

AHSC IMPLEMENTATION AND MUTUAL INDEMNITY AGREEMENT (Transbay 2 East Family)

THIS AHSC IMPLEMENTATION AND MUTUAL INDEMNITY AGREEMENT (the “Agreement”) is made and entered into as of April 3, 2023 between the San Francisco Bay Area Rapid Transit District, a rapid transit district pursuant to Public Utilities Code Section 28500 et seq., (“District” or “BART”), and Mercy Housing California, a California nonprofit public benefit corporation (“Developer,” and collectively with the District, the “Parties,” or individually, a “Party”) upon the basis of the following facts, understanding, and intentions of the parties:

A. The State of California, the Strategic Growth Council (“SGC”) and the Department of Housing and Community Development (“HCD”) issued a Notice of Funding Availability dated January 30, 2023 (the “AHSC NOFA”), under the Affordable Housing and Sustainable Communities (“AHSC”) Program established under Division 44, Part 1 of the Public Resources Code, commencing with Section 75200.

B. Developer and City of San Francisco, as co-applicants, are applying for AHSC Funds in response to the AHSC NOFA to provide funding for (A) construction of the Transbay 2 East Family affordable housing project in San Francisco, California, to be constructed by the Developer (the “Housing Project”); (B) the provision of certain sustainable transportation infrastructure by the District (the “BART STI Improvements”); (C) the construction of certain transportation-related amenities by the District (the “BART TRA Improvements; and (D) certain costs related to purchase of SF MUNI “A” transit passes for Housing Project residents allowing use of BART within San Francisco, the creation and maintenance of a bicycle, pedestrian, and transit education program, and funding to support local workforce development efforts (the “AHSC Programs”), together with other sustainable transportation infrastructure to be constructed by the City of San Francisco, which are not pertinent to this agreement (the “Non-BART Transportation Projects”). These improvements are described in more detail in the final application to be submitted by April 4, 2023 (collectively, the “AHSC Application”).

C. The AHSC Application seeks an award to the Developer in an aggregate amount of up to \$40,960,743 in AHSC Funds consisting in part of: (A) up to \$28,000,000 of AHSC loan Funds for a permanent loan (“AHSC Loan”) which will be disbursed to a limited partnership to be formed later or its successor (the “Partnership”), for construction of the Housing Project; (B) \$5,034,634 of the AHSC grant funds for the purpose of reimbursing the cost of the BART STI Improvements; (C) \$1,581,119 of AHSC grant funds for the purpose of reimbursing the cost of the BART TRA Improvements; and (D) up to \$6,345,624 of AHSC grant funds for reimbursing the costs of the AHSC Programs. The AHSC grants shall be referred to collectively as the “AHSC Grants.” The AHSC Loan and the AHSC Grants are collectively referred to herein as the “AHSC Financing.”

D. The District and Developer are required to enter into this Agreement in order to comply with the specific AHSC Program Threshold Requirement stated in Section 106(a)(12)(A) of the 2023 AHSC Program Guidelines dated December 15, 2022 (the “Transportation Agency Prior Experience Threshold Requirement”). This section of the guidelines dictates that applicants

must demonstrate prior experience by providing evidence of at least two prior projects that are similar to the proposed AHSC project in scope and size, which have been completed by the applicant, or joint applicant, during the ten (10) years preceding the application due date. This section of the guidelines also states that the applicants may demonstrate the requisite experience by using the past experience of work completed of a non-applicant so long as the applicants can provide an executed agreement with that specific non-applicant for the completion of the related work in the AHSC Application for which funding is sought. The purpose of this Agreement is to, amongst other things, comply with the Transportation Agency Prior Experience Threshold Requirement.

E. The District is a non-applicant, but, as set forth herein, will have obligations to perform the following specific BART STI Improvements and BART TRA Improvements included in the AHSC Application (collectively, the “Transit Obligations”):

1. BART STI Improvements: Purchase of two new capacity-increasing heavy rail cars to extend the length of trains, increase the number of trains operating through the Transbay Tube during peak, and maximize throughput capacity across the BART network.
2. BART TRA Improvements: BART will install 17 Next Generation Fare Gates at Embarcadero BART Station as part of an effort to upgrade all fare gates throughout its system. The Next Generation Fare Gate design incorporates a tall, swing-style gate with improved passenger throughput and maintainability, and a more modern appearance.

F. The District can demonstrate prior experience and provide evidence of at least two prior projects that are similar in scope and size which have been completed during the ten (10) years preceding April 4, 2023. Below is a list of these projects:

1. STI: Rail Car Procurement Program: On November 8, 2017, under a contract to Bombardier Transit Corporation for the procurement of new rail cars, BART’s first replacement rail cars were delivered. As of January 2023, BART has accepted 451 Fleet-of-the-Future rail cars and decommissioned 239 legacy rail cars as part of an overall program to not only replace but expand its fleet.

2. STI. eBART DMU: Procurement of eight Diesel Multiple Unit (DMU) Vehicles to serve BART to Antioch extension. The vehicles include a variety of amenities including high-back seats, six digital signs (with multiple language support), automated audio announcements, clear station arrival / destination signs, and modern climate control systems. Project Cost: ~\$65M. Completed May 2018.

3. TRA: Concord BART Station Plaza Improvements: An upgrade of the exterior public spaces surrounding the Concord BART station entrance for a more context-sensitive design that improves the safety and livability of the station area. The project improved multimodal transfer waiting areas and enhanced pedestrian and bicycle connections to surrounding neighborhoods. Areas improved included the existing plaza and pedestrian paseo to the west of the station, bus transfer area, station entrance and ticket vending area, and pedestrian connections east of the station. Completion date: July 27, 2018.

4. TRA. Warm Springs/South Fremont Station: As part of the overall station construction, installation of bicycle lockers and racks, wayfinding, pedestrian-scale lighting, and continuous canopies along the bus intermodal that serve as bus shelters. Project cost: ~\$90M. Completed: March 2017.

G. Subject to receipt of an award of the AHSC Financing, the District shall be responsible for completing the Transit Obligations, and for all costs and expenses related thereto, and Developer shall be responsible for constructing and developing the Housing Project and for providing the AHSC Programs (together, the “Developer Obligations”), and for all costs and expenses related thereto. In connection with the AHSC Grants and AHSC Loan, Developer is required to enter into standard agreements, reimbursement agreements, and regulatory agreements with HCD where Developer will be liable for the full and timely performance by the parties to complete the obligations set forth therein, including completion of the Developer Obligations, Transit Obligations, and Non-BART Transportation Projects, as described in the AHSC Application. The AHSC Application and all standard agreements, disbursement agreements, regulatory agreements and any other agreements required by HCD in connection with the AHSC Financing shall be collectively referred to herein as the “AHSC Documents.”

H. The District and Developer each acknowledge and agree that the inability or failure by either party to fully and timely complete each party’s respective improvements required by the AHSC Documents may affect the timing and right of the other party to receive reimbursement of AHSC funds due the other party notwithstanding the other party’s full and timely performance of its obligations.

NOW, THEREFORE, in consideration of the recitals, covenants and agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

AGREEMENT

1. Obligations. The District shall, in its sole responsibility, complete the Transit Obligations in accordance with the terms of the AHSC Documents and the approved design and construction documents. The Developer shall, in its sole responsibility, complete the Developer Obligations in accordance with the terms of the AHSC Documents and the approved design and construction documents. Each Party will provide the other Party with copies of all requisitions for work related to their respective work, the notice of completion, and other documents related to their respective work that another party may reasonably request.

2. District Indemnity. District is responsible for carrying out the Transit Obligations using AHSC grant proceeds in accordance with the AHSC Documents, including, but not limited to, any disbursement deadlines contained therein. District shall indemnify, defend, and hold harmless Developer, and its affiliates, directors, officers, partners, members, agents and employees (each, an “Developer Indemnified Party”) against any and all claims, actions, suits, causes of action, losses, liabilities, injuries, costs, damages, or expenses (collectively, “Claims”), including, without limitation, any direct, indirect or consequential loss, liability, damage, or expense, court costs and attorneys’ fees, arising out of or in connection with the District’s performance of or failure to perform its obligations to complete the Transit Obligations, in the manner and within the time periods set forth in the AHSC Documents.

However, in no event shall the Developer Indemnified Party be indemnified hereunder for any Claims to the extent said Claims result from Developer Indemnified Party's gross negligence or willful misconduct. District agrees to pay all of the Developer Indemnified Party's costs and expenses, including reasonable attorneys' fees, which may be incurred in any effort to enforce any term of this Agreement, including, but not limited to, all such costs and expenses which may be incurred by any Developer Indemnified Party in any legal action, reference or arbitration proceeding brought by HCD or other third party.

3. Developer Indemnity. Developer is responsible for carrying out the Developer Obligations using AHSC grant proceeds and AHSC Loan funds in accordance with the AHSC Documents, including, but not limited to, any disbursement deadlines contained. Developer shall indemnify, defend, protect, and hold harmless the District and its affiliates, directors, officers, partners, members, agents and employees (each, an "District Indemnified Party") against any and all Claims, including, without limitation, any direct, indirect or consequential loss, liability, damage, or expense, court costs and attorneys' fees, arising out of or in connection with Developer's performance of or failure to perform its Developer Obligations to complete construction and development of the Housing Project, in the manner and within the time periods, set forth in the AHSC Documents. However, in no event shall the District Indemnified Party be indemnified hereunder for any Claims to the extent said Claims result from the District Indemnified Party's gross negligence or willful misconduct. Developer agrees to pay all of the costs and expenses of the District Indemnified Party, including reasonable attorneys' fees, which may be incurred in any effort to enforce any term of this Agreement, including, but not limited to, all such costs and expenses which may be incurred by any District Indemnified Party in any legal action, reference or arbitration proceeding brought by HCD or other third party.

4. Schedule of Performance; Progress Reports. Developer and District shall comply with the schedule of performance set forth in Exhibit A attached hereto for the completion of their respective obligations hereunder (the "Schedule of Performance"). The District and Developer agree to give the other Party a written quarterly status report on the progress toward the milestones listed in Exhibit A, i.e., the Developer will report on the Developer's progress on the Housing Project and the District will report on the District's progress on the Transit Obligations. If any Party anticipates not meeting the targeted construction and grant disbursement milestones as established in the AHSC Documents, that Party will promptly notify the other Party in writing and will meet with the other Party to discuss the reasons why the milestone dates may not be met and what actions the delayed Party intends to take to meet the milestones or otherwise rectify the work schedule in order to maintain good standing with the terms and conditions established in the AHSC Documents.

5. Delegation. Notwithstanding the obligations of each Party under this Agreement, each Party shall be entitled to enter into sub-agreements with each other or with other parties to provide any assistance or services needed for each Party to perform its obligations under this Agreement and the AHSC Documents.

6. Cost Overruns. Developer shall be responsible for paying all costs required to complete the Developer Obligations, irrespective of whether such costs exceed the AHSC Loan. District shall be responsible for paying all costs required for the Transit Obligations, irrespective of whether such costs exceed the portion of the AHSC Grant designated for the Transit

Obligations. Neither party is responsible for cost overruns on the Non-BART Transportation projects.

7. Billing and Payment Procedure: The District shall submit to Developer all reimbursement requests in the form of invoices for the costs associated with the Transit Obligations. Invoices will include backup documentation as required by HCD and a cover sheet indicating the budget line item from which each cost shall be drawn. Once the AHSC Grant Disbursement Agreement is executed, Developer shall submit corresponding reimbursement requests to HCD within 15 days of receipt of District's invoice (or such later date as may be required by HCD, but in any event within 45 days after receipt of the District's invoice) and disburse to the District any such funds received from HCD within 7 days of receipt. District shall apply any such funds received to pay the expenses submitted in connection with the invoices and shall comply with all HCD requirements under the AHSC Documents governing the disbursement and use of AHSC Grant funds. Failure of the Developer to timely submit the District reimbursement requests to HCD or to disburse any funds received from HCD within the time period required herein for the Transit Obligations to the District shall be a default under this Agreement and shall excuse the District from performance of the Transit Obligations.

8. Implementation Agreements. In the event a grant award is received from AHSC, the Parties recognize that each Party may need additional assurances from another Party (including assurances for the Housing Project's lenders and investors) regarding the AHSC Grant and AHSC Loan before commencement of construction of the Housing Project and the Transit Obligations. The Parties agree to cooperate with each other to reach mutual agreement on amendments to this Agreement, other implementation agreements or estoppel certificates necessary to provide reasonable assurances and indemnifications related to the disbursement of AHSC Grant funds. The Parties recognize that any such amendments to this Agreement or execution of additional agreements may require approval of the District's Board of Directors and Developer's Board of Directors.

9. Notices. Formal notices, demands, and communications between the Parties shall be sufficiently given if, and shall not be deemed given unless, dispatched by registered or certified mail, postage prepaid, return receipt requested, or delivered by express delivery service, return receipt requested, or delivered personally, to the principal office of the Parties as follows:

District: Abigail Thorne-Lyman
Director, Real Estate & Property Development
BART
2150 Webster St., 9th floor
Oakland, CA 94612
510-464-6140
athorne@bart.gov

Developer: Ramie Dare
Vice President
Mercy Housing California
1256 Market Street
San Francisco, CA 94103
415-355-7100
rdare@mercyhousing.org

10. Events of Default. The occurrence of any of the following events shall constitute an Event of Default under this Agreement:

(a) A Party fails to perform any of its obligations under this Agreement, and does not cure such failure within 30 days after written notice of such failure has been delivered to the defaulting Party in accordance with Section 9 above; or

(b) A Party purports to revoke this Agreement or this Agreement becomes ineffective for any reason.

11. Termination. This Agreement shall terminate upon the earlier of: (i) completion of all obligations under the AHSC Documents; or (ii) mutual agreement of the Parties hereto.

12. Third Party Beneficiary. The Partnership shall be a third party beneficiary of this Agreement and shall be entitled to the rights and benefits hereunder and may enforce the provisions hereof as if it were a party to this Agreement.

13. Assignment. District hereby acknowledges and approves the assignment by Developer and the Partnership to the Housing Project's senior lender ("Construction Lender") of all of their respective right, title and interest in, to and under the Agreement (the "Collateral") as collateral security for the Partnership's obligations to Construction Lender under, and in connection with Construction Lender's loan to the Partnership. In the event Construction Lender forecloses upon the Collateral, District hereby agrees that Construction Lender shall have all of Developer's rights and interests under the Agreement. Construction Lender is hereby made an express third party beneficiary of this Section 13, and the parties hereto shall not amend, modify or terminate the Agreement without Construction Lender's express written consent.

14. Miscellaneous.

(a) Nothing in this Agreement shall be construed to limit any claim or right which any Party may otherwise have at any time against an Indemnitor or any other person arising from any source other than this Agreement, including any claim for fraud, misrepresentation, waste, or breach of contract other than this Agreement, and any rights of contribution or indemnity under any federal or state environmental law or any other applicable law, regulation, or ordinance.

(b) If any Party delays in exercising or fails to exercise any right or remedy against a Party, that alone shall not be construed as a waiver of such right or remedy. All remedies of any Party against the other Party are cumulative.

(c) This Agreement shall be binding upon and inure to the benefit of each of the Parties hereto and their respective representatives, heirs, executor, administrators, successors, and assigns. This Agreement may not be amended except by a written instrument executed by the Parties hereto.

(d) This Agreement shall be deemed to have been delivered and accepted in the State of California and governed exclusively by the internal substantive laws of the State of California as the same may exist at the date hereof. The Parties hereto agree that any action hereon between the parties and their successors in interest may be maintained in a court of competent jurisdiction located in the State of California, and consent to the jurisdiction of any such California court for the purposes connected herewith.

(e) Each Party hereto intends that this Agreement shall not benefit or create any right or cause of action in or on behalf of any person other than the Parties hereto.

(f) This Agreement may be executed in multiple counterpart copies, any one of which when duly executed, with all formalities hereof, shall be fully binding and effective as the original of this Agreement.

(g) This Agreement shall be effective as of the date first written above, provided however that in the event that the parties do not receive an award of the AHSC Funds, this Agreement shall automatically terminate and be of no further force or effect.

[Signatures on following page]

District:

San Francisco Bay Area Rapid Transit District,
a rapid transit district

DocuSigned by:
By: Val Menotti
Name: Val Menotti
Its: Chief Planning & Development Officer

Developer:

Mercy Housing California,
a California nonprofit public benefit corporation

DocuSigned by:
By: Ramie Dare
Name: Ramie Dare
Its: Vice President, Real Estate Development

EXHIBIT A**Schedule of Performance****BART:***BART STI Improvements*

| Performance Milestone | Date |
|---------------------------------------|-------------------|
| Begin procurement | August 31, 2023 |
| Complete delivery of transit vehicles | August 31, 2024 |
| All funds fully disbursed | November 30, 2027 |

BART TRA Improvements

| Performance Milestone | Date |
|------------------------------|-------------------|
| Begin construction | June 30, 2025 |
| Complete construction | December 31, 2026 |
| All funds fully disbursed | December 31, 2026 |

Developer:

| Performance Milestone | Date |
|---|------------------|
| Execute Standard Agreement for AHSC Grants | May 1, 2025 |
| Execute Disbursement Agreement for AHSC Grants | May 1, 2025 |
| Begin construction of housing project | June 1, 2025 |
| Complete construction and obtain Certificate of Occupancy | May 1, 2027 |
| All funds fully disbursed | December 1, 2027 |