

AGREEMENT BETWEEN THE CITY OF SAN FRANCISCO AND THE TRUST FOR PUBLIC LAND REGARDING THE PARK ACTIVATION AT BUCHANAN MALL

This Agreement for Design and Construction of a Park Activation at Buchanan Mall ("**Agreement**"), is entered as of July 16, 2015, by and between The Trust for Public Land ("**TPL**"), a California nonprofit public benefit corporation, and the City and County of San Francisco ("**City**") acting through its Recreation and Park Department ("**RPD**"), collectively referred to herein as the "**Parties**."

RECITALS

A. Project Site. The City, through RPD, operates and maintains the Buchanan Mall which includes five consecutive blocks of green space and asphalt paths surrounded by affordable housing and community centers and is located in the City and County of San Francisco, CA between Grove and Eddy Street, described on Exhibit A attached hereto and commonly referred to as "Buchanan Mall Park" ("**Project Site**"). The Project Site is under the jurisdiction of the Recreation and Park Commission. See **Exhibit A – Project Site**.

B. Funding. TPL will be responsible for the design and construction of capital improvements that will consist of either garden planting or placemaking improvements with the intent to activate the Project Site for use by the community as a park, open space, and community gathering place (the "**Project**" or "**Activation**") at the Project Site at no cost to the City. TPL will provide and administer the funds which have been provided to TPL by a foundation (the "**Grantor**") for the purpose of completing this Activation. These funds shall be utilized by TPL to complete all capital improvements on the Project Site including the costs of all services and consultant fees, permit fees and construction costs associated with the Activation design and construction. The total cost of the Activation shall not exceed \$187,600 which shall be a grant in place to the City.

C. Timeline. TPL and RPD acknowledge that time is of essence to the Grantor, who desires the project to be built by September 30, 2015 according to the Timeline attached as **Exhibit B**. The parties may modify the Timeline only by written agreement. If the Project is significantly delayed before construction starts, TPL and RPD understand that the Grantor may terminate the Pledge Agreement and TPL may terminate this Agreement pursuant to Section 14(a).

D. Grant Approval. On July 16, 2015 by Resolution No. 1507-006 the San Francisco Recreation and Park Commission ("**Commission**") approved this Agreement, and recommended that the Board of Supervisors accept from TPL (1) an in-kind grant of design and construction services, fees, and costs currently valued at approximately \$187,600, (the "**Grant**"). City's acceptance of the Grant is conditioned upon approval from the Board of Supervisors.

E. Maintenance and Community Engagement. As an Activation effort, this Project is intended to foster stewardship by nearby community members. Additional goals of this Project are to encourage residents to actively participate in voluntary upkeep of the Project elements, encourage regular communication with RPD, and general stewardship of the Park.

NOW, THEREFORE, subject to and effective upon the execution of this Agreement by both Parties (the "**Effective Date**"), the Parties agree as follows:

1. Term. This Agreement shall become effective upon approval by the Commission and full execution by the Parties. Except with respect to any provisions of this Agreement which expressly survive the Acceptance Date (as defined in Section 12) or the earlier termination of this Agreement in accordance with Section 14, this Agreement shall expire on the earlier of the Acceptance Date or the earlier termination of this Agreement.

2. Permission to Enter. RPD confers on TPL a revocable, personal, unassignable, non-exclusive and non-possessory privilege to enter upon and use the Project Site owned by City for the limited purpose of design and construction of improvements to enhance or activate the Project Site for use by the community as a park, open space, and community gathering place subject to the terms, conditions and restrictions set forth below. This Agreement gives TPL a license only, revocable at any time at the will of City, and notwithstanding anything to the contrary herein, this Agreement does not constitute a grant by City of any ownership, leasehold, easement or other property interest or estate whatsoever in the Project Site, or any portion thereof.

3. Design and Construction. TPL, at its own expense and at no cost to the City, will develop a Concept Plan, which shall be subject to approval by the Recreation and Parks Commission ("Commission"). Thereafter TPL, at its own expense and at no cost to the City, shall provide all labor, materials, and project and construction management services necessary for the completion of design and the construction of the Project in accordance with the approved Concept Plan and the Timeline outlined in Exhibit B. Such services shall include all necessary design services leading to fully permitted Plans and Specifications ("**Plans and Specifications**") for the Project, and construction management services necessary to build the Project. TPL shall be responsible for fully incorporating comments from RPD staff in the Plans and Specifications and shall be responsible for ensuring that the Plans and Specifications comply with all applicable laws, statutes, ordinances and governmental rules and regulations, including, without limitation, all federal and state laws governing disability access. TPL shall be responsible for obtaining, at its own expense and at no cost to the City, all permits and governmental approvals necessary to complete the Project. TPL shall select, hire and manage a licensed contractor or artist (the "**TPL Contractor**") of its choice to perform all services relating to site preparation and construction of the Project, subject to all applicable requirements of this Agreement. TPL shall certify to RPD that it has in place all funds necessary to complete construction of the Project, and RPD shall have no obligation to fund any shortfall in funding for construction of the Improvements.

4. TPL Payments. TPL shall provide evidence satisfactory to RPD of TPL Contractor's acknowledgement that RPD is not a party to any design or construction contract and has no obligation or liability thereunder. In connection therewith, TPL shall provide or cause to be provided to the City fully executed waivers and releases from the TPL Contractor, and all other contractors and subcontractors hired by TPL, waiving any rights of such parties to make claims against City and releasing City from all liability to such parties in connection with performance of any obligations contemplated in the construction contracts.

5. Intentionally Deleted.

6. Intentionally Deleted.

7. Construction Inspections. RPD and TPL will conduct on-site construction inspections and approvals, per a pre-determined schedule of critical work, to ensure that construction of the Improvements conforms to the Plans and Specifications. Upon substantial completion, TPL will prepare a punch list in coordination with RPD, which will need to be executed prior to Final Acceptance pursuant to Section 12.

8. Insurance.

(a) Without limiting the indemnification required by this Agreement, TPL shall maintain and cause all contractors hired by TPL to maintain the following insurance at all times during the Term of this Agreement:

(1) Worker's Compensation, with Employer's Liability limits not less than \$1,000,000 each accident; and

(2) Comprehensive General Liability Insurance with limits not less than \$1,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage; and

(3) Commercial Automobile Liability Insurance with limits not less than \$1,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Personal Injury, Products and Completed Operations; and

(4) Professional Liability Insurance with limits not less than \$1,000,000 each claim with respect to negligent acts and errors and omissions arising from performance of services under this Agreement.

(b) Insurance companies shall be legally authorized to engage in the business of furnishing insurance in the State of California. All insurance companies shall have a current A.M. Best Rating not less than "A-, VIII" and shall be subject to the prior approval of the City.

(c) Comprehensive General Liability and Commercial Automobile Liability Insurance policies shall be endorsed to provide the following:

(1) Name as Additional Insured the City and County of San Francisco, its Officers, Agents and Employees.

(2) That such policies are primary insurance to any other insurance available to the Additional Insured, with respect to any claims arising out of the Contract, and that insurance applies separately to each insured against whom claim is made or suit is brought.

(d) All policies shall provide thirty days' advance written notice to the City of reduction or nonrenewal of coverages or cancellation of coverages for any reason. Notwithstanding anything to the contrary in this Agreement, upon the lapse of any required insurance coverage, RPD shall have the right to terminate this Agreement upon Seven (7) days' prior written notice to TPL. TPL shall be responsible, at its expense, for separately insuring TPL's personal property.

(e) Should any of the coverage be provided under a claims-made form, the coverage shall be maintained continuously throughout the term of this Agreement, and

without lapse, for a period of three years beyond the expiration of this Agreement, to the effect that, should occurrences during the contract term give rise to claims made after expiration of the Agreement, such claims shall be covered by such claims-made policies.

(f) Should any of the required insurance be provided under a form of coverage that includes a general annual aggregate limit or provides that claims investigation or legal defense costs be included in such general annual aggregate limit, such general annual aggregate limit shall be double the occurrence or claims limits specified above.

(g) Should any required insurance lapse during the term of this Agreement, requests for payments originating after such lapse shall not be processed until the City receives satisfactory evidence of reinstated coverage as required by this Agreement, effective as of the lapse date. If insurance is not reinstated, the City may, at its sole option, terminate this Agreement effective on the date of such lapse of insurance.

(h) Before each contractor commences any operations under this Agreement, TPL or the contractor must furnish to City certificates of insurance and additional insured policy endorsements, in form and with insurers satisfactory to City, evidencing all coverages set forth above, and shall furnish complete copies of policies promptly upon City request.

9. Indemnification. The Parties' obligations under this Section shall survive the expiration or other termination of this Agreement. Each party agrees to waive claims against and indemnify the other party as follows:

(a) TPL agrees to defend, indemnify and hold harmless the City, its officers, employees and agents ("**City Indemnitees**") from any and all acts, claims, omissions, liabilities and losses asserted by any third party arising out of acts or omissions of TPL, its officers, directors, employees, agents, contractors or subcontractors in connection with this Agreement, except those arising by reason of the sole negligence of the City Indemnitees.

(b) City agrees to defend, indemnify and hold harmless TPL, its officers, directors, employees and agents ("**TPL Indemnitees**"), from any and all acts, claims, omissions, liabilities and losses asserted by any third party arising out of acts or omissions of City, its officers, employees and agents in connection with this Agreement, except those arising by reason of the sole negligence of TPL Indemnitees.

(c) In the event of concurrent negligence of City Indemnitees and TPL Indemnitees, the liability for any and all claims for injuries or damages to persons and/or property shall be apportioned under the California theory of comparative negligence as presently established or as may hereafter be modified.

10. Intentionally Deleted.

11. Intentionally Deleted.

12. Final Acceptance. Upon notice from TPL that the Improvements undertaken by TPL are complete, in accordance with the Plans and Specifications, and that TPL has obtained all necessary regulatory approvals, and upon submission to the City of the waivers and releases and assignments required under Sections 4 and 11 of this Agreement, RPD shall, within five (5) working days of such notice, perform a final inspection. Contingent on conducting this inspection, RPD must receive as-built

drawings that are marked-up on hard copy of Plans and Specifications, operating manuals, all warranties and any additional requirements as outlined in the Plans and Specifications. Upon RPD's inspection and decision to accept the work, RPD will, no later than seven (7) days from such decision to accept the work prepare a letter of final acceptance (the "**Acceptance Letter**") addressed to TPL, which shall be effective on the date of its issuance ("**Acceptance Date**"). Upon receipt of the Acceptance Letter, TPL shall immediately remove all of its property from the Project Site and shall repair, at TPL's cost, any damage to the Project Site caused by such removal or caused by TPL's construction activities in the Project Site as permitted hereunder, and shall with the exception of the land underneath the Improvements and subject to the Plans and Specifications, restore the Project Site to its condition prior to construction of the Improvements undertaken by TPL. Prior to delivery of the Acceptance Letter to TPL, the Improvements shall not be open to the public. If the Improvements are nonetheless opened to the public by the City before the Acceptance Date, that action shall be deemed to be the equivalent for all purposes of the City providing TPL with an Acceptance Letter.

13. Delivery of Improvements. TPL shall deliver the Improvements undertaken by TPL free of all liens, easements or potential claims and shall provide RPD fully executed waivers and releases from all contractors and subcontractors hired by TPL of all claims against the City, its employees and agents. Upon delivery of the Improvements undertaken by TPL, TPL shall assign to the City any warranties or guaranties required by its contracts with the contractors and subcontractors hired by TPL. TPL shall also assign to the City the right to any available remedies for latent defects.

14. Early Termination and Notices.

(a) Either party may terminate this agreement upon 10 days written notice at any time before TPL has awarded and approved a construction contract to build the approved Project at the Project Site. In the event of such a termination, the City shall have no responsibility to TPL with respect to any costs TPL may have incurred as contemplated by the terms of this Agreement.

(b) After the award and approval of a construction contract as contemplated by this Agreement, TPL may terminate this Agreement only due to the City's failure to comply with any term of this Agreement (including all exhibits hereto) 30 days after having given the City notice of such failure, unless the City cures such failure to the TPL reasonable satisfaction within such 30-day period, or a different reasonable timeframe mutually agreed upon by the Parties in writing.

(c) After the award and approval of a construction contract as contemplated by this Agreement, The City may terminate this Agreement due to TPL failure to comply with any term of this Agreement (including all exhibits hereto) 30 days after having given TPL notice of such failure, unless TPL cures such failure to the City's reasonable satisfaction within such 30-day period, or a different reasonable timeframe mutually agreed upon by the Parties in writing.

(d) Notice of termination, and any other notices under this Agreement, shall be provided to each Party at the addresses below. The Parties addresses for purposes of such notices are:

TRUST FOR PUBLIC LAND	SF RECREATION AND PARK DEPARTMENT
Philip Vitale, Project Manager The Trust for Public Land 101 Montgomery Street – Suite 1100 San Francisco, CA 94104	Philip A. Ginsburg, General Manager SF Recreation & Park Dep't 501 Stanyan Street San Francisco, CA 94117
Gilman Miller, Senior Counsel The Trust for Public Land 101 Montgomery Street – Suite 1100 San Francisco, CA 94104	Dawn Kamalanathan, Director of Capital and Planning SF Recreation & Park Dep't 501 Stanyan Street San Francisco, CA 94117
Tim Ahern, Media Director The Trust for Public Land 101 Montgomery Street – Suite 1100 San Francisco, CA 94104	Office of the City Attorney, General Government Team RPD General Counsel City and County of San Francisco City Hall, Room 234 1 Dr. Carlton B. Goodlett Place San Francisco, CA 94102

15. Maintenance. After Final Acceptance of the Project, RPD will, at a minimum be responsible for maintenance of the Project Site in accordance with the most recently adopted "Prop C" park maintenance standards, or any successor standards that may be adopted by RPD. After Final Acceptance of the Project, the City may, at its sole option and without notice to TPL, alter, or remove any and all Project Improvements installed or placed on or about the Project Site.

16. No Tobacco Advertising. The Parties acknowledge and agree that no advertising of cigarettes or tobacco products is allowed on any real property owned by or under the control of the City, including the property, which is the subject of this Agreement. This prohibition includes the placement of the name of a company producing, selling or distributing cigarettes or tobacco products or the name of any cigarette or tobacco product in any promotion of any event or product. This prohibition does not apply to any advertisement sponsored by a state, local or nonprofit entity designed to communicate the health hazards of cigarettes and tobacco products or to encourage people not to smoke or to stop smoking.

17. Public Relations. RPD and TPL shall use good faith efforts to cooperate on matters of public relations and media responses related to the Project. The Parties shall also use good faith efforts to cooperate with any inquiry by the other Party or by the public in regard to this Agreement. This Agreement, and any report or memorandum between the Parties, shall be subject to the disclosure requirements of the City's Sunshine Ordinance and the California Public Records Act.

Any response to an inquiry by a news or community organization to RPD or TPL in reference to the Project shall include a recommendation to contact the other Party. Neither TPL nor RPD shall issue a press release in regard to this Agreement without providing prior notice to the other party. To facilitate the execution of this Section, the

City have each designated one person as a spokesperson with respect to this Agreement. All media contacts to RPD will be directed to the Director of Policy and Public Affairs at the address provided for RPD in Section 14. All media contacts to TPL will be directed to Tim Ahern at the address provided for TPL in Section 14.

At a time and in a format to be determined by the Parties, RPD and TPL may hold at least one joint public event, such as a ground breaking ceremony or ribbon cutting ceremony. At any such event, the Parties shall participate on an equal basis. If RPD or TPL holds any other event solely or largely dedicated to the Project, the Parties shall, as time permits, notify the other Party and allow that Party to participate on an equal basis. Materials and collateral for the Project shall be approved by RPD and TPL.

Nothing in this Agreement shall prohibit TPL or RPD from discussing this Agreement in response to inquiries from the public or the press.

18. Miscellaneous.

(a) The Parties may enter into additions, amendments, or other modifications to this Agreement (including, without limitation, preparation of any or all of its exhibits) that the Recreation and Park Department's General Manager, in consultation with the City Attorney, determines are in the best interest of the City, do not materially decrease the benefits of the Agreement to the City, do not materially increase the obligations or liabilities of the City, do not authorize the performance of any activities without pursuing all required regulatory and environmental review and approvals, and are necessary or advisable to complete the transactions which the Agreement contemplates and effectuate the purpose and intent of this Agreement. Any other additions, amendments, or modifications require approval from the Recreation and Park Commission.

(b) This Agreement (including the Exhibits hereto, which are incorporated herein by reference) contains the entire understanding between the Parties as of the date of this Agreement, and all prior written or oral negotiations, discussions, understandings and agreements are merged herein.

(c) Except as expressly provided to the contrary, all approvals, consents and determinations to be made by the City hereunder may be made by the General Manager of RPD or his or her designee in his or her sole and absolute discretion.

(d) RPD reserves the right to remove or alter any or all Improvements in its sole discretion to protect the public health, safety and welfare. Except where an emergency requires immediate action to protect public health and safety, RPD shall make good faith efforts to meet and confer with TPL in advance of any such action and make good faith efforts to retain or restore the Improvements. This provision shall survive the expiration or other termination of this Agreement.

(e) All actions described herein are subject to and must be conducted and accomplished in accordance with the applicable requirements of the City's charter, its municipal code and state and federal laws and regulations.

IN WITNESS WHEREOF, the undersigned have indicated their approval effective as of the respective dates set forth to their names.

APPROVED:

Philip A. Ginsburg
General Manager
Recreation and Park Department

Date

Gina Fromer, California State Director
The Trust for Public Land

Date

APPROVED: RECREATION AND PARK COMMISSION

By: _____
Margaret McArthur, Secretary

Date: _____

Resolution No. _____

APPROVED AS TO FORM:
DENNIS J. HERRERA
CITY ATTORNEY.

By: _____
_____, Deputy City Attorney

Exhibit A: Project Site
Exhibit B: Project Timeline

Exhibit A

Project Site

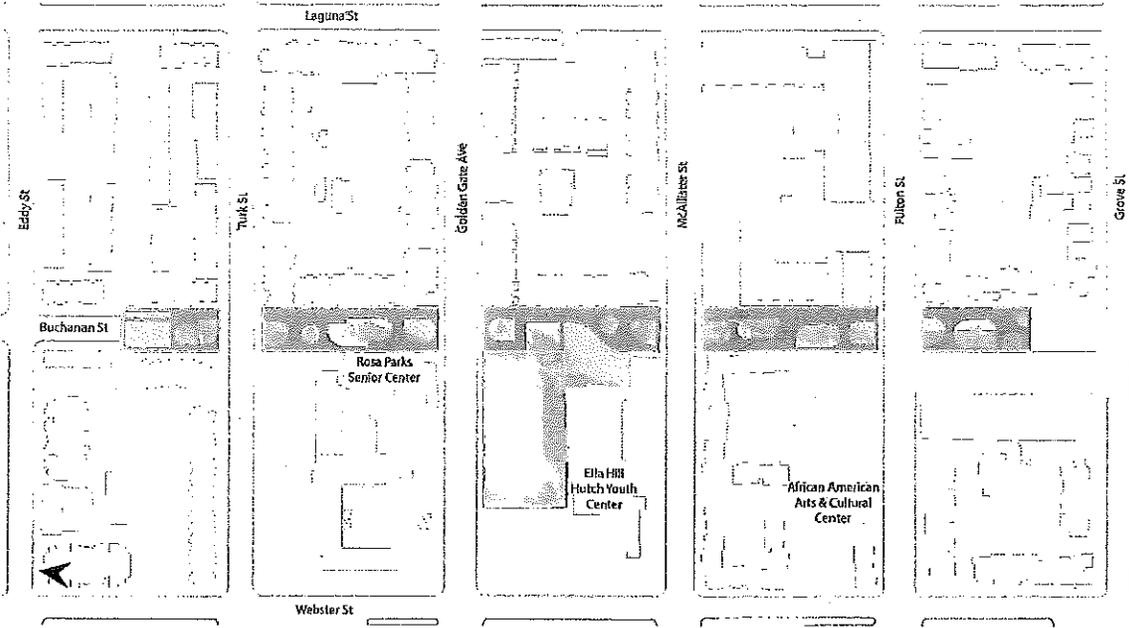


Exhibit B

Project Timeline

Buchanan Mall Timeline: DRAFT
 June 24, 2015

