



Midpeninsula Regional
Open Space District

R-23-126
Meeting 23-30
October 25, 2023

AGENDA ITEM 9

AGENDA ITEM

Highway 17 Wildlife and Trail Crossings Funding Exchange Agreement with the Metropolitan Transportation Commission and Santa Clara Valley Transportation Authority

GENERAL MANAGER'S RECOMMENDATIONS *den*

Authorize the General Manager to execute a Funding Exchange Agreement with the Metropolitan Transportation Commission and Santa Clara Valley Transportation Authority for the exchange of federal regional discretionary funds for Midpeninsula Regional Open Space District non-federal, unrestricted funds for the Highway 17 Wildlife and Trail Crossings project in an amount not to exceed \$500,000.

SUMMARY

Together, the Highway 17 Wildlife Crossing (MAA20-001) and Regional Trail Crossing (MAA20-002) Projects (collectively the Highway 17 Project or Project) were one of the highest ranked priority actions during the Vision Plan Process in 2014. The Project supports the Midpeninsula Regional Open Space District's (District) goal of providing safe, regional wildlife and trail access across Highway 17 near the Lexington Reservoir just south of the towns of Monte Sereno and Los Gatos.

In October 2019, the Board of Directors (Board) approved moving forward with the environmental analysis of four crossing alternatives for the Highway 17 Project (R-19-136) as part of the Caltrans Project Approval and Environmental Document (PA&ED) phase. Work on the PA&ED phase is underway, and staff is currently working with the consultant (AECOM) to complete preliminary engineering designs and environmental review, anticipated to be completed in Winter 2023/2024.

An existing cooperative agreement with Caltrans for the PA&ED phase establishes the District as the California Environmental Quality Act (CEQA) lead agency and Caltrans as the National Environmental Policy Act (NEPA) lead agency. NEPA is the federal equivalent of CEQA and is required for the Project to receive federal funding. Caltrans requires the establishment of a federal nexus for NEPA environmental review. To establish a nexus for NEPA, the District recommends entering into a Funding Exchange Agreement with the Metropolitan Transportation Commission (MTC) who will commit \$500,000 in federal discretionary funds for construction of the Project, in exchange for \$500,000 in non-federal funds with no spending or eligibility limitations. Per a separate Board-approved cooperative agreement with the Santa Clara Valley Transportation Authority (VTA), VTA is the federal sponsor and project delivery partner for the Plans, Specifications and Estimates (PS&E) and Construction phases of the Highway 17 Project.

As federal sponsor and project delivery partner, the \$500,000 of federal discretionary funds will be programmed from MTC to VTA to be used towards construction of the Project. With these actions completed and federal funds assigned, the project will have federal nexus to complete the NEPA environmental review process and also be eligible for future federal funds (including transportation funds) to support construction.

DISCUSSION

Background

The current phase of work includes preparation of the: 1) Caltrans Draft and Final Project Reports; 2) California Environmental Quality Act (CEQA) document; and 3) National Environmental Policy Act (NEPA) document.

The cooperative agreement with Caltrans for the PA&ED phase establishes the District as the CEQA lead agency and Caltrans as the NEPA lead agency. Caltrans has the authority delegated by the Federal Highway Administration (FHWA) to act as a lead agency for NEPA. NEPA is the federal equivalent of CEQA and is required for the Project to receive federal funding.

The most common actions that require or create a nexus to NEPA for local agencies are projects proposed on federal lands, have a federal partner, and/or where federal funding is involved. Caltrans cannot consider approval of a NEPA document without a NEPA nexus. The Project is not located on federal lands, and the District does not have a formal federal partner for the Project. Out of the three common actions, securing federal funding was identified as the most practical way to establish a NEPA nexus for the Project.

Through discussions with MTC and VTA, a solution was identified for a funding exchange agreement with MTC whereby the District would exchange District funds for discretionary federal transportation funding that is administered through MTC. In order to execute a funding exchange, the District needed to partner with a Project Sponsor eligible to encumber MTC's federal transportation funds.

On October 9, 2021, the General Manager submitted a letter to VTA formally requesting that VTA consider becoming the Project Sponsor and enter into discussions with the District to become the Project Delivery Partner for PS&E and Construction.

On March 3, 2022, VTA's Board of Directors adopted a resolution (Resolution No. 2022.03.10) to approve VTA as a Project Sponsor for the Highway 17 Project, allowing federal funding to be programmed for the Project and positioning VTA to deliver the Project on the District's behalf.

On March 23, 2022, MTC approved amendments to the 2021 Transportation Improvement Plan (TIP) to add the Highway 17 Project. The TIP is a comprehensive list of Bay Area transportation projects receiving federal funding, and the Project's inclusion on the list was needed to receive OBAG funds. At the same meeting, MTC also approved revisions to the One Bay Area Grant programs (OBAG 1 and 2), including programming \$500,000 of federal funds to VTA as part of a future funding exchange agreement for the Project.

On May 24, 2023, the District's Board of Director's authorized the General Manager to enter into a Cooperative Agreement (Project Delivery Partner Agreement) with VTA for the PS&E

phase of the Project. During the PS&E Phase, VTA will be managing a prime consultant to complete final designs, and conduct studies and develop plans for right-of-way acquisitions, for components of the Project within the Caltrans right-of-way so that the Project is ready for permitting and construction.

Proposed Funding Exchange Agreement with MTC and VTA

MTC, VTA and the District have mutually agreed that entering into a Funding Exchange Agreement (Agreement) is the correct pathway to establish a NEPA nexus for the Project and ensure eligibility for other federal funding. The Agreement specifies that MTC will program \$500,000 of federal Transportation Improvement Program (TIP) funds to VTA for the Project and VTA will request federal authorization/obligation of the TIP funds from MTC by July 1, 2024. The District then must provide \$500,000 of local funds to MTC within three months of the federal authorization/obligation of TIP funds. Once construction commences, the federal funds will be provided to VTA on a reimbursement basis for construction costs incurred on the Project. If, through no fault of VTA or the District, VTA does not actually receive the federal funds, MTC must return the District’s local funds and can reprogram the federal funds to another project.

FISCAL IMPACT

Disbursement of District funds under the proposed Funding Exchange Agreement would come from General Fund Capital fund. Measure AA funds will not be used to fund the exchange agreement.

Other expenses pertaining to the Highway 17 Crossings Projects are eligible for Measure AA reimbursement. The following table outlines the *Measure AA Portfolio 20 South Bay Foothills — Wildlife Passage and Ridge Trail Improvements* allocation, costs-to-date, projected future project expenditures and projected portfolio balance remaining.

MAA20 South Bay Foothills — Wildlife Passage and Ridge Trail Improvements Portfolio Allocation:	\$13,966,000
Grant Income (through FY27):	\$8,240,991
Total Portfolio Allocation:	\$22,206,991
Life-to-Date Spent (as of 09/28/23):	(\$2,623,189)
Encumbrances:	(\$319,064)
Remaining FY24 Project Budgets:	(\$1,876,499)
Subtotal	\$17,388,239
Future MAA20 project costs (projected through FY27):	(\$32,691,507)
Total Projected Portfolio Expenditures:	(\$37,510,259)
Portfolio Balance Remaining (Proposed):	(\$15,303,268)

The following table outlines the Measure AA Portfolio 20 allocation, projected life of project expenditures and projected portfolio balance remaining.

MAA20 South Bay Foothills — Wildlife Passage and Ridge Trail Improvements Portfolio Allocation:	\$13,966,000
Grant Income (through FY27):	\$8,240,991
Total Portfolio Allocation:	\$22,206,991
Projected Project Expenditures (life of project):	

20-001 Wildlife Corridor: Highway 17 Crossing	(\$17,727,349)
20-002 Bay Area Ridge Trail: Highway 17 Crossing	(\$19,281,738)
20-004 Spooky Knoll Trail/new Hwy 17 Trail Connections	(\$501,173)
Total Portfolio Expenditures:	(\$37,510,259)
Portfolio Balance Remaining (Proposed):	(\$15,303,268)

PRIOR BOARD AND COMMITTEE REVIEW

- February 24, 2016: Award of contract to Trail People to proceed with the conceptual design and feasibility study ([R-16-18](#), [meeting minutes](#))
- August 24, 2016: Caltrans cooperative agreement for the Project Initiation Document phase ([R-16-105](#), [meeting minutes](#))
- October 12, 2016: Contract Amendment with Trail People for additional Caltrans analysis ([R-16-126](#), [meeting minutes](#))
- November 9, 2016: Resolution and approval of a Caltrans cooperative agreement ([R-16-147](#), [meeting minutes](#))
- June 27, 2018: Advancement of eight alternatives to the Caltrans PSR-PDS phase and approval of a contract amendment with Trail People ([R-18-66](#), [meeting minutes](#))
- October 24, 2018: FYI noticing the Board of an upcoming public meeting for feedback on crossing alternatives ([FYI memo](#), [meeting minutes](#))
- February 13, 2019: FYI Final Revised Alternatives Report ([FYI memo](#), [meeting minutes](#))
- September 17, 2019: Planning & Natural Resources Committee, Crossing alternatives, Caltrans Project Study Report, environmental review, public outreach and funding ([R-19-124](#), [meeting minutes](#))
- October 23, 2019: Approval of the Caltrans PSR-PDS document and Cooperative Agreement to begin the PA&ED phase ([R-19-136](#), [meeting minutes](#))
- May 27, 2020: Award of Contract to AECOM for the PA&ED phase, CEQA/NEPA ([R-20-53](#), [meeting minutes](#))
- December 9, 2020: Application for Grant Funding from the Wildlife Conservation Board ([R-20-144](#), [meeting minutes](#))
- August 25, 2021: Contract Amendment with AECOM ([R-21-113](#), [meeting minutes](#))
- February 9, 2022: FYI Highway 17 Wildlife and Regional Trail Crossings Project Status Update ([FYI memo](#), [meeting meetings](#))
- May 25, 2022: FYI Highway 17 Crossings Design Aesthetics ([FYI Memo](#), [meeting minutes](#))
- September 13, 2022: Legislative, Funding, and Public Affairs Committee, Guiding Principles for the Design Enhancements of the Highway 17 Crossings ([R-22-91](#), [meeting minutes](#))
- October 26, 2022: Guiding Principles for Highway 17 Crossings Design Enhancements ([R-22-118](#), [meeting minutes](#))

- May 23, 2023: Highway 17 Wildlife and Trail Crossings Cooperative Agreement with the Santa Clara Valley Transportation Authority ([R-23-56](#), [meeting minutes](#))

PUBLIC NOTICE

Public notice was provided as required by the Brown Act.

CEQA COMPLIANCE

This item does not constitute a project subject to the California Environmental Quality Act (CEQA). The District is currently conducting environmental review for construction of the Project to satisfy CEQA and NEPA (National Environmental Policy Act). Board consideration of the environmental review is tentatively scheduled for Winter 2023/2024.

NEXT STEPS

If approved by the Board, the General Manager will execute the Funding Exchange Agreement with MTC and VTA. VTA will request the \$500,000 of federal discretionary funds programed to the Project from MTC by July 1, 2024 to be used for construction of the Project. Within three months of VTA’s request, the District will provide MTC \$500,000 of local funds, completing the funding exchange.

The current overall Highway 17 Project schedule for construction of the multi-use trail overcrossing, connecting trails, wildlife undercrossing, and associated directional fencing is as follows:

Milestones	Tentative Timeline
Board consideration of CEQA Caltrans NEPA and PA&ED approval	Winter 2023/2024
PS&E	2024 - 2025
Bidding and Construction (funding dependent)	2025 - 2028

Attachments:

1. Project Vicinity Map
2. Funding Exchange Agreement with the Metropolitan Transportation Commission and Santa Clara Valley Transportation Authority

Responsible Department Heads:

Jane Mark, AICP, Planning Manager

Kirk Lenington, Natural Resources Manager

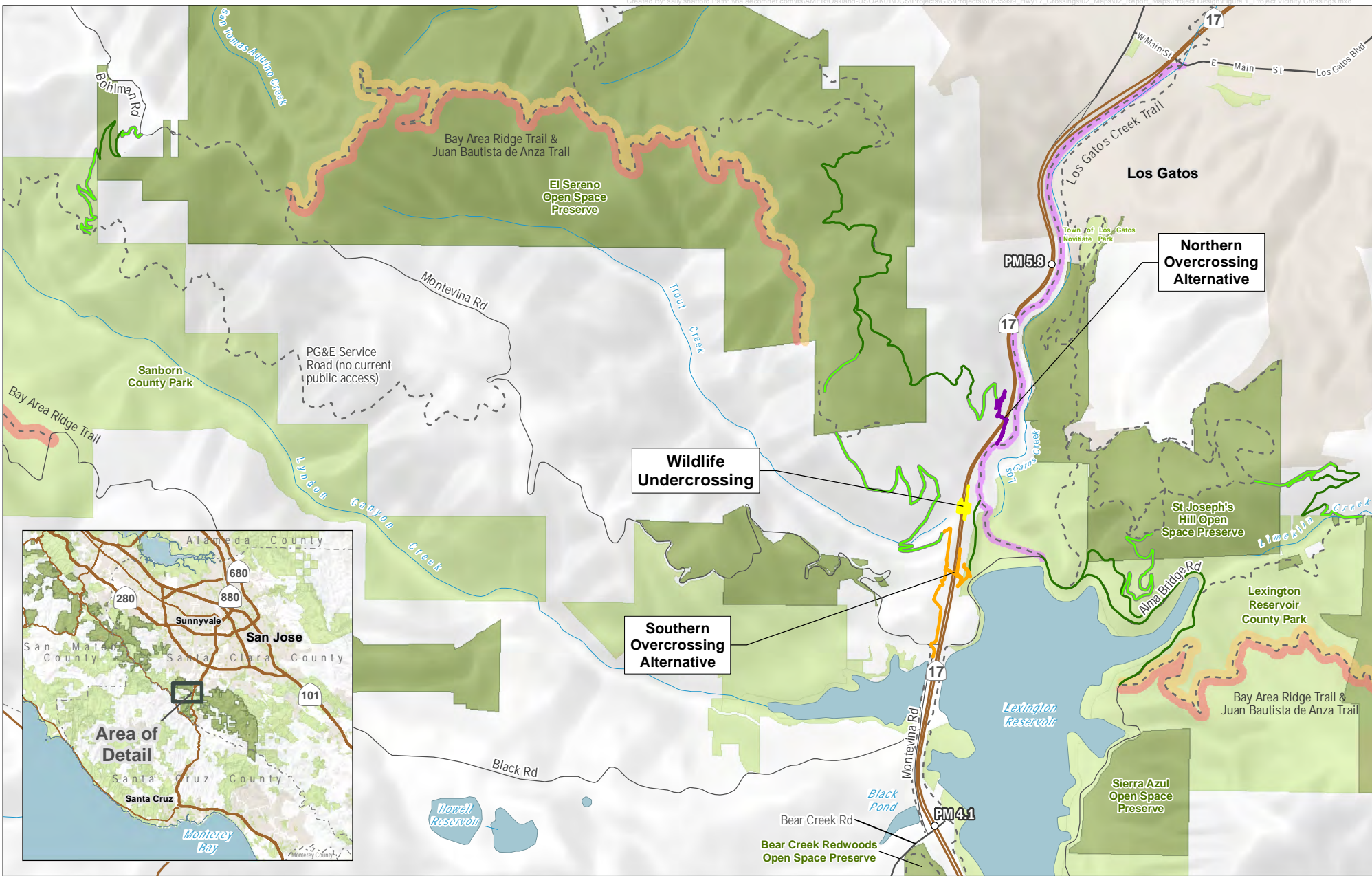
Prepared by:

Jared Hart, AICP, Senior Planner

Contact person:

Jared Hart, AICP, Senior Planner, Planning Department

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Project Vicinity

- Project Post Mile
- River/Stream
- Midpen Open Space
- Other Protected Land

- Proposed Crossings**
- Southern Overcrossing Alternative
 - Northern Overcrossing Alternative
 - Wildlife Undercrossing

- Trails**
- Proposed Trail
 - Existing Trail - Proposed Improvements
 - - - Existing Road or Trail

- Bay Area Ridge Trail
- Bay Area Ridge Trail & Juan Bautista de Anza Trail
- Los Gatos Creek Trail

Note: Not all proposed trails will be built

Midpeninsula Regional
Open Space District
(Midpen)
5/1/2023



While the District strives to use the best available digital data, these data do not represent a legal survey and are merely a graphic illustration of geographic features.

**Agreement between the Metropolitan Transportation Commission (MTC),
Santa Clara Valley Transportation Authority (VTA), and Midpeninsula
Regional Open Space District (MIDPEN) for the exchange of federal regional
discretionary funds for MIDPEN non-federal unrestricted funds**

This funding agreement (“AGREEMENT”) is entered into as of the last date of signature below (“Effective Date”) by and between MIDPENINSULA REGIONAL OPEN SPACE DISTRICT (“MIDPEN”) created under California Public Resources Code 5500 et seq., the SANTA CLARA VALLEY TRANSPORTATION AUTHORITY (“VTA”), a public agency organized as a special district under California law, and the METROPOLITAN TRANSPORTATION COMMISSION (“MTC”), a regional transportation agency created under California Government Code Sections 66500 et seq.

Recitals

- (1) MIDPEN is the lead funding agency for the State Route 17 Bicycle and Pedestrian Trail and Wildlife Crossing project within Santa Clara County (the “PROJECT”).
- (2) The PROJECT will improve safety along the highway south of Monte Sereno and Los Gatos by constructing bicycle and pedestrian trail and wildlife crossing improvements.
- (3) MIDPEN has secured the funding necessary to complete the preliminary engineering and environmental documentation, and detailed design phases of the PROJECT.
- (4) Caltrans requires the establishment of a federal nexus for the PROJECT to proceed with National Environmental Policy Act (NEPA) environmental review processes.
- (5) MIDPEN has requested the assistance of MTC to commit five hundred thousand dollars (\$500,000) in federal regional discretionary funds to the PROJECT, such as Surface Transportation Block Grant Program (STBGP) funds (“REGIONAL DISCRETIONARY FUNDS”), in exchange for non-federal funds with no spending or eligibility limitations (“MIDPEN LOCAL FUNDS”).
- (6) MTC, as the transportation planning, coordinating, and financing agency for the nine-county San Francisco Bay Area, is eligible to program and assign REGIONAL DISCRETIONARY FUNDS and has discretionary funding authority for the funds requested for the PROJECT.
- (7) VTA will serve as the federal sponsor and project delivery partner for the PROJECT and will enter into a funding agreement with MTC for the pass through of REGIONAL DISCRETIONARY FUNDS to VTA for the PROJECT.
- (8) MIDPEN has requested MTC program the \$500,000 in REGIONAL DISCRETIONARY FUNDS to VTA for the PROJECT.

- (9) MIDPEN, VTA, and MTC now desire to proceed with this AGREEMENT immediately, as nothing in this AGREEMENT adversely affects MTC's responsibility to provide regional discretionary funds to other existing programmed projects in the Bay Area.
- (10) MIDPEN, VTA, and MTC mutually desire to specify the terms and conditions under which MTC is to provide REGIONAL DISCRETIONARY FUNDS to VTA in exchange for MIDPEN's provision of MIDPEN LOCAL FUNDS to MTC.

Now, therefore, in consideration of the mutual covenants contained herein, the parties agree as follows:

Section I

MTC AGREES:

- (1) To perform such actions and to deliver such documents necessary to provide REGIONAL DISCRETIONARY FUNDS to VTA in accordance with this AGREEMENT.
- (2) To have committed and programmed in the federal Transportation Improvement Program (TIP) by September 1, 2022, five hundred thousand dollars (\$500,000) of MTC-apportioned REGIONAL DISCRETIONARY FUNDS to VTA for implementation of the PROJECT and maintain the PROJECT in TIP until federal authorization/obligation of REGIONAL DISCRETIONARY FUNDS.
- (3) To indemnify, defend, and hold harmless MIDPEN and VTA, their respective Commissioners, directors, officers, representatives, agents, and employees from and against all claims, injury, suits, demands, liability, losses, damages, and expenses, whether direct or indirect (including any and all costs and expenses in connection therewith), incurred by reason of any act or failure to act of MTC, its officers, employees or agents, or subcontractors or any of them in connection with its performance under this AGREEMENT, except to the extent caused by negligence or willful misconduct of MIDPEN or VTA.

Section II

MIDPEN AGREES:

- (1) To enter into a project delivery agreement with VTA prior to the federal authorization/obligation of REGIONAL LOCAL FUNDS for the delivery of the PROJECT.
- (2) To provide MIDPEN LOCAL FUNDS in the amount of five hundred thousand dollars (\$500,000) to MTC within three (3) months of VTA receiving federal authorization/obligation of REGIONAL DISCRETIONARY FUNDS for implementation of the PROJECT. If, through no fault of VTA or MIDPEN, VTA does not receive REGIONAL DISCRETIONARY FUNDS following MIDPEN's provision of MIDPEN

LOCAL FUNDS to MTC, MTC shall return MIDPEN LOCAL FUNDS to MIDPEN upon the termination of this AGREEMENT.

- (3) To indemnify, defend, and hold harmless MTC and VTA, their respective Commissioners, directors, officers, representatives, agents, and employees from and against all claims, injury, suits, demands, liability, losses, damages, and expenses, whether direct or indirect (including any and all costs and expenses in connection therewith), incurred by reason of any act or failure to act of MIDPEN, its officers, employees or agents, or subcontractors or any of them in connection with its performance under this AGREEMENT, except to the extent caused by negligence or willful misconduct of MTC or VTA.

Section III

VTA AGREES:

- (1) To enter into a project delivery agreement with MIDPEN prior to the federal authorization/obligation of REGIONAL DISCRETIONARY FUNDS for the delivery of the PROJECT.
- (2) To request federal authorization/obligation of MTC-apportioned REGIONAL DISCRETIONARY FUNDS for the PROJECT in the amount of five hundred thousand dollars (\$500,000) prior to July 1, 2024.
- (3) To indemnify, defend, and hold harmless MTC and MIDPEN, their respective Commissioners, directors, officers, representatives, agents, and employees from and against all claims, injury, suits, demands, liability, losses, damages, and expenses, whether direct or indirect (including any and all costs and expenses in connection therewith), incurred by reason of any act or failure to act of VTA, its officers, employees or agents, or subcontractors or any of them in connection with its performance under this AGREEMENT, except to the extent caused by the negligence or willful misconduct of MTC or MIDPEN.

Section IV

IT IS MUTUALLY AGREED:

- (1) The term of this AGREEMENT will commence on or after the Effective Date. With the exception of MTC's, MIDPEN's, and VTA's indemnification, defense, and hold harmless responsibilities under Item 3 of Section I, Section II, and Section III above, which will survive termination of this AGREEMENT, the AGREEMENT will expire upon the satisfaction of MIDPEN's obligations to MTC with MIDPEN LOCAL FUNDS, as outlined in Item 2 of Section II of this AGREEMENT, if not terminated earlier as provided below.
- (2) Notwithstanding Item 2 of Section II and Section III, MIDPEN or VTA may terminate this AGREEMENT by written notice to MTC at any time prior to federal

authorization/obligation of the REGIONAL DISCRETIONARY FUNDS or if VTA has not received federal authorization/obligation of the REGIONAL DISCRETIONARY FUNDS by December 31, 2024, and no arrangement for availability of these funds after December 31, 2024, has been made by MTC to the satisfaction of MIDPEN or VTA. If the AGREEMENT is terminated by MIDPEN or VTA, MTC will reprogram the REGIONAL DISCRETIONARY FUNDS to other projects selected at MTC's discretion and neither MIDPEN nor VTA shall owe any further obligation pursuant to this AGREEMENT.

- (3) Notwithstanding Item 2 of Section II and Section III, MTC may terminate this AGREEMENT by written notice to VTA and MIDPEN if, through no fault of MTC, VTA has not received federal authorization/obligation of the REGIONAL DISCRETIONARY FUNDS by December 31, 2024. If the AGREEMENT is terminated by MTC, MTC will reprogram the REGIONAL DISCRETIONARY FUNDS to other projects selected at MTC's discretion, and neither MIDPEN nor VTA will owe any further obligation pursuant to this AGREEMENT.
- (4) This AGREEMENT will bind and benefit the parties hereto and their heirs, successors, and permitted assigns.
- (5) MTC, VTA, and MIDPEN agree to do all such things, take all such actions, and to make, execute, and deliver such other documents and instruments, as may be reasonably requested to carry out the provisions, intent, and purpose of the AGREEMENT.
- (6) This AGREEMENT may not be changed, modified, or rescinded except in writing, signed by all parties hereto, and any attempt at oral modification of this AGREEMENT will be void and of no effect.
- (7) All required reports, demands, and notices may be sent by regular mail or electronic mail. Notices that are mailed by regular mail will be deemed delivered two (2) business days after deposited in the mail. Notices may be personally delivered and will be deemed delivered at the time they are delivered to the appropriate address set forth below. Notices delivered by electronic mail will be deemed received upon the sender's receipt of an acknowledgment from the intended recipient (such as by the "return receipt requested" function, as available, by return electronic mail, or other written acknowledgment of receipt); provided that, if such notice is not sent during normal business hours of the recipient, such notice will be deemed to have been sent at the opening of business on the next business day of the recipient. Unless and until notified otherwise in writing, a party must send or deliver all such communications relating to this AGREEMENT to the following physical or email addresses:

Susanna Chan, MIDPEN
Assistant General Manager
5050 El Camino Real
Los Altos, CA 94022
schan@openspace.org

Kenneth Kao, MTC
Assistant Director, Funding Policy and Programs
375 Beale St., Suite. 800
San Francisco, CA 94105
kkao@bayareametro.gov

Marcella Rensi, VTA
Deputy Director of Grants & Fund Allocation
3331 N. First St.
San Jose, CA 95134
marcella.rensi@vta.org

- (8) This AGREEMENT is the entire agreement among MTC, VTA, and MIDPEN relating to the subject matter of this AGREEMENT. MTC, VTA, and MIDPEN acknowledge they have not relied upon any promise, representation, or warranty not expressly set forth in this AGREEMENT in executing it.
- (9) Should any part of this AGREEMENT be declared unconstitutional, invalid, or beyond the authority of MTC, VTA, or MIDPEN to enter into or to carry out, such decision will not affect the validity of the remainder of this AGREEMENT, which will continue in full force and effect; provided that the remainder of this AGREEMENT can, absent the excised portion, be reasonably interpreted to give effect to the intentions of the parties.
- (10) No waiver by either party of any default or breach of any covenant by any other party will be implied from any omission to take action on account of such default if such default persists or is repeated, and no express waiver will affect any default other than the default specified in such waiver, which will be operative only for the time and to the extent stated in such waiver. Waivers of any covenant, term, or condition contained herein will not be construed as a waiver of any subsequent breach of the same covenant, term, or condition. No waiver of any provision under this AGREEMENT will be effective unless in writing and signed by the waiving party.
- (11) The laws of the State of California will govern this AGREEMENT and any dispute that might arise between the parties without regard to conflict of law provisions.
- (12) MTC, VTA, and MIDPEN represent and warrant that they are authorized to execute this AGREEMENT.
- (13) This AGREEMENT may be executed in counterparts. Further, the parties may execute and deliver this AGREEMENT by electronic means such as DocuSign, .pdf, or similar format.

IN WITNESS WHEREOF, MTC, VTA, and MIDPEN have executed this AGREEMENT as follows:

MIDPENINSULA REGIONAL
OPEN SPACE DISTRICT

METROPOLITAN TRANSPORTATION
COMMISSION

Ana Ruiz
General Manager

Andrew Fremier
Executive Director

Date:

Date:

SANTA CLARA VALLEY
TRANSPORTATION AUTHORITY

Carolyn M. Gonot
General Manager/CEO

Date

Approved as to form:

Tamara Costa
Sr. Assistant Counsel

Date