

RECORDING REQUESTED BY:

CITY OF OAKLAND

WHEN RECORDED RETURN TO:

City of Oakland
Department of Transportation
250 Frank H. Ogawa Plaza, Suite 4314
Oakland, California 94612
Attn: Director

EXEMPT FROM RECORDING FEES PER GOVERNMENT CODE §§6103, 27383

APN: 002-0097-040

SUBSURFACE TRANSFORMER ROOM MAINTENANCE AGREEMENT
(525 12th Street)

THIS SUBSURFACE TRANSFORMER ROOM MAINTENANCE AGREEMENT (525 12th Street) (this “**Agreement**”), dated as of February 7, 2023 (“**Effective Date**”), is entered into by and between the CITY OF OAKLAND, a municipal corporation (“**City**”), and SAMUEL MERRITT UNIVERSITY, a California nonprofit public benefit corporation (“**SMU**”) (each individually a “**Party**” and collectively, the “**Parties**”).

RECITALS

This Agreement is entered into upon the basis of the following facts, understandings, and intentions of the City and SMU.

A. Pursuant and subject to the provisions of that certain Ground Lease (T5-T6) by and between City, as landlord, and Samuel Merritt University, a California nonprofit public benefit corporation, as tenant, dated as of November 14, 2022, as disclosed by the Ground Lease dated November 14, 2022, and for the period on the ninety-ninth (99th) anniversary of the date that the Memorandum of Lease is recorded in the official Records, or earlier terminated in accordance with this Lease, Samuel Merritt University operates certain real property on behalf of the City, located in the City of Oakland, including the property commonly known as 525 12th Street or T-5/T-6, as more particularly described on **Exhibit A** attached hereto (the “**Property**”).

B. The Commencement Date of the Ground Lease is the date that the Memorandum of Lease is recorded in the Official Records and the Ground Lease will expire on the 99th anniversary of the Commencement Date, unless earlier terminated in accord with section 9.6 of the Ground Lease. The terms and conditions of the Ground Lease agreement are hereby incorporated by reference herein.

C. The Property is implementing a subsurface transformer room and structural elements to provide electric utility to the University

D. The transformer room encroaches into the public right-of-way (the “**ROW**”) adjacent to the Property on 12th Street within right-of-way depicted on **Exhibit B** attached hereto, pursuant to, and as more particularly described in plans and specifications prepared by, or on behalf of, SMU (collectively,

the “**Plans**”) pursuant to the City Planning Department’s record numbered PLN21249 (the “**Permit**”) on file with the City.

E. SMU recognizes that the City’s approval of the Permit is based on SMU’s commitment to the long-term maintenance, repair, care, and, if and when necessary, replacement of the subsurface transformer room and structural elements within the public ROW (the “**Improvement**”), and that the Permit would not have been approved without the assurance that this Agreement would be executed by SMU for recordation in the Official Records prior to any acceptance of public improvements by the City.

F. The City and SMU desire to enter into an agreement pursuant to which SMU will maintain the transformer room and structural elements within the public ROW.

NOW, THEREFORE, in consideration of the mutual terms, covenants, conditions, and promises set forth herein, the City and SMU hereby agree as follows:

1. Purpose. The purpose of this Agreement is to memorialize SMU’s agreement that the maintenance, periodic inspection, repair, safe operation and, if and when necessary, replacement of the subsurface transformer room and structural elements (collectively, “**Maintenance Services**”) by SMU shall be in accordance with the standards, including the Maintenance Standards (as defined below), set forth herein and in accordance with this Agreement.

2. Improvement as a Benefit. SMU agrees that the Improvement will materially benefit City Center and that SMU’s agreement to perform the Maintenance Services in accordance with this Agreement is necessary for approval of the Permit.

3. Maintenance Obligations. SMU, at its sole cost and expense, shall maintain, safely operate, periodically inspect, repair, and, if and when necessary, replace the Improvement, as well as perform all necessary service on maintenance equipment, in order to maintain the attractive appearance, condition, and safety of any and all structures, and efficient operation of the Improvement, in accordance with the Maintenance Standards and industry and City standards applicable to similar Improvements.

4. Maintenance Standards. SMU shall comply, or cause compliance of its maintenance staff, contractors, and subcontractors, with the following standards (collectively, “**Maintenance Standards**”) in connection with the required maintenance of the Improvement.

a. The Improvement shall be maintained in compliance with the Plans and Permit, in good condition.

b. Maintenance shall include, but not be limited to: repairing any damage to structural sidewalk, ensuring the City’s ROW shall remain otherwise unobstructed and access unimpeded, cleaning surfaces to maintain an attractive appearance, providing safeguards for public safety when the basement vault doors are open.

c. All maintenance work shall conform to all applicable federal and state Occupation Safety and Health Act standards and regulations for the performance of maintenance, and shall be in accordance with Sections 4-b Operating Agreement, which provisions are incorporated herein by this reference as those fully-set forth herein.

d. Any and all chemicals or unhealthful substances used in and during maintenance shall be applied in strict accordance with all government requirements. As necessary, precautionary measures shall be employed recognizing that all areas are open to public access.

e. Operating of the security gate (including storage of gate during opening hours) shall be performed safely and recognizing that all areas are open to public access.

5. Street Maintenance. Nothing contained herein shall limit the City's ability to maintain City Center in accordance with its standard procedures.

6. Access to the ROW. The City hereby grants permission to SMU, and/or its authorized agents, employees or contractors, to enter upon the ROW Area at reasonable times and in a reasonable manner to perform Maintenance Services to maintain the Improvement.

7. Permits and Approvals. To the extent that performance of the Maintenance Services requires permits or governmental approvals, SMU shall, at its cost and expense, obtain such permits and approvals.

8. Insurance. Throughout the term of this Agreement, SMU shall obtain and maintain insurance required pursuant to the Operating Agreement, which extends beyond the Premises to include the ROW Area, and deliver to the City, at no cost to the City, certificate(s) evidencing such coverage.

9. Term. This Agreement shall commence on the Effective Date and shall continue until the expiration of the Term of the Operating Agreement, as such Term may be extended from time to time, unless terminated by the City in its sole discretion or by mutual agreement of the Parties.

10. Indemnification. SMU shall indemnify, defend and hold the City, and its Councilmembers, officers, agents, contractors, and employees (the "**Indemnified Parties**") harmless from liens, claims, demands, actions, cause of action, obligations, liabilities, damages, losses, costs, and expenses (including reasonable attorneys' fees) (individually, "**Claim**" and collectively, "**Claims**"), which may arise from or in any manner relate to any work performed, or services provided, under this Agreement by SMU, or SMU's contractors, subcontractors agents, or employees, including, but not limited to, the performance of Maintenance Services. The foregoing indemnity shall apply regardless of whether or not the City has prepared, supplied, or approved plans and/or specifications for the Improvements and regardless whether any insurance required under this Agreement is applicable to any Claim or Claims.

11. Default. The failure to maintain the Improvements in the manner set forth in this Agreement shall constitute an event of default. Upon such event of default, the City shall provide written notice to SMU. Upon receipt of the written notice, SMU shall have thirty (30) calendar days to remedy such event of default (or such longer period of time as may reasonably be required, provided that SMU shall commence to remedy such default within the thirty (30) calendar day period and thereafter diligently prosecute such remedy to completion). If SMU fails to remedy the event of default within the prescribed time period, the City shall have the right to do all work necessary to remedy the event of default and charge SMU actual costs incurred by the City for such work. The City may bring legal action to collect the sums due as the result of expending public monies to maintain, repair, and if and when necessary, replace any Improvements that are the responsibility of SMU as provided herein. SMU acknowledges and agrees that the City may also pursue any and all other remedies available at law or equity in the event of a breach of SMU's obligations and agreements set forth herein.

12. Assignment by City. The City shall have the right at its option to assign its rights and obligations under this Agreement to a municipal services district or other public agency without the consent of SMU.

13. Runs with the Land; Binding on Successors. This Agreement pertains to, and runs with the Property and any leasehold interest therein, including the Operating Agreement, in perpetuity, and shall be recorded against the Property. This Agreement binds the assigns and successors in interest of SMU. The City and its successors and assigns, in the event of any breach of this Agreement shall have the right to exercise all of the rights and remedies, and to maintain any actions at law or suits in equity or other proper proceedings against SMU or its permitted successors and assigns to enforce the curing of such breach.

14. Assignment by SMU. SMU may assign its obligations under this Agreement to a successor in interest only with prior written approval of the City. In connection with any such assignment, SMU and its assignee shall execute and deliver to the City a written assignment and assumption agreement pursuant to which the assignee shall assume all obligations of SMU hereunder, and in a form acceptable to the City Attorney (the “**Assignment and Assumption Agreement**”). Upon the City’s acceptance of the Assignment and Assumption Agreement between SMU and any assignee under this Agreement, SMU shall be relieved of the performance of any further duties or obligations under this Agreement arising after such Assignment and SMU shall be released from any further liability under this Agreement.

15. Notices. Any notice relating to this Agreement shall be given in writing and shall be deemed sufficiently given and served for all purposes when delivered personally or by generally recognized overnight courier service, or five (5) calendar days after deposit in the United States mail, certified or registered, return receipt requested, with postage prepaid, addressed as follows:

To SMU: Samuel Merritt University
3100 Telegraph Ave,
Oakland, CA 94609
Attn: President

After completion of construction/occupancy: _____

To City: City of Oakland
Economic & Work Force Development Department
Public/Private Partnership Division
250 Frank H. Ogawa Plaza, 5th Floor
Oakland, CA 94612
Attn: Director

With copy to: Office of the City Attorney
One Frank H. Ogawa Plaza, 6th Floor
Oakland, CA 94612
Attn: Supervising City Attorney for Real Estate

16. Miscellaneous.

a. Modification; Waiver. Any modification or amendment to this Agreement shall be of no force and effect unless it is in writing and signed by the Parties. No waiver of any of the provisions of this Agreement shall be deemed, or shall constitute, a waiver of any other provision, whether or not similar. No waiver or consent shall constitute a continuing waiver or consent to commit either party to provide a waiver in the future except to the extent specifically set forth in writing. No waiver shall be binding unless executed in writing by the Party making the waiver.

b. Section Headings. Section headings as used herein are for convenience only and shall not be deemed to be a part of such section and shall not be construed to change the meaning hereof.

c. Governing Law. The interpretation, validity, and enforcement of this Agreement shall be governed by and interpreted in accordance with the laws of the State of California. Any action, cause of action, lawsuit, claim, or legal proceeding of any kind related to or arising under this Agreement shall be filed and heard in a court of competent jurisdiction in the County of Alameda.

d. No Limitations on City's Police (or Authorized) Powers. Nothing herein is intended to, nor does, limit the City's police power, nor limit the ability of the City, and/or its authorized agents, employees, contractors, officers, officials, representatives, volunteers, and/or other third-party vendors from taking any and all actions authorized under federal, state, or local law.

e. Exhibits. Any and all exhibits and schedules attached hereto or to be attached hereto are hereby incorporated and made a part of this Agreement by this reference.

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

g. Authority. Each person executing this Agreement on behalf of a party represents and warrants that such person is duly and validly authorized to do so on behalf of the entity it purports to bind and if such party is a partnership, corporation, or trustee, that such partnership, corporation, or trustee has full right and authority to enter into this Agreement and perform all of its obligations hereunder.

h. No Agency Relationship. Neither SMU, nor any of SMU's agents, contractors, or subcontractors are, or shall be, considered to be agents of the City in connection with the performance of any of SMU's obligations under this Agreement.

i. Attorney's Fees and Costs. Either Party may bring a lawsuit to enforce or require performance of the terms of this Agreement, and the prevailing Party in such suit or proceeding shall be entitled to recover from the other Party its reasonable costs and expenses, including attorneys' fees.

j. Time of Essence. Time is of the essence of each and every provision of this Agreement.

k. Complete Agreement. This Agreement represents the complete understandings and agreements of the Parties and no prior oral or written understandings are in force and effect.

l. No Third Party Beneficiaries. This Agreement is not intended to, and does not, create any private rights of action to third parties; no third parties are the intended beneficiaries of this Agreement.

m. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.

[Remainder of page intentionally blank; signatures on following page]

IN WITNESS WHEREOF, the City and SMU have executed this Agreement as of the Effective Date.

CITY:

City of Oakland,
a municipal corporation

By: _____
Name: _____
Title: _____

Approved as to form and legality:

By: _____
Name: _____
Title: _____

SMU:

Samuel Merritt University,
a California nonprofit public benefit corporation

By: _____
Name: _____
Title: _____

IN WITNESS WHEREOF, the City and SMU have executed this Agreement as of the Effective Date.

CITY:

City of Oakland,
a municipal corporation

By: _____
Name: _____
Title: _____

Approved as to form and legality:

By: _____
Name: _____
Title: _____

SMU:

Samuel Merritt University,
a California nonprofit public benefit corporation

By: _____
Name: _____
Title: _____

ACKNOWLEDGEMENT

<p>A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.</p>	
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STATE OF CALIFORNIA

COUNTY OF _____

On this _____ day of _____, 2023, before me, _____, Notary Public, personally appeared _____ who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: _____

(Seal)

ACKNOWLEDGEMENT

<p>A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.</p>	
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STATE OF CALIFORNIA

COUNTY OF _____

On this _____ day of _____, 2023, before me, _____, Notary Public, personally appeared _____ who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: _____

(Seal)

EXHIBIT A

Property Legal Description

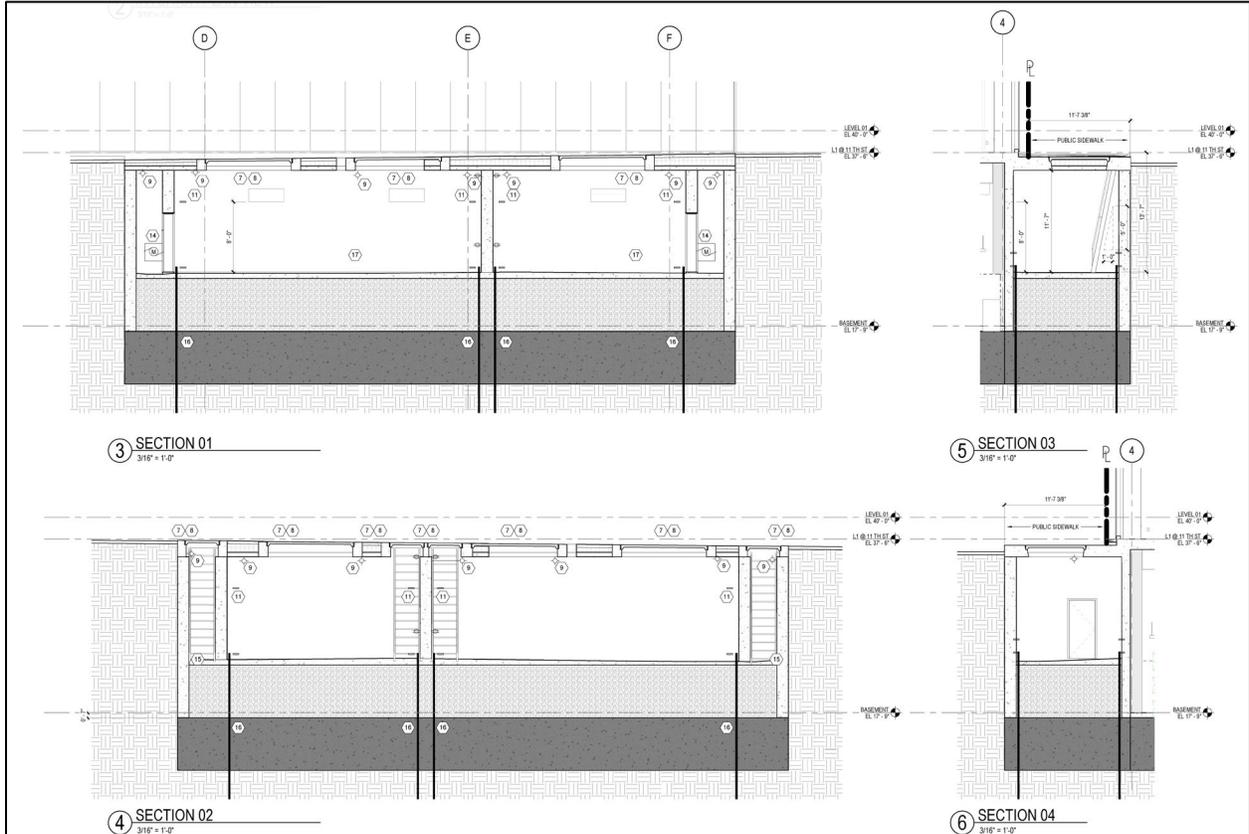
Real Property in the City of Oakland, County of Alameda, State of California, described as follows:

LOT 2, AS SHOWN ON PARCEL MAP 10430, FILED MARCH 06, 2018 IN MAP BOOK 338, PAGES 65-67, ALAMEDA COUNTY RECORDS.

EXCEPTING THEREFROM THOSE PORTIONS OF THE ELEVATIONS BELONGING TO STG CITY SQUARE, LLC, A DELAWARE LIMITED LIABILITY COMPANY AS SET FORTH IN PLAT ATTACHED TO GRANT DEED RECORDED JANUARY 25, 2018, AS INSTRUMENT NO. 2018014706 OF OFFICIAL RECORDS.

APN: 002-0097-039 and 002-0097-040

EXHIBIT B (continued)



A more legible copy is available at the Office of the Director, DOT, City of Oakland, 250 Frank H. Ogawa Plaza, 4th Floor.

EXHIBIT C

Design and Permitting Requirements for Transformer/Vault through Pacific Gas & Electric

1. The permittee shall submit PG&E Engineering plan, stamped and approved by PG&E to OakDOT Engineering Services.
2. The permittee shall submit a letter from PG&E authorizing the applicant and/or contractor to excavate and install a transformer vault on PG&E's behalf.

EXHIBIT D

Oakland City Council Resolution XXXXX C.M.S. (page 1 reference)

[Attached]