



Office of the City Manager

CONSENT CALENDAR
December 3, 2019

To: Honorable Mayor and Members of the City Council
From: Dee Williams-Ridley, City Manager
Submitted by: Phillip Harrington, Director, Public Works
Subject: Reimbursement Agreement with Wareham Development for Wareham's Construction of Public Facilities

RECOMMENDATION

Adopt a Resolution authorizing the City Manager to execute a reimbursement agreement (Attachment 1) and any amendments with Wareham Development for reimbursement of City's share of construction of a traffic signal at the intersection of San Pablo Avenue and Parker Street, and lane re-striping and associated signing and parking restrictions at the intersection of San Pablo Avenue and Dwight Street.

FISCAL IMPACTS OF RECOMMENDATION

The final reimbursement amount will be dependent on the actual costs of the public improvements and fair share amounts established under the Use Permit #ZP2016-0170 of Wareham Development. The estimated full cost of the improvements is as follows:

Traffic Signal Installation: \$500,000.00

Restriping of Traffic Lanes:\$100,000.00

The fair share cost to the developer is based on two use options described in the use permit.

Option 1 (MOB-R&D): The development is used as a Medical Office Buildings (MOB) and Research and Development (R&D). The fair share amount for Wareham Development will be 20% (Traffic Signal) and 11% (Restriping of Traffic Lanes). Based on the estimated improvement costs the City would reimburse the development \$490,000.00.

Use Option 2 (100% MOB): The development is used 100% for Medical Office Buildings. The fair share cost percent for the Wareham Development will be 29% (Traffic Signal) and 19% (Restriping of Traffic Lanes). Based on the estimated improvement costs the City would reimburse the development \$436,000.00.

The current development plan under Use Permit #ZP2018-0117 calls for development Option 2 which is 100% Medical Offices.

Reimbursement per the agreement (Attachment 1) would be paid by the City to Wareham Development in four equal payments starting the first September after the completion of the public facilities by Wareham. The current projection is for construction to be completed by December 2020, so the first reimbursement would be due by September 1, 2021.

Funding is proposed to come from a new Capital Improvement Fund allocation to fund the City's obligation to this project. An alternative is to reprogram baseline Transportation capital funding from Measure B – Local Streets and Roads, Measure BB – Local Streets and Roads, Measure F – Vehicle Registration Fee, or State Transportation Tax funds. This would impact other projects currently programmed to receive those funds either by delay or cancellation.

CURRENT SITUATION AND ITS EFFECTS

Currently the intersection of San Pablo Avenue and Parker Street is not signalized, and is under stop control on the Parker Street approaches. The intersection of San Pablo Avenue and Dwight Way is signalized with a single east and west approach lane on Dwight Way.

The City has determined through Wareham Development's Use Permit #ZP2016-0170 and Traffic Impact Analysis (TIA) that these intersections will be significantly impacted by the development and further impacted by future planned developments in the area and along the San Pablo Corridor in West Berkeley. The TIA further identifies the traffic associated with the development would trigger the Caltrans threshold warrant for a traffic signal at the intersection of San Pablo Avenue and Parker Street.

Not implementing these improvements prior to completion of the development will likely cause significant delays at the intersections of San Pablo and Parker Street and Dwight Way. Approval of the agreement will allow the construction of the improvements by Wareham prior to their occupancy of the Medical Office Building.

BACKGROUND

Wareham Development is engaged in the development of certain real property located at 1050 Parker Street and 2621 Tenth Street in City of Berkeley. Development of the project, under the conditions of the use permit requires construction of traffic improvements which consist of a new traffic signal and possible lane re-striping, collectively "Public Facilities", in the project area that will serve the Wareham Project as well as current and future developments in the area.

Construction of the Public Facilities is expected to mitigate the traffic impacts identified in the Environmental Impact Report of the Wareham Development.

Construction of the Public Facilities will further provide improved access and circulation in this developing area of West Berkeley for area properties, future developments and public services and transportation.

The fair share amount of the Public Facilities to be contributed by Wareham Development was determined in the TIA. The rationale for the fair share was based on the amount of traffic the development would contribute to the specific impact identified at the two intersections.

ENVIRONMENTAL SUSTAINABILITY

There are no environmental impacts expected from the reimbursement agreement between City of Berkeley and Wareham Development.

RATIONALE FOR RECOMMENDATION

The existing and projected traffic levels noted in the TIA for the Wareham Development use permit are likely to occur as part of the Wareham Development and other approved developments along the San Pablo Avenue Corridor. The agreement allows for Wareham to construct the improvements and share in the costs that would otherwise fall on the City to eventually construct.

ALTERNATIVE ACTIONS CONSIDERED

No alternatives have been determined.

CONTACT PERSON

Hamid Mostowfi, Supervising Traffic Engineer, Public Works, 981-6403

Attachments:

- 1: Resolution
- 2: Reimbursement Agreement

RESOLUTION NO. ##,###-N.S.

AGREEMENT: REIMBURSEMENT AGREEMENT WITH WAREHAM DEVELOPMENT
FOR WAREHAM'S CONSTRUCTION OF PUBLIC FACILITIES

WHEREAS, Wareham Development is engaged in the development of certain real property located at 1050 Parker Street and 2621 Tenth Street in City of Berkeley; and

WHEREAS, Development of the project under the use permits requires construction of traffic improvements which consist of a new traffic signal and possible lane re-striping, collectively "Public Facilities" in the project area that will serve the Wareham Project as well as current and future developments in the area; and

WHEREAS, Construction of the Public Facilities will enable future development in the city to have immediate access to public services that would not be available to such development without direct payment of the expense of extending such similar public services to the area; and

WHEREAS, Wareham Development is funding upfront and constructing the public facilities; and

WHEREAS, the City will fund its share of the project in payments over four years from future Fiscal Year Capital Improvement Plan allocations,

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that a reimbursement agreement and any amendments with Wareham Development for reimbursement of City's share of construction of a traffic signal at the intersection of San Pablo Avenue and Parker Street, and possible lane re-striping is accepted. A record signature copy of said agreement and any amendments to be on file in the Office of the City Clerk.

AGREEMENT
FOR CONSTRUCTION OF PUBLIC FACILITIES AND SUBSEQUENT
REIMBURSEMENT

This Agreement For Construction Of Public Facilities and Subsequent Reimbursement (“Agreement”) is hereby entered into by and between the CITY OF BERKELEY, a California municipal corporation (“City”) and 2621 TENTH STREET, LLC, a California limited liability company (“Developer”) (collectively, the “Parties”) as follows:

RECITALS

A. Developer is engaged in the development of certain real property located at 1050 Parker Street in the City (the “Project”). Pursuant to Use Permit #ZP2016-0170 issued by the City (“Use Permit”), the Project is permitted for a three-story 60,670 square-foot building, of which 20,370 square feet is designated for medical office use, 40,300 square feet is designated for research and development use and 750 square-feet is designated for a quick service restaurant on the ground floor. However, Developer has submitted an application to the City for a zoning modification (Use Permit #ZP2018-0117) whereby the building would be designated entirely for medical office use with a ground-level quick service restaurant.

B. Development of the Project under the Use Permit requires the construction of traffic improvements (a traffic signal (“Traffic Signal”) and possible lane re-striping (“Lane Re-striping” or “Re-striped Lane”), collectively, “Public Facilities” and individually, “Public Facility” as discussed in further detail in Section 1.1 of this Agreement) in the Project area that will serve Developer’s Project and will also serve future development in the area.

C. Construction of the Public Facilities will enable future development in the City to have immediate access to public services that would not be available to such development without direct payment of the expense of extending such similar public services to the area.

D. The Parties agree that City will be responsible for approving the design of the Public Facilities to benefit the Project and other future development in the area.

E. The Parties agree that the Traffic Signal is to be constructed within the California Department of Transportation’s (“Caltrans”) right-of-way on San Pablo Avenue and a portion of City’s right-of-way, and that Caltrans must approve and issue permits for installation of the Traffic Signal. The Parties agree that Developer will be responsible for preparation and revision of all plans and documents necessary to secure permits from Caltrans, and that City will help facilitate submittal of plans and the encroachment permit application to Caltrans.

F. The Parties agree that Developer will be responsible to design, construct and install the Public Facilities, but will be reimbursed by City for designing, constructing and installing the portions of the Public Facilities that will benefit other development in the area.

G. Developer and City recognize that it is in their mutual interests to coordinate the design, construction and installation of the Public Facilities to serve the efficient development of the area as it develops and to avoid duplication of costs and effort.

H. Developer and City have memorialized their respective roles and responsibilities for these purposes in a matrix attached to this Agreement as Exhibit “A.”

OPERATIVE PROVISIONS

NOW, THEREFORE, in consideration of the mutual promises and covenants made by the Parties and contained herein, and other consideration, the value and adequacy of which are hereby acknowledged, the parties incorporate the above-stated recitals and agree as follows:

1. Design and Construction of Public Facilities

1.1 Public Facilities Construction Documents. Developer shall engage traffic and civil engineer consultants (collectively “Developer Consultants”), to design the Public Facilities. Developer intends to engage Fehr & Peers and Kier & Wright, both of whom are deemed approved. Developer shall submit to City for approval, not to be unreasonably withheld, the construction documents for the Public Facilities at the thirty-five percent (35%), sixty-five percent (65%) and ninety-five (95%) design level stages.

City shall review the construction documents to verify conformance with City standards for those improvements on the City’s right-of-way, and conceptual approval for those improvements on Caltrans’s right-of-way. City’s review of the construction documents at the sixty-five percent (65%) and ninety-five percent (95%) stages shall be streamlined and limited to the Public Facilities’ compliance with drainage requirements, the American with Disabilities Act and City’s requirement for detection hardware. Assuming there are no subsequent changes requested by Caltrans that would significantly alter operation of the respective Public Facility, City’s approval at the ninety-five percent (95%) stage shall constitute City’s final approval of the design of the Public Facility. Developer Consultants shall provide a courtesy copy of the one hundred percent (100%) stage design plans to the Alameda-Contra Costa Transit District (“AC Transit”) with a carbon copy to the City.

In accordance with Condition 83 of the Use Permit #ZP2018-0117, after issuance of the certificate of occupancy for the Project and prior to implementation of the Re-stripped Lane, Developer shall conduct yearly traffic performance monitoring at San Pablo Avenue and Dwight Way. Within thirty (30) days of completing the third year of traffic performance monitoring, the City Engineer shall determine whether a Re-stripped Lane is necessary at San Pablo Avenue and Dwight Way. If the City Engineer determines that a Re-stripped Lane is necessary, City and Developer’s obligations with respect to the Re-stripped Lane shall be governed by this Agreement and all references to “Public Facility” or “Public Facilities” shall include the Re-stripped Lane, as necessary. If the City Engineer determines that a Re-stripped Lane is unnecessary, Developer shall have no remaining obligations to the City, as described in Section 8.2.

1.2 Roles and Responsibilities. Exhibit A is a Matrix reflecting the roles and responsibilities of each party relating to the Traffic Signal, as agreed to by the City and Developer and shared with Caltrans.

1.3 Traffic Signal Encroachment Permit Application. After City’s final approval of the construction documents for the Traffic Signal at the ninety-five percent (95%) stage, as

discussed in Section 1.1, Developer Consultants, in consultation with City, shall prepare and submit the Caltrans encroachment permit application with the one hundred percent (100%) stage construction documents. The City shall request Caltrans’s approval for Developer Consultants to act as City and Developer’s representative during the Caltrans encroachment permit application and review process. Developer shall address any follow-up required by Caltrans upon its review of the construction documents and will advise City of any changes to the construction documents required by Caltrans. Developer shall be responsible to resubmit the application incorporating any changes.

1.4 Developer’s Construction. Developer shall, in accordance with approved plans and specifications, design, construct and install the Public Facilities.

1.5 Developer to Secure Bids. Developer and City acknowledge and agree that competitive bidding for public projects is a mandatory requirement under the City’s Charter Section 67 and Public Contract Code Sections 20160-20175.2. Developer shall be solely responsible for securing appropriate bids and awarding the contract for construction of the Public Facilities in compliance with all applicable federal, state and local laws. Developer shall be solely responsible for any and all claims, actions, or liability, including attorneys’ fees, arising out of or in connection with Developer’s securing of bids and award and performance of the contract for the construction of the Public Facilities. Developer shall provide City with copies of all bids submitted to Developer pursuant to Section 1.5, identifying the bid selected by Developer for the Public Facilities.

2. Allocation of the Costs of Design and Construction

2.1 Estimated Total Costs. The Parties estimate that the total costs of the design and construction, Caltrans encroachment permitting, inspection and testing of the Public Facilities, engineering and permitting fees, costs and fees assessed by local and state agencies and public utilities, as well as the legal fees to prepare this Agreement, will be as follows:

Public Facilities	Estimated Total Costs
Traffic Signal at Parker Street and San Pablo Avenue	\$500,000
Re-striped Lane at Dwight Avenue and San Pablo Avenue	\$100,000

(“Estimated Total Costs”).

2.2 Actual Total Costs. Developer shall, within thirty (30) days of completion of each Public Facility, provide City with all invoices submitted to Developer by its contractor(s), and a final itemized bill showing all reasonable fees and costs incurred by Developer for the applicable Public Facility. These fees and costs shall include, but are not limited to, design and construction fees and services for the applicable Public Facility, Caltrans encroachment permitting fees, inspection and testing fees, engineering and permitting fees, costs and fees assessed by local and state agencies and public utilities, and legal fees to prepare this Agreement (“Actual Total Costs”). The Actual Total Costs for the Traffic Signal shall include the entirety of the legal fees to prepare this Agreement. City’s costs for the Public Facilities, including but not limited to, staff time, shall not be included in Actual Total Costs.

2.3 Reimbursement Amount. The Parties agree that the reimbursement available to Developer for the Actual Total Costs (“Reimbursement Amount”) shall be City’s proportionate share of the Actual Total Costs (“City’s Proportionate Share”). City’s Proportionate Share shall be the percentage difference between the whole of the Project and the Project’s percentage contribution of projected traffic at the intersections of each component of the Public Facilities (Traffic Signal and Re-stripped Lane), as determined in the Traffic Impact Analysis for the following Project scenarios:

Medical Office and Research & Development:

Public Facilities	Project’s contribution of traffic	City’s Proportionate Share
Traffic Signal at Parker Street and San Pablo Avenue	20% of traffic generated at intersection	80% of Actual Total Costs
Re-stripped Lane at Dwight Avenue and San Pablo Avenue	11% of traffic generated at intersection	89% of Actual Total Costs

Medical Office:

Public Facilities	Project’s contribution of traffic	City’s Proportionate Share
Traffic Signal at Parker Street and San Pablo Avenue	29% of traffic generated at intersection	71% of Actual Total Costs

Re-striped Lane at Dwight Avenue and San Pablo Avenue	19% of traffic generated at intersection	81% of Actual Total Costs
---	--	---------------------------

3. Terms and Limitations of Developer Payment and City Reimbursement

3.1 City to Reimburse Developer. City shall reimburse Developer for City’s Proportionate Share of Actual Total Costs, for the Traffic Signal and Re-striped Lane each, as appropriate, pursuant to Sections 1.1 and 2.3, or any upfront payments that are not Actual Total Costs, pursuant to Section 3.2. For each Public Facility, reimbursement payments shall be made in four equal annual installments, payable on or before September 1st of each year, beginning with the first September following completion of the pertinent Public Facility. The Parties acknowledge that the maximum reimbursement available to Developer for Actual Total Costs shall be subject to an imputed interest accrual rate of 5.0% per annum. Developer shall prepare a payment schedule for each Public Facility within 30 days after the Actual Total Costs have been identified per Section 2.3.

3.2 City’s Costs. City shall assume full responsibility for all costs of obtaining and maintaining necessary City approvals, licenses, easements, land use entitlements and City costs of administration, construction oversight and inspections, including staff time, as described further in Exhibit A. In instances where Developer makes upfront payments for any costs that are not Actual Total Costs, City shall reimburse Developer in full in the manner described in Section 3.1.

4. Permits

4.1 Permits, Licenses and Compliance with Law. City shall be solely responsible for identifying all necessary City approvals for the Public Facilities.

City shall coordinate with Developer to ensure that the design of the Public Facilities complies with all applicable local, state, and federal laws, whether or not said laws are expressly stated in this Agreement, including City’s zoning and development standards and all other provisions of the City’s Municipal Code. To the extent feasible and practical, City shall proceed in a timely manner so as not to delay the work or increase the costs for the work. City shall cooperate in good faith and issue approvals and permits in a timely manner if Developer is required to access City rights-of-way for activities required to install the Public Facilities.

Developer Consultants, in consultation with City, shall prepare the encroachment permit application to Caltrans as described in Section 1.3.

4.2 Traffic Control Plan. Developer shall coordinate with Caltrans to complete the traffic control plan for the Traffic Signal. Developer shall provide a copy to City upon submitting its traffic control plan to Caltrans.

4.3 Connection to Pacific Gas and Electric’s electrical grid. In consultation with City, Developer shall, on behalf of City, prepare and submit an application to Pacific Gas and Electric (“PG&E”) to commence electric service for the Traffic Signal. Developer shall execute an agreement with PG&E for payment of engineering and construction fees, which shall be reimbursable as an Actual Total Cost, as described in Section 2.2. During construction of the Traffic Signal, Developer shall schedule with PG&E to connect the Traffic Signal to PG&E’s electrical grid. After the connection to PG&E’s electrical grid is made, Developer shall schedule, in coordination with PG&E, City and Caltrans, the activation of the Traffic Signal and ensure the Traffic Signal is in working order.

4.4 Ongoing Operations and Maintenance Costs. Following construction of each component of the Public Facilities, Developer and its successors and assigns shall deliver the Public Facility to the appropriate agency as set forth in Section 8.1 and shall have no further obligations with respect to any ongoing operation, maintenance, or repair costs of that Public Facility. City shall be responsible for maintaining the Traffic Signal pursuant to a maintenance agreement with Caltrans.

5. Prevailing Wage Requirements

5.1 General Obligations. Developer acknowledges and agrees that the work performed hereunder shall be subject to prevailing wage rates as provided in Labor Code Section 1720, *et seq.* (“**State Labor Code**”). Accordingly, Developer shall comply and shall cause its contractor to comply with all applicable State Labor Code requirements, including provisions requiring the payment of prevailing wages in connection with construction of the Public Facilities. Developer shall require its general contractor to post at the Public Facilities site prevailing wage rates for all applicable trades and to submit copies of payroll records to Developer to ensure compliance with State Labor Code requirements pertaining to “public works.” Developer shall provide such payroll records to City promptly following City’s request therefor. Developer shall also include in its general contractor construction contract a provision obligating the general contractor to require its contractors and/or subcontractors to comply with all State Labor Code requirements pertaining to “public works.” If any federal funding or assistance is provided for the Public Facilities, Developer shall also comply and cause its general contractor and subcontractors to comply with any applicable federal labor requirements, including the Davis-Bacon Act of 1931 as codified in 40 U.S.C §§ 3141 through 3148 (“**Davis-Bacon**”).

5.2 Indemnity. Developer shall defend (with counsel reasonably acceptable to City) indemnify and hold harmless City and its elected officials, officers, agents, employees and contractors (collectively, “**City Parties**”) from and against any and all claims made by a third party or parties arising out of Developer’s obligation to comply with all State Labor Code and, if applicable, Davis-Bacon requirements pertaining to public works and payment of prevailing wages in connection with the construction of the Public Facilities, as required pursuant to the immediately preceding paragraph, and indemnify and hold harmless City and City Parties with respect to all liabilities, costs and damages in connection therewith (including attorneys’ fees and costs), including final judgments or settlements in actions brought by any “contractor” in which City is (i) determined to be an “awarding body” and (ii) damages are awarded, pursuant to Labor Code Sections 1726 or 1781 or applicable portions of Davis-Bacon. Developer’s indemnity obligations under this Section shall survive expiration or termination of this Agreement.

5.3 Waiver and Release. Developer hereby waives and releases City and City Parties from any and all manner of claims or other compensation whatsoever, in law or equity, arising out of, directly or indirectly, or in any way connected with Developer's obligation to comply with all State Labor Code and, if applicable, Davis-Bacon requirements in connection with the construction of the Public Facilities.

6. City's Right To Inspect And Observe Public Facility Construction

6.1 City Inspection and Rejection. Work and materials, and preparation of materials, from beginning of construction until final completion and acceptance of the Public Facilities located within City's right-of-way, shall be subject to inspection and rejection by City, its agents, representatives or independent contractors retained by City to perform inspection services. Developer shall provide City representatives with proper and safe conditions for such access and advise them of Developer's safety procedures and program so that they may comply therewith as applicable.

6.2 Developer Notice to City. Developer shall give City and or Caltrans timely notice of readiness of each component of the Public Facilities for all required inspections, tests or approvals, and shall cooperate with inspection and testing personnel to facilitate required inspections or tests. City shall promptly inspect work as required, within two (2) business days of receipt of Developer's notice to City.

6.3 Inspection by Public Bodies Other than City. If applicable laws or regulations of any public body having jurisdiction require any work (or part thereof) specifically to be inspected, tested or approved by an employee or other representative of such public body (e.g., PG&E and Caltrans), Developer shall assume full responsibility for arranging and obtaining such inspections, tests or approvals, and obtain the required certificates of inspection or approval. Developer shall pay all upfront costs in connection with any inspections, tests or approvals required for the acceptance of materials or equipment to be incorporated in the Public Facilities, or of materials, mix designs, or equipment submitted for approval prior to Developer's purchase thereof for incorporation into the Public Facilities. Notwithstanding the above, City and Developer shall coordinate in good faith toward ensuring that the necessary inspections, tests, approvals, or payments required for these inspections, tests or approvals, proceed in a timely manner so as not to delay the work or increase the costs for the work.

7. System Testing and Connection to Current Established System

Upon completion of construction and before final inspection pursuant to Section 6, Developer shall conduct signal system testing to ensure the proper operation of the Traffic Signal. Developer shall advise City and Caltrans of its results and facilitate repairs as necessary.

Developer shall also coordinate with Caltrans to ensure the Traffic Signal operates in coordination with Caltrans's I-80 ICM signal timing. Developer shall also coordinate with AC Transit to ensure the proper use of Transit Signal Priority equipment and coordinate the timing of the Traffic Signal.

8. Conveyance Of Public Facilities

8.1 Dedication Requirements. Developer shall dedicate and convey the Traffic Signal to Caltrans, free and clear of all title exceptions and encumbrances, in favor of Caltrans. If necessary, as discussed in Section 1.1, Developer shall dedicate and convey the Re-stripped Lane to City, free and clear of all title exceptions and encumbrances, in favor of the City. Developer will make the dedication and conveyance within 30 days following the completion of construction of the respective Public Facility, along with delivery to City and Caltrans of the as-built record documents of the respective Public Facility. Prior to acceptance of the respective Public Facility by the City Engineer or Caltrans, Developer shall be solely responsible for maintaining the quality of the work, and maintaining safety at the work site.

8.2 Acceptance of Public Facilities. Developer shall notify City and Caltrans upon completion of construction and testing of the Traffic Signal. Developer shall seek final inspection of the Traffic Signal from Caltrans and provide City with Caltrans's written approval and acceptance of the Traffic Signal within thirty (30) days following the date upon which Developer provides the offer of dedication to Caltrans pursuant to Section 8.1. In accordance with Section 1.1, if the Re-stripped Lane is required by the City Engineer, City shall conduct final inspection of the Re-stripped Lane within City's right-of-way in a timely manner and provide Developer with written approval and acceptance of the Re-stripped Lane, no later than thirty (30) days following the date upon which Developer provides the offer of dedication to City pursuant to Section 8.1. City will accept Developer's conveyance of the Re-stripped Lane upon the satisfaction of the provisions of this Agreement.

Upon acceptance of the Traffic Signal by Caltrans, Developer shall have no remaining responsibilities and liabilities relating to the Traffic Signal, as set forth in Sections 4.4, 8, 11 and 15. If the City Engineer determines that the Re-Striped Lane is unnecessary after the third year of traffic performance monitoring at San Pablo Avenue and Dwight Way, as described in Section 1.1, Developer shall have no remaining responsibilities and liabilities to the City relating to the Re-stripped Lane.

8.3 Assignment of Warranties and Contracts. Concurrent with conveyance of the Public Facilities to the City and Caltrans pursuant to Section 8.1, Developer, as assignor, shall assign in writing, all rights under all warranties described in Section 11 to the City, as assignee.

9. Damages

9.1 Reporting. If any damage (including death, bodily injury or property damage) occurs in connection with the performance of this Agreement, Developer shall immediately notify the City Manager's office by telephone at 510-981-7008, and Developer shall promptly submit to the City's Risk Manager and the City's authorized representative a written report (in a form acceptable to the City) with the following information: (i) a detailed description of the damage (including the name and address of the injured or deceased person(s), and a description of the damaged property), (ii) names and addresses of witnesses, and (iii) names and addresses of any potential insurance companies.

10. Improvement Security

10.1 General Requirements. Developer shall secure faithful performance, labor and material, and warranty security for the Public Facilities from all pertinent contractors and subcontractors, within the times provided below and the costs thereof shall not be included in the Actual Total Costs. Developer shall ensure that contractors and subcontractors will continuously maintain the faithful performance and labor and material security in effect until the last to occur of (a) Developer's satisfactory completion of the Public Facilities as determined by the City Engineer or his/her designee, (b) City's final acceptance of the Public Facilities, and (c) the expiration of applicable time periods for filing liens for payment of labor and materials claims, at which time City shall release and/or return to Developer the faithful performance and labor and material security. If any of the security instruments is a surety bond, the surety issuing said bond shall be admitted in the State of California and have a financial rating from A.M. Best Company of A-VIII or better. In addition, the surety bond, whether issued by individual or corporate surety, shall, among other required terms and conditions, contain conditions that (i) death of the named principal shall not operate as a release of the obligation of the surety and (ii) no extension of time, change, alteration, modification, deletion, or addition to the Construction Documents, or of the work (including services) required thereunder, or any City action to perform work, protect work, mitigate damages, or advance critical work to mitigate schedule delay shall release or exonerate surety on the bond or in any way affect the obligations of surety on the bond, unless such action is a City default, and surety waives notice of same.

11. General Representations And Warranties

Developer represents and warrants that it is and will be at all times fully qualified and capable of performing or causing to be performed the work of designing and constructing the Public Facilities in accordance with the terms of this Agreement. Developer warrants that all construction services shall be performed in accordance with generally accepted professional standards of good and sound construction practices. Developer warrants that the Public Facilities including, without limitation, each item of material and equipment incorporated therein, shall be new, of suitable grade of its respective kind for its intended use, and free from defects in design, engineering, materials, construction and workmanship. Developer warrants that all work shall conform in all respects with all applicable requirements of federal, state and local laws; applicable construction codes and standards; licenses and permits; and drawings and specifications and all descriptions set forth therein. Developer shall not be responsible, however, for the negligence of others in the specification of specific equipment, materials, design parameters and means or methods of construction where that is specifically shown and expressly required by Developer Consultants' construction documents. Other than as set forth in this Agreement, after delivering each component of the Public Facilities to City as described in Section 8.1 above, Developer will have no remaining responsibilities relating to the respective Public Facility.

12. Insurance

Developer shall, until the date by which the City accepts the Public Facilities, maintain insurance to cover Developer (including its agents, representatives, contractors, subcontractors, and employees) in connection with the performance of work under this Agreement. This

Agreement identifies the minimum insurance levels with which Developer shall comply; however, the minimum insurance levels shall not relieve Developer of any other performance responsibilities under this Agreement (including the indemnity requirements), and Developer may carry, at its own expense, any additional insurance it deems necessary or prudent. Concurrently with the execution of this Agreement by the Developer, and prior to the commencement of any work, Developer shall furnish written proof of insurance (certificates and endorsements), in a form acceptable to the City. Developer shall provide substitute written proof of insurance no later than 30 days prior to the expiration date of any insurance policy required by this Agreement.

12.1 Minimum Insurance Levels.

Developer shall maintain, and require its contractor to maintain, insurance at the following minimum levels:

(a) Commercial General Liability (with coverage at least as broad as ISO form CG 00 01 01 96) coverage in an amount not less than \$4,000,000 general aggregate and \$2,000,000 per occurrence for general liability, bodily injury, personal injury, and property damage.

(b) Automobile Liability (with coverage at least as broad as ISO form CA 00 01 07 97, for “any auto”) coverage in an amount not less than \$1,000,000 per accident for bodily injury and property damage.

(c) Builder’s all-risk insurance in an amount not less than the full insurable cost of the Public Facilities and related improvements on a replacement cost basis.

(d) Workers’ Compensation coverage as required by the State of California.

12.2 Endorsements.

The insurance policies from the Developer and its contractor shall be endorsed as follows:

(a) For the commercial general liability and automobile insurance, the City (including its elected officials, employees, and agents) shall be named as additional insured, and the policy shall be endorsed with a form at least as broad as ISO form CG 20 10 04 13 and CG 20 37 04 13.

(b) Developer’s insurance is primary to any other insurance, self-insurance or joint self-insurance available to the City with respect to any claim arising out of this Agreement. Any insurance, self-insurance or joint self-insurance maintained by the City shall be excess of the Developer’s insurance and shall not contribute with it.

(c) Developer’s insurance will not be canceled, limited, or allowed to expire without renewal until after 30 days’ written notice has been given to the City. During the term of this Agreement, Developer will not materially alter any of the policies or reduce any of the levels of coverage afforded by its insurance policies.

12.3 Qualifications of Insurers. All insurance companies providing coverage to Developer shall be insurance organizations authorized by the Insurance Commissioner of the State of California to transact the business of insurance in the State of California, and shall have an A.M Best's rating of not less than "A:VII."

13. Default

In the event of a breach of this Agreement by either Party, the other Party shall be entitled to all remedies at law or in equity.

14. City As Third Party Beneficiary

City is an intended third party beneficiary of the rights of Developer with respect to all agreements entered into prior to or after this Agreement by the Developer with design, engineering, construction, and other professionals related to this Public Facilities, including but not limited to engineering contractors, for the purposes of performing the work of design and construction of the Public Facilities ("**Design and Construction Agreements**"). All Design and Construction Agreements shall include a provision granting to the City the right of assignment in the event of a Developer default or after the conveyance of the Public Facilities to the City under this Agreement, as set forth in Section 8.3. City may exercise such rights under this Agreement and any Design and Construction Agreements, but shall not be obligated to do so, upon (i) a Developer default prior to the conveyance of the Public Facilities to the City or (ii) after the conveyance of the Public Facilities to the City.

15. Indemnification

Developer shall defend, indemnify and hold City Parties free and harmless from any and all liability, claims or causes of action from loss, damage, or injury to or death of persons or property in any manner arising out of or incident to Developer's performance of this Agreement, including without limitation, all consequential damages and attorneys' fees. Developer's indemnity obligation to City Parties shall cease upon City's acceptance of the Public Facilities pursuant to Section 8.2. City agrees to defend, indemnify and hold Developer free and harmless from any and all liability, claims or causes of action from loss, damage, or injury to or death of persons or damage to property resulting from intentional or negligent acts or omissions of the City, its officers, employees, agents, or contractors arising out of its approval of the Public Facilities and/or City's performance of this Agreement, including all consequential damages and attorneys' fees.

16. Termination

In the event that either of the Parties defaults in the performance of any of its obligations under this Agreement or materially breaches any of the provisions of this Agreement, non-breaching Party shall be entitled to all remedies at law or in equity.

17. Notices

All notices permitted or required under this Agreement shall be deemed made when delivered to the applicable party's representative as provided in this Agreement. Such notices shall be mailed or otherwise delivered to the addresses set forth below, or at such other address as the respective parties may provide in writing for this purpose:

City: City of Berkeley
2180 Milvia Street
Berkeley, CA 94704
Attention: City Engineer

With copy to: City of Berkeley
2180 Milvia Street, Fourth Floor
Berkeley, CA 94704
Attention: City Attorney

Developer: 2621 Tenth Street, LLC
c/o Wareham Property Group
1120 Nye Street, Suite 400
San Rafael, CA 94901
Attention: Managing Member

With a copy to: Burke, Williams & Sorensen LLP
101 Howard Street, Suite 400
San Francisco, CA 94105
Attention: Anna C. Shimko

Such notice shall be deemed made when personally delivered or when mailed, forty-eight (48) hours after deposit in the U.S. Mail, first class postage prepaid and addressed to the party at its applicable address.

18. Nuclear Free Berkeley

Developer agrees to comply with B.M.C. Chapter 12.90, the Nuclear Free Berkeley Act, as amended from time to time.

19. Oppressive States Contracting Prohibition

In accordance with Resolution No. 59,853-N.S., Developer certifies that it has no contractual relations with, and agrees during the term of this Contract, to forego contractual relations to provide personal services to, the following entities:

- a. The governing regime in any "Oppressive State," as defined in Resolution No. 59,853-N.S.
- b. Any business or corporation organized under the authority of the governing regime of any Oppressive State.

- c. Any individual, firm, partnership, corporation, association, or any other commercial organization, including parent-entities and wholly-owned subsidiaries (to the extent that their operations are related to the purpose of its contract with the City), for the express purpose of assisting in business operations or trading with any public or private entity located in any Oppressive State.

Appendix A to Resolution No. 59,853-N.S. designates the following as Oppressive States for the purposes of this contract: Tibet Autonomous Region and the provinces of Amdo, Kham, and U-Tsang. Developer's failure to comply with this section shall constitute a default of this Contract pursuant to Section 13.

20. Berkeley Living Wage Ordinance

20.1 Developer hereby agrees to comply with the provisions of the Berkeley Living Wage Ordinance, B.M.C. Chapter 13.27. If Developer is currently subject to the Berkeley Living Wage Ordinance, as indicated by the Living Wage Certification form, attached hereto, Developer will be required to provide all eligible employees with City mandated minimum compensation during the term of this Contract, as defined in B.M.C. Chapter 13.27, as well as comply with the terms enumerated herein.

20.2 If Developer is currently subject to the Berkeley Living Wage Ordinance, Developer shall be required to maintain monthly records of those employees providing service under the Contract. These records shall include the total number of hours worked, the number of hours spent providing service under this Contract, the hourly rate paid, and the amount paid by Developer for health benefits, if any, for each of its employees providing services under the Agreement. Developer agrees to supply City with any records it deems necessary to determine compliance with this provision. These records are expressly subject to the auditing terms described in Section 22.

20.3 If Developer is currently subject to the Berkeley Living Wage Ordinance, Developer shall include the requirements thereof, as defined in B.M.C. Chapter 13.27, in any and all subcontracts in which Developer engages to execute its responsibilities under this Agreement. All subcontractor or subconsultant employees who spend 25% or more of their compensated time engaged in work directly related to this Contract shall be entitled to a living wage, as described in B.M.C. Chapter 13.27 and herein.

20.4 If Developer fails to comply with the requirements of this Section, the City shall have the rights and remedies described in this Section, in addition to any rights and remedies provided by law or equity.

20.5 Developer's failure to comply with this Section shall constitute a material breach of the Agreement pursuant to Section 14. In addition, at City's sole discretion, Developer may be responsible for liquidated damage in the amount of \$50 per employee per day for each and every instance of an underpayment to an employee. It is mutually understood and agreed that Developer's failure to pay any of its eligible employees at least the applicable living wage rate will result in damages being sustained by the City; that the nature and amount of the damages will be extremely difficult and impractical to fix; that the liquidated damage set forth herein is the

nearest and most exact measure of damage for such breach that can be fixed at this time; and that the liquidated damage amount is not intended as a penalty of forfeiture for Developer's breach. City may deduct any assessed liquidated damages from any payments otherwise due Developer.

21. Berkeley Equal Benefits Ordinance

21.1 Developer hereby agrees to comply with the provisions of the Berkeley Equal Benefits Ordinance, B.M.C. Chapter 13.29. If Developer is currently subject to the Berkeley Equal Benefits Ordinance, Developer will be required to provide all eligible employees with City mandated equal benefits, as defined in B.M.C. Chapter 13.29, during the term of this contract, as well as comply with the terms enumerated herein.

21.2 If Developer is currently or becomes subject to the Berkeley Equal Benefits Ordinance, Developer agrees to provide City with all records City deems necessary to determine compliance with this provision. These records are expressly subject to the auditing terms described in Section 22 of this Agreement.

21.3 If Developer fails to comply with the requirements of this Section, City shall have the rights and remedies described in this Section, in addition to any rights and remedies provided by law or equity.

21.4 Developer's failure to comply with this Section shall constitute a material breach of the Agreement pursuant to Section 14.

21.5 In addition, at City's sole discretion, Developer may be responsible for liquidated damages in the amount of \$50.00 per employee per day for each and every instance of violation of this Section. It is mutually understood and agreed that Developer's failure to provide its employees with equal benefits will result in damages being sustained by City; that the nature and amount of these damages will be extremely difficult and impractical to fix; that the liquidated damages set forth herein is the nearest and most exact measure of damages for such breach that can be fixed at this time; and that the liquidated damage amount is not intended as a penalty or forfeiture for Developer's breach. City may deduct any assessed liquidated damages from any payments otherwise due Developer.

22. Audit And Inspection Of Records

22.1 Developer shall require Developer Consultants to maintain all drawings, specifications, calculations, cost estimates, quantity takeoffs, statements of costs and completion dates, schedules and all correspondence, internal memoranda, papers, writings, and documents of any sort prepared by or furnished to Developer during the course of performing the work in connection with the Public Facilities for a period of at least three (3) years following final completion and acceptance of the Public Facilities. All such records shall be available to City upon request at reasonable times and places.

22.2 Developer shall require Developer Consultants to maintain and make available to City during business hours accurate books and accounting records relative to its activities under this Agreement. Developer shall also require Developer Consultants to permit City to audit,

examine and make copies, excerpts and transcripts from such books and records, and to make audits of all invoices, materials, payrolls, records or personnel and other data related to all matters covered by this Agreement, whether funded in whole or in part under this Agreement. Developer shall require Developer Consultants to maintain such data and records in an accessible location and condition for a period of not less than five years after final payment under this Agreement or until after final audit has been resolved, whichever is later. The State of California or any federal agency having an interest in the subject of this Agreement shall have the same rights conferred upon City by this Paragraph.

22.3 The rights and obligations established pursuant to this Paragraph shall be specifically enforceable and survive termination of this Agreement.

23. Miscellaneous Provisions

23.1 Definition of Developer. Developer, as used in this Agreement, shall include its contractors, subcontractors and consultants, and all parties acting on its behalf.

23.2 Relationship Between the Parties. Developer is, and at all times shall remain, an independent contractor solely responsible for all acts of its employees, agents, contractors, or subcontractors, including any negligent acts or omissions. Developer is not City's agent, and shall have no authority to act on behalf of the City, or to bind the City to any obligation whatsoever, unless the City provides prior written authorization to Developer.

23.3 Nondiscrimination. Developer shall comply with all applicable federal, state, and local laws regarding nondiscriminatory employment practices, whether or not said laws are expressly stated in this Agreement. Developer shall not discriminate against any employee or applicant because of race, color, religious creed, national origin, physical disability, mental disability, medical condition, marital status, sexual orientation, or sex.

23.4 Entire Agreement. This Agreement, including any exhibits, contains the entire agreement of the Parties hereto with respect to the matters contained herein.

23.5 Assignment. This Agreement shall inure to the benefit of and be binding upon the Developer and City, their heirs, successors and assigns.

23.6 Authority to Bind Principals. The signatories hereto represent that they have been appropriately authorized to enter into this Agreement on behalf of the party for whom they sign.

23.7 Titles and Captions. Titles and captions are for convenience of reference only and do not define, describe or limit the scope or the intent of this Agreement or any of its terms. References to section numbers are to sections in this Agreement, unless expressly stated otherwise.

23.8 Interpretation. The Developer and City acknowledge that this Agreement is the product of a mutual arms-length negotiation and drafting. The Developer and City each

represent and warrant to the other that it has been represented by legal counsel in the negotiation and drafting of this Agreement.

23.9 Severability. Each provision, term, condition, covenant and/or restriction in this Agreement shall be considered severable. In the event that any provision, term, condition, covenant and/or restriction, or part thereof is declared invalid, unconstitutional or void for any reason, such provision or part thereof shall be severed from this Agreement and shall not affect the remainder of the Agreement which shall continue in full force and effect.

23.10 Amendments to Agreement. Any amendments to this Agreement must be in writing and signed by the appropriate authorities of the Developer and City.

23.11 Administration. Following approval of this Agreement by the City Council, the parties shall exercise their rights, perform their obligations and otherwise administer this Agreement through the Office of the City Manager. The City Manager shall have the authority to issue interpretations and to make minor amendments to this Agreement on behalf of the parties, provided such actions do not materially increase the obligations of either party; make a commitment of additional costs to be incurred by either party; or result in a discretionary extension of time in excess of ninety (90) days.

23.12 Counterpart Originals. This Agreement may be executed in duplicate originals, each of which is deemed to be an original.

23.13 Effective Date. This Agreement shall become effective and binding upon the parties upon its approval by the City Council and its execution by the duly authorized representatives of each party.

[Remainder of page intentionally left blank]

[Signatures on next page]

IN WITNESS WHEREOF, the City and Developer do hereby agree to the full performance of the terms set forth herein.

Dated: 5/20/19, 2019

DEVELOPER:

2621 TENTH STREET, LLC,
a California limited liability company

Wareham-NZL, LLC

By: _____

Name: Richard K. Robbins

Its: Manager

CITY:

CITY OF BERKELEY

Dated: _____, 2019

By: _____

Its: _____

APPROVED AS TO FORM

Michael Vos

CITY ATTORNEY FOR THE
CITY OF BERKELEY

Exhibit A

Roles and Accountability Matrix
 New Signal (Parker & San Pablo) & Re-Stripe (Dwight & San Pablo)
 Berkeley, CA

ID	Task	Development Team				City of Berkeley	Caltrans	AC Transit	Comments	Status
		Design Team		Developer	Contractor					
		F&P	K&W							
1	Finalize & Execute Legal Agreement			R		R				
2	Pre-Permit Concept Design Meeting with Caltrans	P	P	P		R	P	To take place once design concept complete. Determine process, stages of Caltrans review (e.g. 35%, 65%, 95%), whether application is for "improvements" and then "design improvements".	Complete	
3	Survey	C	R					Includes a utility conflict analysis, F&P to advise on limits, and if OH utilities need to be surveyed		
4	Prepare Concept Design	R	C			C		F&P to confirm operations & maintenance responsibilities (city vs. state)	Complete	
5	Prepare & Submit PG&E Application for Service	R				C				
6	Design / Prepare Construction Documents (CD)	R	R			C	C	Includes traffic control plans		
7	City Review & Approval (Design Review)					R		City will perform timely review and approval of CDs (at 35%, 65%, and 95%). City will confirm that design conforms with City's codes and regulations. Streamlined reviews at 65% and 95% level to be limited to drainage, ADA, and detection hardware.		
8	Prepare Package for Caltrans Encroachment Permit	R	C			C		Will include CDs at 100%.		
9	Request Consultant to Serve as Authorized Representative of City	C				R		City to request that Fehr & Peers be permitted to act as a representative during Caltrans review and approval process.		
10	Submit Caltrans Encroachment Permit Application Package	R				C		Standard Permit Application forms and 100% Plans and Specifications		
11	Caltrans Review & Approval (Design Review)						R	Caltrans will confirm that design conforms with State's codes and regulations.		
12	Respond to Caltrans Comments	R	C			A		F&P to advise City of any changes to CDs in response to Caltrans comments.		
13	Resubmit Caltrans Encroachment Permit	R				C				
14	Confirm PG&E Service needs	R		A		C		Developer to enter into contract with PG&E to pay engineering and construction fees		
15	Finalize & Execute Maintenance Agreement					R	R	Existing agreement will be used for this project while Caltrans and City work to update the maintenance agreement (separate process)		
16	Caltrans Approval & Encroachment Permit Issuance						R			
17	Hire & Manage Contractor	A		R		A		Once a contractor is selected, Development Team will advise City.		
18	City Approval & Permit Issuance					R		Will be required if side streets are impacted (e.g. staging, potentially cameras)		
19	Provide Courtesy Copy of Plans (100% CDs) to AC Transit	R				A	A			
20	Construct Signal	C	C		R			Contractor will provide City with copy of material submittals.		
21	Schedule Inspections (with City, PG&E and Caltrans)				R			For any work that may take place in City right of way.		
22	Inspections - Caltrans Right of Way						R	If Caltrans does not inspect any element of construction activities, the City will do so.		
23	Inspections - City Right of Way					R		If applicable		
24	Schedule PG&E to hook up power				R					
25	Signal System Testing			A	R	A	A			
26	Coordination of Signal with I-80 ICM Project signal timing	R			A	C	C	Caltrans provides input.		
27	Coordinate Transit Signal Priority (TSP) equipment and timing with AC Transit	R			A	C	C	AC Transit provides information.		
28	Final Inspection / Sign-Off - Caltrans Right of Way				P	A	R			
29	Final Inspection / Sign-Off - City Right of Way (Re Stripe)				P	R	A	If applicable		
30	Assignment of Warranties			R	R	R	I	City has confirmed that the warranties will be assigned to City of Berkeley.		
31	Maintenance					R				

R = Responsible
 P = Participant
 C = Consulted
 A = Advised
 F&P = Fehr & Peers
 K&W = Kier & Wright

Project Costs
 All Hard Costs
 All Soft Costs including, but not limited to, design fees, PG&E Engineering Fee, Caltrans permit fees, City permit fees, legal fees to prepare agreement

City of Berkeley
 City of Berkeley internal efforts (including but not limited to staff time) to be absorbed by the City and not charged as project costs

