

Project: Earthquake Safety Program
Owner: City of Albany
BART Parcel No.: R26-1-3D, R27-1-3C,
R28-1-3B, R28-2-3B, R29-1-3B, R30-1-
3B, R31-1-3B

SUMMARY OF ACQUISITION AGREEMENT

Grantor: City of Albany

Grantor's Address: 1000 San Pablo Avenue, Albany, CA 94706

Grantee: San Francisco Bay Area Rapid Transit District

Grantee's Address: 300 Lakeside Drive (LKS-22)
Oakland, California 94612

Assessor's Parcel: APNs 065-2409-0870-02; 065-2409-0890-02; 065-2650-0320-02;
065-2650-034-02; 065-2650-036-02; 065-2652-085-02; 065-2652-
083-02; 065-2652-081-02; 066-0805-011-02; 066-2805-013-02; 066-
2806-008-02; 066-2806-010-02; 067-2819-010-02; 067-2820-011-02;
067-2820-010-02; 067-2832-017-02 (Portions)

Property: Grantee proposes to acquire a right of entry over portions of the
Property.

Property Location: City Limit Line to Dartmouth Street; Dartmouth Street to Marin
Avenue; Marin Avenue to Solano Avenue; Solano Avenue to
Washington Avenue; Washington Avenue to Portland Avenue;
Portland Avenue to Brighton Avenue; Brighton Avenue to City Limit
Line
Albany, California
Alameda County

Consideration: Three hundred seventy-eight thousand, six hundred seventy-three
dollars (\$378,673)

Exhibits: Exhibit A – Right of Entry Agreement
Exhibit B – Ohlone Greenway Revisions Exhibit

ACQUISITION AGREEMENT

THIS ACQUISITION AGREEMENT ("Agreement") is entered into as of the ____ day of _____ 2009 ("Effective Date"), by and between **CITY OF ALBANY**, a body politic and municipal corporation ("**Grantor**"), and the **SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT**, a rapid transit district ("**Grantee**").

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

- A. Grantor is the owner of certain property located in the County of Alameda, State of California. The property is located along BART rights-of-way at City Limit Line to Dartmouth Street; Dartmouth Street to Marin Avenue; Marin Avenue to Solano Avenue; Solano Avenue to Washington Avenue; Washington Avenue to Portland Avenue; Portland Avenue to Brighton Avenue; Brighton Avenue to City Limit Line and is more commonly known as Alameda County Assessor's Parcel Numbers 065-2409-0870-02; 065-2409-0890-02; 065-2650-0320-02; 065-2650-034-02; 065-2650-036-02; 065-2652-085-02; 065-2652-083-02; 065-2652-081-02; 066-0805-011-02; 066-2805-013-02; 066-2806-008-02; 066-2806-010-02; 067-2819-010-02; 067-2820-011-02; 067-2820-010-02; 067-2832-017-02 (the "Property"). The Property is part of the Ohlone Greenway that passes through the City.
- B. Grantor desires to sell a Right of Entry over a portion of Property to Grantee, and Grantee desires to purchase a right of entry, more particularly identified in **Exhibit A**, attached hereto and incorporated herein by reference ("ROE"), over a portion of Property from Grantor on all of the terms, covenants, and conditions hereinafter set forth. The performance of this Agreement constitutes the entire consideration for the sale of the Right of Entry over a portion of the Property and shall relieve Grantee of all further obligation or claim in connection with its purchase and use of the Right of Entry.
- C. Grantor desires to make revisions to its current design of certain property within the City of Albany commonly known as the Ohlone Greenway, as illustrated in **Exhibit B**, Ohlone Greenway Revisions, and attached hereto and incorporated herein by reference (the "Revisions"). Grantor desires to have the Revisions installed by Grantee after Grantee completes its phased seismic retrofit work within the ROE area and Grantee desires to complete such work for Grantor.
- D. Grantor and Grantee both acknowledge that a Letter of Agreement between the parties will be executed prior to said phased seismic work, and said Letter of Agreement will set forth the respective duties, responsibilities and obligations of Grantor and Grantee in regard to the construction of Grantee's earthquake safety program in the City of Albany.

NOW THEREFORE in consideration of the mutual covenants and promises of the parties, the parties hereto agree as follows:

1.0 ARTICLE 1 – RIGHT OF ENTRY

Grantor shall grant to Grantee and Grantee shall accept from Grantor on all of the terms and conditions set forth herein, a ROE over the Property in accordance with **Exhibit A**.

2.0 ARTICLE 2 - ROE CONSIDERATION AND COMPENSATION FOR BETTERMENTS

2.1 ROE Value. The value of the ROE ("ROE Value") is **Three Hundred Seventy-eight Thousand, Six Hundred Seventy-three Dollars (\$378,673)** based on an appraised value.

2.2 ROE Consideration. In lieu of payment by check or cash for the ROE, Grantor accepts as consideration performance by Grantee of the work beyond the equivalent value of Grantee's required restoration that is included in Exhibit B. Such performance as consideration shall not exceed the ROE value described in Section 2.1 above. Grantor agrees that by accepting performance by Grantee as consideration, Grantor grants the access required to Grantor's property to perform said work, and agrees that said performance is the full and final compensation. If the awarded value for Grantee's Contract 15PE-110 is less than Grantee's estimate, Grantor agrees that Grantor will not request a rebate from the ROE value described in Section 2.1; and conversely, if the awarded 15PE-110 contract value exceeds Grantee's estimate, Grantee agrees that Grantee will not request extra compensation for the difference.

3.0 ARTICLE 3 – ACCEPTANCE AND OWNERSHIP

3.1 Acceptance and Ownership. Grantor shall accept the Revisions upon complete performance of a phase; provided such Revisions have been performed in accordance with the plans and specifications therefor. Upon acceptance of said phased Revisions, Grantor automatically assumes all ownership and maintenance responsibility thereof, except for those items covered under the plant establishment period. Grantee shall warrant all other work for twelve (12) months after acceptance by Grantor of each phase.

4.0 ARTICLE 4 - CONDITIONS TO AGREEMENT

4.1 Grantor Breach. Notwithstanding anything to the contrary elsewhere in this Agreement, in the event of a breach by Grantor of any of its covenants, representations, warranties, or other agreements set forth in this Agreement, Grantee may elect (i) nevertheless to proceed with the purchase of the ROE interests, reserving all of its rights and remedies available to it under this Agreement and otherwise at law or in equity including, without limitation, the right to collect damages for such breach from Grantor and the right to indemnification as provided in Section 6.1, or (ii) to terminate this Agreement by written notice to Grantor delivered prior to commencement of construction, and upon such termination, Grantee shall be relieved of all further obligations hereunder.

- 4.2 Grantee Breach. Notwithstanding anything to the contrary elsewhere in this Agreement, in the event of a breach by Grantee of any of its covenants, representations, warranties, or other agreements set forth in this Agreement, Grantor may elect (i) nevertheless to proceed with sale of the ROE interests, reserving all of its rights and remedies available to it under this Agreement and otherwise at law or in equity including, without limitation, the right to collect damages for such breach from Grantee and the right to indemnification as provided in Section 6.1, (ii) to terminate this Agreement by written notice to Grantee delivered prior to commencement of construction, and upon such termination, Grantor shall be relieved of all further obligations hereunder, or (iii) re-open to public use portions of the Property subject to the ROE that Grantee has closed as part of the phased seismic work, including without limitation, removal from the Property of any of Grantee's equipment or other personal property that Grantor determines would interfere with the public's safe use of the Property.
- 4.3 Termination. In the event of a breach by either Party of any of its covenants, representations, warranties, or other agreements set forth in this Agreement, the other Party may elect to terminate the Agreement upon delivery of a written Notice of Intent to Terminate to the other Party. Such notice shall be served as set forth in Section 8.4 of this Agreement. The date of termination shall be the date that is thirty (30) calendar days after the date on which the Notice of Intent to Terminate is received or deemed received. Upon termination, the Parties shall be relieved of further obligations hereunder.

5.0 ARTICLE 5 - REPRESENTATIONS AND WARRANTIES

- 5.1 Ownership of Property. Grantor represents and warrants that it owns the Property in fee simple, subject only to outstanding encumbrances, if any, now on record in the County in which the Property is located.
- 5.2 Authority. Each individual executing this Agreement on behalf of Grantee and Grantor, respectively, represents and warrants that such individual is duly authorized to execute and deliver this Agreement on behalf of Grantee and Grantor, respectively, and that this Agreement is binding upon Grantee and Grantor in accordance with its terms.
- 5.3 Environmental Compliance. Grantor is not making and hereby specifically disclaims and Grantee hereby waives any warranty, guaranty or representation, oral or written, as to or concerning the condition of the Property. Grantor authorizes Grantee, at Grantee's discretion, to conduct a Phase I Environmental Study to determine the condition of the Property, including but not limited to its environmental condition. The ROE granted by this Agreement is made on an "as is" basis. Grantee's agreement to use the Property without representations and warranties except those stated herein was a material factor in determining the Consideration for the ROE. Accordingly, all costs for clean-up or disposal of materials found on the Property shall be borne solely by the Grantee.

6.0 ARTICLE 6 – COVENANTS/INDEMNITY

- 6.1 Covenants/Indemnity. To the extent allowed by law, Grantee shall indemnify, defend with counsel acceptable to Grantor, and hold harmless Grantor and its officers, officials, employees, agents and volunteers from and against any and all liability, loss, damage, claims, expenses, and costs (including without limitation, attorney's fees and costs and fees of litigation) (collectively, "Liability") of every nature arising out of or in connection with this Agreement or its failure to comply with any of its obligations contained in this Agreement, except such Liability caused by the sole negligence or willful misconduct of Grantor.

The Grantee's obligation to defend and indemnify shall not be excused because of the Grantee's inability to evaluate Liability or because the Grantee evaluates Liability and determines that the Grantee is not liable to the claimant. The Grantee must respond within 30 days, to the tender of any claim for defense and indemnity by the Grantor, unless this time has been extended by the Grantor. If the Grantee fails to accept or reject a tender of defense and indemnity within 30 days, in addition to any other remedy authorized by law, so much of the money due the Grantee under and by virtue of this Agreement as shall reasonably be considered necessary by the Grantor, may be retained by the Grantor until disposition has been made of the claim or suit for damages, or until the Grantee accepts or rejects the tender of defense, whichever occurs first.

With respect to third party claims against the Grantee, the Grantee waives any and all rights of any type to express or implied indemnity against the Indemnitees.

Notwithstanding the forgoing, to the extent this Agreement is a "construction contract" as defined by California Civil Code Section 2782, as may be amended from time to time, such duties of Grantee to indemnify shall not apply when to do so would be prohibited by California Civil Code Section 2782.

In the event that Grantee or any employee, agent, or subcontractor of Grantee providing services under this Agreement is determined by a court of competent jurisdiction or the California Public Employees Retirement System (PERS) to be eligible for enrollment in PERS as an employee of Grantor, Grantee shall indemnify, defend, and hold harmless Grantor for the payment of any employee and/or employer contributions for PERS benefits on behalf of Grantee or its employees, agents, or subcontractors, as well as for the payment of any penalties and interest on such contributions, which would otherwise be the responsibility of Grantor. *[Note: This paragraph may be deleted as per legal discussions between BART and the City]*

7.0 ARTICLE 7 - INSURANCE

- 7.1 Owner Controlled Insurance Program. BART shall include the City, its Councilmembers, officers, directors, employees and agents as additional insureds in the master insurance program obtained during construction of the Project, also known as the Owner Controlled Insurance Program (“OCIP”). Coverage for the City will include general liability and builders’ risk (course of construction) insurance. BART shall provide the relevant certificates of insurance and endorsements on all such policies to the City. The OCIP will be maintained in full force and effect during construction of the Project.
- 7.2 Primary Insurance. The insurance afforded to the City shall be considered primary insurance to the full limit of the OCIP and any insurance against a loss covered by policies held by the City shall be considered excess insurance only. Any policy obtained under the OCIP shall contain a severability-of-interests clause.
- 7.3 Tender of Defense. The City shall be accorded the same protections with respect to liability and indemnity as is accorded BART under such insurance policies. The City reserves the right to tender to BART the defense of any claims asserted against the City in connection with or arising out of the Project.

8.0 ARTICLE 8 - GENERAL PROVISIONS

- 8.1 Binding on Successors. The terms, covenants, and conditions herein contained shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto.
- 8.2 Entire Agreement. This Agreement contains all of the covenants, conditions, and agreements between the parties regarding the subject matter hereof, except as provided for in the Letter Agreement referenced in Recital D (the execution of which shall be a condition precedent to the Acquisition Agreement taking effect), and shall supersede all prior correspondence, agreements, and understandings both verbal and written. No addition or modification of any term or provision shall be effective unless set forth in writing and signed by both Grantor and Grantee.
- 8.3 Attorney's Fees. In the event either party to this Agreement institutes legal action to interpret or enforce the terms hereof, or to obtain money damages, the prevailing party shall be entitled to recover from the other, in addition to costs and judgment as awarded by the court, its attorney's fees incurred therein. The prevailing party shall include without limitation a party who dismisses an action or proceeding for recovery hereunder in exchange for consideration substantially equal to the relief sought in the action or proceeding.
- 8.4 Notices. All notices or other communications required or permitted hereunder shall be in writing and either delivered by hand or commercial messenger, or deposited in the United States mail first-class, postage prepaid and addressed as follows:

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To Grantor: City of Albany
1000 San Pablo Avenue
Albany, CA 94706
Attention: Beth Pollard, City Administrator

To Grantee: San Francisco Bay Area Rapid Transit District
Real Estate Department
300 Lakeside Drive, 22nd Floor
Oakland, CA 94612
Attention: Laura Giraud

Notices which are delivered by hand shall be deemed received upon delivery; notices which are transmitted by commercial messenger or deposited in the United States Mail in accordance with the terms of this Section 8.4 shall be deemed received three (3) days after delivery by commercial messenger or the date of mailing, as the case may be. The foregoing addresses may be changed by notice to the other party as herein provided.

- 8.5 Governing Law. This Agreement shall be governed by, and construed in accordance with the laws of the State of California, without reference to conflicts of law principles.
- 8.6 Captions. All captions and headings in this Agreement are for the purposes of reference and convenience and shall not limit or expand the provisions of this Agreement.
- 8.7 Time. Time is of essence of every provision herein contained in this Agreement.
- 8.8 Counterparts. This Agreement may be executed in counterparts, each of which shall be an original, but all counterparts shall constitute one Agreement.
- 8.9 Survival. The terms, covenants, and conditions of Articles 2, 3, 4, 5, and 6 shall remain true and correct as of the close of escrow, shall be deemed to be material and shall survive the execution and delivery of this Agreement and the delivery of the ROE document.
- 8.10 Modification to Agreement. This Agreement may be modified or amended at any time by the mutual consent of the parties herein.

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R30-1-3B, R31-1-3B

IN WITNESS WHEREOF, the parties hereto have executed one (1) or more copies of this Agreement as of the Effective Date set forth above.

GRANTOR

CITY OF ALBANY
a body politic and municipal corporation

Name: _____
Beth Pollard
Title: _____
City Administrator

Name: _____
Robert Zweben
Title: _____
City Attorney

GRANTEE

**SAN FRANCISCO BAY AREA RAPID TRANSIT
DISTRICT,**
a rapid transit district

APPROVED BY:

Laura Giraud
Real Estate Department Manager

