) of the Department of Transportation Act, codified at 49 U.S.C. § 303(c) ("DOT Act Section 4(f)"), said pathway is designated by the City as non-recreational in nature, is not significant for recreational purposes and will

be utilized for bicycle and pedestrian pathway or associated landscaping purposes as an integral part of the local transportation system; (iii) the City will not use or consent to the use of any grant funds pursuant to Section 6(f)(3) of the Land and Water Conservation Fund Act, codified at 42 U.S.C. § 4601-8(f)(3) ("LWCF Act"), for any development or improvements on or to the Premises; and (iv) in the event that the City undertakes or has undertaken any use, development or improvements for park purposes, and/or uses or consents to the use of any grant funds pursuant to the LWCF Act, on the Premises and/or on property adjacent to the Premises, the City assumes responsibility, at its sole cost, for compliance with the requirements of DOT Act section 4(f), the LWCF Act and the Public Park Preservation Act of 1971 (Cal. Pub. Res. Code section 5401 et seq.), as applicable, with respect to the Premises and/or such property adjacent to the Premises."

10. EMERGENCY ACCESS. The City of Albany Fire Department responds to emergencies on BART property, including the underground, at-grade and elevated sections of trackway. BART and City agree to preserve emergency access to BART's trackway at all times, regardless of whether or not the Ohlone Greenway or any other part of BART property is otherwise open to the public or used by the City for any purpose. Should BART decide to exercise BART's rights under Sections 4, 12, 15 and/or 16 to close public access to the Ohlone Greenway or terminate this License for any reason, emergency access shall be maintained.
11. INSURANCE. At all times during the life of this License, or as may further be required by this License, City at its own cost and expense shall provide the insurance specified by this Article.

11.1 Evidence Required

At or before execution of this License, City shall provide BART with a certificate of insurance executed by an authorized representative of the insurer(s) evidencing that City's insurance complies with this Article. The certificate shall reference the License Agreement between BART and City. In addition, a copy of all required endorsements shall be included with and attached to the Certificate of Insurance.

11.2 Notice of Cancellation, Renewal, Reduction or Material Change in Coverage

All policies shall be endorsed to provide thirty (30) days prior written notice of any cancellation, reduction or material change in coverage. For policies that extend beyond the coverage policy year, City shall submit to BART's Manager of Insurance certification confirming the insurance has been renewed and continues in place. Notice shall be forwarded to:

Department Manager, Insurance
San Francisco Bay Area Rapid Transit District
P. O. Box 12688,
Oakland, California 94607-2688

11.3 Qualifying Insurers

All policies shall be issued by California admitted companies which hold a current policy holders alphabetic and financial size category rating of not less than A:VIII according to Best's Insurance Reports.

11.4 Insurance Required

A. Commercial General Liability Insurance for bodily injury (including death) and property damage which provides limits of not less than One Million Dollars (\$1,000,000) per occurrence and Two Million Dollars (\$2,000,000) annual aggregate.

1. Coverage shall include:
 - a) Premises and Operations;
 - b) Products/Completed Operations;
 - c) Broad Form Property Damage;
 - d) Contractual liability;
 - e) Personal Injury liability; and
 - f) Cross-Liability and Severability of Interests.
2. Such insurance shall include the following endorsements, copies of which shall be provided:
 - a) Inclusion of BART, its directors, officers, representatives, agents and employees as additional insured as respects to City's operations in connection with this License;
 - b) Stipulation that the insurance is primary insurance and that no insurance or self-insurance of BART will be called upon to contribute to a loss.

B. Comprehensive Automobile Liability for bodily injury (including death) and property damage which provides coverage limits of at least One Million Dollars (\$1,000,000) combined single limit per occurrence applicable to all owned, non-owned and hired vehicles.

C. Workers' Compensation/Employer's Liability Insurance Statutory Workers' Compensation and Employer's Liability insurance for not less than One Million Dollars (\$1,000,000) per accident applicable to Employer's Liability coverage for all employees engaged in services or operations under this License. The policy shall include broad form all-states/other states coverage. Coverage shall be specifically endorsed to include the insurer's waiver of subrogation in favor of BART, its directors, officers, representatives, agents and employees, a copy of which shall be provided to BART. Should City contract any work to be

done on the Premises, City shall require each contractor or subcontractor of any tier to similarly to comply with this Article, all in strict compliance with federal and state laws.

11.5 Special Provisions

A. The foregoing requirements as to the types and limits of insurance coverage to be maintained by City and any approval of said insurance by BART is not intended to and shall not in any manner limit or qualify the liabilities and obligations otherwise assumed by City pursuant to this License, including but not limited to the provisions concerning indemnification.

B. BART acknowledges that some insurance requirements contained in this Article may be fulfilled by a funded self-insurance program of City. However, this shall not in any way limit liabilities assumed by City under this License. Any self-insurance program must be approved in writing by BART.

C. Should any of the work under this License be contracted, City shall require each of its contractor or subcontractor of any tier to provide the aforementioned coverage, or City may insure its contractor(s) under its own policy(s).

D. BART reserves the right to terminate the License in the event of material noncompliance with the insurance requirements of this Article.

12. TERMINATION IN EVENT OF NONPAYMENT OF DAMAGES. In the event that BART is charged with any liability arising out of this License for injury or damages caused by or resulting by reason of anything done or omitted to be done by the City, its officers, agents and employees under or in connection with any work, authority or jurisdiction delegated to the City in connection with City's construction, maintenance, or use of the Premises and is required to pay any damages, award, compensation or judgment because of said construction, maintenance, operation or use, BART may terminate this License if not reimbursed by City or City's insurance carrier under City's agreement to indemnify BART herein.

13. COSTS AND EXPENSES. By its approval of facilities, BART in no way assumes any liability or obligation whatsoever for any costs or expenses to be incurred by City under this License for the purposes for which this License is made. Such freedom from liability or expense by BART shall include any connection or service charges or rates or bills for City utility services, including but not limited to gas, electric, water, sewer, garbage or rubbish removal from all structures and facilities maintained by the City for the purposes of the Ohlone Greenway.

14. CONCESSIONAIRES AND OTHER THIRD PARTIES. Any and all rights granted by City to concessionaires or other third parties involving the Premises

shall be approved by BART in writing prior to the granting thereof and shall be in effect only during the term of this License. BART shall have no obligation to, or responsibility for, such concessionaires or third parties and it shall be the responsibility of City that such parties observe and conform to any pertinent conditions of this License, including but not limited to BART's rights of ownership, possession and use. Concessionaires shall release and hold harmless BART from all liability and claims for damages. Said release shall be a condition precedent to the City's grant of any permission or license to said concessionaires or third parties.

15. BART RESPONSIBILITY. BART shall notify the City a minimum of 48 hours in advance of any entry for purpose of maintenance activities which requires all or a portion of the closure of the Ohlone Greenway. BART shall sign appropriate detour routes around any such closure.
16. TERMINATION. If City does not comply with the conditions contained herein or as subsequently amended by mutual agreement, BART may terminate this License by written notice to City. City or BART may terminate this License upon one hundred eighty (180) days notice to the other party.
17. NOTICES. All notices shall be given to BART in writing, personally or by mail, address as follows:

San Francisco Bay Area Rapid Transit District
P.O. Box 12688
Oakland, CA 94604-2688
ATTN: Right of Way Management Division

All notices given by BART to City shall be addressed as follows:

City of Albany
1000 San Pablo Avenue
Albany, CA 94706
ATTN: City Manager

IN WITNESS WHEREOF, the parties hereto have executed one (1) or more copies of this License, on the date(s) set forth below, effective as of the day and year first above written.

CITY OF ALBANY

a body politic and municipal corporation

Name: _____

Title: _____

Beth Pollard
City Manager

**SAN FRANCISCO BAY AREA RAPID TRANSIT
DISTRICT,**

a rapid transit district

Laura Giraud
Real Estate Department Manager