

## ATTACHMENT C

### Caldecott Improvement Project City of Oakland/ California Department of Transportation Settlement Agreement

This Settlement Agreement (AGREEMENT) is entered into by and between the City of Oakland (the CITY) and the California Department of Transportation (the DEPARTMENT) (collectively "the Parties") on this 7<sup>th</sup> day of August 2008.

#### RECITALS

The purpose for which this AGREEMENT is made, and all pertinent recitals, is described below:

WHEREAS, the DEPARTMENT has proposed Caldecott Improvement Project (PROJECT) in and around Highway 24 in and near the Caldecott Tunnel in order to provide a new bore; and

WHEREAS, the DEPARTMENT's PROJECT was approved on September 12, 2007 via a Project Report and this action has been posted by the Federal Highway Administration on August 29, 2007; and

WHEREAS, the DEPARTMENT has determined that the PROJECT as described in the Project Report and Final Environmental Assessment/Environment Impact Report issued in September 2007, addresses impacts and necessary mitigation; and

WHEREAS, the CITY has expressed written and oral concerns to the DEPARTMENT with respect to adequacy of the Final Assessment/Environmental Impact Report; and

WHEREAS, the DEPARTMENT has or will obtain all necessary environmental approvals, permits, or fulfilled other conditions required for acquisition and construction of the PROJECT as proposed; and

WHEREAS, the DEPARTMENT will obtain all necessary permits, contracts, funding, and other necessary approvals for the real property acquisition and construction of the PROJECT; and

WHEREAS, the DEPARTMENT has committed to, and will implement, the mitigation/abatement measures and monitoring, which are summarized in the "List of Mitigation/Abatement Measures," dated April 18, 2008, included as Attachment A; and

WHEREAS, certain disputes have arisen between the Parties with respect to adequacy of the Final Assessment/Environmental Impact Report. These are collectively referred to as the "Disputes"; and

WHEREAS, the Parties hereto desire to resolve the Disputes by the DEPARTMENT agreeing to implement certain improvements/enhancements to further  
Final Version

reduce the PROJECT impacts and provide other project-related benefits to the CITY, and the CITY by agreeing to release DEPARTMENT from any and all liability for damages, attorneys' fees, and costs, in connection with the Disputes; and

WHEREAS, based on this AGREEMENT, the CITY will dismiss any pending actions and will waive any and all claims or actions and will not join, finance or assist in any claims or actions, challenging or contesting the DEPARTMENT's right to plan, design, construct and permanently operate the PROJECT, except as expressly provided herein; and

WHEREAS, all conditions, promises, and obligations in this Agreement for both Parties are subject to the appropriations of resources by the State Legislature, the allocation of resources by the California Transportation Commission (CTC) for the funding for the PROJECT, the CITY actually receiving eight million dollars (\$8,000,000) in funding commitments, no later than the 2012 STIP cycle, for certain traffic, pedestrian/bicycle and local street and noise barrier improvements/enhancements as detailed in Section 1, and the DEPARTMENT awarding the Construction Contract for the PROJECT, except as expressly stated herein.

NOW, THEREFORE, in consideration of their mutual covenants, promises and undertakings, the Parties agree as follows:

**1. TRAFFIC, PEDESTRIAN/BICYCLE & LOCAL STREET ENHANCEMENT PROJECTS, NOISE STUDY AND FUNDING**

The following measures will be funded in accordance with the process outlined herein, subject to the funding limitations noted below and contingent upon the award of PROJECT to a responsive bidder.

- a) Candidate traffic, pedestrian/bicycle, noise barrier, and local street enhancements proposed through this agreement are specified in Attachment B. The CITY will select projects from this list for construction, consistent with the funding limitations herein. It is understood that the enhancements in Attachment B, with the exception of any noise barriers, will be environmentally cleared, designed and constructed by the CITY, with reimbursement according to the process cited below. However, it is further understood that the list of enhancements provided is preliminary in nature; therefore, the City reserves the right, subject to approval by the Alameda County Congestion Management Agency (ACCMA), being the primary funding agency, to modify or substitute similar projects that have as their primary purpose the improvement of pedestrian, bicycle, transit and local street improvements, noise barriers, including projects that support the use of transit (and thus reduction of single-occupant motorized vehicles, such as transit signal coordination and amenities), to the greater community in the Highway 24 corridor between I-580 and the Caldecott Tunnel.

- b) The DEPARTMENT shall work with the ACCMA and CCTA to ensure that the City actually receives eight million dollars (\$8,000,000) in funding commitments, no later than the 2012 STIP cycle, for certain traffic, pedestrian/bicycle and local street and noise barrier improvements/enhancements as detailed in this Section.
- c) The Parties understand that the ACCMA reserved \$2 million (FIRST FUNDING) in its submittal for the 2008 State Transportation Improvement Program (STIP) for the PROJECT, and the California Transportation Commission programmed these funds at its June 25, 2008 meeting.
- d) The Parties understand that on January 25, 2008 the ACCMA and the Contra Costa Transportation Authority (CCTA) signed a letter agreement that provides a mechanism to swap the \$2 million in 2008 STIP funds stipulated in Section 1) c) above with Contra Costa County Measure J Sales Tax funds. Subsequently, on February 29, 2008 the ACCMA and CCTA Executive Directors conveyed the above referenced funding commitment to the Oakland Mayor via a letter, which is included as Attachment C to this AGREEMENT. As stipulated in the letter, the CCTA Board subsequently approved an additional \$2 million advance (SECOND FUNDING) of Measure J funds at its June 18, 2008 meeting in exchange for an equivalent amount of Alameda County share of 2010 STIP funds.

The initial \$4 million in Measure J funds will be available to the ACCMA following award of the PROJECT construction contract. All funds will be available for reimbursement of actual expenditures documented by the CITY or the implementing agency, if different from the CITY, within 30 days after invoicing. The CITY agrees to submit an accounting of expenditures to the ACCMA and CCTA for use of all Measure J funds after incurring expenses.

An amount of \$100,000 out of FIRST FUNDING will be made available on a reimbursement basis, consistent with the preceding paragraph, 60 days after the execution of this agreement, following a request from CITY, for development of projects listed on Attachment B. These funds will be made available for the necessary additional technical studies and clearances, community outreach, feasibility work, prioritization of improvements, and/or construction of projects generally defined in Attachment B and/or improvements that will be recommended by the DEPARTMENT soundwall study defined in Section 1) g), at the City's option.

- e) The DEPARTMENT shall work with ACCMA and CCTA to ensure funding for up to an additional \$4 million as identified in ACCMA's current Countywide Transportation Plan, in future state and federal funding cycles. The next state funding opportunity for this \$4 million is during the 2010 STIP cycle, expected to be approved by the CTC in spring 2010. On July 31, 2008, the ACCMA Board of Directors adopted Resolution Number 08-006 REVISED, included as Attachment D that pre-commits \$4 million from the 2010 and/or 2012 STIP fund cycles for the Route 24 Corridor Enhancement projects. The ACCMA consideration of future funding is subject to available funds and to the necessary applications and documents being prepared by the City of Oakland and/or DEPARTMENT consistent with the policies of the MTC and CTC, and to inclusion of the \$4 million in the Metropolitan Transportation Commission's T 2035 update of its Regional Transportation Plan (RTP). MTC is expected to adopt T 2035 in early 2009.
- f) The Parties understand that, subject to inclusion in the Metropolitan Transportation Commission's T 2035 program, the ACCMA has included up to \$10 million for a countywide "Soundwall Retrofit Program" in its 25-year transportation plan for Alameda County. Any soundwall improvement project recommended by the sound study will have to compete for funds on a countywide basis, for funding in excess of the funding sources defined in Sections 1) d) and e) above. The ACCMA has identified the STIP as the funding source for the countywide soundwall program.
- g) Consistent with the ACCMA Freeway Soundwall Policy, the DEPARTMENT will conduct a pre-NBSSR corridor study of existing noise along SR 24 between SR 13 and I-580, in order to provide information to identify locations where soundwalls might be feasible, reasonable and cost effective. The study will be completed within nine (9) months from the date of the AGREEMENT.

## 2. WEST PORTAL STAGING/CONSTRUCTION AREA

The PROJECT has been divided into four separate construction contracts: 1) Construction of the 4<sup>th</sup> Bore of the Caldecott Tunnel as described in the approved environmental document, 2) Installation of a traffic signal at Kay/Broadway Intersection and roadway improvements at the Kay/Tunnel Road Intersection, 3) Realignment of the Westbound SR24 to Northbound SR13 Connector, and 4) Landscaping along Route 24, within the limits of the PROJECT.

For the Contracts Nos. 2) and 3) described above, the DEPARTMENT agrees to have a public outreach program in place to be reviewed and concurred by the CITY in accordance with Section 26 of this Agreement, to provide an information line and a Public Information Officer throughout construction. The DEPARTMENT agrees to implement the noise criterion of 86 dBA at 50 feet from the noise source for nighttime operations (7:00 p.m. to 7:00 a.m). In addition, the DEPARTMENT agrees to enforce the parking restrictions contained in section 2) e) iv) below in Contract No. 3.

None of the provisions specified in this section applies to Contract No. 4) described above.

In furtherance of addressing concerns by the CITY for further reduction of potential construction noise, the Parties agree on the following additional measures for the construction of Contract No. 1, described above:

a) CONSTRUCTION-RELATED NOISE ABATEMENT (from 7:00 p.m. to 7:00 a.m.)

i) The DEPARTMENT agrees to, and the construction contract documents shall stipulate that, as one of the first orders of work, the contractor will construct a temporary soundwall along Caldecott Lane that will include sound-insulating and sound-absorbing materials to minimize construction noise, including reflective noise. This temporary wall that separates the west portal staging area from Caldecott Lane, shall be constructed only if the contractor drills from the west side.

ii) PROJECT Noise Criterion

The PROJECT Noise Criterion outside the temporary soundwall shall be the pre-construction ambient noise plus 3 dBA for the hourly  $L_{eq}$  to account for a combination of ambient and construction noise. The maximum instantaneous noise level limit for construction noise is the pre-construction maximum noise level,  $L_{max}$ .

iii) Prior to the start of project construction activities, the contractor will be required to submit a detailed noise control plan to the DEPARTMENT. The plan will provide assurance to the DEPARTMENT that the construction activities will meet the PROJECT Noise Criterion. The DEPARTMENT shall make the plan available to the CITY for its review and comment within the time parameters set forth in Section 26.

iv) The DEPARTMENT agrees to, and the construction

contract documents shall stipulate that, the contractor shall immediately suspend any construction activity or operation that results in noise levels that fail to meet the PROJECT noise criterion at any time between 7:00 p.m. and 7:00 a.m.

- v) The DEPARTMENT agrees to, and the construction contract documents shall stipulate that, if necessary, the temporary ventilation fans shall be acoustically insulated or attenuated to meet the PROJECT noise criterion.
- vi) The DEPARTMENT agrees to, and the construction contract documents shall stipulate that, the concrete batch plant is to be located behind the temporary acoustical soundwall and shall be enclosed, to prevent light, dust and other construction-related impacts from occurring outside of the enclosed structure.
- vii) After commencement of construction activities, should the CITY and the DEPARTMENT determine through the problem solving process set forth in Section 6 that it is necessary to reduce noise level below that of the Project Noise Criterion, the DEPARTMENT shall actively engage with the contractor and request the contractor to silence vehicle backup alarms during nighttime hours (7:00 p.m. to 7:00 a.m.). Strobe lights or flag persons could be utilized to the extent possible, in accordance with state safety regulations and with the California Occupational Health & Safety Administration (CAL OSHA) regulations.

b) NOISE MONITORING

- i) The DEPARTMENT will obtain pre-construction ambient noise levels at eight (8) locations selected by the CITY, agreed to by the DEPARTMENT and specified in Attachment E. Measurement results will be contained in a report, "Pre-construction Baseline Ambient Noise Measurements". These noise measurements will be obtained over a period of fourteen (14) days at each measurement location. The hourly data measured from 7:00 p.m. to 7:00 a.m. for each of the fourteen (14) days will be listed in the report. The hourly sound levels will be logarithmically averaged to determine a single value of each hour and will be considered the pre-construction ambient noise levels.
- ii) Two metrics will be used to describe the ambient noise: the hourly  $L_{eq}$  and the hourly  $L_{max}$ .

- iii) During construction, the DEPARTMENT will perform continuous acoustical measurements at three locations # 1, 3 and 8 as shown on Attachment E to assure that noise levels, between 7:00 p.m. and 7:00 a.m. do not exceed the PROJECT noise criterion.
  
- c) CITY/COMMUNITY NOTICE, OUTREACH & INVOLVEMENT
  - i) As required in the Draft Transportation Management Plan (TMP), the DEPARTMENT will retain a Public Information Officer (PIO) for the entire duration of the PROJECT. The CITY will be offered an opportunity to participate in the selection of the PIO, who will be an independent consultant, as discussed in the Draft TMP in Section F below and is included as Attachment F.
  
  - ii) Measures to be taken consistent with the TMP include, but are not limited to, the following:
    - a. The PIO to create a standard operating procedure for conducting public affairs for the PROJECT, as well as guidance on responding to the CITY, media and public. The procedure shall include a mandatory monthly meeting between the PIO, RE and CITY. The CITY shall review this procedure before final implementation, pursuant to Section 26.
  
    - b. The PIO will set public informational meetings prior to construction start to inform the interested parties about the construction activities that will take place in the early stages of construction and the proposed mitigation/abatement to be implemented.
  
    - c. A 24-hour, non-emergency telephone information line will be established and the DEPARTMENT will respond to requests in no longer than 16 hours. If the complaint is noise-related, the DEPARTMENT will respond within 2 hours and immediately take appropriate action to remedy the complaint, including taking additional noise measurements if deemed necessary.
  
    - d. The PIO will generate a monthly chart showing the type and number of complaints and resolution of complaints. The CITY shall be provided a copy of the monthly chart to be discussed at the regular meetings with the PIO, RE, and CITY.

e. The PIO will establish Web pages for the public to learn about the progress of construction activities, ask questions, and submit comments. The project Website will include detour maps, weekly updates of construction activities, and a link to the CITY Website and 511.org.

d) HOURS OF OPERATION

- i) The construction contract documents shall stipulate that the contractor shall be allowed to work 24-hour days, seven (7) days per week, subject to meeting applicable contract documents and this AGREEMENT, including the PROJECT Noise Criterion, except as specified below.
- ii) The DEPARTMENT agrees to, and the construction contract documents shall stipulate that, tunnel blasting will be prohibited during nighttime hours (7:00 p.m. to 7:00 a.m.)

e) CONSTRUCTION STAGING

The construction contract documents shall include the following requirements, which are applicable if the PROJECT is constructed from the west side:

- i) The DEPARTMENT agrees to, and the construction contract documents shall stipulate that vehicles transporting excavated material (i.e. off-haul trucks) will be prohibited during the hours between 9:00 p.m. to 7:00 a.m. This approach will not be possible during the initial stage of tunneling {when less than 60 meters (200 feet) of tunnel has been excavated} when there is an insufficient length of tunnel to store the excavated material. However, once the tunnel excavation has progressed deeper, the excavated material will be stored inside the tunnel during the hours between 9:00 p.m. and 7:00 a.m., therefore minimizing construction noise.
- ii) The DEPARTMENT agrees to, and the construction contract documents shall stipulate that, heavy project construction vehicles, such as off-haul trucks and equipment, weighing between 4.5 tons and up to and including a weight limit of 16.5 tons (i.e., up to and including Class 7 in the FHWA vehicle classification) in Gross Vehicle Weight (GVW), will be prohibited from



using City streets in lieu of freeways, except when the vehicle is en route to or from the nearest freeway access ramp. Construction vehicles with a GVW above 16.5 tons (Class 8) will be prohibited from using City streets under all circumstances with the following exceptions:

- a. Kay Overcrossing,
  - b. Caldecott Lane and Broadway east of Kay Overcrossing,
  - c. Caldecott Lane and Tunnel Road west of Kay Overcrossing when Tunnel Road (westbound) and Old Tunnel Road (eastbound) ramps to SR24 are closed, and
  - d. When designated detour routes prescribed in the Traffic Management Plan (TMP) are to be used.
- iii) The DEPARTMENT agrees to, and the construction contract documents shall stipulate that, the excavated material off-haul trucks shall take the Old Tunnel Road and Tunnel Road exits from the Eastbound and Westbound SR24, respectively.
- iv) Project-related construction equipment and vehicles, including workers' company and personal vehicles, shall be prohibited from parking on Caldecott Lane, Kay, Tunnel Road, Hiller Drive and Broadway. In addition, storage of PROJECT-related materials and/or equipment shall not be permitted on CITY's streets.
- v) The DEPARTMENT agrees to and the construction contract documents shall require the contractor to develop an offsite parking plan in order to address construction-related parking, consistent with Section 2) e) iv) above for City review pursuant to Section 26, prior to starting any construction activity. The goal of the plan is to eliminate parking on any CITY streets.
- vi) The DEPARTMENT agrees to, and the construction contract documents will stipulate that, the contractor shall shield construction lights as much as possible to minimize light pollution. The contractor shall be required to submit a complete working drawing for construction staging area lighting plan for DEPARTMENT's review and approval. The DEPARTMENT shall make the drawings available for CITY's review and comment within the time parameters set forth in Section 26. The working drawings will include a general exterior lighting system for nighttime construction and support activities that avoids obtrusive lighting into

adjacent private and public property. If complaints regarding light pollution are received during construction, necessary corrective action will be taken within 24 hours.

vii) The DEPARTMENT agrees to, and the construction contract documents shall stipulate that, if the contractor mines the tunnel only from one side, it will be from the east side, with the batch plant located on the same side.

f) **TRANSPORTATION MANAGEMENT PLAN**

A Draft Transportation Management Plan (Draft TMP) has been prepared for the PROJECT. The DEPARTMENT agrees to implement the Draft TMP during the construction phase. The Draft TMP includes motorist information strategies, incident management and construction strategies, as well as a public awareness program and a communication plan. The Draft TMP, dated May 30, 2008 is included as Attachment F to this Agreement. The Parties agree that the TMP is a living document. Hence, the DEPARTMENT agrees that any major changes made to the Draft TMP shall be provided to the CITY for its review and comment within the time parameters set forth in Section 26.

3. **CONSTRUCTION VIBRATION**

a) It is anticipated that blasting may result in vibration high enough to warrant special consideration. The DEPARTMENT agrees to, and the construction documents shall provide for advance notice of blasting operations pursuant to the pertinent Draft TMP provisions, included herein as Attachment F. In addition, the contract shall provide for the following:

i) Before any blasting takes place, the contractor shall identify and survey, with the permission of property owner/occupant, select residential structures located within a 200-meter (670-foot) radius area, where the blasting operation is anticipated. The contractor shall document (prepare notes, take photographs and/or videotape) any existing defects or damages.

ii) In addition to the general notice provided for in the Draft TMP, the contractor shall notify the owners and residents of those residences identified in Section 3 a) j) (i.e. the houses located within 200-meter radius) of the schedule for blasting a minimum of twelve (12) hours prior to commencing any blasting operation.

- iii) During blasting, vibrations shall be monitored at select residential structures, using appropriate accelerometers or geophones that measure the vibration characteristics induced from blasting.
- iv) Measures shall be taken to ensure that vibration does not exceed 0.5 inches/second PPV (peak particle velocity) by using controlled blasting that limits the charge detonated on a particular blast.
- v) The DEPARTMENT shall remediate or compensate for damages to the properties that resulted from the blasting operations as soon as practicable but in no event later than 100 days of submission of accepted claim. However, if the accepted claim's total value does not exceed \$5,000, the DEPARTMENT will compensate within 60 working days. This provision is not intended to, nor does it relieve the DEPARTMENT from any more stringent requirements of the California Tort Claims Act, or its equivalent.

#### 4. NON-CONSTRUCTION NOISE, AIR QUALITY AND TRAFFIC MONITORING

The following studies relating to traffic, pedestrian/bicycle and local street improvements shall be conducted by the DEPARTMENT, or its consultants, as requested by the CITY:

- a) Three months prior to beginning of construction, perform air-quality measurements/analysis to establish references for Particulate Matter (PM) and Carbon Monoxide (CO) at agreed upon locations, specified in Attachment G. Furthermore, approximately six months prior and six months after the 4<sup>th</sup> Bore is fully opened to traffic, additional air quality measurements will be taken. CITY and DEPARTMENT shall mutually agree on methodology of studies.
- b) Three months prior to beginning of construction, perform noise measurements to establish references at agreed upon locations, specified in Attachment H. Furthermore, approximately six months prior and six months after the 4<sup>th</sup> Bore is fully opened to traffic, additional noise measurements will be taken. CITY and DEPARTMENT shall mutually agree on methodology of studies.
- c) Three months prior to beginning of construction, conduct traffic counts to establish references at agreed upon locations, specified in Attachment I. In addition, between the Caldecott Tunnel and I-580 traffic counts will be taken at a location each in the Westbound and Eastbound SR24 directions. Furthermore, approximately six

months prior and six months after the 4<sup>th</sup> Bore is fully opened to traffic, additional traffic count will be taken. CITY and DEPARTMENT shall mutually agree on methodology of studies.

5. GENERAL TOPICS

- a) Parties have discussed and mutually agreed on the proposed conceptual planting for the PROJECT. The proposed landscaping project will commence in 2014, after the completion of the PROJECT. Refer to Attachment J.
- b) Parties have discussed and mutually agreed that removal of trees on the west side of the tunnel is required to clear the construction staging areas. Refer to Attachment K. Removed trees will be replanted, in accordance with the requirements of the resource agencies, as part of the future landscaping project addressed above. The City shall review the Final Landscaping Plan as provided in section 26.
- c) The DEPARTMENT agrees to consider the use of rubberized asphalt or comparable material in future roadway rehabilitation projects on Route 24, west of the Caldecott Tunnel, with the exception of bridge structures. The determination of the need for pavement rehabilitation is based on the DEPARTMENT's annual maintenance inspection and testing to determine the condition of the roadway. The DEPARTMENT's current goal is to use rubberized asphalt in all roadway rehabilitation projects where the use of this material is feasible.
- d) Any future wetland mitigation/creek restoration work that DEPARTMENT'S District 4 is required to or proposes to implement until PROJECT is operational, shall be forwarded to the CITY for its consideration as to whether the CITY may have projects that satisfy the regulatory agency requirements. If the CITY has such projects, and if the regulatory agencies approve of such projects, then DEPARTMENT shall provide CITY funding for such projects
- e) The DEPARTMENT has held an outreach event and made available a list of opportunities to small and local businesses. In addition, the DEPARTMENT will hold future events for the local businesses to network with potential prime contractors. The DEPARTMENT is fully committed to making a good faith effort and working closely with the CITY to meet both the DEPARTMENT's and the CITY's Small Business contracting goals in the PROJECT. DEPARTMENT will periodically provide the CITY with a summary of its outreach activities and information about progress on achieving the goals.

- f) The DEPARTMENT and CITY representatives shall jointly evaluate the City Streets with the contractor two (2) weeks prior to and after the construction of the PROJECT and if deemed necessary, based upon excessive wear, shall repave the City Streets and bring the pavement conditions to pre-construction conditions at PROJECT's costs.
- g) In accordance with the PROJECT requirements for an easement to be acquired from the CITY, the CITY shall grant a permanent easement in the parcel described in Attachment L (the PARCEL), and shall consent to entry by the DEPARTMENT on the PARCEL for purposes of construction of the PROJECT. This PARCEL would otherwise be subject of a Resolution of Necessity obtained by the DEPARTMENT for the PROJECT, and if necessary, an action in eminent domain. CITY agrees that within 60 days of this Agreement, to sign the proposed Right of Way Agreement with DEPARTMENT and all other necessary transfer documents, except the grant of easement which shall be signed by October 31, 2008, accepting the DEPARTMENT'S offer of Fair Market Value for the PARCEL.

## 6. PROBLEM SOLVING PROCESS/DISPUTE RESOLUTION

- a) It is the intent of the Parties that conflicts be resolved as quickly as possible and at the lowest level possible. The DEPARTMENT and the CITY shall each designate senior-level representatives to meet and confer with the PIO, Resident Engineer (RE) and the Contractor as necessary to address specific concerns and/or complaints as they arise. The meeting shall take place within 72 hours after determining that a complaint could not be resolved by the PIO or RE, in no event later than one week after the complaint is received.
- b) If the issues cannot be resolved by the PIO/RE/Contractor and CITY REPRESENTATIVE within five (5) working days, then the issue shall be forwarded to a Senior Management Committee comprising a senior staff person from the DEPARTMENT, ACCMA, CCTA and the Director of the CITY's Community and Economic Development Agency and/or his/her designee.
- c) If the issues cannot be resolved by the Senior Management Committee within five (5) working days, then the issue shall be forwarded to an Executive Steering Committee comprising the chief executives of the DEPARTMENT'S District 04, ACCMA, CCTA and the CITY Administrator and/or his/her designees.

d) If the issues cannot be resolved by the Executive Steering Committee within five (5) working days, then the issue shall be forwarded to a final decision making group comprising the Director of the DEPARTMENT and the Mayor of Oakland.

e) If any of the PARTIES believe the resolution of a recurring or significant problem is time sensitive, then it may designate the issue to be a SIGNIFICANT MATTER, whereby (a) the time responses for each step (b) and (c), shall be shortened to 48 hours; or (b) any Party may immediately elevate the dispute to the Director of the DEPARTMENT and the Mayor of Oakland.

f) In addition to the provisions above, a Mediation of disputes can occur at the written notice/election of one of the PARTIES if the issue is not resolved after good-faith consultation with the Mayor of Oakland and the Director of the Department of Transportation as provided in section above.

1. The written notice invoking mediation shall contain a statement setting forth the nature of the dispute, the key issues to be resolved in the mediation, the amount of money involved, if any, third parties, if any, necessary for resolution, and the remedy sought.

2. The Mediator shall be appointed upon the mutual agreement of the PARTIES. In the event the PARTIES cannot agree on a person to act as the Mediator within five (5) days after the initiation of MEDIATION PROCESS, the each party will provide a list of 10 names of persons with at least five (5) years of experience in resolving disputes. The parties shall select a Mediator from this list, or alternate in striking names from the lists until one name remains. The party initiating the striking of names will be chosen by random chance, such as a flipping of a coin.

3. The fees and expenses of the Mediator shall be shared equally among the PARTIES.

4. The rules and procedures for the mediation shall be those set forth herein plus any supplemental rules and procedures established by the Mediator that are not inconsistent with the rules and procedures set forth herein.

5. All matter submitted to Mediation and the results thereof shall be confidential, except if otherwise prohibited by law, or upon agreement of the parties, or to the extent disclosure is necessary to carry out the terms of any resolution reached in mediation.

6. The Mediator shall schedule an initial meeting with the Parties on a mutually acceptable date within ten (10) days after he or she has been appointed. At this meeting, the Parties shall discuss the dispute with the Mediator in a good faith attempt to resolve the issues and reach a settlement. If the Mediator believes the discussions are productive, the Mediator may continue them for a period of time not to exceed thirty (30) days from the date of the initial meeting. If the dispute has not been resolved through an agreement in principle among the Parties within such thirty (30) day period, the mediation will cease, unless otherwise mutually agreed to by the Parties.

7. Each Party agrees to provide as participants in the discussions one or more representatives with decision making and settlement authority sufficient to resolve the particular dispute, subject to approval of the Party's Governing Body, where required.

8. The Mediator shall have the authority to request any information at any time from any Party as he or she shall deem reasonably necessary for resolution, excluding attorney-client or other privileged information.

(i) Each Party may provide to the Mediator any information the Party deems reasonably necessary for resolution of the dispute, at any time.

(ii) The Mediator shall be authorized to engage in ex parte contacts with any Party or other person with information relevant to dispute at any time until termination of discussions among the Parties and the Mediator. All ex parte contacts shall remain confidential to the Mediator, to the extent permitted by applicable law or unless otherwise agreed to by the parties.

(iii) The mediation shall be held in such time and place within the City of Oakland as may be selected by the Mediator, subject to the consent of the Parties, which consent shall not be unreasonably withheld.

g) The project team will proactively evaluate ways to further reduce noise, light, dust and other project-related impacts by working collaboratively with the CITY staff. The design team will be retained during construction to provide technical advice to the management group, defined in Section 6) b) above.

h) Notwithstanding the time periods detailed above in this Section 6, if a shorter time period is expressly provided elsewhere in this AGREEMENT, the shorter time period shall prevail.

7. **RELEASE AND GENERAL PROVISIONS**

- a) The CITY releases and waives any and all claims, defenses, suits in law or equity, administrative proceedings or administrative action challenging or contesting State's right or authority to plan, design, construct and permanently operate the PROJECT by the DEPARTMENT arising out of or base upon any failure to conform with, or a violation of the provisions and requirements of, the California Environmental Quality Act; the National Environmental Protection Act; the federal Clean Air Act; the California Clean Air Act; and other Federal and State Environmental statutes, law, or regulations ("Environmental and Permitting Provisions"); and state or federal transportation planning requirements including, without limitation, the legal requirements under these statutes, their implementing regulations, and any other claim based upon a claim that the DEPARTMENT has not obtained a necessary permit or approval for the PROJECT, except as provided herein.
  
- b) The CITY agrees that it will not institute in its own name, nor will it join with, finance or otherwise support any suits in law or equity and/or administrative proceedings or administrative actions, or claims challenging the DEPARTMENT's right or authority to plan, design, construct, or operate the PROJECT arising out of or relating to any failure to conform with, or any violation of the provisions of the Environmental and Permitting Provisions, except as provided herein.

The Parties will be released from all obligations under this AGREEMENT if the DEPARTMENT cannot construct the PROJECT, if the PROJECT is not funded, or the contract for construction is not awarded.

- 8. **NO ADMISSION OF LIABILITY OR FAULT:** The Parties acknowledge and agree that the respective performance under this AGREEMENT and the execution of this AGREEMENT are the result of compromise and are entered into in good faith and shall never for any purpose be considered an admission of liability or fault or of responsibility concerning any of the Disputes and no past or present wrongdoing on the part of any of the Parties shall be implied by such payment or execution.
  
- 9. **EFFECTIVE DATE:** This AGREEMENT is effective on the date indicated on page one, as the date the Parties entered into this AGREEMENT.
  
- 10. **CONSTRUCTION OF AGREEMENT:** This AGREEMENT is the product of negotiation and preparation by and among the Parties hereto and their respective attorneys. The Parties therefore expressly



acknowledge and agree that this AGREEMENT shall not be deemed prepared or drafted by one party or another, or its attorneys, and will be construed accordingly.

11. **GOVERNING LAW:** This AGREEMENT shall be interpreted in accordance with and governed in all respects by the laws of the State of California, or other applicable federal statutes.
12. **BINDING EFFECT:** This AGREEMENT shall be binding upon and inure to the benefit of the Parties hereto and their respective heirs, executors, administrators, trustors, trustees, beneficiaries, predecessors, successors, assigns, partners, partnerships, parents, subsidiaries, joint ventures, affiliated and related entities, officers, directors, principals, agents, employees, servants, representatives and all other persons, firms, associations and/or corporations connected with them, including, without limitation, their insurers, sureties and/or attorneys.
13. **ADMISSIBILITY OF AGREEMENT:** The Parties expressly agree that this AGREEMENT does not constitute a protected communication under Evidence Code sections 1152.5 or 1123 and is admissible as evidence in any action to enforce this AGREEMENT and/or in the Action.
14. **SEVERABILITY:** If any phrase, clause, section, subsection, paragraph, subdivision, sentence, term, or provision of this AGREEMENT, or the application of any term or provision of this AGREEMENT to a particular situation, is finally found to be void, invalid, illegal, or unenforceable by a court of competent jurisdiction, then notwithstanding such determination, such term or provision will remain in force and effect to the extent allowed by such ruling and all other terms and provisions of this AGREEMENT or the application of this AGREEMENT to other situations will remain in full force and effect.

Notwithstanding the foregoing, if any material term or provision of this AGREEMENT or the application of such material term or condition to a particular situation is finally found to be void, invalid, illegal, or unenforceable by a court of competent jurisdiction, then the Parties hereto agree to work in good faith and fully cooperate with each other to amend this AGREEMENT to carry out its intent.

15. **LIMITED SUPPLEMENTATION OF ATTACHMENTS:** Based upon the mutual consent of the parties, Attachments to this AGREEMENT may be updated, or modified within 6 months after the effective date of this AGREEMENT. Those attachments modified shall supercede the original attachment and shall be referenced by the same letter, preceded by the designation "Superceded-(date)-Attachment No.). The index to this AGREEMENT shall be amended accordingly. Notices shall be given to the parties indicated below in the notice section for all supplementation of exhibit. Consent to supplement exhibits shall not be unreasonably withheld by the Parties.

16. **COUNTERPARTS:** This AGREEMENT may be executed in counterparts, and in facsimile and/or electronic form, and all so executed, shall constitute an agreement which shall be binding upon all Parties hereto, notwithstanding that the signatures of all Parties' designated representatives do not appear on the same page.
17. **WARRANTY OF AUTHORITY:** Each person who executes this AGREEMENT on behalf of a corporation, partnership, joint venture, unincorporated association, or other entity represents and warrants to each party hereto that he or she has the authority of the shareholders or members of said entity to do so, and agrees to indemnify and hold harmless each other party from any claim that such authority did not exist.
18. **LEGAL REVIEW:** Each party acknowledges that he, she, or it has had an opportunity to have, and did have, this AGREEMENT reviewed by an attorney. This AGREEMENT was drafted by the Parties, and no construction shall be construed against any party.
19. **ENTIRE AGREEMENT:** This AGREEMENT, including all signature pages attached hereto, and Attachments A through L, constitutes the entire understanding between and among the Parties with regard to the Dispute. There are no representations, warranties, agreements, arrangements, undertaking, oral or written, between or among the Parties hereto relating to the subject matter of this AGREEMENT which are not fully expressed. If there is any inconsistency between the body of this AGREEMENT and the Attachments, the body of this AGREEMENT shall govern.
20. **COOPERATION:** The Parties will work together in the spirit of good faith and cooperation to successfully implement this AGREEMENT. To the extent there are any disagreements among the Parties, including alleged violations of the AGREEMENT, the Parties will immediately raise those disagreements. Prior to initiating any legal action, the Parties will meet in good faith to attempt to resolve the disagreement, as provided in Section 6. However, any and all legal actions may be brought only if the preceding dispute resolution process has been completed.
21. **AMENDMENTS:** This AGREEMENT may be amended only by an instrument in writing signed by authorized representatives of the party against whom enforcement is sought.
22. **WAIVER:** No failure by any party to insist on the strict performance of any obligation of another party under this AGREEMENT or to exercise any right, power, or remedy arising out of a breach hereof, will constitute a waiver of such breach or of the enforcing party's right to demand strict compliance with any terms of this AGREEMENT. No acts or admissions by any party or its employees, agents or contractors, will waive any or all of the enforcing party's rights under this AGREEMENT. The Parties do not waive any of their defenses, rights, immunities, or privileges under law by this AGREEMENT, except as expressly stated in the AGREEMENT.

23. **HEADINGS:** The headings in this AGREEMENT are for reference and convenience of the parties and do not represent substantive provisions of this AGREEMENT.
24. **NOTICES:** Any notice given pursuant to this AGREEMENT will be given in writing, via facsimile or email, and concurrently by prepaid U.S. certified or registered postage, addressed to recipient as follows:

**City of Oakland:**

Director, Community and Economic Development Agency  
City of Oakland  
250 Frank H. Ogawa Plaza, Suite 3315  
Oakland, CA 94612  
Attention: Dan Lindheim  
Phone: (510) 238-6840  
FAX: (510) 238-6538  
Email: [DLindheim@oaklandnet.com](mailto:DLindheim@oaklandnet.com)

Office of the Oakland City Attorney  
One Frank H. Ogawa Plaza, 6<sup>th</sup> Floor  
Oakland, CA 94612  
Attention: Mark P. Wald  
Phone: (510) 238-3540  
FAX: (510) 238-6500  
Email: [mpwald@oaklandcityattorney.org](mailto:mpwald@oaklandcityattorney.org)

**California Department of Transportation:**

California Department of Transportation  
District 4  
111 Grand Avenue  
Oakland, CA 94612  
Attention: Cristina Ferraz, Project Manager  
Phone: (510) 286-3890  
FAX: (510) 286-5559  
Email: [Cristina\\_Ferraz@dot.ca.gov](mailto:Cristina_Ferraz@dot.ca.gov)

California Department of Transportation  
Legal Division  
595 Market Street, Suite 1700  
San Francisco, CA 94105  
Attention: David Gossage, Deputy Chief Counsel  
Phone: (415) 904-5700  
FAX: (415) 904-2333  
Email: [David\\_Gossage@dot.ca.gov](mailto:David_Gossage@dot.ca.gov)

Any party to this AGREEMENT may change the name or address of representatives for purpose of this Notice section by providing written notice to all other parties ten (10) business days before the change is effective.

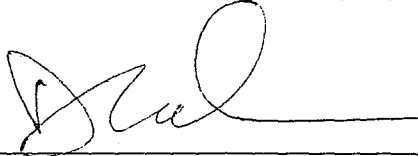
25. **RECITALS:** The parties agree that the Recitals to this AGREEMENT are true and correct, and comprise an integral part of the AGREEMENT.
26. **CITY'S REVIEW AND APPROVAL.** Whenever CITY is provided rights to review certain plans, reports or documents (hereafter "documents") pursuant to this settlement AGREEMENT, the following procedures shall govern:

CITY shall have ten (10) working days after receiving the written document to provide written comments or approve such documents, which approval shall not be unreasonably withheld. Failure to either approve the documents or provide written comments by the specified date means the document is deemed approved. Department shall incorporate CITY'S comments into a revised document and provide CITY ten (10) working days for review and comment on the revised document, or to approve the revised document, which approval shall not be unreasonably withheld. If CITY and DEPARTMENT cannot agree on the final document, then the Dispute Resolution Process contained in Section 6 shall be followed.

Signatures:

\_\_\_\_\_

Date:



\_\_\_\_\_  
Name: Dan Lindheim  
Title: Acting City Administrator  
City of Oakland

8-4-08  
\_\_\_\_\_

Date:



\_\_\_\_\_  
Name: Bijah Sartipi  
Title: District Director, District 4  
California Department of Transportation

Approved as to form:

8/4/08  
\_\_\_\_\_

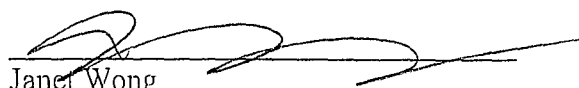
Date:



\_\_\_\_\_  
Mark P. Wald  
Attorney for the City of Oakland

\_\_\_\_\_

Date:



\_\_\_\_\_  
Janet Wong  
Attorney for the California Dept. of  
Transportation